

SUCCESS AND THE REMUNERATION OF THE LAWYER

The situation in the Netherlands.

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1. Lawyers' fees in the Netherlands are, in principle, free. There are no rules which govern the calculation of lawyers' fees. The fee structure is a matter of contract between the lawyer and his client.
2. There is only one general rule on the calculation of lawyers' fees. This rule is incorporated in the Code of Conduct (rule 25 clause 1) which provides:

When determining his fees, the lawyer is obliged to charge a reasonable fee, taking into account all the circumstances of the case.
3. That is the general rule: a liberal approach. However, in respect of the combination between success and the calculation of fees, the approach is not liberal.
4. The Dutch Code of Conduct (rule 25, clauses 2 and 3) provides:
 - i) *A lawyer may not agree that he will only charge for his services upon the obtaining of a specific result. The prohibition of "no cure no pay".*
 - ii) *A lawyer may not agree to charge a proportionate part of the value of the result obtained (with the exception of debt collection matters, for which the Bar Association has an advised scaled tariff). The prohibition of "quota pars litis".*
5. In three disciplinary decisions of the Disciplinary Appeals Tribunal, so called "success fees" have been deemed acceptable and not contrary to the abovementioned rules of conduct. For example, charging fees at a higher hourly rate upon success, and also some more refined variations thereof. However, the lawyer must always charge a basic fee to start off with. Success fees are only additions to the basic fees.
6. About 5 years ago a lawyer filed a complaint with the Dutch Competition Authority, stating that the prohibition of no cure no pay and quota pars litis in the Code of Conduct was in breach of the Dutch Competition Law for personal injury lawyers. Subsequently the Dutch Competition Authority made a provisional ruling that there was a reasonable assumption that these rules were contrary to the Dutch Competition Law in respect of personal injury lawyers. However, the Dutch Competition Authority also stated that this would be otherwise if the rules were not contained in the Code of Conduct but in a formal resolution of the Netherlands Bar Association.

7. Subsequently, in 2002, the Netherlands Bar Association passed such a resolution, with literally the same prohibitions as contained in the Dutch Code of Conduct concerning no cure no pay and quota pars litis. This, however, did not terminate either the formal disputes concerning the legality of the prohibitions nor the discussions within the Bar Association itself.
8. Within the Bar Association the ideas were strongly divided. Some wished to have a certain mitigation of the rules, others wished to keep the strict prohibitions in force. In the end this resulted in a new regulation of the Bar Association, allowing for an experiment with no cure no pay and quota pars litis fees, however restricted to the personal injury practice and only available for people who otherwise would not be able to get legal services. The reasoning was that such a mitigation was necessary to ensure access to justice for these people.
9. However, this regulation was subsequently nullified by the Minister of Justice, using his capacity to do so upon public interest arguments. His reasoning was mainly that he was afraid that the introduction would lead to an Americanised claim culture. He also argued that the independence of lawyers was at stake.
10. Curiously, on the same day that the Minister of Justice notified the Bar Association that he intended to nullify the Bar resolution, the Dutch Competition Authority notified the Bar Association that it held the old regulation – with the strict prohibition – to be contrary to the Dutch Competition Law.
11. The last development in this sequence is that a commission, instituted by the Minister of Justice to investigate the essentials of the legal profession, a Dutch “Clementi Commission”, in its recent report of April 2006 advised to introduce a “no win no fee” arrangement for (especially) personal injury matters. In other words, upholding the prohibition of quota pars litis.
12. So, where do we stand now in the Netherlands? Simply: anything is possible, with a Minister of Justice on the one hand and the Dutch Competition Authority on the other hand taking completely opposite views, with the Bar Association itself and the Commission standing somewhere in between. It is, by now, at any rate also a matter for the Dutch Parliament. The report of the Commission is for the Minister, but this followed a parliamentary motion. The Minister now has to report to Parliament. This might even lead to legislation. However, in the end, Dutch tradition will probably lead to a compromise, an amicable solution ending somewhere halfway.

