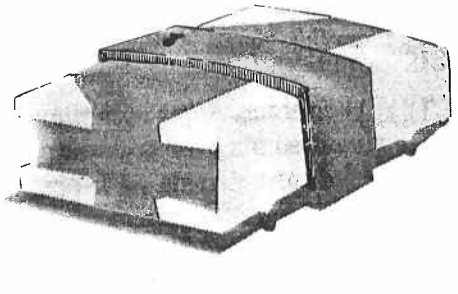
NETHERLANDS

A SPECIAL REPORT PREPARED BY
ALBERT JAN VAN DEN BERG*
OF STIBBE & SIMONT, AMSTERDAM

The Netherlands is one of the favourite countries for international arbitrations. A recent private survey among foreign parties who had chosen Amsterdam, The Hague or Rotterdam as place of arbitration revealed that their choice had been prompted by the following considerations: the Dutch tradition and experience in international arbitration, geographically convenient location, excellent and relatively cheap hearing facilities and hotel accommodation, the language skills of the Dutch, the efficient telecommunication infrastructure, and the availability of sophisticated law firms acting as co-counsel – Dutch law firms are among the largest on the European continent.

The survey shows, however, that foreign parties give the highest ratings to the modern legislative framework afforded by the Arbitration Act 1986 and the efficient support of the international arbitral process by the Dutch courts.

In order to update its legislation to better serve the needs of the international business community, The Netherlands enacted a completely new Arbitration Act in 1986. The new Act has been implemented in articles 1020-1076 of the Netherlands Code of Civil Procedure. A translation of the Act in English, French and German with annotations by Professor Pieter Sanders and the author of this report is published in *The Netherlands Arbitration Act 1986* (Netherlands Arbitration Institute/Kluwer, ISBN 90 6544 297 9).



MAIN FEATURES OF THE ARBITRATION ACT 1986

The main features of the new Dutch Act are:

Freedom – The Act offers the parties maximum freedom to tailor the method of appointing arbitrators and the arbitral proceedings to their needs.

Guidance – The provisions of the Act 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.

This system does not open the door to additional possibilities of attacking an arbitral award in the case in which a statutory provision, when the parties have not made a different arrangement, is not observed during the arbitration. The Act contains extensive waiver provisions. If a party fails to object to non-observance of a statutory provision during the arbitration, he forfeits the right to challenge the award afterwards on this ground. On the other hand, if the party does object, the arbitral tribunal usually has the opportunity to cure the defect.

Single Act – The new Act does not distinguish between domestic and international arbitration unlike, for example, the legislation in force in France since 1981 and Switzerland since 1987.

The Dutch legislator considered such a dichotomy undesirable because it could create uncertainty as to whether an arbitration should be regarded as international. The resolution of this preliminary question may take considerable time which in turn can delay the arbitral process.

Moreover, why should domestic arbitration be treated less favourably than international arbitration? The Dutch legislator reasoned the other way around by adopting the principle that what is good for international arbitration is also good for domestic arbitration. This principle enabled the

legislator to treat both types of arbitration on the same footing in a single act.

In so doing, however, the new Act does take into account the specific needs of international arbitration. Accordingly, when one of the parties is foreign, certain time-periods are extended. Furthermore, the Act contains liberal provisions for determining the law applicable to the substance of the dispute.

Unambiguous applicability – Nowithstanding the various theories advocated in certain academic circles, in practice it is generally the accepted rule that in the majority of international cases the law of the place of arbitration governs the arbitration procedure and award. This unambiguous rule is followed in the new Dutch Act. The Act specifically provides that Title One of the Act applies if the place of arbitration is situated in The Netherlands.

One of the most popular delaying tactics is the plea that no valid arbitration agreement exists and that the arbitrators lack competence to decide the dispute

The rule of territorial applicability laid down in the Act explains its main division. The Act is divided into two titles. Title One applies to arbitration in The Netherlands. Title Two governs arbitration outside The Netherlands.

Title One can be considered the arbitration act proper and contains more than 50 articles. It is set up in a sequence that follows that of an arbitration in more or less a chronological order. It consists of seven sections:

- Section One: Arbitration agreement and appointment of arbitrators;
- Section Two: Arbitral proceedings;
- Section Three: Arbitral award;
- Section Four: Enforcement of the arbitral award;
- Section Five: Setting aside and revocation of the arbitral award;
- Section Six: Arbitral award on agreed terms;
- Section Seven: Final provisions.

Title Two deals with the effects in The Netherlands of foreign arbitrations. It contains only three articles, which concern the recognition of an agreement providing for arbitration abroad and the enforcement of an arbitral award made outside The Netherlands.

Expedition – It is said that one of the advantages of arbitration is a quick resolution of the dispute. Although this goal is not always achieved in international practice, the new Dutch Act attempts in any case to pursue it.

For example, the Act requires that the arbitrators be appointed within two months after the arbitration's commencement (if there is a foreign party, the period is three months). If no appointment has taken place within this period of time - or a longer or shorter period of time agreed to by the parties - the President of the District Court can be requested to make the appointment.

Another example is that the Act expressly provides for the replacement of an arbitrator who proceeds in an unacceptably slow manner.

Arbitrate first – Expedition in international arbitration can, in particular, be defeated by dilatory tactics of the responding party. The Dutch Act combats this with a variety of provisions. A recurring theme in the Act is: 'Arbitrate first'.

One of the most popular delaying tactics, for example, is the plea that no valid arbitration agreement exists and, hence, that the arbitrators lack competence to decide the dispute. Such a plea can seriously frustrate the arbitration when it must be referred to the courts during the arbitral proceedings, as these can take considerable time.

In contrast to this, the new Dutch Act provides that, when appointing the arbitrators, the President of the District Court, or the arbitral institution designated by the parties, may not go into the question of the validity of the arbitration agreement. The President or the institution must simply appoint the arbitrator at the request of a party.

Conversely, a party is not allowed to hold the plea that an arbitration agreement is lacking as a trump card for the future with a view of using it when the results of the arbitration are not in his favour. He must raise the plea before submitting any defence on the merits in the arbitration. If he does not, he forfeits his right to invoke the lack of an arbitration agreement at a later phase in the arbitral proceedings or before the court.

In addition to this, the Act empowers the arbitrators to decide on their own competence – a matter that is not taken lightly by arbitrators in The Netherlands. If they decide that they are

competent, their decision cannot be challenged in court during the arbitration; it can be challenged only in the framework of subsequent proceedings for setting aside the arbitral award. Thus, during the arbitration, the courts cannot be approached to rule on the arbitrators' competence, thereby eliminating a major source of delay in arbitration.

Effective court assistance and supervision – Both domestic and international arbitration can function properly only if adequate assistance and supervision by the courts is available.

Court assistance is necessary in the event that the arbitral process reaches an impasse, for example, when the appointment of the arbitrators cannot be carried out for one reason or the other.

Supervision by the courts should not result in judicial scrutiny of the merits of the arbitral decision, which would defeat the very nature of arbitration

Supervision by the courts is necessary in order to ensure that the arbitral process be conducted in an orderly manner. It means, in particular, that the courts should supervise the validity of the arbitration agreement and the observance in the arbitration of the fundamental principles of fair trial, also called due process. On the other hand, supervision by the courts should not result in judicial scrutiny of the merits of the arbitral decision, which would defeat the very nature of arbitration.

The new Dutch Act carefully balances the various aspects of this judicial role in relation to arbitration. In so far as assistance is concerned, the Act designates the President of the District Court for a number of matters, including:

- determination of the number of arbitrators;
- appointment of arbitrators;
- replacement of an arbitrator;
- challenge of an arbitrator;
- examination of a recalcitrant witness.

In accordance with the freedom granted to the parties in the new Act, the parties may agree (except with respect to the challenge of an arbitrator and the examination of a recalcitrant witness) to substitute the President by an arbitral institution. In addition, the decision of the President in these matters is final and not subject to appeal.

ENFORCEMENT OF THE AWARD

Enforcement proceedings of an award made in The Netherlands are rather simple. The respondent will be heard if he so requests or if the President of the District Court orders him to appear. In practice, leave for enforcement is often granted on a 'while you wait' basis.

To avoid concurrent proceedings for challenging the award, no appeal is allowed against the grant of leave for enforcement; the sole remedy in practice is an application for setting aside the award.

When deciding on a request for enforcement, the President only exercises, if at all, a summary control: enforcement may be refused if the award or the manner in which it was made is 'manifestly contrary to public policy or good morals' - a ground which is virtually never successful.

Enforcement proceedings of an award made outside The Netherlands can take place on two bases. First, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, to which The Netherlands has been a party since 1964. Second, the provisions contained in the Act itself for enforcement of foreign awards. The latter are more liberal than the New York Convention and apply to awards irrespective of the foreign country in which the award was made.

Finally, the Act also cuts short dilatory tactics with respect to the enforcement of the award. Previously, the losing party could stave off the day of reckoning and cause the suspension of enforcement of the award by simply initiating an action for setting aside the award. The new Act provides that an action for setting aside, whether in The Netherlands or abroad, does not by operation of law suspend the enforcement of the award. For suspension of enforcement, court intervention is needed. Accordingly, a party may request the court to suspend enforcement when proceedings for setting aside the award are pending. If the court grants the request for suspension of enforcement, it may order the party who applied for the suspension to provide security (in the form of a bank guarantee) in case he is unsuccessful in the setting aside proceedings. In practice, this possibility of having to put up security constitutes an effective deterrent for frivolous setting aside actions.

The exclusion of appeal is in accordance with the above-mentioned feature: expedition in arbitration.

Supervision by the courts over the arbitral process is in fact, according to the Act, concentrated in one single post-award action. The grounds for setting aside are restricted to a bare minimum and, notably, do not include any form of a re-examination by the courts of the merits. No appeal to the courts on the merits of an arbitral

award is possible. The grounds for setting aside are limited to:

- absence of a valid arbitration agreement;
- irregular constitution of the arbitral tribunal under the rules applicable thereto;
- failure of the arbitral tribunal to comply with its mandate;
- absence of signature or reasons in the award;
- violation of public policy.

In order to avoid dilatory tactics, a party must raise grounds regarding points 1-3 above in the arbitral proceedings (to the extent that such ground was known to him) or he will be barred from raising them in an application for setting aside. It should be added that an action for setting aside an award is rarely successful in The Netherlands.

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The Dutch judiciary, which strongly favours both domestic and international arbitration, also takes an active part in the world of arbitration. Thus, the Presidents of the District Courts of Amsterdam, The Hague and Rotterdam are members of the Governing Board of the prestigious Netherlands Arbitration Institute - a general institution which promotes and administers domestic and international arbitrations under its own rules. This membership offers a beneficial guidance for arbitration matters involving the courts.

THE ARBITRATION PROCESS

Certain other matters regarding arbitration in The Netherlands merit some attention.

Drafting the arbitration clause – The following clause is recommended by the Netherlands Arbitration Institute:

'All disputes arising in connection with the present contract, or further contracts resulting therefrom, shall be finally settled in accordance with the Rules of the Netherlands Arbitration Institute (Nederlands Arbitrage Instituut).

'The arbitral tribunal shall be composed of [one arbitrator][three arbitrators].

'The place of arbitration shall be ....

'The arbitral tribunal shall decide [as *amiable compositeur*] [in accordance with the rules of law].

'The procedure shall be conducted in the ... language.

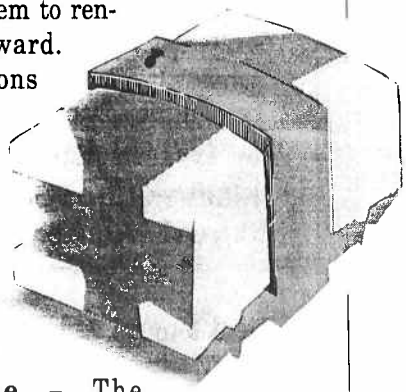
'Consolidation of arbitral proceedings with other arbitral proceedings pending in The Netherlands, as provided in Article 1046 of the Netherlands Code of Civil Procedure, is excluded'.

It regularly happens that foreign parties agree to arbitrate in The Netherlands under the Rules of the United Nations Commission on International Trade Law (UNCTRAL) of 1976. In such a case, the Netherlands Arbitration Institute can be designated by the parties as Appointing Authority under the UNCITRAL Rules. The Netherlands Arbitration Institute charges administrative fees that are relatively modest in the international context.

Impartiality of the arbitrator – In the Netherlands, great importance is attached to the impartiality of the arbitrator. The courts have held that not only an actual lack of impartiality disqualifies a person from acting as arbitrator but also the mere appearance of bias.

To avoid unnecessary challenge proceedings, the new Act imposes a duty on all prospective arbitrators to disclose in writing to the person who has approached him any grounds on which he could presumably be challenged.

Correcting errors in the award – The Act contains provisions on the rectification by the arbitrators of a manifest computation or clerical error in the award. Furthermore, if the arbitrators have omitted to decide on one or more matters submitted to them for decision, a party may request them to render an additional award. Both sets of provisions have proven to be particularly useful in large international arbitrations involving numerous and complex claims (eg large construction projects).



Peace Palace – The Permanent Court of Arbitration at the Peace Palace in The Hague offers hearing facilities in dignified and historic surroundings to certain international arbitrations, especially those involving a State, state agency or state-controlled corporation as one of the parties. It also hosts arbitrations under the UNCITRAL Rules and the Rules of the International Chamber of Commerce.

Mr Van den Berg is a partner with Stibbe & Simont at the firm's Amsterdam office and is a professor of arbitration law at Erasmus University in Rotterdam. He is General Editor of the Yearbook Commercial Arbitration *and the* International Handbook on Commercial Arbitration, *which are published by the International Council for Commercial Arbitration (ICCA). He is Vice-President of the Netherlands Arbitration Institute, and is a member of ICCA, the Court of Arbitration of the London Court of International Arbitration, the Court of Arbitration of the Hong Kong International Arbitration Centre, and the Commission on International Arbitration of the International Chamber of Commerce.*