The Netherlands Arbitration Act 1986

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On 1 December 1986 a completely new Arbitration Act entered into force in the Netherlands. It replaces the legislation on arbitration which had scarcely been changed since its inception in 1838. The new Act is implemented by arts 1020-1076 of the Netherlands Code of Civil Procedure.

The modern provisions of the Act favour arbitration to a large extent. They take into account recent developments in other countries (eg the legislative changes in France) as well as in the international field (eg New York Arbitration Convention of 1958, UNCITRAL Arbitration Rules 1976 and UNCITRAL Model Law 1985). The provisions are rather detailed in order to offer parties and arbitrators guidance in the course and conduct of the arbitration. Many of these provisions are so-called 'fall-back' provisions: they apply unless the parties agree otherwise. They are characterised by the freedom afforded to the parties in arranging their arbitration.

The new Act does not distinguish between domestic and international arbitration as, for example, is the case in France since 1981. The Dutch legislator considered such a dichotomy undesirable because it could create uncertainty in certain cases as to whether or not an arbitration is to be regarded as international. A separate law on international arbitration in the Netherlands was also deemed unnecessary because the provisions of the new Act are so flexible that they can equally apply to the specific needs of international arbitrations.

The foregoing also explains why the Netherlands has not implemented the UNCITRAL Model Law on International Commercial Arbitration of 1985. As the Model Law's title indicates, it is limited to international arbitrations. Nevertheless, though more detailed, the new Dutch Act is largely

Note: A translation of the new Act in English, French and German with annotations by Prof Pieter Sanders and the author of this article is published in *The Netherlands Arbitration Act 1986* (Kluwer, Deventer). See also the author of this article, 'National Report Netherlands', in XII *Yearbook Commercial Arbitration* (1987) pp 3-38 and in the companion loose-leaf publication *International Handbook on Commercial Arbitration*.

compatible with the Model Law since most of its solutions do not deviate from those contained in the Model Law.

The Act is divided into two titles: Title One (arts 1020-1073) applies to arbitration in the Netherlands. This Title constitutes the Arbitration Act proper. Title Two (arts 1074-1076) concerns arbitration outside the Netherlands (recognition of arbitration agreements and recognition and enforcement of foreign arbitral awards). This division is based on the unambiguous rule that arbitration, whether national or international, is governed by the arbitration law of the place of arbitration.

Title One: Arbitration in the Netherlands

Title One consists of seven sections, which more or less follow an arbitration chronologically. They are briefly reviewed below.

Section One is devoted to the arbitration agreement and appointment of arbitrators (art 1020-1035). The arbitration agreement must be in writing. This requirement is a matter of proof only. Article 1021 specifies what is understood by an arbitration agreement in writing:

> 'For this purpose, an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party'.

When a case is brought before a court in violation of a valid arbitration agreement, the court must refer the parties to arbitration if one of the parties invokes the agreement before submitting a defence (art 1022). The arbitration agreement does not preclude a party from applying to a court for interim measures (such as conservatory attachment) or injunctions in urgent cases.

There are no limitations as to who may be appointed as arbitrator, provided that they enjoy legal capacity (art 1023). Judges can now also be appointed as arbitrators.

There must be an odd number of arbitrators. If the arbitration agreement provides for an even number, an additional arbitrator is to be appointed (art 1026).

The appointment of arbitrators is to be carried out in accordance with the method agreed upon by the parties (art 1027). If there is no agreement on the method or if the method cannot be carried out, the President of the District Court can be requested to appoint the arbitrators.

The role of the President of the District Court in assisting arbitrations is an important one under the new Act. He also decides on the challenge of an arbitrator, the hearing of an unwilling witness, and the consolidation of related arbitrations (see below under Section Three). In order not to delay arbitrations unduly, the decision in these matters is not subject to appeal.

The Act attaches great importance to the impartiality and independence of arbitrators. These criteria are grounds for challenging arbitrators (arts 1033 and 1035). If a prospective arbitrator presumes that justifiable doubts exist as to his impartiality or independence, he is obliged to disclose these grounds in writing (art 1034). The same provisions apply to a secretary engaged by an arbitral tribunal.

Section Two is concerned with the arbitral proceedings (arts 1036-1048). The basic rule is that the arbitral proceedings are to be conducted in such manner as agreed between the parties (usually embodied by arbitration rules). If the parties have not made such an agreement, the arbitral tribunal determines the conduct of the proceedings (art 1036).

The Act explicitly stipulates that the parties must be treated on the basis of equality. Furthermore, the arbitral tribunal is, at the request of a party, obliged to hold a hearing (art 1039(1)-(2)).

The arbitral tribunal is not bound by the rules of evidence followed in Dutch courts. An interesting provision, which is rather unusual in civil law countries, lays down the power of the arbitral tribunal to order the production of documents (art 1039(4)). Section Two further contains extensive provisions on the examination of witnesses (art 1041) and experts (art 1042).

The default of a party is also regulated in the new Act (art 1040). Provisions on the default of a claimant are included. In cases of default of the claimant as well, the arbitral tribunal may terminate the proceedings. These provisions are designed to prevent 'sleeping dog arbitrations'.

The position of third parties is provided for in art 1045. According to this Article, a third party who has an interest in the outcome of the arbitral proceedings may request the arbitral tribunal to permit him to join the proceedings as co-claimant or co-defendant or intervene for the purpose of safeguarding his rights. A party to an arbitration who claims to be indemnified by a third party may serve a notice of joinder on such a party. In each of these cases, the arbitral tribunal may permit the third party to participate as a party in the arbitral proceedings if that third party has acceded by agreement in writing between him and the (original) parties to the arbitration agreement.

Another innovative provision concerns the consolidation of arbitrations (art 1046). If the subject matter of two or more arbitral proceedings are connected with each other, a party may request the President of the District Court in Amsterdam to consolidate the arbitral proceedings. The consolidation of related arbitrations is restricted in two ways. First, consolidation under art 1046 is possible only between arbitral proceedings taking place in the Netherlands. It will, therefore, be rare that international arbitrations will be subject to consolidation under art 1046. Article 1046 was primarily inserted into the new Act with a view to consolidation of arbitrations in the domestic building industry where several arbitration institutes are active in the Netherlands. Second, the parties have the freedom to agree to exclude the possibility of consolidation. Accordingly, no consolidation may be ordered if one of the arbitration agreements excludes such a possibility. Parties may also agree to the exclusion of consolidation after the dispute has arisen.

Section Three (Arts 1049-1061) deals with the arbitral award and various related matters. The Act lists three categories of an award (art 1049): a final award, a partial final award and an interim award. In a final award, all issues are decided upon by the arbitral tribunal. The arbitral tribunal may also separate issues, in which case it may render a partial final award (for example, on the issue of liability, leaving the quantification of damages to a subsequent award). An interim award may be rendered, for example, on jurisdictional issues.

The arbitral tribunal must make the award in accordance with the rules of law, unless the parties have authorised it to decide as *amiable compositeur* (art 1054(1) and (3)).

A provision which is particularly relevant to international arbitration concerns the law applicable to the substance of the dispute: art 1054(2) provides that the arbitral tribunal must make the award in accordance with the rules of law chosen by the parties. If the parties have not made a choice of law, the arbitral tribunal must make the award 'in accordance with the rules of

law which it considers appropriate'. This modern rule empowers arbitrators to make a direct choice without being obliged to apply conflict of laws rules.

The award must be dated and signed (art 1057). If an arbitral tribunal consists of several arbitrators and a minority refuses to sign or is incapable of signing, the lack of signature can be remedied by a corresponding statement of the other arbitrators at the bottom of the award. The award must also contain reasons for the award in view of the right of parties to be informed how justice is done.

A copy of the award, signed by an arbitrator or a secretary of the arbitral tribunal, is to be communciated without delay to the parties (art 1058). The original of a final or partial final award is to be deposited with the Registry of the District Court. The lack of such deposit has no legal consequences. The deposit is relevant only for certain time limits (in particular for the application of setting aside under an award, see below under Section Five). The deposit is not a condition precedent to a request for enforcement or an application for setting aside. A final award or partial final award is binding on the parties from the day on which it is made (art 1059).

Section Three of the Act also contains provisions on the rectification of a manifest computation or clerical error in the award (art 1060). Furthermore, if the arbitral tribunal has failed to decide on one or more matters which have been submitted to it, a party may request the tribunal to render an additional award (art 1061).

Section Three regulates in various places the appeal to a second arbitral tribunal. Such appeal must have been the subject of an agreement of the parties (in practice, certain arbitration rules in the field of commodity arbitration provide for such an appeal). An appeal on questions of fact or law to a State court is not possible. In fact, the judicial review of an award is strictly limited (see below under Section Five).

One of the innovations in the Act is the option to empower the arbitral tribunal or its chairman to render an award in summary arbitral proceedings (*kort geding, référé arbitral*) (art 1051). Summary arbitral proceedings, like those before the President of the District Court, allow for the issuance of injunctions in urgent cases. They do not provide a decision on the merits. It is not yet clear whether this faculty offered by the new Act will frequently be used in practice since summary proceedings before the President of the District Court work rather well already.

Section Three contains rather extensive provisions on the pleas concerning the jurisdiction of the arbitral tribunal (art 1052). This article opens with the provision that the arbitral tribunal has the power to decide on its own jurisdiction ('competence-competence'). It then treats the two main grounds for lack of jurisdiction: the invalidity of the arbitration agreement and the irregular constitution of the arbitral tribunal. When a party appears in the arbitration, he must raise the plea that the arbitral tribunal lacks jurisdiction before submitting any defence (*in limine litis*). If he fails to do so, he will be barred from raising the plea later in the arbitral proceedings or in proceedings before a court (unless the dispute is not capable of settlement by arbitration). A decision of the arbitral tribunal that it has jurisdiction (which may be in the form of an interim award) can only be challenged in court in conjunction with the challenger of a subsequent final or partial final award. In case the arbitral tribunal declares that it lacks jurisdiction, the Dutch or foreign court which would have had jurisdiction if no arbitration had been agreed to, will become competent for trying the case on the merits.

Article 1053 contemplates the separability of the arbitration clause. It provides that an agreement shall be considered and decided upon as a separate agreement and that the arbitral tribunal has the power to decide 'on the validity of the contract of which the arbitration agreement forms part or to which the arbitration agreement is related'. Consequently, the invalidity of the main contract in principle does not entail the invalidity of the arbitration clause contained in it.

Section Four (arts 1062-1063) concerns the enforcement of the award. The proceedings are rather simple. The respondent will be heard if he has requested such or if the President of the District Court has ordered him to appear. To avoid concurrent proceedings for challenging an award, no appeal is allowed against the grant of leave for enforcement; the sole remedy in practice is the application for setting aside the award.

When deciding on a request for enforcement, the President of the District Court exercises a summary control only: enforcement may be refused if the award or the manner in which it was made is 'manifestly contrary to public policy or good morals'.

Section Five (arts 1064-1068) is concerned with the means of recourse against the award. It is in this area in particular that the new Act is a significant improvement over the old one. The new Act practically limits the challenge against an award to one action: the action for setting aside the award (arts 1064 and 1065). In addition, the revocation of an award is possible in three rather exceptional cases, ie fraud, forgery and when documents were withheld by the opposing party (art 1068).

The Act strikes a fair balance between justified recourse and recourse for dilatory purposes. In accordance with this system:

- The grounds on which an award may be set aside are limited to a bare minimum. A review of the merits of the award is not permitted. The grounds are:
  (a) absence of a valid arbitration agreement;
  (b) irregular constitution of the arbitral tribunal under the rules applicable thereto;
  (c) failure of the arbitral tribunal to comply with its mandate;
  (d) absence of signature or reasons;
  (e) violation of public policy.
- A party must have raised grounds (a), (b) or (c) in the arbitral proceedings (to the extent that such ground was known to him) or he will be barred from raising them in the setting aside proceedings.
- The party challenging the award must mention all grounds alleged by him in the application for setting aside.
- The time limit for setting aside is restricted to three months after the date of deposit of the award with the Registry of the District Court or after the date on which the award, together with leave for enforcement, is officially served on the party challenging the award.
- An action for setting aside does not suspend the enforcement of the award by operation of law. A court may grant suspension of enforcement in which case it may order the party applying for setting aside to provide a bank guarantee as security for compliance with the award.

Section Six (art 1069) contains provision concerning an award on agreed terms. In a case where parties reach a settlement during the arbitral proceedings, the terms of the settlement can be recorded by the arbitral tribunal in the form of an arbitral award. Such an award has the same force and effect as an ordinary award. The advantage is that such an award can be easily

enforced in the Netherlands under the provisions of Section Four of the Act and abroad under the New York Arbitration Convention of 1958.

Section Seven (arts 1070-1073) sets out various final provisions. They include the provision that Title One applies if the place of arbitration is situated within the Netherlands (art 1073(1)). The place of arbitration is determined by the parties or, in the absence of an agreement in this respect, by the arbitral tribunal (art 1037, which is contained in Section Two).

Title Two: Arbitration Outside the Netherlands

Title Two (arts 1074-1076) provides, in the first place, for a *stay of proceedings before a Dutch court* if so requested by a party before submitting any defence, when the parties have agreed to arbitration outside the Netherlands (art 1074(1)). The court must stay the action 'unless the agreement is invalid under the law applicable thereto'. No specific conflict rules are provided for determining the law governing the arbitration agreement since it was felt that this question can be answered according to ordinary conflict rules.

Article 1074(2) makes it clear that an agreement providing for arbitration outside the Netherlands does not constitute a bar to a request to a Dutch court for interim measures (such as conservatory attachment). Thus, a Dutch court can be called upon for aid with interim measures in connection with an arbitration taking place abroad, assuming jurisdiction in a Dutch court can be obtained.

Article 1075 provides for *enforcement of a foreign award under a treaty*, in most cases the New York Arbitration Convention of 1958.[1]

Finally art 1076 contains provisions on *enforcement of foreign awards when no treaty is applicable*. It applies to an arbitral award in whatever foreign country it is made. There is no reciprocity requirement. Article 1076 can also be used if an applicable treaty allows a party to rely on the domestic law on enforcement of foreign arbitral awards. The latter is true in particular for the New York Arbitration Convention of 1958, which contains in art VII(1) a so-called 'more-favourable-right-provision'. In a number of cases art 1076 may indeed be more favourable to enforcement of a foreign award than the New York Convention (in particular, the requirement of the written form of the arbitration agreement — which is rather demanding under the Convention — and the estoppel from invoking certain grounds).

The party seeking enforcement need only submit the original or a certified copy of the award. No translation is required provided that the President of the District Court (to whom the request is to be addressed) and the respondent have a sufficient command of the foreign language.

The grounds for refusal of enforcement are exhaustively listed in art 1076; no other grounds may be invoked. A review of the merits of the foreign award is not allowed. The following grounds must be asserted and proven by the party against whom enforcement is sought:

(a) absence of a valid arbitration agreement under applicable law;

(b) irregular constitution of the arbitral tribunal under applicable rules;

(c) failure of the arbitral tribunal to comply with its mandate;

(d) award is still open to an appeal on the merits to a second arbitral tribunal or to a court in the country where the award was made;

(e) award has been set aside by a court in the country where award made.

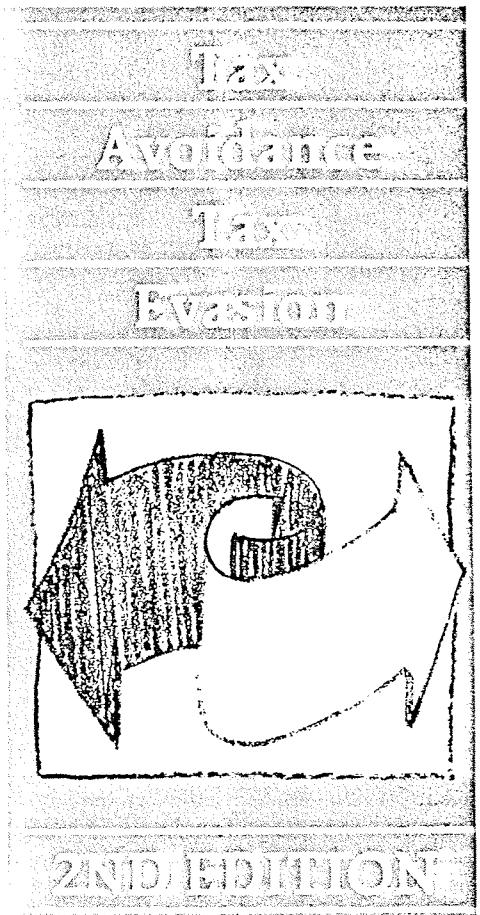
The respondent is estopped from invoking grounds (a), (b), or (c) if he did not raise them in the arbitral proceedings (to the extent that the ground was known to him).

Enforcement may be refused by the court on its own motion if it would be contrary to public policy. The Dutch legislator considered providing for 'international public policy', but refrained from doing so since it was felt more appropriate to develop this concept further by case law. Dutch courts have already applied international public policy in a number of cases by allowing enforcement of a foreign award although the same award, if made in the Netherlands, could be challenged for violation of mandatory statutory provisions (eg even number of arbitrators and lack of reasons).[2] □

Footnotes

1 See, in general, *The New York Arbitration Convention of 1958* (Kluwer, Deventer, 1981) by the author of this article. See also the court decisions reported annually in *Yearbook Commercial Arbitration* (Kluwer, Deventer). Vols I (1976) — XII (1987) contain 313 decisions from 23 countries.

2 It should be noted that the Netherlands Arbitration Institute ('NAI') has revised its Arbitration Rules in view of the new Act. English, French and German translations of the Rules, in force as of 1 December 1986, are available at the NAI Secretariat, PO Box 22105, 3003 DC Rotterdam.



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