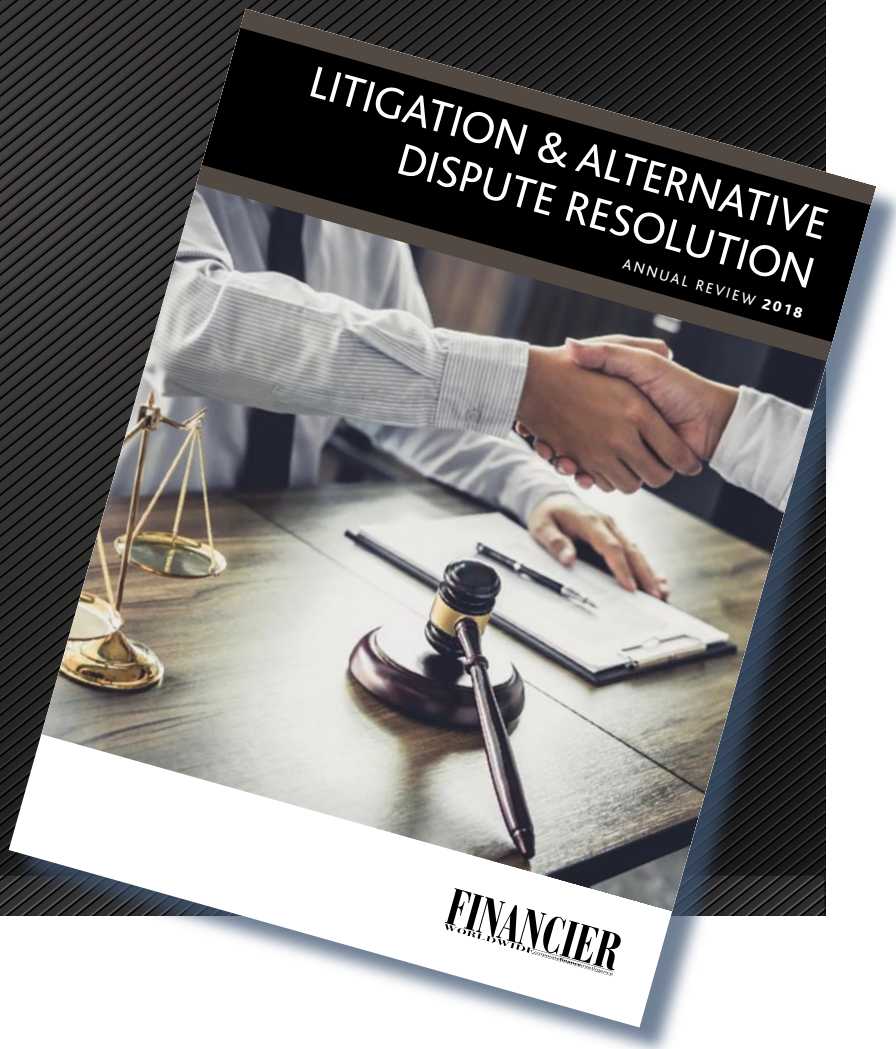
ANNUAL REVIEW

Litigation & alternative dispute resolution



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Timo Jansen is a specialist in the prevention and resolution of corporate and contractual disputes. His extensive experience includes pre-contractual liability, M&A, joint ventures, directors' and shareholders' liability and franchises. He acts in professional liability and fraud cases. His clients are mainly active in the insurance, retail and telecommunications sectors. He studied law at Universiteit Utrecht and completed the Law & Economics master's programme. Thereafter he studied corporate litigation and advanced financial statement analysis in postgraduate specialisation courses at Grotius Academie and the Amsterdam Institute of Finance.

Q. Could you outline some of the current market challenges at the centre of commercial disputes in the Netherlands?

JANSEN: The Dutch administration of justice has struggled with the digitalisation of court proceedings. This year, an ambitious programme, *Kwaliteit En Innovatie* (Quality and Innovation), was aborted due to managerial problems following a €220m investment in information and communication technologies (ICT). On the other hand, the Dutch administration of justice has begun to accommodate international business concerns with the establishment of the Netherlands Commercial Court (NCC) which is expected to open in the first half of 2019. The NCC will offer a swift resolution of international commercial disputes by specialised judges, in English, for a slightly higher administration fee. In addition to the WCAM legislation – the Dutch act that allows for collective mass claims settlements to be declared binding – the NCC has further demonstrated the Dutch ambition to become an international hub for resolving commercial disputes.

Q. What general advice can you offer to companies on implementing an effective dispute resolution strategy to deal with conflict, taking in the pros and cons of mediation, arbitration, litigation and other methods?

JANSEN: The strength of any dispute resolution strategy depends on intelligence. One should know the facts of a case, as well as the interests and position of the counterparty, in order to choose a position and plot a winning strategy. In all circumstances, the preliminary strategy should be aimed at reaching an amicable solution on acceptable terms. After all, settling is the most cost efficient and non-disruptive method of dispute resolution. If an amicable solution appears out of reach, the appropriate dispute resolution method depends on the specifics of the case and the predetermined key performance indicators (KPIs). Relevant circumstances in this regard are, for instance, the type of conflict, the financial cost, the financial outlook of the parties involved, timing, recourse possibilities and the profile of the judges or arbitrators.

Q. To what extent are companies in the Netherlands likely to explore alternative dispute resolution (ADR) options before engaging in litigation?

JANSEN: Given the establishment of the Dutch Association of Corporate Mediation, it is clear that Dutch companies and foreign companies situated in The Netherlands are increasingly exploring ADR options. We are also witnessing the growing importance of e-courts in business to consumer disputes.

Q. How would you describe arbitration facilities and processes in the Netherlands? Are local courts supportive of the process?

JANSEN: With the Netherlands Arbitration Institute (NAI) and the Arbitration Council, arbitration facilities and processes in The Netherlands are well established and are known for their expertise in commercial and real estate disputes. Dutch courts are particularly supportive of these processes as exequaturs are obtained swiftly and decisions are nullified by exception.

Q. What kinds of situations or circumstances might lead companies to pursue litigation instead of arbitration?

JANSEN: The Netherlands is known for the quality of its justice system and its well-functioning civil courts, in terms of independence, acceptability of judgments, speed and reasonable costs. In the World Bank's 2016 report 'Good Practices For Courts', The Netherlands is presented as an example to other jurisdictions. Consequently, litigation is the default method of dispute resolution in The Netherlands instead of arbitration. Parties turn to arbitration essentially to either raise a threshold for initiating formal dispute resolution, ensure confidential treatment of their affairs or to choose a certain expertise.

Q. What practical challenges need to be dealt with when undertaking complex international, multijurisdictional disputes in the Netherlands?

JANSEN: As is demonstrated by the Converium collective settlement for non-US residents, the Shell litigation on the Nigeria oil spills, the Trafigura litigation on the polluted Probo Koala vessel, the pending AGEAS litigation and the Akzo Nobel/PPR takeover battle, The Netherlands prides itself on the resolution of complex and international multijurisdictional disputes.

Q. What considerations should companies make when drafting a dispute resolution clause in their commercial contracts to address the possibility of future disputes?

JANSEN: Companies should consider what incentive the dispute resolution clause is supposed to provide. For example, should it promote or prevent formal dispute resolution or should it be neutral in that regard? Also, companies should consider whether it should create an extrajudicial preliminary phase in which parties explore amicable solutions. Of course, how these considerations are weighted depends on the nature of the relationship and the purpose of the contract.

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