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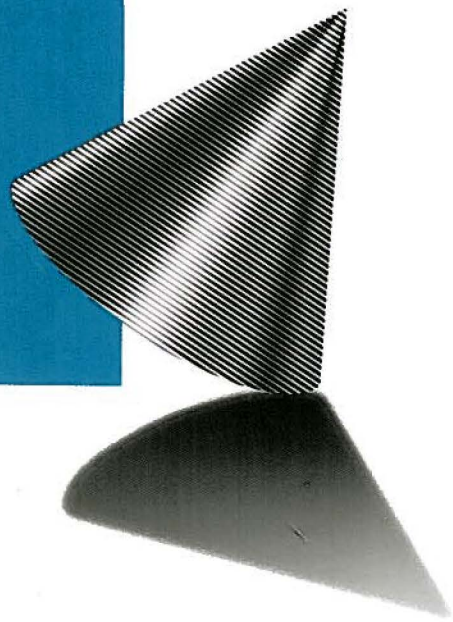

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PALESTRA

ESTUDIO MARIO CASTILLO FREYRE

Países Bajos (Netherlands)

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I. Introduction: historical overview of the development of international arbitration in the Netherlands

The Dutch legal framework for arbitration can be found in the Dutch Arbitration Act of 1 December 1986, which is incorporated in Book 4 (*i.e.*, articles 1022-1077)

of the Dutch Code of Civil Procedure («*DCCP*»).[1] Although a considerable part of the arbitration act is of a mandatory nature, party autonomy on various procedural arrangements and options is broad. The wide scope for exercising this party autonomy has been affirmed, recently, in a proposal for amendment of the Dutch Arbitration Act.[2]

Over the past decade, arbitration has increasingly been applied and viewed as a credible and trustworthy alternative to litigation in the State courts. The general climate for (international) arbitration in the Netherlands is characterised as friendly and benefits from consistent support by the Dutch government and a professional and well regarded judiciary. The Peace Palace in The Hague is available for hearings in, and administration of, arbitrations and is considered to be a good seat and venue for international arbitrations by both parties and arbitral tribunals. In recent years, the Dutch Supreme Court has consistently disapproved of undue intervention in arbitral proceedings and awards. Consequently, setting aside of arbitral awards remains highly exceptional. In addition, the Supreme Court has held, explicitly, that proceedings to set aside arbitral awards may not be used as a *de facto* appeal on the merits and that the public interest in the effectiveness of arbitration requires that a court only sets aside an arbitral award in clear-cut cases.

The best-known and the only general arbitration institution in the Netherlands is the Netherlands Arbitration Institute («*NAI*»). The NAI administers both national and international arbitral proceedings in a wide range of fields. The NAI accepts cases dealing with all subject matters. In addition, ICC Arbitration is also well known in The Netherlands and there are a number of active and specialised arbitration institutions, which institutions focus on arbitrations related to specific industries. Truly international arbitrations with a seat of arbitration in the Netherlands are mostly conducted under the arbitration rules of either the International Chamber of Commerce, UNCITRAL or the NAI. The NAI also administers UNCITRAL arbitrations, as does the Permanent Court of Arbitration in The Hague.

II. SOURCES OF THE LAW OF INTERNATIONAL ARBITRATION

2.1. Domestic sources

The greater part of the Dutch Arbitration Act (Title 1 of Book IV; articles 1020 to 1075 DCCP) involves arbitration in the Netherlands. Only a few provisions (Title 2

[1] Act of 2 July 1986, Staatsblad 1986, 372.

[2] See http://www.internetconsultatie.nl/herzieningarbitragerecht.

of Book IV; articles 1074 to 1076 DCCP) deal with arbitration outside the Netherlands. Title 1 of Book IV applies if the place of arbitration is located in the Netherlands (article 1073 DCCP). Article 1073 DCCP is a provision of mandatory law. If the place of arbitration is situated in the Netherlands, international arbitrations, with one or more parties having their residence outside the Netherlands, are governed by the same rules as domestic arbitrations.

The Ministry of Justice has requested a working party, chaired by Professor Albert Jan van den Berg, to draft a proposal for amendments to the Arbitration Act.[3] The proposal has been published and presented on a symposium in 2005 and constitutes of a complete draft bill with explanatory notes. The text has been submitted to the Ministry of Justice on 21 December 2006. On 31 October 2011, the Minister of Justice has informed Parliament of his intention to bring a new arbitration act into force by 1 January 2014.[4] A draft bill for the revision of the arbitration act was published in March 2012.[5] Stakeholders were invited to comment on this draft bill before 1 June 2012. The draft bill, which is expected to be submitted to the Parliament in the course of 2013, does not contain radical changes in Dutch Arbitration Law, but is aimed at reducing barriers to arbitration in general by enhancing the efficiency and flexibility of the arbitral process, by reducing state court intervention and by maximising party autonomy. One of the proposals made to increase efficiency is to limit the proceedings for setting aside and enforcement of arbitral awards to one fact-finding instance, and not multiple instances, as is the current practice.

2.2. International sources

The Dutch government and Dutch jurists have made considerable contributions to the development of treaties and international rules and regulations dealing with arbitration. The main international sources for arbitration in the Netherlands are the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards («*New York Convention*»)[6] and the Convention on the Settlement of Investment Disputes between States and Nationals of other States («*ICSID Convention*»).[7] In addition, many provisions of the Dutch Arbitration Act were inspired by the UNCITRAL Model Law.

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[3] «Tekst van de Voorstellen tot wijziging van het Vierde Boek (Arbitrage), artikelen 1020-1076 Rv», Tijdschrift voor Arbitrage 2005, 36. Detailed information (in Dutch) regarding the proposal can be found on www.arbitragewet.nl.

[4] See http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2011/10/31/innovatieagenda-rechtsbestel.html, § 019.

[5] See http://www.internetconsultatie.nl/herzieningarbitragerecht.

[6] See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

[7] See http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

The role of EU law in the field of arbitration is in practice fairly limited because arbitration is one of the subjects that is, at least currently, excluded from the scope of application of both the Convention of 27 September 1968 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters («*Brussels Convention*») and EC Regulation n.° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters («*Brussels I Regulation*»), which instruments lay down common rules on jurisdiction and the enforcement of judgments. The European Commission is, however, working on an amendment of the Brussels I Regulation which is likely to result in certain arbitration-related issues to be governed by this regulation in the future.[8]

III. THE ELECTION OF THE NETHERLANDS AS SEAT OF ARBITRATION

3.1. The arbitration agreement

Article 1020(1) DCCP provides that submission of a dispute to arbitration requires an agreement to arbitrate, which is generally referred to as an arbitration agreement. Articles 1020(1) and 1020(2) DCCP define the arbitration agreement as the agreement by which parties bind themselves to submit to arbitration either an existing dispute between them or disputes which may arise between them in the future our of a defined legal relationship, whether contractual or not. An arbitration agreement may thus take the form of an arbitration clause in a contract, for example, referring possible future disputes arising out of that contract to arbitration, but it can also take the form of a submission agreement (referred to under Dutch law as *compromis*), in which the parties agree to submit an existing dispute between them to arbitration. Arbitration rules to which an arbitration agreement refers, are deemed to form an integral part of that arbitration agreement (article 1020(6) DCCP).

3.1.1. Validity of the arbitration agreement

3.1.1.1. Formal validity

Strictly speaking, Dutch law stipulates no requirements of form in respect of arbitration agreements. An arbitration agreement can therefore be concluded orally or even be implied in an established trade usage. However, article 1021 DCCP provides that if the arbitration agreement is (timely) contested, it can only be proven by an

[8] See VLEK, J.F. «Aanzet tot herschikking EEX: het voorstel van de Commissie». *Weekblad voor Privaatrecht, Notariaat en Registratie* n.° 2011/6892; HAERSOLTE VAN-VAN HOF, J.J. «De voorgestelde aanpassing van de arbitrage-exceptie in de EEX-Verordening». *Weekblad voor Privaatrecht Notariaat en Registratie* n.° 2011/6892.

instrument in writing. For this purpose, an instrument in writing which provides for arbitration, or which refers to standard conditions providing for arbitration, is sufficient, provided that this instrument is expressly or implicitly accepted by or on behalf of the other party. Article 1021 DCCP also provides that an arbitration agreement may also be proven by electronic means, pursuant to the implementation of the Directive on Electronic Commerce in the Internal Market.[9]

3.1.1.2. Substantive validity and arbitrability

In addition to the general provisions in articles 1020(1) and 1020(2) DCCP for the submission of existing or future *disputes* to arbitration, article 1020(4) DCCP provides for the possibility to submit to arbitration:

(a) only the determination of the quality or condition of goods,

(b) only the determination of the amount of damages or of a monetary debt, and

(c) the supplementation or amendment of a legal relationship arising from agreement or otherwise («filling of gaps»).

The submission to arbitration of only these particular determinations or the supplementation or amendment requires an explicit agreement. A «regular» arbitration agreement providing for the submission of disputes to arbitration as such does not provide an arbitral tribunal with the required jurisdiction to exclusively provide (*i.e.*, outside the context of a dispute) determinations, supplements or amendments as meant by article 1020(4) DCCP.

All subject matters may be referred to arbitration, unless this would lead to legal consequences which parties may not freely dispose of (article 1020(3) DCCP). This involves the legal consequences in respect of which the legislature or the courts through case law have determined that these may only be ascertained by State courts. This exclusive jurisdiction of the State courts comprises subjects in which dispute resolution results in a ruling that has legal effect in relation to non-parties (*erga omnes*), and thus, not just to the parties to the arbitral proceedings. By their nature, such rulings cannot be rendered by arbitrators because an arbitral award can only have binding effect on parties that agreed to arbitration. Generally speaking, most commercial issues can be submitted to arbitration. Restrictions may apply in cases concerning, amongst others, family law (*e.g.*, divorce, adoption and family supervision), intellectual property rights, bankruptcy law and company law. Current

[9] Directive n.° 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular, electronic commerce.

case law supports the position that rulings regarding the legal validity of decisions and resolutions of legal entities are, by their nature, deemed to apply *erga omnes* and, therefore, the State court's jurisdiction to rule on this validity is exclusive (albeit that this is a matter that attracts considerable academic debate).[10]

Furthermore, there are also subjects that require the exercise of coercive powers attributed, exclusively, to the State including notably the involvement of bailiffs or the police. These matters are, in principle, also subject to the exclusive jurisdiction of the State courts. Examples include the (effectuation of) requests for protective measures (such as a prejudgment attachment), requests to hear reluctant witnesses and claims for committal due to failure to comply with a judicial order.

Further, non arbitrability applies to subjects that are deemed to be so important that dispute resolution is exclusively reserved for the State courts. This usually regards subjects directly or indirectly involving third-party interests. Examples include dispute settlement schemes in mass tort cases, inquiries into company affairs (*enquête*) and class actions. Although in the past, there has been debate whether disputes regarding leases can be submitted to arbitration, there is now a growing consensus that this is possible.[11]

3.1.2. Separability of the arbitration agreement

Article 1053 DCCP lays down the principle of separability of the arbitration agreement. The first sentence of article 1053 DCCP provides that the agreement to arbitrate has to be considered and decided upon as a separate agreement. The second sentence of article 1053 DCCP states that the arbitral tribunal has the power to decide on the validity of the contract of which the agreement to arbitrate forms a part or to which the arbitration agreement relates.

The separability (also referred to as the autonomy) of the arbitration agreement entails that the arbitral tribunal has to decide on the validity of the main contract separately from the validity of the arbitration agreement concluded in relation to and/or included in the main contract. The essential function of the principle of separability is evident and in line with international practice: it prevents the tribunal from undermining its own jurisdiction by declaring the main agreement null and void, terminated or, otherwise invalid, and thus, ensures that an arbitral award holding that the main contract is invalid, is considered valid.

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[10] *Hoge Raad*, 10 November 2006, *Nederlandse Jurisprudentie*, 2007, 561.

[11] SNIJDERS, H.J. *Burgerlijke Rechtsvordering Boek IV Arbitrage*. Kluwer, 2006, article 1020 DCCP, note 5(e).

3.1.3. Extension of the arbitration agreement to third parties

Under certain circumstances, Dutch law allows an arbitral tribunal to assume jurisdiction over individuals or entities who are not themselves party to an arbitration agreement. A legal successor is bound by an arbitration agreement concluded a legal predecessor, insofar as it concerns the right or obligation in which he has succeeded its predecessor. Examples of this are transfers of claims, debts or contracts. Furthermore, an arbitration clause in articles of association or regulations is held to binding on all who are bound by these articles of association or regulations.

There are also several ways in which third parties may become a participant in an arbitration. Article 1045 DCCP provides the basis for the intervention of a third party in an arbitration between two other parties. This intervention can either be voluntary, by means of joinder (*voeging*) or intervention (*tussenkomst*), or a party may be forced to participate in the arbitration with a view to indemnify (*vrijwaren*) one of the parties in the arbitration (mostly the respondent). A third party who has an interest in the outcome of the arbitral proceedings, may request the arbitral tribunal to join the proceedings or to intervene therein. An imminent loss of rights, a prejudice or the risk of conflicting decisions will usually qualify as such an interest in the outcome of the arbitral proceedings. The difference between joinder and intervention is to be found in the nature of this interest. If the third party wishes to take its own position in the proceedings, exercise its own rights or institute its own claims (for example, if a third party claims to be the owner in proceedings between two other parties with respect to a right of ownership), the third party needs to intervene. If the third party does not wish to take its own position, but only wishes to support one or more parties (on the same side) in the arbitration in its claim or defence (*e.g.*, a guarantor who wants to assist its debtor in the arbitral proceedings), it needs to join the proceedings. Unlike the joinder or intervention of a third party, the initiative of a claim for indemnity comes from one of the parties in the arbitration. If, for example, the respondent is a contractor who is confronted with a claim of the principal, the contractor may be indemnified by a subcontractor and seek to ensure the joinder of the subcontractor.

According to article 1045(3) DCCP, the participation of a third party in the arbitral proceedings requires that the third party accedes to the arbitration agreement between the parties in the arbitration in writing. The arbitral tribunal must also hear the parties before taking a decision as to whether a third party will be allowed to participate in the proceedings. Even if all applicable conditions have been satisfied, the arbitral tribunal may still refuse a third-party's participation in the proceedings, for instance if an intervention will cause unacceptable delay to the main proceedings or if permitting, it will unduly complicate the proceedings.

If the arbitral tribunal permits the participation of a third party, the third party becomes party to the arbitral proceedings (article 1045(4) DCCP).

3.1.4. Jurisdiction of an arbitral tribunal to rule on its jurisdiction under the arbitration agreement (principle of Kompetenz-Kompetenz)

The internationally accepted principle of *Kompetenz-Kompetenz*, *i.e.*, that the arbitral tribunal has the power to decide on its own jurisdiction, is laid down in article 1052(1) DCCP. Irrespective of the applicable decision making standard, the *communis opinio* is that the arbitral tribunal must always decide on its jurisdiction in accordance with the rules of law.[12] The principle of *competence-competence* prevents a party from being able to intentionally delay the arbitral proceedings by challenging the jurisdiction of the tribunal before the courts. The parties will, thus, first have to await the tribunal's decision on its jurisdiction before being able to challenge the tribunal's competence before the courts.[13]

According to article 1052(2) DCCP, a plea of lack of jurisdiction on the ground that there is no valid arbitration agreement, must be raised before submitting any defence on the merits. A decision of the arbitral tribunal that it does not have jurisdiction is final and implies that the court shall have jurisdiction, unless parties have agreed otherwise (article 1052(5) DCCP). A decision of the arbitral tribunal that it does have jurisdiction may be challenged after the final award is rendered (article 1052(4) DCCP). To this effect, the relevant party may institute court proceedings for setting aside the award on the basis that a valid arbitration agreement is lacking. The issue could possibly also be addressed in exequatur proceedings.

It is a matter of discussion whether or not a declaration by the tribunal that it lacks jurisdiction can be given in the form of an arbitral award. An argument pleading against this is that it would be illogical to assume that a valid arbitral award can be rendered when the decision of the arbitral tribunal implies the exact opposite, *i.e.*, that the tribunal lacks jurisdiction and hence, is not competent to render an award. A practical argument pleading in favour of this is that the respondent who successfully

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[12] SNIJDERS, H.J. *Op. cit.*, article 1052 DCCP, note 1.

[13] In two different cases in which the claimant had initiated both arbitral proceedings and proceedings before a State court, the The Hague District Court and the Groningen District Court ruled that the principle of competence-competence entails that the court has to refrain from a decision on its competence to hear the claim for as long as the dispute is pending before an arbitral tribunal. In both cases the claimant had chosen to initiate the arbitral proceedings prior to addressing the State courts. See Groningen District Court, 13 October 2004, *Bouwrecht* 2005, 162 and *Tijdschrift voor Arbitrage* 2006, 51, pp. 144-145; The Hague District Court, 19 May 2004, *Bouwrecht* 2004, 632.

raises a plea as to lack of jurisdiction of the tribunal will feel the need for an enforceable award insofar as the decision as to costs is concerned. In practice, most arbitral tribunals seem to adopt the practical approach by simply giving the declaration in the form of an arbitral award. On point case law from Dutch State courts is not available.

3.2. The arbitral tribunal

3.2.1. Composition and constitution of the arbitral tribunal

The DCCP allows parties a great deal of autonomy with regard to the (method of) appointment of the arbitral tribunal. Parties may appoint as arbitrator any natural person of legal capacity. Unless the parties have agreed otherwise, no person shall be precluded from appointment by reason of his nationality (article 1023 DCCP).

The parties are free to agree on the number of arbitrators. However, the total number of arbitrators should always be odd (being understood that the tribunal may also consist of only one arbitrator; see article 1026(1) DCCP). If the parties have agreed upon an even number of arbitrators, then these arbitrators, or, in the case of disagreement between them, the President of the District Court as interim provision judge, will appoint an additional arbitrator to chair the tribunal (articles 1026(3) and 1026(4) DCCP). An arbitral award rendered by an even number of arbitrators can be set aside on the ground that it violates public policy (see also section 3.7.1 below). The President of the District Court as interim provision judge shall, at the request of either party, determine the number of arbitrators if the parties have not agreed thereon, or if the agreed method of determining that number is not carried out and the parties cannot reach agreement on the number (article 1026(2) DCCP).

The parties may also agree on the method of appointment of the arbitrators (article 1027(1) DCCP). The arbitration agreement may stipulate that a third party will appoint the arbitrators. However, the arbitration agreement cannot give one of the parties a privileged position with regard to the appointment of arbitrators. In such case, the counterparty may request the President of the District Court, within one month after the commencement of the arbitration, to appoint the arbitrator or arbitrators (article 1028 DCCP).

If the appointment is not made within the applicable time limit (two months, or three months if one of the parties is domiciled or has his actual residence outside of the Netherlands), the arbitrator or arbitrators shall, at the request of either party, be appointed by the President of the District Court. The parties are, however, free to agree upon the application of different time limits (article 1027(2) and 1027(3) DCCP).

3.2.2. Independence and impartiality of arbitrators

It is a general rule in (international) arbitration that all the arbitrators, including those chosen or appointed by the parties, must be impartial towards the parties and carry out their functions impartially and without bias. This rule is implied in article 1033(1) DCCP, which provides that an arbitrator can be challenged if there is justifiable doubt as to his impartiality or independence. The same applies for a secretary to the arbitral tribunal. A (prospective) arbitrator who presumes that he could be challenged, is obliged to disclose this and mention the reasons for a possible challenge (article 1034(1) DCCP).

The DCCP does not provide any guidance as to when an arbitrator is to be considered not or no longer impartial and independent. According to standard case law in the Netherlands the *outward appearance of partiality* may be relevant when establishing whether there is sufficient cause to challenge an arbitrator. In order to define the concepts of impartiality and independence, the so-called *Leidraad on partijdigheid van de rechter*[14] which document contains rules on impartiality and independence of members of the Dutch judiciary or the IBA Guidelines on Conflicts of Interest in International Arbitration[15] may be applied or used for guidance. Although these IBA Guidelines have no binding effect, they are relied upon in arbitrations and court proceedings and there seems to be a tendency to rely on these guidelines for establishing good practice in international arbitration.

An arbitrator must not only be impartial and independent at the outset of the arbitration, but must ensure that he remains impartial and independent during the arbitral proceedings. An arbitrator may not show prejudice, for example by disclosing his view on the merits of the case prior to his appointment or even at the start of a hearing. According to case law of the Dutch Supreme Court,[16] the rules of impartiality and independence demand that an arbitrator does not engage in gathering evidence without involving the parties to the arbitral proceedings. The Supreme Court has also held that arbitrators should in principle restrict themselves to the examination of evidence. They may use their specific expertise to resolve the dispute, but if this were to require them to conduct their own inquiry, they may only do so if the parties have given them explicit permission to base their judgments on their own findings. If an arbitrator himself conducts an examination of the facts, he may later have to weigh his own conclusion against those of a party-appointed expert contesting the validity

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[14] See http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Algemeen/Pages/Leidraad-onpartijdigheid-van-de-rechter.aspx.

[15] See www.ibanet.org.

[16] HR 29 June 2007, NJ 2008, 177. See for a discussion of this judgment also *Global Arbitration Review, The European & Middle Eastern Arbitration Review*, 2008, p. 56.

of the findings of the arbitrator. Such party may justifiably doubt that the arbitrator will be impartial towards the conclusions of the party-appointed expert. As a result of this second Supreme Court judgment, arbitrators —and especially arbitrators who have been selected and appointed for their specific expertise— may only conduct their own inquiry with the explicit approval of the parties. Failing such approval, the impartiality and independence of the investigation arbitrator is at stake.

An arbitrator should also avoid having a direct personal or professional interest in the outcome of a case. Such interest —or at least the appearance thereof— is amongst others assumed, if the arbitrator is simultaneously acting as counsel in proceedings in which the same or similar issues are at stake. There is an obvious risk that the arbitrator may be reluctant to decide contrary to the position that he is defending as counsel in other proceedings. To put it differently, there is a risk that the arbitrator may be inclined to generate case law in favour of his client.[17] On the other hand, no outward appearance of partiality is assumed if the arbitrator has previously acted as counsel in proceedings in which the same issues were at stake, but has in the meantime withdrawn from that case. Case law seems to indicate that a prospective arbitrator can regain his impartiality by withdrawing as counsel from the conflicting case.[18]

3.2.3. Challenge of an arbitrator

As stated above, an arbitrator can be challenged if there is justifiable doubt as to his impartiality or independence (article 1033(1) DCCP). The party who appointed a certain arbitrator can only challenge this arbitrator for reasons which became known to that party after the appointment of the arbitrator (article 1033(2) DCCP). If the arbitrator was appointed by a third party (for example an arbitration institute) or by the President of the District Court, a party may not challenge the arbitrator if the party resigned himself to the appointment, unless the party became aware of the grounds for challenging the arbitrator after his appointment (article 1033(3) DCCP).

The procedure for challenging an arbitrator is set out in article 1035 DCCP. The challenge shall be notified in writing by the challenging party to the challenged arbitrator, the other members of the arbitral tribunal, the other party, and, if applicable, the authority that appointed the challenged arbitrator. The notification must include the grounds for the challenge. The arbitral tribunal may suspend the arbitral proceedings as of the date of receipt of the challenge (article 1035(1) DCCP).

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[17] President of The Hague District Court 18 October 2004, *Tijdschrift voor Arbitrage* 2005, 51, pp. 106-109.

[18] President of The Hague District Court 5 October 2004, *Tijdschrift voor Arbitrage* 2005, 52, pp. 109-111.

If the challenged arbitrator does not withdraw within two weeks[19] after the day of receipt of the notification, the President of the District Court as interim provision judge will determine, at the request of either party, whether the challenge is justified (article 1035(2) DCCP). This request to the President of the District Court must be made within four weeks[20] after the day of receipt of the notification (article 1035(2) DCCP). The right to challenge is forfeited if this request is not made within the applicable time limit. If the challenged arbitrator withdraws, or if the challenge is upheld by the President of the District Court, the arbitrator shall be replaced in accordance with the rules that applied to his appointment, unless the parties have agreed otherwise (article 1035(3) DCCP). The decision on a challenge from the President of the District Court is not subject to appeal (article 1070 DCCP).

3.3. The arbitral procedure

3.3.1. Procedural rules

The procedure of arbitration is mostly governed by articles 1036 to 1048 DCCP. These articles apply if the place of arbitration is located in the Netherlands. They provide general rules which leave much room for the parties to agree on the way the procedure is to be conducted. In most cases, parties do so by referring in the arbitration agreement to the rules of one of the recognised arbitration institutes. Insofar a procedural issue is not decided by articles 1036 to 1048 DCCP and the agreement made by the parties; it may be decided by the arbitral tribunal (article 1036 DCCP).

3.3.2. Law governing the arbitral procedure

The place of arbitration law determines the law governing the arbitral procedure. If the arbitration is seated in the Netherlands, article 1073(1) DCCP provides that Title 1 of Book IV DCCP (articles 1020 to 1073 DCCP) applies. This is a mandatory rule and the parties may thus not deviate from this provision by agreement. Whether domestic or international arbitration is involved is irrelevant. An international arbitration only involving foreign parties is therefore subject to Dutch arbitration law if the place of arbitration is situated in the Netherlands.

3.3.3. Right to be heard and right to equal treatment

Article 1039(1) DCCP lays down two basic procedural principles of due process that the arbitral tribunal must apply, *i.e.*, the principle of equal treatment of the parties

[19] According to article 1035(4) DCCP, this period is six weeks if the challenged arbitrator or either of the parties is domiciled or resides outside the Netherlands.

[20] According to article 1035(4) DCCP, this period is eight weeks if the challenged arbitrator or either of the parties is domiciled or resides outside the Netherlands.

and the obligation to give each party an opportunity to substantiate its claims and to present its case (the principle of hearing both sides or *audite et alteram partem*). The principle of equal treatment entails that both parties will have to be heard to the same extent. The principle of hearing both sides involves the parties' right to be notified of the other party's claims and their substantiation, to respond to statements of the other party and to express their views on the information on which the award will be based. A substantial violation of the principle of equal treatment and hearing both sides may result in the award being set aside (article 1065(1)(e) DCCP) and in refusal of the recognition and enforcement (article 1063(1) and 1076 DCCP), on the basis that the manner in which the award was made violates public policy (see also sections 3.7.1 and IV below).[21]

Article 1039(2) DCCP lays down the parties' right to present their case and to elaborate on their contentions during a hearing. The article is of mandatory law and provides that the arbitral tribunal shall give the parties the opportunity to give an oral explanation of their contentions, either at the request of one of the parties or on its own accord. The parties may renounce their right to a hearing, but this renunciation should be explicit and unambiguous and can only be done after the commencement of the arbitration. Given the mandatory nature of article 1039(2) DCCP, the parties cannot renounce their right to a hearing prior to the commencement of the arbitration.

3.3.4. Taking of evidence

The rules of evidence to be applied in the arbitral procedure are at the discretion of the arbitral tribunal, unless the parties have agreed otherwise (article 1039(5) DCCP). As a general rule, the arbitral tribunal is free to determine the admissibility, relevance, materiality and weight of evidence as well as the allocation of the burden of proof, and is not bound by the (formal) rules of evidence that apply in state court proceedings in the Netherlands. However, it is generally accepted that there is one exception to this rule under Dutch Arbitration Law, and that such arbitral tribunals should apply the same rules of evidence as a court would apply when deciding on its competence and, hence, on the validity of the arbitration agreement.[22]

The rules for production of evidence in general leave considerable scope for party agreement or, insofar an issue is not governed by party agreement, the

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[21] *Hoge Raad*, 25 May 2007, *Nederlandse Jurisprudentie* 2007, 294.

[22] Snijders, H.J. *Op. cit.*, article 1039 DCCP, note 5. See also Fung Fen Chung, C.S.K. *Bewijsmiddelen in het arbitraal geding*, SDU, 2004, pp. 76 *et seq.*, who is not convinced that arbitrators, when deciding a plea as to lack of jurisdiction, are required to apply the same rules of evidence as a court would apply in determining the existence and validity of the arbitration agreement.

discretion of the arbitral tribunal. The arbitral tribunal has a discretionary power to permit parties to hear witnesses and experts (article 1039(3) DCCP). The arbitral tribunal will usually allow a request for the hearing of witnesses and/or experts. Arbitral tribunals may also decide to hear witnesses or experts on their own motion, but rarely do so. The procedure for questioning witnesses is left to the arrangements made by the parties, or in the absence of such arrangements, the discretion of the arbitral tribunal. The result of this is often that, in line with procedural arrangements in Dutch State court proceedings, the witnesses are questioned by the arbitrators and after arbitrators have finished, by the parties. Cross-examination is a rare feature in domestic arbitrations, but more common in international arbitrations seated in the Netherlands and involving parties domiciled in jurisdictions in which cross-examination is common.

The arbitral tribunal may order parties to disclose documents (article 1039(4) DCCP). Dutch arbitrators tend to be cautious in allowing broad orders for disclosure of documents, let alone for discovery of documents. Arbitrators often follow the IBA Rules on the Taking of Evidence in International Commercial Arbitration, either as guidance or by application if the parties have agreed thereto.[23]

3.3.5. Provisional measures

Provisional measures are often sought and granted in the proceedings before the Dutch State courts. This has influenced the proliferation of provisional measures within arbitrations seated in the Netherlands and has also resulted in a liberal interpretation of the notion «provisional». Consequently, litigants may exercise a number of options to seek provisional measures and such measures need not be *per* se provisional in the sense that they may not have irreversible consequences.

A notable feature of Dutch Arbitration Law is that provision is made for so-called summary arbitral proceedings (*arbitraal kort geding*). This procedural instrument is styled in the fashion of similar proceedings in the Dutch State courts and provides parties with a means to obtain provisional measures in the form of an award. Summary arbitral proceedings are only available if the parties have agreed include summary arbitral proceedings in their arbitration agreement (which occurs automatically upon application of the NAI Rules, in Dutch seated arbitrations, and may be considered to occur under other, both national and international, arbitration rules as well).[24] Summary arbitral proceedings need to be distinguished from fast track proceedings on the merits.

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[23] See www.ibanet.org for both the 1999 and 2011 version of these IBA Rules.

[24] Article 1051 DCCP.

3.4. Provisional measures

3.4.1. Jurisdiction to pronounce provisional measures

Jurisdiction to grant provisional measures lies with both the State courts and arbitral tribunals and may take the form of an award, permission (*verlof*) to *e.g.*, seize property or order.

As per article 1022(2) DCCP, State courts hold so-called residual jurisdiction to assist parties and tribunals in granting provisional measures and hold exclusive jurisdiction in respect of provisional measures that require the State's instruments to enforce such as pre-judgement attachments or seizure or property (*conservatoir beslag*).

Prior to the appointment of an arbitral tribunal, the State courts may be addressed to obtain evidentiary relief, such as preliminary witness examinations, preliminary expert reports and/or a preliminary site visit. This is provided in article 1022(3) DCCP. Subsequent to the appointment of the arbitral tribunal, this power vests with the arbitral tribunal.

If the parties have agreed upon arbitral summary proceedings and either of the parties invokes this agreement when the state courts are addressed for assistance in summary proceedings, which is required as per article 1022(2) DCCP, article 1051(2) DCCP regulates jurisdictional matters. If such agreement is invoked, the State courts may still exercise a discretionary power to decline to accept jurisdiction and direct the parties to summary arbitral proceedings.[25] The latter occurs where the matter in dispute requires specific technical or trade expertise or where other considerations are present that compel the State court to decline to hear the case.

The conditions for ordering provisional measures vary. Insofar as measures are derived from practice in the state courts, the conditions exercised in the state courts —for example regarding preliminary witness examinations— are often also applied, or used as reference, by arbitral tribunals.[26]

With respect to summary arbitral proceedings, the tribunal will balance the interests of the parties. As part thereof, a tribunal will have to assess whether the matter at hand requires measures to be taken, urgently (*spoedeisendheid*) in the sense that

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[25] See, *inter alia*, Amsterdam Court of Appeal, 3 February 2000, *Tijdschrift voor Arbitrage* 2003, pp. 68-69.

[26] See, recently, NAI 3712 1 October 2011, *Tijdschrift voor Arbitrage* 2012-1 (published after finalisation of this publication).

proceedings on the merits cannot be awaited, and also whether or not the matter is sufficiently clear to grant measures sought (*i.e.*, not too complex from either the procedural and/or the substantive perspective). This follows from the reference in article 1051(1) DCCP to the standards set out in article 254 DCCP, which regulates summary proceedings in the state courts. Given the reference to article 254 DCCP, the aforementioned conditions of urgency and absence of undue complexity are interpreted liberally.

3.4.2. Type of provisional measures

Provisional measures may take many shapes and forms. This follows from practice in the State courts.

Notable examples of provisional measures include preliminary witness examinations, orders to produce or preserve evidence and order to provide security for costs. Anti-suit injunctions are by and large not permitted in the EU pursuant to the Brussels I Convention and the application of the *Allianz vs. West Tankers* judgement.

In addition, arbitral tribunals acting in summary arbitral proceedings often grant claims to monetary sums (in respect of which the presence of the requisite level of urgency is generally taken to follow from the nature of the claim),[27] and have also been seen to intervention in takeovers and order various forms of specific performance.[28]

3.4.3. Challenge and appeal against provisional measures

In principle, a provisional measure does not affect proceedings on the merits. Consequently, separate or on-going proceedings on the merits offer the route to challenge a provisional measure. In the absence of party agreement, arbitral appeals are not open in summary proceedings.[29]

3.4.4. Enforcement of provisional measures

Provisional measures are typically complied with, due to the fact that parties consider that they can ill afford to be seen by the tribunal not to comply.

If provisional measures take the form of an award, the award may be enforced. This applies in particular to awards in summary arbitral proceedings. It follows from

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[27] See *e.g.*, NAI 2 December 2003, *Tijdschrift voor Arbitrage* 2005, pp. 8-11.

[28] See *e.g.*, NAI 27 March 2000, *Tijdschrift voor Arbitrage* 2001, pp. 8-10.

[29] Article 1050(1) and 1051(3) DCCP and Parliamentary History to these provisions TK 1983-1984, 18.464, n.° 3, 20.

article 1051(3) DCCP that awards rendered in summary proceedings are put on an equal footing with awards in proceedings on the merits and that, consequently, the same conditions for enforceability apply. A party seeking to enforce such a summary arbitral award is at risk of a claim for damages flowing from unlawful enforcement if the summary arbitral award is overturned.

Measures granted by the State courts —which most notably occurs prior to the appointment of the arbitral tribunal and as per article 1022(2) and (3) DCCP may be enforced by application of the State's means to ensure compliance—. In the case of witnesses, this may include action by the police to bring forward a witness. In the case of a seizure of property, including evidence, this entails employing a bailiff, who may, in turn, seek police assistance, to effectuate a measure.

If provisional measures are ordered by a tribunal seated in the Netherlands, they are in principle not enforceable in the Netherlands (as per articles 1062(1) and 1063(1) DCCP). However, if the provisional measures take the form of an arbitral summary award, the summary award may be enforced pursuant to the fact that article 1051(3) determines that the summary award is considered equal to an award on the merits for enforcement purposes. That, however, does not necessarily imply that a foreign court requested to grant an exequatur for a Dutch arbitral award in summary proceedings will consider the award in summary arbitration to meet the requisite finality under the New York Convention. In addition, article 1056 DCCP provides a tribunal with the mandate to grant a penal sum, to ensure compliance with measures taken and this penal sum can be granted upon request of either of the parties and may also apply in some instances to ensure compliance with provisional measures.

Provisional measures ordered by foreign tribunals may be enforced if they qualify for enforcement under the New York Convention of 1958. This will not occur often. Given that the Dutch Arbitration Act permits the application of more favourable conditions applicable to Dutch arbitral award, to foreign arbitral awards, the statements applicable to Dutch arbitral awards may be applicable as well (article 1076 (1) DCCP).

Provisional measures ordered by foreign State courts may qualify for enforcement under the conditions of the EC-Regulation n.° 44/2011 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or the Brussels Convention of 1968 (see also § 2.3) or Lugano Conventions of 1988. Consequently, enforcement may occur if the decision pursuant to which the measures are ordered is declared enforceable in the EC member State in which they have been ordered.

3.5. Law governing the merits of the case

3.5.1. Choice of law by the parties

Absent agreement to the contrary, the arbitral tribunal decides in accordance with the rules of law (*regelen des rechts*).[30] If the parties have made a choice of law, the arbitral tribunal decides on the basis of the rules of law chosen by the parties.[31]

The parties may also require the tribunal to decide their dispute by application of the alternative decision making standard, *i.e.*, as *amiable compositeurs* (*goede mannen naar billijkheid*).[32] This entails that the tribunal may decline to apply the applicable rules of law in light of considerations of fairness (*billijkheidsgronden*).[33] A tribunal applying this alternative decision making standard may not decide in violation of provisions of public order.[34]

3.5.2. Determination of the applicable law by the arbitral tribunal in the absence of a choice by the parties

If the parties have not made a choice of law, the arbitral tribunal decides in accordance with the rules of law that it deems applicable.[35] Under Dutch law, the arbitral tribunal is not bound by rules of private international law, but will in practice apply generally accepted rules of private international law in determining which rule of law the tribunal qualifies for application.[36]

3.5.3. Limit to the freedom of the parties and arbitrators (lois de police)

The freedom of the parties and the arbitrators as to the law to be applied is limited by rules of public policy. According to Dutch law, the arbitral tribunal may not decide contrary to public policy. As a result of this, the arbitral tribunal will have to apply mandatory rules of law that are of public policy, even if the arbitral tribunal has to

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30 Article 1054 (1) DCCP.

31 Article 1054 (3) DCCP.

32 VAN MIERLO, A.I.M., C.J.J.C. VAN NISPEN & M.V. POLAK. *Tekst & Commentaar Burgerlijke Rechtsvordering*. Kluwer, 2010, p. 1491.

33 VAN MIERLO, A.I.M., C.J.J.C. VAN NISPEN & M.V. POLAK. *Op. cit.*, pp.. 1491-1492.

34 The nuance of the application of these two decision making standards under Dutch arbitration law is set out, in detail, in two contributions by MEIJER, G.J. & H.A.M. VAN ROESSEL. «Enige beschouwingen over goede mannen naar billijkheid deel I and deel II». *Tijdschrift voor Arbitrage*, 2010, 12 and 28.

35 Article 1054 (2) DCCP.

36 VAN MIERLO, A.I.M., C.J.J.C. VAN NISPEN & M.V. POLAK. *Op. cit.*, p. 1492. Reference is made to Explanatory Memorandum, Parliamentary History II 1983/84, 18 464, n.° 3, p. 23.

decide as *amiable compositeur*. If an arbitral award violates public policy, enforcement of the award may be refused on the basis of article 1063(1) DCCP (see part IV, below) or the award may be challenged on the basis of article 1065(e) DCCP (see paragraph 3.7.1, below).

An award violates public policy if it is contrary to mandatory law of such fundamental nature that its application must not be impeded by procedural constraints. It is not possible to firmly state which rules are of such fundamental nature and this is also subject of debate. Mandatory rules of public policy might be found in various legal systems potentially applicable in an international arbitration (*e.g.*, the law of the seat, the governing substantive law, the law of a supra-national legal system, and international law) and might apply to both, the procedural and substantive aspects of the arbitration.

A notable example of a violation of public policy of a substantive nature is the incorrect application of or failure to apply EC competition law. In regard to EC competition law, the ECJ determined in the Eco Swiss case[37] that, where domestic rules of procedure require a national court to grant an application for challenge of an arbitration award where such an application is founded on failure to observe national rules of public policy (as article 1065(1)(e) DCCP does), it must also grant such an application where it is based on failure to comply with the prohibition laid down in article 81 EC. The same applies to considerable parts of EC consumer protection law. In the Mostaza Claro case,[38] the European Court of Justice ruled that the Directive concerning unfair terms in consumer contracts must be interpreted as meaning that a national court seized of an action for the challenge of an arbitral award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even when the consumer has not pleaded that invalidity in the course of the arbitral proceedings, but only in that of the action for challenge. In these cases, the ECJ has not answered the question whether or not arbitrators breach their mandate by an *ultra vires* award if they were to determine whether the relevant consumer law provisions were violated in the absence of a plea by either of the parties to that effect. It could be argued that it would be a breach of the mandate if the arbitrators did so, and accordingly, would make the award susceptible to challenge on the basis of article 1065(1)(c) DCCP. In our opinion, however, it should be regarded as an intrinsic part of the arbitrators' mandate to *ex officio* apply rules of public policy, and thus, even where parties have argued for the application thereof.

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[37] ECJ 1 June 1999, C-126/97 (*Eco Swiss China Time Ltd. vs. Benetton International NV, European Court Reports* 1999, I-03055; also in *Nederlandse Jurisprudentie*, 2000, 339.

[38] ECJ 26 October 2006, C-168/05 (Elisa María Mostaza Claro vs. Centro Móvil Milenium SL), *European Court reports* 1999, I-10421.

Other examples where an arbitral award will be considered contrary to public policy include an award deciding a dispute which is not capable of being settled by arbitration or an award made in violation of fundamental principles of due process (*e.g.*, the principle of hearing both sides).

Apart from mandatory rules of law that are of public policy, article 1054(4) DCCP provides that the arbitrators must also take into account applicable trade usages. This provision applies irrespective of the applicable decision standard. In this respect, the arbitral tribunal may look, for example, at the UNIDROIT Principles of International Commercial Contracts 2004 and the Principles of European Contract Law. However, the requirement that arbitrators «take into account» trade usages does not mean that they are bound by them. As a consequence, an award which does not comply with (international) trade usages cannot be challenged on that ground. Given that even the incorrect application of the applicable law in itself is insufficient to challenge an arbitral award, this holds *a fortiori* true for trade usages, which merely have to be «taken into account».

3.6. The award

Arbitral awards may be qualified in three types: a final award, a partial final award and an interim award.[39] A final award is an award in which the arbitral tribunal has definitely given an award on the claims made in the proceedings (by wholly or partially granting or dismissing the claim). In a partial final award, the arbitral tribunal definitively grants or dismisses part of the claim(s) and postpones the decision on the other part of the claim.[40] In an interim award the arbitral tribunal has not definitely granted or dismissed the claim(s) in the dictum (the operative part of the decision), so the arbitral tribunal has not definitely decided on the case.[41] This distinction is relevant, because it has consequences for the parties' possibilities to lodge an appeal against the award (which is only possible if parties have agreed to the possibility of appeal).[42]

These options are set out in article 1050 DCCP, and apply unless the parties have agreed otherwise.[43] Appeal of a partial final award is only possible together with the last final award. Arbitral appeal of an interim award is only possible together with an arbitral appeal of a (partial) final award.[44]

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[39] Article 1049 DCCP.

[40] VAN DER BEND, B., M. LEIJTEN & M. YNZONIDES. *A Guide to the NAI Arbitration Rules*, KLI, 2009, p. 219.

[41] *Ibid.* See article 232 (1) DCCP.

[42] Article 1050(1) DCCP.

[43] Article 1050 (2) DCCP.

[44] Article 1050 (3) DCCP.

Article 1054(1) and (3) DCCP provide that the arbitral tribunal shall make its decision in accordance with the rules of law, unless the parties have instructed the arbitral tribunal to decide as *amiable compositeur*. It is not easy to precisely determine the contours of this second decision making standard. It is generally accepted that in this case, the arbitral tribunal is not bound by mandatory or supplementary rules of law. However, in practice the distinction between the two standards is foremost food for scientific debate. In the majority of cases it is difficult to tell whether the outcome of the case would be different, if the arbitral tribunal would have applied the other standard.

According to Dutch law, the arbitral tribunal may not decide contrary to public policy. As a result of this, even if the arbitral tribunal has to decide as *amiable compositeur* the arbitral tribunal will have to apply mandatory rules of law that are of public policy.[45] If the arbitral tribunal does decide contrary to public policy, this may lead to a refusal to enforce the arbitral award on the basis of article 1063(1) DCCP, as well as to having the award set aside on the basis of article 1065(1)(e) DCCP.

The arbitral tribunal —whether deciding as *amiable compositeur* or in accordance with the rules of law— will have to take into account any applicable trade usage. In this respect, the arbitral tribunal may look at the UNIDROIT Principles of International Commercial Contracts 2004[46] and the Principles of European Contract Law.

The requirement that arbitrators «take into account» trade usages does not mean that they are bound by them. Accordingly, if a tribunal fails to comply with (international) trade usages, the award cannot be set aside on the basis thereof.[47]

An award can be set aside for lack of reasons. However, arbitral award can only be set aside based on this ground, if it contains no reasons at all, and thus, *not* if the reasons given are unsound. State courts are not permitted to review an arbitral award on the merits.[48] In the *Nannini* case, the Supreme Court has complicated the application of this ground for setting aside by ruling that an award that does contain reasons, but in which no convincing explanation for the decision can be ascertained, must be

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45 ECJ 1 June 1999, C-126/97 (*Eco Swiss China Time Ltd vs. Benetton International NV*), *European Court Reports* 1999, page I-03055; also in: NJ 2000, 339. See for a further discussion also Burg. Rv, 2006 (SNIJDERS, H.J.), article 1054 DCCP, notes 1-4.

46 See www.unidroit.org.

47 Even the incorrect application of applicable law in itself is insufficient to set aside an arbitral award, see HR 22 December 2006, *Nederlandse Jurisprudentie* 2008, 4 (Kers/Rijpma) and the comments on article 1065 DCCP in Part III, Chapter 1, so this is *a fortiori* true for the trade usages, which merely have to be «taken into account».

48 HR 25 February 2000, *Nederlandse Jurisprudentie* 2000, 508 (Benetton III).

equated with an award that does not contain reasons and can, thus, be set aside.[49] This criterion has lead to considerable debate, since it is unclear what is meant by a 'convincing explanation' (*steekhoudende verklaring*).[50] The Nannini-judgement has resulted in an increase of setting aside action. In the subsequent Kers/Rijmpa-case, however, the Supreme Court added that the *Nannini* criterion must be applied with restraint and that the court must only apply it in clear-cut cases. State courts may now only set aside an award if the award contains no reasons at all or if it is so defectively reasoned that it must be equated with an award without reasons.[51] The Supreme Court also ruled that, if the reasoning of the tribunal is based on the wrong rules or an incorrect interpretation of the applicable rules, the award cannot be set aside for that reason, because this does not mean that the award can be put on par with an award that does not contain any reasoning at all.[52]

3.7. Challenge and revision of the award

3.7.1. Challenge of the award

3.7.1.1. Grounds for challenging awards

Article 1065 DCCP lists 5 grounds for setting aside, *i.e.*, challenging, an arbitral award: (a) absence of a valid arbitration agreement, (b) constitution of the arbitral tribunal contrary to the rules applicable thereto, (c) breach of mandate, (d) the arbitral award was not signed by the arbitrators or not reasoned and (e) the award or the manner in which it is realized, is contrary to public policy or good morals.[53] This list is exhaustive.[54] In recent years, the Supreme Court has consistently directed the courts to act with restraint in applying the grounds for setting aside. Proceedings to set aside an award may, thus, not be used as an appeal in disguise. The public interest in the effectiveness of arbitration requires that a court only sets aside in clear-cut cases.[55]

The award can be set aside if the tribunal has declared it has jurisdiction, but there is no valid agreement to arbitrate (*i.e.*, ground (a) in article 1065(1) DCCP).

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[49] HR 9 January 2004, *Nederlandse Jurisprudentie* 2005, 190 (Nannini/SFT).

[50] '*Steekhoudend*' also translates as 'sound' and 'well-founded'.

[51] HR 22 December 2006, *Nederlandse Jurisprudentie* 2008,4 (Kers/Rijpma).

[52] See *e.g.*, HR 22 December 2006, *Nederlandse Jurisprudentie* 2008,4 (Kers/Rijpma), par. 3.5.

[53] Article 1065 (1) DCCP.

[54] VAN MIERLO, A.I.M., C.J.J.C. VAN NISPEN & M.V. POLAK. *Op. cit.*, p. 1523. Reference is made to Explanatory Memorandum, Parliamentary History II 1983/84, 18 464, n.° 3, p. 28.

[55] See *e.g.*, HR 17 January 2003, *Nederlandse Jurisprudentie* 2004, 384 (IMS/MODSAF), HR 9 January 2004, *Nederlandse Jurisprudentie* 2005, 190 (Nannini/SFT) and HR 22 December 2006, *Nederlandse Jurisprudentie* 2008, 4 (Kers/Rijpma).

One of the reasons for invalidity of the arbitration agreement involves arbitrability. If an arbitral tribunal renders an award on a matter which is not capable of being settled by arbitration because it concerns legal consequences which may not be freely determined by the parties (article 1020(3) DCCP), the award can be set aside on the ground that the agreement, which referred the dispute to arbitration, was invalid.[56]

The second ground (b) in article 1065(1) pertains to requirements for the constitution of the tribunal, which are determined by the Dutch Arbitration Act and party agreement.[57] If the arbitral tribunal is not constituted in accordance with those requirements, the arbitral award rendered by that tribunal can be set aside. However, if a party participated in the constitution of the arbitral tribunal without complaining that its constitution was not in accordance with the prevailing requirements, that party is barred from applying to have the award set aside on this ground (articles 1065(3) and 1052(3) DCCP).

A tribunal violates its mandate if it awards in excess of, or differently from what was claimed, if it fails to decide on a claim, if it fails to take into account an essential defence, if it violates the agreed procedural rules, or if it decides in accordance with the rules of law instead of as *amiable compositeur* or *vice versa* (*i.e.*, ground (c) in article 1065(1) DCCP).

The award must be signed in accordance with article 1057 DCCP,[58] failing which it can be set aside on the basis of article 1065(1)(d). This rarely provides a ground for setting aside.[59] As stated in more detail above, an award can also be set aside if it does not contain reasons.

A violation of public policy,[60] which is the fifth ground for setting aside and contained in article 1065(1)(e), can pertain to either procedure and/or substance.

As to procedure, an award may be set aside if the manner in which it was made violates public policy. This typically involves violations of fundamental principles of due process and fair trial. In particular, the right to be heard, and/or heard equally, has generated quite some case law in proceedings to set aside an award.

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[56] Parliamentary History TK 1983-1984, 18.464, n.° 3, p. 29.

[57] See Part II, Section 3.

[58] See article 48, note 1.

[59] See for such a rare example: The Hague Court of Appeal, 28 November 2006, www.rechtspraak.nl via LJN: AZ3177, C 2004-1182 (appeal to the Supreme Court pending).

[60] The term 'good morals' is a superfluous addition —it offers no addition to what is already covered by 'public policy'—; see SANDERS, P. *Het Nederlandse arbitragerecht. Nationaal en international.* Kluwer, Deventer, 2001, p. 197.

Other examples of situations in which the manner in which the arbitral award was made breach public policy, involve violations of the impartiality and independence that arbitrators are required to observe. An award can only be set aside on this basis, if the claim is based on established facts evidencing that an arbitrator was not impartial or independent when rendering the decision, or when —taking into account the circumstances of the case— there is such severe doubt as to his impartiality or independence, that it would be unacceptable to uphold the arbitral award.[61]

As to substance, an award may be set aside if its contents violates public policy. It violates public policy if it is contrary to mandatory law of such fundamental nature that its application must not be impeded by procedural constraints.[62] A notable example is the incorrect application of or failure to apply EC competition law. In regard of EC competition law, the ECJ determined in the *Eco Swiss* case[63] that, where domestic rules of procedure require a national court to grant an application for setting aside of an arbitration award where such an application is founded on failure to observe national rules of public policy (as article 1065(1)(e) DCCP does), it must also grant such an application where it is founded on failure to comply with the prohibition laid down in article 81 EC. The same applies to EC consumer law.[64] In the *Mostaza Claro* case the European Court of Justice ruled that the Directive concerning unfair terms in consumer contracts, must be interpreted to mean that a national court seized of an action for setting aside of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even when the consumer has only argued the point in an action for setting aside, but failed to do so in the course of the arbitral proceedings.[65] In these cases, the ECJ has not decided whether arbitrators must act *ultra vires* and *ex officio* determine whether the relevant consumer law provisions were violated.[66]

Specific provision is made for partial setting aside. As mentioned, article 1065(5) DCCP provides that if the arbitral tribunal has awarded in excess of, or differently

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61 HR 18 February 1994, *Nederlandse Jurisprudentie* 1994, 765 (Nordström/Nievelt); European Commission on Human Rights 27 November 1996, *Nederlandse Jurisprudentie* 1997, 505 (Nordström/Nederland).

62 HR 21 March 1997, *Nederlandse Jurisprudentie* 1998, 206 (Benetton/Eco Swiss).

63 ECJ 1 June 1999, C-126/97 (*Eco Swiss China Time Ltd. vs. Benetton International NV*), *European Court Reports* 1999, p. I-03055; also in: *Nederlandse Jurisprudentie* 2000, 339.

64 ECJ 26 October 2006, C-168/05 (Elisa María Mostaza Claro vs. Centro Móvil Milenium SL), *European Court Reports* 1999, p. I-10421.

65 *Ibid.* For an application *ex officio* by an arbitral tribunal, see NAI 3 September 2007, *Tijdschrift voor Arbitrage* 2008, 3, n.° 6.

66 Dutch courts are required to do so, see *e.g.*, HR 3 December 2004, *Nederlandse Jurisprudentie* 2005, 118 (Vreugdenhil/Floraholland); Amsterdam Court of Appeal, 12 October 2000, *Nederlandse Jurisprudentie* 2002, 111.

from, what was claimed, the arbitral award shall be partially set aside 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. Partial setting aside is possible also in the case of application of the other grounds for setting aside. From case law it follows that it is possible to apply to have an arbitral award partially set aside, if the award contains decisions that are not inextricably entwined, so that a certain part of the award can be set aside, while the remainder of the award, not being inseparably connected, can be upheld.[67]

3.7.1.2. Proceedings

A party can submit a claim for challenge of a (partially) final arbitral award that is not, or no longer, open to appeal (*i.e.* the award has become final).[68] This claim must be filed at the registry of the district court where the original award is, or is to be, deposited.[69] The party claiming setting aside has to file the claim for challenge within three months after the day on which the award was deposited.[70] If the arbitral tribunal has failed to decide on one or more matters within its mandate, not being an essential defence by the respondent,[71] parties are obliged to request for a supplementary judgment before being able to submit a claim for challenging the award.[72] Subsequent to requesting such supplementary award, a claim for challenging the award on the ground of the arbitral tribunal not observing its mandate is only possible if the tribunal has either given or refused to give a supplementary judgment.[73] This latter claim is to be submitted within three months after the supplementary judgment was filed at the registry of the district court.[74]

3.7.2. Revision of the award

3.7.2.1. Grounds for revision

Pursuant to article 1068 DCCP, a party can request the revision of an award if (a) the award was wholly or partially based on fraud, which fraud is discovered after the award was rendered, by or with the knowledge of the other party, committed during

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67 HR 20 January 2006, *Nederlandse Jurisprudentie* 2006, 77 (ASB/Sagro).
68 Article 1064 (1) DCCP.
69 Article 1064 (2) DCCP.
70 Article 1064 (3) DCCP.
71 Van Mierlo, A.I.M., C.J.J.C. Van Nispen & M.V. Polak. *Op. cit.*, p. 1534. Reference is made to Supreme Court 14 February 1997, NJ 1998, 109 (Mannaerts Q.Q./Van Rhienen).
72 Article 1061 (1) DCCP.
73 Article 1065 (6) DCCP, Van Mierlo, A.I.M., C.J.J.C. Van Nispen & M.V. Polak. *Op. cit.*, p. 1534.
74 Article 1065 (7) DCCP.

the arbitral procedure, (b) the award is wholly or partially based on procedural documents that appear (after the award was rendered) to be forged or (c) a party obtained documents after the award was rendered which would have influenced the arbitral tribunal's decision and were withheld by or through the actions of the other party.[75]

3.7.2.2. Proceedings

Revocation proceedings commence with the issuance of a writ of summons and are conducted in accordance with the rules applicable to litigation in first instance (articles 78-260 DCCP), albeit that the competent court in first instance is the Court of Appeal.[76] Consequently, there is only one so-called factual instance, after which only cassation-appeal to the Supreme Court is possible. Cassations are, in short, limited to review on errors in law, not in fact.

The time limit for issuing the writ of summons is three months. This time limit may start on three different dates. In relation to the time limit for the application to set aside, the writ of summons must be served (i) within three months after the date of deposit of the award with the court clerk's office, *or* (ii) within three months after the award (together with leave for enforcement) is officially served by the party seeking enforcement of the award (see article 1064(3) DCCP above). Since the time limit for setting aside may have lapsed, before the fraud or forgery of documents, or withholding of relevant documents has been discovered, article 1068 DCCP provides that the writ may be served (iii) within three months after the fraud or forgery has become known or the party has obtained the new documents. If a party is a natural person and dies within any of these time limits, his heirs may use an additional limitation period.[77]

Although the text of article 1068 DCCP may suggest otherwise, article 1068 DCCP does not lead to the revocation of the award, but to the award being set aside. In this respect, the provisions for revocation in arbitration cases are different from those for court decisions. The latter provide for reopening of the case and the possibility that the court revokes the contested decision and gives a new decision on the merits of the case (articles 382-391 DCCP).[78] This is different in arbitration:

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[75] Article 1068 (1) DCCP.

[76] Proceedings to set aside are also conducted in accordance with the rules applicable to litigation, but proceedings to set aside are conducted in the three instances (District Court, Court of Appeal and Supreme Court).

[77] Article 1068 DCCP refers to article 341 DCCP, on the basis of which a three-month period starts to run as of the date on which the party died, which period may be extended by a maximum of four months.

[78] Article 1068 formerly adopted the same procedure, but this was changed in a revision of the DCCP.

if the arbitral award is set aside based on a ground for revocation, the party having initiated the arbitration will have to start from scratch by initiating proceedings before State courts (article 1068(3) in conjunction with article 1067 DCCP). The parties may agree, however, that the jurisdiction of the courts does not revive if they agree to submit the case to arbitration (again; article 1068(3) in conjunction with article 1067 DCCP).

Neither setting aside proceedings not revocation proceedings suspend the enforcement of an award (article 1068(2) in conjunction with article 1066(1) DCCP). However, the court that decides on the revocation may, upon a justified request thereto, suspend enforcement until a final decision is made on the revocation (article 1068(2) in conjunction with article 1066(2) DCCP). The provisions on suspension of enforcement are the same as those for proceedings to set aside (see the comments on article 1066 DCCP above), save that, of course, the request for suspension should be made to the Court of Appeal instead of the District Court.

Article 1068(3) DCCP provides that the court may wholly or partially set aside the arbitral award if it finds the grounds for revocation to be correct. The provision does not contain criteria in regard to the question of whether an award should be set aside either in part or in full. A court could apply the same criterion as has been established for proceedings to set aside, by partially setting aside the part(s) of the award containing decisions which are not inextricably entwined, so that a certain part of the award can be set aside, while the remainder of the award, not being inseparably connected, can be upheld (see the comments on article 1065 DCCP above). In cases of wilful acts of fraud or forgery, the court may however feel tempted to penalize the party guilty of such conduct by wholly setting aside an award, even where the award is only partially based on such circumstances.

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The recognition and enforcement of foreign arbitral awards is contained in articles 1075 and 1076 DCCP. A distinction is made between arbitral awards made in a foreign State to which a treaty applies concerning recognition and enforcement[79] and arbitral awards made in a foreign State to which no treaty concerning recognition and enforcement applies.[80] In the first case, the most relevant treaty concerning recognition and enforcement is the New York Convention.[81] If this treaty or another

[79] Article 1075 DCCP.

[80] Article 1076 DCCP.

[81] The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 United Nations Treaty Series, p. 38, no. 4739 (1959). See VAN

treaty applies, article 1075 DCCP states that the provisions of articles 985 to 991 DCCP inclusive apply (unless the Dutch Arbitration Act contains provisions which deviate from these provisions), which contain the formalities regarding the enforcement of foreign judgments. The only difference is that the President of the District Court is the competent judge (not the District Court itself), and that the time limit for appeal from this decision and for appeal to the Supreme Court shall be two months (instead of one month).[82] Article 985 DCCP determines that the decision must be enforceable on the basis of an Act or a treaty. This will usually be either articles 1075 or 1076 DCCP, or the New York Convention. Accordingly, the judge will have to decide whether the conditions of either these DCCP provisions or the New York Convention are met.[83]

If no treaty applies concerning recognition and enforcement, or if a treaty applies that allows a party to rely on the law of the country in which the party seeks recognition or enforcement, an exequatur for an arbitral award may still be sought in the Netherlands unless either (1) the party against whom recognition or enforcement is sought, states and proves one of the following grounds: absence of a valid arbitration agreement, constitution of the arbitral tribunal contrary to the rules that apply thereto, the arbitral tribunal has not observed its mandate,[84] the arbitral award is still open to appeal (to a second arbitral tribunal or a court in the country in which the award was rendered), the arbitral award was set aside by a competent authority of the country in which the award was rendered, or (2) the court considers that the recognition or enforcement would be contrary to public policy.[85] The arbitral award can be partially recognised or enforced if it contains decisions is in excess of, or different from what was claimed: the part of the award in excess of or different from the claim can be separated from the remaining part of the award.[86] The provisions of articles 985 to 991 DCCP, inclusive, apply (unless the Dutch Arbitration Act contains provisions which deviate from these provisions), the only differences being that the President of the District Court is the competent judge (not the District Court itself), that the time limit for appeal from this decision and for appeal to the Supreme Court shall be two months (instead of one month) and that it is not required to submit documents which evidence the enforceability of the arbitral award in the country in which it was rendered.[87]

MIERLO, A.I.M., C.J.J.C. VAN NISPEN & M.V. POLAK. *Op. cit.*, p. 1552.

82 Article 1075 DCCP.

83 VAN DER BEND, B., M. LEIJTEN & M. YNZONIDES. *Op. cit.*, p. 311.

84 Under certain circumstances do these three grounds not constitute a ground for refusal of recognition or enforcement (article 1074 (4-6) DCCP).

85 Article 1076 (2) DCCP.

86 Article 1076 (5) DCCP.

87 Article 1076 (6) DCCP.

V. Conclusion

The Netherlands provides a modern arbitration act and a judiciary that is both highly familiar with arbitration and supportive of arbitral proceedings. It is notable that arbitral institutions such as the NAI and the ICC, as well as the Permanent Court of Arbitration, a UN institution seated in The Hague, experience an increase in their arbitral case load. The PCA remains a preeminent and neutral forum for seating international arbitrations. The recently adopted improvements to the NAI Rules of Arbitration and the draft bill for the revision of the arbitration act that further modernises the arbitration act, provide ample basis for continued confidence in the Netherlands regarding arbitration as a respected and credible alternative to litigation in State courts and alternative dispute resolution methods.