

30-CE-0517177/00-36

IMPLEMENTED BY



www.dbblaw.eu

FOR



ENTERPRISE AND INDUSTRY DG

***STUDY ON POSSIBLE NATIONAL LEGAL OBSTACLES
TO FULL RECOGNITION OF ELECTRONIC PROCESSING
OF PERFORMANCE INFORMATION ON CONSTRUCTION
PRODUCTS (UNDER THE CONSTRUCTION PRODUCTS
REGULATION), NOTABLY WITHIN THE REGIMES OF
CIVIL LIABILITY AND EVIDENTIARY VALUE***

OBJ

**Jean ALBERT
Team Leader**

**- COUNTRY REPORT -
- THE NETHERLANDS -**

Submitted by
Jan Willem VAN DIJK (J.B.C.W. Van Dijk)
Country Expert

December 2013

1. CHAPTER 1: Introduction.....	3
1.1. Summary of the regulation implementing Directive 89/106/EEC	3
1.2. Summary of the changes that are taking place following the adoption of the CPR	6
1.2.1. Current system.....	6
1.2.2. Change proposed or implemented (including repealing of Directive	6
89/106/EEC transposing legislation.....	6
2. CHAPTER 2: Legal context in which the DoP may be relevant	6
2.1. Presentation of the type of legal contexts in which the DoP may be relevant (i.e.	6
authorizations, liability, procedure and evidentiary rules).....	6
2.1.1. Summary of construction products liability.....	7
2.1.2. Statute of limitations in the area of construction products liability	10
2.1.3. Summary of the rules relating to authorizations pertaining to the use of	11
construction products.....	11
2.2. Administrative bodies that may require the DoP	11
2.2.1. Presentation, role, function and competence of these bodies	11
2.2.2. Link with the field of construction products.....	13
2.2.3. Context in which these bodies might need access to the DoPs (including	13
reference to rules and examples)	13
2.3. Judicial bodies that may require the DoP	13
2.3.1. Presentation, role function and competence of these bodies.....	17
2.3.2. Link with the field of construction products.....	17
2.3.3. Context in which these bodies might need access to the DoPs (including	17
reference to rules and examples)	17
2.4. Insurance organisations.....	17
2.4.1. Role of insurance organisations in the construction products industry	17
2.4.2. Context in which these organizations might need access to the DoPs	18
3. CHAPTER 3: Electronic/digital provision of the DoPs before administrative and	18
judicial bodies.....	18
3.1. Provision of electronic documents to administrative bodies	18
3.1.1. Admissibility of electronic documents (including reference to rules and	18
summary of case examples)	18
3.1.2. Weight of admissible electronic documents (including reference to rules	21
and summary of case examples)	21
3.1.3. Authentication and integrity requirements (including those on	21
preservation).....	21
3.2. Provision of electronic documents to judicial bodies	21
3.2.1. Admissibility of electronic/digital evidence (including reference to rules	21
and summary of case examples)	21
3.2.2. Weight of admissible electronic/digital evidence (including reference to	23
rules and summary of case examples).....	23
3.2.3. Authentication and integrity requirements (including those on	23
preservation)	23
4. CHAPTER 4: Case Study	23
5. Conclusion.....	27
5.1. Use of electronic means to provide DoPs before administrative bodies	27
5.2. Use of electronic means to provide DoPs before judicial bodies	27

1. CHAPTER 1: Introduction

1.1. Summary of the regulation implementing Directive 89/106/EEC

Directive 89/106/EEC¹ has been implemented through the Building Decree (hereinafter: BB) 1992 (*Dutch: Bouwbesluit 1992*) which has its legal basis in the Housing Act (*Dutch: Woningwet*). BB 1992 was drafted with Directive 89/106/EEC in mind and was followed up by BB 2003. BB 2003 provided more regulations with regards to more types of buildings and construction works, while further elucidating the rules of BB 1992. When Regulation 305/2011² (hereinafter: “CPR”) partly came into force BB 2012 was drafted. The basic principles of BB 2012 apply to BB 2003 as well.

BB 2012 is based on articles 2, 3, 5, 6 and 120 of the Housing Act. These articles determine that through a general administrative order rules will be given. These are:

Article 2

- a) The construction of buildings or construction works, including technical requirements
- b) The state of existing buildings, construction works or unused land, including technical requirements
- c) Putting into use or using buildings, construction works or unused land, including technical requirements
- d) Demolishment of buildings or construction works, including technical requirements

The general administrative order may only enforce requirements for reasons of safety, health safety, usability, conservation of energy or environment. The general principle of BB 2012 is that any requirements must not be more restrictive than absolutely necessary. BB 2012 also reformulates the accessibility requirements for buildings. The accessibility requirements are targeted specifically at less abled persons (such as those in a wheelchair) and provides instructions with regards to the minimal measurements of

¹ Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products

² Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC

entranceways, doors and ways to handle the difference in height with a bridge or slope. BB 2012 has, due to the principle of acquired rights, little effect on buildings which conformed to older building requirements and possible construction work on those buildings.

Article 3 determines that the general administrative order may require the conformity to norms or a statement of quality.

Article 5 determines that technical requirements as meant in article 2 may only be given through a separate general administrative order.

Article 6 determines that separate rules may be given for (the preservation of) monuments, including different technical requirements.

Article 120 determines that a general administrative order may be given in order to conform to international obligations.

In accordance with article 5 of the Housing Act, BB 2012 depends on the Regulation Building Decree 2012 (*Dutch: Regeling Bouwbesluit 2012*) (hereinafter: RBB 2012). BB 2012 contains rules and regulations on performance norms and which NEN-norm (Dutch Norm), NEN-EN-norm (European Norm transposed into a Dutch norm) or h'EN-norm is applicable. The RBB 2012 determines which version of these norms is applicable.

While BB 2012 governs the requirements for buildings and construction works, the General Provisions on Spatial Law Act (*Dutch: Wet Algemene Bepalingen omgevingsrecht*) introduced a single permit for 25 types of permits, including building permits and demolition permits. Many permits are governed by one application process, one decision on the application and one local authority. Whether a permit may be given depends on a number of laws with regards to planning, the environment, noise levels, monuments, dangerous substances, air pollution, nature protection, soil water protection etc.

BB 2012 is based on the idea that the principal/architect/builder of a building or construction work as well as a owner/user of an existing building, construction work or unused lands is primarily responsible for the quality, the use and preservation. To ensure that the responsibility of these parties does not conflict with safety, health safety, usability and the conservation of energy and the environment, BB 2012 contains the minimum requirement with regards to building and construction works. These minimum requirements must be met for a building as a whole or large parts of a building (for instance, in case a building has a living-function as well as a business-function). The principle is a minimum interference from the government with regards to buildings or construction works. A designer is free to design a building with layout as required by the current market situation, in which he is only limited by the minimum requirements as laid out in BB 2012.

BB 2012's minimum requirements are based on functional requirements and a related performance requirement. For example, a functional requirement is that a building must be built in such a way that a possible fire has limited effects. The related performance requirement is that an exhaust for flue gas is required to be fireproof in the way as determined by NEN 6062. This means that conforming to NEN 6062 is equal to conforming to the functional requirement. However, in some cases it is necessary to meet the functionality requirement without conforming to NEN 6062. In such cases, a different method may be used to conform to the functional requirement through a different construction from NEN 6062.

Another example is the functional requirement that a construction must conform to a heat resistance of (for instance) $3.5 \text{ m}^2 \text{ k/w}$ (BB 2012, chapter 5.1 Energy Conservation, new buildings). In order to meet this requirement, the used isolation material is most important. The performance requirement may require use of a certain material with a certain thickness and thermal conductivity coefficient. However, a different material may have a different thermal conductivity coefficient which in turn requires a different thickness. Ultimately, use of the product also leads to a thermal resistance of $3.5 \text{ m}^2 \text{ k/w}$, and the functionality requirement is met without meeting the corresponding performance requirement.

To summarize, conforming to a performance requirement means the functional requirement is met, but it is not necessary to conform to a performance requirement in order to meet the functional requirement. This system ensures that new construction materials may be used as long as they conform to the functional requirement. In such cases, the builder must be able to show that the solution conforms to the functional requirement.

1.2. Summary of the changes that are taking place following the adoption of the CPR

1.2.1. Current system

In the system before the adaptation of the CPR (i.e. BB 2003) , the CE-marking was obligatory for all construction products for which a h'EN norm exists.

1.2.2. Change proposed or implemented (including repealing of Directive 89/106/EEC transposing legislation

BB 2012 currently obligates the use of the CE-marking with reference to Directive 89/106/EEC. On 1 July 2013, this legislation will be repealed with reference to the CPR, as the provisions are the same as those of the CPR.

BB 2012 contains provisions for the Council for Accreditation (*Dutch: Raad voor Accreditatie*), the Dutch accreditation body responsible for accreditation as meant in Regulation 765/2008. The Council for Accreditation accredits inspection bodies, (medical) laboratories and inspection companies. Currently, these inspection bodies, (medical) laboratories and inspection companies have been appointed by the Minister, but must be reappointed on the basis of Directive 305/2011, and new inspection bodies (etc.) must be accredited by the Council for Accreditation.

2. CHAPTER 2: Legal context in which the DoP may be relevant

2.1. Presentation of the type of legal contexts in which the DoP may be relevant (i.e. authorizations, liability, procedure and evidentiary rules)

2.1.1. Summary of construction products liability

The Dutch Civil Code (hereinafter: “Civil Code”) (*Dutch: Burgerlijk Wetboek*) has specific regulations for the liability for products. Section 6:185-193 Civil Code determines the liability for producers of products which cause damages. Section 6:185-193 Civil code is an implementation of the Product Liability Directive (Directive 85/374)³, which is dependent on the interpretation of Directive 85/374. Apart from these specific regulations, liability may also be determined through the general system for liability, namely section 6:74-80 (contractual liability) and section 6:162-168 (unlawful acts / torts).

Contractual liability claims

Liability for construction products may be determined by means of the general provisions with regards to liability, namely section 6:74 Civil Code (non-performance / breach of contract) and section 6:162 (torts / unlawful acts), although proceedings may also be based directly on the product liability directive.

Section 6:74 Civil Code reads as follows:

6:74

1. Every failure in performance of an obligation shall require the obligor to repair the damage which the obligor suffers there from, unless the failure is not attributable to the obligor.
2. To the extent that it is established that performance is and will remain impossible, paragraph 1 shall apply only if in accordance with the provisions of Sections 6:80-6:87.

A breach of contract in case of construction products is determined by whether the product is fit for purpose as meant in article 6:77 Civil Code (this may be deduced from section 7:17 Civil Code with regards to buying the material, but section 7:17 may be excluded in contracts between professional parties). Any legal action on the basis of section 6:74 Civil code can only be successful in a contractual relationship, in this case between the buyer of the construction product and the seller (the manufacturer) and is

³ Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

therefore part of the internal recourse of any legal action. As such, if the buyer is liable for damages caused, the buyer may be indemnified by the seller/manufacturer. This chain may be propagated if the buyer is not the builder of a building and/or another construction work.

Non-contractual liability claims

If liability on the basis of 6:74 is not possible, which is the case for any third party which has incurred damages without there being a contractual relationship between the third party and (ultimately) the manufacturer, liability may be determined through section 6:162 (torts / unlawful acts) Civil Code. Section 6:162 reads as follows.

6:162

1. A person who commits a tort against another which is attributable to him, must repair the damage suffered by the other in consequence thereof.
2. Except where there are grounds for justification, the following are deemed tortuous: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to standards of due care.
3. A tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles.

Liability on the basis of construction products may exist if the following is met:

- The manufacturer has a duty based in law, unwritten law with regards to standards of due care.
- There was an act or an omission with regards to this duty
- Damages were suffered as a result of the act or the omission.
- There is a direct correlation between the act or omission and the damages suffered, i.e. the duty of the manufacturer was intended to prevent the situation in which the damages were suffered.

As such, if a construction product is defective and damages are suffered, the builder may be liable if he has failed to perform his duties with regards to whether the construction

products he used were fit for purpose. If the construction products were selected by an architect or a designer, they may be liable. If the manufacturer has provided construction products which were not fit for purpose, or if the manufacturer has falsified information which regards to the performance of a certain product, the manufacturer may be liable for the damages suffered.

Only if liability can be determined for more than one party involved with the construction products or the use of these construction products with regards to the construction of a building or an other construction work are these parties liable in solidum.

Liability for products

The Civil Code provisions on liability for products is based on The General product safety directive (2001/95/EC)⁴ and the product liability directive (85/374/EEC)⁵. The General product safety directive aims to ensure that consumer products placed on the market do not present a risk under normal conditions of use. Article 2 of this directive limits the applicability of the directive only to products for which other EU directives regarding safety provisions are not available. As the Construction Products directive applies to construction products in particular, the General product safety directive does not directly apply to construction products. However, as the provisions in Dutch Law are based on both directives, both have influence on liability for products.

The provisions on liability for products only cover damages caused by defective products. Liability for products is based on the non-contractual liability provisions, with an advantage for a tortfeasor with regards to evidence. On the basis of these provisions the tortfeasor only has to prove damages, defectiveness of the products and that the damages were caused by the defective product.

⁴ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety

⁵ Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

Case law

There are only a few cases which involve construction products, which often are the result of higher administrative appeal and currently rarely involve construction product liability. One such case is from the Administrative Jurisdiction Division of the Council of State (*Dutch: Afdeling bestuursrechtspraak Raad van State*), in which an appeal was made against the decision to use certain materials for a barrier meant to stop crashing cars. In the case, the municipality of Zwolle, had to motivate the building permit given, as the used materials may not have conformed to a NEN-norm.⁶ In another case, the life expectancy of a product determined the amount of tax depreciation over the usability period. The case was between a citizen and the tax authorities.⁷

There are two cases on liability for construction products.

One case is partially on liability and involved the test results from a non-accredited testing facility with regards to norm EN 12966. As the non-accredited facility could not properly perform the tests, the Ministry of Infrastructure and the Environment was justified in no longer ordering products from the supplier.⁸

The other case involved roof panels which turned out to be defective and caused a dangerous situation. The product of the panels wished to take immediate action and tried to have the insurance company pay for all the costs. The ruling was that the insurance company was only held to pay the amount the insurance covered, and did not have to pay the excess⁹.

In many cases defective problems will be replaced without any legal action, as the liability is often accepted (and insured) without the need for legal action.

2.1.2. Statute of limitations in the area of construction products liability

Liability for products

In accordance with Directive 85/374, article 10, section 6:191 determines that the statute of limitations for a claim based on section 6:185-193 is three years.

(Non)-Contractual liability claims

⁶ ABRvs 4 April 2012, LJN: BW0779, AB 2012, 154.

⁷ Court of Appeal Amsterdam 1 September 2004, LJN: AR2959, NTFR 2003. 1883.

⁸ Court The Hague 17 May 2010, LJN: BM5665.

⁹ Court The Hague 4 October 2010, LJN: BN9228

Section 3:310 Civil Code determines the statute of limitations for all legal action on the bases of damages suffered. In principle legal action is not possible after a period of 5 years once the damages have become apparent and the person responsible for the damages is known. Legal action is no longer possible after 20 years after the damages have been suffered. One exception to this is damages suffered because of dangerous substances (such as asbestos).

2.1.3. Summary of the rules relating to authorizations pertaining to the use of construction products

BB 2012 determines the minimum quality of building and construction works. In order to conform to the minimum quality, only construction products with a known performance can be used. There are no mandatory authorisations, but the builder is responsible for conforming to the requirements of BB 2012.

2.2. Administrative bodies that may require the DoP

2.2.1. Presentation, role, function and competence of these bodies

ILT

Control on the usage of CE marking for construction products in the Netherlands has been delegated to the Inspectorate Living environment and Transport (*Dutch: Inspectie Leefomgeving en Transport*) (hereinafter: "ILT"). The ILT is the supervisory authority for CE markings. However, manufacturers and distributors are responsible for the application of the CE markings and the draft of a DoP, as well as performing random tests to ensure that the construction products maintain the quality as recorded in the DoP. If this is not the case, manufacturers and distributors must notify the ILT that a construction product might cause damages.

The ILT has administrative (section 5:15-5-19 Awb (General Administrative Law Act) powers and may impose a fine under administrative order. The ILT has penal law powers as well on the basis of section 120, paragraph 2 of the Housing Act in conjunction with section 1a, under 2 Economic Offenses Act (*Dutch: Wet op de economische delicten*). The ILT can order a manufacturer or distributor to perform certain acts, such as preserving and storing certain materials or removing construction

products from trade. When information is falsified, the ILT may take action to determine whether there is a breach of section 225 of the Dutch Penal Code (forgery).

Council for Accreditation

The Council for Accreditation (*Dutch: Raad voor Accreditatie*) is the Dutch accreditation body and is responsible for accreditation as meant in Regulation 765/2008, setting out the requirements for accreditation and market surveillance relating to the marking of products, including construction products. The Council for Accreditation accredits inspection bodies, (medical) laboratories and inspection companies. The Council for Accreditation is an independent administrative body which ultimately answer to the Ministry of Economic Affairs, Agriculture and Innovation. The Council for Accreditation was established with the Act on the appointment of a national accreditation-entity (*Dutch: Wet aanwijzing nationale accreditatie-instantie*).

Other administrative bodies

While local administrative bodies provide authorisation for building, the authorisation is not based on other requirements than those of BB 2012. Builders are responsible for conforming to BB 2012 by using materials that maintain the minimum quality as required by BB 2012.

On the basis of the Ministerial Regulation Spatial law (*Dutch: Ministeriële regeling omgevingsrecht*,) (hereinafter: WOR) it is possible to provide a DoP when applying for permits regarding BB 2012, as technical information regarding the safety of construction may be necessary to evaluate whether a permit may be given. The request for a permit includes an evaluation based on BB 2012 and in order to verify whether functional requirements are met, it is necessary to provide performance information as contained in the DoP to assess whether the product used is suited to achieve the functional requirements. Local administrative bodies are required to supervise construction projects. The local inspectorate for building and housing supervises projects and oversees compliance with laws and regulations and building permits. This also includes whether the methods used during constructions are safe and whether the incorporated construction products are safe. In such cases, a DoP may be required in order to demonstrate the used products are safe in the way that they have been used.

2.2.2. Link with the field of construction products

The ILT is responsible for the supervision on CE markings, and as such, supervision on the DoP and information provided by market operators and whether those market operators meet all the requirements of the CPR.

Local authorities assess whether the used construction products conform to the requirements of BB 2012. They also supervise construction work and may assess during construction if the products used are safe with regards to BB 2012 in the manner that the construction products are actually used.

The Council for Accreditation ensures that CE-markings are based on valid research, by checking the certificates of Notified Bodies.

2.2.3. Context in which these bodies might need access to the DoPs (including reference to rules and examples)

The ILT may at any time request information regarding the DoP in order to confirm a product has validly been CE-marked (i.e. if the products conforms to the requirements from the CPR) and, as such, to check whether the DoP is correct.

Local authorities may ask for the DoP when CE-marked products are involved to ensure that construction work is safe and whether the functional requirements for building are met by way of conforming to the performance requirements. Although the builder / contractor may also show that the used product is suitable through other means, it is likely that, if a DoP is available (which is mandatory for all CE-marked products), the DoP will be presented to this end.

The Council for Accreditation does not specifically require the DoP, unless necessary in order to check the certificates of Notified Bodies.

2.3. Judicial bodies that may require the DoP

A large proportion of Dutch law is laid down in international agreements, the Constitution, legal codes, acts and municipal and provincial ordinances. As defined by the Constitution, the Judiciary (Organization) Act (*Dutch: Wet op de rechtelijke*

organisatie) and other acts, the role of the courts in applying the law is to create order and shape its development.

In the cases submitted to the courts, disputes may arise as to the meaning of a particular rule or regulation in a specific case. A court may not refuse to give judgment. Discrepancies between the judgments of different courts must be avoided. To ensure the uniformity of law and case law, a single supreme body must monitor decisions by the lower courts and the formation of new law. In the fields of civil, criminal and tax law, the Supreme Court fills this role, as it has the power to quash the decisions of lower courts if they do not give due consideration to procedural rules or if their judgments are not in accordance with the applicable law. This is known as cassation and is the most important task of the Supreme Court.

The Judiciary (Organization) Act provides the following for the judiciary system.

District Courts

The Netherlands is divided into 10 districts, each with its own court.

Each court has a number of sub-district venues. The district court is made up of a maximum of five sectors. These always include the administrative sector, civil sector, criminal sector and sub-district sector (*Dutch: Kantonrechter*). Family and juvenile cases are often put into a separate sector, as is sometimes the case with the administration of the law concerning aliens. The court board is free to determine such matters.

Sub-district sector

It is relatively simple for ordinary citizens to have their case heard in the sub-district sector. They have the right to argue their own case and do not need a lawyer to represent them in court. Cases are handled by a single judge.

In terms of civil law, the sub-district judge deals with all cases involving rents, hire purchase and employment.

In criminal law, the sub-district judge only deals with minor offences, not serious offences. Often these are cases in which the police or the public prosecutor has proposed a settlement. If the accused refuses to accept such a proposal, then the case comes before the sub-district judge. The sub-district judge usually delivers an oral judgment immediately after the hearing.

Civil law/family law sector

The civil sector handles cases not specifically allocated to the sub-district judge. Most of these cases are decided by a single judge, but here too there are full-bench panels with three judges to deal with more complex cases. A number of district courts have a separate sector for family and juvenile cases, when the number of such cases is considerable.

Administrative law sector

With only a handful of exceptions, administrative disputes are heard by the district court; in many cases the hearing by the administrative law sector is preceded by an objection procedure under the auspices of the administrative authorities. It is usual for these cases to be heard by a single judge, but here too the district court can decide to appoint three judges to a case which is complex or which involves fundamental issues.

Tax cases also fall under the administrative law sector.

If the district court in question has no separate sector to handle cases governed by the law concerning aliens, such cases are dealt with by the administrative law sector or a division thereof.

In cases involving civil servants and social security issues, appeal is a matter for a special appeals tribunal, the Central Appeals Tribunal, and in most other cases for the Administrative Jurisdiction Division of the Council of State.

Courts of Appeal

The 10 districts are divided into four areas of Court of Appeal jurisdiction: The Hague and Amsterdam in the west, Arnhem-Leeuwarden in the east and in the north and 's-Hertogenbosch in the south.

With regard to criminal and civil law, the justices of the Court of Appeal deal with cases where an appeal has been lodged against the judgment passed by the district court. The Court of Appeal re-examines the facts of the case and reaches its own conclusions. In most cases it is possible to contest the Court of Appeal's decision by appealing in cassation to the Supreme Court of the Netherlands.

In addition to criminal and civil cases, the Court of Appeal also deals with all appeals against tax assessments, in its capacity as administrative court.

Special Tribunals: There are three special tribunals in the Netherlands that are competent in specific areas of administrative law.

In administrative law the legislative authorities may charge either the ordinary courts or special tribunals with the administration of justice. Both options have been exercised.

The district courts, courts of appeal and the Supreme Court are responsible for tax law.

The district courts of first instance and special tribunals are generally responsible for other areas of administrative law. These special tribunals include:

- the Central Appeals Council (social security and public servants law)
- the Administrative Jurisdiction Division of the Council of State (administrative law in general)
- the Trade and Industry Affairs Appeal Council (economic public law)

Supreme Court

As the highest court in the fields of civil, criminal and tax law in the Netherlands, the Supreme Court is responsible for hearing appeals in cassation and for a number of specific tasks with which it is charged by law. The aim of cassation is to promote legal uniformity and the development of law. The court examines whether a lower court observed proper application of the law in reaching its decision. At this stage, the facts of the case as established by the lower court are no longer subject to discussion. An Attorney General's office is attached to the Supreme Court. Its members main task is to provide the Supreme Court with independent advice, known as an advisory opinion, on how to rule in a case. Not only judgments of courts of appeal can be appealed in cassation, also judgments of the Joint Court of Justice of the Netherlands Antilles and Aruba can be appealed in cassation to the Supreme Court . The Supreme Court is located in The Hague.¹⁰

¹⁰ See: www.rechtspraak.nl

2.3.1. Presentation, role function and competence of these bodies

All courts which assess the facts of the case in civil liability cases may come into contact with DoP when determining liability for damages suffered.

The following courts may require the DoP, if a construction product has a CE-marking and therefore requires a DoP. The District Court (Rechtbank), which deals with all civil disputes, with the exception of disputes regarding labour, lease and rent, agency agreements and cases where the claim is below EUR 25.000,- or an indeterminate value which is likely less than EUR 25.000,-. These cases are handled by the Subdistrict Courts.

As judgement of the District Court and Subdistrict Court may be appealed, the Courts of Appeal may also require the DoP in order to assess the facts of the case.

The Supreme Court does not assess the facts of a case, and therefore will not require the DoP itself in any ruling.

2.3.2. Link with the field of construction products

Any cases concerning liability with regards to construction products will be brought before the Courts.

2.3.3. Context in which these bodies might need access to the DoPs (including reference to rules and examples)

Determining liability may require assessing whether construction products used are either fit for purpose or fit for the specific purpose for which they were selected by a builder, designer or architect. Parties are responsible for the scope of the case, and, as such, are required to set forth their cases through facts and evidence. A wronged party may include a DoP as evidence, in which case the court may examine the DoP.

2.4. Insurance organisations

2.4.1. Role of insurance organisations in the construction products industry

Manufacturers, architect, designers, builders, developers are not required by law to take insurance coverage for the construction products used in a building, nor do insurance companies require that specific documents related to the construction products be

provided in order to provide insurance coverage. However, construction parties are almost always insured in practice. Principals usually require that builders have insurance, such as a Construction All Risk (CAR) insurance and third party liability insurance. Dutch construction is heavily dependent on standard forms of contracts, such as the Uniform Administrative Conditions for the performance of works and technical installation works (*Dutch: Uniforme Administratieve Voorwaarden voor de uitvoering van werken en technische installatiewerken*). Standard contracts often obligate the builder to take out insurance. Also, on the level of putting out orders to tender by the government, CAR-insurance may be an obligatory part of the tender conditions.

2.4.2. Context in which these organizations might need access to the DoPs

Insurance companies may usually decide to not cover damages if a manufacturer, architect, designer, builder or developer has not acted with the expected duty or care. Such instances may involve falsifying information, such as the DoP. However, in such cases, the matter will most likely be brought before the courts.

Currently, insurance companies do not specifically require construction products with the CE marking are used. If a construction product is used which should have a CE marking, but does not have a CE marking, this falls under the general clause of the expected duty or care as with general provisions of civil liability.

3. CHAPTER 3: Electronic/digital provision of the DoPs before administrative and judicial bodies

3.1. Provision of electronic documents to administrative bodies

3.1.1. Admissibility of electronic documents (including reference to rules and summary of case examples)

Electronic documents

Dutch national law does not contain a definition of what is understood to be an electronic document. However, it also does not have a definition for what is a written document. While electronic communications such as e-mail and whether such communications are the same as communication by regular post are still the subject of

some discussion, it is accepted that any type or form which can contain words and signs can be perceived as a document.

On the basis of the European E-commerce Directive¹¹ Dutch law contains provisions on the basis of which electronic documents are equal to non-electronic documents, however, these provisions are only applicable to contracts which have formal requirements, such as notarised deeds.

Dutch law dictates that statements are allowed in any form (section 3:37 Civil Code). Statements have a freedom of form, which means they may also be done electronically. As such, in theory, all communication may be done electronically. However, policy may state that electronic is not recognised by the recipient or that a statement must be done through registered post. These policies are not found in national law, but are operational choices by an administrative body with regards to the way the administrative body can or will handle communications from other parties. For instance, administrative bodies may be reached through e-mail regarding some matters (such as requesting general information), but not regarding other matters (at the discretion of the administrative body).

Administrative bodies & courts

Generally, electronic communication between administrative bodies and other parties is recognised as important by the Dutch legislator. As such, a framework for digital communication with administrative bodies has been implemented through legislation, such as the adding provisions on electronic communication in the General Administrative Law Act (*Dutch: Algemene wet bestuursrecht*) through the Administrative Electronic Communication Act (*Dutch: Wet elektronisch bestuurlijk verkeer*).

Electronic communication is possible if the administrative body has opted to allow electronic communication. If communicating electronically is allowed, then a choice may be made between communicating either electronically or through other means. A special

¹¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

website exists for permits with regards to BB 2012 specifically.¹² The website provides the option to apply for a permit digitally and providing the necessary information digitally. Communicating through other means than electronically, however, does not exclude the possibility of communicating through, for example, the regular postal services and then providing documents on a digital medium, such as CD-Rom or USB-stick.

There are no specific rules which obstruct the provision of electronic documents, although administrative bodies may prefer a printed version of any electronic document.

Absence of case law

Administrative bodies

There are no published decisions / cases from administrative bodies with regards to the admissibility of electronic documents. The main reason is that administrative bodies are not required to publically make available the contents of the decisions on, for instance, building permits other than through publication that a permit has been requested and/or granted (at which point the document may be requested by certain involved parties). Another reason is that if an application is denied because it was done electronically, the decisions to deny the application is not publically made available. If the application is accepted however, the acceptance of the electronic application is not further mentioned in the decision (other than that the application has been received).

Administrative courts

There is no relevant case law regarding the admissibility or weight regarding electronic documents from the Administrative courts. One reason for this is the principle that judiciaries enjoy full discretion regarding evidence, the allocation of the burden of proof, the admission of evidence and the weight of evidence. In administrative cases the judiciary may determine whether certain evidence is admissible, but there is no requirement to further motivate why the evidence is admissible. As such, if and insofar electronic evidence is necessary and provided, a judge is not required to motivate why the evidence is valid and why it carries a certain weight in most cases (and such a

¹² www.omgevingsloket.nl

decision may be implicit because the evidence is accepted). Such a motivation is required when the validity of the evidence is questioned, but this is the same for non-electronic documents.

3.1.2. Weight of admissible electronic documents (including reference to rules and summary of case examples)

There are no regulations which determine that electronic documents are not admissible. Judiciaries in civil law are free to weigh the evidence as they see fit on the basis of the Code for Civil Proceedings, section 152, paragraph 2. While such a rule does not exist for administrative courts, it is generally accepted to also apply for administrative courts.

3.1.3. Authentication and integrity requirements (including those on preservation)

There are no regulations regarding the authentication or integrity requirements of digital documents. Manufacturers and distributors are required to preserve and store the DoP's as the ILT may require this information at any time. If these documents cannot be provided, a fine or penalty may be incurred.

3.2. Provision of electronic documents to judicial bodies

3.2.1. Admissibility of electronic/digital evidence (including reference to rules and summary of case examples)

Electronic documents

Dutch national law does not contain a definition of what is understood to be an electronic document. However, it also does not have a definition for what is a written document. While electronic communications such as e-mail and whether such communications are the same as communication by regular post are still the subject of some discussion, it is accepted that any type or form which can contain words and signs can be perceived as a document.

On the basis of the European E-commerce Directive¹³ Dutch law contains provisions on the basis of which electronic documents are equal to non-electronic documents,

¹³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

however, these provisions are only applicable to contracts which have formal requirements, such as notarised deeds.

Dutch law dictates that statements are allowed in any form (section 3:37 Civil Code). Statements have a freedom of form, which means they may also be done electronically. As such, in theory, all communication may be done electronically. However, policy may state that electronic is not recognised by the recipient or that a statement must be done through registered post. These policies are not found in national law, but are operational choices by an administrative body with regards to the way the administrative body can or will handle communications from other parties. For instance, administrative bodies may be reached through e-mail regarding some matters (such as requesting general information), but not regarding other matters (at the discretion of the administrative body).

Evidence may be delivered to a civil court through all means, unless the law determines otherwise, according to section 152 paragraph 1 Code for Civil Proceedings (*Dutch: Wetboek van Burgerlijke Rechtsvordering*). As such, in civil courts, evidence may be delivered electronically. Currently it is impossible to hand in evidence through e-mail, but evidence may be given through a CD-ROM.

Evidence is admissible in any form, including digital, provided it is delivered in a form the courts can process. A PDF document provided on a CD-ROM is sufficient for a document, although the court might prefer a printed version. It is, however, likely that parties during a trial will have to explain the DoP, its meaning and why it is relevant. An expert may also be used to submit a report on the role of the DoP with regards to the facts of the case. The court could not confirm whether a USB-stick would be admissible, citing security issues.

Absence of case law in civil cases

There are not many cases regarding electronic evidence with regards to Dutch Civil law. As with the Administrative Courts, the same principles regarding the weight and admissibility of evidence apply. Civil cases are also restricted by the role of the judge in

such cases: he is only allowed to rule on what parties have stated in the case and only rule on evidence brought before the courts (except for generally known facts). Parties in civil proceedings have to dispute the electronic evidence and state whether or not the evidence may be used before a judge may rule on the admissibility. While there is case law regarding, mostly, whether or not an e-mail has (or has not) been received, e-mail is often viewed in the same manner as regular post. All electronic evidence is, as such, admissible, as long as the court is able to process the evidence. A party must explicitly state the evidence is untrustworthy or inadmissible in order for a judge to determine whether it is. Even in such cases, a judge may implicitly rule that the form of the evidence is admissible, by accepting the evidence without a further ruling. As such, there is no case law specifically for the admissibility of electronic evidence.

3.2.2. Weight of admissible electronic/digital evidence (including reference to rules and summary of case examples)

There are no regulations or case law concerning electronic or digital evidence or the weight thereof. In principle evidence in all forms is admitted and the judge will weigh the evidence. It is unlikely that the form of the evidence will influence any ruling on evidence. Judiciaries in civil law are free to weigh the evidence as they see fit on the basis of the Code for Civil Proceedings, section 152, paragraph 2.

3.2.3. Authentication and integrity requirements (including those on preservation)

There are no regulations with regards to authentication and integrity requirements.

4. CHAPTER 4: Case Study

CASE STUDY

Manufacturers X and Z have supplied with the construction products the reference number for the DoPs and the Internet address ("Website") where the DoPs can be found.

Manufacturer Y has placed on the construction products QR codes that contain the content of the DoP and Website where the DoPs can also be found.

The Builder goes to the Websites of Manufactures X and Z, inputs the reference number for the DoP on the Website and a DoP appears. It can be downloaded the form of PDF or similar files, is readable and contains the information required by the CPR.

The Builder downloads the DoPs onto his computer and archives it.

The Builder uses his smartphone to read Manufacturer Y's QR Codes, enabling him to view the DoPs' contents. He downloads the DoPs' contents onto his smartphone. The information contained in the QR Codes is readable and reflect the information required by the CPR.

Hypothesis 1

A couple of years later a claim is brought up having a bearing with the factual performance of a construction product.

The Builder seeks to produce a digital medium (memory stick, cd, smartphone) containing the content of the relevant DoPs (bearing in mind that for a building there might be hundreds of DoPs) before a court (administrative or civil).

What type of digital medium, if any, is accepted by the Courts to be used in Court?

Any digital medium which the Courts can process. A CD-Rom is accepted by the Courts. PDF files are the standard for documents, which can be processed.

Would the content of the digital medium produced be accepted as evidence of the DoPs (please describe in detail in which circumstances and under which conditions (citing relevant rules or case examples), if any, the digital medium would or would not be accepted as evidence)?

The content of the digital medium will always be accepted as evidence.

Would the content of the digital medium produced be accepted as evidence of the content of the DoPs (please describe in detail in which circumstances and under which conditions (citing relevant rules or case examples), if any, the digital medium would or would not be accepted as evidence of the content of the DoPs)?

The content of DoPs in digital form would be accepted as evidence, unless it can be proven the content is incorrect or falsified.

Would this be given the same weight as other types of evidence?

Evidence in digital form is given the same weight as other types of evidences, except for evidence which Dutch law states is binding (such as notarised documents).

The Builder provides the addresses of the Websites where the DoP information can be found.

Would the Court accept the DoP information from the Websites as evidence of the DoPs (please describe in detail in which circumstances and under which conditions (citing relevant rules or case examples), if any, the Website addresses would or would not be accepted as evidence of the DoPs)?

All evidence must be submitted through legal documents. As such, the url of the website cannot be used as evidence. If the website was saved digitally, it may be used as evidence if an explanation is provided on where a judge will find the required information on the digital copy.

Would the Court give the same weight to this as other types of evidence?

Unless there would be a reason to doubt the validity of the provided evidence (which must be stated and properly motivated by the opposing party) the evidence will be weighed the same as a paper document.

Hypothesis 2

The builder needs to obtain a final building permit from the authorities.

He/she, as part of the documentation used to obtain the final building approval produces a digital medium (memory stick, cd, smartphone) containing the content of the relevant DoPs.

Would the building inspectors/approval body accept the builder's medium (please describe in detail in which circumstances and under which conditions (citing relevant rules or case examples), if any, the digital medium would or would not be accepted)?

Building permits may be applied for digitally, in which case the documents may be provided electronically in many different formats. The following formats are accepted.

Photo's: .png, .jpg

Scanned documents: .tiff, .jpg, .pdf (PDF/A-1a, PDF/A-1b and PDF 1.4).

Office Documents: .pdf (PDF/A-1a and PDF 1.4)

Drawings/Designs: .pdf (PDF/X and PDF 1.4)

Backgroundinformation (i.e. any information not directly relevant for the application for a permit) may also be provided in different formats.

- ArcGIS-compatible files: .shp, .shx, .dbf, .prj, .shp.xml, .sbn, .sbx en .lyr
- CAD-files: .dwg en .dxf
- Bim-files: .ifc en .ifcxml
- Spreadsheet: .xls en .ods

These files are accepted through the internet, but are also be accepted if provided on a cd-rom when doing an application on paper.

He/she, as part of the documentation used to obtain the final building approval produces the Website addresses.

Would the building inspectors/approval body accept the builder's provision of the Website addresses (please describe in detail in which circumstances and under which conditions (citing relevant rules or case examples), if any, the Website addresses would or would not be accepted)?

A website address would not be accepted. Only the aforementioned formats are accepted when applying for a permit. This may change once article 7.2 in conjunction with 60.b of the CPR has been fully adopted.

5. Conclusion

5.1. Use of electronic means to provide DoPs before administrative bodies

There are no legal objections to providing DoPs in digital form before administrative bodies. An administrative body may, however, dictate in which way electronic documents are provided. Such a way may include providing such information through a website if the administrative body allows for this method. The administrative body must, legally, confirm such a method may be used. It is likely administrative bodies will allow the use of a website for the DoP once the CPR comes into effect (in accordance with article 7.3 in conjunction with article 60.b).

5.2. Use of electronic means to provide DoPs before judicial bodies

The answer under 5.1 applies here *mutatis mutandis*. Judicial bodies may also allow the use a website for delivering the DoP electronically.

List of persons / organisations who provided information for this study

Xella Nederland B.V.
Mildijk 141
4214 DR Vuren
Han Heijsters

European Federation for Construction Chemicals
Av. E. van Nieuwenhuysse 6
B1160 Brussels
Elisa Setién

Gemeente Utrecht
Loket Bouwen, Wonen en Ondernemen
Rachmaninoffplantsoen 61
3533 JZ Utrecht
(general information desk)

Rechtbank Midden-Nederland
Griffie Civiele Zaken
Vrouwe Justitieplein 1
3511 EX Utrecht
(general information desk)

CRH Structural Nederland
Einsteinstraat 5
3864 BH Harderwijk
J.W. Verkleij

List of weblinks to legislation

Dutch Civil Code (Burgerlijk Wetboek)

wetten.overheid.nl/BWBR0002656/ (Book 1)

wetten.overheid.nl/BWBR0003045/ (Book 2)

hwetten.overheid.nl/BWBR0005291/ (Book 3)

wetten.overheid.nl/BWBR0002761/ (Book 4)

wetten.overheid.nl/BWBR0005288/ (Book 5)

wetten.overheid.nl/BWBR0005289/ (Book 6)

wetten.overheid.nl/BWBR0005290/ (Book 7)

wetten.overheid.nl/BWBR0005034/ (Book 8)

wetten.overheid.nl/BWBR0030068/ (Book 10)

General Administrative Law Act (Algemene wet bestuursrecht)

<http://wetten.overheid.nl/BWBR0005537>

Dutch Penal Code (Wetboek van Strafrecht)

<http://wetten.overheid.nl/BWBR0001854/>

Code for Civil Proceeding (Wetboek van burgerlijke Rechtsvordering)

<http://wetten.overheid.nl/BWBR0001827>

Judiciary (Organisation) Act (Wet op de Rechterlijke Organisatie)

<http://wetten.overheid.nl/BWBR0001830>

Building Decree 1992 (Bouwbesluit 1992)

<http://www.onlinebouwbesluit.nl/?v=11>

Building Decree 2003 (Bouwbesluit 2003)

<http://vrom.bouwbesluit.com/Inhoud/docs/wet/bb2003>

Building Decree 2012 (Bouwbesluit 2012)

<http://vrom.bouwbesluit.com/Inhoud/docs/wet/bb2012>

Regulation Building Decree 2012 (Regeling Bouwbesluit2012)

http://vrom.bouwbesluit.com/Inhoud/docs/wet/bb2012_reg

General Provisions on Spatial Law Act (Wet algemene bepalingen omgevingsrecht)

<http://wetten.overheid.nl/BWBR0024779>

Ministerial Regulation Spatial Law (Ministeriële Regeling Omgevingsrecht)

<http://wetten.overheid.nl/BWBR0027471>

Economic Offenses Act (Wet op de economische delicten)

<http://wetten.overheid.nl/BWBR0002063>

Act on the appointment of a national accreditation-entity (Wet aanwijzing nationale accreditatie-instantie)

<http://wetten.overheid.nl/BWBR0026591>

Administrative Electronic Communication Act (Wet elektronisch bestuurlijk verkeer)

<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/besluiten/2004/04/29/wet-elektronisch-bestuurlijk-verkeer-stb-2004-214/wetelektronischbestuurlijkverkeer-stb-2004-214.pdf>