



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

The Impact of Uniform Law on National Law: Limits and Possibilities – Commercial Arbitration in the Netherlands

Vesna Lazić*

Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.

1. Introduction

Sufficient support from the judiciary and an arbitration-friendly legislative framework are crucial factors in making arbitration in a particular jurisdiction an effective and attractive method for the settlement of commercial disputes. When exercising their supportive and supervisory roles in arbitration, the courts are inclined, probably more than in any other field of law, to look beyond their national borders. Similarly, in the process of the legal reforms of arbitration law, the national legislators will take into consideration modern trends in comparative arbitration law and practice. Thereby, arbitration statutes in other jurisdictions, as well as uniform laws, will certainly be considered. This paper is focused on the impact that the uniform law may have on Dutch substantive and arbitration law. It will first discuss how the notion ‘uniform law’ is to be understood in the substantive law, taking into consideration the relevant provisions of private international, as well as arbitration law. It is thereby examined how a non-national law is applied by the courts and by the arbitrators in the Netherlands in resolving international commercial disputes. Thereafter, the relevant provisions of arbitration law are addressed, particularly those relating to the extent of control over arbitral awards. The purpose is to examine whether the statutory law presents a friendly framework for arbitration and to what extent comparative law and practice have been considered by the arbitration law makers in the Netherlands.

The impact of uniform law on national law in the Netherlands is in this paper primarily viewed in the context of arbitration law and practice. Yet when addressing certain issues the analysis is extended to the general rules of private international law as applied by the judiciary. This is particularly so when the meaning and the reach of the notion of ‘uniform law’ are considered. The purpose is to compare methods applied by the courts and by the arbitrators in the Netherlands in determining the law governing substantive issues. In that context it is examined whether the fact that the courts and the arbitrators may apply different methods in determining the applicable substantive law has any relevance in defining the scope and the meaning of the ‘uniform law’ concept.

2. Impact of Uniform Law on Substantive Law: What Does the Notion of ‘Uniform Law’ Include?

In general and without reference to any particular system of law, the notion of ‘uniform law’ in the narrowest sense can be understood so as to include international instruments, such as conventions. In the widest sense, it can be considered to mean ‘non-national law’ or ‘a-national law’ or ‘non-State body of law’. In other words, it would include any source of law which does not have its origin exclusively in the legal system of a particular country. Thus, the latter would, in addition to international conventions, extend to trade usages or ‘customs’, general principles of law, general principles of contract law or of the law of obligations, transnational law, and the *lex mercatoria*. How the scope of the ‘uniform law’ notion is likely to be defined in the Netherlands is addressed *infra*. Thereby the relevant provisions of arbitration law, private international law, as well as decisions of the judiciary will be considered.

2.1 Parties’ Choice of the Applicable Substantive Law

Freedom of the parties to determine the rules to govern their contractual relationships is a general principle of contract law that has been accepted worldwide. It is clearly incorporated both in private international law and arbitration law in the Netherlands.

2.1.1 Choice of Law in Court Proceedings

The national courts apply the rules of private international law contained in the EC Convention on the Law Applicable to Contractual Obligations, Rome 1980, which will be replaced by the Rome I Regulation¹ after it enters into force.² Both instruments clearly accept the principle of party autonomy in determining the law applicable to contractual obligation.³ Thus, an agreement will be governed by the law chosen by the parties. The law to be applied must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.⁴

The provisions of both the Rome Convention and the Rome I Regulation refer to the ‘law’ chosen by the parties. The Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations of 15 December 2005⁵ provided expressly that the parties may choose a non-national law to govern their contractual

* Dr. Vesna Lazić is Associate Professor at the Molengraaff Institute for Private Law of Utrecht University in the Netherlands and Senior Researcher at the T.M.C. Asser Institute in The Hague.

¹ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177/6 (hereafter: Rome I Regulation).

² Pursuant to its Articles 28 and 29, the regulation will apply from 17 December 2009 to contracts concluded after the same date.

³ See, e.g., the Preamble to the Rome I Regulation (under 11), stating that ‘[t]he parties’ freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations’.

⁴ Art. 3, para. 1 EC Convention on the Law Applicable to Contractual Obligations, Rome 1980; Art. 3 of the Rome I Regulation.

⁵ Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations, Presented by the Commission, Brussels, 15.12.2005. COM(2005)650 final. For the comments on the provisions of this Proposal, see ‘Comments on the European Commission’s Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations’ by the *Working Group on Rome I within the Max Planck Institute for Comparative and International Private Law, Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 71.

relationship. Furthermore, the Explanatory Memorandum⁶ expressly referred to the UNIDROIT Principles of International Commercial Contracts⁷ and the Principles of European Contract Law (PECL),⁸ as well as ‘possible future optional Community instruments’.⁹ It however excluded private codifications and other insufficiently defined sources such as the *lex mercatoria*.¹⁰ Although the possibility to apply a non-national law provided for in the Proposal was met with approval by many,¹¹ regrettably this provision has been omitted from the final text of Article 3 of the Rome I Regulation.¹² Yet, the Preamble to the Rome I Regulation in heading (13) states that ‘[t]his Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention’.¹³

Although this wording in the Rome I Regulation is likely to give rise to different interpretations as to its meaning and reach, it will bring no changes in Dutch private international law. Generally, different views were expressed in the literature in the Netherlands, as well as in other jurisdictions, regarding the interpretation of Article 3 of the Rome Convention. Some authors expressed the view that this provision was to be interpreted so as to include a choice of a non-State body of law, such as UNIDROIT Principles, the PECL or international conventions.¹⁴ The others rejected such an extensive interpretation of

⁶ Explanatory Memorandum for the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations, 15.12.2005, COM (2005) 650 final (hereafter: Explanatory Memorandum).

⁷ UNIDROIT Principles of International Commercial Contracts 2004 (hereafter: UNIDROIT Principles).

⁸ Principles of European Contract Law, reprinted in Lando, O., Clive E., Prümé, A. and Zimmermann, R., (eds.), *Principles of the European Contract Law – Part III*, Kluwer Law International (2003), p. 59 *et seq.* (hereafter: PECL)

⁹ Explanatory Memorandum, p. 5.

¹⁰ *Id.*

¹¹ See, e.g., Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), 13 September 2006, COM (2005)650 final – 2005/0261 (COD), p. 5, stating that it ‘would for the first time allow parties to use European standard contracts, which to a large extent would be genuinely harmonized and would represent a significant step towards completion of the Internal Market’. See also, Boele-Woelki, K., *Nieuw Europees IPR inzake overeenkomsten – Van Verdrag naar Verordening*, *Internationaal Contracteren*, Feestbundel Willem F. Grosheide (2006) p. 265; Lando, O. and Nielsen, P.A., ‘The Rome I Proposal’, 3 *Journal of Private International Law* 1 (April 2007), p. 32; Dutson, S., ‘A Dangerous Proposal – the European Commission’s Attempt to Amend the Law Applicable to Contractual Obligations’, *Journal of Business Law* (September 2006), pp. 608-618 (609).

¹² An express provision on the possibility to choose a non-State body of law was already omitted from Article 3 in the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Compromise package by the Presidency, Brussels, 13 April 2007, 8022/07 ADD 1 REV 1. The text of this provision contained in Art. 3 paras 2, 3 and 4 of the Compromise package of 13 April 2007 has been taken over in the final text of the Rome I Regulation with minor changes to the wording. For the commentary on this provision in the Compromise package of 13 April 2007 and the criticism of removing the possibility of a choice for a non-State body of law from the text of Article 3 see, Boele-Woelki, K. and Lazić, V., ‘Where Do We Stand on the Rome I Regulation?’, in Boele-Woelki, K. and Grosheide, F.W. (eds.), *The Future of European Contract Law*, Liber Amicorum for E. Hondius, Kluwer Law International, 2007, pp. 19-42, at pp. 27-30.

¹³ Preamble to the Rome I Regulation (under 13). Besides, the Preamble to the Rome I Regulation in heading (14) states that ‘[s]hould the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules’.

¹⁴ See, e.g., Boele-Woelki, K., *Principles en IPR – Enkele beschouwingen over de toepassing van de UNIDROIT Principles of International Commercial Contracts en de Principles of European Contract Law in internationale overeenkomsten*, Koninklijke Vermande, Utrecht (1995). See also, Goode, R., *Contract and Commercial Law: the Logic and Limits of Harmonisation*, *Ius Commune Lectures on European Private Law*, no. 3 (2003) p. 16.

this provision.¹⁵ Yet, when applying the Convention, decisions of the courts in the Netherlands illustrate that the parties are permitted to agree on the application of an international convention containing the uniform substantive rules. In other words, a parties' reference to a convention containing uniform rules has been accepted by the courts in the Netherlands as a valid determination of the *lex contractus*. Such a choice may validly be made if a particular convention permits, or at least does not preclude, its application on the basis of the parties' choice.¹⁶ Thus, the Supreme Court held that a choice of the Convention on the Contract for the International Carriage of Goods by Road (CMR)¹⁷ as the *lex contractus* had been validly made even although the Convention was not otherwise applicable.¹⁸ Similarly, the District Court of Rotterdam held that the parties had validly made a choice for the 1980 Vienna Sales Convention¹⁹ as the *lex contractus* even though the dispute was outside the Convention's formal scope of application.²⁰ Obviously, the Rome Convention and its reference to a 'law' have not been a hindrance to the parties in choosing an a-national body of law. The relevant part of the Preamble to the Rome I Regulation implies that such an interpretation was in accordance, or at least was not contrary to the spirit and the underlying purpose of the Convention. The jurisdictions that used to maintain such an interpretation under the Convention may clearly continue to do so under the Rome I Regulation.²¹

Although the purpose of this Report is to discuss the role of uniform law in the Netherlands, it is interesting to briefly address the manner in which the wording in the Preamble can be interpreted in other legal systems within the European Union. Namely, it seems to be less clear what meaning will be given to this part of the Preamble in those jurisdictions that have so far not permitted the parties' choice of a non-national law as the *lex contractus*. In other words, the Rome I Regulation clearly 'does not preclude' the parties' reference to a non-State body of law. Consequently, those jurisdictions within the European Union where such a choice was permitted under the Rome Convention will simply continue to do so under the Rome I Regulation. However, it may be questionable whether the wording in the Preamble in heading (13) imposes an obligation upon the courts in all Member States to consider such choice as a valid determination of the *lex contractus*. Such an obligation would thus extend to those jurisdictions where a choice of a non-national law has not so far been permitted under the private international law relating to contractual obligations. If the wording concerned was to be interpreted so as to impose such an obligation upon the EU member states, then uniformity in the application of the Regulation would be ensured.

¹⁵ Polak, M.V., 'Principles en IPR: geen broodnodig en pasklaar alternatief "recht"', *WPNR* (1996) no. 6225, pp. 391-392. Cf., Bernardini, P., 'International Arbitration and A-National Rules of Law', 15 *ICC International Court of Arbitration Bulletin* 2 (2004) 58-69, at p. 64, n. 23, stating, *inter alia*, that the international Conventions, such as the 1980 Rome Convention, 'provide for criteria identifying State law' and that accordingly 'a-national rules may not be recognised by State courts as having the effects of a choice of law within the meaning of the conflict of law rules'.

¹⁶ Strikwerda, L., *Inleiding tot het Nederlandse Internationaal Privaatrecht*, achtste druk, Kluwer, Deventer (2005) par. 168, p. 177.

¹⁷ Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956) in force in the Netherlands as of 2 July 1961.

¹⁸ *HR* 26 May 1989 *NJ* 1992, 105; see also, *HR* 5 January 2001 *NJ* 2001, 391.

¹⁹ United Nations Convention on Contract for the International Sales of Goods (Vienna, 11 April 1980) in force in the Netherlands as of 1 January 1992.

²⁰ *Rb Rotterdam* 21 November 1996, *NIPR* 1997, no. 223.

²¹ For a different interpretation concerning this part of the Preamble, see Van Wechem, T.H.M. and Pontier, J.A., *Europese conflictregels voor de overeenkomst en de onrechtmatige daad: Rome I en Rome II*, Preadviezen NVIR, 2008, p. 20.

On the other hand, the wording that the ‘Regulation does not preclude’ a choice for a non-national law is used in the Preamble and does not form part of the text of the Regulation in Article 3. It may imply that no uniformity in that respect could have been achieved among the EU Member States so that the EC legislator might have decided to leave this issue outside the scope of the Regulation.²² Consequently, a disparity among the Member States on this issue would remain: a choice of a non-national law would remain a valid determination of the *lex contractus* in those jurisdictions where such a choice has been permitted. The Member States where such a choice has not been recognised would be under no obligation to alter their practice either, considering the absence of an express provision in that respect in the text of the Regulation. Thus, these Member States may continue to qualify the choice for a non-State body of law, such as the PECL or the UNIDROIT Principles, as a so-called *materiellrechtliche Verweisung*. Accordingly, such Principles are part of the contract terms, but a so-called *kollisionrechtliche Verweisung* cannot effectively be made.²³

In short, the possibility of different interpretations of the wording in the Preamble to the Rome I Regulation by the courts in the EU Member States cannot be excluded. It is likely that the European Court of Justice ECJ will have to shed some light on the meaning and the reach of the wording in the Preamble. A clear indication in that respect from the European Court of Justice is needed to determine with certainty whether a member state that does not recognise a choice of a non-State body of law or an international convention as the *lex contractus* is interpreting and applying the Rome I Regulation incorrectly.

In general, it would have been a better approach if an express provision on the possibility to choose a non-national law, as expressed in the Proposal of 2005, had remained in the final text of Article 3 of the Rome I Regulation. In particular, there would be no risk of differently interpreting the wording in the preamble to the Regulation. The possibility for the parties to choose a non-national law as the *lex contractus* would have been clearly ensured in all states of the European Union. Such an express regulation would be in line with the approach that the vast majority of EU Member States maintain with respect to the freedom to choose a non-State body of law in arbitration.²⁴ In general, there are no obvious reasons justifying such a different treatment in determining the law applicable to commercial transactions between the courts and the arbitrators in the European Union.²⁵

2.1.2 Parties’ Choice of Law in Arbitration

Party autonomy, a fundamental principle of arbitration, is incorporated in Dutch arbitration law and is fully supported by the judiciary. In general, the possibility for the parties to influence various aspects of arbitration by their agreement is inherent to international commercial arbitration law and practice. The same is true with respect to the choice of the

²² It is true that it is unlikely that there would be other conflict of law rules applicable to contractual obligations in the member states, considering the uniform application of the Regulation expressed in Article 2. Yet if a certain issue is not expressly regulated in an EC instrument, the application of certain principles of private international law accepted in a particular member state is not excluded. The same is true with respect to court decisions, in particular those delivered by the highest judicial instances. Even though they are not considered to be precedents, these decisions usually present persuasive authorities, even in civil law jurisdictions.

²³ The *kollisionrechtliche Verweisung* implies that the Principles are the *lex contractus*, so that the mandatory rules of the otherwise applicable law are excluded. For more particulars, see Boele-Woelki/Lazić, p. 29.

²⁴ See, e.g., Article 1051 of the German Code of Civil Procedure, according to which the arbitrators shall decide the dispute ‘in accordance with ... *rules of law*’ chosen by the parties (emphasis added). Similarly, Article 834 of the Italian Code of Civil Procedure refers to the ‘rules’ agreed upon by the parties. See also, Article 34 of the Spanish Arbitration Act, Article 31 of the Finnish Arbitration Act, Article 1700 of the Belgian *Code judiciaire*, Article 1054(2) of the Dutch Arbitration Act.

²⁵ For more particulars, see Boele-Woelki/Lazić, pp. 29-30.

applicable substantive law. It is incorporated in arbitration statutes as well as in various arbitration rules worldwide. The right of the parties to choose any system of law, any set of rules or principles, including non-national law is virtually undisputed in contemporary arbitration law and practice.

Just as many other statutes on arbitration, statutory law in the Netherlands²⁶ provides that the parties may choose the applicable substantive law. According to Article 1054(1) Rv, the arbitral tribunal must decide a dispute in accordance with the rules of law. The principle of party autonomy in choosing the applicable substantive law is expressed in Article 1054(2). It provides, *inter alia*, that ‘if a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the rules of law chosen by the parties’. The expression ‘rules of law’ used in Article 1054(1) and (2) Rv encompasses not only the national rules of law, but also non-national rules, general principles of law or the *lex mercatoria*.²⁷ Thus, the parties may choose the UNIDROIT principles as well as the PECL.

Besides, the parties may authorise the arbitrators to decide as *amiable compositeur* (Art. 1054(3) Rv). Accordingly, the parties are free to choose a national law, a non-State body of law, as well as to authorise the tribunal to decide *amiable compositeur*.

Possible limitations to the freedom of choice in court proceedings and in arbitration will be addressed under 2.4.

2.2 Applicable Substantive Law in the Absence of the Parties’ Choice

The courts and arbitrators do not necessarily apply the same methods in determining the applicable substantive law. Nor do they necessarily rely on the same legal sources. The relevant provisions of private international law as well as arbitration law and their actual or possible interpretation by the courts and arbitrators will now be briefly addressed.

2.2.1 Determination of the Applicable Law in Litigation

As already mentioned, the courts in the Netherlands apply the 1980 Rome Convention in determining the law applicable to the substance of the case. After 17 December 2009 the Rome I Regulation will apply with respect to contracts entered into after that date.

Thus, to the extent that the law applicable to the contract has not been chosen in accordance with Article 3 of the Rome Convention, the contract shall be governed by the law of the country with which it is most closely connected (Art. 4(1) Rome Convention). It is presumed that the agreement is most closely connected with the country where the party that is to effect the performance which is characteristic of the agreement has its habitual residence or its central administration at the time of concluding the agreement (Art. 4(2) of the Rome Convention).²⁸ In paragraph 5 it is provided when the presumption shall not apply. It also

²⁶ The Dutch Arbitration Act presently in force came into effect on 1 December 1986. It is contained in Book Four of the Netherlands Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, hereafter: *Rv* or Arbitration Act) and consists of Articles 1020-1076.

²⁷ See the legislative history – *Memorie van Toelichting (MvT)*, Kamerstukken II 1983, 18 464, no. 3, p. 23. See also, Berg, A.J. van den, Delden, R. Van and Snijders, H.J., *Netherlands Arbitration Law* (Kluwer Law and Taxation Publishers, Deventer/Boston 1993) p. 92 (Van den Berg/Van Delden/Snijders). Meijer, G.J., ‘Arbitrage – Boek Vier’ in Van Mierlo, A.I.M., Van Nispen, C.J.J.C. and Polak, M.V. (eds.), *Burgerlijke Rechtsvordering: Text & Commentaar* (Kluwer, Deventer 2008) (Meijer, *T&C Rv*). Cf., Meijer, G.J. and Borelli, S., ‘Interview met P. Sanders’ (1996) *Tijdschrift voor arbitrage* p. 8; Lazić, V. and Meijer, G.J., ‘Country Reports: Netherlands’ in: Weigand, F.-B. (ed.), *Practitioner’s Handbook on International Arbitration*, C.H.Beck/DJØF, 2002, pp. 889-948, at p. 933.

²⁸ The presumptions of the closest connection with respect to a right in immovable property or a right to use immovable property and a contract for the carriage of goods are given in paragraphs 3 and 4 respectively.

provides that the presumptions in paragraphs 2, 3 and 4 shall be disregarded if the contract is more closely connected with another country.

A somewhat different approach in determining the applicable law in the absence of a choice has been maintained in Article 4 of the Rome I Regulation. Paragraph 1 contains the conflict of law rules for certain types of contracts, such as a contract for the sale of goods, a contract relating to a right *in rem* or to a tenancy in immovable property, a franchise and a distribution contract, a contract for the sale of goods, as well as a contract concerning buying and selling interests in financial instruments. For contracts which are not specifically listed in paragraph 1, 'the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence' shall be applicable (Art. 4 par. 2). The exception in favour of the law of the country with which a contract is more closely connected is provided in paragraphs 3 and 4, in a manner similar to paragraph 5 of the Rome Convention.

Thus, the connecting factors in both the Rome Convention and the Rome I Regulation refer to the 'law' of a particular country. Consequently, the courts in the Netherlands, just as in all the Member States of the European Union, will be required to apply a national law in the absence of the parties' choice of the applicable substantive law.

However, it does not mean that a non-State body of law should generally not be applied in the absence of an explicit choice of law by the parties in that respect. Of course, a convention unifying certain aspects of substantive law, such as the 1980 Vienna Sales Convention, will apply according to its own provisions on the field of application, unless the applicability of the Convention is expressly excluded by the parties.²⁹ In general, a unification of substantive law will prevail over any national law that may be applicable according to the rules of private international law. In interpreting the provisions of a convention, the courts in the Netherlands may apply the UNIDROIT Principles, as well as the Principles of European Law.³⁰

2.2.2 Determination of the Applicable Substantive Law in Arbitration

In arbitration the tribunal generally has wide discretion in determining the applicable law in the absence of the parties' choice. Article 1054(2) Rv provides that when there is no choice of the applicable law the tribunal shall make the award in accordance with the rules of law which it deems appropriate. Accordingly, the arbitrators may apply the so-called 'direct method' (*voie directe*) in determining the applicable law. In other words, the arbitral tribunal may directly choose the applicable law, without being required to apply conflict of law rules.³¹ Yet, in practice, the arbitrators usually apply generally accepted rules of private international law in determining the applicable law.³²

²⁹ See, e.g., Article 6 of the 1980 Vienna Sales Convention providing for the possibility for the parties to exclude the application of the Convention.

³⁰ See, e.g., *Gerechtshof 's-Hertogenbosch*, 16 October 2002, *NIPR* 2003, n. 192. When deciding on the issue whether general conditions were validly incorporated, the Court concluded that the 1980 Vienna Convention on the Sales of Goods did not provide any express regulation in that respect. After concluding that the UNIDROIT Principles contained no provisions in that respect either, the Court applied the Principles of European Law. The Convention was applicable as the dispute involved a French and a Dutch party, and both France and the Netherlands had ratified the Convention. See also Krusinga, S.A., *Commerciële koop over de grenzen: over het gebruik van algemene voorwaarden in internationale verhoudingen*, 3 *NTHR* (2004), pp. 60-68 at pp. 64-65.

³¹ See Legislative history – *Memorie van Toelichting (MvT)*, Kamerstukken II 1983, 18 464, no. 3, p. 23.

³² Meijer, G.J., 'Arbitrage – Boek Vier' in Van Mierlo, A.I.M., Van Nispen, C.J.J.C. and Polak, M.V. (eds.), *Burgerlijke Rechtsvordering: Text & Commentaar*, Kluwer, Deventer (2008) Art. 1054, n. 2 b), p. 1420 (Meijer, *T&C Rv*).

As already mentioned, the parties are not obliged to choose the law of a particular country, but can agree on the application of the *lex mercatoria*. The same is true for the arbitral tribunal when determining the applicable law in the absence of the parties' choice. As already explained, Article 1054(1) and (2) uses the wording 'rules of law', and not the 'law'. The expression 'rules of law' includes a non-national law and the *lex mercatoria*.

In the absence of the parties' choice of the applicable substantive law, the arbitral tribunal may determine the applicability of the 'rules of law which it considers appropriate' (Art. 1054 par. 2 Rv). Accordingly, it may decide to apply a non-State body of law, including the *lex mercatoria*. No authorisation by the parties is thereby needed in that respect. In contrast, the arbitral tribunal may decide as *amiable compositeur* only if the parties have authorised it to do so by agreement (Art. 1054 para. 3 Rv). Should the arbitral tribunal decide as *amiable compositeur* without an agreement between the parties in that respect, such an award may be set aside on the ground that the tribunal has not complied with its mandate (Art. 1065(1)(c) Rv).³³ Consequently, the application of the *lex mercatoria* may be considered as the application of the 'rules of law', rather than as a kind of *amiable compositeur*, in the context of the relevant provision of Article 1054 Rv. Indeed, the arbitral tribunal which is authorised to decide as *amiable compositeur* may apply the *lex mercatoria*.³⁴

Just as many other arbitration statutes,³⁵ as well as various arbitration rules, the Netherlands Arbitration Act provides that '[i]n all cases the arbitral tribunal shall take into account any applicable trade usages'. Accordingly, they may be applied even in the absence of an agreement between the parties in that respect.³⁶

The Arbitration Rules of the Netherlands Arbitration Institute (NAI Rules)³⁷ follow a similar approach in their provisions relating to the applicable law (Art. 46)³⁸ and trade usage (Art. 47).³⁹ Accordingly, both the Netherlands Arbitration Act, as well as the NAI Rules, provide for the so-called 'direct approach' in determining the applicable law. Such a statutory regulation is in line with the modern trends in international arbitration, whereby the arbitrators are given a wide discretion in determining the applicable substantive law.

In general, the distinction between a 'direct' and 'indirect' method in determining the applicable law in various arbitration rules is not likely to have considerable practical implications. The same is true with respect to the wording 'rules of law' instead of 'law', used in connection with the authority of the arbitrators to determine the applicable substantive law in the absence of the parties' choice. Court decisions relating to arbitration published in other jurisdictions illustrate that a failure of the arbitrators to determine the applicable law in accordance with the method provided for in the arbitration rules chosen by the parties does

³³ Sanders, P. and Berg, A.J. van den (eds.), *The Netherlands Arbitration Act 1986*, Kluwer Law and Taxation Publishers, Deventer – Antwerp, London – Frankfurt – Boston – New York (1987) p. 32, n. 68 (Sanders/van den Berg).

³⁴ Lazić/Meijer, p. 934.

³⁵ See, e.g., Art. 1051(4) of the 1998 German Arbitration Act (contained in Book X of the German Code of Civil Procedure) providing that '[i]n all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.' This provision is identical to Article 28(4) of the UNCITRAL Model Law.

³⁶ On the relevance of trade usages in arbitration in general, see Aksen G., *The Law Applicable in International Arbitration – Relevance of Reference to Trade Usages*, in: Van den Berg, A.J. (ed.), *Planning Efficient Arbitration Proceedings – The Law Applicable in International Arbitration*, Kluwer Law International, The Hague/London/Boston (1996), ppp. 471-479.

³⁷ Arbitration Rules in force as of 13 November 2001.

³⁸ Art. 46 of the NAI Rules is identical in its wording to Art. 1054 paras. 1 and 2 of the Netherlands Arbitration Act.

³⁹ Art. 47 is identical in its wording to Art. 1054(4) of the Netherlands Arbitration Act.

not necessarily constitute a reason for setting the award aside. Thus, the fact that arbitrators failed to use the conflict of law method as provided under the previous ICC rules of 1988 (Art. 13(3) ICC Rules)⁴⁰ was not considered by the French courts to be an excess of powers.⁴¹ As has been rightly observed, this provision of the 1988 ICC Rules never prevented arbitrators from applying the rules of law they considered appropriate. The partial awards in ICC case 7110,⁴² rendered in arbitration taking place in The Hague, the Netherlands, can be mentioned as an example. In applying Article 13(3) of the 1988 ICC Rules, the arbitrators criticised the conflict of law method and applied the UNIDROIT Principles in the absence of an express parties' choice for the applicable national law. In the awards rendered by a majority of the votes,⁴³ the arbitral tribunal interpreted Art. 13(3) of the 1988 ICC Rules and held, *inter alia*, as follows:

[T]he application of the Unidroit Principles does not depend on their self-given criteria of application, but on the powers vested with this Tribunal under Art. 13(3) of the ICC Arbitration Rules, which are not limited to the *voie indirecte* and authorize it to directly determine the applicable law it deems more appropriate to govern the merits, i.e., in this case, the general legal rules and principles regarding international contractual obligations enjoying wide international consensus, including, without limitation, the Unidroit Principles as an adequate restatement and expression of such general legal rules and principles. The application of the Principles in case of absence of choice then rests upon Art. 13(3) of the ICC Arbitration Rules and the mandate conferred on this Tribunal to find and determine the law applicable to the Contracts.⁴⁴

In other cases, the arbitrators have interpreted the absence of a choice of law as a 'negative implied choice'. Thus, they considered that the parties thereby expressed that neither of them was prepared to accept the applicability of the other party's national law.⁴⁵

It should be emphasised that the only reason for mentioning these examples is to illustrate that the 'conflict of law' or 'indirect method' does not in itself necessarily imply that the arbitrators will apply a particular national law. There is no intention to comment on the appropriateness of the approaches used and the interpretations given by the arbitrators in these awards. Likewise, it is not intended to suggest that it is appropriate in all circumstances to apply a non-national body of law in the absence of the parties' choice, even when an 'indirect method' is provided for in the arbitration rules.

⁴⁰ The ICC Rules of 1998 currently in force provide for the direct method in Article 17(1).

⁴¹ See, e.g., *Compania Valenciana de Cementos Portland SA v. Primary Coal Inc.*, Paris Court of Appeal of 13 July 1989, 79 *Revue critique de droit international privé* (1990) pp. 305-307, excerpt in XVI *Yearbook Commercial Arbitration* (1991) pp. 142-144. This decision was affirmed by the Supreme Court in its decision of 22 October 1991, *Rev. Arb.* pp. 457-458, excerpt in XVIII *Yearbook Commercial Arbitration* (1993) pp. 137-139. See also, the decision of the Austrian Supreme Court, *Norsolor v. Pabalk Ticaret*, 18 November 1982, excerpt in IX *Yearbook Commercial Arbitration* (1984) pp. 159-161.

⁴² ICC Partial Awards in ICC case 7110 of June 1995, April 1998, February 1999, 10 *ICC International Court of Arbitration Bulletin 2* (1999), pp. 39-57.

⁴³ See the opinion of the dissenting arbitrator, *id.*, pp. 51-57.

⁴⁴ *Id.*, p. 51.

⁴⁵ E.g., award in ICC case 7375, June 1996, referred to in: Mayer, P., 'The Role of the UNIDROIT Principles in ICC Arbitration Practice', *The UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration*, Special Supplement of the *ICC International Court of Arbitration Bulletin* (2002) 105-119, at p. 110.

2.3 The Degree of Incorporation of ‘Uniform Law’ as National Law

The Netherlands has ratified numerous conventions in the field of private law, including commercial law and arbitration. It is a party to a number of conventions containing substantive law rules.⁴⁶ Sometimes the rules contained in the conventions have been incorporated in Dutch national legislation.⁴⁷

Even when a certain unification of the law has not been incorporated or implemented in Dutch legislation, it can and often does play an important role in the process of law making. The 1985 UNCITRAL Model Law on International Commercial Arbitration⁴⁸ can be mentioned as an example. It was taken into consideration in the process of drafting the 1986 Arbitration Act currently in force. Even though the Dutch legislator eventually opted not to base the statute on the UNCITRAL Model Law, its main principles were incorporated in the Act. Furthermore, one of the incentives for the current reforms of the Netherlands Arbitration Act is to bring the Act more into line with the UNCITRAL Model Law, as will be addressed later.

Although court decisions in the Netherlands are not precedents in the meaning used in the common law countries, they are certainly considered to be persuasive authority. This is particularly so with respect to the decisions of the Supreme Court (*Hoge Raad*). As explained previously, they provide for important guidelines in interpreting legal norms in general, including defining the content, meaning and reach of the notion of ‘uniform law’.

Finally, when addressing the issue of the extent and the manner in which uniform law has been incorporated in national law, the instruments of unification within the European Union must be mentioned.⁴⁹ Namely, a number of legislative acts of the EC have been inspired and designed following a model law drafted by other international institutions, such as the UNCITRAL. The Credit Transfer Directive of 27 January 1997⁵⁰ may be mentioned as an example. Significant parts of the Directive implement the UNCITRAL Model Law on International Credit Transfers (1992). Similarly, the 1980 Vienna Sales Convention was considered in the process of drafting the Consumer Sales Directive of 25 May 1999.⁵¹

⁴⁶ E.g., Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999), in force in the Netherlands as of 28 June 2004; United Nations Convention on the Contract for the International Sales of Goods (Vienna, 11 April 1980) in force in the Netherlands as of 1 January 1992; Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956) in force in the Netherlands as of 2 July 1961; Protocol of 3 June 1999 for the Modification of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, in force in the Netherlands as of 1 July 2006.

⁴⁷ See, e.g., the 1924 International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading. Some other states, including Germany, Belgium and Turkey, have also incorporated the rules of the convention into their commercial codes. Besides, the 1964 Hague Conventions and Uniform Laws on the International Sales of Goods (Uniform Law on the International Sale of Goods and the Convention relating to a Uniform Law on the Formation of Contracts on the International Sale of Goods) were considered when the Dutch Civil Code was drafted.

⁴⁸ UNCITRAL Model Law on International Commercial Arbitration, United Nations Document A/40/17, Annex I, as adopted by the United Nations Commission on International Trade Law on 21 June 1985.

⁴⁹ In this context, it may be appropriate to mention the efforts within the EC to adopt a legal instrument containing rules of substantive contract law. See, Communication from the Commission to the European Parliament and the Council – European Contract Law and the revision of the *acquis*: the way forward, of 11 October 2004 COM(2004) 651 final. The Communication outlines the plan for developing the Common Frame of Reference, which will contain fundamental principles and model rules of contract law. For the latest developments in that respect see, Report from the Commission, Second Progress Report on the Common Frame of Reference of 25 July 2007, COM (2007) 447 final.

⁵⁰ European Parliament and the Council Directive 97/5/EC of 27 January 1997 on cross-border credit transfers, OJ L 43 of 14.02.1997.

⁵¹ Directive of the European Parliament and of the Council 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171 of 07.07.1999.

When the law of the Netherlands is to be applied as the proper law of the contract in proceedings before the Dutch courts, it will, in principle, be applied with all its norms that contain substantive law, including international treaties such as the 1980 Vienna sales Convention. Indeed, the applicability of an international convention will be determined by the relevant provisions on the scope of application of that particular legal instrument.⁵² In addition, the parties may agree on the applicability of an international convention containing the rules of substantive law, such as the CMR or the 1980 Vienna Sales Convention, as has already been explained.

With respect to arbitral proceedings, the arbitrators have a wide discretion in determining the applicable law, as mentioned previously. Thereby the relevant provision of Article 1054 has already been discussed. Thus, the arbitrators do not have to apply the conflict of law method, but may instead use the so-called *voie directe* to determine the applicable law. Considering that the arbitrators may apply 'uniform law' instead of any national law, even in the absence of the parties' agreement in that respect, it may be expected that they will apply uniform law that has been incorporated into a national body of law. In general, Title One of the Netherland Arbitration Act (Arts. 1020-1073) applies when the seat of arbitration is in the Netherlands.

2.4 Limitations on the Application of Foreign Law in Court Proceedings and in Arbitration (*Loi de Police; Ordre Public*)

The Rome Convention and the Rome I Regulation contain provisions that impose limitations on the application of the law chosen by the parties, as well as on the law determined by the conflict of law rules which are applicable in the absence of party choice.

The provisions contained in Articles 3(3), 5(2) and 6(1) of the Rome Convention limit the freedom of choice. They are distinct in nature and they limit the choice of law in different ways. Article 3(3) of the Convention deals with situations where the parties choose a foreign law whereas their relationship is connected to only one state. Thereby, a choice of foreign law is the only 'international' element in an otherwise purely 'domestic' case. Such a choice for 'foreign' law cannot operate so as to exclude the imperative provisions of the law of the country solely connected with the parties and their legal relationship. These are the provisions the application of which may not be excluded by an agreement of the parties (*ius cogens*).

Articles 5 and 6 contain provisions limiting the choice of the applicable law for consumer contracts (Art. 5 par. 2) and individual employment contracts (Art. 6 par. 1). A detailed analysis of these provisions is outside the scope of this Report. For the purposes of this paper it suffices to say that the protection of the interests of weaker parties, consumers and employees in commercial transactions is the reason for restricting the freedom of choice. Thus, only a limited choice of law is permitted in transactions involving these parties. Namely, such a choice shall not operate so as to deprive a consumer and an employee of protection provided by mandatory provisions of the law that would apply in the absence of the parties' choice.

⁵² In principle, the Dutch courts apply the 1980 Vienna Sales Convention when the law chosen by the parties is the law of the Contracting State. See, e.g., *Hof Leeuwarden*, 5 June 1996, *NIPR* (1996) p. 404; *Rb Arnhem Voorzieningenrechter*, 31 January 2008, LJN: BC4029. In accordance with Article 6 of the Convention, the parties may exclude the application of the Convention. The Dutch courts generally held that such exclusion may be made expressly or clearly demonstrated by the terms of the choice of law clause or the conduct of the parties. Cf., Bertrams, R. and S.A. Kruisinga, *Overeenkomsten in het international privaatrecht en het Weens Koopverdrag*, Kluwer, 2007, p. 75.

The provisions contained in Articles 7 (mandatory provisions; *lois de police*)⁵³ and 16 (the public policy exception) present a limitation to the applicability of the law chosen by the parties, but also to the law that may be subsidiary applicable in the absence of the parties' choice of substantive law.

The Rome I Regulation introduces a number of substantial changes to the provisions that limit the application of the governing law. These changes will now be briefly discussed. Thereby the provisions limiting the parties' choice will be addressed first. Thereafter, the provisions that limit the applicability of the chosen law or the law otherwise applicable will be briefly dealt with.

The provision limiting the freedom of choice may be divided as follows:

- (a) Imperative norms the application of which cannot be excluded by the parties' choice for another law (*ius cogens*) (Art. 3 paras. 3 and 4). Although not identical in its wording, the provision of Article 3(3) of the Rome I Regulation does not substantially deviate from Article 3(3) of the Rome Convention, addressed above. In the newly introduced paragraph 4 the Rome I Regulation provides that EC law may not be excluded by the parties' choice of law in certain circumstances.⁵⁴
- (b) Contracts with respect to which party choice is limited (Art. 5 par. 3 relating to the choice of law in a contract for the carriage of passengers; Art. 6 consumer contracts; Art. 7 par. 3 relating to the choice of law in a contract other than an insurance contract covering a large risk as defined in the First Council Directive 73/239/EEC of 24 July 1973; Art. 8 relating to individual employment contracts). The possibility to choose the applicable law is limited in different ways. With respect to consumer contracts and individual employment contracts the Rome I Regulation generally follows the approach used in the Rome Convention, as briefly addressed above. The 2005 Proposal excluded the possibility of a choice of law in consumer contracts. The fact that such a solution has not been introduced in the Rome I Regulation is to be met with the approval.⁵⁵ The possibility to choose the applicable law in contracts for a carriage of passengers and certain insurance contracts has been limited in a different way. The relevant provisions of Articles 5(2) and 7(2) limit the possibility to choose the applicable law by providing a list of 'laws' that may be chosen. Thus, only the law of the country where the passenger has his habitual residence (a) or the carrier has either his habitual residence or his place of administration (b) and (c) or where either the place of departure (d) or the place of destination is situated (e). The same approach in limiting the parties' choice is used in Article 7 par. 3.

⁵³ Paragraph 1 of Article 7 relates to the applicability of the mandatory provisions of the country which is closely connected with the dispute (a 'third country') and paragraph 2 deals with the mandatory provision of the *lex fori*.

⁵⁴ Art. 3(4) Rome I Regulation reads as follows:

'Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate, as implemented in the Member State of the forum, which cannot be derogated from by the agreement.'

This provision was a part of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Compromise package by the Presidency, Brussels, 13 April 2007, 8022/07 ADD 1 REV 1; text available on <http://register.consilium.europa.eu/pdf/en/07/st08/> For the criticism expressed with respect to this provision in the Compromise Package, see Boele-Woelki/Lazić, p. 31.

⁵⁵ For more particulars on the appropriateness of the provision of the Proposal in that respect, see Boele-Woelki/Lazić, pp. 34-35.

The provisions limiting the application of the law chosen by the parties, as well as of the law applicable in the absence of a choice of law are contained in Articles 9 (overriding mandatory provisions) and 21 (public policy of the forum). Article 9 contains provisions similar to those in Article 7 of the Rome Convention. Yet, it introduces a number of important changes. First of all, a definition of ‘overriding mandatory provisions’ is introduced.⁵⁶ These are defined as provisions which are ‘regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization’. Furthermore, an important change has been introduced with respect to the mandatory rules of a ‘third country’. This provision gives the possibility to apply a law of a third country, but such a possibility is more limited than under Article 7(1) of the Rome Convention. In particular, it mentions only the law of the country where the contract has been or has to be performed. Besides, the application of these provisions is limited to such ‘overriding mandatory provisions [which] render the performance of the contract unlawful’.⁵⁷

Accordingly, these provisions may influence the applicability of a foreign substantive law by the courts in the Netherlands. Consequently, the uniform law incorporated in the foreign substantive or procedural law will be accepted, but the applicability of the provisions limiting the choice may not be excluded, as has been illustrated. In other words, the limitations contained in these provisions will apply with respect to any applicable law, regardless of whether or not this law contains a uniform law.

As to arbitral proceedings, the relevant provision on the applicable law contained in Art. 1054 Rv does not mention a public policy exception to the otherwise applicable law in international arbitration. In general, it is not the choice of the substantive law of a particular country in itself that may violate public policy. It is rather that the application of particular provisions of the applicable law may result in a decision which is contrary to Dutch public policy. It should be mentioned that the public policy exception is usually restrictively applied by the judiciary in the Netherlands, particularly in the context of international arbitration. Should the application of a particular provision result in a decision which would violate public policy according to internationally accepted standards, such an award may be set aside and its enforcement may be refused in the Netherlands.

A violation of public policy is listed among the reasons for which an arbitral award may be set aside (Art. 1065 para. 1(e) Rv) and for which enforcement may be refused (Arts. 1063 par. 1 Rv and 1076 para. 1(B) Rv). It also presents a reason to refuse the recognition and enforcement of a foreign arbitral award under Article V(2)(b) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Act does not expressly make a distinction between domestic and international public policy. Yet the courts in the Netherlands have accepted the doctrine of international public policy, which is to be generally more narrowly construed than the public policy exception in domestic cases.

Although there are no express provisions in that respect in the Arbitration Act, the interests of weaker parties should also be protected in arbitration. Transactions involving consumers may be mentioned as an example. Generally, consumer contracts are particularly considered when arbitration law reforms are discussed in a certain legal system.⁵⁸ Thus, even when no special regulation can be found in statutory arbitration law, the courts have often

⁵⁶ Art. 9 par. 1 Rome I Regulation.

⁵⁷ Art. 9 par. 3 Rome I Regulation.

⁵⁸ For example, when the Netherlands Arbitration Act of 1986 was drafted, it was considered whether to place an arbitration clause on the ‘blacklist’, in particular from the point of view of a consumer in arbitration. See *E.H. Hondius*, *Tien jaar arbitragewet en BW*, *Tijdschrift voor Arbitrage* 1996, p. 139.

ensured that the rights of a weaker party are protected, thereby relying on the relevant provisions of civil law.⁵⁹

Public policy with respect to procedural matters will be briefly discussed *infra*.

3. Uniform Law and Arbitration Law

3.1 Arbitration Statute Provides for a ‘Friendly Procedural Framework’

The Arbitration Act currently in force was enacted in 1986 and introduced in Book IV Rv, consisting of Articles 1020-1076. Even though it did not implement the 1985 UNCITRAL Model Law, as will be addressed later, the Act is based on the main principles incorporated in the Model Law. In particular, the principle of party autonomy is fully incorporated in the Act. The provisions of the Act are mainly of a discretionary nature and are intended to be applied only in the absence of party choice. In other words, their purpose is primarily to ensure an effective conduct of arbitral proceedings, to prevent unnecessary delays and to offer sufficient assistance to the parties and arbitrators in obtaining an award as efficiently as possible.

The number of mandatory provisions is very limited. They include only the basic principles of procedural law and, as such, cannot be considered as a substantial restriction of party freedom.⁶⁰ Thus, the parties must be treated with equality and each party must have an opportunity to present his case and to substantiate his claim as provided in Art. 1039, para. 1 Rv. A violation of this basic principle of procedural law (*audi et alteram partem*) may result in an arbitral award being set aside (Art. 1065, para. 1 (e) Rv) or the recognition or enforcement of the award being refused. In addition, the right to a hearing may not be denied to the parties (Art. 1039, para. 2 Rv).⁶¹

Besides, the principle of limited court control in arbitration expressed in Article 5 of the Model Law is incorporated in the Arbitration Act, as will be addressed in the following text.

⁵⁹ Dutch courts have denied effect to an arbitration clause in certain circumstances 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 Art. 6:233 of the Civil Code. See, e.g., HR 23 March 1990, *Nederlands Jurisprudentie* 1991, p. 214 (*Botman/Van Haaster*); *Kantonrechter Zierikzee*, 19 February 1988, *Tijdschrift voor Arbitrage* 1988, p. 147. Similarly, many arbitration statutes give only limited effect to arbitration clauses relating to disputes involving such transactions. With respect to consumer contracts, see, e.g., Section 6 of the 1999 Swedish Arbitration Act, Art. 1031(5) of the 1998 German Arbitration Act. As to contracts of employment, the Belgian Code of Civil Procedure in Article 1678(2) provides for the *ipso jure* nullity of an agreement to arbitrate future disputes falling within the competence of the Labour Court.

⁶⁰ *Id.*

⁶¹ By using of the criterion ‘unless the parties have agreed otherwise’ in determining the mandatory nature of a provision, the following provisions would seem to be mandatory: the provisions on the examination of witnesses (Art. 1039, para. 3 Rv and Art. 1041 Rv) and experts (Art. 1039, para. 3 Rv and Art. 1042 Rv), the default of a party in the arbitral proceedings (Art. 1040 Rv), personal appearance by the parties (Art. 1043 Rv), a request for information on foreign law (Art. 1044 Rv), the joinder and intervention of third parties in the arbitral proceedings (Art. 1045 Rv), the time-limit for making the award (Art. 1048 Rv), an uneven number of arbitrators in arbitral proceedings which take place in the Netherlands (Art. 1026, para. 1 Rv). In addition, the jurisdiction of the President of the District Court in the procedure for challenging arbitrators may not be excluded by an agreement between the parties. See, Lazić/Meijer, pp. 913 and 914.

3.2 Scope of the Courts' Control of Arbitral Awards

According to the Act, the only means of recourse that are available against an arbitral award are an application for setting aside (Arts. 1064-1067 Rv) and an application for the revocation of an award (Art. 1068). However, an application for revocation is of little practical importance, considering the exceptional nature of the reasons.⁶²

The number of grounds for setting aside an arbitral award is limited to those provided in Art. 1065 Rv. These grounds are: (1) the absence of a valid arbitration agreement, (2) the improper constitution of the arbitral tribunal, (3) the failure of the tribunal to comply with its mandate, (4) the lack of a signature on the award or of the reasons for the award as provided in Article 1057,⁶³ (5) a violation of public policy or good morals.

Besides, the Act further limits the possibility for the parties to invoke some of the grounds (Art. 1065 paras. 2-4 and 6). In particular, this is the case with respect to the objections concerning the invalidity of the arbitration agreement (par. 2), an irregularity in the constitution of the arbitral tribunal (par. 3) and a failure by the tribunal to comply with its mandate (paras. 4 and 6). Thus, a party who has participated in arbitral proceedings without raising the plea of the invalidity of the arbitration agreement before submitting a defence may not successfully invoke this objection in the annulment procedure. The party will not be estopped from raising this objection only if the invalidity concerns the non-arbitrability of the subject-matter (Arts. 1065 para. 2 and 1052 para. 2 Rv). Similarly, a party who participated in the establishment of the arbitral tribunal may not invoke the irregularity in the constitution of the tribunal. The same is true for a party who has not participated in the constitution of the tribunal, but has made an appearance in the arbitral proceedings without raising the plea of the irregularity in the establishment of the tribunal before submitting a defence (Arts. 1065 par. 3 and 1053 par. 3 Rv). Furthermore, a failure by the tribunal to comply with its mandate shall not constitute a reason for setting aside if the party invoking this ground has participated in the arbitral procedure without raising this objection although he was aware of the arbitral tribunal's non-compliance with its mandate (Art. 1065 para. 4 Rv). Besides, if the arbitral tribunal has failed to decide one or more matters submitted to it, the application for setting aside because of a tribunal's non-compliance with the mandate shall only be admissible if an additional award was requested according to Article 1061 (Art. 1065 para. 6 Rv).⁶⁴

A violation of public policy applies both in a procedural sense as well as in a substantive sense. As to the latter, an award could be considered to be contrary to public policy if it was found, for example, that the subject-matter of the dispute was not capable of settlement by arbitration. Regarding the procedural issues, only a violation of the fundamental principles of procedural law, such as violations of due process and the equal treatment of the parties, would be considered to be contrary to public policy.⁶⁵

⁶² Van den Berg, *Int. Handbook on Comm. Arb.*, p. 32. Art. 1068 was amended by the Law of 6 December 2001, *Stb. (Staatsblad, Bulletin of Acts and Decrees)* 2001, no. 580. The reasons for revocation listed in Art. 1068 par. 1 thereby remained unchanged.

⁶³ *HR 25 February 2000, NJ 2000*, 508. According to Art. 1057 par. 4(e) Rv, an arbitral award shall contain the reasons for the decision, 'unless the award concerns merely the determination only of the quality or condition of goods'. However, when a ground for setting aside under Art. Art. 1065 Rv is invoked, the court may not examine a decision of the arbitral tribunal on the merits. See, e.g., *HR 17 January 2003, NJ 2004*, 384. Yet, the court may examine whether there are 'solid reasons' provided in the arbitral award. See, *HR 9 January 2004, NJ 2005*, 190.

⁶⁴ Lazić/Meijer, p. 941.

⁶⁵ *Ibid.*, Art. 1065, n. 99.

No appeal on the merits to a court is admissible in the Netherlands. The parties may agree on an appeal to a second arbitral tribunal, usually by choosing a set of arbitration rules which provide for this possibility (Art. 1050 Rv).

3.3 Role of Public Policy and Arbitrability in the Recognition or Enforcement of Arbitral Awards Rendered Abroad

Control over an award rendered abroad by the courts in the Netherlands is reduced to an examination of the reasons enumerated in Article V of the 1958 New York Convention. When the Convention does not apply, the recognition or enforcement may be refused on the grounds listed in Article 1076 of the Act. The reasons for refusing to recognise and enforce foreign arbitral awards in Article 1076 are substantially similar to those listed in Article V of the 1958 New York Convention. In general, the court before which the enforcement of a foreign award is sought may not review the merits of the award. As already mentioned, the grounds for the refusal of enforcement are limited to those under Article V of the New York Convention or Article 1076 Rv and they do not include a mistake in fact or law.⁶⁶ The only exception to this rule is when the award violates the substantive rules of public policy of the country where the enforcement is sought (Art. V(2)(b) New York Convention).⁶⁷

Article 1076 Rv mirrors the provision of Article V of the 1958 New York Convention. The main principles expressed in the relevant provision of the Convention have been taken over and incorporated in Article 1976. Thus, the burden of proving the grounds listed in Article 1076 para 1(A) is borne by the party opposing enforcement. Besides, the grounds for refusal under Article 1076, para. 1 (A) Rv present an exhaustive list. The number of reasons is limited and the grounds for refusal must be narrowly interpreted. The party seeking enforcement must rely either on the 1958 New York Convention or any other applicable treaty or on Article 1076 Rv as a basis for enforcement. It is not possible for the party to 'combine elements favourable to him from the two'.⁶⁸

Under the Act, the party, against whom enforcement is sought, may invoke five grounds for disputing enforcement (Art. 1076, para. 1 (A) Rv). As mentioned previously, Article V of the Convention and the provisions of Article 1076, para. 1 (A) Rv provide for the same grounds for refusing enforcement. These include the lack of a valid arbitration agreement (1076, para. 1 (A) (a) Rv), the improper constitution of the arbitral tribunal (1076, para. 1 (A) (b) Rv), and non-compliance by the arbitral tribunal with its mandate (1076, para. 1 (A) (c) Rv). The enforcement and recognition under the Act may also be refused if the 'arbitral award is still open to an appeal to a second arbitral tribunal, or to a court in the country in which the award is made' (Art. 1076, para. 1(A)(d) Rv). Some commentators take the view that this ground can be understood so as to mean that the award has not yet become 'binding' upon the parties, as expressed in Article V(1)(e) of the New York Convention.⁶⁹

However, the Act limits the possibility to invoke the grounds listed in Article 1076, para. 1 (A) (a)–(c) Rv in the same manner as they are limited in Article 1065 relating to the reasons for setting the award aside. Namely, both provisions refer to Article 1052 when providing for the limitations to the applicability of a number of grounds. These reasons relate

⁶⁶ Berg, A.J. van den, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, (Asser/Kluwer, The Hague/Deventer 1981) p. 269 *et seq.* (Van den Berg, *New York Convention*)

⁶⁷ See also, Court of Justice of the EC, 1 June 1999 (C-126/97) (*ECO Swiss/Benetton*) NJ 2000, 339, published also in (1999) XXIV YCA 629.

⁶⁸ Van den Berg, *New York Convention*, p. 161.

⁶⁹ Sanders/Van den Berg, Art. 1076, n. 122.

to the invalidity of the arbitration agreement, irregularity in the constitution of the tribunal and the arbitral tribunal's non-compliance with its mandate. They cannot be successfully invoked in the enforcement procedure by the party who participated in the arbitral proceedings, but failed to raise that objection during the arbitral proceedings (Art. 1076, paras. 2-4 Rv).⁷⁰

Both the Convention and the Act provide that an award may be refused enforcement if it violates public policy (Art 1076, para. 1 (B) Rv). This reason may be raised by the court on its own motion (*ex officio*).⁷¹ As mentioned previously, the courts in the Netherlands have accepted the doctrine of international public policy, even though there is no distinction between domestic and international public policy in the Act. The latter is generally more narrowly construed than the public policy exception in domestic cases. In other words, the courts more restrictively apply the public policy exception when deciding on the recognition and enforcement of a foreign arbitral award than when such a violation is considered with respect to an arbitral award rendered in 'international arbitration' in the Netherlands (i.e., arbitration involving international elements). Thus, an arbitral award rendered in an 'international arbitration' by an even number of arbitrators may be annulled as it is considered to violate Dutch public policy. However, a foreign award shall not be refused enforcement as being contrary to public policy provided that an even number of arbitrators was permitted under the law applicable to the arbitration.⁷²

It has already been mentioned that a violation of public policy applies in both a procedural and a substantive sense. The subject-matter or objective arbitrability is not a separate ground either for setting aside or refusing the enforcement of the award. Instead, if an award deals with a subject-matter which is not capable of settlement by arbitration, such an award may be challenged or enforcement may be refused as being contrary to public policy. The Act does not provide for a list of non-arbitrable matters. Instead, Article 1020 Rv provides that the 'legal consequences of which the parties cannot freely dispose'⁷³ remain outside the arbitration domain'.⁷⁴ Obviously, this definition does not give a clear answer as to which matters are 'capable of settlement by arbitration'. Similarly, the statutory definitions in other jurisdictions may employ the same or different approaches to defining arbitrability, but they do not usually provide a clear answer as to the domain of arbitration. Usually, a careful study of other fields of law and guidance from the judiciary are needed to determine whether a particular subject-matter is capable of settlement by arbitration.⁷⁵ There is no uniformity in the legal literature as to the approach in determining the scope of arbitrable matters. 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. These views will now be briefly presented.⁷⁶

⁷⁰ Lazić/Meijer, p. 944.

⁷¹ *Id.*

⁷² Sanders/Van den Berg, Art. 1076, n. 124.

⁷³ Article 1020(3) of the present Act (para. 2 under the text of the Proposals).

⁷⁴ The same is true for paras. 5 and 6 of Art. 1020. Paragraph 5 provides that the expression 'arbitration agreement' will include an arbitration clause which is incorporated in articles of association or rules which bind the parties. If the parties have made a reference to a set of arbitration rules in their agreement, such rules shall be considered to be a part of this agreement (par. 6).

⁷⁵ For a comparative analysis of the approaches in defining arbitrability in France, Germany, the Netherlands and in the United States, see: V. Lazić, *Insolvency Proceedings and Commercial Arbitration*, Kluwer Law International, The Hague/London/Boston (1998), pp. 140-154.

⁷⁶ For a more detailed presentation of subject-matter arbitrability and the suggestions in the literature, see Lazić, *Arbitration Law Reforms in the Netherlands*, p. 127.

In general, matters of public policy are held to be non-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.⁷⁷ Some authors express the view that whether a particular matter has a public policy nature should be decided on the case-by-case basis.⁷⁸ Others⁷⁹ suggest that the rules on the exclusive jurisdiction of national courts imply the non-arbitrability of a subject-matter. 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 129.⁸⁰ In contrast to these obvious situations in which arbitration is excluded, it is suggested to distinguish 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.⁸¹

It should be mentioned, however, that in practice the public policy exception, including the non-arbitrability of the subject-matter, does not present a significant limitation to arbitration. They are usually restrictively interpreted and do not result in an excessive control of arbitral awards.

3.4 Publication of Arbitral Awards and their Possible Impact on Court Decisions and Legislative Amendments

Awards in the Netherlands have been published since 1919.⁸² In particular, they are published without indicating the names of the parties in the *Tijdschrift voor Arbitrage* (Journal of Arbitration). For example, the NAI Rules provide that '[u]nless a party communicates in writing to the Administrator his objections hereto within one month after receipt of the award, the NAI shall be authorised to have the award published without mentioning the names of the parties and deleting any further details that might disclose the identity of the parties'.

As the awards of various arbitral institutions are often published and are thus readily available,⁸³ it is likely that they are to be considered by the courts in the Netherlands. The same is true for decisions of courts in other jurisdictions rendered in exercising their supportive or controlling functions in arbitration. As already mentioned, the courts would generally be inclined to take into consideration foreign decisions taken in the context of international commercial arbitration. The same would be true in the process of law reform.

The Arbitration Act contains no express provision concerning the question whether an arbitral tribunal is bound by a decision of another arbitral tribunal. In general, the existence of a Dutch arbitral award, which has acquired the force of *res judicata* (Art. 1059 par. 1 Rv), will prevent the enforcement of an award subsequently rendered in arbitral proceedings between the same parties concerning the same subject-matter in the dispute. Such a subsequently

⁷⁷ Snijders, H.J., 'Vierde boek – arbitrage', in *Burgerlijke Rechtsvordering (Civil Procedure)*, loose-leaf edition (Kluwer, Deventer 2006) Art. 1020, n. 5 (Snijders, Loose-leaf).

⁷⁸ Meijer, G.J., 'Arbitrage – Boek Vier' in Van Mierlo, A.I.M., Van Nispen, C.J.J.C. and Polak, M.V. (eds.), *Burgerlijke Rechtsvordering: Text & Commentaar* (Kluwer, Deventer 2008) Art. 1020, n. 6 (Meijer, *T&C Rv*).

⁷⁹ Sanders, P., *Het nieuwe arbitragerecht* (4th ed., Kluwer, Deventer (2001) pp. 36-38 (Sanders, *Het nieuwe arbitragerecht*).

⁸⁰ *Id.*, Cf., O.L.O. de Witt Wijnen, 'De herziening en ABC', *TvA*, 2005, 10, at. p. 13.

⁸¹ Such would be the case with respect to labour contracts, disputes involving the renting of houses, insolvency proceedings and questions pertaining to company law. Sanders, *Het nieuwe arbitragerecht*, pp. 39-51.

⁸² Van den Berg, *Int. Handbook on Comm. Arb.*, p. 27.

⁸³ E.g., in the *Yearbook Commercial Arbitration, ICC Bulletin, Mealey's International Arbitration Report, ASA Bulletin*, to mention only a few.

rendered award may be refused enforcement as being contrary to public policy (Art. 1063 para. 1). The same is true with respect to a foreign arbitral award which has been recognised in the Netherlands (Art. 1075-1076 Rv). In a similar vein, such a subsequently rendered arbitral award, between the same parties with respect to the same subject-matter, may be set aside as being contrary to public policy (Art. 1065 para. 1(e) Rv).⁸⁴

Similarly, there are no provisions on the question whether arbitrators are bound by a decision of a state court. In general, it can be said that a judgment by a Dutch court which has acquired the force of *res judicata* will prevent the enforcement of a subsequently rendered arbitral award between the same parties with respect to the same subject-matter. The same effect would be given to a foreign judgment recognised in the Netherlands. The enforcement of such a contradictory award would be contrary to public policy (Art. 1063 para 1 Rv and 1076 para 1(B) Rv) and may be set aside for the same reason (Art. 1065 para 1(e) Rv).⁸⁵

3.5 The Impact of International Arbitration Rules, Foreign Statutory and Case Law, and International Organisations (UNCITRAL, UNIDROIT) on the Drafting of National Arbitration Legislation

The Arbitration Act of 1986 incorporated ‘a substantial part’ of the case law that had been developed by the courts.⁸⁶ The arbitration statutes of other countries, particularly those of France and Switzerland, were taken into consideration in the process of drafting the Arbitration Act.⁸⁷ The same is true for international treaties, as well as for legal instruments of the UNCITRAL. Namely, both the 1976 UNCITRAL Arbitration Rules and the 1985 UNCITRAL Model Law on International Commercial Arbitration were taken into consideration by the Dutch legislator.⁸⁸

Since its 1986 enactment, the Act has been subject to minor changes on several occasions.⁸⁹ The Act is currently being revised, whereby rather substantial changes are suggested. ‘The Proposals for Changes to Book Four (Arbitration), Articles 1020-1076 Code on Civil Procedure’ were drafted by a Working group led by Prof. A.J. van de Berg.⁹⁰ As

⁸⁴ Lazić/Meijer, p. 934.

⁸⁵ *Id.*, pp. 94 and 95.

⁸⁶ Van den Berg/Van Delden/Snijders, p. 1.

⁸⁷ *Memorie van toelichting (MvT)*, (1984) *Tijdschrift voor arbitrage (TvA)*, 4A 19-20 (MvT 1984 TvA 4A).

⁸⁸ F. Korthals Altes, Preface to Sanders/Van den Berg. See also, Van den Berg/Van Delden/Snijders, 1. For more particulars on the history of the 1986 Arbitration Act, see Snijders, loose-leaf, explanatory note 2; Franx, J.P., *Het ontwerp Boek IV van het Wetboek van Burgerlijke Rechtsvordering*, W.E.J. Tjeenk Willink B.V., Zwolle (1985) 73 *et seq.*

⁸⁹ The amendment to the Act in 1991 was merely to correct an editorial mistake in Art. 1041, para. 1 Rv (Law of January 31, 1991, (1991) *Stb.* No. 50). The amendments in effect as from 1 January 2002 were mainly adaptations of terminology due to the alterations introduced in Book 1 Rv relating to the procedure at first instance (Law of 6 December 2001, *Stb.* 2001, no. 580). Amendments of a substantive nature were those relating to the requests for the taking of evidence before the tribunal is established and to the revocation of the award in Article 1068. Finally, the Act was amended on 30 June 2004 (Decision of 18 June 2004, *Stb.* 2004, 285), in order to implement the Directive on Electronic Commerce of 8 June 2000 (2002/31/EC, *Stb.* 2004, no. 210). Thereby the definition of evidence of a ‘written form’ in Article 1021 Rv was altered. The text of Article 1021 was amended so as to provide expressly that an arbitration agreement could be evidenced by electronic means. It is thereby expressly referred to Article 6:227a, para. 1 of the Civil Code. For more particulars on the written form requirements of an arbitration agreement, see, Lazić, V., ‘Arbitration Law Reforms in the Netherlands: Formal and Substantive Validity of an Arbitration Agreement’ in J.H.M. van Erp/L.P.W. van Vliet (eds.), *Netherlands Reports to the Seventeenth International Congress of Comparative Law*, Intersentia, Antwerp-Oxford-Utrecht (2006) 125 (hereafter: Lazić, Arbitration Law Reforms in the Netherlands).

⁹⁰ ‘Tekst van de Voorstellen tot wijziging van het Vierde boek (Arbitrage) Artikelen 1020 – 1076 Rv’, *TvA* 2005, 36 (the latest version of the text dated 15 February 2005). The same text is also published on <http://www.arbitragewet.nl>.

illustrated previously, the Act presents a friendly framework for arbitration.⁹¹ Yet, it appeared desirable to introduce some considerable changes to the text of the Act.⁹² The necessity of a substantial revision of Dutch statutory arbitration law was already recognised when the amendments to Book 1, mentioned above, were discussed.⁹³ First of all, it is believed that the Netherlands would become a more attractive venue for arbitration if the solutions of the 1985 UNCITRAL Model Law were more substantially incorporated in the new legislation.⁹⁴ As mentioned previously, the Act was based on the principles of the Model Law. However, it is generally felt that the provisions of the Model Law should have been more widely incorporated in the final text of the Act.

Besides, in the last decade national statutory laws in a number of jurisdictions,⁹⁵ as well as in the rules of different arbitral institutions, have been substantially revised.⁹⁶ 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.⁹⁷

Obviously, the work of international institutions (such as the UNCITRAL), the actions and rules of various arbitral institutions, as well as the law reforms in the neighbouring countries have played an important role in taking the initiative for the arbitration law reforms in the Netherlands. They also had an impact on the fashioning of the arbitration legislation. The same is true for international conventions, in particular the 1958 New York Convention. Namely, when drafting Article 1076 Rv, the provision of Article V of the New York Convention was taken into consideration.

4. Conclusions

With respect to the meaning and scope of the notion of ‘uniform law’ in arbitration law in the Netherlands, it may be understood so as to include any source of law which does not have its origin exclusively in a national law of a particular country. This clearly follows from the relevant provision of Article 1054 of the Arbitration Act, as well as the legislative history. Accordingly, the parties may choose any ‘rules of law’, including the UNIDROIT Principles of PECL, the *lex mercatoria*, general principles, trade usage, as well as authorising the

⁹¹ Cf., A.J. van den Berg, *Hoe gastvrij is Nederland voor internationaal arbitrage*, Public Lecture held on 11 April 1990 at the Erasmus University Rotterdam, Kluwer, Deventer (1990).

⁹² *Toelichting op voorstel tot wijziging van Arbitragewet, TvA (Tijdschrift voor arbitrage) 2005*, p. 126; published also at www.arbitragewet.nl/toelichting.xml (hereafter: *Toelichting, TvA*).

⁹³ *Nota naar aanleiding van het Eindverslag, Kamerstukken II 1999/2000*, 26 855, no. 5, p. 3, referred to in *Toelichting TvA*, p. 126. Cf., P. Sanders, *Het nederlandse arbitragerecht – nationaal en internationaal*, Fourth Edition, Kluwer, Deventer (2001) p. 309 *et seq.*

⁹⁴ *Toelichting*, p. 27. The reasons for the amendments were explained in Lazić, *Arbitration Law Reforms in the Netherlands*, p. 125.

⁹⁵ E.g., the 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.

⁹⁶ 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.

⁹⁷ *Toelichting*, p. 126 and 127. See also, E.R. Meerdink, ‘Symposium herziening arbitragerecht, *TvA 2005*, 75. For a different view on the reasons for the revision, see H.J. Snijders, ‘Algemene beschouwingen bij het Voorontwerp tot herziening van de Nederlandse arbitragewetgeving’, *TvA (Tijdschrift voor arbitrage) 2005*, p. 27. The major reasons for the reforms are mentioned on the website of the Dutch Arbitration Law Reforms <http://www.arbitragewet.nl/toelichting.xml> (visited on 23 September 2008).

tribunal to decide as *amiable compositeur*. In the absence of the parties' choice, the arbitrators have a wide discretion and may apply any 'rules of law' that they consider appropriate. However, there must be an express agreement between the parties to authorise the tribunal to decide as *amiable compositeur*.

The parties may agree on a non-State body of law in litigation as well. The judiciary has obviously accepted the parties' choice of a convention containing substantive uniform law. There is no decision where a choice of a *lex mercatoria* or the UNIDROIT Principles or PECL has been dealt with. However, it may be expected that the courts will consider it to be a valid choice of the *lex contractus*, at least regarding the UNIDROIT Principle and the PECL. In any case, there is no indication that the courts in the Netherlands would not permit such a choice. This is particularly so considering that the content of the chosen non-national rules is clearly defined. Besides, the Courts themselves have resorted to both sets of Principles in interpreting the conventions, as already explained.

The statutory law on arbitration in the Netherlands presents a 'friendly procedural framework'. The principles of party autonomy and limited court control are fully incorporated in the Act and supported by the judiciary. The international conventions, particularly the 1958 New York Convention, the UNCITRAL instruments, as well as the statutes in various jurisdictions and arbitration rules were considered in the process of law making. The same is true with respect to the current arbitration law reforms.

Cite as: Vesna Lazić, *The Impact of Uniform Law on National Law: Limits and Possibilities – Commercial Arbitration in the Netherlands*, vol. 13.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (May 2009), <<http://www.ejcl.org/132/art132-3.pdf>>.