Het voorlopig getuigenverhoor

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13. SUMMARY

439 Introduction

In civil cases in the Netherlands, (potential) parties can use the instrument of the *voorlopig getuigenverhoor*.[1] A *voorlopig getuigenverhoor* offers (potential) parties the opportunity to have witnesses examined by the court before the moment of producing evidence in the principal action. Below, the purpose of the *voorlopig getuigenverhoor* will be dealt with first whereby attention will also be devoted to the historical and comparative law perspective. The procedural side of the *voorlopig getuigenverhoor* will be dealt briefly thereafter, because an application for a *voorlopig getuigenverhoor* that complies with the legal requirements will in principle be granted by the court. An application that complies with the legal requirements can be rejected by the court on the basis of four grounds: insufficient interest, abuse of authority, being contrary to the principles of due process and another, compelling objection. These grounds for rejection are discussed in the last section of this summary.

440 The purpose of the voorlopig getuigenverhoor; history; comparative law

The first purpose of the *voorlopig getuigenverhoor* is to preserve evidence of witnesses if there is a danger that the person of the witness will no longer be available once the moment of producing evidence in the principal action has come. It can be stated in a general sense that a *voorlopig getuigenverhoor* could nearly always be ordered in the Netherlands if there was a danger that evidence would be lost. The requirement of the danger of losing evidence lapsed in 1951 with respect to a *voorlopig getuigenverhoor* prior to a principal action and in 1988 with respect to a *voorlopig getuigenverhoor* during a principal action as well. The lapse of the danger of losing evidence provided the *voorlopig getuigenverhoor* with a second purpose: the collection of evidence of witnesses in order to be able to assess the chances of success in a principal action that is to be initiated later or that has already been initiated, to determine the basis for the future claim or to establish the identity of the

1 The Dutch term will be used in this summary as there is no proper English translation of the term *voorlopig getuigenverhoor*.

other party. The latter function, the collection of evidence, is currently the main function of the *voorlopig getuigenverhoor* (ch. 2).

Different means of preserving evidence prior to the moment of producing evidence can be found in our neighbouring countries. In Germany, witnesses can be examined at the request of a party prior to and during civil proceedings if evidentiary problems may arise as a result of the loss of evidence or the complication of obtaining or using evidence (*selbständige Beweisverfahren)*. The possibility of using the *selbständige Beweisverfahren* to obtain greater certainty about the facts, and thus increase the chances of a settlement, exists if the other party consents to the *selbständige Beweisverfahren* (par. 3.2). In England, parties can request a deposition order to examine a witness who will not be able to appear during the trial (for health reasons or in connection with obligations abroad) before the trial commences (par. 3.3). And finally, a *mesure d'instruction in futurum* can be ordered in France on the basis of Article 145 CPC in order to preserve facts that are relevant to the decision. The initial purpose of Article 145 CPC was only to prevent the loss of evidence, but Article 145 CPC is now also used to assess the possibilities for (successfully) submitting a claim. Although Article 145 CPC applies to various forms of evidence, including the examination of witnesses, Article 145 CPC is not used in practice for the examination of witnesses (par. 3.4).

441 Jurisdiction of the court

The Dutch court that is able to base its jurisdiction on the grounds of jurisdiction of Article 4 or 7-26 Brussels Ibis (2 or 5-24 Brussels I or EVEX Convention) is also competent to hear an application for a *voorlopig getuigenverhoor* for the purpose of that principal action. A *voorlopig getuigenverhoor* cannot be designated as a provisional or a preservation measure within the meaning of Article 35 Brussels Ibis (31 Brussels I) if the purpose of the *voorlopig getuigenverhoor* is not the prevention of the loss of evidence. It is uncertain whether the *voorlopig getuigenverhoor* with a preservation function can be considered to be a measure within the meaning of Article 35 Brussels Ibis (31 Brussels I) (par. 4.2.2.2). On the basis of the Evidence Regulation, the competent Dutch court has the right in accordance with the Dutch provisions to request the competent court of another Member State to hold a *voorlopig getuigenverhoor* or to request the central body or competent authority of another Member State to hold a *voorlopig getuigenverhoor* directly in that other Member State. This is subject to the condition that the request is made with the aim of enabling the parties to obtain evidence for use in the proceedings that have been initiated or that are intended. The Evidence Regulation does not have exclusive effect (par. 4.2.2.3).

In the event the proceedings are already pending, only the Dutch court before which the proceedings are pending has subject-matter and territorial jurisdiction. If no proceedings have been initiated as yet, the Court under whose subject-matter jurisdiction the case will likely come will have subject-matter jurisdiction to hear the application for holding a *voorlopig getuigenverhoor*. The court that will presumably

be competent to hear the case if it is brought will first have territorial jurisdiction and secondly the court within whose jurisdiction the persons or the majority of the persons to be examined as witnesses live or reside (par. 4.2.3 en 4.2.4).

442 Procedure

The proceedings for applying for a *voorlopig getuigenverhoor* are independent application proceedings whereby the applicant requests the court to order a *voorlopig getuigenverhoor* (par. 5.1). The law imposes several limitations on the possibility of requesting a *voorlopig getuigenverhoor*. Firstly, a *voorlopig getuigenverhoor* can only be ordered if the law permits evidence produced by means of witnesses (par. 5.2.2). Secondly, a *voorlopig getuigenverhoor* can only be ordered within the context of civil summons proceedings or application proceedings. It is not possible to order a *voorlopig getuigenverhoor* for the purpose of administrative or criminal proceedings (par. 4.3 and 5.2.3).

A *voorlopig getuigenverhoor* may be requested by any interested party before the case is pending. Only the parties can request a *voorlopig getuigenverhoor* once the principal action is pending (par. 5.4). In addition to the general requirements that apply to an application, there are several additional requirements that apply to applications requesting that a *voorlopig getuigenverhoor* be ordered. Firstly, the request must include the nature and amount of the claim in the principal action, so that the court can assess whether the *voorlopig getuigenverhoor* can be held before it. Secondly, the facts or rights the applicant wishes to prove must be described in the application, so that the court and the other party are able to assess whether a ground for rejection applies or whether the facts and rights are relevant, disputed and sufficiently specific. Thirdly, the names and the places of residence of the persons the applicant wishes to hear as witnesses must be stated. Fourthly, the name and place of residence of the other party must be included in the application so that the interests of the other party can be protected (par. 5.5).

Following submission of the application, the applicant and the other party must in principle be summoned for the handling of the application. The court is required to render a substantiated decision following the handling of the application. The court may grant or reject the application in whole or in part. The court indicates in its decision granting the application in respect of which facts the applicant will be allowed to have witnesses heard. The decision also includes several practical decisions concerning the witness examination to be held (par. 5.6 and 5.7).

An appeal may be lodged against a negative decision; there is no possibility of an appeal if the application is granted. This asymmetrical prohibition on appeals can be broken on the basis of three grounds: if Section 186 of the Dutch Code of Civil Procedure was applied wrongly or was wrongly not applied and in the event essential formalities were not observed. For instance, an interested party that was not heard concerning the application to hold a *voorlopig getuigenverhoor* has the

right to submit an appeal against the decision granting the application on the ground of violation of the principle of audi alteram partem (par. 5.8).

The delegated judge designated by the court is competent to hear the witnesses. In principle, the *voorlopig getuigenverhoor* progresses according to the same rules as the normal examination of witnesses. After the witnesses of the applicant have been heard, the other party is in principle automatically allowed to produce evidence to the contrary. Following the (counter) examination of witnesses, a personal appearance of the parties may be held at the request of the parties in order to discuss the further handling of the case and possibly to reach a full or partial settlement (par. 5.11, 5.12 and 5.13).

If all parties were present or represented at the examination, the witness testimony made during a *voorlopig getuigenverhoor* has the same (free) evidentiary value as that made in the customary manner during pending proceedings (par. 5.14).

443 Grounds for rejection

Establishing the truth and efficiency have adopted key positions in Dutch civil proceedings in a relatively short period of time. There is a direct connection between establishing the truth and efficiency: if parties provide full disclosure at the earliest possible stage and are aware of the (evidence of the) relevant facts, such will promote the proper, expeditious and efficient conduct of civil proceedings. (The development towards) establishing the facts at an early stage for the purpose of settlements and the more efficient conduct of a case is also visible in Germany, England and France. The instrument of the *voorlopig getuigenverhoor* is a useful tool and fits well with the starting points of establishing the truth and efficiency in civil proceedings, because the facts that can or should be proved by witnesses can be established at an early stage, which means that later proceedings can be avoided or conducted more efficiently. Moreover, there is no sufficient alternative for the *voorlopig getuigenverhoor*, although it would be possible to develop alternatives. Think in this connection of an entirely oral examination of witnesses by a court investigator following the English example or increasing the possibilities for exchanging written witness testimony. The *voorlopig getuigenverhoor* also has its disadvantages. It is time-consuming and costly, as the court first has to handle and decide on the application for holding the *voorlopig getuigenverhoor* and then has to hear to witnesses of the applicant and the other party. In addition, the instrument is liable to abuse, because it can be used to obtain information that is valuable to the applicant without the applicant actually considering initiating proceedings against its other party (par. 1.1 and 1.2).

The possibilities for rejecting an application for holding a *voorlopig getuigenverhoor* were expanded by the Supreme Court (the highest court) in three rulings rendered in 2002, 2003 and 2005. An application can be rejected on the basis of four grounds: insufficient interest, abuse of authority, being contrary to the principles of due process and another, compelling interest (par. 6.2 and 6.3). All grounds are open

standards that limit the authority to hold a *voorlopig getuigenverhoor* that exists in abstracto. It is not clear, however, where those limits lie. This book therefore provides a further demarcation of the grounds. Firstly, the starting point in that connection remains that in principle an application must be granted despite the expansion of the possibilities for rejection; the court can only reject an application if there exist compelling objections against granting the application. Secondly, a balance is sought in that connection between, on the one hand, the preservation of the useful functions of the *voorlopig getuigenverhoor* and, on the other hand, an efficient use of the *voorlopig getuigenverhoor*. Thirdly, the interests of the parties are taken into account when elaborating the grounds, but factors such as the juridical views and social views (of citizens, the judiciary and the legal profession) that exist in the Netherlands and practical objections are also taken into account. And finally, it must always first be assessed whether the applicant has sufficient interest in its application. If so, the three other grounds for rejection come into play. Abuse is subject to the most severe obligation to furnish facts and the grounds of contrary to the principle of due process and another compelling object is subject less severe obligation to furnish facts (par. 6.4 and 6.5). When discussing the grounds for rejection, it is assumed that the *voorlopig getuigenverhoor* is used to gather evidence of witnesses. Following discussion of the grounds for rejection, attention is devoted to the *voorlopig getuigenverhoor* that is used as an instrument for preserving evidence.

444 Insufficient interest

The application for holding a *voorlopig getuigenverhoor* must be rejected if the applicant has insufficient procedural interest in its application. The court is able to assess whether there exists sufficient procedural interest by comparing two hypothetical situations with each other: one in which the application is granted and one in which the application is rejected. If there is no or insufficient difference between the two situations such means that there is no or insufficient interest in the application within the meaning of Article 3:303 of the Dutch Civil Code. Insufficient procedural interest in granting a *voorlopig getuigenverhoor* exists if the testimony cannot be used for the purpose of the principal action. The difference between rejecting and granting does not exist or does not exist sufficiently in such cases (par. 7.2, 7.3 and 7.4).

445 Insufficient interest: the claim in the principal action does not exists or longer exists or is certain to fail

Firstly, evidence of witnesses cannot be used for the purpose of the principal action if the claim in the principal does not exists or longer exists or is certain to fail. This is the case if:

(a) the applicant fails to indicate what claim it intends to submit in the principal action (par. 7.5.2.2).

(b) the claim has no chance of succeeding legally or actually. The applicant is not required to prove its claim in the principal or give prima facie evidence in respect

thereof. However, there exists insufficient interest in a *voorlopig getuigenverhoor* if it can be assumed during the marginal assessment of the claim in the principal action that it is very likely that the claim in the principal action will be rejected or has no chance of succeeding legally or actually (par. 7.5.2.3).

(c) the claim or a certain point of dispute no longer exists. There is insufficient interest in a *voorlopig getuigenverhoor* if it becomes clear during a marginal assessment of the claim in the principal action that it is very likely that said claim or a specific point of dispute that is relevant to that claim has been ended. This may be the case in the case of a final judgment, a settlement agreement, a cancellation or a withdrawal proceedings (par. 7.5.2.4).

446 Insufficient interest: the principal action is already at an advanced stage

Secondly, evidence of witnesses cannot be used for the purpose of the principal action if the principal action is already at an advanced stage. There is insufficient interest in holding a *voorlopig getuigenverhoor* if the final procedural act is performed almost simultaneously with the rendering of a decision on the application for holding a *voorlopig getuigenverhoor*. That would mean that the *voorlopig getuigenverhoor* would be completed so late that there would be insufficient time left to be able to use the *voorlopig getuigenverhoor* in the principal action. A sufficient interest that was lost at any time during the principal action may be regained (par. 7.5.3).

447 Abuse (Section 3:13(2) of the Dutch Civil Code): the prejudice criterion

Authority is abused if it is established that prejudicing the party against whom the authority is exercised is the *sole* intention (the prejudice criterion). This criterion does not play an important role in practice (par. 8.3).

448 Abuse (Section 3:13(2) of the Dutch Civil Code): the purpose criterion

Authority is abused if the authority is exercised for a purpose other than for which it was granted (the purpose criterion). If there are several purposes, both permissible and non-permissible purposes, abuse on the ground of the purpose criterion can only be assumed if it is obvious that the permissible interests alone would not have induced the exercise of the authority (the obviousness criterion). It is not required that the applicant exercises the authority intentionally or for a different purpose in bad faith.

The *voorlopig getuigenverhoor* serves to enable a party or interested party to gather evidence or obtain clarity concerning facts that are relevant (to the decision in) the principal action. A *voorlopig getuigenverhoor* is therefore contrary to the purpose thereof if there is no prospect of specific civil proceedings, if it is not sufficiently clear to the court and the other party to what actual event the examination will relate or if the applicant cannot and will not obtain clarity concerning the facts in order to be able to better assess its chances of success in the relevant principal action, to

determine the basis of its claim or to establish who is other party in the principal action (par. 8.4.2).

The purpose of the *voorlopig getuigenverhoor* is exceeded in the following cases, which are not intended to constitute an exhaustive list:

(a) *fishing expedition. Fishing expeditions* are not in accordance with Dutch law, in which the basic principle applies that a party cannot simply automatically gain access to information that is not in its possession. A *fishing expedition* has two characteristics. Firstly, there is no direct connection between the information that is requested and a specific claim. An indication for the lack of a direct connection between the facts to be proved and the intended claim in the principal action exists if the body of facts in respect of which the witness has to give evidence is unlimited. Secondly, information is requested that is as yet entirely unknown to the party that seeks the information. The court usually considers the characteristics jointly when performing its assessment (par. 8.4.3).

(b) a form of evidence other than a witness examination is appropriate. Contrariness to the purpose of the *voorlopig getuigenverhoor* exists if only written documents can provide the desired information. A request for a *voorlopig getuigenverhoor* that is intended to hear experts in order to obtain an expert opinion, which is characterised by the fact that knowledge and/or experience is added to the observed facts, is also contrary to the purpose of the *voorlopig* getuigenverhoor; the personal, sensory perception of a witness is central to a witness examination. I consider that a *voorlopig getuigenverhoor* is possible if the applicant wishes to hear an expert concerning the facts observed by the expert within the context of his investigation and in respect of which he reported or concerning the manner in which he performed his investigation. Witnesses can also give evidence concerning the existence and content of internal reports that are not available to the public (par. 8.4.4).

(c) the applicant aims to establish facts for the purpose of a different principal action. Contrariness to the purpose of the *voorlopig getuigenverhoor* exists if (i) the facts are not collected in a principal action between the applicant and the defendant and can exist if (ii) there are clear indications that a *voorlopig getuigenverhoor* is requested within the context of a principal action other than the principal action referred to in the application, (ii) or (iii) it concerns a tangle of proceedings and it is not clear for which proceedings the *voorlopig getuigenverhoor* is requested (par. 8.4.5).

(d) the principal action is premature. An applicant who initiates the principal action while the *voorlopig getuigenverhoor* was requested to determine the basis for the claim in the principal action can, in principle, change his claim or change or increase the grounds thereof until a judgment has been rendered in the principal action; it does not abuse the *voorlopig getuigenverhoor*. An applicant that requests a *voorlopig getuigenverhoor* in order to establish the identity of the other party cannot change other parties in the principal action if it becomes clear that it has selected the wrong party; it depends on the circumstances of the case if the applicant abuses the *voorlopig getuigenverhoor*. It doesn't abuse the *voorlopig getuigenverhoor* when it can give an acceptable explanation for initiating the

principal action against a possibly wrong party and when a new principal action can be filed against the correct party (par. 8.4.6).

(e) the application is used as a means of protest or as a means of exerting pressure. The mere circumstance that the party that requests a *voorlopig getuigenverhoor* seeks publicity or otherwise exerts pressure by requesting the *voorlopig getuigenverhoor* is insufficient for assuming abuse on the basis of the purpose criterion. This only applies if it is obvious that the permissible interests alone would not have induced a party to exercise the authority (par. 8.4.7).

449 Abuse (Section 3:13(2) of the Dutch Civil Code): the disproportionality criterion

Authority is abused if there is disproportionality between the interest in the exercise of the authority and the interest that is prejudiced as a result, which means that the authority cannot be exercised within reason (the disproportionality criterion). The success of reliance on abuse on the ground of the disproportionality criterion requires an imbalance between the interests of the parties involved (par. 8.5.1).

The following factors, which are important but not intended to be exhaustive, can play a role in the balancing of interests:

(a) trade secrets; trading loss. The circumstance that confidential company information winds up in the hands of the applicant or third parties as a result of a *voorlopig getuigenverhoor* is a factor that can be so compelling that rejection takes place on the basis of the disproportionality criterion. Three factors are decisive for the protection of trade secrets. Firstly, the nature of the confidential data. An a priori obstruction to submit data to proceedings can only exist with respect to data in respect of which the law prescribes confidentiality. Concerning data that must be disclosed there is no right to confidentiality. I am of the opinion that, in principle, a company is not required to provide all other confidential company information to a third party. This is all the more cogent as it is sometimes difficult or onerous to protect this information other than by simply keeping this information secret. Secondly, the purpose of disclosing the data and the legal relationship between the company and the party that requests disclosure of the data. A *voorlopig getuigenverhoor* is generally used to gather information within the context of (establishing the truth in) the principal action. This is a compelling interest, but it becomes more likely that the interest of the applicant will have to give way as the data are more deserving of protection. The court will have to assess, taking all circumstances into consideration, whether and to what extent the applicant is able to use the trade secrets obtained during the *voorlopig getuigenverhoor* to its advantage and to the disadvantage of its other party. Thirdly, the nature and extent of the disclosure. Practical measures can be implemented to prevent disclosure to third parties if the applicant wishes to investigate trade secrets. However, it is difficult to conceive of measures that would prevent information from winding up in the possession of the other party.

A *voorlopig getuigenverhoor* can cause trading loss also in the event the requested information does not constitute a trade secret. Although incurring a trading loss merely as a result of the *voorlopig getuigenverhoor* is not in principle a decisive factor that benefits the defendant, it may be expected of the applicant that it accurately describes what facts it wishes to investigate, so that the investigation (and consequently the trading loss) is limited as much as possible (par. 8.5.2).

(b) weak claim in the principal action. The purpose of the *voorlopig getuigenverhoor* means that the court cannot reject an application because the applicant failed to prove its claim in the principal or failed to provide prima facie evidence of its claim. It is allowed, however, to include the factor of a weak material claim (which became evident during a marginal review) in the balancing of interests. This may apply in the case of a patent application at an early stage, a claim for compensation that has little chance of success in light of established case law or a formal obstruction that prevents the principal action from being initiated (par. 8.5.3).

(c) the facts are too vague or irrelevant. Insufficient interest or a fishing expedition may exist if the applicant wishes to investigate facts that are vague and/or irrelevant. The factor of facts that are too vague and/or irrelevant can play a role in the balancing of interests in less clear cases of facts to be proved that are not described very clearly or in the case of less significant doubts as to whether the facts to be proved are related to the claim in the principal action (par. 8.5.4).

(d) prognosis; result of the witness testimony. There is less reason to fully maintain the prohibition on prognoses within the context of a *voorlopig getuigenverhoor* than there is in the principal action in view of the fact that a witness that was not heard during the *voorlopig getuigenverhoor* can still be heard later during the principal action. The factor that it is expected that a witness will not able to provide any information or only information that has little relevance is a strong argument in favour of the defendant. On the one hand, the mere fact that a witness in proceedings other than the *voorlopig getuigenverhoor* has already made a (written) statement does not constitute a ground for rejecting a *voorlopig getuigenverhoor*. One the other hand, the expectation that a witness will not be able to provide any (additional) information or only (additional) information that has little relevance can be taken into consideration in the balancing of interests (par. 8.5.5).

(e) (other) evidence is available and concerns the same facts as the applicant wishes to investigate as part of the *voorlopig getuigenverhoor*. In this connection it is relevant in the first place whether the applicant is seeking to support other evidence that already exists by means of witness testimony or whether the applicant seeks to refute the other evidence by means of witness testimony. And secondly, it is important whether the applicant was a party to the other means for obtaining evidence that were used and whether it was able to exercise influence on the gathering of evidence. Thirdly, it is important whether the other evidence has or has not already been collected in civil proceedings (par. 8.5.6).

450 Contrary to the principles of due process

The principles of due process may prevent an application for holding a *voorlopig getuigenverhoor* from being granted in specific cases. It is difficult to provide a definition of the term (contrary to) the principles of due process. Firstly, the term comprises a multitude of standards. Secondly, the judgment whether something is or is not contrary to the principles of due process depends increasingly on the circumstances of the case, whereby general, social interests play a role in particular. Thirdly, decisions are (too) often substantiated with a mere reference to due process. Fourthly, the views held by society concerning the substance of due process are changing (par. 9.2).

The tendency to attach ever greater meaning to the efficient conduct of a case is important to the elaboration of the ground for rejection of being contrary to the principles of due process. The ground for rejection of being contrary to the principles of due process can be used, on the one hand, to ensure that the useful instrument of the *voorlopig getuigenverhoor* can be continued to be used in full and, on the other hand, to use the instrument of the *voorlopig getuigenverhoor* in an efficient manner.

The balancing of interests that must be performed as part of the assessment of the ground for rejection of being contrary to the principles of due process is not an ordinary balancing of interests; there will have to be a clear disproportionality between, on the one hand, the interest of the applicant in holding a *voorlopig getuigenverhoor* and, on the other hand, the interest of an efficient (expeditious, effective and most economical) conduct of the case. Efficiency comes to play a dominant role once the principal action has been initiated. The basis for rejection for being contrary to the principles of due process will often be the (advanced) stage of the principal action (par. 9.3 and 9.4).

The following factors, which are important but not intended to be exhaustive, can play a role in balancing of interests:

(a) the (advanced) stage of the principal action. The starting point is the granting of the *voorlopig getuigenverhoor,* also while a principal action is pending. However, holding a *voorlopig getuigenverhoor* is not always efficient when the principal action is already pending. The stage of the principal case plays a role in the balancing of interests of being contrary to the principles of due process if a decision is rendered at any time before the final procedural act. This factor has a special status in the balancing of interests; the other factors that play a role in the balancing of interests acquire a different meaning against the background of (the stage of) the pending principal action. The closer the principal action approaches the final procedural act, the more weight will be attributed to the factor of the stage of the principal action. On appeal, the advanced stage of the principal action combined with obvious doubts concerning the question whether it is useful to prove certain facts quickly leads to the conclusion that holding a *voorlopig getuigenverhoor* is inefficient and that formulating an order to produce evidence and hearing witnesses should be left to the court hearing the case on the merits.

I do not consider the early stage of the principal action, namely before the position of the defendant in the principal action is known, to be a factor of the balancing of interests (par. 9.5.2).

(b) interference with procedural policy in the principal action. The *voorlopig getuigenverhoor* must not disrupt (the order of producing evidence in) the principal action. The failure of a *voorlopig getuigenverhoor* to fit in with a certain explicit (court-determined in the principal action) or implicit (on the basis of logic) order of producing evidence is therefore a factor in the balancing of interests on the basis of being contrary to the principles of due process (par. 9.5.3).

(c) other investigations have not yet ended. If evidence on the basis of other investigations is not yet available, but an investigation is ongoing at the time of the handling of the *voorlopig getuigenverhoor*, it may be useful for reasons of efficiency to await that investigation. It is of foremost importance in that connection whether there is sufficient overlap between the investigation and the *voorlopig getuigenverhoor* and secondly whether the investigation will be concluded within a reasonable term (par. 9.5.4).

(d) complexity of the principal action. If the case is substantively very complex or has an extensive body of facts and the principal action is pending, the complexity of the principal action may demand that the court hearing the case on the merits determines whether and what evidence is required (nr. 369).

(e) part of the relevant facts. This factor plays a role if the *voorlopig getuigenverhoor* only concerns part of the relevant facts in the principal action, while other issues must be decided in that principal action as well and it is likely that testimony concerning those other issues must be given (again) in the principal action (nr. 370).

(f) large number of witnesses. The wish to hear a large number of witnesses may be legitimate. Combined with other factors, such as the fact that the principal action is pending and the risk that (a number of) witnesses have to be heard again in the principal action, the large number of witnesses can lead to rejection of the application (nr. 371).

(g) a long time between the events in respect of which the witness has to be heard and the application for holding a *voorlopig getuigenverhoor* or slow conduct of the principal action without a sufficient justification (nr. 372).

(h) the applicant is able to prove the facts in another manner that is much less onerous and costly for the court, the other party and the witnesses. As the freedom of a (potential) party to the proceedings to determine its own litigation strategy and to choose its own evidence is of primary importance, the defendant has to argue convincingly that the applicant could have opted for a less onerous form of evidence with (nearly) the same result and this factor is rarely afforded a great deal of weight. The larger the difference between the burden of the *voorlopig getuigenverhoor* and the other form of evidence, the fewer additional factors are needed to cause a balancing of interests to turn out in favour of the defendant (nr. 373).

(i) an inconsistent procedural attitude on the part of the applicant in the principal action. An applicant who refused to produce any or very limited evidence of witnesses in the first instance of the principal action without providing a plausible explanation and who does wish to produce evidence by witnesses or

hear a larger number of witnesses during the appeal proceedings against the principal action, may be confronted with the fact that this is held against it (nr. 374).

451 Other compelling interest

The guideline for the elaboration of the ground for rejection is that there must be considerable objections against granting the *voorlopig getuigenverhoor*. This ground for rejection must be interpreted in the same manner as the ground contrary to the principles of due process (less strict than abuse). I am of the opinion that this ground can play a useful role if there are problems with the person of the witness that were already brought to the attention of the court during the handling of the application (par. 10.2).

A compelling interest may exist in the following cases, which are not intended to constitute an exhaustive list:

(a) reliance on the right to refuse to give evidence/duty of confidentiality that was announced. Following the appearance of a witness, it is in principle up to the delegated judge to render a decision in the event a witness claims to have a reason for not testifying or for not answering certain questions. However, the court may assume the existence of another compelling interest if it seems likely in advance that a witness will not make a substantive statement. Whether a different compelling interest actually exists in a specific case depends on the circumstances. The reason why a witness is of the opinion that he or she is not required to give evidence or to give only partial evidence is of particular importance in that connection (par. 10.3.2).

(b) agreement not to use the statement of a particular witness (par. 10.3.3).

(c) the other party is able to demonstrate that the witness is not able to give evidence on medical grounds. This would appear to me to be a compelling factor for not ordering a *voorlopig getuigenverhoor* with respect to the witness involved especially if the physical or mental limitation is of a temporary nature and the witness will be able to give evidence later in the principal action (par. 10.3.4).

(d) the (emotional) burden placed on the witness. Giving evidence may place an unreasonable burden on a witness, depending on the circumstances of the case (whereby the interests of the parties are taken into account as well)(par. 10.3.5).

(e) the witness or other persons run a real, physical danger if the witness gives substantive evidence and practical measures cannot avert that danger. I am of the opinion that hearing witnesses whose identity is unknown (anonymous witnesses) should in principle also be possible within the context of a *voorlopig getuigenverhoor*. The court should know the identity of the anonymous witness and the other party of the party that calls the witness should be afforded sufficient opportunity to examine the anonymous witness as effectively as possible (par. 10.3.6).

452 Danger of losing evidence

A *voorlopig getuigenverhoor* can be requested not just for gathering evidence, but also for the purpose of securing evidence, because there is a danger that evidence will be lost. The danger of losing evidence exists if the person of the witness threatens to be no longer available before he can be heard in the principal action. This is first the case if there is a real danger that the witness becomes unavailable. Secondly, loss of evidence exists if there is a real danger or even certainty that the witness will die. There is no longer a danger of losing evidence if a witness has recovered from a life-threatening disease such as cancer. Thirdly, a danger of losing evidence exists if the witness suffers from a progressive illness that impairs the memory or the physical condition of the witness, which means that it is uncertain whether the witness will be able to give evidence when the witness examinations are held in the principal action. The mere deterioration of the memory of a healthy witness does not constitute a danger of losing evidence.

The establishment of the truth runs a real and direct danger in the case of danger that evidence is lost, because the witness (probably) can no longer be heard at a later moment during the principal action. I therefore consider that the rule that the *voorlopig getuigenverhoor* can be rejected on the basis of four grounds for rejection should not apply if the court holds that there is a danger that evidence is lost. Alignment should be sought with the German *selbständige Beweisverfahren* if there is a danger that evidence is lost: a *voorlopig getuigenverhoor* must be granted, unless the evidence given by the witness in all probability cannot contribute to the decision in the principal action in any way and at any time. An exception should apply in the event giving evidence places such a psychological and/or physical burden on the witness that establishing the truth should give way to the compelling interests of the witness (par. 6.7).