

KBvG  
Royal Professional Bailiff Association

# Modernising commencement of collection proceedings

The reaction of the Dutch Royal Professional Bailiff  
Association to “A new balance” the interim report of the  
study group Asser & co.

*With a preface by A.H. Korthals LL M, former Minister of  
Justice*

Royal Professional Bailiff Association

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# 1 Preface

After Dutch civil process law was partly revised, it appeared that there was a need to fundamentally review the Dutch civil procedural law and the basis, principles and basic assumptions of civil procedural law. To this end, the Minister of Justice commissioned a research that will be conducted in three phases. The work group Asser, Groen, Vranken has finished the first phase with the publication of the interim report “A new balance”.

The new balance aimed for in procedural law concerns the bailiff as a public official and as someone authorised in proceedings. The bailiff supports the execution of jurisdiction and has pre-eminently insights into the practice of this jurisdiction.

The report of the work group Asser, Groen and Vranken was for the Professional Bailiff Organisation an occasion to study the question in which way a number of components of the current procedure can be reorganized so that the processing of collection business, independently of the amount of the claim, will be more straightforward under the direction of the judge, the claimant will receive an enforceable instrument faster, and the legal organisation can work more efficiently. Mainly the proceedings concerning the claims that are not challenged have been studied.

The position of the bailiff in Dutch procedural law is unique. Both at the beginning, at the introduction of the proceedings, and at the end at a possible execution, the bailiff grants its office. This has advantages in practice that should not be underestimated. For example, the bailiff who is familiar with missing recourse options will warn the claimant who wishes to commence a lawsuit from incurring unnecessary costs. Since, of course, there are no social benefits for sentences that cost the claimant money, burden the judicial system and do not have any appreciable effect.

The KBvG when formulating its reaction, did not limit itself to react to the provisional choices made by the work group Asser & co., but makes concrete proposals in order to achieve a reorganisation of the collection proceedings.

I highly recommend the reaction of the KBvG.

A.H. Korthals

## 2 Introduction

The KBvG took note of *A new balance*<sup>1</sup> with interest and appreciation, the interim report of a fundamental review of Dutch civil procedural law, published by the researchers Prof W.D.H. Asser, LL M, Prof. H.A. Groen LL M and Prof. J.B.M. Franken, LL M, with the cooperation of Mrs. I.N. Tzankova LL M

The KBvG has reacted on two occasions to the contents of the interim report. Both reactions are incorporated in this book.

In order to prepare this report, the governing committee Fundamental Review of the KBvG, split in two sub-committees, drew up a report that deals with two specific subjects. The first part deals with general aspects of the proceedings of civil law. The second part of this report gives insight into the way the bailiff can play a role in the process of reorganisation with the use of modern means of communication in the execution of official tasks,

For the first part of the report, a number of experts on procedural law from outside the professional group have been appealed to:

Prof. A.W. Jongbloed LL M, extraordinary professor procedural law and right of stoppage at the University of Utrecht and coordinator of the education for candidate bailiff;

G.J. Knijp LL M, Vice President of the Court of Leeuwarden;

T. Sternfeld LL M, employee of Nauta Dutilh in Amsterdam;

H.A. Stein LL M, lawyer and attorney in Breda.

On behalf of the KBvG the following people contributed to the first part:

A.E. de Best, bailiff in Hoofddorp

F.J.M. van der Meer, bailiff in Alkmaar

J.M. Wisseborn LL M, bailiff in Harderwijk

J. Nijenhuis, bailiff in Roermond

A.C.C.M. Uitdehaag, bailiff in Etten Leur

The second part of the report has been composed by:

D. Struiksma, former bailiff and president of the Bailiff Network Organization;

G. Wind, bailiff in Deventer

J.M. Wisseborn LL M, bailiff in Harderwijk

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<sup>1</sup> Boom Juridische uitgevers, The Hague 2003, ISBN 90 5454 322 1

### 3 A new balance. An initial reaction

The results of a review of civil procedural law, makes us look forward to a similar thorough and renewed way of thinking regarding collection and execution law. Imbalance and insufficient law can likewise be found in this area, e.g. concerning forced clearance regulations, the authority to retrieve options of recovery or converging of confiscations.

The new balance aimed for in procedural law concerns the bailiff as a public official and as someone authorised in proceedings. At a later stage we will discuss the part of the report that specifically deals with the course of the legal proceedings. This chapter contains our initial reaction to the ideas of the researchers that are important for the office of bailiff.

Although our appreciation is not reduced: we criticise the speed with which the study group in its reflection on the introduction of the legal proceedings chooses for filing a written document with court registry, where the clerk's office sends it to the opposing party by post<sup>2</sup>. The discussion on summons and whether its replacement by a petition is desired or not is a procedural comet. Each time it passed, the united bailiffs defended the summons by writ. They substantiated their defence, but regardless of their arguments, it was always argued that they acted in their own interests. Not the weight of the arguments they produced, but only their lobby would be the reason that the summons was not abolished a long time ago.

The first phase of the review was a good occasion, outside the framework of a discussion with or between those concerned, to reflect on the question whether maintaining the summons as an introductory act of the legal proceedings is useful or not. We are sorry that the study group did not take advantage of this possibility. Its choice to opt for another method of introducing legal proceedings is an interim one, but also hardly a motivated one. It may be true that the phase now started of checking legal practise and science follows on from the initial theoretical stage, but the check could have been more thorough on this point. For example, the report could have contained a detached assessment of the summons in writ in contrast with alternatives that practise saw the last decennia.

However, the bailiffs, now united in a statutory professional association, still want to participate in the review of procedural law without reserve. Initially, we want to do this by once again establishing a criterion for discussion for ourselves and other participants, as to what the exact position of the bailiff is. What is his place in the legal system?

Since the introduction of the Bailiff law, on 15 July 2001, the bailiff no longer falls under the legal organisation.

His office was founded in the Law on the composition of civil courts, now it is founded in the new law, which concentrates on his profession. A bailiff used to be appointed at a court. Nowadays, the place of establishment is indicated in the Royal Decree of his appointment. Without any doubt, a new accent has been placed on the entrepreneurship of the bailiff. This was exactly what the legislator wanted. It was one of the results of the Market forces, deregulation and legislative quality operation. Whether a candidate can establish themselves as bailiff is not determined by being available, but whether they have a qualified business plan.

As a side factor: according to the bailiff, the D of Deregulation should be printed in italics. His office has never been surrounded by as many rules as now.

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<sup>2</sup> Report 8.7.2

The fact that the bailiff is no longer part of the judiciary organisation and that he is more independent than ever, does not mean that his place in the whole of governmental powers has changed. The bailiff is not part of the executive power, let alone of the legislative. He still belongs to the judiciary power in a constitutional sense, since his office is founded on the same constitutional grounds as those on which the office of judge is founded, namely that the government cannot allow self-organisation.

When searching for an answer to the question as to which governmental figure is best for the civilian seeking to serve justice first, the Legislation<sup>3</sup> or the bailiff, it suffices to answer the question: what is most effective? Also when he first contacts the bailiff, the civilian directly appeals to the judiciary power of the government. It may appear to be different from the point of view of the judiciary organisation, but bringing a bailiff into action is not a form of outsourcing.

Now we have determined our position, we will follow the study group in the thought that the difference between the summoning procedure and appeal procedure is outdated<sup>4</sup>. There are matters in which justice has to be served. This has to be done well and that calls for differentiation, in the progression of a process and in the method of commencement of proceedings<sup>5</sup>.

However, when assessing the effectiveness of a certain form of commencement of proceedings, not only its influence on the progress of the proceedings has to be taken into account. The meaning of this form for the legal provision after the sentence has to be involved in the study.

R.M. Hermans<sup>6</sup> LL M correctly observes that in fact the person seeking justice is concerned with obtaining what is his right. Provision in title deeds is a phase in the course of proceedings that only ends when the debtor complies, or when compliance is forced by execution. Success or failure of execution depends on a lot of factors, but it is also related to the quality of the commencement of legal proceedings.

A balance is not only state of balance, but also a tool that can serve as equilibrium between matters. In this sense the balance can be used as metaphor as well.

When the hinge of the imaginative lever is placed on the border of procedural law and execution law, in such a way that one arm reaches the procedural law and the other the execution law, the result in the sphere of the execution law should determine the weight of the document that commences the proceedings.

We can imagine that parties that already debated in the phase before the proceedings are supported by lawyers or other professional advisors that have already tried to settle the affair finally appeal to the governmental judge with the freedom of form of article 96 Rv. It can also be envisaged that one party does this and that the debate, after a simple daily proviso, is continued in court. Both parties are careful here. The party that has been determined as being wrongful will not be surprised by execution.

Besides, execution will not very often be necessary. However, parties that take this route usually concentrate on the final sentence of the judge. The intervening third party mentioned above also indicated this.

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<sup>3</sup> The name of the new style judiciary organisation

<sup>4</sup> Report 8.7.1 8.7.2

<sup>5</sup> Report 8.5, first paragraph; 8.9 (Summary) third paragraph

<sup>6</sup> Lawyer in Amsterdam, intervener in the spring meeting of the Dutch Society for Procedural Law on 25 June 2003, published in Tijdschrift voor civiele rechtpleging (TCR), 2003 no 3

However, the majority of the entitlements to enforcement appointed by the judge are formed by judgment by default<sup>7</sup>. The relative surprise of the execution and the frequently lacking juridical expertise of the debtor have to be balanced here. After all, the government did not allow one of its own organisations protect him. The intrusion on his personal life, that is inevitable with enforcement, has to be carefully concealed. This is the case now, but even more so when it is made easier for the claimant to obtain a title in typical collection proceedings.

The tremendous number of times titles are requested, afforded and offered for execution can be taken into account.

If there is a way to prevent a pointless appeal to the judge from the very start, it has to be used. The enforcement of a sentence against a debtor that is not clearly indicated, an empty legal person, of whom only the postal address is known, who has left for an unknown destination a long time ago, is bankrupt, has debt restructuring, on whose benefit another thirteen confiscations lie or that evidently does not offer any satisfaction at all, runs up against problems that should be recognised at the commencement of proceedings if possible, and preferably prior to this.

Therefore, we argue for the qualitative and quantitative impact of the execution in civil cases having a fitting counterbalance in the civil procedural law. In cases in a defended action where the parties are provided with legal assistance, this counterweight can be light. In this case, a daily proviso, by letter of the clerk brought to the attention of the lawyers, could suffice. In most of the civil cases, the cases by default, the counterweight has to be heavy, since only the execution is the real collision of the debtor with the governmental power. Precision at the commencement of proceedings promotes correctness of the sentence by default and with it the legal certainty at enforcement. In this scenario, the summons by writ cannot be replaced by a letter of the clerk to the opposing party without loss of legal certainty. Researching the execution possibilities in advance is part of the normal tasks of the bailiff. He also prevents that the judiciary system is burdened with cases where on balance no title is necessary, i.e. those – many- cases that are dealt with as a result of the summons.

This point of view does not mean we reject the proposal of the study group to separate the collection cases of other civil cases<sup>8</sup>. On the contrary, in principle we agree with this. A claim that is not disputed, no matter its size, should quickly and efficiently be given an entitlement to enforcement. It seems logical to use a computerized system.

However, we believe that provision in title deeds has to remain a task of the governmental judge in this set-up as well<sup>9</sup>. That this does not demand an intensive personal involvement of a judge is proved on a daily basis by the way sentences by default in subdistrict courts develop. The sentence by default is a product of the judiciary system. The judge is ultimately responsible.

With this assumption, computerized provision in title deeds in collection cases can be achieved by means of good cooperation between the judiciary organization and the bailiffs. Whether the claim, as the claimant submits on a central site, can still be called a submission of an appeal, seems just as important as the question of whether the notice of a claim to the opposing party should still be called a summons.

The point is that the claimant receives an entitlement to enforcement, simply and quickly, unless it appears that his claim is disputed after all.

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<sup>7</sup> According to the publication of the Council for the Administration of Justice, in 2002, of all submitted civil <missing text>

<sup>8</sup> Report 8.7.4

<sup>9</sup> Report 8.7.4, final paragraph; 13.4, summary point 7

We strongly believe that this idea cannot be realized when the existing organizations are deployed, before the official activities of the bailiff concerning commencement of proceedings are conveyed to the judicial organisation. Taking this statement as a basic assumption, we will discuss further the way this can be realized in a following reaction.

To sum up:

- an objective comparison of the summons by writ with other, forms that have been used in the commencement of proceedings in trading cases, in particular on the point of effectiveness, would have been very welcome;
- the choice between shelving a proposal and summons is from the point of view of the claimant a choice between two guises of one government;
- the difference between summons and appeal procedures is extremely outdated;
- differentiation is required also concerning the form of the commencement of proceedings;
- provision in the title deeds is the means to obtain the final goal; realizing the claims of the claimant;
- the violence of the execution has several steps that have to be expressed in the efficiency with which the proceedings commence;
- the success of the execution is closely related to the quality of the commencement of proceedings;
- also in collection cases, the title has to be provided under the direction of the governmental judge;
- cooperation between the judicial system and the bailiffs offers the best prospects on a swift introduction of a collection procedure.

## 4 General aspects of the civil proceedings

### 4.1 Introduction

The KBvG, just as other interest groups such as the NVvR and the NovA, considers the assignment of the Minister of Justice via the interim report “A new balance” (hereinafter to be referred to as: “IR”) as an opportunity to critically evaluate procedural law in its entirety and to this end, the interim report is a good basis.

Just like the other participants on the juridical playground, bailiffs regularly dwell on the dysfunctioning/functioning of procedural law, both in general, and in specific cases. Therefore, they have actively participated in the parliamentary discussion concerning the introduction of a new procedural law as of 1 January 2002. The adaptations that were introduced at the time, have according to the KBvG removed a great number of bottlenecks. Especially the formation of one court organization in which the former subdistrict courts have been incorporated and the streamlining of rules that became possible due to this fact, has been a blessing for practice.

Unlike the IR states, the KBvG does not see a reason to fundamentally adapt the procedural law introduced in 2002. Complaints about the length and costs of proceedings are continual and will not be resolved even if the IR’s recommendations are followed up, since it is just a matter of (and will remain) simple, difficult and very complicated cases, each with their own urgency and each with more or less competent advisors and other people involved that each have their own reasons to speed up, delay or obscure cases.

Besides, the KBvG believes that adaptation of parts is required, such as streamlining the collection proceedings and a better connection of the appeal in the first instance; this will be discussed later. The KBvG urges that for each step that is concretely taken, practised, i.e. the users of the system are listened to.

### 4.2 The function of procedural law

The function of procedural law should according to the KBvG be firstly focused on provision of the title deeds. The KBvG completely agrees with the point of view as the Advice Committee Civil Procedural Law (hereafter to be called ACCPL) stated in its letter of 29 December 2003 (under point 5).

In the footsteps of each human right committee, the committee justifiably takes the position that disputes have to be brought before an independent court: this central task of the judicial power should be maintained in full force and it is also the task of the judicial power to provide the necessary means to realize this. It is increasingly a source of concern for the KBvG that the courts see the amount of cases increasing both in size as well as complexity, but that the financial means to deal with these cases is not or is barely increased. The High Council and the PG have also expressed their concern on this issue. The additional increase of registry charges per 1 February 2004 were not aimed at increasing the capacity of the apparatus, and the KBvG believes that with this an undesirable development has been continued. It goes without saying that jurisdiction is expensive, but with a more professional support method a lot could be achieved according to the KBvG, especially on the subject of bulk collection. To its regret, the KBvG observes that Justice lets a lot of ICT initiatives peter out for financial reasons, which only increases the workload of clerk's offices.

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### 4.3 The autonomy of the parties

The parties both have their own interests in building up a position in the proceedings as strongly as possible.

The judge is independent and impartial in his position to determine the dispute laid in front of him. Initiatives during the progress of the proceedings should come from the parties involved, and not from the judge. In the trade press and various reports, the IR suggested a more active role of the judge has provoked serious criticism.

The KBvG shares in this criticism and it feels similarly to the ACCPL, that a more active judge will no longer be an impartial one. The parties determine the basis of the claim, the size of the dispute and who does and does not participate in the proceedings.

It is the parties that have to define the legal dispute and that have to come up with arguments. Intervention of the judge in this case is altogether wrong, no matter how much he or she may sometimes wonder about the procedural attitude of a party. It must be prevented that the judge will come forward as a party's advocate, and in this way put his independence at stake.

The character of the criminal procedure and the public interests connected to it, result in the judge focusing more so on the material search for truth, while in civil legal proceedings the parties determine in principle which points of dispute are submitted to the judge and which are not. In this framework, the basic assumption is that the civil judge has to regard undisputed facts as in principle conclusive (see art. 149 paragraph 1 Rv).

The procedural legal relation between the parties and the task of the civil judge follow from what is laid down in art. 19-25 Rv. As a consequence, civil law, unlike public law, can more easily show a discrepancy between material and formal truth, and the basic assumption is that the government or judge does not involve himself in this. This basic assumption resulting in the character of the civil proceedings and the civil legal relation also entails that material defences, such as limitation, have to be used by the parties.

The ACCPL correctly observes that interventions by the judge could also bring about delays and extra costs, and neither of the parties would be pleased in this respect. The fact that the parties (should) have to form a community of proceedings is an attractive image, but does not have any bearing on reality. The parties of the proceedings were, are, and will be opposite parties, and that has to be accepted. A role for the judge as case manager is according to the KBvG undesirable. Possible bottlenecks can be solved by adapting the regulations concerning the roles of the people involved, and/or better control of the legislator on these points.

The parties of the proceedings should remain fair and reasonable towards each other, or in any case, according to the opinion of some, but in practice it is an illusion to expect such behaviour of the parties. Snijders correctly observes in the NJB of 17 September 2003 that a claimant that raises an unpaid collection just wants to have a title. If there is something to negotiate, the parties will really attempt this, whether or not they are urged on by their advisors, but if that does not give any results, it will result in a dispute before a judge.

The new art. 19-21 Rv force the parties to be open and will give the judge room to respond to negotiations insofar as there is no requirement of confidentiality. This exhibition duty could be reinforced with sanctions, also with regard to the advisors. The question is whether this is possible and desirable, since a judge has to have a framework for examination at his disposal in order to be able to make a decision on this point. It can be argued that in connection with this issue, the relation between advisor and client should be scrutinized, but this is a disastrous plan. Jurisdiction where it has bearing on "our own wallet", demonstrates that sanctions with respect to advisors cannot be expected.

## 4.4 Extrajudicial costs

Unfortunately, the IR does not discuss extrajudicial costs. All the time the costs of justice is pointed out, but the fact that the previous 7 years an extremely alarming trend on the field of collection costs has arisen, is lost track of. Although the Minister still held the opinion that the standard rate was reasonable at the introduction of the new collection law (see page 40 PG introduction law books 3.5 and 6 Civil Code at section 57 ab), due to the Voorwerk report, of which even its composers admit is seriously fails, the claimants are substantially put at a disadvantage. The legislator has been repeatedly urged to make a good new rule concerning this issue, but the KBvG has to observe that even the guideline to fight arrears in trade transactions 2000/35 is utterly insufficiently implemented. The decision of the Supreme Court of 11 July 2003 NJ 2003/566 only reinforces the problem, while the AG has indicated a very clear and for practice a very desirable path in its conclusion.

In this framework, the KBvG points out that it is remarkable that governmental institutions can count on proper collection regulations when collecting, such as the treasury with an automatic fine system, increasing from 1 to 10%, the LBIO with a standard increase of 10% in article 1:408 of the Civil Code and the recently introduced regulations for the CBP (Stct. 5 September 2003). The claimant that is not part of the government also has a right to compensation of the collection costs: many claimants in civil legal proceedings have not chosen their debtors, but are confronted with them and their illegal actions.

## 4.5 Second round before the judge

Contrary to what most critics feel, the KBvG does not think it is desirable to emphasise one round. Mainly the judge's option to close the debate after the parties appeared in court, is not desirable, especially since the KBvG advocates a more limited model of higher appeal. Even after an extensive substantiation, the answer can surprise the claimant, because of which an appearance in court after the answer will often be too early. Besides, the KBvG would like to demand attention for the fact that many judges (and in particular the subdistrict judges) pronounce a blank intermediate sentence and put the parties on the appearance on the spot. Many legal proceedings can be dealt with without appearances: it is often forgotten that personal appearances entail a precious loss of time for the parties and their advisors, while a strictly regulated second round can make matters often a lot more clear. If both parties indicate that they desire a second round, the judge should not prevent this.

## 4.6 Mediation

The KBvG sees mediation as a very useful instrument and various members of the KBvG are mediator or are in training to become one. As the IR recognises, mediation knows limits. Besides, obligated mediation does not work. The judge could give the parties a little nudge if he sees that they are open to it, because a final solution the parties create themselves is stronger than a sentence. A recent English sentence, in which a party was sentenced to pay a large amount of the costs, because she did not cooperate with mediation, justly received a lot of criticism in the specialist publications. Mediation should be possible, but it is not a goal in itself, and should not become so. In this way, party autonomy is the first matter of importance as well.

## 4.7 Further integration of the subdistrict judge within the court

In the footsteps of what is said in the second part of this report, the KBvG advocates further integration of the Subdistrict and Civil sectors. It is remarkable that the subdistrict judge may

deal with the “smaller cases” within the court and takes care of the bulk within the court organisation. The KBvG argues for abolition of the subdistrict sector in due course, since the differences that are now made between “in persona” and solicitor cases are completely outdated. Nowadays, no one can be explained that he/she may defend himself or herself for a dispute of € 4.500,-- (or be claimant) and if the dispute amounts to € 1.000,-- more, he/she is forced to take a solicitor. It is even more remarkable since (except for cassation in criminal cases) everyone may proceed themselves in fiscal, administrative or criminal cases, irrespective of the size. The KBvG argues for one box office for all cases, where a judge involved becomes the steering judge and distributes the cases within the court. The KBvG wants to emphasize it highly respects the subdistrict judges as judges, but finds that these judges often have to spend their time on matters that are far below their level. The judge can – if possible – at the gate or in the course of the dispute determine whether a representative in the proceedings is required.

This assessment will not be as difficult as it seems at first sight: the regulation of section 98 Rv does not cause any problems in practice at all. It is clear that some requests still require representation in the proceedings, for which according to the KBvG the term “solicitor” will have to disappear. Due to the coming introduction of the national solicitorship, this term does no longer have any factual meaning.

## 4.8 Higher Appeal

The last change of the Rv contained a shift of accent in the first instance, in the way that -with the duty to substantiate – the accents was more placed on the first phase of the proceedings. However, a lot of the profits gained by this is lost again if violating the duty to substantiate can be redeemed in higher appeal, without too many damages. Even more disadvantageous for the parties is when violating the duty to substantiate leads to the loss of an instance, and with it to a move of the actual process to higher appeal.

In order to guarantee the increased accent at the “front door” (the first instance), the backdoor (higher appeal) should be fitted with some locks. The starting point is that, if it is correct, in principle the whole judiciary fight has to take place in the first instance. The first instance offers by definition a quicker progress of proceedings (unus case law), which is not only beneficial to the parties, but also the State, of course. Jurisdiction in higher appeal (in principle plural) is after all in its character a more expensive form of jurisdiction, that is by definition more time-consuming than unus case law (due to diverging opinions and the necessity to tune to one another and an agreement to a multiple of the factor 3, not even mentioning the –now- nearly unlimited possibilities of actual expansion of the judiciary dispute in the higher appeal phase).

At the moment, the Netherlands has a nearly unlimited “reformatioinal” model, in which the sentence in the first instance need not be more than a necessary bump in the road towards the final verdict of the highest judge. Sometimes, this leads to poor proceeding in the first instance, and that without too much risk: after all, in higher appeal everything can still be corrected, expanded, adjusted, and done again. In the same way, this leads to poor jurisdiction in the first instance: “four quick decisions are better than two considered ones, and whoever wants to have the case really sorted out just has to appeal”.

Therefore, it cannot be denied that a higher appeal model more based on cassation, in which the judge of appeal has an extensive controlling function with respect to the first instance and where, to a lesser extent, he offers a new actual instance, and in which the Higher Court mainly focuses on promoting judiciary unity and development.

When developing a model more based on cassation, questions as the following will arise: is there still a need for a prohibition of appeal or a general limit of appeal? To what extent does appeal offer room for new or adapted claims, actual new facts, new bases and defences? Apart from the grounds of appeal system, is there room for the current unlimited devolutive effect that mainly serves to protect the respondent, or can a more assertive attitude be demanded of the respondent? To what extent should higher appeal offer room for (extensive) research of facts, inquiries, expert reports, etc, or should the case be remitted to the first instance (faster and cheaper)? Can the option to remit by the judge in appeal after the final judgement in the first instance still be considered when factual inquiry has to take place? Is a certain measure of delegation of factual inquiry to people that are not judges conceivable (so that the proceedings are faster and cheaper)?

Some characteristic aspects of the first instance since 1 January 2002:

- Concentration of the dispute in the (first phase of the) first instance (as relating to and resulting from the principle of finality of the first instance);
- the duty of communication of the parties (20-22 Rv);
- in principle, the debate finishes with the CnA;
- making the first record heavier by the obligation to substantial and producing proof. (111 Rv);
- rectifying non essential mistakes has been simplified in the same instance (31, 32, 69, 123 Rv);
- principle of exclusion interim appeal.
- Tendency to organize the first instance more sober;
- unius jurisdiction; plural jurisdiction is very rare;
- less exchange of written conclusions;
- tendency to deal quickly with cases by making “decisions by appearances”.

The consequences of the continued existence of the old procedural law in higher appeal after 1 January 2002:

- Complete new discussion of the case in appeal;
- the duty to substantiate in the first instance does not affect the appeal;
- practically unlimited possibilities to rectify and give additions to own factual and legal mistakes and omissions;
- appeal is not only concerned with grounds of appeal against the judgement of the judge in the first instance, but also – nearly unlimitedly – with (whether or not fundamental) changes and additions of (the basis) of the claim, new defences, new proof by witnesses or new research by experts, and the addition of legal foundations by virtue of one's office;
- the positive side of devolutive effect prompts the judge in appeal by virtue of his office, when one or more grounds of appeal succeed, to assess in favour of the respondent of all bases of the claim or defences that were not dealt with in the first instance or that were rejected;
- all these things are always separate from the option to establish appeal.
- Actual shift of the research from the first to the second instance:
- the tendency that in appeal more and more often factual inquiry takes place, that was omitted in the first instance (in order to save time and costs);
- the duty to substantiate of the first instance does not affect appeal, which can lead to superficiality in the first instance;
- insufficient factual inquiry in the first instance (due to business economical or other non legal reasons) can be justified by the possibility to (fully) rectify this in appeal;
- “difference in culture”: the court as a court of appeal more tends to fundamental treatment of (subdistrict) appeals than -at the time-, the court of which the main task lies in the first line.

Objections against (the continued existence) of the current situation:

Higher appeal is often described as a continuation of the debate in the first instance. However, often higher appeal deals with a first and entirely new assessment of a case on the basis of new statements, bases or defences; in this case without a second factual instance. After all, the current system does not even hinder radical changes of course in higher appeal, as long as it is not proposed to late (good order of proceedings).

- In this case, higher appeal releases itself completely or partly from the discussion and the judgement in the first instance. So, there is no question of going deeper into the debate; it is a case of a “shift” to other grounds and/or facts. This disowns the fact that there is already a judgement of the first judge, the value of which seems to be minimal, and the judgement of which (and the progress of proceedings lying at its basis) have to be regarded as a superfluous exercise and thus as a waste of time and costs. Moreover, the question arises whether it is always reasonable to involve a party that was declared right in the first instance on the basis of the debate that was held at the time, on the basis of new grounds and/or facts in a second factual procedure that is onerous for it. There is also no question of suitable spending of government money in this case.

The previous shows that in the current situation there is no real necessity to submit all legal and factual ground in the first instance. The principle of finality of the first instance that applies since 1 January 2002 is thus harmed. This is not only at odds with the apparent intention of the legislator, but in the worst case it paves the way to superficiality of both the judge and the parties in the first instance, and devaluates the value of the first judge’s verdict. The tendency to superficiality is even reinforced by the current management and business economical targets (increase of target and production figures, production dependent finance), because of which many traditional professional (quality) targets risk to be pushed into the background (“much” law prevails over “good” law). It would be really incorrect to assume that the defects concerning the progress of proceedings in the first instance do not need to be tackled with the motivation that higher appeal offers sufficient possibilities to rectify these.

The judge in appeal does not have sufficient sanctions at his disposal to deal with wrongly omitted concentration in the first instance, and even if the judge gives consequence to insufficient substantiating of the claimant by declaring the claim inadmissible, it paves the way to appeals.

In the literature, a comparison has been made with communicating vessels: if pressure is put on the first instance, the mass moves to the second instance. Jurisdiction in appeal is plural jurisdiction, and therefore less fast and moreover more expensive. Moving factual inquiry to the second instance is therefore counterproductive.

## 4.9 Proposals of a good connection of the first instance with the second instance

Therefore, higher appeal should connect well with the first instance and will have to be organized in such a way that justice is done to a more intended principle of finality in the first instance. This will have the effect that the second instance – more than now – will have the character of a controlling and, if necessary, correcting instance, while the essence of the judgement of the dispute will remain in the first instance. To this end the following proposals have been drawn up.

The occasion for each higher appeal is a decision of the judge in the first instance. His judgement plays a central role in higher appeal and will be checked by the judge in appeal. In this connection the person that appeals has to indicate clearly which components of this judgement he wants the judge in appeal to check and which objections he has against it, all this while giving clear grounds of appeal. The position of the defendant should show clearly on which legal and factual grounds he concludes that the judgement, of which appeal, should remain intact (see hereafter the devolutive effect).

As far as new facts or grounds for the claim or defence against the claim are brought forward in this framework, in such a way that it is a question of essential new data or an essential change of course, the judge in appeal will put these facts/grounds/defences aside, when no good reason is given for not bringing them up in the first instance. Thus, the essence of the judgement in higher appeal will lie in controlling the decision of the judge in first instance, in particular on the basis of the statements and grounds that have already been discussed in the first instance, and on which the decision of the first judge is based.

The fact that the principle of devolutive effect of appeal should be strongly restrained is related to the previous. The official testing by the judge in appeal in favour of the defendant of grounds/defences that were not discussed in the first instance –nowadays often leading to judicial mistakes and/or unsuspected judgements- should be cancelled; instead the defendant is expected to explicitly state which other grounds/defences he wants to appeal to in higher appeal, if one or more grounds aimed against the judgement to appeal, would appear to answer to his purpose.

In this connection, the interdiction for the judge to remit a case after final judgement should be dropped; it promotes the principle of concentration in the first instance and prevents that the disputes are in fact only judged in one actual instance.

Besides, the judge in appeal should have the authority to keep cases in which (hardly) any factual inquiry needs to take place, and to deal with it in the highest actual instance.

In principle, the research of facts should be checked in the first instance. That means that the inquiries, expertise reports and local inspection will take place at the court, to which end the judge in appeal can remit the case to the court, if necessary. This fits in with the aim to push back the “resit” function of higher appeal in favour of the control function, and it is a brake on the current development to quickly deal with cases by taking a decision based on appearances.

Within higher appeal, strong demands should be made to the obligation to claim and motivate of the parties. General statements (such as: “party X maintains everything it brought forward in the first instance, which is regarded as inserted here”) are not allowed. An exact indication of the contents of a ground or defence against which is appealed in higher appeal, with a clear explanation of supporting facts and statement of the place it was found in the file of the first instance is required. As said before, legal and factual new data have to be accompanied with an explanation why it was not already dealt with in the first instance. For its review, an “open norm” can suffice, as it will obtain a more detailed form and character in the course of jurisprudence; the fact that a concrete criterion is not directly available, is no reason for the duty to substantiate not to have force in appeal. And the argument that mistakes or omissions of advisors will be more severely punished than the mistakes or omissions of judges cuts no ice. A party commencing procedures rashly, unfoundedly or carelessly – with the accompanying financial and often emotional burden for the opposing party – is of an entirely different nature than (correcting) a mistake or omission of a judge in a dispute already before the courts.

The profundity of higher appeal should not differ in proportion to the character of the progress of the proceedings in the first instance (small claims, summary proceedings, or complicated cases). The control function of higher appeal will oppose this. However, a distinction could be made concerning the energy of proceeding.

## 5 The bailiff in the process of reorganization

### 5.1 Starting points modernising commencement of proceedings

In the current proceedings, when the case is not solved in the phase before the proceedings are started, the defendant in all cases summoned before the judge, the case is discussed in the hearing and is – whether a defence has been forwarded or not – a judgement is passed. This procedure entails that for all cases an extensive range of actions have to be taken before the claimant obtains an entitlement to enforcement.

The KBvG feels that it is desirable and necessary to adopt the current procedure for cases that do not deal with a dispute, but only with giving a title – the bulk of civil proceedings – and to mould it into a modern form.

This argument is even more manifest, since it concerns a substantial amount of cases.

According to the announcement of the Council for the Administration of Justice, the amount of cases by default numbered approx 200,000 in 2002.

Safeguarding legal security for claimant and defendant also remains the central point in the model described hereafter.

According to the KBvG a distinction should be made between cases that are dealt with by default and that lead to a judgement by default and cases in which a defence is forwarded and for which it is necessary that a judge deals with it (at a hearing).

The KBvG assumes that the commencement of the proceedings in the new style will no longer be the direct summons of the opposing party for a hearing of the judge, but that it is commenced by a bailiff serving the legal claim of the claimant to its debtor. In this sense, a description of the claim is included besides the usual notifications, and subsequently the opposing party is informed of the fact that he has the opportunity to let the bailiff know (in writing, via email, and so forth) whether he disputes the claim.

The opposing party is explicitly explained in what way the “defence” announcement should be made. A period is stipulated, i.e. a date is given on which the announcement has to be received. After the “serving of the legal claim” there are three possibilities:

- the claim is paid;
- the opposing party does not respond;
- an announcement follows that the claim is either disputed or recognised.

If the opposing party indicates that he challenges the claim, the bailiff will send a summons for a hearing. When submitting the case to the judge (via a central clerk's office), the message of the opposing party is included.

In any case, the judge is always brought in when payment remains forthcoming.

The cases are delivered to the clerk's office in pdf format or in another way via an electronic channel. The facility organised to this end (central clerk's office) can process these in the application after it has been received in this way.

When submitting, a distinction will be made between cases in which no communication of the opposing party has been received (or it was received after the deadline) and cases in which the opposing party indicates that they challenge the claim.

This is explained below in more details with the description of the model of proceedings. All cases will go to one point.

The distinction between cases in which the bailiff did not receive a reaction will be manifested after they are submitted to the central clerk's office. In cases where no reaction was received, an entitlement to enforcement is immediately provided. This means that immediately after a case has been submitted to the central clerk's office and the bailiff's declaration that no reaction was received, a judgement by default follows.

In cases where a reaction was received, the service of the legal claim and the summons of the hearing are distributed to the court indicated (the residence of the opposing party), after which the case is discussed on the day of hearing indicated.

Further attention has to be devoted to the question whether, and if so, in which cases of unexpected challenge, - did the claimant know about the challenge, then he should not have chosen the new collection procedure – the parties have to be legally represented.

This seems pre-eminently a subject for consultation between the Ministry of Justice and the Council for the Administration of Justice.

The serving of the claim (to the opposing party) has to be done via the bailiff and this is due to the following reasons:

- safeguarding the legal certainty of the opposing party (what is happening is explained to them, what their options are and what the consequences of those options are);
- the bailiffs give advice (how to deal with, and where it is possible to get legal aid);
- the courts' clerk's offices are unburdened, since the bailiffs supply information.
- safeguarding the filter position of the bailiff, as described hereafter;
- research currently conducted shows that distribution in a large number of cases leads to settlement before the hearing.

This will prevent burdening the judiciary system.

The data of the preliminary research induces the KBvG to study the issue in depth.

At this stage, it is useful to identify a claim's material legal aspects and phases. Initially, on the basis of the debtor's obligation towards him, the claimant has a right to claim, subsequently a legal claim, and finally a right of recourse.

Only when the debtor does not pay in a regular way, the claimant has an interest in the second aspect of his claim: enforcement by governmental intervention.

In the model of the new collection procedure the claimant has to turn to the bailiff in order to realize his legal claim as well.

The first step of governmental intervention is the servicing of the legal claim to the debtor.

As an aside, a lot can be said against the statement of the authors of "A new balance" concerning the prominent role the legal expenses insurance companies should play in the future.

It is of no avail to legal certainty to have a party with its own –commercial- interest play an important role in the result of a dispute.

From the point of view of limiting risks – inherent in an insurance company-, it can hardly be expected to objectively deal with the settlement of a dispute.

The central task of the proxy is after all defending the interests of one of the parties involved in a dispute. Besides, it is also important that a great deal of the people we discuss here do not have legal expenses insurance.

Moreover, the bailiff is impartial as a public official.

The model of proceedings is drawn up as follows:

1. The bailiff serves the legal claim.
2. The service gives the opposing party the opportunity to announce within a given term in the writ, whether he challenges the claim.
3. If a defence, i.e. an announcement from the opposing party that the claim is challenged, is received, a summons for a hearing will follow.
4. The cases that qualify for this (cases by default following the term indicated in the writ, and defence cases after the summons has been sent) will be submitted to the central clerk's office.
5. Upon delivery a distinction is made between cases for which no reaction was received, and cases in which it was, i.e. either a defence has been forwarded, or a defence is announced and the summons are served (accompanied by an official report of the bailiff)
6. For cases in which no reaction was received, a judgement by default is immediately pronounced.
7. Cases in which a reaction from the opposing party was received are dealt with during a court hearing (of the residence of the opposing party).

In the model described, obtaining an entitlement for reinforcement is strongly simplified, while safeguarding the interests of both claimant and debtor, cases in which no defence is forwarded are dealt with while a judge bears the final responsibility, but in fact he is only involved when a claim is challenged.

As a consequence, the judge and clerk's office can use their time and energy predominantly on cases in which a dispute has to be settled.

A number of subjects more or less related to the considerations regarding the reorganisation of procedural law, focused on what is described in this report, should be discussed as well. Not because it is supposed that they form an entire whole, but since it is the right moment to research whether subjects should be added to this procedure now the reorganisation of procedural law is under discussion.

As a consequence, the final target – the real and successful enforcement of a title – can be achieved in an improved way.

## 5.2 Research possibilities of recourse/ information authorisation / sources of information

It is advisable to be able to determine whether further measures (serving and obtaining an entitlement to enforcement) can be used with a reasonable chance of success, prior to servicing the legal claim and on the basis of checking a number of sources of information.

It does not profit anyone that cases in which later there appear to be no possibilities for recourse from the opposing party, are first dealt with by the bailiff and subsequently by the court.

Therefore, we suggest giving the bailiff the authority to consult a number of sources on which basis it can be established whether there is a reasonable chance to successfully conclude the case, before “servicing the legal claim”.

The current situation allows that the bailiff has the authority to verify the address of the summoned party in the Municipal Base Administration (MBA), before serving the summons. Subsequently, unless the bailiff knows that there are no possibilities for recourse, he serves the summons.

In the adaptation proposal, the bailiff does his research on the basis of a number of sources of information, before serving the summons.

The bailiff reports the result of the “recourse test” to his principal objectively.

On the basis of this test, further steps follow (negative recourse test: file closing; positive recourse test: serving the legal claim).

It is obvious that, when the bailiff gives positive advice on the basis of the recourse test (the proceedings can start), it is not a guarantee, nonetheless a strong indication for success at any rate.

The proposed information authority can be achieved by making enquiries at UWV concerning employment.

If employment is found, it is still no guarantee for possible attachment of earnings (in the near future).

Besides, it is of utmost importance to consider the method in which the bailiff can find out whether an attachment (under the employer) has been made.

Clear criteria and limiting conditions will have to be set – also in relation to the privacy of the debtor – with respect to the way the research and the report to the claimant will take place.

An example of a guarantee for the debtor is the aspect that an employer is not already informed about the fact that his employee did not pay a claim at the stage of the recourse test.

In case of debt restructuring, guaranties have to be built in as well.

Discussions with the Council for the Administration of Justice are already taking place concerning the obtaining of information regarding WSNO judgements, bankruptcies, and suspensions of payment by electronic means.

To be sure, this information is already available on [www.rechtspraak.nl](http://www.rechtspraak.nl), however a person has to be actively searched for in this source. When the file in which this information is laid down will be put at the bailiff’s disposal, the information can be checked on the basis of the bailiff’s own files. A function as described above justifies the request of the professional group to request signals even more.

The advocated recourse test followed by information made available to the claimant is a new fact in procedural law.

An advantage is that all this will lead to a more proportional burdening of the judiciary system.

The bailiff is the only who can wholly fulfil this role due to his official responsibilities and the objective criteria on which basis the use of his authorities can be tested.

Besides, it can also be envisaged that this recourse test is done, after the summons has been served.

At the moment, the bailiff will not summon when he knows that the debtor does offer recourse, at least not without clear further instructions.

When this practise of warning in case of knowledge already known pertaining to the lack of recourse, is continued, a beginning can be made with the proposed new collection procedure.

The preceding active research concerning possibilities of recourse, with the use of the proposed extended official information authority of the bailiff could be added to this procedure at a later stage.

### 5.3 Summons for a hearing / completing the information related to the case

The question to be answered is whether a summoning for a hearing can be omitted.

The KBvG proposes – as stated above – to include in the serving of the legal claim, that the debtor can communicate (letter, email, and so forth) to the bailiff within the period indicated whether the claim is challenged.

This communication could suffice with the statement that the claim is challenged.

Subsequently, following the KBvG's proposal, the bailiff has to take care of summoning the opposing party to the hearing, after serving the legal claim and the announcement of the opposing party that the claim is disputed. On this hearing, for which the bailiff also submits the messages received from the opposing party, the case is discussed.

The KBvG feels that the bailiff should not discuss with the debtor the contents, whether the defence the debtor has to forward concerning the defence and the question whether the defence is valid.

This is the exclusive task of the judge. Similarly, we are of the opinion that the bailiff may not judge the quality of an acknowledgement.

If the debtor acknowledges the claim, the case will be referred to the judge, even when the acknowledgement is complete.

He should determine whether a hearing is required.

The KBvG assumes, on the basis of its members' experiences that in this situation there will be no question of a transfer of proceedings by default to proceedings in which a defence is forwarded.

The bailiff will always stimulate – just as in the current situation – the defendant to forward a defence in a hearing, when there is a lack of clarity. In this way, the defendant's legal certainty is and will remain guaranteed.

### 5.4 Submitting a case (and its data) to the clerk's office

At the moment, a procedure for electronically submitting bulk cases to the courts' clerk's offices is under discussion.

The KBvG proposes that the Council for the Administration of Justice will set up a central body to which all cases can be electronically submitted.

Cases in which no defence is forwarded will – automatically – lead to a judgement by default.

The judge will deal with cases in which a defence is forwarded or announced, and for which the summoning has taken place. Based on the model described above, challenged and non-challenged cases are divided in a stage long before the case is in the current situation (see Figure 1 and Figure 2).

This gives both the judiciary system and the bailiffs the opportunity to organise the proceedings in a more efficient way.

### 5.5 Communication between the bailiff and the “anonymous” claimant

The model described above implicates that the claimant can choose a specific bailiff to accept the assignment. However, when the commencement of proceedings is done via a website, the question arises as to how the claimant can choose a bailiff to deal with the case.

The KBvG proposes to develop a uniform site for all bailiff offices.

Besides, an –identical- central site has to be developed for all claimants that do as yet not have a relation with a bailiff and/or only want to contact him in his official authority.

## 5.6 Form requirements for submitting a case via the website

Of course, the case that the claimant wants to submit via the website should answer to a number of requirements concerning its form. In any case, the grounds of the claim should be clearly formulated.

When developing an electronic form which will have to give the claimant something to hold on to, can be further connected to the existing legal regulations of everything a writ has to contain.

Evidently, it is not the intention that a central party makes a judgement on the contents of the grounds and claim the claimant submitted at this stage.

It is the intention that the claimant indicates the grounds and claims in one A4 at most.

Attention should be given to the way the recourse test described above can be implemented.

This will be an important step in the procedure.

With respect to the costs, an advance model in which the claimant will be refunded for a large part of the costs, when the recourse test shows that there are no possibilities of recourse, can be considered.

## 5.7 The costs of the claim submitted via the website (processing and payment of the bailiff and clerk's office's costs)

The claimant owes both the bailiff and the clerk's office in the procedure. For example:

- preparation costs, and in case of a positive recourse test, serving the legal claim;
- court fee;

The question is whether a model can be found that provides for a central payment of these costs.

For example, a system in which the claimant pays a fixed amount per credit card.

A central body could take care of payment of the costs to the bailiff and clerk's office (and possibly in an automatic way).

## 5.8 Costs of the official activities of the bailiff

The official costs for serving the legal claim can be determined on the basis of the existing scale of fees.

The KBvG proposes to further determine the official fee for summoning after defence/reaction.

## 5.9 Duty to substantiate

Will the duty to substantiate be partly or completely cancelled in the proposals described?

Would this be advisable?

It should be noted that a claimant can neglect his duty to substantiate in the current situation as well.

For this reason, it is extremely important that it is clearly indicated when submitting the claim on the website (and before the "confirm" button is clicked), that the proceedings are only suitable for the claims that are supposed to be unchallenged.

## 5.10 Proposal of the committee:

The Board of the KBvG consulted with its general meeting concerning the contents of this report and the proposals it describes and will, now the general meeting agrees, present the report to the Ministry of Justice and the Council for the Administration of Justice and will subsequently consult with them on the method the proposals can be realized.

As soon as the consultation offers perspective on realization of the KBvG's ideas, the board will go public by publishing the second reaction announced regarding A new balance.