

ARBITRATION IN THE NETHERLANDS

By Mark Ziekman and Marlous de Groot, CMS

Table of Contents

1.	Historical background	499
1.1	Overview	499
1.2	Review of the Netherlands Arbitration Act	500
1.3	Arbitration experience in the Netherlands	500
2.	Scope of application and general provisions of the Netherlands Arbitration Act	501
2.1	Scope of application	501
2.2	General principles	501
3.	The arbitration agreement	502
3.1	Formal requirements	502
3.2	Arbitrability	502
3.3	Separability	502
3.4	Legal consequences of a binding arbitration agreement	503
4.	Composition of the arbitral tribunal	503
4.1	Composition of the arbitral tribunal	503
4.2	Procedure for challenging and substituting arbitrators	504
4.3	Arbitrators' fees	504
4.4	Arbitrator immunity	504
5.	Jurisdiction of the arbitral tribunal	505
5.1	Competence to rule on jurisdiction	505
5.2	Power to order interim measures	505
6.	Conduct of proceedings	505
6.1	Commencing an arbitration	505
6.2	General procedural principles	505
6.3	Seat and language of arbitration	506
6.4	Multi-party issues	506
6.5	Oral hearings and written proceedings	507
6.6	Default by one of the parties	508
6.7	Taking of evidence	508
6.8	Disclosure of documents	508
6.9	Appointment of experts	508
6.10	Confidentiality	508

7.	Making of the award and procedural rulings	509
7.1	Choice of law	509
7.2	Form, content and notification of an award	509
7.3	Settlement	510
7.4	Power to award interest and costs	510
7.5	Decision making by the arbitral tribunal	510
7.6	Effect of an award	510
7.7	Correction and interpretation of the award	511
7.8	Submissions	511
8.	Role of the courts	511
8.1	Jurisdiction of the courts	511
8.2	Preliminary rulings on jurisdiction	512
8.3	Interim protective measures	512
8.4	Obtaining evidence and other court assistance	512
9.	Challenging and appealing an award through the courts	513
9.1	Jurisdiction of the courts	513
9.2	Appeals	513
9.3	Applications to set aside an award	513
10.	Recognition and enforcement of awards	514
10.1	Domestic awards	514
10.2	Foreign awards	514
11.	Special provisions and considerations	515
12.	Concluding thoughts and themes	515
13.	Contacts	516

1. Historical background

1.1 Overview

- 1.1.1 On 1 October 1838, the legal basis for arbitration in the Netherlands was implemented in Book III of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*). This remained more or less unchanged until the 1986 Arbitration Act was adopted and came into force on 1 December 1986. The 1986 Arbitration Act is set out in Book IV of the Code of Civil Procedure (***Netherlands Arbitration Act***).
- 1.1.2 The Netherlands Arbitration Act was designed to promote the Netherlands as a seat for international arbitration. The Model Law (1985)¹ has clearly influenced the 1986 amendments in the Netherlands Arbitration Act in view of the emphasis placed on *inter alia* party autonomy. As a result, the Netherlands Arbitration Act contains a comprehensive set of rules for arbitration in the Netherlands and some articles regulating arbitration outside the Netherlands.
- 1.1.3 Please note that in this guide the term “the Netherlands” does not include the Caribbean islands within the Kingdom of the Netherlands. These islands adopted their own legislation with respect to arbitration, also based, to a large extent, upon the Model Law (1985).²
- 1.1.4 Every arbitration that takes place in the Netherlands is subject to the Netherlands Arbitration Act, even when the parties involved are foreign. The regulations contained in the Netherlands Arbitration Act often apply subject to the agreement of the parties and there is considerable scope for the parties to formulate their own arbitral procedure (most commonly by adopting a standard set of arbitration rules promulgated by a domestic or international arbitral institution, as appropriate).
- 1.1.5 One peculiarity of the Netherlands Arbitration Act is that, in a number of cases, the President of the District Court may be called upon to assist with the conduct of the arbitration. One such instance is where the parties have failed to reach agreement on the number of arbitrators. In such a case, the President of the District Court may be petitioned by either party to make a ruling. There is further scope to make applications to the President of the District Court in other cases, such as for the appointment of an arbitrator, the removal of an arbitrator, the

¹ Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

² On 10 October 2010 the island group of the Netherlands Antilles split up. Its islands Curaçao and St. Maarten now have the constitutional status of separate countries within the Kingdom of the Netherlands, a status that nearby Aruba obtained in 1986. The islands Bonaire, St. Eustatius and Saba are special municipalities of the Netherlands, with separate legislation on arbitration, very similar to that on Curaçao, St. Maarten and Aruba.

examination of an unwilling witness or the granting or refusal of an enforcement order. In many ways the President's role is akin to that of an arbitral institution and in general any such interference is very limited.

1.2 Review of the Netherlands Arbitration Act

- 1.2.1 During the review of the Dutch Civil Procedural law in 2002, the Minister of Justice announced that the Netherlands Arbitration Act would also be reviewed. On 21 December 2006, a preliminary draft bill was presented to the Ministry of Justice by the chair of the Netherlands Arbitration Institute (**NAI**). It is not yet known when the legislative proposal of the Netherlands Arbitration Act will be submitted to the House of Representatives or whether the legislator will accept the preliminary draft bill.
- 1.2.2 There are two main reasons for reviewing the Netherlands Arbitration Act. First, after the implementation of the Netherlands Arbitration Act, the Model Law (1985) was adopted by at least 60 countries. The Netherlands is not one of those countries. Although the Model Law (1985) influenced Netherlands law on arbitration, the Netherlands Arbitration Act does not fully mirror its terms. Secondly, several important sets of institutional arbitration rules have been revised since the implementation of the Netherlands Arbitration Act, e.g. the ICC Rules, the LCIA Rules and the arbitration rules of the NAI (**NAI Rules**).

1.3 Arbitration experience in the Netherlands

- 1.3.1 The Netherlands has positive experience with arbitration. The leading arbitral institute is the NAI. In addition, there are permanent arbitration boards, for example *De Raad van Arbitrage voor de Bouwbedrijven* (construction) and numerous other trade-specific arbitration panels. Arbitration has even made some inroads into sport-related disputes, and the Royal Dutch Football Association arbitration board is well established. Arbitration is also widely used in IT, telecom and internet cases. ICT-Office (a Dutch trade association for 550 IT, telecom, internet and office companies) recommends that its members use general terms and conditions containing an arbitration clause based on the rules of *Stichting Geschillenoplossing Automatisering*. Finally, in 2000, the Dutch Centre of the ENDR, a network supported by the European Union for European arbitration, was founded.
- 1.3.2 While not as popular as institutional arbitration in the Netherlands, ad hoc arbitration is also available and the Netherlands Arbitration Act contains fall-back provisions that may assist in conducting ad hoc arbitrations.

- 1.3.3 The often cited advantages of arbitration over court proceedings, such as confidentiality, trade expertise of arbitrators, flexibility and expediency, apply with equal force to arbitration in the Netherlands.
- 1.3.4 Traditionally the cost of arbitral proceedings in the Netherlands has not varied significantly from court proceedings. Costs may increase if the award is challenged in the courts, though the Netherlands Arbitration Act has curtailed the grounds for challenge.
- 1.3.5 In addition to arbitration, there are binding ruling procedures in the Netherlands. A binding ruling (*bindend advies*) by an independent third party resembles arbitration, but there is one essential difference. A binding ruling can only be set aside and declared non-binding if it is in serious conflict with reasonableness and fairness and if it would be an abuse of law if the opposite party, on the basis of the binding ruling, should wish to hold the other party to it. In other words, the binding ruling is subject to limited review on the ground that the ruling is in serious conflict with reasonableness and fairness (*marginale toetsing*). Another difference between the binding ruling procedures and arbitration relates to the enforceability of the award/ruling. A binding ruling has the characteristics of an agreement and is deemed to have the force of an agreement. An arbitration award can be enforced simply on the basis of an enforcement order. In the case of a binding ruling, the ruling must be brought before the District Court to request enforcement.

2. Scope of application and general provisions of the Netherlands Arbitration Act

2.1 Scope of application

- 2.1.1 The Netherlands Arbitration Act is applicable if the seat of the arbitration is located in the Netherlands, whether the arbitration is ad hoc or institutional, and regardless of the nationality of the parties.³

2.2 General principles

- 2.2.1 Article 17 of the Dutch Constitution provides that no party may be prevented against his or her will from being heard by a court he or she is entitled to apply to by law. Therefore, arbitration must be based on the consent of all those involved. The principle of party autonomy is enshrined in the Netherlands Arbitration Act,

³ Netherlands Arbitration Act, art 1073, see also paragraph 6.3.2 below.

together with the principle of equality of the parties and the right of each party to present its case and to be heard.⁴ Infringement of party autonomy may result in the annulment (*vernietiging*) of an award.⁵

3. The arbitration agreement

3.1 Formal requirements

3.1.1 An arbitration agreement must be evidenced in writing.⁶ The requirement is a statutory provision that coincides with arbitration legislation abroad and also with provisions in various treaties on arbitration.

3.1.2 Arbitrators do not have jurisdiction to hear a case in the absence of a valid arbitration agreement. Parties may agree to submit to arbitration, disputes which have arisen or which may arise between them out of a defined legal relationship (whether contractual or not).⁷

3.2 Arbitrability

3.2.1 The question as to whether a dispute is suitable for arbitration may arise in the arbitration itself if there is a challenge to the jurisdiction of the arbitrator pursuant to Article 1052 of the Netherlands Arbitration Act. The issue may also arise if the case comes before an ordinary court where a party invokes the arbitration agreement to stay the court proceedings. Some disputes are not suitable for arbitration, such as certain proceedings in family law (e.g. divorce or adoption), bankruptcy proceedings and certain aspects of corporate law (e.g. the status of a limited liability company or liquidation proceedings).

3.2.2 If arbitrators render an award on a matter not suitable for arbitration, such an award is in conflict with public policy and can therefore be set aside.

3.3 Separability

3.3.1 The arbitration agreement shall be considered and decided upon as a separate agreement.⁸ The arbitral tribunal has the power to rule on the validity of the main agreement that contains the arbitration clause. Therefore, the possible invalidity of the main contract will not affect the validity of the arbitration clause that is

⁴ An elaboration of this principle is given in Netherlands Arbitration Act, art 1039, para 1.

⁵ Netherlands Arbitration Act, art 1065, paras 1(c) and 5.

⁶ *Ibid.*, art 1021.

⁷ *Ibid.*, art 1020.

⁸ *Ibid.*, art 1053.

included within the main contract. However, it is still uncertain whether an arbitration clause will survive if the main contract is considered non-existent by the arbitral tribunal.

3.4 Legal consequences of a binding arbitration agreement

- 3.4.1 A binding arbitration agreement first and foremost settles the jurisdiction of the arbitral tribunal. If a dispute within the scope of the arbitration agreement is brought before any domestic court, it will rule that it lacks jurisdiction. However, the District Court does have jurisdiction in certain procedural matters as is further described in section 8.1 below and the President of the District Court has jurisdiction in summary proceedings.
- 3.4.2 Other obvious consequences of a binding arbitration agreement are the different procedural rules and, if this is agreed upon, the choice of law that is to settle the dispute.

4. Composition of the arbitral tribunal

4.1 Composition of the arbitral tribunal

- 4.1.1 The parties are free to agree on any uneven number of arbitrators. If the parties, however, agree upon an even number of arbitrators, these arbitrators must appoint an additional arbitrator as chair.⁹ In certain other countries an even number of arbitrators is permitted and the courts in the Netherlands are willing to enforce the awards of foreign arbitral tribunals in such circumstances. If the parties fail to determine the number of arbitrators or cannot reach agreement on the number of arbitrators, the President of the District Court will determine the number of arbitrators at the request of any of the parties.
- 4.1.2 The arbitral tribunal is appointed according to the procedure agreed between the parties. An appointment shall be made within a period of two months (three months if at least one of the parties is domiciled outside of the Netherlands) from the date the dispute is submitted to the arbitral tribunal, unless the arbitral tribunal had already been appointed.
- 4.1.3 Where a party fails to make an appointment within the two-month period, the non-defaulting party may request the President of the District Court to make the appointment.

⁹ *Ibid*, art 1026.

4.2 Procedure for challenging and substituting arbitrators

- 4.2.1 An arbitrator must accept his or her appointment in writing.¹⁰ He or she may be relieved from the appointment upon his or her own request or by the joint decision of the parties. An arbitrator may be challenged if there is justifiable reason to doubt his or her impartiality or independence.¹¹
- 4.2.2 An arbitrator selected by one party can only be challenged by that same party for reasons that have become apparent after his or her appointment. A party cannot challenge an arbitrator appointed by a third party or by the President of the District Court if he or she has acquiesced in the appointment, unless a reason to challenge the arbitrator becomes known to him or her thereafter.
- 4.2.3 The general rule that an arbitrator may be challenged where there are justifiable reasons to doubt his or her impartiality or independence derives from Article 10 of the UNCITRAL Arbitration Rules (1976).¹²
- 4.2.4 In the event that an arbitrator is incapable of performing his or her duties, he or she shall be removed upon the request of either party or, in default thereof, by the President of the District Court. Where an arbitrator is thus removed, he or she shall be replaced in accordance with the same procedure as per the original appointment.
- 4.2.5 The arbitration is suspended during the period for replacing an arbitrator unless otherwise agreed by the parties.

4.3 Arbitrators' fees

- 4.3.1 The Netherlands Arbitration Act does not include stipulations regarding the arbitrators' fees. In this regard, distinction should be made between institutional arbitration and ad hoc arbitration. In the former case, the arbitral institution will have a fee schedule, and in the latter case, the determination of fees is left to the arbitrators and the parties. It is normal practice that the arbitrators request a deposit before the start of the arbitral proceedings.

4.4 Arbitrator immunity

- 4.4.1 The liability of arbitrators in the Netherlands to a large extent mirrors the liability of judges, hence an arbitrator may only be held liable in exceptional cases.¹³ Where the arbitrator has ignored fundamental principles of law, this may constitute a

¹⁰ *Ibid*, art 1029.

¹¹ *Ibid*, art 1033.

¹² See CMS Guide to Arbitration, vol II, appendix 3.1.

¹³ See among other judgments *ASB Greenworld v NAI*, Dutch Supreme Court, 4 December 2009, *JOR* 2010, 175.

violation of public policy which is in turn a ground for annulling the award or refusing its enforcement order. In exceptional circumstances, the arbitrator may be liable in damages to the parties for rendering an award that is contrary to public policy and is incapable of being enforced. Furthermore, the arbitrator may be held liable if an award is filed late, or if there has been excessive delay in the conduct of the proceedings.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

5.1.1 The arbitral tribunal is competent to rule on its own jurisdiction in the first instance and will decide upon the existence or validity of the arbitration agreement. This decision is, however, subject to subsequent judicial control.¹⁴

5.2 Power to order interim measures

5.2.1 The arbitral tribunal has the power to grant interim measures if the parties so agree.¹⁵ In the absence of such an agreement, an application must be made to the President of the relevant District Court.¹⁶

6. Conduct of proceedings

6.1 Commencing an arbitration

6.1.1 In general, arbitral proceedings commence when a party to a dispute serves a written notice informing the other party that it is commencing arbitration and setting out the disputes submitted to arbitration. The parties may agree on a different procedure for initiating an arbitration.¹⁷

6.2 General procedural principles

6.2.1 Dutch law includes a number of fundamental principles of procedural law. These principles include the equal treatment of parties and the right of each party to defend its own rights and to put forward arguments to that effect.¹⁸ The arbitral tribunal has the right to request oral submissions, to call witnesses or experts and

¹⁴ Netherlands Arbitration Act, art 1052.

¹⁵ *Ibid*, art 1051.

¹⁶ *Ibid*, art 1022, para 2.

¹⁷ *Ibid*, art 1036.

¹⁸ *Ibid*, art 1039.

to order the submission of documents.¹⁹ The arbitral tribunal is free to apply whatever rules of evidence it deems fit.²⁰ The arbitrators may at their discretion determine the relevance and weight of evidence.

6.2.2 The Netherlands Arbitration Act provides that the arbitration is conducted in a manner agreed upon by the parties or, in the absence of such an agreement, according to the directions of the arbitral tribunal.²¹

6.2.3 The way in which the arbitral proceedings are to be conducted is in most cases set out in the arbitration agreement. Where the parties have not agreed on the applicable procedure, the arbitrators determine the conduct of the proceedings (for example, directions on when submissions must be delivered). The chair of the arbitral tribunal plays an important role in such matters.

6.3 Seat and language of arbitration

6.3.1 The Netherlands Arbitration Act contains no provisions on the language of the proceedings and of documents to be submitted to the arbitral tribunal. The applicable language is therefore determined by the parties or, in the absence of an agreement, by the arbitral tribunal.²²

6.3.2 The seat of the arbitration is usually stipulated by the parties in their agreement, or, in absence of such agreement, it will be determined by the arbitral tribunal.²³ The seat of arbitration is important, as this determines whether the Netherlands Arbitration Act is applicable. Furthermore, the arbitration award has to be filed at the office of the District Court at the seat of arbitration (when the seat of the arbitration is in the Netherlands), so that an authoritative copy of the text is available for possible judicial review.²⁴

6.4 Multi-party issues

6.4.1 The Netherlands Arbitration Act contains several provisions on multi-party issues. Any third party that claims to have an interest in the outcome of the proceedings can request to join a party to the proceedings in its claim against another party (*voeging*) or file a claim against both parties (*tussenkomst*).²⁵ A party can also

¹⁹ *Ibid*, art 1039, paras 2–4, 1041, 1042 and 1043.

²⁰ *Ibid*, art 1039.

²¹ *Ibid*, art 1036.

²² *Ibid*, art 1036.

²³ *Ibid*, art 1037.

²⁴ *Ibid*, art 1058, para 1(b).

²⁵ *Ibid*, art 1045, para 1.

request that a third party is brought into the arbitration (*vrijwaring*).²⁶ An important condition is that the new participant is willing to become party to the arbitration agreement. The arbitral tribunal, having heard all parties, has the final say in these matters.

6.4.2 It is also possible to consolidate two arbitrations on related subjects. The President of the District Court of Amsterdam has jurisdiction in these matters.²⁷

6.5 Oral hearings and written proceedings

6.5.1 The arbitral tribunal has discretion as to whether there should be an oral hearing and may request an oral hearing even if the parties have elected a “documents only” format for the arbitration. The arbitral tribunal may order the parties to appear in person for the purpose of providing information or attempting to arrive at a settlement at any stage of the proceedings.²⁸

6.5.2 The arbitral tribunal may regulate the manner in which witnesses are examined and it is entitled to examine witnesses under oath. The cross-examination of witnesses is unusual in the Netherlands; however, the parties are free to agree on a cross-examination procedure should they wish to. In the event that a witness fails to appear voluntarily, or refuses to make a statement, the arbitral tribunal may permit the requesting party, within a term to be determined by the arbitral tribunal, to apply to the President of the District Court requesting the appointment of a delegated judge (*Rechter-Commissaris*) before whom the witness will be examined. Arbitrators have the opportunity to be present at the examination of the witness.²⁹

6.5.3 Further procedural powers of the arbitral tribunal include:

- the selection of an expert to deliver an opinion;³⁰
- the termination of an arbitration reference if a claimant fails to take certain procedural steps;³¹
- rendering an expedited award where the respondent defaults in presenting a defence without good reason;³²
- ordering parties to provide documents to the arbitral tribunal;³³ and

²⁶ *Ibid*, art 1045, para 2.

²⁷ *Ibid*, art 1046.

²⁸ *Ibid*, art 1043.

²⁹ *Ibid*, art 1041, para 2.

³⁰ *Ibid*, art 1042.

³¹ *Ibid*, art 1040, para 1.

³² *Ibid*, art 1040, para 2.

³³ *Ibid*, art 1039, para 4.

- allowing third parties who have an interest in the arbitration to join as a party or be heard as an intervener.³⁴

6.6 Default by one of the parties

- 6.6.1 The arbitral tribunal can terminate arbitral proceedings if the claimant, without showing good cause, does not file or substantiate its claims in time.³⁵ If the respondent, without showing good cause, fails to file or substantiate a defence in time, the arbitral tribunal is to award all claims unless a claim appears to be unjustified or unfounded. The arbitral tribunal can order the claimant to produce evidence of its claims before making this decision.³⁶

6.7 Taking of evidence

- 6.7.1 The arbitral tribunal shall, subject to any agreement between the parties, determine matters regarding evidence.³⁷

6.8 Disclosure of documents

- 6.8.1 The arbitral tribunal may order the disclosure of documents (often upon the request of the parties).³⁸ There is no formal sanction for breach of this order, although the arbitral tribunal is at liberty to draw inferences from any non-compliance. Generally, it is a matter for the parties to determine which documents they disclose. In the event that documents are unreasonably withheld by a party, the resulting award may be revoked if the other party obtains such documents afterwards and can establish that they would have affected the decision of the arbitral tribunal.³⁹

6.9 Appointment of experts

- 6.9.1 The Netherlands Arbitration Act authorises the arbitral tribunal to appoint experts, and the parties will have an opportunity to pose questions to the expert, and comment on the expert's opinion.⁴⁰

6.10 Confidentiality

- 6.10.1 The Netherlands Arbitration Act is silent on the confidentiality of the award. It has been the general practice in the Netherlands since 1919 to publish important

³⁴ *Ibid.*, art 1045.

³⁵ *Ibid.*, art 1040.

³⁶ *Ibid.*, art 1040, para 3.

³⁷ *Ibid.*, art 1039, para 5.

³⁸ *Ibid.*, art 1039, para 4.

³⁹ *Ibid.*, art 1068, para 1(c).

⁴⁰ *Ibid.*, art 1042, para 1.

awards as this is perceived to be in the public interest. The widely used NAI rules of procedure state that the NAI may have awards published, provided that parties are not named and defining characteristics of the parties are left out.⁴¹ A party can nevertheless prevent publication by objecting to the NAI within a month after it has received the award. There has been some speculation about the possibility of a party to an award bringing a claim for damages against an institution that has published the award.

7. Making of the award and procedural rulings

7.1 Choice of law

7.1.1 Parties often agree on the applicable law in their arbitration agreement and the arbitral tribunal will uphold this choice. The parties are also at liberty to refer to the *lex mercatoria*, although this choice of substantive law has not enjoyed wide acceptance in the Netherlands.

7.1.2 Where parties have neither selected a national law nor opted for the *lex mercatoria*, the arbitral tribunal will generally select the law of the country most closely connected with the contract between the parties (generally the law of the jurisdiction in which the principal obligations are to be performed).

7.2 Form, content and notification of an award

7.2.1 Unless the parties have agreed otherwise, if the arbitral tribunal is composed of more than one arbitrator, it shall decide by a majority of votes. The award shall be in writing and signed by the arbitrator or arbitrators. If a minority of the arbitrators refuses to sign, the other arbitrators shall record this fact in the award.⁴² The requirement for an award to be made in writing is mandatory.⁴³

7.2.2 The arbitral tribunal has to ensure that an original copy of the award is filed with the Registry of the District Court within the district where the arbitration is seated.⁴⁴

7.2.3 Finally, an award must contain the reasons on which it is based; otherwise it is liable to be set aside. The extent and effect of this requirement is the subject of

⁴¹ NAI Rules, art 55.

⁴² Netherlands Arbitration Act, art 1057.

⁴³ It is common in arbitrations in the construction industry for a verbal decision to be made, followed by a written award. This procedure often leads to delay in receiving the written award.

⁴⁴ Netherlands Arbitration Act, art 1058, para 1(b).

much debate. In 2004 the Supreme Court ruled that annulment of the award due to the absence of reasons is only possible if the award is rendered without any reasons at all for the decision. Annulment is not possible when the reasons and explanations for the decision are deficient or inadequate, unless such deficiency in the reasoning is so obvious that it is considered to be on a par with no reasoning at all.⁴⁵

7.3 Settlement

7.3.1 Arbitrators may render an award to reflect a settlement reached by the parties.⁴⁶ Such recorded settlement is a valid award for the purposes of enforcement, and can only be set aside if it is contrary to public policy. The settlement award must be signed by both parties.

7.4 Power to award interest and costs

7.4.1 The Netherlands Arbitration Act does not contain rules on the costs of the arbitration. An arbitral tribunal is free to award costs and has wide discretion as to how the costs are to be allocated. It is usual practice for costs to follow the event (i.e. costs are awarded in favour of the successful party).

7.5 Decision making by the arbitral tribunal

7.5.1 The parties can agree on the procedural aspects of how the arbitral tribunal is to render its award. Unless otherwise agreed by the parties, the arbitral tribunal decides by a majority of votes (where there is more than one arbitrator). The appointment of a secretary (*secretaris*) to record the arbitral decision is quite popular in the Netherlands. The secretary ensures that the arbitral tribunal complies with certain agreed formalities.

7.6 Effect of an award

7.6.1 The final and conclusive award primarily settles the dispute between the parties. If it has become final and conclusive (*kracht van gewijsde*), domestic courts will recognise and enforce it, subject to the proceedings described in section 10.1 below. Parties to the arbitration agreement cannot challenge the facts as established in the award as they acquire the force of *res judicata* (*gezag van gewijsde*).⁴⁷ However, other parties are not bound by the facts as established in the award.

⁴⁵ *Nannini v SFT Bank*, Dutch Supreme Court 9 January 2004, *JBPR* 2004, 31.

⁴⁶ Netherlands Arbitration Act, art 1069.

⁴⁷ *Ibid*, art 1059.

7.7 Correction and interpretation of the award

7.7.1 The correction of a final award is permitted under the Netherlands Arbitration Act.⁴⁸ The correction of an interim award is not allowed, since the omission can be repaired in a subsequently rendered interim award or in the final award. The parties are at liberty to request the correction of typographical or computational errors within 30 days of the award being filed. Corrections of names, addresses, date of signing and place of the award are also permitted within the same period. Enforcement, however, is not suspended pending resolution of a request for corrections, unless the President of the District Court, who may be called upon for assistance, deems it necessary to suspend further proceedings for urgent reasons until there is a ruling on the request for corrections.

7.7.2 In a situation where the claimant has neglected to claim interest or costs of the proceedings, an arbitral tribunal will exceed its jurisdiction if it nonetheless orders the payment of interest or costs of the proceedings.⁴⁹ If such a fundamental principle of procedural law is violated, an award can be set aside.⁵⁰

7.8 Submissions

7.8.1 The arbitral tribunal shall also determine the timetable for submissions, unless the parties have already agreed a timetable.

8. Role of the courts

8.1 Jurisdiction of the courts

8.1.1 If a dispute falls within the scope of an arbitration agreement, the appropriate domestic court will rule that it lacks jurisdiction.⁵¹ In a number of cases, however, the Netherlands Arbitration Act envisages that the District Court will assist in the conduct of the arbitration. For instance, the District Court may be called upon to:

- appoint an arbitrator;⁵²
- remove or replace an arbitrator;⁵³
- examine reluctant witnesses;⁵⁴

⁴⁸ *Ibid*, art 1060.

⁴⁹ *Kuiken v Balkema*, Amsterdam Court of Appeal 23 May 1958, *NJ* 1958, 465.

⁵⁰ Netherlands Arbitration Act, art 1065, para 1.

⁵¹ *Ibid*, art 1022.

⁵² *Ibid*, art 1027, para 3.

⁵³ *Ibid*, art 1029, para 4.

⁵⁴ *Ibid*, art 1041, para 2.

- obtain information regarding foreign law;⁵⁵
- fix a date for the hearing;⁵⁶
- lift, suspend or mitigate a penalty (*dwangsom*);⁵⁷ and
- grant or refuse enforcement of an award.⁵⁸

8.1.2 Generally, it can be said that the role of the President of the District Court is important in a limited number of cases where the arbitration procedure, for whatever reason, falters. Such instances remain exceptional in Dutch arbitration practice.

8.2 Preliminary rulings on jurisdiction

8.2.1 Please note that a challenge of the jurisdiction of the domestic courts should be made before the formal defence on the merits is filed.⁵⁹ It is advisable to explicitly request that any preliminary decision on jurisdiction is open for immediate appeal so the parties are not forced to complete an entire proceeding before the decision that the court has jurisdiction can be appealed.

8.3 Interim protective measures

8.3.1 An arbitration agreement shall not preclude a party from requesting a court to grant interim measures of protection to preserve the *status quo* between the parties, such as to ensure that no assets will be moved out of the relevant jurisdiction.⁶⁰ If time is of the essence, as is often the case in these matters, a party can apply to the President of the District Court for a decision in summary proceedings (*kort geding*).

8.4 Obtaining evidence and other court assistance

8.4.1 The arbitral tribunal has no power to compel a witness to give evidence to the arbitral tribunal but a delegated judge (*Rechter-Commissaris*) can be appointed to examine the witness.⁶¹ Attendance by the witness can be secured under Dutch Civil Procedure Law by way of a summons (*dagvaarding*).

⁵⁵ *Ibid*, art 1044, para 1.

⁵⁶ *Ibid*, art 1041, para 2.

⁵⁷ *Ibid*, art 1056, para 3.

⁵⁸ *Ibid*, art 1063.

⁵⁹ *Ibid*, art 1022, para 1.

⁶⁰ *Ibid*, art 1022, para 2.

⁶¹ *Ibid*, art 1041, para 2.

- 8.4.2 Applications for a witness to be examined before the commencement of the arbitral proceedings should be made to the District Court, as the Netherlands Arbitration Act does not make provision for a witness examination before the commencement of arbitral proceedings.

9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts

- 9.1.1 The application to set aside (*vernietigen*) or revoke (*herroepen*) an award should be lodged with the District Court at the seat of arbitration. This has to be done within three months of the award being filed there or, if no award is filed, within three months of the award and judicial enforcement order (*verlof tot tenuitvoerlegging*) being served upon the other party.⁶²

9.2 Appeals

- 9.2.1 An appeal against a decision of the President of the Court will generally be a matter for the Court of Appeal. An appeal against an award is not possible before the courts in the Netherlands, unless the parties have expressly provided for this in their arbitration agreement.

9.3 Applications to set aside an award

- 9.3.1 The grounds on which an award can be set aside (*vernietigd*) are as follows:
- there is no valid arbitration agreement;
 - the arbitrator has not been correctly appointed;
 - the arbitral tribunal lacks substantive jurisdiction;
 - the award has not been signed and/or does not contain sufficient reasons;
 - there have been serious irregularities affecting the proceedings; or
 - the award is contrary to public policy.⁶³
- 9.3.2 An award can be revoked (*herroepen*) by the District Court in specific cases of fraud, or if, after the award, a party obtains documents that would have affected the decision of the arbitral tribunal which were withheld by the other party.⁶⁴

⁶² *Ibid*, art 1064, para 3.

⁶³ *Ibid*, art 1065.

⁶⁴ *Ibid*, art 1068, para 1(c).

10. Recognition and enforcement of awards

10.1 Domestic awards

- 10.1.1 The recognition and enforcement of an award in the Netherlands must be sought by way of an application to the President of the relevant District Court.⁶⁵
- 10.1.2 The President will only grant enforcement of the award after the period for challenging the award has elapsed (i.e. after three months of receipt of the award from the parties).
- 10.1.3 In practice, enforcement of awards is nearly always granted in the Netherlands, subject only to exceptional cases on the grounds set out in the Netherlands Arbitration Act, namely:
- the content of the award is contrary to public policy or public morals;
 - the manner of formation of the award is contrary to public policy or public morals; or
 - a penalty (*dwangsom*) is unlawfully imposed.⁶⁶
- 10.1.4 If enforcement has been granted by the President, the only legal remedy available for a respondent is to apply for the annulment of the civil request, being a revocation of an award in the event of fraud, forgery or upon the emergence of new evidence. An application for revocation shall be brought before the Court of Appeal.

10.2 Foreign awards

- 10.2.1 The Netherlands is party to the New York Convention.⁶⁷
- 10.2.2 Articles 1075 and 1076 of the Netherlands Arbitration Act govern the enforcement of foreign awards rendered in New York Convention states and non-New York Convention states. An award may be challenged on several grounds, including if:
- the arbitral tribunal exceeded the terms of its reference in the award;
 - there was no valid arbitration agreement between the parties; or
 - the award is contrary to public policy.⁶⁸

⁶⁵ *Ibid*, art 1062.

⁶⁶ *Ibid*, art 1063.

⁶⁷ New York Convention (see CMS Guide to Arbitration, vol II, appendix 1.1).

⁶⁸ Netherlands Arbitration Act, art 1076.

- 10.2.3 The European Court of Justice⁶⁹ and the Court of Appeal⁷⁰ have ruled that an award rendered in violation of regulations governing European Union anti-trust law⁷¹ can constitute a violation of public policy.
- 10.2.4 An award may also be contrary to public policy if there is a violation of a fundamental principle of fair procedure, such as the denial of one party's right to be heard by the arbitral tribunal.⁷²
- 10.2.5 It should be noted that the Dutch requirements for a valid arbitration agreement are less stringent than those prescribed in Article II of the New York Convention. Thus, in summary, a party seeking to enforce a New York Convention award in the Netherlands may, in appropriate circumstances, apply to the court either on the basis of Article 1076 of the Netherlands Arbitration Act or the New York Convention.

11. Special provisions and considerations

- 11.1.1 The Netherlands Arbitration Act does not address the possibility of rectifying errors in an interim award. The Netherlands Arbitration Act also does not address the issue of dissenting opinions. Dissenting opinions are extremely rare in domestic arbitrations in the Netherlands, although it would appear to be open to arbitrators in an international arbitration to render a dissenting opinion and attach this to the award.

12. Concluding thoughts and themes

- 12.1.1 The Netherlands is an arbitration friendly country. There are several industries in which arbitration is frequently used, such as construction, sports and IP/ICT. Also the NAI is constantly trying to make national arbitration and international arbitration as effective and client friendly as possible, offering a very good alternative for dispute resolution of pretty much any kind of dispute outside of court.

⁶⁹ *Eco Swiss China Time Ltd. v Benetton International NV*, Case 126/97 ECR [1999] I-3055.

⁷⁰ *Sesam v Betoncentrale Twente*, Amsterdam Court of Appeal 12 October 2000, *Tijdschrift voor Arbitrage* 2001, p 184.

⁷¹ EC Treaty, art 81.

⁷² *Kersten & Co v Société Commerciale Raoul-Duval*, Amsterdam Court of Appeal 16 July 1992, *NJ* 1994, 181.

13. Contacts

CMS Derks Star Busmann

Mondriaantoren

Amstelplein 8A

1096 BC Amsterdam

The Netherlands

Mark Ziekman

T +31 20 3016 413

E mark.ziekman@cms-dsb.com

Marlous de Groot

T +31 20 3016 331

E marlous.degroot@cms-dsb.com