CHAPTER 8

LIABILITY OF ARBITRATORS UNDER NETHERLANDS LAW

8.1 The liability of arbitrators is a virtually unknown phenomenon in the Netherlands. Whereas the former Arbitration Act contained a provision to the effect that an arbitrator could be held liable if he failed to carry out his mandate or did not do so in a timely manner,[1] the new Arbitration Act of 1986 does not contain any provision in this respect.[2] As regards case law, the writer can discover only two judgments.[3] Both were given by the Supreme Court some time ago (1916 and 1927). In both cases, to be discussed below, the Dutch Supreme Court dismissed the claim for liability of the arbitrator. Finally, only one commentator has devoted an article to the liability of arbitrators.[4] A few other commentators mention the question merely in an incidental manner.[5] Against this background it is not an easy task to give an authoritative view concerning liability of arbitrators in the Netherlands.

LIABILITY OF JUDGES

8.2 When the subject of liability of arbitrators is discussed, invariably a comparison is made with the question whether, and if so to what extent, judges can be held liable. This question is approached by the Dutch Supreme Court with regard to the alleged liability of the state for acts or omissions of a judge, but it can be assumed that the principle laid down by the Supreme Court applies with similar force to the liability of a judge in

1. The former article 628 of the Dutch Code of Civil Procedure (CCP).
2. An English translation of the new Act with brief annotations can be found in the trilingual publication by P. Sanders and A. J. van den Berg, *The Netherlands Arbitration Act 1986* (Kluwer 1987).
3. Hoge Raad, 29 December 1916, *Nederlandse Jurisprudentie* 1917, p. 118; 28 January 1927, *id.* 1927, p. 662.
4. B. van Marwijk Kooy, *De aansprakelijkheid van de arbiter en de bindend adviseur*, in *Nederlands Juristenblad* (1977) p. 347.
5. See, e.g., Van Rossem-Cleveringa, *Burgerlijke Rechtsvordering*, 4th ed. (Zwolle 1970) p. 1369.

person. The principle laid down by the Supreme Court is that the state cannot be held liable in tort for acts of a judge. The exception to this principle is formulated as follows:

"Only if during the preparation of a judicial decision a negligence of fundamental legal principles has occurred to the effect that a fair and impartial treatment of the case cannot be deemed to have taken place, and if no means of recourse are or have been available against said decision, the State might be held liable for damages resulting from a violation of the right ensured by Art. 6 of the European Convention for the protection of human rights and fundamental freedoms."[6]

8.3 It is clear that this exception can virtually never be applied and hence, for all practical purposes, the liability of judges and that of the state for their conduct, can be considered absolute. The main reason for the principle of non-liability is, according to the Supreme Court, that the Dutch legislator can be deemed to have provided exhaustively for means of recourse against judicial decision in order to protect the interest of parties involved in the process of obtaining a correct decision. In the opinion of the Supreme Court, it is incompatible with the above-mentioned nature of means of recourse that a judicial decision can be the subject of new judicial proceedings. Commentators mention other considerations for upholding the principle: the independence of the judge and the force of *res judicata* and *ne bis in idem* of a judicial decision. It is further pointed out that the Dutch Code of Civil Procedure itself contains a specific provision according to which a judge can be held liable for damages if he refuses to give a decision.[7] It is inferred *a contrario* that in all other cases a judge and hence the state cannot be held liable.

8.4 The result of the foregoing is that Dutch law on the issue of liability as developed by the Dutch Supreme Court comes close to the absolute immunity of the judges as it exists in England[8] and the United States. But can such immunity also be extended to arbitrators as is done in these countries?

LIABILITY OF ARBITRATORS

8.5 For a proper understanding of the question whether arbitrators can be held liable under Dutch law, it is necessary to describe briefly the legal relationship between the arbitrator and the parties. It is generally assumed in the Netherlands that such a relationship can be classified as a contract for the carrying out of certain services governed by article 1637 of the Dutch Civil

6. Hoge Raad, 3 December 1971, *Nederlands Jurisprudentie* 1971, No.137, p. 408. The Supreme Court added that it did not decide whether Netherlands statutory law would provide a basis which would enable a judge to decide thereon.
7. Art, 844 CCP.
8. See, e.g., House of Lords, *Sutcliffe* v. *Thackrah* [1974] 1 Lloyd's Rep. 318.

Code. The contract implies, *inter alia*, that the arbitrator has to conduct the case in accordance with the instructions of the parties (laid down in the arbitration agreement and, if agreed to, the arbitration rules) for which the parties have to pay him a remuneration. However, the precise contents of the obligations of the arbitrator are uncertain.

Article 1637 of the Dutch Civil Code refers to what has been expressly stipulated and to what is customary. One custom is clear: arbitrators and parties almost never draw up a formal contract containing express stipulations. The remainder, obligations according to what is customary, is unclear.

8.6 Article 628 of the former Dutch Arbitration Act (contained in the Code of Civil Procedure) provided that an arbitrator who failed to carry out his mandate or failed to do so in a timely manner, could be held liable for damages.[9] The old Act did not address the question whether an arbitrator could be held liable when he did not carry out his mandate in a proper manner.

8.7 In the case decided in 1916, the arbitration clause in a sales contract referred disputes to an arbitration commission of five arbitrators.[10] The dispute was brought before the commission on 5 December 1912. However, the commission resigned from the case on 21 January 1913 without rendering a decision. The claimant sued the arbitrators on the basis of article 628 CCP. The Supreme Court rejected the claim, reasoning that the claimant still had a remedy since either he could have requested the appointment of replacement arbitrators or, if this proved to be impossible, he could have brought the case on the merits before the court.

8.8 In the case decided in 1927, the claimant sued the arbitrators who had acted in the first instance, asserting that they had rendered an award "although they knew better".[11] The claimant based his claim on the arbitrators' obligations "which resulted from the acceptance of their mandate". During the appeal arbitration, the claimant settled the dispute against the respondent and the settlement included a mutual release of all claims. For this reason the Court of Appeal dismissed the claim, reasoning that by agreeing to the settlement, the claimant had made it impossible for himself to prove the alleged damages. The Court of Appeal's decision was affirmed by the Supreme Court.

8.9 As mentioned above, the new Arbitration Act 1986 does not contain any provisions regarding the liability of arbitrators. The situation envisaged by article 628 of the former Act (i.e., the failure to carry out the mandate or to carry it out in a timely manner) is now largely remedied by the provisions of article 1031(2) of the 1986 Act. According to this provision, a party may

9. *Supra*, n.1.
10. *Supra*, n.3.
11. *Supra*, n.4.

request the president of the District Court to terminate the mandate of the arbitral tribunal if, despite repeated reminders, the arbitral tribunal carries out its mandate in an unacceptably slow manner. The president has a discretionary power to do so "having regard to all circumstances". If the mandate of the arbitral tribunal is terminated in these circumstances, the jurisdiction of the ordinarily competent court revives. This remedy is not so much intended to find application in practice, but rather functions as a deterrent for slow arbitrators. A mere reference to article 1031(2) is already sufficient to reactivate dozing arbitrators.

8.10 In the rather hypothetical case that the mandate of the arbitral tribunal is terminated because of its failure to carry out the mandate with due dispatch, the question may arise whether the arbitrators can be held liable. This writer is inclined to think so, since the decision of the president establishes the (rebuttable) assumption that the arbitrators, or one or more of them, failed to carry out their mandate. The question which then arises is that of quantifying the damages. They presumably do not include the amount of the claim of the claimant against the respondent since the claimant can ordinarily still bring his claim in court (see the decision of the Supreme Court of 1916, mentioned above). The damages seem to be limited to the costs of the arbitration and the extra costs involved in bringing a fresh case before the court.

8.11 Furthermore, the arbitrators are, in this writer's opinion, not entitled to remuneration in these circumstances on the basis of the *exceptio non adimpleti contractus*. In this connection, it is interesting to note that the Netherlands Arbitration Institute's Rules of 1986 provide that if the mandate of the arbitral tribunal is terminated before the last final award, the arbitrators are entitled to reasonable compensation for the work performed by them "unless termination takes place on the ground that the mandate was performed in an unacceptably slow manner".[12]

8.12 Again, the new Arbitration Act contains remedies for situations where something is done incorrectly by the arbitrator. Thus, article 1065(4) provides that an award cannot be set aside for failure to comply with the mandate if a party who invokes this ground has participated in the arbitral proceedings without invoking such ground, although it was known to him that the arbitral tribunal did not comply with its mandate. If the party objects during the arbitral proceedings, the irregularity can usually be corrected by the arbitral tribunal. Furthermore, article 1060 provides for the correction of clerical or similar errors in the award and for the rectification of certain data in the award, and article 1061 provides for the right to request an additional award in cases where arbitrators have omitted to decide on all matters submitted to them. The result of all these statutory provisions is that very few cases will be left in practice

12. Article 62(2) of the Netherlands Arbitration Institute's Rules of 1986.

in which an arbitrator can be deemed to have failed to comply with his mandate.

8.13 But should an arbitrator be held liable if such a case does occur? As explained above, the question is to be answered on the basis of the contract between the arbitrator and the parties. For this reason, the principle of non-liability, as laid down by the Dutch Supreme Court for judges, cannot of itself be applied. It is said that there would be reason to assume that arbitrators are liable for damages in cases where they do not fulfil their mandate in a proper manner, to which it is quickly added that it will very seldom occur that such an improper fulfillment can be asserted and proven.[13]

8.14 In his article, Van Marwijk Kooy points out that such a liability is inappropriate for arbitrators.[14] He advocates a treatment of the liability of arbitrators which is similar to that of Dutch judges, because both are engaged in the profession of decision making. He reasons that the special nature of the contract between arbitrators and parties not only requires that arbitrators carry out their work with special care but also that the parties cannot hold them liable for shortcomings. He bases this exceptional contractual construction on the considerations ventured by Lord Salmon in the English House of Lords case *Sutcliffe* v. *Thackrah*:[15]

"It is well settled that judges, barristers, solicitors, jurors and witnesses enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in court during the course of a trial. This is not because the law regards any of these with special tenderness but because the law recognises that, on balance of convenience, public policy demands that they shall have such an immunity. It is of great public importance that they shall all perform their respective functions free from fear that disgruntled and possibly impecunious persons who have lost their cause or been convicted may subsequently harass them with litigation. This does not mean that the law fails to recognise the obligation of judges, barristers, solicitors, jurors and witnesses to exercise care. The law takes the risk of their being negligent and confers upon them the privilege from enquiry in an action as to whether or not they have done so. The immunity which they enjoy is vital to the efficient and speedy administration of justice. Since arbitrators are in much the same position as judges, in that they carry out more or less the same functions, the law for generations recognised that public policy requires that they too shall be accorded the immunity to which I have referred."

8.15 The exception to the principle of non-liability of arbitrators should, according to Van Marwijk Kooy, be similar to the one for Dutch judges mentioned above: liability can be present only if during the preparation of the decision such negligence has occurred that a fair and impartial treatment of the case cannot be deemed to have taken place.

13. *Supra*, n.5.
14. *Supra*, n.4.
15. *Supra*, n.8.

CONCLUSION

8.16 The writer believes that the solution should lie between these two extreme opinions: a failure to observe the duty of care should be accepted only in case of gross or intentional negligence on the part of the arbitrator. A mere refusal of an enforcement or setting aside of the award does not signify *ipso jure* such negligence.[16]

However, it is unsettled how the question of the arbitrators' liability is to be resolved under Dutch law. It may be doubted whether it will ever be resolved in view of the checks and balances built into the 1986 Arbitration Act and the general perception of arbitrators in the Netherlands to take their mandate very seriously.

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16. It is to be mentioned that the NAI Rules contain an exclusion of liability for "any action or failure to act with regard to an arbitration governed by these Rules". In ordinary contracts, an exclusion of liability can be overridden in Dutch law in cases of gross or intentional negligence.