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A New Arbitration Law for the Netherlands

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I. Introduction

The Netherlands is arbitration-minded. Labour arbitration, as practised in the United States of America, is unknown in the Netherlands. In the commercial field, however, the use of arbitration is widespread. This may be seen from the great number (well over 100) of specialized arbitral institutions.[1] The general arbitral institution is the Netherlands Arbitration Institute, the rules of which contain the same list-procedure for the appointment of arbitrators as the Rules of the American Arbitration Association.[2] Another indication of the popularity of arbitration is the existence, since 1919, of an arbitration periodical which publishes not only articles on arbitration and court decisions on arbitration, but also extracts from interesting arbitral awards, either ad hoc or from one of the many arbitral institutions.[3] Of course, where necessary, the identity of the parties is fully cam-

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* Presently this proposed law is before the Dutch Parliament and a copy of it is unobtainable. Consequently, no citations will be given for the Bill.

1. These institutions can be found in the field of commodities such as grain, but also in other branches such as the building sector, graphic industry, cinematographic sector and, recently, in the world of sports, where disputes arising out of transfer of soccer players are dealt with by arbitration. A selected list of arbitral institutions is given in Sanders, *National Report on Arbitration in the Netherlands*, 6 Y.B. COM. ARB. 60 (Int'l Council for Com. Arb. (ICCA) 1981) [hereinafter cited as *National Report, Netherlands*]. The *Yearbook: Commercial Arbitration* has appeared since 1976 under the auspices of the ICCA (in English), and is published by Kluwer, Deventer; Netherlands.

2. The Netherlands Arbitration Institute was established in 1949 and, right from the beginning, introduced the list-procedure in Europe. Its Rules can be obtained (also in English) from its Secretariat, Oppert 34, Rotterdam.

3. The journal, *Tijdschrift voor Arbitrage*, appears bimonthly in Dutch and is published by Tjeenk Willink, Zwolle; Netherlands.

ouflaged. Thus, alongside the jurisprudence of the courts there also exists in the Netherlands a published arbitral jurisprudence. This is, by Western standards and procedures, quite exceptional.

The development of arbitration in the Netherlands has been greatly favoured by the recognition of the arbitral clause since the existing arbitration legislation was enacted in 1838. No further submission is needed once a dispute, covered by the arbitral clause, has arisen. Another important factor is the favourable attitude of the courts towards arbitration. Whenever possible, the courts uphold the arbitration result; consequently, setting aside procedures are seldom successful.[4]

Why then has the Netherlands decided to revise its arbitration legislation, which is contained in the Code of Civil Procedure of 1838?[5] One of the reasons is that the arbitration law of the Netherlands cannot be understood from these articles alone. To a great extent, the Dutch arbitration law has been developed by the courts. This situation is unsatisfactory, especially for foreign parties. It requires quite some effort, as recently experienced when the Iran-USA Claims Tribunal took its seat in The Hague, to understand the actual arbitral situation in the Netherlands.[6] Furthermore, arbitration as practised today differs in many aspects from earlier arbitration practice. This creates problems the courts cannot solve under existing legislation. The intervention of the legislature is, therefore, required to make arbitration function according to present day needs. Examples of this intervention will be given when some innovations

4. For the means of recourse available against an arbitral award, see *National Report, Netherlands, supra* note 1, at 79-83.

5. WETBOEK VAN BURGERLIJKE RECHTSVORDERING [Rv.] arts. 620-657 (Neth. 1838).

6. The release of the American diplomatic hostages from Iran in 1981 was accomplished through mediation by the Popular Republic of Algeria, and the agreement of the United States and the Islamic Republic of Iran. These Algerian Accords provided for, *inter alia*, the creation of a special international arbitral tribunal to decide claims and counterclaims by nationals of either country against the government of the other. The tribunal found the Dutch arbitration laws unclear and not pertinent to foreign parties. The Iran-United States Claims Tribunal, seated at The Hague, conducted the proceedings in accordance with the United Nations Commission on International Trade Law [UNCITRAL] Rules, except as modified by the parties or by the tribunal to ensure claims settlement. For a discussion of the creation of the tribunal and its impact on the UNCITRAL Rules, see Aksen, *The Iran-U.S. Claims Tribunal and the UNCITRAL Arbitration Rules*, in THE ART OF ARBITRATION 1-26 (J. Schultsz & A. van den Berg eds. 1982).

of the proposed new law are presented. Finally, after World War II, a great deal of new legislation, national as well as international, came into force.[7] This, too, may have inspired the Netherlands government to introduce the Bill to Parliament, which hopefully will be passed in 1985.

In presenting the major aspects of the proposed Dutch arbitration law, this Article shall follow the order in which arbitration generally proceeds. First the arbitration agreement will be explored (Part II); then the appointment of arbitrators (Part III); followed by the arbitral procedure (Part IV) and the arbitral award (Part V). Thereafter, we will consider the enforcement of the arbitral award (Part VI) and the means of recourse against the award (Part VII).

The new arbitration law will no longer be part of Book III of the Dutch Code of Civil Procedure (CCP). As in the new French law, the arbitration law will be contained in a separate chapter of the CCP: Book IV.[8] This is divided in two Titles: Title I, arbitration in the Netherlands and Title II, arbitration taking place outside the Netherlands (discussed in Part VIII of this Article). Unlike the new French law, the proposed Dutch legislation makes no distinction between domestic arbitration and interna-

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7. Since World War II, new arbitration statutes have entered into force in Switzerland (1969), Belgium (1972), and France (1981). Partial but essential changes took place in the United Kingdom (1979), Austria (1983), and Italy (1983). The following post-war conventions were concluded: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as New York Convention of 1958], *reprinted in* 2 REGISTER OF TEXTS OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 24 (1973) [hereinafter cited as U.N. REGISTER OF TEXTS]; European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364 [hereinafter cited as Geneva Convention of 1961], *reprinted in* U.N. REGISTER OF TEXTS, *supra*, at 34; Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 160 [hereinafter cited as Washington Convention of 1965], *reprinted in* U.N. REGISTER OF TEXTS, *supra*, at 46; European Convention Providing a Uniform Law on Arbitration, Jan. 20, 1966, Europ. T.S. 56 [hereinafter cited as Uniform Law of Strasbourg of 1966], *reprinted in* U.N. REGISTER OF TEXTS, *supra*, at 65. Also UNCITRAL is active in the field of international commercial arbitration.

8. By Decree No. 81500 of May 12, 1981 (Official Gazette May 14, 1981), a new Book IV was added to the French *Code de procédure civile* [C. PR. CIV.]. Domestic arbitration is regulated in C. PR. CIV. arts. 1442-1491 (Fr. 1981); international arbitration in *id.* arts. 1492-1507. An English translation can be found in 7 Y.B. COM. ARB. 271-82 (ICCA 1982).

tional arbitration.[9] Every arbitration taking place in the Netherlands is subject to the rules of Title I, regardless of the nationality of the parties or the subject matter of the arbitration.

Apart from the foregoing, in many instances the new French law has been taken into account, as revealed by the explanatory notes accompanying the new Bill. The Swiss Intercantonal Arbitration Convention ("Concordat Suisse")[10] and the international arbitration conventions concluded after World War II, also have been considered.[11] The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, to which parties may refer in their arbitration agreement, also appear to have been consulted as they reflect modern arbitration practice.[12] Even the Model Law on International Commercial Arbitration, now under preparation by UNCITRAL, has been referred to on some occasions.[13] Altogether, a comparative study of international and national foreign arbitral policy underlies the Bill for the new Dutch arbitration law.

Such a comparison will also underlie this Article. When I discuss the subjects indicated above and report on the new rules as proposed in the Bill, comparison will be made to solutions found in other legislations. This Article will concentrate on the main issues and innovations as proposed. The reader should be

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9. *See* C. PR. CIV. art. 1492 (Fr. 1981) ("Arbitration is international if it implicates international commercial interests.").

10. *See* 4 J. WETTER, THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE 387-96 (1979). With the exception of the canton of Zurich, most of the Swiss cantons have adhered to the "Concordat" of Mar. 27, 1969, approved by the Federal Council on Aug. 27, 1969. A booklet, entitled *Concordat Suisse sur l'Arbitrage, March 27, 1969*, published by Editions Payot, Lausanne, in 1974 (94 pages), gives the French, English, German, and Italian text of the "Concordat" with short annotations on its 46 articles in French, English, and German.

11. *See* Uniform Law of Strasbourg of 1966, *supra* note 7; Geneva Convention of 1961, *supra* note 7; New York Convention of 1958, *supra* note 7.

12. The UNCITRAL Arbitration Rules were adopted by the General Assembly on Dec. 15, 1976 (Resolution 31/98). The text has been reproduced in 2 Y.B. COM. ARB. 161 (ICCA 1977), with a commentary by this author, *id.* at 172-219.

13. This project is still under discussion in a Working Group of UNCITRAL. The Secretariat of UNCITRAL prepared for the seventh session of the Working Group, held in February 1984, a composite draft text of a model law on international commercial arbitration. U.N. Doc. A/CN.9/WG.II/WP.48 (1983) [hereinafter cited as UNCITRAL Model Law]. The UNCITRAL project will be discussed in the ICCA Interim Meeting to be held in Lausanne, May 9-12, 1984. Quotations in this Article are from the UNCITRAL Model Law, which is still subject to further changes.

constantly aware that this Article is discussing a proposed Bill, which Parliament might still modify. Even so, it is interesting to know the direction and focus of the ideas which should soon become law.

II. The Arbitration Agreement

Arbitration can only take place on the basis of a valid agreement to arbitrate. This applies to the submission, in which an existing dispute is referred to arbitration, and to the arbitral clause contained in a contract which refers disputes that might arise in the future to arbitration. Present Dutch law is very liberal in relation to the arbitral clause. An oral agreement to arbitrate disputes that may arise in the future is accepted and, if arbitration in a specific branch of trade is usual, parties are also bound to arbitrate even if their contract makes no mention of arbitration. These liberal aspects of the arbitral clause will be changed under the proposed legislation.

A submission has always been *in writing*. The proposed law will introduce this requirement for the arbitral clause, albeit only *ad probationem*. Documentary proof is required, from which it should be apparent that the parties intended to submit differences that may arise under their contract to arbitration. This is in line with international conventions. The New York Convention of 1958 states in Article II that an agreement in writing shall include "an exchange of letters or telegrams"[14] to which the Geneva Convention of 1961 added that such written agreements may also be expressed "in a communication by a teleprinter."[15] The Uniform Law of 1966 is broader still. Article 2 of the Uniform Law states that an arbitration agreement shall be constituted by an instrument in writing "or by other documents binding on the parties and showing their intention to have recourse to arbitration."[16] UNCITRAL'S project for a Model Law, as it now stands, adds to the definition of "arbitration agreement" thus: "The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the refer-

14. New York Convention of 1958, *supra* note 7, art. II.
15. Geneva Convention of 1961, *supra* note 7, art I.
16. Uniform Law of Strasbourg of 1966, *supra* note 7, art 2.

ence is such as to make that clause a term of the contract."[17] This formulation envisages the practice of referring in a contract to general conditions containing an arbitral clause. An arbitral clause is sufficiently proven under the new law when a document issued by one of the parties and accepted, explicitly or tacitly, by the other party refers to general conditions containing an arbitral clause.

On the other hand, the Bill does not allow one of the parties to have a privileged position with regard to the appointment of arbitrators. In such a case the arbitration agreement is considered invalid. The Uniform Law in Article 3 contains the same provision: "An arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of the arbitrator or arbitrators."[18] A similar provision can be found in Article 1025 of the German Code of Civil Procedure.

The *separability* of the arbitration agreement from the main contract has been recognized by the courts. For the arbitral clause, generally embedded in the main contract, separability is of special importance. Arbitrators can annul the contract without undermining their own competence. The Geneva Convention of 1961 had recognized the arbitrators' competence to rule, *inter alia,* on the existence or the validity of the contract of which the (arbitration) agreement forms a part.[19] The Uniform Law of 1966 states *expressis verbis* that a decision of the arbitrators "that the contract (the main contract) is invalid shall not entail *ipso iure* the nullity of the agreement contained in it."[20] The separability of the arbitration agreement is generally recognized by the courts of many countries.[21] The Bill incorporates this principle in language similar to Article 21 of the UNCITRAL Arbitration Rules, where it states that the arbitration agreement shall be treated as an independent agreement and the arbitral tribunal is entitled to rule on the validity of the main contract of which the arbitration agreement forms part or to

17. UNCITRAL Model Law, *supra* note 13, art. 7, ¶ 2.

18. Uniform Law of Strasbourg of 1966, *supra* note 7, art. 3.

19. Geneva Convention of 1961, *supra* note 7, art. VI.

20. Uniform Law of Strasbourg of 1966, *supra* note 7, art. 18.

21. *See* Sanders, *L'autonomie de la clause compromissoire*, Y.B. COM. ARB. 31-43 (ICCA 1978).

which it is related.[22] These last words relate to the submission which does not form part of the main contract, but constitutes a separate agreement.

Separability is closely connected with the question of whether arbitrators are entitled to *decide on their own competence,* an issue known in the arbitration literature as "compétence-compétence." Article V of the Geneva Convention of 1961 relates the two concepts in one sentence: "[T]he arbitrator shall be entitled to decide upon the existence or validity of the arbitration agreement (issue of compétence-compétence) *or* of the contract of which the agreement forms part (issue of separability)."[23] It is recognized in most countries, usually by the courts, that arbitrators may decide on their own competence subject to judicial review.[24]

The Bill incorporates this principle in the law, as does the new French law in Article 1466, subject of course, to judicial review.[25] It cannot be left entirely to arbitrators to decide on their competence, since the normal access to the court for settlement of the dispute would consequently be precluded. However, if a party appears in an arbitration without raising the issue of competence *in limine litis,* access to the court is precluded with the exception of the question of whether the subject matter is capable of settlement by arbitration.

Since there may be a valid arbitration agreement, but the composition of the arbitral tribunal might be contrary to the rules applicable to such compositions, the Bill provides that this issue can only be submitted to the court if a party who appeared in the arbitration has raised this point *in limine litis.* If he has not done so, this plea can no longer be raised, either in the arbitration or in court proceedings.

This also is in line with the arbitration conventions and rules of arbitration such as the UNCITRAL Rules.[26] For exam-

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22. UNCITRAL Model Law, *supra* note 13, art. 21, ¶ 2.

23. Geneva Convention of 1961, *supra* note 7, art. V.

24. *See generally National Reports,* 1-9 Y.B. COM. ARB. (ICCA 1976-1984). *E.g.,* Steyn, *England,* 8 Y.B. COM. ARB. 3 (1983). The author states: "It is clear, however, that the arbitrator's decision cannot be final. The court has the last word." *Id.* at 24 (citing Dalmia Dairy Indus. v. National Bank of Pakistan, [1978] 2 Lloyd's L.R. 223).

25. C. PR. CIV. art. 1466 (Fr. 1981).

26. *See* UNCITRAL Arbitration Rules, *supra* note 12, at 161-71.

ple, the Geneva Convention of 1961 provides: "The party which intends to raise a plea as to the arbitrator's jurisdiction . . . shall do so not later than the delivery of its statement of claim or defence relating to the substance of the dispute."[27] The Uniform Law of 1966 has a similar provision which states that in cases which present issues of either the absence of a valid arbitration agreement or irregular composition of the arbitral tribunal, both of these claims "shall be deemed not to constitute a ground for setting aside an award where the party availing himself of it had knowledge of it during the arbitration proceedings and did not invoke it at the time."[28]

The Bill defines the *domain of arbitration* broadly. All differences which have arisen or may arise between the parties regarding a defined legal relationship, whether contractual or not,[29] may be submitted to arbitration, unless it follows from the law that the subject matter is not capable of settlement by arbitration. In addition quality arbitration, largely practiced in commodity arbitration, is *expressis verbis* qualified as arbitration, leaving the rules to be followed in this case entirely to the parties (in practice the rules of the arbitral institute to which the parties have referred) or, failing this, to the arbitrators.

The parties can also entrust the *filling of gaps* to arbitrators. Under the new Dutch law, adaptation of a contract under essentially changed circumstances — for which contracts may contain a "hardship clause" — may already be dealt with by the courts. Filling of gaps, however, covers more than this adaptation. The original contract may contain gaps because, at the time of conclusion of the contract, the necessary factual data were not available. In such a case the question arises whether, when the data have become known and the parties could fill the gap but cannot agree on it, the parties can provide in their agreement that this shall be done by arbitrators. This no court can do.

The Bill uses a broad formulation, which covers adaptation as well as the filling of gaps as such. According to the Bill the

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27. Geneva Convention of 1961, *supra* note 7, art. V. In practice, the party's plea as to the arbitrator's jurisdiction is raised with the delivery of a defence.

28. Uniform Law of Strasbourg of 1966, *supra* note 7, art. 25.

29. *See* New York Convention of 1958, *supra* note 7, art. II.

parties can, in their agreement, authorize the arbitrators to complete the contract (filling of gaps proper) or to modify the same (adaptation of the contract). The agreement should determine which gaps should be completed, and under which conditions adaptation can take place. After gap-filling proceedings are initiated and parties have had every opportunity to express their views, the arbitrators will decide the issue by a declaratory award, which will be binding on the parties.

The issue of filling of gaps has on many occasions been the subject of discussion.[30] There has been serious doubt as to whether, under existing arbitration laws, this could be entrusted to arbitrators when the parties cannot reach agreement. Should the Dutch Parliament accept the Bill in its present form, Dutch arbitration law will be, to my knowledge, the first to introduce in a legal text the possibility of filling of gaps by means of arbitration.

III. The Appointment of Arbitrators

The Dutch Bill fully recognizes party autonomy as regards the appointment of arbitrators. In the case of a submission — when the parties refer an existing dispute to arbitration — the parties name the arbitrators in their submission. They may, however, delegate their appointment, to a third party which may be useful if they cannot agree on the choice of a presiding arbitrator.

The arbitral clause does not normally contain the names of the arbitrators and, in my opinion, should not do so as a rule, as the nature of the dispute is not yet known. This avoids problems in cases where, after a number of years, a dispute arises and one of the arbitrators is unavailable. Instead, the arbitral clause generally contains a regulation of the manner in which the arbitrators will be appointed. The arbitral clause itself may contain such a regulation or refer the matter to the rules of an arbitral

30. This topic has been explored at many arbitration conferences as well as in the Arbitration Committee of the International Chamber of Commerce [ICC]. The ICC issued, in 1978, *Brochure No. 326* on the *Adaptation of Contracts*. This term is taken by the ICC in a broad sense and covers the filling of gaps as well. Rules are added for the settlement of these issues. In view of the uncertainty whether arbitration will always be admitted under the applicable arbitration law, the ICC Rules leave the parties a choice between a recommendation by a third party or a binding decision.

institution which usually regulates the appointment of arbitrators in detail. The role of the applicable procedural arbitration law is in these cases only a subsidiary one. If for some reason the regulation provided by the parties does not work; i.e., as where a defendant does not appoint an arbitrator in time or the two arbitrators chosen by the parties fail to reach agreement on the chairman, then the president of the court will come to the assistance of the parties.

The same principle — the primacy of party autonomy and the subsidiary role of the law — is also found in the New York Convention. Article V states as grounds for refusal in respect to the composition of the arbitral tribunal and of the arbitral procedure that these were "not in accordance with the agreement of the parties or, failing such agreement, were not in accordance with the law of the country where the award was made."[31]

According to the Bill and to arbitration law in the Netherlands since 1838 and even before, the *number* of arbitrators must be *uneven*. No deviation from this rule is allowed although, when a foreign award is enforced in the Netherlands and the applicable arbitration law permits an even number of arbitrators, the courts have enforced such an award by applying the restrictive test of international public policy. An award made in the Netherlands by an even number of arbitrators, however, would violate Dutch public policy and be set aside. Where the arbitral clause prescribes the appointment of an even number of arbitrators, an innovation in the new Bill provides that those arbitrators once appointed shall appoint an additional arbitrator as chairman. Again, the courts will assist if the arbitrators cannot agree on the choice of the chairman.

Arbitrators may be *challenged* for the same reasons as judges, or if for some other reason justifiable doubts exist about their impartiality or independence. The same reasons may also constitute grounds for challenge of the secretary of an arbitral tribunal, if one has been designated.

The Bill introduces a duty to *disclose* possible grounds for challenge, previously unknown in Dutch law although in practice such disclosure was not uncommon. Disclosure before appointment takes place will prevent later challenge. As a rule, the chal-

31. New York Convention of 1958, *supra* note 7, art. V.

lenged arbitrator will then withdraw. Why should one act as arbitrator if, from the start, one of the parties has expressed doubt about his impartiality or independence? A challenge could be based on unreasonable grounds. In such a case, an immediate decision on the challenge is required. Such a decision will be taken by the president of the court without there being a possibility of an appeal. The arbitrator who withdraws or has been challenged successfully will be replaced according to the rules applicable to his appointment.

No person will be excluded from being appointed as arbitrator because of his *nationality*. The Bill, which where possible permits deviation by agreement of the parties, adds "unless parties have agreed otherwise." In an international arbitration it is quite common for parties to state that the chairman of the arbitral tribunal be of a nationality other than that of the parties. All arbitrators in an arbitration taking place in the Netherlands could be of a foreign nationality.

A new provision introduces the possibility to *terminate the mission of arbitrators* if the tribunal performs its mandate in an unacceptably slow manner. If this is the case, the president of the court may, at the request of a party and having heard the other party and the arbitrators, terminate the arbitral proceedings; in this case the competence of the court to deal with the dispute is revived.

IV. The Arbitral Proceedings

The Dutch Bill's recognition of party autonomy in the matter of the appointment of arbitrators also applies to arbitral proceedings. In principle, the conduct of the proceedings depends on agreement of the parties or, failing regulation by them (usually by reference to the rules of an arbitral institution), on the arbitrators. Here again the applicable arbitration procedural rules play a supplementary role. Some provisions, however, are of a mandatory character, such as the rule that parties shall be *treated with equality* and that each party should have a full opportunity to present its case. Morever, an *oral hearing* must take place if one of the parties so requests.

When a party wants to introduce *witnesses* or experts, the arbitral tribunal "may," according to the Bill, comply with such a request. Normally such a request will be granted but experi-

ence has shown, however, that discretion of the tribunal is desirable because the hearing of a witness or a party-appointed expert may not be necessary or may be inspired only by delaying tactics.

Court assistance is again provided in case a witness does not appear voluntarily before the arbitral tribunal or refuses to testify. In such a case the tribunal may (again), on request of a party, permit that party to request the president of the court to appoint a judge who would then hear the witness. In such a case the provisions of the Dutch CCP apply, thus making it possible to compel the witness to appear and testify. Arbitrators have the opportunity to be present at that hearing.

The arbitral tribunal is free to decide the manner in which witnesses will be heard. As a rule, the party which introduces the witness will initiate the examination, and the other party may then examine the witness. The arbitrators may ask additional questions at each occasion. Under some circumstances witnesses may be cross-examined.

The arbitral tribunal, if it deems it necessary to do so, may appoint *experts* to advise the tribunal on specific issues formulated by the tribunal. The parties receive a copy of the appointment of such experts together with the formulation of their objectives. In practice, the tribunal will consult the parties before appointing experts. The parties will receive copies of the experts' reports and, on request of one of the parties, a hearing of the experts shall be scheduled. On that occasion the parties can ask questions and are given the opportunity to introduce their own experts.

In court proceedings a third person may *join* the proceedings (for instance, when he stands bail for the debtor and wishes to assist the debtor in the proceedings), or he may *intervene* (e.g., if in proceedings where ownership is in issue, he claims to be the owner). The Bill also introduces these possibilities in arbitration. Since every arbitration requires a valid agreement to arbitrate, the arbitral tribunal may comply with such third party requests only if that party by a written agreement with the original parties has acceded to the arbitration agreement. The third person, thus, becomes a party to the arbitral proceedings and the tribunal regulates how the proceedings will be conducted.

The Bill also introduces *total or partial consolidation* of ar-

bitral proceedings. This is another much-discussed topic,[32] and satisfactory solutions are not readily available.[33] In practice, it is not unusual that arbitration proceedings which either totally or partially concern the same dispute take place before different

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32. *See, e.g.*, ICCA's Interim Meeting, Warsaw 1980, on *International Arbitration in Multi-Party Business Disputes*. The Report of this meeting, containing all the reports and contributions, was published in 1981 by the Polish Chamber of Foreign Trade, Trebacka 4, Warsaw.

33. Apparently, solutions can only be found in the United States. In at least two states, Massachusetts and California, the legislature regulates consolidation. *See, e.g.*, CAL. CIV. PROC. CODE § 1281.3 (West 1982). This section provides:

> Consolidation of separate arbitration proceedings; petition; grounds; procedure
>
> A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:
>
> (1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and
>
> (2) The disputes arise from the same transactions or series of related transactions; and
>
> (3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.
>
> If all of the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation, shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties. If the applicable abitration agreements name separate arbitrators, panels, or tribunals, the court, if it orders consolidation, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator in accord with the procedures set forth in Section 1281.6.
>
> In the event that the arbitration agreements in consolidated proceedings contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of the various parties to achieve substantial justice under all the circumstances.
>
> The court may exercise its discretion under this section to deny consolidation of separate arbitration proceedings or to consolidate separate arbitration proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings.

Id.

In New York the courts accept consolidation and so do the federal courts. The leading case is Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966, 975 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976). In *Espanola*, the Second Circuit upheld the consolidation of two arbitration proceedings concerning disputes under a maritime contract of affreightment despite the objection of one party. The court found that all parties had been afforded ample opportunity to express their views and present evidence, there were common questions of law and fact, and there was a danger of conflicting findings if consolidation were not permitted. The Second Circuit agreed with the trial court that the Federal Rules of Civil Procedure permitting consolidation were applicable, and the "liberal purposes" of the Federal Arbitration Act permitted and encouraged consolidation in proper cases. *Id.* at 975.

arbitral tribunals acting under different arbitration rules; cases involving the building industry provide a typical example of this. The purpose of consolidation, whether total or partial, is to avoid conflicting awards.

In the case of *total* consolidation, a diligent party may request the president of the District Court of Amsterdam to order it. The president has discretionary power to do so, after hearing all parties and arbitrators concerned. Thereafter, the parties must try to agree which arbitrators shall decide the consolidated case and which arbitration rules apply. If no agreement is reached the president will determine these issues.

Partial consolidation, where distinct cases are consolidated for the purpose of determining a common legal issue, should prove very useful. An example of such an issue where parties would benefit by a joint decision is the question whether export of goods to a particular country might be regarded as illegal under the prevailing circumstances. In case of a *partial* consolidation the president formulates the particular issue to be decided. Again, parties are given the opportunity to agree on which arbitrators will decide the issue and which arbitration rules apply. If no agreement is reached, again the president appoints the arbitrators and decides the applicable rules. The award of this special tribunal is then sent to the arbitral tribunals originally involved. In the light of the partially consolidated award, these tribunals continue with the arbitral proceedings pending before them.

V. The Arbitral Award

Every award must contain a decision and the reasons for it. *Reasons* are deemed essential to an award made in the Netherlands. Although reasons must be given, no review on the merits may take place.[34] An award made in the Netherlands can only be set aside on the limited number of essentially procedural grounds summed up in Part VII. Only in quality arbitration reasons need not and, in fact, can not be given. It should be noted, however, that the requirement does not apply to foreign awards

34. See *infra* pp. 600-02 for a discussion of the grounds upon which annulment may be granted under the new Bill.

made in a country where reasons need not be given. Such a foreign award is nevertheless enforceable in the Netherlands just as a foreign award, as explained earlier, made by an even number of arbitrators is enforceable in the Netherlands.[35]

The award is made by a *majority of votes.* The Bill adds "unless the parties agreed that the award should be made unanimously." This addition does not reflect Dutch arbitration practice. It has been made in order to take account of the fact that parties to an international arbitration might insist on unanimity.

The award must be *signed* by the arbitrators. If a minority refuses to sign, the other arbitrators have to mention this refusal under their award and sign such a statement. The same rule applies — and this is a departure from existing law of arbitration — if a minority of arbitrators for some reason is prevented from signing the award, and it is not expected that this obstacle will soon be removed.[36] Although the Bill, like the existing law, is silent on this point, an arbitrator who refuses to sign may attach a *dissenting opinion* to the award. This may occur in international cases. In domestic cases the dissenting opinion is never used.

Furthermore, the award should contain the names of the arbitrators, the names and domiciles of the parties, and the date and the place of the award. In this respect correction is possible.[37]

Arbitrators have full discretion as to the the *type of awards* they may render. There may be a complete final award, but also there may be a partial final award, at a point when some of the issues are ready for decision while other issues are still to be considered. Arbitrators may also render interim awards, such as an award ordering the sale of perishable goods or an award on their own competence. Arbitrators may deal with a plea as to their jurisdiction[38] either in an interim award or they may join such a decision on this issue with any final decision. In stating

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35. See *supra* p. 590 for an examination of the requisite ratio of arbitrators under the new Bill, and the enforceability of foreign awards.

36. The Bill follows the example of BEILAGEN ZUDEN STENOGRAPHISCHEN PROTOKOLLEN DES NATIONALRATS art. 592, para. 2 (Aus. 1983). *See also* Melis, *National Report on Arbitration in Austria*, 9 Y.B. COM. ARB. 180 (ICCA 1984).

37. *See also* UNCITRAL Arbitration Rules, *supra* note 12, art. 32.

38. *See supra* notes 23-28 and accompanying text.

that arbitrators may render complete or partial final awards and interim awards, the Bill mirrors arbitration practice.

The introduction of an *arbitral summary award* is new. In court proceedings, the summary decision of the president of the court (référé) is well known and often used. The introduction of an arbitral summary award corresponds with the policy of the legislature that parties should have the greatest possible freedom to regulate the arbitral proceedings according to their wishes. Therefore, the Bill introduces the possibility that parties, in their arbitration agreement,[39] may authorize the tribunal or its president to render an arbitral summary award in those cases where otherwise the president of the court would have jurisdiction to decide in référé. If parties have provided for an arbitral référé, the jurisdiction of the president is excluded from the day the arbitral tribunal has been constituted. It may, however, be doubted whether much use of this new practice will be made. Parties may prefer to continue present practice and to approach the president of the court for a summary decision.

In dealing with the relation between arbitration and court proceedings it may be useful, especially for readers in the USA, to mention that in the Netherlands, *pre-award attachments* present no difficulty. Conservatory attachments may always be requested from the court. These attachments, when granted, leave the decision on the subject matter of the dispute to arbitration. The Bill states *expressis verbis* that an arbitration agreement does not preclude a party from requesting conservatory measures from the ordinary courts.

The possibility of *correction* of an award is a further innovation under the Bill. The tribunal is empowered to correct errors in computation or clerical or typographical errors. Correction is also possible when the names of arbitrators or the names and domiciles of the parties have not been mentioned correctly. When the date or place where the award has been made have not been stated, this may also be rectified on request of a party or by the arbitral tribunal *proprio motu*.

If the tribunal has failed to render a decision on one or more issues which can be separated from the decided issues, a

39. In practice, this is done by reference in the parties' agreement to arbitration rules containing this novum.

party may request the tribunal to render an *additional award.* If the tribunal rejects this request, the party has the right to introduce an action for annulment.

Provisions for both the correction of the award and the additional award may also be found in the new French law.[40] The UNCITRAL Arbitration Rules provide for the correction of the award in Article 36 and for the additional award in Article 37.[41] These are refinements of arbitration law, which should be welcomed.

Another welcome innovation is the introduction of an *award on agreed terms.* During the arbitration proceedings the parties may reach a settlement. It could be questioned whether arbitrators are entitled to incorporate the settlement in an award and, by doing so, make it enforceable. Arbitrators have the task to reach a decision; they are not conciliators or mediators. Under the new law, the arbitrators are entitled to incorporate a settlement in an award but are not obliged to do so. They may refuse the incorporation, without giving reasons for this refusal. Such a refusal would be exceptional; however, the authority seems necessary because a settlement could be in violation of rules of public policy, for example, a violation of foreign exchange regulations to which arbitrators would not be prepared to lend their names.

An award on agreed terms, incorporating a settlement of the parties, must be signed by the arbitrators and the parties. In this and other respects, this special type of award deviates from other arbitral awards. No reasons need be given and the only ground for setting aside is a violation of public policy. In all other respects, this special type of award is treated like any other arbitral award.

In introducing the award on agreed terms the Bill follows the example of the Uniform Law of 1966[42] and the Swiss Concordat of 1969.[43] Germany had already introduced the award on agreed terms (*Schiedsvergleich*) in 1924.[44]

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40. *See* C. PR. CIV. art. 1494 (Fr. 1981).

41. *See* UNCITRAL Arbitration Rules, *supra* note 12, at 169.

42. *See* Uniform Law of Strasbourg of 1966, *supra* note 7, art. 31.

43. *See* Swiss Concordat of 1969, art. 34, *reprinted in* 4 J. WETTER, *supra* note 10, at 393.

44. *See* ZIVILPROZESSORDNUNG [ZPO] art. 1044a (W. Ger. 1983).

Arbitrators decide according to *rules of law,* unless parties have authorized them to decide as "*amiables compositeurs.*" An explanation of the difference between the two is beyond the scope of this Article. However, this difference is not as great as it is often deemed to be. Indeed, the rules of law also give broad scope to rules of equity.

Whether deciding according to the rules of law or as "*amiables compositeurs*" the tribunal must take into account the relevant trade usages. This requirement is also in the new French law, albeit only for international arbitrations.[45] Relevant trade usages must be considered in both the domestic and international arbitration since Dutch law does not distinguish between the two.

The Bill adds a provision that if parties have designated a specific law as applicable to the substance of the dispute, the arbitrators must accept such choice of law. Failing such designation by the parties, the arbitrators must decide according to the rules of law which, under the circumstances of the case, they consider most suitable. The arbitrators have discretion regarding the choice of applicable law. When arbitrators, failing designation by the parties, choose the applicable law, they do not have to apply "the proper law under the rule of conflict that the arbitrators deem applicable,"[46] as Article VII of the Geneva Convention of 1961 prescribes. As under the new French law, the arbitrators may directly choose without first turning to applicable conflict of laws rules.[47] This is in conformity with actual international arbitration practice.

VI. Enforcement of the Arbitral Award

The arbitrators deposit the original of an award with the registry (*Griffie*) of the court competent at the place where the award has been made. The task of the arbitral tribunal is then terminated, with the exception of a possible correction of the

45. *See* C. PR. CIV. art. 1496, para. 2 (Fr. 1981).

46. Geneva Convention of 1961, *supra* note 7, art. VII.

47. *See* C. PR. CIV. art. 1496, para. 1 (Fr. 1981). The statute provides: "The arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to the rules of law he deems appropriate." *Id.*

award or a possible additional award, as discussed earlier.[48]

For the execution of the award, a leave of enforcement (*exequatur*) of the president of the court where the award has been deposited is needed. The president exercises, on that occasion, only a summary control over the award. He may refuse his *exequatur* when *prima facie* the award or the manner in which it was made was contrary to public policy. The president, therefore, exercises only a very restricted control, limited to the violation of public policy plus two lesser grounds for refusal which will be mentioned below.

If the president grants the *exequatur,* the other party may only bring an action to set aside the award before the full court. If this action is successful, both the award and the *exequatur* will be annulled.

Refusal of *exequatur* may also take place when an arbitral award has been declared "immediately enforceable" (*uitvoerbaar bij voorraad*), which arbitrators may do, but only in the same instances as the courts. The president controls whether this is the case.

Like the courts, the arbitrators may also award a "penal sum" (*dwangsom*), a sum payable if, for instance, the award is not complied with within a certain period. Such a penalty is excluded only if the payment of a sum of money has been awarded. The president oversees whether the arbitral tribunal, in doing so, correctly applied the relevant provisions of the Dutch CCP.

VII. Means of Recourse

The Bill does not provide for appeal from an arbitral award to the court. This appeal from arbitration to court proceedings was almost never used in practice. On the other hand, *appeal to a second arbitral instance* is quite common in commodity arbitration. Although the rules of many arbitral institutions active in this field contain rules for appeal-arbitration, the existing law is silent on this matter. Appeal-arbitration has been worked into the Bill and several problems have been solved, discussion of

48. See *supra* pp. 596-97 for a discussion of the extent of correction permissible under the new Bill, and the Bill's provision for additional awards when necessary.

which is beyond the scope of this Article. On the other hand, the action for setting aside will now be explored in some detail.

The *action for setting aside* an arbitral award has been greatly simplified, compared with the situation under the prevailing arbitration law. Such an action may be instituted as soon as the award has been made or, if the right to arbitral appeal has been reserved, as soon as the appeal award has been rendered or the time for appeal has elapsed without an appeal being brought. The period in which an action for setting aside may be instituted terminates two months after the other party has officially been notified of the award and of the leave for enforcement (*exequatur*) which has been obtained from the president. An action for setting aside an interim award may be brought only in combination with an action against a final or partial final award. This corresponds with the new French law which states that the action to set aside may be brought "immediately following the rendering of the award and is barred if not made within one month following the notification of the award and its exequatur."[49] The Bill has extended the one month period to two months.

The *grounds for annulment* of the award in an action for setting aside are limited to five. Again the new French law served as a model. These grounds are:

(a) if there was no valid arbitration agreement;
(b) if the composition of the arbitral tribunal was in violation of the rules governing such composition;
(c) if the arbitral tribunal exceeded the scope of the mission conferred upon it;
(d) if the award was not signed as prescribed by the law or did not set forth reasons;
(e) if the award was contrary to public policy.

If a valid arbitration agreement is lacking (*ground a*), arbitrators are not competent to deal with the case. Arbitrators are competent to decide on their own competence (compétence-compétence, discussed earlier).[50] Their decision on this issue is not final but subject to judicial review. Earlier it was also observed that a party appearing in the arbitration should raise the plea of

49. *See* C. PR. CIV. art. 1493 (Fr. 1981).
50. *See supra* notes 23-28 and accompanying text.

jurisdiction *in limine litis*. If he does not do so, the action is barred with the exception of the situation where the subject matter of the dispute is not capable of settlement by arbitration.

Ground b is also qualified. This ground cannot be invoked by a party who cooperated in composing the arbitral tribunal. In case no cooperation took place this ground should, like the previous one, be invoked *in limine litis* by a party appearing in the arbitration. If he failed to do so his action for annulment, based on this ground, will be rejected by the court.

Ground c encompasses many issues. When arbitral proceedings are instituted on the basis of a valid agreement to arbitrate, arbitrators are to be given instructions. These instructions relate to *what* is to be decided (the issues submitted to arbitrators for their decision) and *how* to reach decisions (the rules of procedure to be followed by the arbitrators). It may happen that arbitrators have not decided on all issues submitted to them. This has been discussed earlier.[51] In that case, an additional award should first be requested. If no such request has been made, a setting aside action on *ground c* can not be brought. On the other hand, if the arbitral tribunal has refused to make an additional award, *ground c* can be invoked. Instead of less, the arbitrators may have decided more issues than were submitted to them. This may lead, according to the Bill, to a partial annulment of the award, if the decision which was taken beyond the scope of the submission can be separated from the other decisions[52].

It may also happen that in conducting the arbitration proceedings, the arbitrators do not act in accordance with the applicable rules of procedure. Such deviation may become apparent only in the course of arbitration. The Bill restricts reliance on *ground c* to a party who participated in the arbitral proceedings and had knowledge of such a deviation by the arbitrators. The party should have invoked this ground during the arbitration proceedings, drawing the attention of the arbitral tribunal to the

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51. See *supra* pp. 596-97 for a discussion of the Bill's treatment of the additional award.

52. See also Uniform Law of Strasbourg of 1966, *supra* note 7, art. 26, which provides: "If there are grounds for setting aside any part of an award, that part shall be set aside only if it can be separated from the other parts of the award."

fact that they did not act in accordance with the applicable rules of procedure which are part of the scope of the submission. If the party did not do so, the action for setting aside will be barred.

Ground d limits the annulment of the award to the two essential points mentioned earlier: the signing of the award by the arbitrators and reasons stated for the award; if this is lacking, the award can be annulled. As previously observed, the other requirements for the award — names, date, and place — are subject to rectification.

Finally, *ground e* contains as a ground for annulment: violation of public policy. This violation can concern not only the award itself but also the manner in which the arbitrators arrived at their decision. Similarly, Article V, para. 2, of the New York Convention of 1958 cites "contrary to public policy" as ground for refusal of enforcement of an award.[53] It is generally accepted that the ground of public policy includes a violation of fundamental rules of procedure.[54] As noted earlier, when the president of the court is requested to grant leave of enforcement, he may refuse such leave for reasons of public policy. As previously observed, this control is only *prima facie*.[55] Even when leave of enforcement has been granted, the issue may still be brought to the court in an action for annulment.

As mentioned at the beginning of this section, the grounds for annulment are limited to the above mentioned five grounds. It should be emphasized that the court in considering these grounds may not examine the award on its merits. No remedy exists against a "mal jugé"[56] of arbitrators, unless arbitral appeal has been agreed upon by the parties. The situation is similar to a court decision which has become final.

Under the proposed Dutch law, instituting an action for annulment does not have the effect of *suspending execution* of the award, similar to the Swiss Concordat.[57] The court which is

53. New York Convention of 1958, *supra* note 7, art. V.

54. *Cf.* A. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 300 (1981) (violation of due process falls under "contrary to public policy" ground).

55. For a discussion of the limited control exercisable by the president in these circumstances, see *supra* pp. 598-99.

56. A French term, meaning the issue was wrongly decided.

57. *See* Swiss Concordat of 1969, *reprinted in* 4 J. WETTER, *supra* note 10, at 390.

seized with the action may, however, on request of a diligent party, order suspension and simultaneously order the successful applicant to give a security. If the court rejects the request for suspension, it may order the other party to give security.

What happens *after an award has been set aside?* The existing law does not regulate the situation which arises after the court decision, by which an award has been annulled, has become final. In that case, under the Bill, however, the competence of the courts revives unless parties have concluded a new arbitration agreement or another arbitral tribunal would be competent.

Finally, in addition to the arbitral appeal and the action for setting aside, the law provides for an exceptional means of recourse of *revision (requête civil).* Of the grounds for revision, three apply in slightly modified form, to the revision of an award. Although these grounds are rarely invoked, one ground relating to fraud is sometimes relied upon. The party invoking this ground will have to prove that the award is based, totally or partially, on *fraud* committed by the other party during the arbitral proceedings, and that the fraud was discovered only after the award had been made. This action must be brought before the competent Court of Appeal within three months after the discovery of fraud.

VIII. Arbitration Taking Place Outside the Netherlands

The previous sections described the proposed new Dutch arbitration law. Its provisions are contained in Title I of the new Book of the Dutch CCP: Arbitration in the Netherlands. These provisions will apply both to domestic arbitrations and to arbitrations of an international character if the place of arbitration is in the Netherlands. The law is applicable to the latter situation regardless of the nationality of the parties or the nature of the dispute.

Title II of the new Book of the Dutch CCP deals mainly with the enforcement of awards made in foreign states. A distinction is made between recognition and enforcement of a foreign award falling under a treaty to which the Netherlands is a party and the recognition and enforcement of a foreign award to which no treaty applies.

Where a *treaty does apply*, the Bill introduces no changes.

As under the current law request for leave of enforcement of the foreign award should be addressed to the president of the court who refuses or grants the *exequatur* on the grounds mentioned in the treaty.

Currently, treaty-awards are mostly awards which come within the scope of the New York Convention of 1958. More than sixty states have become a party to this Convention. The Netherlands ratified this Convention in 1964 with the reservation of reciprocity.

Article VII of the New York Convention states that the provisions of the convention do "not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . or the treaties of the country where such award is sought to be relied upon."[58] Once the Bill has been enacted and the New York Convention applies (which will practically always be the case), foreign parties will have a choice between enforcement in the Netherlands under the Convention or under the new Dutch arbitration law.

There will be recognition and enforcement in the Netherlands of a foreign award to which *no treaty applies* and from which no appeal lies or is no longer possible unless:

(a) there was no valid arbitration agreement;
(b) the composition of the arbitral tribunal was in violation of the applicable procedural rules;
(c) the arbitral tribunal exceeded the scope of the mission conferred upon it;
(d) recognition or enforcement would violate public policy;
(e) the award has been set aside or its execution has been refused or suspended by a competent authority of the country in which, or under the law of which, the award was made.

Ground b will be rejected if the party invoking this ground cooperated in the composition of the tribunal. The same applies to *ground c* if the party invoking this ground participated in the arbitral proceedings and on that occasion did not invoke it during the proceedings although he was aware that arbitrators exceeded the scope of their mission. If the arbitrators have

58. New York Convention of 1958, *supra* note 7, art. VII.

awarded more than was claimed (another example of *ground c*) the award may be partially recognized and enforced if the excess can be separated from the remaining part of the award.

The grounds for refusal of the *exequatur* show a great similarity to the grounds for annulment, discussed earlier. Only *ground e* is added. A similar provision may be found in the New York Convention of 1958.[59]

Again, when enforcement of a non-treaty-award is sought in the Netherlands, the request for an exequatur must be addressed to the president of the court. His decision can be appealed to the Court of Appeal within a period of two months.

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59. New York Convention of 1958, *surpa* note 7, art. V, provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

IX. Conclusion

This Article is intended to give a broad outline of the impending Dutch arbitration law. Many details have been necessarily omitted. I have concentrated on the major changes that are contemplated in the Dutch arbitration law. Comparison with similar developments elsewhere shows that the Dutch revision is in accord with those developments. Dutch arbitration legislation dates from 1838, and after almost 150 years the time has arrived for the Netherlands to bring its arbitration law up to date.