Netherlands Arbitration Law

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9 INTERNATIONAL ARBITRATION

9.1 Introduction

Arbitrations are generally regarded as international if the nationalities, domicile, or place of actual residence of the parties differ. There is a difference of opinion as to whether an arbitration is also international if the underlying agreement overlaps the frontiers of two countries (e.g. an arbitration between parties of the same nationality concerning cross-border transport).

In contrast to the Netherlands Arbitration Act, some foreign arbitration acts distinguish between domestic and international arbitration. France, for example, has recently enacted two arbitration acts: an act of 1980 regarding 'arbitrage interne' and another act of 1981 regarding 'arbitrage international'.

The 1981 act defines international arbitration as 'Est international l'arbitrage qui met en cause des intérêts du commerce international'. French legislation regarding international arbitration is more liberal than its counterpart for domestic arbitration in the sense that parties in international arbitration are given more room to deviate from statutory regulations by agreement, and to arrange matters not provided for in the act in a manner they themselves think fit.

Recently, Switzerland has followed France's lead. Until recently, arbitration in Switzerland was considered to be a cantonal affair. In 1969 a so-called *'Concordat sur l'arbitrage'* was drawn up (comparable to a uniform model law), which has since been adopted by 24 of the 26 cantons. However, in Switzerland international arbitration is now regarded as a federal matter. On the occasion of the introduction of the new Swiss Federal Act on private international law, a separate chapter (chapter 12, arts. 176-194) regarding international arbitration, was included in the Act. The Act was passed by the Swiss parliament on 18 December 1987. An English translation has been published in Int. Handbook Comm. Arb., under Switzerland, Annex II, as well as in XIII Yearbook Comm. Arb. (1988) p. 446 ff.

In this connection, we may mention the Model Law on International Arbitration established in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law is not an international treaty. It is intended to be a *model,* especially for countries that want to modernise their arbitration laws for *international* commercial arbitrations carried out in their territory.

The Model Law gives an extensive definition of international arbitration:

1. This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

2. The provisions of this Law, except arts. 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

3. An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their place of business:
(i) the place of arbitration is determined in, or pursuant to, the arbitration agreement;
(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

4. For the purposes of paragraph (3) of this article:
(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
(b) if a party does not have a place of business, reference is to be made to his habitual residence.

5. This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.'

The word 'commercial' in the first paragraph of the Model Law quoted above is explained as follows:

'The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; exploitation agreement or concession joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.'

Several countries have already adopted the Model Law (Cyprus, for example). In other countries, the introduction of the Model Law is being studied (e.g. in England, but the critical report of October 1987 of the Departmental Advisory Committee on Arbitration Law led to the rejection of the Model Law).

The text of the Model Law is reproduced in XI Yearbook Comm. Arb. (1986) p. 380 ff., as well as in Int. Handbook Comm. Arb., tab UNCITRAL.

At first blush, a separate act for international arbitration appears attractive. However, there is a danger that in practice it will be unclear whether certain cases come under domestic or international arbitration as defined in the separate act. For instance, does a dispute arising from an agreement between a French company and a wholly-owned French subsidiary of an American company for the construction of an amusement park near Paris come under French international or domestic arbitration law? Preliminary questions of this nature have the potential to cause considerable delay in the commencement of an arbitration.

The Dutch legislature did not believe it necessary to draw a statutory distinction between domestic and international arbitration. In contradistinction to the French legislature, to name just one, which wanted to make strict provisions for internal arbitration, the Dutch legislature saw no reason to do so. Its starting-point was that what is good for international arbitration will, in principle, also be good for domestic arbitration. That is why the new Netherlands Arbitration Act is extremely liberal.

A comparison between the French International Arbitration Act of 1981 and the new Netherlands Arbitration Act, demonstrates that they hardly differ at all in *content*. However, the Netherlands Act is considerably more detailed and, consequently, gives the parties, the arbitrators and the courts much more concrete guidance.

On two points the Netherlands Act is more demanding than the French International Act. First, the Netherlands Act provides that there must be an odd number of arbitrators (art. 1026), whereas the French International Act permits an even number of arbitrators. In the practice of international arbitrations this is not a significant difference, because the operative agreements or organisation rules provide in most cases for one or three arbitrators (except for some commodity arbitrations). Second, the Netherlands Act requires reasons for the arbitral award (art. 1057(4)(*e*) in conjunction with 1065(1)(*d*); see also sections 2.3.8 and 8.3.3). In France, the parties may agree that the arbitral tribunal does not have to give reasons. In this respect, too, the difference is hardly relevant to real practice because in most international arbitrations the arbitral award states the reasons. The parties nearly always want to know why the arbitral tribunal has reached a certain decision. For the sake of completeness, it must be added to the foregoing that foreign arbitral awards, rendered by an even number of arbitrators or without reasons stated, may be enforced in the Netherlands, if such awards are valid in the country where they were made, on the basis of non-violation of the stricter criterion of international public policy (see section 10.3.1 *in fine*).

The advantage of the Netherlands Act is that its provisions leave no doubt as to when the Act is applicable. If the place of arbitration is situated in the Netherlands, articles 1020 to 1073 (Title One) apply, irrespective of whether the arbitration is domestic or international. Consequently, it is possible to have only foreign parties involved in an arbitration in the Netherlands. However, if the place of arbitration is outside the Netherlands, the Netherlands Act assumes that the arbitration law of that jurisdiction applies (see art. 1076(1)(A)(*d*) and (6), which refer to 'the country in which the award is made') and provides for the consequences of foreign arbitration in arts. 1074 to 1076.

The Dutch legislature has provided for the special circumstances that may be involved when foreign parties are arbitrating in the Netherlands: 'If at least one of the parties is domiciled or has his actual residence outside the Netherlands', the period for the appointment of arbitrators shall be extended (art. 1027(2)). The same applies if an arbitrator is challenged, if that arbitrator or one or both of the parties are domiciled or have their actual residence outside the Netherlands (art. 1035(4)). Furthermore, art. 1054(2) contains rules of private international law (conflict of laws rules), in order to choose the law that applies to the dispute itself.

Although it appears from the MvT (p. 22; TvA 1984/4A, p. 40), that the legislature, in drafting art. 1054(2), has taken into account that the new Act also relates to international arbitrations taking place in the Netherlands, the text does not make its applicability conditional on internationality.

After these introductory remarks it may be clear that under the Netherlands Arbitration Act, whether an arbitration in or outside the Netherlands can be regarded as international, is not, in principle, relevant. That is why this book contains an introduction to international arbitration between chapters 1 to 8 concerning Title One and chapter 10 concerning Title Two.

In this treatment of international arbitration, an arbitration between a state and a foreign private party is equated with an international arbitration between two private parties. This equal treatment

is generally accepted by now, although opinions still differ about applicable substantive law in international arbitrations between states and foreign private parties (see K-H. Böckstiegel, *Arbitration and State Enterprises*, Deventer 1984, p. 27 ff.). International arbitration between two states concerns public international law and is outside the scope of this book.

9.2 Advantages and disadvantages of international arbitration

According to a common estimate, more than 90% of international contracts contain an arbitration clause. International arbitration is used frequently in, among other areas, the commodities trade (e.g. cacao, coffee, tea, grains, feed, oils and fats, sugar, metals, rice, etc.); construction (e.g. hospitals, roads and factories in developing countries; see also art. 67 of the FIDIC Conditions – Fédération Internationale des Ingénieurs Conseils); maritime law (e.g. charter-party disputes); exclusive distribution agreements; joint-ventures (e.g. to carry out big projects); concession agreements (e.g. minerals, oil); provision of services (e.g. hotel industry); patents and trademark licences; and loans.

The reasons why arbitration is chosen in international agreements with such frequency can be summarised as follows (also compare section 2.4).

The first reason is the expertise of the arbitrator. Expertise must not be understood to mean only technical and/or legal expertise, but also familiarity with custom and usage. On a national level, expertise is a very important factor for the choice of arbitration. This is true to an even greater extent for international transactions, with which few domestic ordinary courts are familiar.

The second reason, which applies both nationally and internationally, is that arbitration is limited to one instance. The appeal to a second arbitral tribunal constitutes an exception, but it is one that is hardly ever agreed to in international arbitration (except for commodity arbitration).

The third reason, which also applies both nationally and internationally, is the private nature of arbitration. Business people generally value the opportunity to resolve a dispute without allowing competitors a look behind the scenes.

The fourth reason is that if disputes are settled by an ordinary domestic court, at least one of the parties will be unfamiliar with the procedure. In an international arbitration carried out according to arbitration rules, this situation is avoided: both parties can acquaint themselves in advance with the contents of arbitration rules, which are usually relatively simple.

The fifth reason is that in international arbitration one forum (i.e. the arbitral tribunal) has jurisdiction. Absent an arbitration agreement, domestic courts in different countries may have jurisdiction regarding a dispute about the same international transaction.

The sixth reason is the informal nature of arbitration. As a result of this, the arbitral tribunal and the parties can get to the heart of the matter faster.

The seventh reason is that a foreign party may rightly or wrongly distrust a court in a foreign country, particularly when this country happens to be the opposing party's homeland.

The eighth reason lies in the application of substantive law. Fairly often domestic ordinary courts – quite understandably – tend to display a bias in

choosing the applicable law: after all, they know their own law best. This phenomenon occurs to a lesser extent with international arbitrators. In addition, international arbitrators tend to be more familiar with international trade usages. Some of them even claim that a new *lex mercatoria* has come into being (about this, see section 7.7.4).

The ninth reason concerns the international enforcement of awards. Under the New York Convention of 1958 – about which more will be said later – an arbitral award rendered in a Contracting State may be enforced relatively simply in over 90 other Contracting States. There is no such global system for judgments of domestic courts. While within the EEC, enforcement of an ordinary judgment may take place under the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968/78 (which under its art. 1(4) explicitly does not apply to arbitration), outside the EEC one will have to rely on bilateral treaties. In many cases such bilateral treaties are absent, and even if they exist, enforcement of foreign judgments remains a troublesome affair.

It must be noted that there are also certain disadvantages involved in international arbitration. Two disadvantages pointed out in practice are the following:

First, the costs may be considerable. The fees of good international arbitrators can be high. Administration costs of a number of arbitration institutes may also be substantial. Add to that the costs of attorneys, which may be large in time-consuming cases. On the other hand, however, international arbitrations are mostly confined to one instance. If a dispute of great importance is brought before a domestic court, it usually passes through three judicial instances, in which event the costs of attorneys mount up proportionately.

The second disadvantage is that international arbitrations may be lengthy. The general view that international arbitration moves quickly does not square with actual experience, particularly where complicated factual and/or legal matters, or a large number of different claims (e.g. in international arbitrations regarding complex construction projects) are concerned. Getting arbitrators and parties domiciled or actually resident in different parts of the world together may also take up much time. Furthermore, defendants increasingly resort to dilatory tactics. If the attorney for the claimant and/or the arbitrators are not prepared for this, an international arbitration can become a wearisome matter, with all the ensuing frustrations. Of course, such delays also occur in procedures involving international transactions before domestic courts.

9.3 Legal aspects of international arbitration

It appeared from the introduction to this chapter that the legal regime of international arbitration is not exactly simple. This degree of complexity is partly the result of the differences of opinions about, and approaches to, international arbitration in legislation, administration of justice, and literature in different

countries. In addition, the fact that several legal systems and conventions may be involved in one international arbitration can complicate this way of settling international disputes. For simplicity's sake, the following discussion will briefly deal, in a hierarchical order, with the different legal pillars of an international arbitration.

9.3.1 *The arbitration agreement*

As with domestic arbitrations, the rule that no arbitration is possible without a valid arbitration agreement is applicable to an international arbitration. As noted previously, it is estimated that about 90% of international contracts contain an arbitration clause. Moreover, a submission agreement is occasionally concluded after the dispute has arisen.

It is preferable to include a clause recommended by an arbitration institute in the contract. These clauses have been tested in practice and, in the event a dispute arises, they prevent questions regarding the validity and scope of the clause from having to be decided by arbitrators and/or domestic ordinary courts.

The clause recommended by the ICC may serve as an example:

'All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.'

If for whatever reason the clause must be 'tailor-made', it is advisable in any event to define the field of application as broadly as possible. A restricted definition, such as: 'Disputes regarding the execution of this contract (...)' may give rise to the question whether disputes regarding the termination of the contract also come under it.

Other matters which are recommendable to provide for in the arbitration agreement are: place of arbitration; number of arbitrators (one or three); and language of the procedure.

9.3.2 *Arbitration rules*

Arbitration rules referred to in the arbitration clause are legally part of the clause (compare art. 1020(6)). In most cases it is preferable to refer to a particular set of arbitration rules. If this has not been done, the arbitration is *'ad hoc'* (compare sections 1.3 and 9.4). *Ad hoc* arbitration has many disadvantages because the arbitration clause can rarely equal extensive arbitration rules. Moreover, in *ad hoc* arbitration, failing agreement between the parties, questions concerning, for example, the appointment of arbitrators must be put to an ordinary domestic court, unless the appointment in the clause has been left to a third person.

With arbitration rules such problems do not exist. Usually the rules under which an arbitration institute administers the arbitration adequately provide for the request for arbitration and the answer, the appointment and challenge of arbitrators, the arbitral proceedings, the time limits, the manner in which documents are exchanged, the determination of the arbitral award, and the fees of the arbitrators. The arbitration institute also ensures an orderly course of proceedings. Institutional arbitration does imply that administration costs must be

paid to the arbitration institute in addition to the arbitrators' fees. The most common arbitration rules and arbitration institutes in the field of international arbitration will be discussed in section 9.4.

9.3.3 Applicable arbitration law

The procedural law applicable to the conduct of the arbitration must be distinguished from the substantive law applicable to the dispute itself. The latter law depends, in the first instance, on the choice of law made by the parties, if any (compare art. 1054(2)).

It may happen, then, that a Dutch and a Spanish party have agreed that the arbitration will take place in Vienna, and that the contract will be governed by English law, which obliges arbitrators residing in Austria to apply Austrian arbitration law to the arbitration and English law to the dispute itself.

In principle, the procedural law applicable to an international arbitration is the arbitration law of the place of arbitration.

The place of arbitration is determined by the agreement of the parties (generally by provision in the arbitration clause). It can also be determined by an arbitration institute – on behalf of the parties – if the parties' agreement is silent on this issue but refers to arbitration rules providing for that possibility (e.g. art. 12 of the ICC Rules: 'The place of arbitration shall be fixed by the International Court, unless agreed upon by the parties'). Failing this direction, usually the arbitral tribunal has the jurisdiction to determine the place of arbitration (compare art. 1037(1); see also art. 20(1) of the UNCITRAL Model Law: 'The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal....').

The rule that international arbitration shall take place under the arbitration law of the place of arbitration is generally accepted in practice.

Compare art. 1037(1); art. 1(2) of the UNCITRAL Model Law: 'The provisions of this Law....apply only if the place of arbitration is in the territory of this State.'

The concept of 'place of arbitration' is not so much a factual, but rather a legal concept. The determination of the place of arbitration functions as a choice of law regarding the procedural law applicable to the arbitration. It does not imply that the arbitral tribunal is compelled to hold its hearings, deliberate, and examine witnesses and experts in that place. These matters can usually take place anywhere the arbitral tribunal thinks fit (possibly after consultation with the parties).

Compare art. 1037(4); art. 20(2) UNCITRAL Model Law.

The procedural law applicable to arbitration is of fundamental importance to international arbitration. It provides for the rules of validity of the arbitration agreement, the appointment and challenge of arbitrators, the arbitral proceedings, the arbitral award and the setting aside of the award. The way in which these rules have been formulated differs from one country to another.

Within an international context, we speak of an adequate arbitration act if it at least meets the three following requirements. First, the act must leave the parties the greatest possible freedom for agreements concerning the method of appointment of the arbitrators and the manner of the proceedings. Second, the act must promote the successful progress of the arbitration. This means that any opportunities for dilatory tactics by a defendant must be strictly limited (e.g. no endless proceedings before a court prior to or during the arbitration with respect to the question of the validity of the arbitration agreement; that question may be dealt with after the arbitral award has been rendered, in a procedure for setting aside). Third, the grounds for setting aside the arbitral award must be minimised (validity of the arbitration agreement; the arbitral tribunal has not complied with the mandate given by the parties; violation of fundamental rules of a proper course of the proceedings; violation of international public policy).

In particular, the arbitration act ought not to give the court the opportunity for a judicial review of the merits.

The court's role in relation to international arbitration should be limited to supervision and support of the arbitration. It may be called on in connection with the appointment of arbitrators, if the parties have not concluded an agreement relating to that or if that agreement cannot be carried out. It may also assist in examining unwilling witnesses. If requested, it can also order interim measures of protection (e.g. pre-award attachment).

In this context it can be remarked that, internationally, it is a generally accepted principle that the court of the country under whose law the arbitral award has been rendered has exclusive jurisdiction regarding the setting aside of the arbitral award. A setting aside has extraterritorial effect, because once it has taken place, the arbitral award loses its legal force. Such an effect is not granted to the refusal of leave for enforcement, which is in principle confined to the country where the refusal has been decided (see art. V(1)(*e*) of the New York Convention of 1958, discussed in section 10.3.1).

In view of the above, it is vital that an 'arbitration-friendly' country be chosen, i.e. a country with an adequate arbitration act and courts favourably disposed towards international arbitration.

Germany and France are good examples of such countries. The Netherlands may also be mentioned, especially now that the new Arbitration Act provides a modern and efficient basis for both domestic and international arbitration.

Until 1979 England was less attractive for international arbitration because factual and legal questions that arose in an arbitration could be presented to the English court by means of the so-called 'Special Case', which could not be excluded by agreement. The 1979 Arbitration Act abolished the 'Special Case' and replaced it by a limited appeal to the English court concerning legal questions. As stated above, it is one of the principles of arbitration – particularly of international arbitration – that the court may not interfere with the content of an arbitral award. Neither the 'Special Case', nor, since 1979, the appeal to the English court are in conformity with that principle. Under pressure from abroad especially, the English legislature has limited the appeal (*inter alia*: 'the determination of the question of law could substantially affect the rights of one or more of the parties' (s. 1(4) Arbitration Act 1979)). In addition it has admitted the possibility of excluding appeal by agreement (the so-called 'exclusion agreement'). However, before the dispute has arisen, such an agreement cannot be concluded in so-called 'special category disputes' (i.e. shipping, insurance and commodity disputes), which form a substantial part of English arbitrations.

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See J. Steyn and V.V. Veeder, 'National Report England', in Int. Handbook Comm. Arb., chap. VI.1.

For the study of the law and practice of arbitration in individual countries, we refer the reader to the National Reports published (with texts of the laws) in Int. Handbook on Comm. Arb. (see the literature survey in section 9.8). So far, National Reports of 45 countries have appeared in the International Handbook.

A number of authors (especially in Germany, France and Switzerland) do not deem it obvious that the arbitration law of the place of arbitration should apply. They think that international arbitration should not be subject to local requirements of the arbitration act prevailing in the place of arbitration, because that place, they argue, is mostly determined by accidental circumstances (neutrality; domicile of the chairman of the arbitral tribunal; convenient location; etc.).

These authors offer two alternatives (see, for example, Ph. Fouchard, *L'arbitrage commercial international*, Paris, 1965). First, parties should be free to choose the law applicable to the international arbitration. Such a choice may, for instance, result in the parties agreeing on Hamburg as the place of arbitration, but on French arbitration law as the applicable procedural law. Under the influence of this theory, the New York Convention of 1958 provides for the possibility to choose an arbitration law other than the law prevailing in the place of arbitration (art. V(1)(*e*): 'the country in which, *or under the law of which*, that award was made'). See section 10.3.1.

This first alternative has rarely been applied in practice, however. That is not surprising, because a separate choice of the applicability of the arbitration law of a country other than the place of arbitration may entail a number of complications (such as the question which court has jurisdiction regarding the application to set aside of the arbitral award) (see Van den Berg, thesis, pp. 22-28). An additional argument against this alternative is that the choice of the applicable arbitration law is implied in the determination of the place of arbitration.

A more drastic alternative is the theory of 'a-national' arbitration. Under this theory the parties can by agreement exclude the applicability of any arbitration law. In that case the arbitration is governed only by the agreement of the parties. An agreement to denationalise of an international arbitration – which is highly exceptional in practice – is a risky enterprise, because very few courts indeed are prepared to recognise such an agreement (see my article, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions', *ICSID Review-Foreign Investment Law Journal* (1988) p. 4 ff.).

9.3.4 International arbitration conventions

International treaties are at the top of the hierarchy of the legal regime of international arbitration. Most people are inclined to think that international arbitration is mainly governed by treaties. This is only partly true. It sounds paradoxical: however international an arbitration may be, in most cases it is governed first of all by the arbitration law of the place of arbitration. International treaties merely provide for some – albeit important – aspects of international arbitration.

a. The *Geneva Protocol of 1923* on the validity of arbitration clauses, and the *Geneva Convention of 1927* on the execution of foreign arbitral awards, have been rendered inoperative for nearly all countries on their becoming bound by the New York Convention of 1958 (art. VII(2)), except for Pakistan, Portugal and Mauritius, which have not yet acceded to the New York Convention.

The texts of both Treaties have been published in *27 League of Nations Treaty Series* (1924), p. 158 no. 678 and 42 *id.* (1929-1930) p. 302 ff. Also see Stb. 1925, 379 and 1931, 399.

b. The *New York Convention of 1958* (see Appendix E) is by far the most important convention for international arbitration. It provides for two crucial aspects: (a) the recognition and enforcement of foreign arbitral awards, and (b) the compliance with the arbitration agreement. The New York Convention will be discussed in greater detail below in connection with art. 1074 (see section 10.2.1) and particularly art. 1075 (see section 10.3.1).

English and French texts of the New York Convention have been published in Trb. 1958, 145. English, French and Spanish texts have been reproduced in Van den Berg, thesis, p. 397 ff.; the Dutch translation can be found in Trb. 1959, 58.

c. The *European Convention on International Commercial Arbitration, Geneva, 1961*, was intended to supplement the New York Convention for arbitration in trade relations between East and West in Europe. Most East European countries are parties to this Convention. In Western Europe, Belgium, West Germany, France, Italy and Austria are parties. The Netherlands has not acceded to the Convention. The purpose of the Convention has not been achieved in practice, which is probably due largely to its complex text and structure.

The Convention provides, *inter alia*, for the right of legal persons of public law to resort to arbitration (art. II); the right of foreign nationals to be designated as arbitrators (art. III); the appointment of arbitrators (art. IV, very complicated); the plea as to arbitral jurisdiction (art. V); the plea as to the jurisdiction of courts of law (art. VI); the applicable substantive law (art. VII); the reasons for the award (art. VIII); and the setting aside of the arbitral award (art. IX).

The English text of the Convention has been published in *484 United Nations Treaty Series* (1963-1964) p. 38 ff., no. 7041, and has been reproduced in *UNCITRAL, Register of Treaties of Conventions and Other Instruments Concerning International Trade Law*, Vol. II (New York, 1973), p. 34 ff. See for a commentary on the European Convention of 1961, D. Hascher, 'European Convention on International Commercial Arbitration of 1961 – Commentary', in XVII Yearbook Comm. Arb. (1992), p. 711 ff.

d. The *Convention on the settlement of investment disputes between States and nationals of other States, Washington, 1965*, has more than 90 Contracting States (the Netherlands being one of them). It is the only convention that provides for a completely international arbitration, i.e. an arbitration in no way governed by any domestic arbitration law (including the arbitration law of the place of arbitration). Arbitration under the Washington Convention is administered by the International Centre for Settlement of Investment Disputes (ICSID), exclusively on the basis of the extensive Convention provisions and the rules drawn up under these provisions.

For the ICSID, see section 9.4.7. The Convention applies if: (a) there is a legal dispute; (b) the dispute arises directly out of an investment; (c) this dispute involves a Contracting State and a natural or judicial person of any other Contracting State; and (d) this State and the national of the other Contracting State have consented in writing to submit the dispute to the ICSID (art. 25).

The Washington Convention comprises ten chapters:

- Chapter I: ICSID (arts. 1-24) (establishment and organization; administrative council; secretariat; panels of arbitrators and conciliators; financing; status; immunities and privileges);
- Chapter II: Jurisdiction of ICSID (arts. 25-27);
- Chapter III: Conciliation (arts. 28-35) (possibility of a non-obligatory conciliation procedure);
- Chapter IV: Arbitration (arts. 36-55) (request for arbitration; constitution of the tribunal; powers and functions of the tribunal; the award; interpretation, revision and annulment of the award; recognition and enforcement of the award);
- Chapter V: Replacement and disqualification of conciliators and arbitrators (arts. 56-58);
- Chapter VI: Cost of proceedings (arts. 59-61);
- Chapter VII: Place of proceedings (arts. 62-63);
- Chapter VIII: Disputes between Contracting States (art. 64) (concerning interpretation and application of the Convention);
- Chapter IX: Amendment of the Convention (arts. 65-66);
- Chapter X: Final provisions (arts. 67-75).

Despite the large number of Contracting States (more than 90) and the extensive attention devoted to the Convention in arbitration literature, few arbitrations (about 25) have been instituted thus far with the ICSID. Approximately half of them have resulted in an arbitral award. Some of those awards have by now been set aside by an *ad hoc* Committee of the ICSID (art. 52 of the Convention) (see, for example, *Klöckner* v. *Cameroon*, 3 May 1985, published in XI Yearbook Comm. Arb. (1986) p. 162 ff.; *Indonesia* v. *Amco Asia Corp.*, 16 May 1986, published in XII Yearbook Comm. Arb. (1987) p. 139 ff.).

Furthermore, in practice the efficiency of the Washington Convention has been subject to criticism, because conservatory measures (such as pre-award attachment) can in principle not be ordered by the domestic court during an ICSID arbitration (see my article, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions', *ICSID Review-Foreign Investment Law Journal* (1988) p. 13 ff.).

The text of the Convention has been published in *575 United Nations Treaty Series* (1966) p. 160 ff. no. 8359. The English text of the Convention has been reproduced in *UNCITRAL, Register of Texts, op. cit.*, p. 40 ff. and XVI Yearbook Comm. Arb. (1991), p. 683 ff. The English and French texts have been published in the Trb. 1966, 152, with a Dutch translation. For a biography on ICSID, see XVI Yearbook Comm. Arb. (1991), p. 706 ff.

e. The *Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Cooperation, Moscow 1972*, confines itself to arbitration between companies in the former COMECON countries. The Moscow Convention does not apply to arbitration between the companies from these countries and companies from other countries. Recent changes in Eastern Europe have raised the question whether the Moscow Convention should be revoked.

An English translation of the Moscow Convention has been published in Int. Handbook Comm. Arb., tab CMEA Countries, Annex I.

f. The *Inter-American Convention on International Commercial Arbitration, Panama 1975*, is an incomplete copy of the New York Convention of 1958. It is intended for arbitration in commercial relationships between Latin-American countries. The United States has recently ratified this regional Convention.

The English text of the Panama Convention has been published in III Yearbook Comm. Arb. (1978) p. 15 ff. and in Int. Handbook Comm. Arb., tab Inter-American Arbitration, Annex I.

g. Finally, a few words with relation to *bilateral conventions*. Most of these conventions concern the recognition and enforcement of court judgments and only occasionally provide for the recognition and enforcement of arbitral awards rendered in the other Contracting State. As recognition and enforcement under the New York Convention are usually simpler than under bilateral conventions, the latter are rarely applied in practice.

For bilateral conventions between the Netherlands and other countries, see section 10.3.2.

9.4 International arbitration rules and arbitration institutes

The way in which international arbitration is practised may be divided into *ad hoc* arbitration and arbitration on the basis of arbitration rules (also known as 'institutional' arbitration).

In *ad hoc arbitration*, the parties themselves, in the arbitration agreement (usually an arbitration clause in a contract), provide for the manner of instituting proceedings, the appointment of arbitrators, and the arbitral procedure (within the bounds of the imperative provisions of the law applicable to the arbitration). To the extent that they have not made such arrangements, the parties and the arbitrators have to turn to the rules of supplementary (and naturally imperative) provisions of the law applicable to the arbitration.

As stated in section 9.3.2 above, *ad hoc* arbitration is not to be recommended because the arbitration clause in this kind of arbitration can seldom equal extensive arbitration rules. Furthermore, the administration of an arbitration by an arbitration institute of repute ensures a well-organised procedure.

An example of *ad hoc* arbitration in the field of oil recovery are the cases concerning the Libyan concession agreements. See arbitral awards of 10 October 1973, *BP* v. *Libya*, published in V Yearbook Comm. Arb. (1980) p. 143 ff.; 19 January 1977, *TOPCO* v. *Libya*, IV Yearbook Comm. Arb. (1979) p 177 ff.; 12 April 1977, *LIAMCO* v. *Libya*, VI Yearbook Comm. Arb. (1981) p. 89 ff. For a survey of the arbitral awards in *ad hoc* arbitrations, published in Yearbook Comm. Arb. Vols. I-XV, see *Yearbook Key 1990*, pp. 121-122.

In view of the problems that *ad hoc* arbitration may involve, it is no surprise that parties have increasingly referred to *arbitration rules* of an arbitration institute. Arbitration rules may be compared to a miniature code of civil procedure.

The following sections provide a brief survey of the most widely accepted arbitration institutes and arbitration rules in the field of international arbitration. It is not exhaustive. The number of arbitration institutes around the world that claim to be specialised in the field of international arbitration has grown tremendously over the past ten years. International arbitration is obviously thought of as 'big business', and initiatives have been taken in many countries to attract international arbitrations by means of statutory changes and the establishment

of international arbitration institutes. It is important to approach these initiatives critically, especially if they concern new international arbitration institutes.

9.4.1 International Chamber of Commerce (ICC)

The ICC is regarded as the leading institute in the field of international arbitration. It mainly administers arbitrations of great to very great significance. In about a third of the arbitrations administered by the ICC, a State or public institution is involved as a party. About 30% of ICC arbitrations concern international construction. Other areas include joint ventures, contracts of sale, delivery and installation contracts, exclusive distribution agreements, transfer of know-how, and the like.

The ICC is a non-profit international organisation that seeks to promote international trade in the broad sense of the word. It is headquartered in Paris. In 1923 the ICC founded the "International Court of Arbitration". This name is slightly misleading because the International Court of Arbitration does not itself settle disputes, but merely plays an administrative and supervisory role in arbitrations reported to it under the ICC Arbitration Rules. Disputes are settled by arbitrators appointed separately for each arbitration.

The International Court of Arbitration consists of approximately 30 members proposed by the ICC National Committees (in 58 countries at the moment, the Netherlands being one of them). The Secretariat of the Court, consisting of five counsel with staff, manages the daily routine in the administration of arbitrations.

The applicable rules are found not only in the arbitration rules (officially known as the 'Rules of Conciliation and Arbitration of the International Chamber of Commerce', latest edition: 1 January 1988, ICC publication no. 447), but also in three appendices (published in *XIII Yearbook Commercial Arbitration* (1988) p. 179 ff.).

It is therefore not enough to read only the provisions in the arbitration rules; the appendices must also be consulted. Appendix I, entitled: 'Statutes of the Court', contains provisions concerning, *inter alia*, the appointment of the members of the Court, as well as its constitution and powers. In Appendix II, entitled: 'Internal Rules of the Court of Arbitration', can be found provisions concerning, *inter alia*, the absence of an arbitration agreement, the appointment, challenge and replacement of arbitrators, the independence of arbitrators, the joinder of claims in arbitration proceedings, the advances on the costs of the arbitrations, and the formal control of the arbitral award by the Court. Appendix III, entitled: 'Schedule of Conciliation and Arbitration Costs', concerns the costs of arbitration and conciliation. In this connection it must be noted that the conciliation provided for in the aforementioned rules is an optional preliminary stage for ICC arbitration (and is hardly ever used). A concise but excellent description of ICC arbitration can be found in ICC publication no. 382, *Guide to Arbitration*. An extensive description has been given by W. Craig, W. Park, and J. Paulsson, *International Chamber of Commerce Arbitration* (Oceana, 2nd ed. 1990).

Requesting an ICC arbitration is relatively simple under art. 3 of the Rules of Arbitration. The 'Request for Arbitration' is not bound to a strict formula. The request shall in any case contain the following basic information: (*a*) names, addresses and description of the parties; (*b*) a statement of the claimant's case; (*c*) relevant agreements, in particular the agreement to arbitrate, and such documentation or information as will support the request; and (*d*) particulars concerning the number and the appointment of arbitrators.

With respect to the appointment of arbitrators, the ICC Rules of Arbitration state that where the parties have not agreed upon the number of arbitrators, three arbitrators shall be appointed, and that where the parties have not agreed upon the method of appointment, each party shall nominate one arbitrator, and the International Court of Arbitration shall appoint the third arbitrator (art. 2 of the Rules of Arbitration).

The request for arbitration shall be submitted in triplicate if one arbitrator must be appointed; in the case of three arbitrators, there must be five copies. The date of receipt of the request shall 'for all purposes' be deemed to be the date of commencement of the arbitral proceedings (art. 3(1) of the Rules of Arbitration).

The Secretariat of the International Court of Arbitration sends a copy of the request to the defendant. The defendant has 30 days from the receipt of the documents to file an 'Answer to the Request'. This must contain in any case: (*a*) a comment on the claimant's proposals concerning the number and the choice of arbitrators, and, if appropriate, the name and address of the arbitrator appointed by the defendant; (*b*) the defences; and (*c*) if appropriate, the counter-claim (to which the claimant may reply within 30 days) (arts. 4 and 5 of the Rules of Arbitration).

Upon receipt of the reply – or when the 30-day time-limit has lapsed – the arbitrator or arbitrators are appointed by the International Court of Arbitration, unless the appointment has already been made beforehand in conformity with the agreement between the parties. In the latter case, the Court confirms the appointment (art. 2 of the Rules of Arbitration). Unless agreed upon by the parties, the place of arbitration shall also be fixed by the Court (art. 12 of the Rules of Arbitration). It is the Court's policy to designate a 'neutral' country, i.e. one of which neither party is a national (for a survey of the choices of the relevant countries by the International Court of Arbitration, see Craig, Park and Paulsson, *op. cit.*, Appendix I, table 7). Finally, the Court fixes the amount of the advance on costs for the arbitration (art. 9 of the Rules of Arbitration).

After the foregoing, the file is transmitted to the arbitrators (art. 10 of the Rules of Arbitration). Their first activity is to draw up a document called the 'Terms of Reference' (art. 13 of the Rules of Arbitration). This document must include the following particulars: (*a*) names and description of the parties; (*b*) addresses of the parties; (*c*) a summary of the claims; (*d*) definition of the issues to be determined; (*e*) names, description and addresses of the arbitrators; (*f*) the place of arbitration; (*g*) particulars concerning the applicable procedural rules; and (*h*) other particulars that may be required to make the arbitral award enforceable in law, or may be regarded as helpful by the International Court of Arbitration or the arbitrators. The Terms of Reference shall be signed by the parties and the arbitrators. If a party refuses to sign, the International Court of Arbitration may set a time-limit of two months for the signature of the defaulting party, on expiry of which time-limit the arbitration may proceed – even if that party still has not signed.

The drawing up of the Terms of Reference is a specific aspect of ICC arbitration. It occurs in virtually no other international arbitration rules. Under these other rules arbitrators can start their job immediately upon their appointment and decide on the issues in dispute as they have been formulated in the documents of the parties (on condition, however, that the disputes come under the definition of the field of application of the arbitration agreement). The Terms of Reference date back to the time when the arbitration clause was not a coercive agreement and required a further agreement after the dispute had arisen. In France this practice applied until 1925, when art. 631 of the *Code de commerce* was introduced, in which the arbitration clause was declared valid in commercial matters. In the Netherlands this practice was already abolished before 1900.

The institution of the Terms of Reference is regularly criticised in practice. It is a fact that the drawing up of this document may lead to sometimes considerable delay of the arbitration. This drawing up may in fact result in a 'miniature arbitration', preceding the real arbitration on the merits, because the formulation of the matters in dispute may give rise to long debates. Nevertheless the Terms of Reference often prove to be useful in practice. Their drawing up mostly yields a clarification, and sometimes a decrease, of the matters in dispute. The arbitrators clearly know what they must decide on, and do not face disputes 'hidden' somewhere in usually voluminous documentation. Moreover, the drawing up of the Terms of Reference not infrequently results in a settlement.

After the Terms of Reference have been defined (and the advance on costs for the arbitration has been paid), the arbitral proceedings can commence. These proceedings have been concisely provided for in the ICC Rules of Arbitration (arts. 14 and 15). The arbitrators have very wide powers

to determine the course of the proceedings as they think fit. In so doing, they pay due regard to the parties' wishes and to relevant circumstances. The course of the proceedings in international arbitration in general will be discussed in section 9.6 below.

After the proceedings have been terminated, the arbitrators formulate the award in draft form. This draft must be submitted to the Court unsigned. The Court checks the award for formal defects and may also, as the occasion arises, draw the arbitrators' attention to points of substance (art. 21 of the Rules of Arbitration). After the draft award has been approved by the Court, it is signed by the arbitrators and the parties are notified of this by the Secretariat (art. 23 of the Rules of Arbitration).

9.4.2 London Court of International Arbitration (LCIA)

In section 9.3.3 the special situation with respect to arbitration in England was discussed, where until 1979 factual and legal questions that arose in an arbitration could be submitted to an English court. The amendment established by the 1979 Arbitration Act replaced this system with a limited appeal to the English court in relation to legal questions. This appeal may be excluded by agreement in a number of cases prior to the dispute arising. In this important respect, the amendment has, to a certain extent, brought the English arbitration law into conformity with the principle applying in other parts of the world, i.e. a court shall not review the merits of an arbitral award.

The London Court of International Arbitration (LCIA), which used to be linked to the Chartered Institute of Arbitrators, has anticipated this development of English legislation. On 1 January 1985, a completely new set of arbitration rules, drawn up by people experienced in the practice of international arbitration became effective (published in X Yearbook Comm. Arb. (1985) p. 157 ff. with comment from M. Hunter and J. Paulsson). The result is a set of highly practice-based rules, giving arbitrators, *inter alia,* significant power to eliminate delays by unwilling parties.

9.4.3 American Arbitration Association (AAA)

The American Arbitration Association (AAA) is quantitatively the biggest arbitration institute in the world. It registers about 40,000 arbitrations a year and can draw from a list of over 35,000 arbitrators. However, only some 140 of these arbitrations are international. This is somewhat surprising because the AAA is an efficient organisation that knows how to administer arbitrations.

The AAA administers arbitrations, *inter alia*, on the basis of 'Commercial Arbitration Rules', published in *VII Yearbook Commercial Arbitration* (1982) p. 191 ff.). In 1982 the AAA introduced 'Supplementary Procedures for International Commercial Arbitration' (published in VIII Yearbook Comm. Arb. (1983) p. 195 ff.), which were amended in 1986 (see XII Yearbook Comm. Arb. (1987), p. 195). These procedures for arbitrations between parties of different nationalities are deemed applicable 'unless otherwise advised'. The procedures contain provisions concerning the nationality of arbitrators, the manner of communicating information, the exchange of documents and statements, the hearing, and the language of the proceedings.

9.4.4 *Stockholm Chamber of Commerce*

Over the past ten years the Stockholm Chamber of Commerce has taken great pains to try and attract more international arbitrations to take place under its rules (1976) (published in III Yearbook Comm. Arb. (1978) p. 254 ff.). Sweden, which is known for its neutrality, has an adequate arbitration legislation. Furthermore, Swedish courts approach international arbitrations positively. It does not appear, however, that there has been an appreciable rise of international arbitrations in Stockholm. So far, Stockholm has in fact mainly attracted arbitrations in East-West trade relations.

9.4.5 *Euro-Arab Chambers of Commerce*

An initiative taken in 1982 by the joint Euro-Arab Chambers of Commerce has resulted in a system of arbitration in trade relations between Arab and European countries.

The rules are entitled 'Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chambers of Commerce' (Paris, 1 June 1982, published in *XI Yearbook Commercial Arbitration* (1986) p. 228 ff.).The system may be used by 'any European or Arab individual or entity as well as any others insofar as they are directly or indirectly involved with Arab countries'. As the name of the rules indicates, the system comprises conciliation, arbitration and expertise. The rules contain a number of provisions derived from ICC-arbitration (e.g. Terms of Reference, which are not mandatory under the Euro-Arab rules, however). The system is based on full equality of European and Arab participation. The advantage of this is that the system is in principle acceptable to the Arab world. A disadvantage is that the organisational structure is rather complex (Arbitration Boards, Higher Arbitration Board, Plenary Assembly, and Secretariat/ Registry). So far the number of arbitrations has remained comparatively small.

9.4.6 *UNCITRAL Arbitration Rules*

The United Nations Commission on International Trade Law (UNCITRAL), which considers the promotion of international commercial arbitration of paramount importance, in 1976 issued the UNCITRAL Arbitration Rules (published in II Yearbook Comm. Arb. (1977) p. 161 ff. with comment by P. Sanders). These rules were originally intended for arbitrations in trade relations between developing and developed countries. The initial impetus for the rules resulted from the criticism sometimes put forward in the Third World that the established organisations of international arbitration have allegedly been made according to a Western model. However, the rules are suited for almost any international arbitration and are used as such. The UNCITRAL Arbitration Rules, drawn up under the direction of Professor Pieter Sanders, are considered by many insiders to be one of the best sets of rules currently available for international arbitration.

The rules do not provide for the administration of the arbitration by an arbitration institute. They do provide for a so-called 'Appointing Authority'. This authority may be appealed to in cases where the appointment of one or more arbitrators poses problems, for the challenge of arbitrators, and for advice concerning arbitrators' remuneration.

The Appointing Authority should preferably be designated by the parties in the arbitration clause. A large number of arbitration institutes and other organisations that are interested in international arbitration, have already declared themselves prepared to act as Appointing Authority (see List of Arbitral Institutions, which is published annually in Yearbook Comm. Arb.). The administration costs for acting as Appointing Authority that are charged by the arbitration institutes are generally low in comparison to the administration costs that are charged for arbitrations administered under the rules of these institutes (the ICC, for instance, charges US $ 1,000 per request). It must be emphasised here, that an institute's acting as Appointing Authority does not imply applicability of the arbitration rules of that institute.

If the parties have not designated an Appointing Authority, the Secretary General of the Permanent Court of Arbitration at The Hague may be requested to designate the Appointing Authority. UNCITRAL itself does not act as Appointing Authority.

Although the UNCITRAL Arbitration Rules do not provide for administered arbitration, they may be adapted to this by a few simple alterations. This has, for example, been done by the Inter-American Commercial Arbitration Commission (IACAC) (published in Int. Handbook Comm. Arb., tab Inter-American Arbitration, Annex II), and the Regional Centres of the Asian-African Legal Consultative Committee (AALCC) at Kuala Lumpur, Cairo and Lagos. The Regional Centres at Cairo and Kuala Lumpur have yet to gain much of experience in international arbitration. The establishment of the Centre at Lagos has not yet been completed.

For an article by article analysis of the UNCITRAL Arbitration Rules, see J. van Hof, *Commentary on the UNCITRAL Arbitration Rules. The Application by the Iran-U.S. Claims Tribunal*, thesis Leiden, 1991.

The *Iran-United States Claims Tribunal* at The Hague also functions on the basis of the UNCITRAL Arbitration Rules, though in an adapted version.

The adapted version has been published in VIII Yearbook Comm. Arb. (1983) p. 234 ff. (also see X Yearbook Comm. Arb. (1985) p. 187). The Tribunal was founded under the 'Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran' of 19 January 1981. It mainly treats claims by nationals of the United States against Iran and by nationals of Iran against the United States. Altogether American and Iranian parties have lodged about 1,000 large claims (some of which amount to over US$100m.) and 3,000 small claims (each amounting to less than US$250,000) with the Tribunal.

The many interesting arbitral awards of the Tribunal have, *inter alia*, been published in Part IIIB of the Yearbook Comm. Arb. (from Vol. VIII (1983); see also the literature survey in section 9.8). There is no unanimous opinion on the question of whether arbitration by the Tribunal is governed by Netherlands arbitration law (see the discussion between Hardenberg and myself in NJB 1984 p. 167 ff.).

9.4.7 International Centre for the Settlement of Investment Disputes (ICSID)

Within the framework of arbitration conventions, reference was made in paragraph 9.3.4(*d*) to the Washington Convention of 1965 concerning investment disputes between States and nationals of other States. Under that Convention, the International Centre for the Settlement of Investment Disputes (ICSID) was established. The ICSID plays the role of administrator of arbitrations.

ICSID-arbitration is confined to disputes in the field of investments between States and private parties from other Contracting States. The Convention does not define the term 'investment'. In order to exclude any doubts, it is advisable to state expressly in the arbitration agreement that the contract concerns an investment, as referred to by the Washington Convention.

The agreement for ICSID-arbitration must be in writing. Once it has been concluded, neither the State involved nor the foreign investor can withdraw.

In another respect, too, one should act carefully concerning the agreement for ICSID-arbitration. ICSID has published a slim volume in which no less than nineteen clauses are recommended (DOC ICSID/5/Rev.1). A number of these clauses have been published in IX Yearbook Comm. Arb. (1984) p. 171 ff.

The procedure has been provided extensively for in different sets of rules (DOC ICSID/-15(1985)):

- Administrative and Financial Regulations;
- Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules);
- Rules of Procedure for Arbitration Proceedings (Arbitration Rules);
- Rules of Procedure for Conciliation Proceedings (Conciliation Rules).

9.4.8 Arbitration institutes in former COMECON countries

In the former CMEA countries great importance is attached to arbitration as a means of settlement of disputes in international trade. Arbitration in these countries was administered by so-called 'Arbitration Courts', which were usually attached to the Chambers of Commerce in each country. The recent developments in Eastern Europe have led to several 'Arbitration Courts' being transformed into arbitration institutes on the Western European model.

9.4.9 Netherlands Arbitration Institute (NAI)

The Netherlands Arbitration Institute can also be mentioned in this survey of international arbitration institutes. Arbitrations administered by the NAI increasingly involve foreign parties (about 25% of the arbitrations).

The completely revised Arbitration Rules of 1 January 1993, like the new Arbitration Act, presume to be sufficiently flexible to suit both domestic and international arbitration. The 1993 Rules do contain a number of separate provisions for international arbitration, in order to meet the special circumstances of these arbitrations.

The 'international' provisions in the NAI Arbitration Rules of 1993 are: doubling of the periods of time (art. 5(2)); nationality of arbitrator (art. 16); language (art. 40); decision according to rules of law instead of amiable compositeur (art. 45(2)); applicable law (art. 46); and dissenting opinion (art. 48(4)). For most of these provisions, the Rules use the following definition of international arbitration: 'an arbitration in which at the moment of commencement of arbitration (...) at least one of the parties is domiciled or has his seat, or, in the absence thereof, has his actual residence outside the Netherlands' (art. 1(*g*)).

Translations of the Rules in German, English and French are available from the NAI Secretariat (P.O. Box 190, 3000 AD Rotterdam). In addition, the reader is referred to a publication under the auspices of the NAI, by P. Sanders and A.J. van den Berg, *The Netherlands Arbitration Act 1986*, Deventer, 1987. This edition contains the English, German and French translations of the new Arbitration Act, as well as notes briefly commenting on the statutory provisions separately.

9.4.10 Commodity Trade Associations

A major part of world trade concerns commodities such as cocoa, coffee, tea, grain, feed, oils and fats, sugar, metals, and rice. The commodity trade associa-

tions promote the interests of those who occupy themselves with this type of international trade. A large number of these associations are established in London.

Examples are Grain and Feed Trade Association – GAFTA; Cacao Association of London, Ltd. – CAL; Refined Sugar Association; Federation of Oil, Seeds and Fats Associations, Ltd. – FOSFA; London Metal Exchange – LME; and United Kingdom Tea Association. Similar associations are established in Antwerp, Hamburg, Le Havre and Rotterdam.

Each commodity trade association strives for uniformity of contractual conditions in their branch of trade. For that goal they have drawn up standard conditions, which are regularly adapted in the light of new developments. The parties involved make use of these conditions on a very large scale.

Virtually all commodity trade associations have set up their own arbitration systems, which are referred to in the standard conditions recommended by the associations. Each association administers these arbitrations under its own arbitration rules.

It is beyond the scope of this book to enter more deeply into the great variety of these arbitration systems, on the basis of which the largest number of international arbitrations take place. For a good survey, see D. Kirby Johnson, 'Commodity Trade Arbitration', in R. Bernstein, Editor, *Handbook of Arbitration Practice*, London 1987, p. 189 ff. Also see R. van Delden, 'English Commodity Arbitration: A Foreigner Looking Around in London', in *The Art of Arbitration*, Deventer 1982, p. 95 ff.

9.4.11 Maritime arbitration

We speak of maritime arbitration if, in some way or other, a vessel is involved in the arbitration. Such arbitrations concern disputes regarding charter-parties, bills of lading, collisions, salvages, and so on. The largest number of maritime arbitrations take place in London and New York.

The organisation of maritime arbitration in London is mostly run by the London Maritime Arbitrators' Association (LMAA). This association has no arbitration rules in the usual sense of the word. Instead LMAA arbitrators only accept appointments on the basis of 'LMAA Terms', which are slightly similar to arbitration rules. The LMAA does not act as an administrative institute. See M. Summerskill, 'Maritime Arbitrations', in R. Bernstein, Editor, *Handbook of Arbitration Practice*, London 1987, p. 265 ff.

The organisation of maritime arbitration in New York is in the hands of the Society of Maritime Arbitrators, Inc. (SMA). This society does administer arbitrations in accordance with arbitration rules (published in XI Yearbook Comm. Arb. (1986) p. 245 ff.). Arbitral awards of the SMA are published annually in Part IIB of the Yearbook. See D. Zubrod, Maritime Arbitration in New York, 39 Arbitration Journal (December 1984) p. 16 ff.

Maritime arbitration also takes place in Moscow (Maritime Arbitration Commission), Beijing (Maritime Arbitration Commission) and Gdynia (International Court of Arbitration for Marine and Inland Navigation). Furthermore we refer to the Rules for ICC-CMI International Maritime Arbitration, which have been drawn up by the ICC and the Comité Maritime International (published in VII Yearbook Comm. Arb. (1982) p. 203 ff.) The ICC-CMI Rules have so far been little used in practice.

9.5 Appointment of arbitrators

The appointment of arbitrators is of the greatest importance in every arbitration. The quality of arbitrators makes or breaks an arbitration.

In many international arbitrations the tribunal consists of three arbitrators. A sole arbitrator is a phenomenon rarely seen.

The parties may agree to the method of appointment in the arbitration agreement itself. Usually, however, the agreed method of appointment can be found in the arbitration rules to which the agreement refers. If such agreement on the method of appointment is lacking or defective (e.g. when it does not provide for the case in which the defendant does not participate in the appointment), the parties will have to fall back on the law applicable to the arbitration. The agreed method of appointment naturally must also comply with the imperative provisions of the applicable law.

A current system for the method of appointing arbitrators in international arbitration is that each party appoints one arbitrator and the two arbitrators thus appointed choose the third arbitrator. A variation of this system is that the third arbitrator is appointed by an arbitration institute or another institution. The third arbitrator, who acts as chairman, is usually from a 'neutral' country, i.e. a country of which neither party is a national.

The system in which each party appoints one arbitrator and the two arbitrators thus appointed choose the third arbitrator, can, for instance, be found in the UNCITRAL Arbitration Rules (see section 9.4.6). A great number of arbitration clauses in *ad hoc* arbitrations also provide for this system. The system in which each party appoints one arbitrator and the arbitration institute chooses the third arbitrator, is laid down in the ICC Rules of Arbitration (see section 9.4.1).

The above systems are sometimes described as party-arbitration. In the Netherlands there have always been objections to party-arbitration, because the arbitrators appointed by the parties could tend to act as advocates for the party who appointed them (hence the name 'combat arbitrators'). Party-arbitration is not illegal in the Netherlands, but neither does the law encourage it. If the parties have not agreed upon a method of appointment of the arbitrators, they must reach consensus with respect to all the arbitrators (art. 1027(1); see section 5.2).

Although the same problems may arise internationally, the advantage of party-arbitration is that each party can appoint an arbitrator who can 'translate' his viewpoint within the panel of arbitrators. Consequently any differences caused by differing nationalities could be bridged. This does not mean, though, that the arbitrator appointed by a party can act partially. See Rules of Ethics for International Arbitrators, drawn up by the International Bar Association in 1985, published in XII Yearbook Comm. Arb. (1987) p. 199 ff.

The AAA has the system of the so-called 'list-procedure'. Under this system each party gets an identical list of names of possible arbitrators. Each party then has the opportunity within a specific period of time to delete the names to which he objects and to number the remaining names in the order of his preference. On the basis of the approved names on the lists returned, the AAA then appoints the arbitrators. The arbitrators are generally asked to identify any potential conflicts of interest, i.e., prior relationship with one of the parties, upon which objection to appointment can be made, and is, generally, sustained. The UNCITRAL Arbitration Rules also use this system for the appointment of a sole arbitrator and the third arbitrator, if the parties respectively the two arbitrators appointed by the parties cannot reach agreement about the sole, or respectively the third arbitrator. The list-procedure is also the method of appointment of arbitrators used under the NAI Arbitration Rules.

In arbitrations under the arbitration rules of commodity trade associations the arbitrators are appointed either by the relevant association itself or, according to the system of party-arbitration, with appointment of the chairman of the tribunal by the association. In nearly all cases arbitrators

can only be appointed if they are on a general list of arbitrators of the relevant association, or are in any case members of that association. See D. Kirby Johnson, 'Commodity Trade Arbitration', in R. Bernstein, Editor, *Handbook of Arbitration Practice*, London 1987, p. 192 ff.

9.6 Procedural aspects of international arbitration

Arbitration laws usually contain few provisons regarding the course of the arbitral procedure after the arbitral tribunal has been constituted. Many arbitration institute rules are also rather brief in this respect. The more detailed provisions in the new Netherlands Arbitration Act and the NAI Arbitration Rules of 1993 are an exception. The arbitration rules of the London Court of International Arbitration (LCIA) and UNCITRAL (sections 9.4.2 and 9.4.6) are also detailed, though to a lesser extent. The American Arbitration Association has special detailed rules applicable to larger (in terms of monetary amounts) arbitrations.

Many arbitration rules leave arbitrators almost completely free regarding procedure. The few relevant provisions that arbitration rules contain boil down to the same thing. Concerning the procedure to be followed, the parties can also make agreements themselves (by which the arbitrators are bound in principle), but in most cases the parties leave this to the arbitrators. In all cases, however, arbitrators must observe the fundamental principle of hearing both parties (compare art. 1039(1)). If they do not, their award is open to being set aside, or its enforcement may be refused.

In this connection it must be noted that the management of the procedure in voluminous international arbitrations requires a good deal of attention. In such cases the chairman of the arbitral tribunal – possibly with a secretary – plays an important part. He must carefully plan the course of the procedure, and must be directly available for unexpected eventualities during the procedure. Experience has shown that chairmen sometimes show too little initiative and let themselves be overwhelmed by a case, as a result of which all kinds of procedural complications may arise, the unravelling of which can take much time; the risk being that everybody loses track of the situation.

The usual course of procedure in an international arbitration depends on the kind of arbitration involved. In a commodity arbitration before the Grain and Feed Trade Association (GAFTA) in London, for example, the course of procedure is quite simple. Mainly, there is one exchange of statements from the parties, after which the hearing takes place. But in an arbitration concerning the construction of a large hospital in Saudi Arabia, for example, the number of claims may run to hundreds, and everything is first extensively written down and documented (sometimes there are more than 10,000 documents). During the hearing (usually more than one, which may last weeks, or even months), arguments are exchanged, but apart from that witnesses and experts are examined. After the hearing in such arbitrations it is customary for parties to make written notes concerning everything that has taken place during the hearing ('Post-Hearing Memorials', mostly on the basis of a voluminous verbatim report of the hearing).

As was already described in section 9.4.1, in arbitration under the ICC Arbitration Rules, proceedings are commenced by the submission of a Request for Arbitration. The defendant then has 30 days to submit an answer. Both documents may be brief. After submission of these documents, the arbitral tribunal is constituted. Then the Terms of Reference are drawn up. After the whole advance on costs has been made, the actual procedure commences. Usually there is an exchange of statements (Statement of Claim and Statement of Defence – unless the Request for Arbitration and the Answer may function as such – and the Reply and Rejoinder). Then the hearing takes place.

In voluminous arbitrations with a large number of claims, it is customary that the procedure is divided into groups of claims, so that the procedure can be followed per group of claims, which results in partial awards.

The course of the procedure in an international arbitration also depends on what the parties' attorneys and arbitrators are accustomed to in their own countries. In civil law countries, for instance, emphasis is placed on the documentary treatment, and in common law countries on the oral treatment. In a number of civil law countries the inquisitorial procedure is frequently used, in which the court plays a more or less active role. In common law countries the accusatorial system is followed as a rule, in which the court's role is more passive. Under this system each party presents his own version of the facts and interpretations of the law to the court, and each has the opportunity to refute the evidence presented by the other party. The court in these common law countries must ultimately decide between both viewpoints. These differences between civil law and common law countries have, for clarity's sake, been simplified here. In actual practice – especially the practice of international arbitration – it is not so easy (anymore) to define such dividing lines.

Written evidence in civil law countries also differs from that in common law countries. In civil law countries each party usually only produces such documents as will support his viewpoint. In common law countries this is done on a different basis, the so-called 'discovery of documents'. In a judicial procedure a party is obliged to produce *all* relevant documents – which is called 'disclosure of documents'. This obligation does not exist for arbitrations, but an arbitrator in a common law country has the power, upon either party's request, to order the other party to produce relevant documents. The Netherlands is one of the few civil law countries where this power also exists and has even been legally provided for (art. 1039(4); see also art. 28 of the NAI Rules).

Obtaining evidence through witnesses is also a matter of difference between civil law and common law countries. In the former countries the witness is in principle questioned by the court or the arbitrator. The parties must put their questions to witnesses through the court or the arbitrator. In common law countries, where great value is attached to evidence from witnesses, witnesses undergo a so-called 'cross-examination'. This procedure is as follows: first, a witness is comfortably questioned by the party who has produced the witness ('examination in chief'), then he is soundly interrogated by the other party ('cross-examination'), and finally questioned again by the first party so as to correct any mistakes he may have made when being cross-examined ('re-examination').

The rules prescribe that during the 'examination in chief' (in the United States: 'direct examination') no 'leading questions' may be asked (at least before the ordinary court so as not to mislead the jury). A 'leading question' is one in which the answer is implied. This restriction does not apply to the 'cross-examination'. During the 're-examination' (in the United States: 'redirect examination') only such questions may be asked as relate to subjects which have come up during the 'cross-examination'.

Furthermore, in common law countries the sworn or affirmed written statement ('affidavit' or 'declaration') is quite customary. The opposing party may, if he so wishes, check this written statement by cross-examining the witness.

In international arbitrations between parties from civil law and common law countries, usually an effort is made to bridge the above differences by following a procedure containing elements of both procedures.

The differences relating to written and oral evidence can be neutralised to a large extent by agreeing that the 'Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration' shall apply. These Rules were drawn up by the International Bar Association (IBA) in 1983 (published in X Yearbook Comm. Arb. (1985) p. 152, with an introduction by D.W. Shenton, *id.* p. 145 ff.). Article 4 of these Rules deals with the production of documents; article 5 regards witnesses.

If the parties have not made any agreements about the language of the procedure, this may cause problems. Sometimes they can be solved by following a bilingual procedure, or by means of translations and the services of interpreters (which may be a very costly affair). However, a large proportion of international arbitrations today take place in English. Therefore a sound knowledge in speech and in writing of at least English is an indispensable requirement for anyone who is interested in international arbitration.

A highly informative comparison of the practice concerning the arbitral procedure in different countries may be found in P. Sanders, General Editor, *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series no. 3, Deventer 1986, p. 19 ff. A lucid and practice-based survey can also be found in A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, London, 2nd ed., 1991, p. 289 ff. For arbitration practice in different branches of trade, we may also refer to R. Bernstein, Editor, *Handbook of Arbitration Practice*, London 1987.

9.7 International Council for Commercial Arbitration (ICCA)

The International Council for Commercial Arbitration (ICCA) is an international organisation (with 'observer status' in the United Nations) for the promotion of international trade arbitration. It consists of some 35 members from all parts of the world, who are chosen by co-option.

The present chairman is the Italian Professor G. Bernini. Professor P. Sanders was chairman from 1975 to 1986 and is now honorary chairman.

As the ICCA only aims to promote international trade arbitration, it does not administer arbitrations, nor does it function as an 'Appointing Authority' of arbitrators.

Every four years the ICCA organises an international arbitration congress. Between congresses, so-called 'interim meetings' are held. The reports of these congresses and meetings are published in the ICCA's Congress Series. So far five reports have appeared. The ICCA also publishes the *International Handbook on Commercial Arbitration* and the *Yearbook Commercial Arbitration*.

9.8 Literature on international arbitration

The number of books and articles about the field of international arbitration is overwhelming and still growing. For a reader who wants to study this subject matter, it will be no easy job to find his or her way through this jungle of publications. What is more, not all publications are of high quality as regards content.

What follows is an effort to name a few publications that may serve as basic literature for an introduction to international arbitration, apart from the publications already mentioned under each subject in the separate sections.

Several times in the foregoing there has been mention of the *Yearbook Commercial Arbitration*. The Yearbook, published under the auspices of the International Council on Commercial Arbitration (ICCA), in cooperation with the TMC Asser Institute, The Hague, has appeared annually in English since 1976.

The Yearbook is divided into the following sections: Part I: National Reports; Part IIA: Arbitral Awards; Part IIB: Court Decisions on Arbitration; Part IIIA: Arbitration Rules; Part IIIB: Iran-United States Claims Tribunal; Part IV: Recent Developments in Arbitration Law and Practice; Part V: Court Decisions on the New York Convention of 1958; Part VI: Articles on Arbitration; Part VII: Bibliography.

The *Yearbook Key 1990* makes the material published in the Yearbook easily accessible. It contains a consolidated table of contents of Vols. I-XV, an index to arbitral awards, and indexes to the New York Convention of 1958. An accumulated edition of the Yearbook Key is published once every three or four years.

The *International Handbook on Commercial Arbitration* is also published by the ICCA, in cooperation with the TMC Asser Institute of The Hague. This loose-leaf edition contains National Reports concerning arbitration law and practice in different countries as they had been published until Vol. XIII (1988) of the Yearbook. The loose-leaf edition enables the user to quickly incorporate recent amendments in the law and practice of arbitration into already published National Reports. In addition, the International Handbook also contains the texts of the arbitration laws themselves, translated into English, if necessary. Chapter I.3 contains a bibliography of the most important publications concerning arbitration in the relevant countries.

An excellent practically-orientated introduction to international arbitration has been provided by A. Redfern and M. Hunter in *Law and Practice of International Commercial Arbitration*, 2nd. ed., London 1991.

A classic, which is orientated more towards theory and comparative law, was written by R. David, *L'arbitrage dans le commerce international* (Economica, Paris, 1982). This work has been translated into English: *Arbitration in International Trade*, Deventer 1984.

Arbitral awards are published annually in English in the Yearbook, and in French in a survey (with comments from Y. Derains and J. Jarvin) in *Journal du Droit International* (also named *Clunet*). Arbitral awards in the field of international construction can be found in *The International Construction Law Review*. The Yearbook also publishes part of the arbitral awards of the Iran-

United States Claims Tribunal. All awards of this Tribunal have been compiled in *Iran-United States Claims Tribunal Reports* (Grotius Press, UK), as well as in *Iranian Assets Litigation Reporter* (Mealy Publications, US). Arbitral awards are also sometimes published in *International Legal Materials* (a publication of the American Society of International Law, indispensable for any jurist involved in international law).

Prominent *journals* specialised in the field of international arbitration are: *Arbitration Journal* (American Arbitration Association, New York), *Arbitration International* (London Court of International Arbitration), *ICSID – Foreign Investment Law Review* and the French *Revue de l'arbitrage* (Comité français de l'arbitrage, Paris).

Finally, mention must be made of the *Department of International Commercial Arbitration of the TMC Asser Institute for International and European Law*, The Hague. This Department of the TMC Asser Institute boasts probably the world's greatest collection of treaties, legislation, jurisprudence, rules and literature in the field of arbitration (from more than 100 countries). The Yearbook and the International Handbook are published by the ICCA with its cooperation. This specialised library is indispensable for anyone who wants to dig deep into international arbitration. The address of the TMC Asser Institute is: Alexanderstraat 20-22, 2500 GL The Hague.

10 ARBITRATION OUTSIDE THE NETHERLANDS (TITLE TWO)

10.1 Introduction

The heading of Title Two of the Arbitration Act reads 'Arbitration outside the Netherlands'. The provisions of this Title relate to certain consequences within the Dutch legal system of arbitrations outside the Netherlands. There are three relevant articles in Title Two:

- art. 1074: foreign arbitration agreement and substantive claim before Dutch court (see section 10.2.1); foreign arbitration agreement and interim measures of protection by Dutch court (see section 10.2.2);
- art. 1075: recognition and enforcement of foreign award under treaties (see section 10.3);
- art. 1076: recognition and enforcement of foreign award without treaties (see section 10.4).

The provisions of Title Two form the logical complement to the provisions of Title One (arts. 1020-1073), which apply 'if the place of arbitration is situated within the Netherlands' (art. 1073(1)).

The distinction between arbitration inside and outside the Netherlands should not be confused with the distinction between domestic and international arbitration. In the introduction to the previous chapter (section 9.1) it was noted that the distinction between domestic and international arbitration has no relevance for the applicability of the provisions of Title Two (nor of Title One). The only criterion for applicability of Title Two is that the arbitration must take place outside the Netherlands (art. 1074), or that the arbitral award must have been rendered outside the Netherlands (arts. 1075 and 1076).

10.2 Foreign arbitration agreement (art. 1074)

10.2.1 Jurisdiction of the Dutch court (paragraph (1))

Paragraph (1) of art. 1074 states that a Dutch court seized of a dispute in respect of which an arbitration agreement has been concluded outside the Netherlands shall declare that it has no jurisdiction. This provision corresponds with paragraph (1) of art. 1022, which relates to the jurisdiction of the court if arbitration has to take place in the Netherlands. The court's declaration that it has no jurisdiction is attached to three conditions.

The *first condition* is that there must be an arbitration agreement 'under which arbitration shall take place outside the Netherlands'. This formulation has intentionally been made broad in order to provide for those cases in which the arbitration agreement does not expressly state the place of arbitration, but where it may be assumed that, in view of the foreign elements connected with the arbitration (nationality of the parties and/or the subject of the dispute), the arbitration will take place outside the Netherlands.

If the arbitration agreement contains an explicit indication of the place of arbitration, it is perfectly clear that art. 1074(1) applies. If the arbitration agreement does not contain an explicit indication of the place, but refers to arbitration rules of an arbitration institute whose administrative body determines the place of arbitration, then there may be doubt for as long as the administrative body has not yet determined that place. For example, the ICC Arbitration Rules state in art. 12: 'The place of arbitration will be fixed by the (International) Court (of Arbitration), unless agreed upon by the parties'. The applicable arbitration rules may also state that the place of arbitration shall be fixed by the arbitral tribunal. See, for instance, art. 16(1) of the UNCITRAL Arbitration Rules: 'Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration'. If a Dutch party is involved in such arbitration agreements, one may in principle assume that the ICC International Court of Arbitration or, respectively, the arbitral tribunal, shall determine the place of arbitration to be in a 'neutral' country (i.e. outside the Netherlands). For the ICC, see section 9.4.1.

Where there is doubt as to whether it is an arbitration agreement 'under which' the place of arbitration is outside the Netherlands, it is advisable for a party who wishes to raise a plea that the Dutch court lacks jurisdiction, to invoke alternatively art. 1022(1) concerning arbitration in the Netherlands.

The *second condition* for applicability of art. 1074(1) is that a party invokes the existence of the said agreement 'before submitting a defence'. This condition was discussed in section 4.12 above.

The *third condition* is that the arbitration agreement not be 'invalid under the law applicable thereto'. The validity of the arbitration agreement under the applicable law may relate to the conclusion of the agreement (absence of *consensus ad idem*), as well as the form (usually in writing), and the content of the agreement. This condition was added at a later stage of the establishment of the Act.

The MvA, p. 40; TvA 1986/2 p. 93 explains this addition as follows: 'For the validity of the arbitration agreement, reference has also been made to the applicable law in order to make it clear that the question should be treated under that law. Determination of the law applicable to the arbitration agreement may happen on the basis of the general rules of private international law'. The MvA says nothing about the question which general rules of private international law apply. As the provision contained in art. 1074(1) is intended for the Dutch court, it is probable that the rules of Dutch private international law (conflict of laws rules) are intended. In case of agreements, the general rules, briefly summarised, are that an agreement shall in principle be governed by the law that the parties have chosen, and failing such choice, the agreement shall be governed by the law of the country with which it is most closely connected. In this connection, it should be stressed that in the determination of the law applicable to the arbitration agreement, this agreement is regarded as a separate agreement. Article 1074(1) explicitly refers to the 'law applicable *thereto*'. The New York Convention of 1958 also assumes a separately applicable law. Article V(1)(*a*), which in contrast to art. 1074(1) does contain rules of private international law, states that: 'the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication

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thereon, under the law of the country where the award was made'. Furthermore, the European Convention on the law applicable to contractual obligations, Rome, 19 June 1980, published in Trb. 1980, 156. Article 1(2)(*d*) declares the Convention not applicable to 'arbitration agreements and agreements on the designation of a court which has jurisdiction'. The 1980 EEC Convention therefore also assumes that a separate law governs the arbitration agreement.

The result of the foregoing is that the law governing the main contract does not naturally also apply to the arbitration agreement that forms part of the main contract (arbitration clause), or is related to it. If the main contract contains the parties' explicit choice of law, this does not necessarily mean that the arbitration clause is also subject to that law.

An arbitration agreement seldom contains an explicit choice by the parties of a law applicable to that agreement. In section 9.3.3 it was explained that the choice of the place of arbitration functions as a choice of law with respect to the procedural law applicable to the arbitration. That includes the arbitration agreement. In addition, in conformity with the aforementioned general rule of private international law, the law of the place of arbitration may be regarded as the law of the country with which that agreement is most closely connected. If, then, the place of arbitration has been agreed on by the parties, the law of that place may be regarded, within the framework of art. 1074(1), as the law applicable to the arbitration agreement.

If the parties have not made a choice concerning the place of arbitration, and this place cannot be determined in another manner, it is difficult to establish with which country the arbitration agreement is most closely connected. In my view, the country whose law applies to the main contract is not eligible, because in this respect that country has nothing to do with the arbitration. It might be a practical solution to apply Dutch law. An additional advantage of this would be that in most cases the arbitration agreement will be valid, as Dutch law does not set very strict requirements for the arbitration agreement.

A remarkable decision was reached by the District Court of Arnhem 10 January 1991, ***Machinefabriek Hans Smits B.V. v. Garret, Liquidator Barr & Murphy Ltd.*** TvA 1991, p. 230 in a case in which the parties had agreed to English arbitration with Dutch law to be applicable to the contract itself. The District Court held that it had been correctly asserted 'that the agreed applicability of Dutch law is incompatible with an arbitration under English statutory regulations. Their apparent intention of bringing the contractual relationship within the Dutch jurisdiction cannot be united with the parties' wish to agree to have possible disputes settled in English arbitration proceedings.' The arbitration clause could therefore not apply because the English arbitrator would have to apply Dutch law. P. Sanders in his annotation *loc. cit.* is right in remarking: 'This consideration of the District Court is untenable in my opinion, since it not only denies art. 1054 but also ignores arbitration practice.'

As was already noted with respect to art. 1022, this provision does not exclude appeal (and cassation) against the court's decision about its jurisdiction, in contradistinction to art. 1051(4) with respect to the referral by the President of the District Court to summary arbitral proceedings. A provision as contained in art. 1070 (No appeal may be lodged against the decisions of the President of the District Court mentioned in Sections One to Three of this Title') is lacking. The foregoing also holds for art. 1074. In my opinion, this is an omission that could be corrected in a future amendment of the Act.

As a result of the provision of art. 1074(1), the invoking of art. II(3) of the New York Convention becomes superfluous in most cases. Under art. II(3) of the Convention, the court of a Contracting State (i.e. also the Dutch court), when seized of an action in a matter where the parties have made an agreement within the meaning of this Convention, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the 'said agreement is null and void, inoperative or incapable of being performed'.

Apart from the recognition and enforcement of foreign arbitral awards (arts. I and III-VII; see section 10.3.1), art. II(3), concerning the compliance with arbitration agreements, forms the other aspect of arbitration which is settled by the Convention.

In contrast with the definition of the scope of application of the Convention with respect to arbitral awards in art. I (awards made in the territory of another (Contracting) State) as well as art. 1074(1) (arbitration agreement under which arbitration shall take place outside the Netherlands), the Convention does not indicate which arbitration agreements apply for compliance under art. II(3). An interpretation that has by now become generally accepted is that art. II(3) applies in any case if the arbitration takes place or will take place in a Contracting State other than the one where the arbitration agreement is invoked, irrespective of the nationality of the parties or the internationality of the subject in dispute. If, for example, two Italians agree on arbitration in London, compliance with the arbitration agreement in Italy may be applied for under art. II(3) of the Convention.

The question concerning the applicability of art. II(3) is more difficult if the arbitration takes place or will take place in the State in which the arbitration agreement is invoked. Case law in the Contracting States inclines towards applicability of art. II(3) of the Convention, in that case, if either party is foreign, or if the dispute relates to international trade. See Van den Berg, thesis, p. 56 ff.

In practice the requirement of the agreement *in writing*, as laid down in paragraph (1) and (2) of art. II, is the obstacle to the application of art. II(3). These two paragraphs apply because art. II(3) explicitly refers to 'an agreement within the meaning of this article'. If the requirements of art. II(1) and (2) are not fulfilled, compliance with the arbitration agreement on the basis of the Convention cannot take place. The requirement is considered to be a rule of uniform law for which one may not fall back on more or less stringent national law (see Van den Berg, thesis, p. 170 ff; see also New York Convention of 1958 – Commentary Cases, sub Article II, paragraphs 1 and 2 'Agreement in Writing' in Yearbook Comm. Arb.).

The first paragraph of art. II requires an arbitration agreement in writing, which is defined in the second paragraph as: 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'. This provision contains two alternatives for the written form of the arbitration agreement.

The first alternative of art. II(2) of the Convention is an arbitration clause contained in a contract or a submission agreement that has been signed by both parties. If an arbitration clause is contained in a contract, the signatures suffice for the contract as a whole.

The second alternative concerns the contract with an arbitration clause or the arbitration agreement 'contained in an exchange of letters or telegrams'. Under the second alternative the signatures of the parties are not required. It does mean, however, that one party makes an offer in writing to the other party, and *that the other party accepts this offer in writing and communicates this acceptance to the former party*. In actual practice this turns out to be an extremely strict requirement. Quite often parties conclude an agreement by telephone and subsequently one party sends a confirmation in which an arbitration clause is contained, which confirmation is not accepted in writing by the other party. The transaction is carried out notwithstanding, but when a dispute arises, the other party holds the viewpoint that he has not *in writing* accepted the confirmation with the arbitration clause. The requirement of art. II(2) of the Convention has not been fulfilled, and compliance with the arbitration agreement under paragraph (3) of art. II cannot take place (and enforcement of an arbitral award based on such an arbitration agreement may be refused on the strength of art. V(1)(*a*)).

Another problem with the requirement of the written form of the arbitration agreement, as provided in art. II(2) of the Convention, is the arbitration clause in standard conditions and standard contracts. A substantial part of international contracts is concluded on this basis. Article II(2) says nothing whatsoever about this form of concluding contracts, which has resulted in the usual problems of interpretation.

In comparison with art. II(2) of the Convention, the written form as required by, for example, art. 1021 of the Netherlands Arbitration Act, is considerably less stringent and more geared to practice ('The arbitration agreement shall be proven by an instrument in writing. For this purpose an instrument in writing that 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.') That is also true for a great number of other arbitration acts.

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For that reason a party who wants to invoke an arbitration agreement before a Dutch court seized of a dispute in respect of which the said arbitration agreement has been concluded has, in many cases, every interest in founding the validity of the agreement on the applicable law instead of on art. II(1) and (2) of the Convention. That possibility is provided by the more-favourable-right provision contained in art. VII(1) of the Convention: 'The provisions of the present Convention ... shall not deprive any party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law ... of the country where such award is sought to be relied upon'. Although the text of this more-favourable-right provision refers to the recognition and enforcement of foreign arbitral awards to which the Convention applies, it can, by analogy, also be applied to the compliance with arbitration agreements under art. II(3) of the Convention (see Van den Berg, thesis, p. 86 ff.).

The foregoing means that when a party wishes to raise a plea that the Dutch court lacks jurisdiction, because arbitration has been agreed on and the arbitration agreement comes under the New York Convention (see above), that party may choose to found this plea either on art. II(3) of the Convention, or on art. 1074(1) (for arbitration outside the Netherlands), or on art. 1022(1) (for arbitration inside the Netherlands). As has been explained before, a party will benefit from invoking art. 1074(1), respectively art. 1022(1), if the agreement does not satisfy the definition of an agreement in writing of art. II(2) of the Convention.

The Netherlands, for that matter, is one of the few countries that has an Arbitration Act containing an explicit legal provision settling the absence of jurisdiction of the court with respect to an agreement to arbitrate outside the Netherlands. Moreover, art. 1074(1) does not require any form of reciprocity.

10.2.2 Interim measures of protection and summary proceedings (paragraph (2))

Paragraph (2) of art. 1074 states that the agreement to arbitrate outside the Netherlands shall not preclude a party from requesting a court in the Netherlands to grant interim measures of protection (such as pre-award attachment), or from applying to the President of the District Court for a decision in summary proceedings. Like the first paragraph of art. 1074, which corresponds to paragraph (1) of art. 1022, paragraph (2) of art. 1074 corresponds to paragraph (2) of art. 1022.

Paragraph (2) was added to art. 1074 at a later stage in the establishment of the Act. The MvA (p. 40; TvA 1986/2 p. 94) motivates this addition for brevity's sake 'to prevent any doubt with respect to that'. This doubt might have indeed existed because the absence of such a provision in Title Two could have given rise to an *a contrario* argument in view of art. 1022(2), in which interim measures of protection and summary proceedings are declared compatible in relation to the arbitration agreement inside the Netherlands. Furthermore, it has been questioned in a number of judicial decisions in the United States – in my opinion quite wrongly so – whether pre-award attachment is compatible with arbitration agreements which come under the New York Convention (see Van den Berg, thesis, p. 139 ff.; see also my article, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions', *ICSID Review – Foreign Investment Law Journal* (1988) p. 13 ff.).

To the aforementioned motivation for the addition of paragraph (2) of art. 1074, the MvA adds: 'The jurisdiction of the court respectively the President in this case shall be judged by the general rules of jurisdiction'. This will not cause any problems if the claimant or the defendant has his domicile or residence in the Netherlands (arts. 126-127 Rv). For pre-award attachment with respect to foreigners of no fixed residence within the Netherlands, see art. 765 ff. Rv.

In contrast to paragraph (2) of art. 1022, paragraph (2) of art. 1074 does not refer to the provisions of art. 1051 concerning summary arbitral proceedings (see section 7.4). The absence of this reference is logical because this paragraph relates to arbitration outside the Netherlands. As far as I know, the provisions of art. 1051 are unique in the sense that no other arbitration act so far contains

any regulation concerning summary arbitral proceedings. However, should there be a case in which the parties, under the law applicable to the arbitration agreement, have concluded a valid agreement for summary arbitral proceedings, then the President of a Dutch District Court will face the interesting question whether to apply the provisions of art. 1051 by analogy (i.e. the discretionary power to refer or not to refer the case to the agreed summary arbitral proceedings), or to follow the relevant provisions of the applicable law.

Within the framework of art. 1074(2) the question might also be asked whether a provisional examination of witnesses under art. 214 ff. may be carried out in case of an arbitration taking place outside the Netherlands. The District Court of Den Bosch judged, without giving further reasons, that this was possible with respect to an ICC arbitration (7 December, 1988, *Stork Brabant B.V.* v. *Rhode Island Insurance Ltd.*, TvA 1989/2, p. 59).

10.3 Recognition and enforcement of foreign award under treaties (art. 1075)

Article 1075 concerns the recognition and enforcement of a foreign arbitral award to which a treaty is applicable. Here we refer the reader to art. 1076 as well, which concerns recognition and enforcement of a foreign arbitral award to which no treaty is applicable. The provision contained in 1076 may also be applied if an applicable treaty allows a party to rely upon the law of the country in which recognition or enforcement is sought (which is the case for the New York Convention of 1958: the more-favourable-right provision of art. VII(1)).

Such a choice had been made by the claimant in *Tractoroexport v. Dimpex Trading B.V.* (President of the District Court of Amsterdam, 24 April 1991, TvA 1991/5, p. 184). Not completely right, therefore, was the President's consideration in the decision: 'The plea of Tractoroexport that art. 1075 ff. apply can be granted.' The phrasing ought to have been: '(...) art. 1076 Rv. (...)'. In connection with enforcement on the basis of a treaty as provided in art. 1075, it must be noted that the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968/78 does not apply to arbitration (art. 1(4)).

10.3.1 The New York Convention of 1958

The most important treaty for the recognition and enforcement of foreign arbitral awards is the aforementioned New York Convention of 1958 (see section 9.3.4(*b*)). The text of the Convention can be found in Appendix E.

The way in which courts have interpreted and applied the New York Convention is the subject of my thesis, *The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation* (Deventer 1981), quoted in summary form as Van den Berg, thesis. See also my New York Convention Commentary Cases in the Yearbook Comm. Arb. The Yearbook also annually reports new judicial decisions concerning the New York Convention (up to and including Vol. XVIII-1993, over 500 decisions have been reported).

The New York Convention not only provides for the recognition and enforcement of foreign arbitral awards, it also provides for the compliance with arbitration agreements (art. II(3)). The latter aspect has already been discussed in section 10.2.1 within the framework of art. 1074.

The recognition and enforcement of foreign arbitral awards under the New York Convention is provided for in arts. I and III-VII. Articles VIII-XVI are final provisions.

Recognition, which does not really play an important role separately in practice, will for brevity's sake not be discussed in the following treatment of the Convention. See Van den Berg, thesis p. 243.

The title of the Convention refers to the enforcement of *foreign* arbitral awards. Which arbitral awards can be regarded as 'foreign' and therefore come within the scope of application of the Convention is defined in art. I of the Convention. Article I(1) states that the Convention shall apply to the enforcement of arbitral awards made in the territory of a State other than the State where the enforcement is sought. This means that an arbitral award made in any foreign State comes under the Convention. However, art. I(3) enables a Contracting State to reserve the applicability for arbitral awards made in another *Contracting* State. Two-thirds of Contracting States (the Netherlands being one) have used this reservation.

An annually updated list of Contracting States (more than 90 at the moment) is published in Part V of the Yearbook Comm. Arb.

The place of arbitration is therefore the only relevant criterion for applicability of the Convention to the enforcement of arbitral awards. The Convention does not state any other conditions for its applicability. In particular, the nationality of the parties is irrelevant.

Consequently it may happen that the Convention is applied in Italy to the enforcement of an arbitral award made in London between two Italian parties. Article 2 of the Italian Code of Civil Procedure, forbidding two Italians to submit their disputes to a foreign court or arbitrator, is rendered inoperative by the Convention, which is *ius superveniens*. For example, see Corte di Appello, Venice, 26 January 1987, XIII Yearbook Comm. Arb. (1987) p. 493 ff. For the same reason an American defendant cannot prevent the applicability of the Convention to the enforcement of an arbitral award made in Switzerland on the basis of the defence that the claimant, the Algerian state-owned oil company Sonatrach, forms part of the Algerian State, and that Algeria is not a Party to the New York Convention (U.S. District Court (SDNY), 15 November 1983, *Sonatrach/Shaheen*, X Yearbook Comm. Arb. (1985) p. 540 ff.).

Article I(3) has a second possibility for making a reservation for the applicability of the Convention: the Convention will apply only to differences arising out of legal relationships, whether contractual or not, that are considered as 'commercial' under the national law of the State making such declaration. This reservation has been made by about one-third of the Contracting States. The Netherlands is not among them. This reservation has caused hardly any difficulties in practice.

Apart from the aforementioned criterion of territoriality, the Convention contains a second possibility for its applicability. Under art. I(1)(second sentence) the Convention shall also be applied to arbitral awards 'not considered as domestic [arbitral] awards in the State where their recognition and enforcement are sought'. This additional possibility for the scope of application of the Convention concerns those awards, which on the basis of an agreement between the parties are controlled by the arbitration law of a State other than the State in which the arbitral award will be made. This agreement is also referred to in art. V(1)(*e*) of the Convention: 'the country in which, *or under the law of which*, that award was made'. Such an agreement, however, leads to considerable complications and is for that reason hardly used in practice. See section 9.3.3 *in fine*. See also my article, 'Non-domestic Arbitral Awards under the 1958 New York Convention', *2 Arbitration International* (1986) p. 191 ff.

Article III of the New York Convention contains introductory provisions concerning the enforcement of arbitral awards to which the Convention applies. It

states that each Contracting State shall recognise these arbitral awards 'as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles'. The conditions of the Convention prevail over possible conditions of national law regarding the enforcement of foreign arbitral awards. On the other hand, the manner of enforcement has been left to national procedural law. Article 1075 accordingly states that arts. 985 to 991 Rv shall apply 'to the extent that the treaty does not contain provisions deviating therefrom' (see section 10.3.3). Article III of the Convention may also be regarded as the basis for the application of procedural law of the court in those cases connected with the enforcement for which the Convention does not provide (e.g. counter-claim and limitation).

Article IV of the Convention sets the conditions that must be satisfied by a party applying for enforcement of an arbitral award to which the Convention applies. These conditions have been reduced to a minimum: the party shall supply only a duly authenticated original award and original agreement, or duly certified copies of these documents.

Paragraph (2) of art. IV requires that if the arbitral award and the arbitration agreement are not made in an official language of the country in which the award is relied upon, the party applying for enforcement shall produce a translation of these documents into such language. Such a translation may be very costly, especially when the award and the agreement are voluminous documents. When these documents have been drawn up in English, French or German, such a translation is, in my view, superfluous in an enforcement procedure before a Dutch court, in view of the command of modern languages by members of the Dutch judiciary. When SPP sought enforcement of an arbitral award in the English language (the agreement had also been drawn up in English) against the State of Egypt, the President of the District Court of Amsterdam – in my opinion rightly – rejected Egypt's request for a Dutch translation. The President considered that he had a sufficient command of English. Pres. Rb Amsterdam, 12 July 1984, *SPP/Egypt*, NJ 1988, 12 (JCS), published in English in X Yearbook Comm. Arb. (1985) p. 487 ff. See Van den Berg, thesis, p. 258 ff.

Article V. If the party applying for enforcement has supplied the arbitral award and the arbitration agreement, he is entitled to a leave for enforcement, unless the opposing party asserts and furnishes proof of one of the grounds for refusal enumerated in paragraph (1) of art. V of the Convention. The court may also of its own accord refuse enforcement if the subject matter of the difference is not capable of settlement by arbitration under its national law, or if enforcement would be contrary to its national public policy (paragraph (2) of art. V).

The grounds for refusal enumerated in art. V possess three main characteristics. The first two have been laid down in the text of the Convention itself. The third has been developed in the judicial interpretation under the Convention. First, the party against whom enforcement is sought must assert and furnish proof of one or more of the grounds summarized in paragraph (1). If he fails in this proof, the exequatur court must grant leave for enforcement. The court must not apply these grounds of its own accord. Second, it is a complete enumeration of grounds. Grounds not mentioned cannot lead to refusal of enforcement. That includes, in particular, a review of the merits of the award by

the court. Such a review is excluded under the New York Convention (also under art. 985 Rv). Third, the grounds must be narrowly interpreted.

These main characteristics are generally accepted in case law and literature under the New York Convention.

Ground a of paragraph (1) of art. V concerns the absence of a valid arbitration agreement. Most judicial decisions regarding this ground deal with whether the arbitration agreement fulfils the requirement of the written form of the arbitration agreement as laid down in art. II(1) and (2).

In contrast to art. II(3) concerning compliance with the arbitration agreement, ground *a* of art. V(1) contains rules of private international law (conflict of laws rules) in order to establish the law applicable to the arbitration agreement. Article V(1)(*a*) states that: 'the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'. These conflict of laws rules have rarely been applied in practice because the arbitration agreement is usually valid if the strict requirements of art. II(1) and (2) have been fulfilled. See Van den Berg, thesis, p. 287 ff. Compare section 10.2.1 *in fine*.

Ground *b* of paragraph (1) of art. V provides that the violation of the right of both parties to a hearing is a ground for refusal of enforcement. Although this ground is very popular with defendants, it is seldom successful. Only in extreme cases do courts find that the right of both parties to a hearing has been violated. Likewise, short time limits for appointing arbitrators, the communication of statements and calling to the hearing are examples of possibilities that have never yet been accepted as grounds for refusal of enforcement under art. V(1)(*b*). A party must be given proper notice of the appointment of arbitrators and the arbitration proceedings. If that has been done and a defendant nevertheless defaults on the arbitration, he may not later on invoke any of the grounds for refusal mentioned in the Convention, particularly not ground *b* of art. V(1). Violation of the right of both parties to a hearing may also be brought under public policy, on the ground of which a court may, of its own accord, refuse enforcement (art. V(2)(*b*)).

The right of both parties to a hearing also implies that the arbitrator must inform a party concerning the arguments and the proof which the opposing party has presented. One of the few cases in which enforcement of an arbitral award was refused on account of violation of the right of hearing, concerned an arbitration in which an arbitrator in New York had not forwarded a relevant letter from the American claimant to the German defendant. The Oberlandesgericht [Court] in Hamburg on that ground refused enforcement of the award (decision of 3 April 1975, published in II Yearbook Comm. Arb. (1977) p. 241).

Ground c of paragraph (1) of art. V concerns the case in which the arbitral tribunal has decided beyond the scope of its mandate. Partial enforcement is possible if, and to the extent that, 'decisions on matters which may be submitted to arbitration can be separated from those not so submitted'.

Ground *c* should not be confused with the case in which the arbitral tribunal had no jurisdiction because a valid arbitration agreement was lacking. That case can be ranged under ground *a* of paragraph (1) of art. V. Ground *c* relates to the situation in which the arbitration agreement as such

is valid, but the arbitral tribunal has made decisions not falling within the mandate as defined by the arbitration agreement and the points in dispute submitted by the parties.

A defective application of the law or the facts does not fall under ground *c* (nor under any other ground of the Convention). This is a consequence of the aforementioned main characteristic that there can be no review of the merits of the case by the exequatur court.

As far as we know, ground *c* has until now only once given rise to a (partial) refusal of enforcement.

This was a case of infelicitous wording of an arbitration clause in a contract between a Syrian state enterprise and an Italian company for the construction of two bakery machines in Damascus and Aleppo: 'non-technical' disputes by means of local arbitration in Syria, and 'technical' disputes by means of ICC arbitration in Paris. The Corte di Appello in Trento refused enforcement of the Syrian award, because it deemed part of that award to relate to 'technical' disputes. (Decision of 14 June 1981, published in VIII Yearbook Comm. Arb. (1983) p. 386 ff.)

Ground d of paragraph (1) of art. V provides as a ground for refusal of enforcement that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. Pursuant to the text of ground *d*, the agreement of the parties in relation to the composition of the arbitral authority and the arbitral procedure comes first; only if such agreement is lacking may the arbitration law of the place of arbitration be applied in an enforcement procedure under the New York Convention. However, the question is whether the imperative rules of the arbitration law of the place of arbitration should not also prevail if the parties have made an agreement concerning the composition of the arbitral authority and the arbitral procedure that deviates from those provisions of imperative law.

In my view this question ought to be answered in the affirmative. See my article, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions', *ICSID Review – Foreign Investment Law Journal* (1988) p. 7 ff.

An example will serve to illustrate this difficult provision of the New York Convention. A number of standard charter parties provides for arbitration in London in which each party must appoint an arbitrator, and the two arbitrators thus appointed must choose a third arbitrator. If the defendant does not appoint an arbitrator, then under English law the odd rule applies, that the claimant may appoint his arbitrator as *sole* arbitrator (see Sect. 7(*b*) English Arbitration Act 1950), as interpreted in English case law (see R. Mustill and S. Boyd, *The Law and Practice of Commercial Arbitration in England*, London 1982, p. 146 ff.). Such an appointment of a sole arbitrator is not in conformity with the aforementioned agreement of the parties. Italian courts have therefore refused enforcement of an arbitral award made in London by a sole arbitrator appointed by the claimant, on the strength of art. V(1)(*d*) of the Convention (Corte di Appello, Florence, 13 April 1978, *Sally/Tarmarea*, published in IV Yearbook Comm. Arb. (1979) p. 294 ff.; similarly Corte di Appello, Genoa, 2 May 1980, published in VIII Yearbook Comm. Arb. (1983) p. 381).

American and Spanish courts, on the other hand, have allowed enforcement of such English arbitral awards. Notwithstanding the agreement of the parties, these courts based their judgments on English law and deemed the appointment of a sole arbitrator by the claimant valid (U.S. District Court (SDNY), 30 January 1980, *Associated Bulk Carriers of Bermuda/Mineral Import Export of Bucharest*, published in IX Yearbook Comm. Arb. (1984) p 462; Tribunal Supremo (Highest Court), 3 June 1982, *X/Naviera Y SA*, published in XI Yearbook Comm. Arb. (1986) p. 527).

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The Italian opinion places international arbitration in a 'no-win' position. If the arbitration law of the place of arbitration is followed, as in the above English case, then refusal of enforcement abroad follows on the basis of art. V(1)(*d*). If the agreement of the parties is followed in deviation from the law applicable to the arbitration, then the court of the place of arbitration (in this case the English court) may set aside the award on that ground. Setting aside of the award in the country where it was made causes refusal of enforcement abroad on the strength of art. V(1)(*e*) ('the award (...) has been set aside (...) by a competent authority of the country in which (...) that award was made'). The interpretation of the American and Spanish courts does not lead to such an unacceptable result.

Ground e of paragraph (1) of art. V states that enforcement of the arbitral award may be refused if the arbitral award 'has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'. In fact ground *e* contains three grounds for refusal of enforcement.

The *first ground* is that the award has not yet become 'binding' on the parties. The word 'binding' (in French: *'obligatoire'*) is generally understood to mean that no appeal to appeal-arbitrators or a court can be lodged against the award.

The Geneva Convention of 1927, the predecessor of the New York Convention, required that the award be final (*'définitive'*) in the country where it had been made. In practice the word 'final' was explained in the sense that a leave for enforcement in the country where it had been made was required. As leave for enforcement must also be obtained in the country where enforcement is sought, this interpretation resulted in the system of the so-called 'double-exequatur'.

The authors of the New York Convention deemed the obtaining of a leave for enforcement in the country where the award had been made to be a superfluous requirement. They abolished the system of the so-called 'double-exequatur' by replacing the word 'final' in the Geneva Convention by the word 'binding' in the New York Convention. Case law has unanimously explained and applied the word 'binding' in that sense, although opinions still differ as to the moment at which an award may be deemed to have become 'binding'. As far as we know, enforcement of an award has never been refused because it had supposedly not become 'binding' on the parties. See Van den Berg, thesis, p. 333 ff.

The *second ground* contained in ground *e* is that the arbitral award has been set aside by the court in the country where the award was made (or, in the theoretical case, under the law of which the award was made, see under Art. I *in fine* above).

This provision confirms the generally accepted principle of international arbitration that the court in the country where the award was made has exclusive jurisdiction to judge an application to set the award aside. The foreign court may only grant or refuse enforcement. The difference between the two is that the setting aside of an award has extraterritorial effect (i.e. is also operative abroad, as art. V(1)(*e*) of the New York Convention states), because after the award is set aside there is effectively no longer an arbitral award. The effect of a leave for, or refusal of, enforcement is in principle limited to the jurisdiction where the leave or refusal has been decided by the court. For that reason a court does not have to heed a foreign refusal of enforcement unless it concerns a refusal of enforcement in the country where the award was made which has the effect of setting aside the award, which is exceptional.

The attempt to get an arbitral award set aside in the country where it was made is seldom successful. Only in one out of more than 500 judicial decisions under the New York Convention has enforcement been refused on this ground. The Cour d'Appel in Paris refused enforcement of an arbitral award made in Geneva, because the court in Geneva had set aside that award on the ground that the arbitrators' decision was 'arbitrary' (decision of 20 June 1980, *Claude Clair/Berardi*, published in VII Yearbook Comm. Arb. (1982) p. 319 ff.).

The *third ground* contained in ground *e* is that 'enforcement has been suspended' (in the French authentic text it says: *'a été (...) suspendue'*) by a competent authority of the country in which the award was made. In general it is assumed suspension means a suspension of enforcement in the country where the award was made. The suspension of enforcement must have been ordered by a court; a suspension by operation of law in the country where the award was made is not a sufficient ground for refusal of enforcement under art. V(1)(*e*).

In France, for example, the filing of an application to set the award aside results by operation of law in the suspension of enforcement (art. 1506 of the Nouveau Code de procédure civile; this is different from the Netherlands: see art. 1066). The President of the District Court in Amsterdam rightly decided that this suspension by operation of law, which had been caused by Egypt's application to the French court to set aside the arbitral award, did not fall under art. V(1)(*e*) (decision of 12 July 1984, *SPP/Egypt*, NJ 1988, 12 (JCS), published in English in X Yearbook Comm. Arb. (1985) p. 487 ff.). A different view would imply that the losing party can impede enforcement throughout the world for a long period simply by instituting an action to set the award aside in the country where the award was made. See Van den Berg, thesis, p. 351 ff.

In connection with the setting aside and suspension of enforcement of the arbitral award in the country where it was made as a ground for refusal of enforcement under art. V(1)(*e*), we must point out *art. VI* of the Convention. That article provides that if an application to set aside the award or for the suspension of its enforcement 'has been made' to the court in the country where it was rendered, the foreign exequatur court may adjourn its decision on the enforcement. In addition, if this court decides to adjourn, it may, on the application of the party claiming enforcement, order the other party to give 'suitable security' (e.g. a bank guarantee). Article VI may be applied if the application to set the award aside has been made, or the request for suspension of enforcement has been filed, but the court in the country where the award was made has yet to reach a decision. If it has decided, and the award has been set aside or its enforcement suspended, the foreign exequatur court must refuse enforcement pursuant to art. V(1)(*e*).

Article VI gives the exequatur court the discretion to suspend or not to suspend its decision concerning enforcement. See Van den Berg, thesis, p. 353 ff.; see also my 'New York Convention – Commentary Cases', sub Article VI in Yearbook Comm. Arb. Article VI is discussed in greater detail in section 10.3.3. in connection with art. 988(2) Rv.

The grounds discussed above for refusal of enforcement enumerated in paragraph (1) of art. V must be asserted and proved by the defendant. As stated, *paragraph (2) of art. V* contains two grounds on which the court may of its own accord refuse enforcement: (a) the subject matter of the dispute is not capable of settlement by arbitration, and (b) the enforcement would be contrary to public policy. Ground *a* of paragraph (2) may be considered as a part of public policy. The division into two grounds in paragraph (2) has only historical significance.

When applying public policy by virtue of the New York Convention, courts in the Contracting States increasingly distinguish between domestic and international public order, although this distinction is not expressly made in the text of art. V(2). As a result of this distinction, certain matters, which by virtue of

domestic law of the country where enforcement is sought fall under public policy, are thought not to fall under the stricter criterion of international public policy. In the United States, matters such as disputes in relation to transactions concerning *securities* are not arbitrable. However, the U.S. Supreme Court decided that such disputes can be submitted to arbitration when the transaction is of an international nature.

Decision of 17 June 1984, *Scherk/Alberto Culver*, published in I Yearbook Comm. Arb. (1976) p. 203; the U.S. Supreme Court made an identical decision regarding antitrust matters, 2 July 1985, *Mitsubishi/Soler*, published in XI Yearbook Comm. Arb. (1986) p. 555 ff.

Another example of the distinction between domestic and international public policy is the even number of arbitrators. In a number of countries – the Netherlands being among them (see art. 1026) – an odd number of arbitrators is required by law, and an award made by an even number of arbitrators may be set aside. However, courts in these countries have allowed enforcement of foreign arbitral awards made by an even number of arbitrators in a country where an even number is not forbidden, considering that the prohibition under their domestic law was not such that it could also be regarded as falling under the stricter international public policy. The same view is held by the courts with respect to arbitral awards not containing reasons, which are mandatory in the award in a number of countries (including the Netherlands, see art. 1057(4)(*e*)), but not in others (e.g. England and the United States).

The public policy identified in art. V(2) of the Convention must be judged under the law of the country where enforcement is sought. Despite its qualification, that also goes for 'international public policy'. Yet the case law under the Convention in the various countries tends towards a unanimous view regarding the question of which matters fall under international public policy. This tendency has caused some authors to speak of a third category of public policy: 'ordre public réellement international', i.e. truly international public policy (next to the first and second categories of domestic and international public policy). See, for example, P. Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series no. 3 (Deventer 1986) p. 257 ff. For that matter, this publication contains an excellent discussion of the several aspects of public policy and international arbitration by prominent authors from different countries (pp. 177-362).

The courts in the Contracting States have seldom refused enforcement of an arbitral award on the ground of violation of public policy. This is not only the result of the distinction between domestic and international public policy. It also results from the generally held view that the Convention must be interpreted and applied in favour of international arbitration.

For a survey of case law see Van den Berg, thesis, p. 360 ff. and 'New York Convention – Commentary Cases', sub Article V(2) in Yearbook Comm. Arb.

10.3.2 Bilateral conventions

In section 9.3.4(*h*) it was already noted that bilateral conventions primarily relate to the enforcement of judicial decisions, and only occasionally provide

for the enforcement of arbitral awards made in the other Contracting State. One of the few bilateral conventions between the Netherlands and another country that also contains provisions concerning the enforcement of arbitral awards is the Belgian-Dutch Convention of 1925.

This bilateral convention (published in *Nederlandse Wetgeving*, B, VIB under S) is still applicable because art. VII(1) of the New York Convention contains the more-favourable-right provision. Under art. 15 in conjunction with 11 of the Belgian-Dutch Convention, the arbitral award must satisfy the following conditions:

1 the decision shall not contain anything contrary to public policy, or to principles of public law of the country where the award is invoked;
2 the award shall be enforceable in the country where it was made, although means of recourse are open against that award;
3 the copy of the award submitted shall, under the laws of the country where the award was made, satisfy such conditions as warrant its authenticity;
4 the parties shall have had legal representation or it shall have been decided that they have not appeared after having been duly summoned.

The second condition is more stringent than the New York Convention, because the Belgian-Dutch Convention involves the obtaining of leave for enforcement in the country where it was made. As was set forth before in connection with ground *e* of art. V(1) of the New York Convention, this requirement of a 'double-exequatur' does not apply under the latter Convention. In other respects the Belgian-Dutch Convention is less demanding than the New York Convention. For example, ground *c* (matters beyond the scope of the submission to arbitration) and ground *d* (composition of the arbitral authority or arbitral procedure not in accordance with the agreement of the parties, or, failing such agreement, with the law of the country where the arbitration took place) of art. V(1) of the New York Convention do not occur in the Belgian-Dutch Convention.

For arbitral awards made in Belgium between Dutch and non-Belgian parties (e.g. an ICC arbitration between a Dutch and a Spanish party in Brussels), these differences may cause difficulties for enforcement in the Netherlands on the basis of the Belgian-Dutch Convention. As a result of recent amendments in Belgium, the possibility of setting aside an arbitral award between two non-Belgian parties has been radically excluded by the Belgian court (see H. van Houtte, 'De Belgische Wet van 27 maart 1985 inzake internationale arbitrage' (The Belgian Act of 27 March 1985 concerning international arbitration), TvA 1986/1 p. 1 ff.).

The German-Dutch Convention on Enforcement of 1962 (published in Trb. 1963, 50 and 1965, 155) states in art. 17 that the recognition and enforcement of arbitral awards will continue to be provided for 'by Conventions on recognition and enforcement which are or will be operative between the two States'. The Convention on Enforcement of 1967 between Great Britain and the Netherlands (published in Trb. 1967, 197), contains no provisions concerning the enforcement of arbitral awards.

The Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America, 1956 (published in Trb. 1956, 40) in art. V(2)(*b*)(2) refers to the Geneva Convention of 1927 for enforcement in the Netherlands, and for enforcement in the United States refers to the way in which arbitral awards are enforced within the United States. As both the Netherlands and the United States have become Parties to the New York Convention, the Geneva Convention of 1927 must be considered to have become inoperative (art. VII(2) of the New York Convention). For refusal of enforcement of an arbitral award made in Minnesota because it had not been 'confirmed' by a court in Minnesota, see HR 18 April 1969, NJ 1969, 350.

10.3.3 Articles 985 to 990 inclusive Rv

Article 1075 declares that articles 985 to 991 inclusive (now arts. 985 to 990 inclusive) apply accordingly 'to the extent that the treaty does not contain provisions deviating therefrom'. Moreover, art. 1075 designates the President of the District Court as the competent judge (instead of the District Court itself, as provided for in art. 985 Rv), and provides a time limit of two months to appeal from his decision and for recourse to the Supreme Court (instead of one month, as provided for in art. 990 Rv).

Articles 985 to 990 are contained in Book III, Title Nine, of the Code of Civil Procedure ('Van de formaliteiten, vereist voor de tenuitvoerlegging van in vreemde Staten tot stand gekomen executoriale titels' (Of the procedures required for the enforcement of judgments established in foreign States)). See P. Vlas, *Burgerlijke Rechtsvordering* (Civil Procedure), III, p. 360a ff. Since 1 January 1992 arts. 987-990 have been slightly altered (art. 991 has been repealed).

Article 985 states that when a decision, made by the court of a foreign State, is enforceable in the Netherlands under treaty or law, it can only be enforced after judicial leave for enforcement has been obtained.

Article 985, in conjunction with 1075, designates as the competent court the President of 'the District Court of the district where the party opposing the petitioner is domiciled, and the District Court of the district where enforcement is requested'. Consequently the petitioner can choose between the President of the District Court of the district where the opposing party lives, and that of the place where he wants to enforce the arbitral award. This second option is relevant if enforcement is sought against a debtor who has no domicile here in the Netherlands (e.g. by means of attachment of bank deposits in the Netherlands of a foreign debtor).

These rules of jurisdiction differ from the rules laid down in art. 429*c* Rv. Under this article, the competent court is the court of the domicile or, failing such, of the actual residence of the petitioner (i.e. not of his opposing party, as stated in art. 985 Rv). If a party has no domicile or actual residence in the Netherlands, then the court at The Hague has jurisdiction. Article IV of the new Arbitration Act declares arts. 429*a* to 429*r* inclusive applicable to 'matters which under this Act must be initiated by means of a request'. The application for enforcement of a foreign arbitral award under art. 1075 (and art. 1076) could be regarded as such a matter. It is assumed, though, that the rules of jurisdiction provided in art. 985 prevail over the general provision contained in art. IV of the Act. The reason for this is that art. 1075 explicitly declares arts. 985 to 991 inclusive applicable. Should the application for enforcement be made to a President who has no jurisdiction, then he can still decide on the matter if the opposing party does not raise a plea as to jurisdiction, as this is a matter of relative jurisdiction. See Vlas, *loc. cit.*, p. 361.

Furthermore, article 985 explicitly states that there will be no review of the merits of the award. The New York Convention is interpreted in a similar sense (see the main characteristics of art. V of the New York Convention).

Article 986 deals with the manner in which the application for leave must be filed. Paragraph (2) of art. 986 requires that 'an authenticated copy of the decision' be submitted. If the enforcement is based on the New York Convention, however, both the arbitral award (legalised original or certified copy), and the arbitration agreement (original or certified copy) shall be supplied (art. IV of the Convention).

Paragraph (2) of art. 986 also requires that documents shall be submitted 'that establish that (the arbitral award) is enforceable in the country where it was made'. This requirement does not apply to arbitral awards that fall under the New York Convention because the Convention abolished the system of the so-called 'double-exequatur' (see ground *e* of paragraph (1) of art. V).

For the translations mentioned in paragraph (3) of art. 986, reference is made to the relevant remarks under art. IV(2) of the New York Convention.

Pursuant to art. 987, in conjunction with 1075, the President is to make his decision 'with due speed' after hearing the party against whom the enforcement is requested. Thereto, this party must be summoned by the petitioner by means of a writ.

Article 988(2) states: 'The decision is provisionally enforceable without security having to be given, to the extent that the (President of the) District Court does not decide otherwise'. This provision deviates from art. 429p(1): 'Appeal suspends the effect unless the decision has been declared provisionally enforceable.' A possible other decision by the President in the sense of art. 988(2) (i.e. a declaration that the award is not provisionally enforceable, or an order that security be given by the petitioner), is intended for the case in which the arbitral award can still be set aside in the country where it was made. For arbitral awards whose enforcement is requested on the basis of the New York Convention, this subject matter has been largely provided for in art. VI of the Convention. In accordance with this article, the exequatur court has a discretionary power to suspend its decision concerning enforcement if the setting aside (or suspension of enforcement) has been ordered in the country where it was made. In case of suspension, it also has the discretion to order the party against whom enforcement is sought to give suitable security.

In my opinion, the exequatur court, under art. VI of the Convention, will not suspend its decision and immediately set about granting the leave for enforcement when it is unlikely that the setting aside of the arbitral award in the country where it was made has a chance of success. In that case the decision of the President of the District Court must be provisionally enforceable, and to that extent he may not decide otherwise in accordance with art. 988(2). If this were not so, he would act contrary to the New York Convention. The President could, in this case, possibly order the *petitioner* to give security in case the arbitral award is, yet, set aside in the country where it was made. Such security has not been provided for in art. VI of the Convention and can therefore be based on art. 988(2).

If, on the other hand, the exequatur court suspends its decision on enforcement under art. VI of the New York Convention, pending the procedure for setting aside in the country where the award was made, it may order the *opposing party* to give suitable security. Such security has been provided for in art. VI of the Convention. The order for this security should, in my view, be given when it is uncertain that the defendant will comply with the arbitral award if the setting aside request in the country where the award was made is rejected.

Articles 989 and 990 in conjunction with 1075 concern the legal remedies against the decision of the President of the District Court. As already stated above, the time limit for appeal and recourse to the Supreme Court is two months.

10.4 Recognition and enforcement of foreign award without treaties (art. 1076)

10.4.1 Introduction

Article 1076 provides, under certain circumstances, for the enforcement of foreign arbitral awards in the Netherlands without applying a treaty. Few countries have such a special statutory regulation for the enforcement of foreign arbitral awards.

West Germany is an example of a country that has a special statutory provision (art. 1044 of the Zivilprozeßordnung – ZPO), although this provision is substantially less detailed than art. 1076.

The regulation contained in art. 1076 is totally new for the Netherlands. Before the introduction of the new Arbitration Act, a foreign award could in principle not be enforced in the Netherlands. There was (and theoretically still is) the possible enforcement of a foreign arbitral award by means of an application for compliance with the arbitral agreement, in which the parties bind themselves to act in accordance with the foreign decision of arbitrators. For this troublesome procedure, see HR 6 December 1918, NJ 1919, 129; J.C. Schultsz, 'Recognition and Enforcement of Foreign Arbitral Awards Without a Convention Being Applicable', in *The Art of Arbitration*, Deventer 1982, p. 295 ff.

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Article 1076 applies to an arbitral award made in any foreign State. No condition of reciprocity is attached to it.

The absence of any condition of reciprocity in art. 1076 may help in enforcing arbitral awards made *in the Netherlands* in those countries that have not acceded to the New York Convention. In such countries reciprocity is usually stipulated as a condition for the enforcement of foreign arbitral awards. For Dutch awards, art. 1076 may then be invoked in support of the argument that the Netherlands would also enforce an award made in the country in question, without a treaty being applicable.

The absence of any condition of reciprocity in art. 1076 contrasts, for that matter, with the reservation which the Netherlands made when acceding to the New York Convention in 1964. In accordance with art. I(3) of the Convention, the Netherlands then stated that 'on the basis of reciprocity (...) (it) will apply the Convention to the recognition and enforcement of awards made only in the territory of another *Contracting* State'. In the light of the new article 1076, this reservation should, in my opinion, be revoked.

Article 1076 regards two situations: first, foreign arbitral awards to which no enforcement treaty applies. This will not often be the case, as the New York Convention has been ratified by more than 90 countries.

The second situation has greater relevance to actual practice. Article 1076 may, under the first paragraph, also be applied if an applicable treaty allows 'a party to rely upon the law of the country in which recognition or enforcement is sought'. The second possibility has been specifically included in art. 1076 in view of the more-favourable-right provision of art. VII(1) of the New York Convention: 'The provisions of the present Convention shall not (...) deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law (...) of the country where such award is sought to be relied upon.' Consequently, the New York Convention allows a party to found a request for enforcement on art. 1076 rather than on the Convention itself. The provisions of art. 1076 may be useful for a petitioner in several respects.

Two examples illustrate this. The ground for refusal of enforcement contained under A*a* of paragraph (1) of art. 1076 concerns the absence of a valid arbitration agreement 'under the law applicable thereto'. In most cases, domestic law appears to set less stringent formal requirements for the arbitration agreement than the 'agreement in writing' required by art. II(1) and (2) of the New York Convention (see section 10.2.1 *in fine*). The second example is paragraph (2) to (4) of art. 1076. Pursuant to those provisions, the grounds for refusal of enforcement mentioned in A*a* to A*c* of paragraph (1) of art. 1076 may be waived (i.e. not claiming before submitting a defence that a valid arbitration agreement is lacking; that the arbitral tribunal has been constituted in violation of the rules applicable thereto; or that the arbitral tribunal has not complied with its mandate). Such a waiver of the law has not been explicitly provided for in the New York Convention.

A petitioner must choose between the New York Convention and art. 1076 as a basis for the enforcement of the foreign arbitral award. He cannot combine elements favourable to him from the two (see Van den Berg, thesis, p. 85 ff.). There is a possibility to use one basis primarily and the other as an alternative.

In general, article 1076 follows the system of the New York Convention. The petitioner must fulfill a minimal number of conditions only (see section 10.4.2 below; compare art. IV of the New York Convention). He is then entitled to leave for enforcement, unless the other party asserts and proves one or more of

the exhaustively enumerated grounds for refusal of enforcement, or the court deems enforcement contrary to public policy (see section 10.4.3 below; compare art. V of the New York Convention). Finally, the court may suspend enforcement if a procedure for setting aside the arbitral award has been commenced in the country where the award was made (see section 10.4.3 under ground A*e* below; compare art. VI of the New York Convention).

10.4.2 Conditions to be fulfilled by the petitioner

The petitioner only needs to submit the original or a certified copy of the arbitration agreement and arbitral award.

These conditions are equivalent to those in art. IV(1) of the New York Convention. The regulation of art. 1076(1) deviates from art. 986(2), which requires submission of an authenticated copy of the decision. The President of the District Court may order a translation of these documents if they have not been drawn up in Dutch (art. 986(3) in conjunction with 1076(6); see section 10.4.4).

10.4.3 Grounds for refusal of enforcement

Like art. V of the New York Convention, paragraph (1) of art. 1076 divides the grounds for refusal of enforcement into two categories. Category A concerns the grounds that the party against whom enforcement is sought must assert and prove. Category B consists of a ground (violation of public policy) that the court may apply *ex officio*.

In drawing up the grounds for refusal of enforcement in art. 1076, the legislature has, on the one hand, tried to connect them with the grounds for setting aside mentioned in art. 1065, while, on the other hand, taking into account the grounds for refusal of enforcement named in art. V of the New York Convention (MvT p. 35; TvA 1984/4A p. 52).

The grounds for refusal of enforcement named in A*a*, A*b*, A*c* and B of art. 1076(1) are almost identical to the grounds for settting aside an award contained in paragraph (1) under *a*, *b*, *c* and *e* of art. 1065. When comparing these grounds it must be borne in mind, however, that arts. 1065 and 1076 deal with two different actions. Article 1065 concerns the setting aside of an arbitral award made in the Netherlands (compare section 8.3). In contrast, art. 1076 concerns the enforcement in the Netherlands of an arbitral award made in a foreign State.

In this connection it may be noted that the grounds for refusal of enforcement enumerated in art. V of the New York Convention and in art. 1076 are considerably more detailed than those provided in art. 1063(1) for refusal of enforcement of an award made *in the Netherlands* ('if the award or the manner in which it was made is manifestly contrary to public policy or good morals....'). This difference is due to the fact that the legislature wanted to concentrate the control of arbitral awards made in the Netherlands in the action to set aside the arbitral award.

Such a division of control of the arbitral award has not been provided for in the UNCITRAL Model Law (see section 9.1). The Model Law provides that the grounds for refusal of enforcement of an arbitral award made both inside a Model Law country and outside that Model Law country are virtually identical to the grounds for setting aside of an arbitral award made in the Model Law country (arts. 34 and 36 of the Model Law, published in XI Yearbook Comm. Arb. (1986) p. 380 ff.). The effect of these grounds in the Model Law – which are, for that matter, nearly identical to

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the grounds mentioned in art. V of the New York Convention – is that, for an arbitral award made in the Model Law country, the defendant has the opportunity to invoke the same grounds in both the enforcement procedure and the procedure to set the award aside.

In drawing up the grounds for refusal of enforcement contained in art. 1076, the legislature has taken into account the grounds for refusal provided in art. V of the New York Convention. The result is that the three main characteristics of art. V of the Convention also apply to art. 1076. First, the party against whom enforcement is sought must assert and prove the grounds provided in paragraph (1) sub A (art. 1076(1): 'asserts and proves'). The court may not apply these grounds of its own accord. Second, the grounds in art. 1076(1) form an exhaustive enumeration. Grounds not mentioned cannot lead to refusal of enforcement. That includes, in particular, a review of the merits of the award by the court (art. 985, which applies pursuant to art. 1076(6): 'The merits of the case shall not be reviewed.') Finally, the grounds must be narrowly interpreted.

Ground A*a* for the refusal of enforcement states that 'a valid arbitration agreement under the law applicable thereto is lacking'.

As in art. 1074(1), the legislature has not deemed it necessary to include separate rules of private international law (conflict of laws rules) in order to establish the law applicable to the arbitration agreement.

For this matter, see section 10.2.1 under 'third condition'. It has already been explained above that domestic laws concerning arbitration usually set less stringent requirements for arbitration agreements than art. II(1) and (2) of the New York Convention (compare, for instance, art. 1021). In some countries, even oral arbitration agreements are valid. In connection with the waiver pursuant to paragraph (2) of art. 1076, which will be discussed hereafter, this is probably one of the principal reasons why, in practice, a party seeking enforcement will invoke art. 1076, rather than art. 1075, in conjunction with the New York Convention.

The validity of an arbitration agreement under a certain law can be easily verified in many cases in no. II.1 of the National Report of the country in question in Int. Handbook Comm. Arb., Deventer, loose-leaf edition.

It is not completely clear whether the requirement that the dispute be capable of arbitration must also be determined under the law applicable to the arbitration agreement. The arbitrability of a dispute must in any case be viewed as involving a question of public policy (ground B of art. 1076(1)). This means that it will, in principle, be determined under Dutch law (possibly according to the stricter criterion of international public policy; about this, see art. V(2) of the New York Convention as discussed in section 10.3.1). But must the arbitrability also (i.e. cumulatively) be determined by the foreign law applicable to the arbitration agreement? The MvT (p. 35; TvA 1984/4A p. 52) apparently answers that question in the affirmative. I think that there are good grounds for a negative answer. See Van den Berg, thesis, p. 152 ff., 288 ff. and 369 ff. in connection with the comparable ground *a* of art. V(1) of the New York Convention.

An important limitation of the right to seek refusal of enforcement on the grounds that there is no valid arbitration agreement is found in paragraph (2) of art. 1076. Pursuant to this limitation, ground A*a* cannot lead to refusal of enforcement if the party seeking to rely on it: (1) has made an appearance in the arbitral proceedings, and (2) has not raised the plea that the arbitral tribunal lacks jurisdiction on the ground that a valid arbitration agreement is lacking before submitting a defence.

The provisions of paragraph (2) correspond with art. 1065(2), in conjunction with 1052(2), for arbitration within the Netherlands (see sections 7.5.2 and 8.3.3). The purpose of these "raise or waive" provisions is to prevent heeldragging by defendants. If a defendant seriously thinks that a valid arbitration agreement is lacking, he will have to say so before the arbitration proceeds further. A defendant should not be given the opportunity to withhold his plea as to jurisdiction in order to find out first if the arbitration is progressing favourably.

Paragraph (2) of art. 1076 does not state the exception mentioned in art. 1052(2) – that the right of raising a plea that a valid arbitration agreement is lacking is considered as not having been waived with respect to the question of whether the dispute is capable of settlement by arbitration. The absence of this exception in art. 1076(2) is, in my view, all the more reason not to judge the arbitrability under the law applicable to the arbitration agreement. Above, we have drawn attention to the desirability of answering this question within the framework of art. 1076 only in the light of Dutch law (possibly while applying the stricter criterion of international public policy).

Few other arbitration laws contain provisions of waiver analogous to art. 1052(2) in conjunction with 1065(2) (or to art. 1052(3) in conjunction with 1065(3), and art. 1065(4)). If no waiver takes place in accordance with the foreign law applicable to the arbitration (and consequently to the arbitral award), this does not detract from the provisions concerning waiver mentioned in art. 1076(2) to (4) . The Dutch legislature is at liberty to implement the enforcement of foreign arbitral awards in accordance with Dutch law (i.e. disregarding treaties, provided they allow this) under conditions that it thinks fit.

A consequence of the provisions concerning waiver contained in art. 1076(2) to (4) may be that under the foreign law applicable to the arbitral award, no waiver has taken place, whereas there has been such implementation in accordance with art. 1076(2) to (4) . The system of art. 1076 has been organised in such a way, however, that it may prevent a foreign award from being enforced in the Netherlands, whereas that cannot be done in the country where the award was made. For if under the law applicable to the arbitral award, a party may yet raise a plea that a valid arbitration agreement is lacking, he can nearly always ensure that the award is set aside on that ground in the country where it was made. (The same holds for the incorrect constitution of the arbitral tribunal, and the arbitral tribunal's non-compliance with its mandate, as provided in paragraphs (3) and (4) of art. 1076.) If such an application results in the setting aside of the award in the country where it was made, then enforcement in the Netherlands may be refused on the basis of ground A*e* of art. 1076(1) ('the arbitral award has been set aside by a competent authority of the country in which that award is made'). For the sake of completeness, it may be added that if the application for setting aside has been commenced in the country where the arbitral award was made, but the court in that country has not yet decided on it, the Dutch court may, in accordance with paragraph (7) of art. 1076, suspend its decision concerning enforcement (with a possible order that the opposing party give security; see section 10.4.4 in connection with art. 988(2)).

The provisions concerning waiver in art. 1076(2) to (4) are all limited to a defendant who has appeared in the arbitral proceedings (apart from the very infrequent case of the first sentence of paragraph (3), that the defendant has participated in the constitution of the arbitral tribunal but has subsequently not appeared in the arbitral proceedings, in the sense that he has not submitted any defence). These provisions therefore apply to a party who has actively participated in the arbitral proceedings. If a party has defaulted, then the grounds mentioned in A*a*, A*b* and A*c* may lead to refusal of enforcement.

Ground A*b* for refusal of enforcement states that 'the arbitral tribunal is constituted in violation of the rules applicable thereto'. The 'rules applicable thereto' are the rules concerning the appointment of arbitrators under the law applicable to the arbitration. Furthermore, the parties themselves may also have agreed on rules concerning the appointment (e.g. by referring to arbitration rules). In that case, the rules agreed on by the parties apply to the extent that they are not contrary to imperative provisions of the law applicable to the arbitration (e.g. an even number of arbitrators, when the law applicable to the arbitration stipulates an odd number).

Ground A*b* is considerably clearer in this respect than art. V(1)(*d*) of the New York Convention. See section 10.3.1.

It also goes for ground A*b* that it may be waived. Pursuant to paragraph (3) of art. 1076, ground A*b* does not lead to refusal of enforcement if the party invoking that ground has participated in the constitution of the arbitral tribunal. Nor does ground A*b* lead to refusal of enforcement if a party has *not* participated in the constitution of the arbitral tribunal but: (1) has made an appearance in the arbitral proceedings, and (2) has failed to raise the plea that the arbitral tribunal lacks jurisdiction on the ground that the arbitral tribunal is constituted in violation of the applicable rules before submitting a defence.

Article 1076(2) corresponds with art. 1052(2), in conjunction with 1065(3). For a general explanation of the provisions concerning the waiver in art. 1076(2) to (4), the reader is referred to the relevant remarks above under ground A*a*.

Ground A*c* for refusal of enforcement states that 'the arbitral tribunal has not complied with its mandate'.

This ground also corresponds with a ground for setting aside an arbitral award made in the Netherlands (art. 1065(1)(*c*); see section 8.3.3). The mandate of arbitrators consists of a substantive part (the issues to be dealt with in their award), and a procedural part (the rules the arbitrators must follow in the arbitral proceedings).

The *substantive part* comprises the mandate given to the arbitrators by the law or the parties to decide in accordance with the rules of law or as *amiables compositeurs*. An incorrect application of the law or an unfair decision is not included.

The institution of *amiable compositeur* occurs particularly in civil law countries (*'ex aequo et bono'*; compare art. 1054(3)). In common law countries, this institution is little known. That is one of the reasons why art. 45(2) of the NAI Arbitration Rules states that in an international arbitration, the arbitral tribunal shall decide in accordance with the rules of law unless the parties agreed to authorise it to decide as *amiable compositeur*.

The consideration of the question of whether the arbitral tribunal has dealt with all the issues cannot be connected with the question of whether the arbitral tribunal has adequately applied the substantive law agreed to by the parties. The only question that matters is *whether* the arbitrators have applied that law, not *how* they have applied it. An investigation by the exequatur court into the manner in which the arbitral tribunal applied the applicable substantive law would be equivalent to a review of the merits of the case, which is prohibited within the framework of art. 1076 (and art. 1065) (art. 1076(6) in conjunction with art. 985). The same holds for the manner in which the arbitral tribunal has interpreted and applied the contract between the parties.

Nor can the exequatur court institute an investigation into the fairness of an award if the parties have authorised the arbitral tribunal to decide as *amiable compositeur*. The only thing that the exequatur court is allowed to do is investigate *whether* the arbitral tribunal has decided as such. About this, see P. Sanders in TvA 1988/2 p. 48.

The substantive part of the mandate to the arbitrators also comprises the disputes that the parties have submitted to them to decide, within the definition of the scope of the arbitration agreement. If the arbitrators' decision exceeds or is different from what was claimed, then the arbitral award is capable of partial

enforcement 'to the extent that the part of the award which is in excess of or different from the claim can be separated from the remaining part of the award' (art. 1076(5)).

Article 1076(5) corresponds with art. 1065(5). In contrast to art. 1065(6) and (7) in conjunction with art. 1061, however, art. 1076 does not provide for the arbitral tribunal's failure to decide on one or more of the claims. Such a provision would not have been conceivable within the framework of the enforcement of foreign arbitral awards because the possibility of an additional arbitral award depends on the law applicable to the arbitration. The comparable article V(1)(*c*) of the New York Convention also does not contain a provision for an arbitral award that fails to decide on one or more of the claims. With respect to that provision, I have argued that such an award does apply for enforcement under the Convention. See Van den Berg, thesis, p. 320 ff. The same argument could be followed regarding ground A*c* of art. 1076(1). Similarly, Burg. Rv IV, art. 1076, note 5 (H.J. Snijders). Not fully clear is P. Sanders, *Het nieuwe arbitragerecht*, pp. 267-268. On the one hand Sanders argues that in case of failure to decide he is inclined 'to allow an appeal here to paragraph (4) (he probably means (5); *vdB*), to put "failure to decide" under "different from what was claimed". It is not a case of in excess of what was claimed, but of less than what was claimed. With a little good will this can, in my opinion, be ranged under "different". On the other hand, Sanders argues that art. 1076 does contain a provision regarding 'failure'. For, according to Sanders, this is a case in which the arbitrators do not comply with their mandate. In his view it cannot be asserted therefore, that art. 1076, like the New York Convention, does not speak of 'failure'.

The *procedural part* of the mandate to the arbitrators comprises the provisions concerning the arbitral proceedings and the arbitral award, which the arbitrators must observe under the law applicable to the arbitration. If the parties have also agreed to state the manner in which the arbitrators shall act in the arbitral proceedings (e.g. by referring to arbitration rules), the arbitrators are thereby bound. In that case, the rules agreed to by the parties shall apply to the extent they are not contrary to imperative provisions of the law applicable to the arbitration.

As with ground A*b*, ground A*c* is clearer in this respect than art. V(1)(*d*) of the New York Convention. See section 10.3.1.

Similar to grounds A*a* and A*b*, ground A*c* may also be waived. Pursuant to paragraph (4) of art. 1076, ground A*c* does not lead to refusal of enforcement if the party who invokes it has participated in the arbitral proceedings, but, knowing that the arbitral tribunal did not comply with its mandate, has not invoked the non-compliance with the mandate.

Article 1076(3) corresponds with art. 1065(4). For an explanation of the provisions concerning waiver in art. 1076(2) to (4), the reader is again referred to the relevant remarks made under ground A*a*.

The waiver in accordance with paragraph (3) of art. 1076 will in most cases relate to the procedural part of the mandate. During the arbitral proceedings, a party will usually not be able to verify whether the arbitral tribunal complies with its mandate as to the substance. That generally becomes apparent only in the arbitral award.

Ground Ad for refusal of enforcement states that 'the arbitral award is still open to an appeal to a second arbitral tribunal, or to a court in the country in which the award is made'.

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This ground corresponds with the first ground mentioned in ground *e* of art. V(1) of the New York Convention (that the arbitral award 'has not yet become binding on the parties'; see section 10.3.1). The current interpretation of the word 'binding' in the New York Convention has been laid down in so many words in ground A*d* of art. 1076(1).

This clear provision avoids the awkward question of at which moment an arbitral award must be thought of as having become 'binding' on the parties, and especially, whether this question must be considered under the law applicable to the arbitral award.

The agreement to arbitral appeal is rare (except for a number of commodity arbitrations). Appeal to a court is extremely rare. This appeal must be an appeal on the merits of the case and does not include the institution of the extraordinary legal remedy of setting aside the arbitral award in the country where it was made.

The authors of the New York Convention intended, by using the word 'binding', to abolish the system of the so-called 'double-exequatur'. Similarly, a leave for enforcement in the country where the award was made is no condition for enforcement in accordance with art. 1076. Paragraph (6) of art. 1076 eliminates any doubts about that by stating explicitly that 'no documents need be submitted evidencing the enforceability of the arbitral award in the country in which it was made' (in deviation from art. 986(2)).

Ground Ae for refusal of enforcement states that 'the arbitral award has been set aside by a competent authority of the country in which that award is made'.

The application of ground A*e* requires the arbitral award to *have been* set aside in the country in which it was made (which rarely occurs in practice). It is not sufficient that the application to set the award aside be made (which does happen every now and again in practice). In the latter case, the exequatur court can, at best, suspend its decision concerning enforcement and, if so, it may order the defendant to give security in the enforcement procedure.

The same system applies under art. V(1)(*e*) in conjunction with VI of the New York Convention (see section 10.3.1). The New York Convention adds another ground for refusal of enforcement, specifically that enforcement 'has been suspended' by the court of the country in which the award was made. This ground was also included in ground A*e* of the original draft. In the amended draft this ground has – fortunately – been deleted. Suspension of enforcement in the country where the award was made should not be a ground for refusal of enforcement of a foreign arbitral award. Nor should it, in my opinion, have been included in art. V(1)(*e*) of the New York Convention. Suspension of enforcement is of a preliminary nature; it is nearly always ordered within the framework of a procedure to set an award aside in the country where the award was made (compare art. 1066). If enforcement of an arbitral award has been suspended by operation of law or by the court in the country where it was made, it has not yet been set aside in that country. Thus, it would be premature to proceed in refusing its enforcement abroad. Similarly: MvA p. 41 (TvA 1986/2 p. 94).

The refusal of enforcement of the award by the court of the country where it was made was also a ground for refusal of enforcement under ground A*e* of the original draft. This ground too has – fortunately – been deleted in the amended draft. As explained before, leave for and refusal of enforcement have no extraterritorial effect. This effect is reserved for the setting aside of an award in the country where it was made, because after the setting aside there is no longer an arbitral award as such. In that respect the original draft extended further than the New York Convention because

the Convention does not consider the refusal of enforcement by the court in the country where it was made as one of the grounds for refusal of enforcement under the Convention.

In exceptional cases, a refusal of enforcement in the country where it was made may have the effect of a setting aside of the award in that country. If the defendant can furnish sufficient proof of this, enforcement in the Netherlands may be refused on the strength of ground A*e* of art. 1076(1).

We have discussed above the situation in which an application has been made to set aside the arbitral award in the country where it was made, but the court in that country has not yet made a final decision. In that situation, the Dutch court may suspend its decision on enforcement under the provisions of *paragraph (7) of art. 1076*. For that situation, paragraph (7) declares that the provisions of art. 1066(2) to (6) inclusive shall apply accordingly.

Article 1076(7) in conjunction with art. 1066(2) to (6) inclusive is discussed in section 10.4.4 in connection with art. 988(2) Rv.

Category A of the grounds for enforcement enumerated in paragraph (1) of art. 1076 discussed above must be asserted and proven by the party against whom enforcement is sought. As stated before, *category B* of paragraph (1) of art. 1076 contains the ground on which the court may of its own accord refuse enforcement, namely when 'the court finds that the recognition or enforcement would be contrary to public policy'.

If the dispute is not capable of settlement by arbitration, this may also be contrary to public policy (for historical reasons this has been mentioned as a separate ground *a* in art. V(2) of the New York Convention).

Apparently it was the legislature's intention to ensure that ground B of paragraph (1) of art. 1076 be interpreted and applied in the same way as paragraph (2) of art. V of the New York Convention. Therefore, it suffices here to refer to the discussion of these provisions in section 10.3.1.

The above especially holds for the application of the stricter criterion of international public policy. This criterion is not mentioned in so many words in ground B (nor in art. V(2) of the New York Convention), but it is clear that the legislature had the court's application of this criterion in mind.

The French international arbitration act of 1981 explicitly refers to the international public policy (art. 1502 of the Nouveau Code de procédure civile: 'Si la reconnaissance ou l'exécution sont contraires à l'ordre public international'). The Dutch legislature did not consider it necessary to provide for this concept in the law: '(There is) in the general view, which appears from established case law, enough room for Dutch courts, by means of interpretation, to involve international aspects in the formation of a judgment' (MvT p. 36; TvA 1984/4A p. 53). The MvT in that context points to the Dutch case law, which would enforce an award in the Netherlands that had been made in a foreign State by an even number of arbitrators, although this would be contrary to public policy if it were a Dutch arbitral award. The same holds for foreign arbitral awards in which no reasons have been given. In either case, the awards must be legally valid in the country where they were made.

In *Tractoroexport v. Dimpex Trading B.V.* (President of the District Court of Amsterdam, 24 April 1991, TvA 1991 p. 184), the defendant asserted that enforcement of an arbitral award made in Moscow would be contrary to public policy because the award had allegedly been made in violation of fundamental rules of procedural law. The arbitral tribunal, by calling the defence a counterclaim, had completely disregarded the defence raised by Dimpex because Dimpex had not paid any administration costs. The President rejected this defence, considering that Dimpex could

not maintain that it had not had an opportunity to make its viewpoint known: 'Now that Dimpex (...) has failed (to pay the administration costs due) it has consciously run the risk that its counterclaim would not be dealt with.'

10.4.4 Articles 985 to 990 inclusive Rv

Paragraph (6) of art. 1076 states that the provisions of articles 985 to 991 inclusive (now arts. 985 to 990) shall apply accordingly. The same statement was made in the second sentence of art. 1075 for enforcement under a treaty, except for the addition 'to the extent that the treaty does not contain provisions deviating therefrom'.

As with art. 1075, paragraph (6) of art. 1076 designates the President of the District Court as the competent judge. The relatively competent President is the President of the District Court in the district where the petitioner's opposing party has his domicile, or of the District Court in the district where enforcement is sought (art. 985; see section 10.3.3).

It had already been stated above that it is also one of the main characteristics of art. 1076 that there shall be no review by the exequatur court of the merits of the award. This main characteristic is stated in so many words in art. 985.

Article 986, which deals with the manner in which the application for leave for enforcement must be filed, states in its second paragraph that an 'authenticated copy of the decision' shall be submitted. In section 10.4.2 it was noted that paragraph (1) of art. 1076 deviates from this condition by stating that the petitioner shall submit the original or a certified copy of the arbitral award *and* the arbitration agreement.

Paragraph (2) of art. 986 also provides that documents shall be submitted 'from which the enforceability (of the award) in the country in which it was made can be established'. This condition does not apply to an application for enforcement under art. 1076 because paragraph (6) explicitly states that 'no documents need be submitted evidencing the enforceability of the arbitral award in the country in which it is made' (see section 10.4.3 under ground A*d*: no so-called 'double-exequatur').

Paragraph (3) of art. 986 states, *inter alia*, that the exequatur court may demand that the award and the other documents submitted shall be translated into Dutch. In view of the command of languages of members of the Dutch judiciary, a translation will usually not be required when the documents have been drawn up in English, German or French.

Article 987 provides that the exequatur court shall make its decision 'with due speed' after hearing the parties. The petitioner must summon the opposing party to the hearing by means of a writ.

Article 988(2) states: 'The decision is provisionally enforceable without security having to be given, to the extent that the (President of the) District Court does not decide otherwise' (otherwise: art. 429p(1)). A possible other decision by the President (i.e. a declaration that the award is not provisionally enforceable, or an order that security be given by the petitioner), is intended for the case in which the arbitral award can still be set aside in the country where it was made. That case has been provided for, however, in paragraph (7) of art. 1076, which declares that article 1066(2) to (6) inclusive shall apply accordingly.

Pursuant to art. 1066(2), the court (or, as may be the case, the President of the District Court) may, at the request of either party (in practice this will be the party against whom enforcement is sought), if it considers the request to be justified, suspend enforcement until a final decision is made on the application to set the award aside. Paragraph (5) of art. 1066 states that upon granting the request, the court may order the petitioner to give security. Upon denying the request, the court may order the other party to give security (in practice this is the party seeking enforcement of the foreign award). For the circumstances in which the request may be granted or denied, we refer the reader to what has been said in section 10.3.3 about art. 988(2) in connection with art. VI of the New York Convention.

Articles 989 and 990 concern the legal remedies against the decision of the President of the District Court. Paragraph (6) of art. 1076 provides a time limit of two months for appeal and recourse to the Supreme Court, instead of one month, as provided in art. 990.