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Arbitration Law Reform in the Netherlands: Formal and Substantive Validity of an Arbitration Agreement

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1. Introduction

Arbitration statutory law presently in force in the Netherlands came into effect on 1 December 1986. It is contained in Book Four of the Code on Civil Procedure,¹ consisting of Articles 1020-1076. Since its 1986 enactment, the Act has been amended on several occasions, but these changes were limited in number, nature and their reach. Thus, those introduced in 1991 were aimed at the correction of an editorial mistake in Article 1041 para. 1 Rv.² Similarly, the amendments in effect as from 1 January 2002 were to a great extent merely terminological adaptations needed as a consequence of the changes introduced in Book 1 Rv relating to the procedure at first instance.³ Finally, the changes to the definition or evidence of a ‘written form’ in Article 1021 Rv, that came into force on 30 June 2004,⁴ were introduced to implement the Directive on Electronic Commerce of 8 June 2000.⁵

Although the Act presently in force cannot be considered to be an ‘arbitration unfriendly’ legal framework,⁶ certain shortcomings became evident in practice.⁷ Consequently, a different regulation of a number of issues has appeared desirable and the need for more considerable changes has become apparent. The necessity of a substantial revision of Dutch statutory arbitration law was already recognized when

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¹ Book Four of the Code on Civil Procedure (*Burgerlijke Rechtsvordering (Rv) – Boek vier*), Arts. 1020-1076 (hereinafter: Act or Rv), published in English, French, German and Dutch in: Sanders & Van den Berg 1987.

² Law of 31 January 1991, *Staatsblad* 1991, No. 50.

³ Law of 6 December 2001, *Staatsblad* 2001, No. 580. The only changes of a substantive nature were those in Article 1022, by adding para. 3 relating to requests for the taking of evidence before the tribunal is established and in Art. 1068, relating to revocation of the award.

⁴ Decision of 18 June 2004, *Staatsblad* 2004, No. 285.

⁵ 2002/31/EC, *Staatsblad* 2004, No. 210. The text of Article 1021 was amended so as to provide expressly that an arbitration agreement could be evidenced by electronic means. Thereby an application of Article 6:227a, para. 1 of the Civil Code was provided.

⁶ Cf., Van den Berg 1990.

⁷ ‘Toelichting op voorstel tot wijziging van Arbitragewet’, *Tijdschrift voor arbitrage*, 2005, p. 126; published also at <<http://www.arbitragewet.nl/toelichting.xml>> (hereinafter: ‘Toelichting’, TvA).

the amendments to Book 1, mentioned above, were considered.⁸ Several reasons for this can be mentioned. It is believed that a wider acceptance of the provisions of the 1985 UNCITRAL Model Law on International Commercial Arbitration (hereinafter: Model Law) would make the Netherlands a more attractive venue for arbitration. When the 1986 Act was drafted, the Model Law was considered and its basic principles were incorporated.⁹ Yet, it is generally felt that the provisions of the Model Law found insufficient acceptance in the final text of the Act. It is believed that the incorporation of the Model Law solutions in the new legislation would, to a greater extent, result in a more frequent choice of the Netherlands as the place of arbitration.¹⁰

Besides, in the last decade substantial changes have been introduced in national statutory laws in a number of jurisdictions,¹¹ as well as in the rules of different arbitral institutions.¹² Consequently, a reform of the statutory law in the Netherlands is considered necessary in order to bring the regulatory framework into line with these modern trends and developments in comparative arbitration regulation and contemporary arbitration practice.¹³

A Working group led by Prof. A.J. van de Berg drafted ‘The Proposals for Changes to Book Four (Arbitration), Articles 1020-1076 Code on Civil Procedure’.¹⁴ Some of the amendments proposed, in particular those concerning the structure of the Act and the arbitration agreement will be the subject of analysis in this paper and will be compared with statutory legislation currently in force.

2. Basic Principles and Structure

Basic principles incorporated in the 1986 Act, as well as its structure, have been retained in the Proposals for the new law.

The Act is drafted in a fairly detailed manner, whereby the majority of the provisions are of a supplementary nature. Consequently, they only apply in the absence of a choice by the parties, whereas the provisions which have a mandatory character are very limited in number. The same approach has been followed in the

⁸ *Nota naar aanleiding van het Eindverslag, Kamerstukken II 1999/00, 26 855, nr. 5, p. 3*, referred to in ‘Toelichting’, *TvA*, p. 126. See also, Snijders 2003, aantekening 2. Cf., Sanders 2001, with a summary of the changes proposed by the author, indicating also where a particular issue is addressed in the book, p. 309 et seq.

⁹ In the process of drafting the Arbitration Act, international treaties and modern arbitration statutes of other countries, in particular those of France and Switzerland were taken into consideration. Other instruments, such as the 1976 UNCITRAL Arbitration Rules and the 1985 UNCITRAL Model Law on International Commercial Arbitration were also reviewed. ‘Memorie van toelichting’, *TvA*, 1984, No. 4A, 19-20. See also, Franx 1985, p. 73 et seq.

¹⁰ ‘Toelichting’, *TvA*, p. 27.

¹¹ E.g., new legislation in England & Wales was enacted in 1996. In 1998 the amendments to the Belgian arbitration statutory law were introduced and the new German Arbitration Act, contained in the Code on Civil Procedure – Book X, came into force. In Sweden changes to the Arbitration Act were introduced in 1999.

¹² E.g., the Rules of Arbitration of the International Chamber of Commerce, as well as the Rules of the London Court of International Arbitration were amended in 1998. In the same year, the new Rules of the Netherlands Arbitration Institute came into force and were amended in 2001.

¹³ ‘Toelichting’, *TvA*, p. 126-127. See also, Meerdink 2005, p. 75. But see, Snijders 2005, p. 27, expressing a somewhat different view with respect to the reasons for the changes to the arbitration statute.

¹⁴ ‘Tekst van de Voorstellen tot wijziging van het Vierde boek (Arbitrage) Artikelen 1020 – 1076 Rv’, *Tijdschrift voor Arbitragerecht*, 2005, p. 36 (the latest version of the text dated 15 February 2005). The same text is also published on <<http://www.arbitrage.wet.nl>> (hereinafter: the Proposals).

Proposals, where the principle of party autonomy is incorporated and provisions of a mandatory nature are reduced to exceptions.

The structure of the 1986 Arbitration Act has been maintained in the proposed new text. The Act contains provisions which relate to arbitration within the Netherlands (Title One, Arts. 1020-1073 Rv) and those which concern arbitration outside the Netherlands (Title Two, Arts. 1074-1076 Rv). The division into two Titles provides for a clear criterion for the applicability of the Act.¹⁵ The so-called principle of territoriality is incorporated in Article 1073(1), providing that Title One applies if the place of arbitration is in the Netherlands. The text of this provision has remained unchanged in the Proposals.¹⁶

Finally, there are no changes with respect to the monistic approach in statutory regulation. There is no distinction between 'domestic' and 'international' arbitration under the 1986 Act. Accordingly, there is no dual regime of statutory regulation: the provisions of Title One apply to both domestic and international arbitrations taking place in the Netherlands. The preference for a monistic approach was primarily inspired by a desire to avoid disputes whether a case is to be considered as domestic or international for the purposes of determining the applicability of a particular regime.¹⁷ Besides, it was held that carefully drafted statutory legislation for international arbitration could also be a suitable framework for domestic arbitration.¹⁸

Yet, in cases where at least one of the parties has domicile or actual residence outside the Netherlands, certain time-limits are extended under the Act presently in force. In particular, this is so with respect to the appointment of arbitrators (Art. 1027(2) Rv) and regarding challenging arbitrators (Art. 1035(4) Rv). The provisions on the extension of time-limits apply if at least one party, or the challenged arbitrator, is domiciled or has his actual residence outside the Netherlands.¹⁹

However, this difference with respect to the time-limits is no longer maintained in the text of the Proposal.²⁰ The relevant provision of Article 1027(2) is to be changed so as to provide for a time-limit of three months for the appointment of arbitrators. The provision of Article 1035(4) Rv, providing for extensions to the time-limits with respect to challenging an arbitrator in certain circumstances, is to be

¹⁵ Van den Berg 1987.

¹⁶ A number of new provisions have been introduced in both Title One and Title Two.

¹⁷ 'Memorie van toelichting', *TvA*, 1984, No. 4A, p. 19. See, Lazic & Meijer 2002, p. 890, n. 8 and the literature referred to therein.

¹⁸ Van den Berg 1990, p. 4. However, the Arbitration Rules of the Netherlands Arbitration Institute (NAI), in force as from 13 November 2001, in Article 1(g) define international arbitration as 'an arbitration in which at the moment of commencement of arbitration ... at least one of the parties is domiciled or has his seat, or, in the absence thereof, has his actual residence outside the Netherlands'. This definition is relevant with respect to certain specific provisions which apply in international arbitration (e.g., provisions on longer periods of time (Art. 5 para. 2), nationality of arbitrators (Art. 16), language (Art. 40), applicable law (Arts. 45 and 46)).

¹⁹ In the case of the appointment of arbitrators, the time-limit of two months is, under the Act, extended to three months. In the case of challenging an arbitrator, the time-limit of two weeks for withdrawal for the challenged arbitrator is extended to six weeks in case either one of the parties or the challenged arbitrator is domiciled or has his actual residence abroad. In the same situation, the time-limit for submitting a request for a challenge to the competent court is extended from four weeks to eight weeks.

²⁰ Thus, there is the time-limit of two weeks for the arbitrator to withdraw. If the arbitrator does not withdraw, the request for a challenge to the competent judge at the District Court is to be submitted within two weeks from a written declaration by the arbitrator that he does not intend to withdraw. If no such declaration is made, the request to challenge is to be filed within six weeks from the moment when the notification of a challenge is received by the arbitrator.

repealed. Consequently, the time-limits in Article 1035(2) Rv, as amended in the Proposal, apply in all cases, regardless of whether the domicile or actual residence of a party or the challenged arbitrator is within or outside the Netherlands.

3. Arbitration Agreement

The relevant provisions of the Act relating to an arbitration agreement have undergone several changes. In particular, the Proposals do not distinguish between the two types of arbitration agreements for the purposes of determining the moment when arbitral proceedings commence. Further changes have been introduced with respect to the written form of an arbitration agreement and the law applicable to the arbitration agreement. Also, a number of new provisions have been introduced, in particular with respect to provisional measures. However, the latter remain outside the scope of analysis.

3.1. Types of Arbitration Agreements and the Commencement of Arbitral Proceedings

The general provision relating to an arbitration agreement contained in Article 1020 Rv has remained, to a great extent, unchanged in the Proposals. The only exception is a suggestion to repeal paragraph 2,²¹ where the expressions ‘arbitration clause’ and ‘submission’ are defined in the Act. This provision is quite rightly considered to be unnecessary, bearing in mind that paragraph 1 of the same provision already states that ‘[p]arties may agree to submit to arbitration disputes which have arisen or may arise between them out of a defined legal relationship, whether contractual or not’.²² Thus, it is obvious that this determination includes both a submission agreement and an arbitration clause.

The definitions of the two types of arbitration agreements in Article 1020(2) do not imply any different treatment with respect to their validity under the legislation currently in force. The Act only provides for their separate treatment in Articles 1024 (submission agreement) and 1025 (arbitration clause), concerning the procedure for commencing arbitration²³ and the contents of a submission agreement.²⁴ Thus, unless the parties have agreed otherwise, the arbitration shall be deemed to have commenced by the conclusion of a submission agreement (1024(2) Rv). If arbitration is to be commenced on the basis of an arbitration clause and provided that no other method for the commencement has been agreed upon, the proceedings are considered to have been initiated on the day when a party receives a written notice containing information that the other party is commencing arbitration (Art. 1025(1) and (3) Rv).

In the Proposals all the provisions relating to the distinction between a submission agreement and an arbitration clause are repealed. Thus, Article 1024(1), providing that the submission agreement shall describe the matters which the parties wish to submit to arbitration is omitted in the Proposals. The reason for this is that such a requirement already follows from the text of Article 1020(1), which refers to a

²¹ Article 1020 Para. 2 reads as follows: ‘The arbitration agreement mentioned in paragraph (1) includes both a submission by which the parties bind themselves to submit to arbitration an existing dispute between them and an arbitration clause under which parties bind themselves to submit to arbitration disputes which may arise in the future between them’.

²² Cf., ‘Toelichting’, *TvA*, p. 134.

²³ Articles 1024 and 1025 Rv.

²⁴ Articles 1024(1) Rv.

‘defined legal relationship’.²⁵ Similarly, the provisions contained in Article 1024 and 1025 are repealed under the Proposals. There is a new provision (Art. 1035B), which deals with the commencement of arbitration. No distinction is any longer maintained between a submission agreement and an arbitration clause. The provision follows the determination used in Article 21 of the Model Law and states that arbitration is deemed to be commenced on the date on which a request for arbitration is received by the respondent.

The purpose of the changes addressed is merely to simplify the provisions on the commencement of arbitration and to do away with the redundant definitions. Thus, they have no importance concerning the question of the validity of the two types of arbitration agreements. Different to some other jurisdictions, where the validity of an arbitration clause may exceptionally be excluded for certain types of disputes,²⁶ the Act contains no provisions that limit or exclude the effectiveness of arbitration clauses. The same approach is maintained in the Proposals.

The provisions contained in paragraphs 5 and 6 of the present Act have been retained in the Proposals.²⁷

3.2. *Subject-matter Arbitrability*

As mentioned previously, other issues dealt with in Article 1020 Rv have remained unchanged. This includes the definition of objective or subject-matter arbitrability: ‘legal consequences of which the parties cannot freely dispose’²⁸ remain outside the arbitration domain.²⁹

Just as statutory definitions in other jurisdictions employing either the same or different approaches to defining arbitrability, the one provided in the Act does not give a clear answer as to which matters are ‘capable of settlement by arbitration’. Usually, it is impossible to draw up a comprehensive list of arbitrable matters in a certain legal system, without a careful study of other fields of law and guidance from the judiciary.³⁰ The suggestions addressed in the coming text illustrate that the question of arbitrability remains a rather controversial issue in legal theory in the Netherlands, certainly in the areas of law where there has been no guidance from the judiciary so far. The controversy lies in particular in defining a uniform approach to determine the scope of arbitrable matters.

It is generally held that matters of public policy are not arbitrable as they are not considered to be at the free disposal of the parties. These are, in particular, matters in which a decision has an *erga omnes* effect, such as matters of family law (divorce, adoption) or a declaration of bankruptcy.³¹ Some authors are of the opinion that whether a particular matter has a public policy nature should be decided on the case-

²⁵ ‘Toelichting’, TvA, p. 134.

²⁶ See e.g., Article 1678(2) of the Belgian Code of Civil Procedure, which provides for the *ipso jure* nullity of an agreement to arbitrate future disputes falling within the competence of the Labour Court.

²⁷ Paragraphs 4 and 5 respectively. It is expressly stated that the expression ‘arbitration agreement’ includes an arbitration clause which is contained in articles of association or rules which bind the parties. When an arbitration agreement refers to a set of arbitration rules, such rules will be considered to form part of the agreement.

²⁸ Article 1020(3) of the present Act (para. 2 under the text of the Proposals).

²⁹ The same is true for paras. 5 and 6 of Article 1020 of the present Act, contained in paragraphs 4 and 5 of the Proposals. See *supra* note 27.

³⁰ For a comparative analysis of the approaches in defining arbitrability in France, Germany, The Netherlands and in the United States, see Lazic 1998, p. 140-154.

³¹ Snijders 2003, Article 1020, n. 5.

by-case basis.³² Others attempt to identify a certain line of reasoning to be applied when examining whether a certain issue is of a public policy nature.³³

Prof. Sanders suggests that the exclusive jurisdiction of national courts entails the non-arbitrability of a subject-matter, but the problem lies, in his view, in the fact that it is not always clear when exclusive jurisdiction is in fact provided. However, whenever it is clear that exclusive jurisdiction is provided, that implies objective non-arbitrability. Such exclusive jurisdiction is provided in Article 80 of the Patent Act of 1995 relating to the validity of a patent and Article 14D of the Uniform Benelux Trademark Act. Similarly, special court proceedings are provided for in the 1958 Agricultural Lease Act Articles 128 and 129.³⁴ In contrast to these obvious situations in which arbitration is excluded, the author suggests distinguishing other matters in which the question of arbitrability is likely to arise. Thus, some questions in such disputes are arbitrable, whereas certain aspects fall outside the domain of arbitration. Such is the case with respect to labour contracts, disputes involving the renting of houses, insolvency proceedings and questions pertaining to company law.³⁵

Although the statutes mentioned provide for the exclusive jurisdiction of the judiciary, it may be argued that the exclusivity provisions relate only to the jurisdiction of the courts in relation to the jurisdiction of other courts and not to arbitration.³⁶ Thus, the criterion of exclusive jurisdiction should always be viewed in the context of the purpose which a particular provision intends to achieve. If it is merely part of the general rules on the allocation of jurisdiction, without any reason or intention to exclude arbitration, they should not be interpreted as implying the non-arbitrability of a subject-matter. A similar line of reasoning can also be applied when a special procedure is provided for certain disputes. Arbitrators should not be competent to deliver decisions which have an *erga omnes* effect, as their jurisdiction is based on a private agreement between the parties. Such an agreement, and consequently a decision delivered on the basis thereof, can have binding effect only between the parties, although there are some examples in comparative law pointing to a different approach. For example, in some jurisdictions, such as Switzerland and the United States, an arbitral award may be the basis for registering the invalidity of a patent.

The Proposals also retain the provision in Article 1020 paragraph 4 of the Act (para. 3 in the Proposals). It enlarged the domain of arbitrability by expressly providing that the parties may agree to submit to arbitration ‘the determination only of the quality or condition of goods, the determination only of the quantum of damages or a monetary debt’, as well as ‘the filling of gaps in, or modification of, the legal relationship between the parties’.

3.3. *Formal Validity of an Arbitration Agreement*

A number of amendments with respect to arbitration agreements are suggested in the Proposals. These relate in particular to the written form of an arbitration agreement, a provision relating to a state as a party to arbitration and the law applicable to an arbitration agreement.

³² Meijer 2005, p. 1237, n. 6.

³³ Snijders 2003, Article 1020, n. 5.

³⁴ Sanders 2001, p. 36-38. Cf., De Witt Wijnen 2005.

³⁵ Sanders 2001, p. 36-38.

³⁶ Lazic & Meijer 2002.

3.3.1. Written Form as a Condition of the Validity of an Arbitration Agreement

The Act presently in force provides in Article 1021(1) that an arbitration agreement must be proven by an instrument in writing. Accordingly, the only requirement is that there is evidence of the arbitration agreement. Only when it is argued that there is no arbitration agreement will its existence have to be proven by an instrument in writing. If an arbitration agreement must be proven, according to Article 1021, an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party. There is no requirement for an exchange of documents. Accordingly, the definition of a written form is less stringent than the requirement under Article II(2) of the 1958 New York Convention³⁷ or Article 7(2) of the Model Law.³⁸

Accordingly, written evidence of an arbitration agreement is sufficient under the present Act, whereby a written form is not a condition for the validity or existence of an arbitration agreement. However, it is intended to amend this provision so as to convert a requirement of written evidence into a condition for the existence and the validity of an arbitration agreement. The main reasons for this are found in similar legislative solutions in comparative law,³⁹ but also because of the need to adjust the statutory legislation so as properly accommodate Article 6 of the European Convention on Human Rights. Namely, since the parties waive their constitutional right of access to the judiciary by entering into an arbitration agreement, the requirement of a written form should be a condition for the validity of such an agreement, and not merely a requirement of written evidence.⁴⁰ Therefore, it is suggested that the relevant provision of Article 1021(1) should be amended, whereby the wording that an arbitration agreement shall be 'proven' by an instrument in writing should be replaced by the wording that an arbitration agreement shall be *concluded* in written form (Art. 1021(1) of the Proposals).

3.3.2. Definition of an 'Agreement in Writing'

The definition contained in Article 1020(1) of the Act can be found in paras. 2 and 6 of the Proposals. The relevant provision of Article 6:227a of the Civil Code, relating to the conclusion of an arbitration agreement by electronic means, is reproduced in para. 6 of the Proposals.⁴¹ The second sentence of Article 1020(1) of the Act is now contained in paragraph 2 of the Proposals, whereby the wording has remained basically unchanged. It reads as follows:

'For the purpose of the first paragraph an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party'.

³⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, UN Treaty Series, vol. 330, No. 4739 (1959).

³⁸ See also, Sanders 1999, p. 157.

³⁹ Such as the relevant provisions in English, German and Italian statutory law, as well as in the Model law. Namely, in all these statutes a written form is a condition for the validity of an arbitration agreement and not merely written evidence.

⁴⁰ 'Toelichting', *TvA*, p. 129.

⁴¹ In the Act, this provision of the Civil Code is referred to in para. 1 of Article 1020. For more on this issue, see *infra* under 3.3.4.

As mentioned previously, this definition is more favourable than the definitions under Article II(2) of the New York Convention and Article 7(2) of the Model Law, as there is no requirement for an exchange of documents. The provisions concerning the written form of an arbitration agreement in the New York Convention and in the Model Law have been subject to criticism in legal writing and have often been considered as outdated and unable to meet the needs of modern commerce.⁴² Many statutes on arbitration provide for a less stringent requirement of the written form.⁴³ Besides, the Working Group within the UNCITRAL has been discussing a new provision on the written form of an arbitration agreement. The definition of an 'agreement in writing' under the law of the Netherlands can be invoked and relied upon also in cases that fall within the scope of application of the New York Convention, on the basis of the more-favourable-right provision contained in Article VII(1) of the Convention.

In connection with the arbitration clause contained in the general conditions in consumer contracts it should be mentioned that important changes have been suggested for introduction in the Civil Code. These changes are further discussed *infra*, under § 3.3.3.

In arbitration theory and practice in the Netherlands it is held that an arbitration agreement is entered into if a party to the arbitral proceedings fails to raise the plea of the invalidity or non-existence of an arbitration agreement before submitting a statement of defence.⁴⁴ In the Proposals it is now expressly regulated in Article 1021(3) that an arbitration agreement is considered to have been entered into if a respondent fails to raise the plea that the tribunal has no jurisdiction on the ground that there is no valid arbitration agreement before submitting a statement of defence.⁴⁵ The only difference compared to the Act presently in force is that a failure to object in the Proposal is also regulated in the context of the validity of an arbitration agreement. Accordingly, this may be relevant from a theoretical point of view, but does not alter the regulation under the present Act. This is particularly so bearing in mind that the provisions contained in Articles 1052(2) and 1065(2) have remained virtually unchanged. From the wording of these two provisions it is obvious that a party is precluded from raising the plea of a lack of jurisdiction for invoking the invalidity of an arbitration agreement if it has failed to do so before submitting a defence, whereby the only exception is the objection of invalidity because the dispute is not capable of settlement by arbitration.

In order to establish whether the new regulation contained in Article 1020(3) of the Proposals presents an improvement on the Act it is interesting to compare the relevant provisions of the Netherlands Act with corresponding provisions in some

⁴² See e.g., Kaplan 1996, p. 27 et seq.

⁴³ See e.g., Article 5 of the 1996 English Arbitration Act; Article 1031 of the 1998 German Arbitration Act contained in Book X of the Code on Civil Procedure; Article 178 of the 1987 Swiss Arbitration Act contained in Chapter 12 of the Act on Private International Law.

⁴⁴ 'Memorie van Toelichting', *TvA* 4, 1986, p. 179; Snijders 2003, Article 1021, n. 1; Van den Berg 1987, p. 5. See also, Article 1052(2) Rv and 1065(2) Rv. From the two provisions it follows that if a party fails to raise the plea of the invalidity of the arbitration agreement before submitting a defence, the party is precluded from raising this plea at a later stage in the arbitral proceedings and in the proceedings before the court, unless the objection relates to the non-arbitrability of the subject-matter of the dispute.

⁴⁵ Article 1023(3) of the Proposals reads as follows: '3. An arbitration agreement is also entered into if a respondent fails in accordance with article 1052, second paragraph, to raise a plea that the arbitral tribunal lacks jurisdiction on the ground that there is no valid arbitration agreement'. (translation: VL).

other statutes, such as the German Arbitration Act of 1998 (contained in the Code on Civil Procedure, the 10th Book) and in the Model Law. Besides the general provision on waiver in Article 1027, the German Act provides that a plea that the arbitral tribunal lacks jurisdiction shall be raised no later than the submission of the statement of defence (Art. 1050(2)). In the context of the form of an arbitration agreement, it expressly states that non-compliance with the *form* requirements 'is cured by entering into an argument on the substance of the dispute in the arbitral proceedings' (Art. 1031(6)). A similar result follows from Articles 4 (general provision on waiver), 16(2) (the plea of lack of jurisdiction) and 7(2) of the UNCITRAL Model Law.⁴⁶

The German Act and the Model Law do not contain provisions corresponding to Article 1052(2) and 1065(2) of the Netherlands Act, according to which any reason of invalidity, either formal or substantive, except non-arbitrability of the subject-matter, may not be successfully invoked for the first time after submitting the statement of defence in arbitral proceedings. Consequently, a lack of form is rectified under the German Act and the Model Law by a failure to object to the validity of the agreement before entering into an argument on the merits. What will be the consequences of a failure to object with respect to substantive validity is not expressly regulated in the two Acts. Presumably the general provisions on waiver, as well as provisions relating to the time-limit in which a lack of jurisdiction is to be raised, will be relevant, but the actual reach of these provisions will be determined by the judiciary. It is most likely that not all reasons affecting the jurisdiction of arbitrators will deserve the same treatment. Most probably, the non-arbitrability of the subject-matter would not fall within the reach of the 'waiver of the right to object' provisions.

As indicated previously, if the validity of an arbitration agreement, either formal or substantive, is not contested before submitting a defence, it is clear that a party cannot successfully invoke this ground in proceeding for setting aside (Art. 1065(2) Rv referring to 1052(2) Rv) or in the proceeding for the recognition and enforcement of a foreign arbitral award (Art. 1076(2) Rv). Therefore, introducing the new text of Article 1020(3) in the Proposals is of little practical relevance. Yet, inserting the wording concerned may be interesting from a theoretical point view. The purpose of the new provision now contained in Article 1021(3) could be to distinguish between the reasons for which such objection will be unsuccessful in the later stages. Solutions similar to the regulatory scheme in the German Act and in the Model Law would thereby be provided for. Thus, if a late objection relates to the formal invalidity or non-existence of an arbitration agreement, it will be unsuccessful because the arbitration agreement is considered to comply with the requirement of a written form according to the newly introduced Article 1020(3) of the Proposals. A reliance on Article 1052(2) would not only be unnecessary, but would also not be entirely appropriate. Namely, the party's objection will be unsuccessful not because it is strictly speaking precluded from raising the plea at the later stage, but because the agreement does comply with the requirement of written form. In contrast, if a party raises an objection as to the validity of an arbitration agreement other than relating to formal invalidity, such an objection will be unsuccessful because the party is precluded from raising such a plea at the later stages according to Articles 1065(2) and 1052(2) in the setting aside proceedings and according to Article 1076(2) Rv in the procedure for recognition and enforcement.

⁴⁶ Article 7(2) of the Model Law provides, *inter alia*, that an arbitration agreement 'is in writing if it is contained in ... or in an exchange of statements of claims and defence in which the existence of an agreement is alleged by one party and not denied by another'.

If this is the interpretation that is intended to be attained by including this provision, then it is more appropriate to introduce wording which more closely resembles the expressions used in the Model Law or in the German Act.⁴⁷

3.3.3. Arbitration Clause in General Conditions

As already mentioned, Article 1021(2) incorporates the part of the present Article 1021 according to which an instrument in writing, which refers to standard conditions providing for arbitration, is deemed sufficient if such an instrument is expressly or impliedly accepted by or on behalf of the other party. In this context a rather important amendment is suggested in the Proposals relating to the text of Article 6:236 sub n of the Civil Code. Namely, this provision is to be changed so as to include an arbitration clause on the so-called 'blacklist' of unreasonably onerous clauses in standard or general conditions. When the Act was drafted it was considered whether to place the arbitration clause on this list, in particular from the point of view of a consumer in arbitration.⁴⁸ One of the arguments in favour of including the clause on the 'list' was concern about the extent of a consumer's influence on the choice of arbitrators and consequently the fact that consumers may have the impression that arbitrators lack impartiality. Besides, a simplified procedure before the court of first instance was intended to offer an 'inexpensive alternative' to consumers. An arbitration clause was not placed on the blacklist after all. It was held that the new statute on arbitration did provide for a legislative procedural framework in which the impartiality of arbitral proceedings was sufficiently guaranteed.⁴⁹ Consequently, an arbitration clause is expressly excluded from the list in Article 6:236 sub n of the Civil Code.

Although it remained outside the list, an arbitration clause was in certain circumstances denied effect by applying the relevant provisions of the Civil Code. Thus, an arbitration clause contained in the general conditions was considered unacceptable as being unreasonably onerous to the other party by the application of Article 6:233 of the Civil Code.⁵⁰ Similarly, the rules of general contract law contained in Article 6:248(2) of the Civil Code also apply to an arbitration clause. According to this provision, the rule on the binding character of an obligation under the contract will not apply to the extent that, in the given circumstances, this would be unacceptable according to the criteria of reasonableness and fairness. Thus, it was considered contrary to the criteria of reasonableness and fairness to hold a person of limited means bound by an arbitration clause. It was concluded that the claimant would have been deprived of the right to pursue his claim had the court declared its lack of jurisdiction.⁵¹ Indeed, only in exceptional circumstances would an arbitration

⁴⁷ For example, the words 'The requirement of written form in the meaning of para. 1 is complied with if a respondent ...' could be added.

⁴⁸ Hondius 1996, p. 139.

⁴⁹ 'Toelichting', *TvA*, p. 130.

⁵⁰ HR (Dutch Supreme Court) 23 March 1990, *NJ* 1991, p. 214 (*Botman v Van Haaster*), where the arbitration rules agreed upon contained provisions which may be considered as unreasonably onerous for one of the parties. In a transaction concerning flower bulbs, the rules referred to in the general conditions provided that only the members of a particular Association were allowed to initiate arbitral proceedings, whereas non-members could rely on an arbitration clause only when raising a counterclaim. Consequently, an arbitration clause referring to such rules was considered to be unreasonably onerous.

⁵¹ Kantonrechter Zierikzee, 19 February 1988, *TvA* 1988, p. 147. After submitting his claim to an arbitral institution, the claimant was informed that the claim would only be dealt with after a

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clause be denied effect as being contrary to the criteria of reasonableness and fairness.⁵²

Several reasons are mentioned for adding an arbitration clause to the ‘blacklist’ in Article 6:236 sub n of the Civil Code. Most importantly, the relevant provisions of EC Directive 93/13 indicate that arbitration clauses contained in standard conditions can be considered as unfair terms in consumer contracts.⁵³ Besides, the position of the ‘weaker party’ in arbitral proceedings has lately been the subject of a continuous debate in the legal literature in the Netherlands.⁵⁴ The suggested amendment to the text of Article 6:236 sub n of the Civil Code is only one among several provisions in the Proposals which are introduced with the purpose of creating a more favourable procedural framework for a weaker party in arbitral proceedings.⁵⁵ Also, it was the conclusion of the Netherlands Association for Procedural Law that an arbitration clause should be included on the ‘blacklist’ under Article 6:236 of the Civil Code.⁵⁶

In general it cannot be said that the interests of a weaker party are insufficiently considered when applying the legislation presently in force. Yet the considerations addressed justify the decision to list an arbitration clause among unreasonably onerous clauses in standard conditions. A similar trend in providing for a different regulatory scheme for arbitration clauses in consumer contracts is followed in other jurisdictions as well.⁵⁷

3.3.4. Arbitration Agreement Concluded Electronically

As mentioned previously, Article 1021 was changed in order to implement the Directive on Electronic Commerce of 8 June 2000. The changes to Article 1021(1) were introduced on 30 June 2004. It was expressly stated that an arbitration agreement

deposit to cover the costs had been made. The amount of the costs exceeded the amount of his claim. Thereafter, the Claimant initiated proceedings before the Court.

⁵² Cf., HR 21 March 1997, *NJ* 1998, 219 (*Meijer v OTM*), ‘Toelichting’, *TvA*, p. 130.

⁵³ Council Directive 93/13/EEC on unfair terms in consumer contracts of 5 April 1993, *OJL* 95 21/04/1993. Relevant is Article 3 which in para. 3 refers to the Annex containing an indicative and non-exclusive list of terms that can be considered as unfair. The Annex under (q), reads as follows: ‘(q) excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract’; Cf., European Court of Justice, C-404/97, 27 June 2000, *NJ* 2000, 730 (*Océano Grupo Editorial v Murciano Quintero*) relating to a forum selection clause considered in connection with the costs for the consumer.

⁵⁴ See e.g., Van Bladel 2002; Sillevs Smitt 2003, p. 2146. For other literature on this issue, see ‘Toelichting’, *TvA*, p. 128.

⁵⁵ Other amendments intended to improve the position of a weaker party can be found in the following provisions of the Proposals: a more detailed regulation concerning the privileged position of a party in appointing arbitrators (Art. 1028), basic principles of arbitration procedure are laid down with more particulars in Article 1036, the Proposals provide for a more structured rules on the conduct of arbitral proceedings than the present text of the Act (Arts. 1036–1043) and the deposit of an award with the Registry of the District Court is no longer obligatory, but is left to the agreement between the parties (Art. 1058), whereby the costs are reduced. ‘Toelichting’, *TvA*, p. 128.

⁵⁶ Polak 2004, n. 2, p. 71; Van den Nieuwendijk 2004, n. 1, p. 3. ‘Toelichting’, *TvA*, p. 130.

⁵⁷ See e.g., Article 1031(5) of the 1998 German Arbitration Act. It is interesting in this context to refer to Article 17 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on the Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation), where the effectiveness of forum selection clauses is limited in those contracts where a consumer is a party.

could be proven electronically, whereby the provision of Article 6:227a(1) of the Civil Code was declared to be analogously applicable.

The suggested changes to convert a requirement of written evidence into a condition for the existence and validity of arbitration agreement have already been explained.⁵⁸ Consequently, the wording ‘can be evidenced by electronic means’ is also to be amended so as to state that the requirement of written form is a condition for the validity or existence of an arbitration agreement. Besides, the text of Article 6:227a(1) of the Civil Code is reproduced in paragraph 6 of Article 1021, so that a reference to this provision of the Civil Code is no longer needed. The relevant provision of Article 1020(6) reads as follows:

‘The requirement of written form as referred to in the first to third paragraph will also be met if the arbitration agreement is concluded by electronic means and if

- a. it may be consulted by the parties;
- b. the authenticity of the agreement is guaranteed to a sufficient degree;
- c. the time of the conclusion of the agreement can be established with a sufficient degree of certainty;
- d. the identity of the parties can be established with a sufficient degree of certainty’.

These rules expressed in Art. 1020(6) also apply to questions regulated in Article 1072BB of the Proposals. It is a general provision according to which the requirement of written form is complied with if a particular agreement or communication is concluded or made electronically. Thus, whenever a written form is required, either for an agreement or for any submission to be filed in the proceedings or for any other communication or procedural act, these can be concluded or performed by electronic means, unless the parties have agreed otherwise. This does not apply to any procedural action that has to be carried out in proceedings before the courts, unless it is permitted by the rules that apply in such a procedure. Article 1072BB expressly provides that, in the circumstances dealt with therein, the rules on the conclusion of arbitration agreements by electronic means contained in Article 1020(6) apply analogously.

3.3.5. A State as a Party to Arbitration

This is a new provision suggested for introduction as paragraph 5 of Article 1021. It is modelled on Article 177(2) of the Swiss Private International Law of 1987.⁵⁹ According to Article 1021(5), if a party to an arbitration is a State, a legal person under public law or a state-controlled enterprise, it cannot rely on its own law to contest its capacity to be a party to an arbitration or to enter into an arbitration agreement or to object to the arbitrability of the dispute. This provision incorporates the approach that has already been accepted by the judiciary in the Netherlands,⁶⁰ and as such does not introduce any new position in dealing with this issue. Yet it is

⁵⁸ See *supra*, § 3.3.1.

⁵⁹ Cf., Article II of the European Convention on International Commercial Arbitration, Geneva, 21 April 1961, United States, *Treaty Series*, vol. 484, p. 364, No. 7041 (1963-1964).

⁶⁰ HR 28 January 2005, C03/253 (*IMS v DIO*), referred to in ‘Toelichting’, *TvA*, p. 131 (<<http://www.rechtspraak.nl>>).

desirable and useful to introduce an express provision on the capacity of the state, as it adds to the clarity and transparency of the approach taken.

For the definition of a 'state' it is suggested⁶¹ to consult the UN Draft Article on Jurisdictional Immunities of States and Their Property of the International Law Commission.⁶²

3.3.6. Law Applicable to an Arbitration Agreement

An express provision on the law applicable to arbitration agreements is very seldom found in arbitration statutes, outside the context of the provisions on challenging the award and provisions on the recognition and enforcement of awards.⁶³ Decisions on the validity of arbitration agreements are frequently made without any reference to a particular law, especially as far as the issue of substantive validity is concerned. In other words, deciding on the substantive validity of arbitration agreements usually involves an interpretation of the wording, where the question of 'which law applies' does not play a decisive role.

The Proposal contains a new provision on the law applicable to arbitration agreements in Article 1020(4). The relevant provision of the 1987 Swiss Act on Private International Law served as a model for the drafting of this Article 1021(4). However, the Proposals depart to a certain extent from the approach maintained in Article 178(2) of the Swiss Act. Article 1021(4) reads as follows:

'Notwithstanding provisions in the first to third paragraph, an arbitration agreement is valid if it is valid under the law of the Netherlands or under the law which is applicable according to Article 1054, second paragraph'.

Accordingly, the law applicable to arbitration agreements is either the law of the Netherlands, as the law of the place of arbitration (*lex arbitri*), or the rules of law applicable to the substance of the dispute (*lex causae*). Thus, the applicability of the *lex arbitri* and the *lex causae* is alternative, *in favorem validitatis* of the arbitration agreement. The relevant provision of Article 1054(2), referred to in Article 1021(4), remains unchanged. It provides that the arbitral tribunal shall decide in accordance with the rules of law chosen by the parties. In the absence of such a choice, the arbitrator shall make an award in accordance with the rules of law which he considers appropriate.

The approach taken in the Proposals differs to a certain extent from Article 178(2) of the Swiss Act. The latter provides for the alternative application of either the law chosen by the parties, or the law governing the subject-matter of the dispute, 'in particular the law governing the main contract', or Swiss law. In other words, an arbitration agreement is valid if it is valid under either the *lex arbitri*, or the *lex causae*

⁶¹ 'Toelichting', *TvA*, p. 131, also referring to the commentaries in the corresponding provision of the Swiss Act on Private International Law.

⁶² Article 2 of the Draft UN Convention reads as follows: "'State" means:

- (i) the State and its various organs of government;
- (ii) constituent units of a federal State;
- (iii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;
- (iv) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;
- (v) representatives of the State acting in that capacity'.

⁶³ Article 178 para. 2 of the Swiss Private International Law Act of 1987 is the exception to this, as it contains an express provision on the applicable law.

or under the law chosen by the parties. The law determined by the parties as being applicable to the arbitration agreement is omitted from the Proposals. The reason for this can be found in the fact that the parties seldom, if ever, make a choice in that respect. It is maintained that in the absence of a choice of law, the laws with which the arbitration agreement is most closely connected should be applicable, and these are the *lex arbitri* and the *lex causae*.⁶⁴

It is true that the parties usually do not determine which law will apply to their arbitration agreement. Yet it would be better to follow more closely the approach in the Swiss Act and to introduce the choice of law among the alternative applicable laws. There are several reasons for this. In practice it would make no difference, as the solutions suggested in the Proposals would apply in most situations anyway, since no choice of law is usually made. However, such an approach would be in accordance with party autonomy as an underlying principle in arbitration, which is otherwise accepted and followed in the Proposals. The fact that the opportunity to choose the applicable law is seldom used should not be a reason to depart from party autonomy as a matter of principle. Besides, it is not inconceivable that the parties would wish to determine the applicable law when a submission agreement is concluded.

The relevant provision of the Swiss Act clearly defines the scope of application of the provision containing the definition of the written form of the agreement and the provision containing the conflict of law rules for the substantive validity of the arbitration agreement.⁶⁵ Accordingly, the formal validity will be examined in accordance with the definition provided in Art. 178(1) when the arbitration takes place in Switzerland, a provision which is not a private international law provision. The substantive validity will be decided according to the law determined by the rules of private international law contained in Article 178(2).

The Proposals in Article 1021(4) do not clearly indicate that the rules of private international law contained therein shall apply regarding only the substantive validity of an arbitration agreement. Instead, it uses the wording 'notwithstanding provisions in the first to third paragraph'. As already explained, the provision of paragraph one to three relate to the written form.⁶⁶ If it is indeed intended to distinguish between the provisions relating to the written form in paragraphs 1 to 3 and the private international law rules in Article 1021(4), it would be a better approach to simply use the expression 'as regards substantive validity' or any other similar wording in the latter provision.

According to Article 1073(1) Rv already discussed, Title One, thus also Article 1021(4), applies if the seat of arbitration is in the Netherlands. However, there is no reference to Article 1021(4) in the relevant provisions relating to arbitration outside the Netherlands in which the validity of an arbitration agreement is referred to.⁶⁷ All these provisions refer to the invalidity of an arbitration agreement 'under the law

⁶⁴ 'Toelichting', TvA, p. 131. Cf., Meijer 2005, n. 2. Commenting on the existing Act, which does not contain any provision on the law which is applicable to arbitration agreements, it is stated that the parties seldom, if ever, choose the applicable law. Therefore, it is usually determined either on the basis of the implicit choice or on the basis of the closest connection. In both situations it is presumed that either the law of the place of arbitration or the law applicable to the substance of the dispute applies to the question of the validity of the arbitration agreement.

⁶⁵ The question of formal validity is dealt with in para. 1 of Article 178, which expressly states '[a]s regards its form, the arbitration agreement shall be valid if ...'. The same provision in para. 2 states '[a]s regards its substance...'.
⁶⁶ Cf., 'Toelichting', TvA, p. 131, where para. 2 of Article 1020(3), which relates to the definition of a written form, is also referred to.

⁶⁷ Articles 1074, 1074D and 1076 of the Proposals.

applicable to it', but they neither indicate how the applicable law is to be determined nor do they refer to Article 1021(4). Most probably, in practice this will not lead to the inconsistent application of the rules of private international law, as it may be concluded that Article 1021(4) incorporates the approach that is accepted in arbitration theory and practice in the Netherlands.⁶⁸ Yet, for the sake of clarity and uniformity in the regulations, as well as the legal certainty and predictability of the results it is more appropriate to refer to the same set of private international law rules whenever the courts in the Netherlands have to decide on the question of the law which is applicable to the substantive validity of an arbitration agreement.

4. Conclusions

Only a very few issues contained in the proposed amendments to the Dutch arbitration statutory law have been addressed, in particular the structure of the statute and the issues pertaining to the formal and substantive validity of arbitration agreements. Obviously, the Proposals follow the basic structure of the Act, whereby the division of provisions that apply to arbitration in the Netherlands and arbitration to be held outside the Netherlands has been maintained. This approach in statutory regulation provides for very clear rules concerning the scope of application and, as such, is properly retained in the Proposals.

A few provisions that were adapted to situations with international elements have been repealed. Besides, the provisions relating to the moment when arbitration commences have been simplified and the provision on the content of a submission agreement has been repealed. Consequently, the definitions of an arbitration clause and a submission agreement have been omitted.

The reasons justifying the intention to replace the requirement of 'evidence in writing' with a requirement that an arbitration agreement has to be 'concluded in writing' are explicable. However, it is not so obvious where this idea is being carried out, besides in the change in terminology. This is particularly so bearing in mind that a tacit acceptance of an instrument in writing is sufficient in order to comply with the requirement of a written form. That part has remained unchanged and does not depart from the approaches taken in comparative statutory law.

An improvement is also the decision to put an arbitration clause on the list of terms contained in standard conditions that can be onerous for a consumer as a weaker party. The same can be said of the provision relating to a State as a party to arbitration.

However, it is doubtful whether the newly introduced provision of Article 1021(3) is really required. In particular, it is not clear what is intended to be achieved by introducing this provision. If the purpose is to distinguish between the reasons for 'rectifying' a written form from the other circumstances in which a failure to object in good time results in a loss of the right to object later, whereby a regulation similar to the Model Law would be achieved, then the insertion of this provision may be justifiable at least from a theoretical point of view. If this was not the purpose to be achieved, this provision is unnecessary. This is particularly so bearing in mind the relevant provisions on the time-limit to object and those expressly regulating the *consequences* of a failure to object in good time.

Major objections relating to the provision on the law applicable to the arbitration agreement may be the following: (1) law chosen by the parties as the alternative

⁶⁸ See, Meijer 2005 (Art. 1020, n. 2, Art. 1074, n. 1, Art. 1076, n.2 c).

applicable law is omitted, (2) the scope of application of the provisions defining the written form and the provision containing the rule of private international law to be used in determining the law which is applicable to substantive validity is not clearly defined, (3) there is no reference to the relevant provision on the applicable law elsewhere where the issue of the validity of the agreement is referred to.

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