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The International Comparative Legal Guide to:

Insurance & Reinsurance 2018

7th Edition

A practical cross-border insight into insurance and reinsurance law

Published by Global Legal Group, with contributions from:

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Chief Operating Officer
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Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George Print Group
March 2018

ISBN 978-1-911367-98-7
ISSN 2048-6871

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General Chapters:

Country Question and Answer Chapters:

Continued Overleaf →

Country Question and Answer Chapters:

EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Insurance & Reinsurance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of insurance and reinsurance.

It is divided into two main sections:

Six general chapters. These are designed to provide readers with an overview of key issues affecting insurance and reinsurance work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in insurance and reinsurance laws and regulations in 41 jurisdictions.

All chapters are written by leading insurance and reinsurance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Jon Turnbull and Michelle Radom of Clyde & Co LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Chapter 32

Netherlands


Daan Baas


Niels Dekker

Dirkzwager advocaten & notarissen N.V.

1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

In the Netherlands, insurance and reinsurance companies are regulated by both the Dutch Central Bank (*De Nederlandsche Bank* (DNB)) and the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten* (AFM)).

DNB exercises the prudential supervision of insurance and reinsurance companies and decides on admission to the financial markets. DNB regulates and monitors (re)insurance companies in the Netherlands and their compliance with the applicable rules.

AFM performs conduct-of-business supervision on financial markets for (re)insurance companies. AFM also supervises the integrity of advisers and intermediaries.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The statutory basis for conduct of business supervision of financial undertakings (e.g. (re)insurers)) is the Financial Supervision Act (*Wet op het financieel toezicht*, FSA). Under the FSA, insurance companies must meet certain requirements in order to offer life insurance, non-life insurance, prepaid funeral services insurance or reinsurance services in the Netherlands. The authorisation requirements for insurance companies having their registered offices in the Netherlands are laid down in the FSA and in the applicable subsidiary regulations. The statutory requirements have been worked out in greater detail in the Decree on Prudential Rules for Financial Undertakings (*Besluit prudentiële regels Wft*).

Insurers must obtain an authorisation (licence) from DNB in order to be able to engage in their operations unless they have been exempted from the licensing requirement. Non-life insurers and funeral expenses and benefits in kind insurers with limited risk may be exempted from prudential supervision under certain conditions. The conditions of the Exemption Regulation are set out on the DNB website (http://www.toezicht.dnb.nl/en/2/51-234334.jsp).

There have been two types of authorisation (licences) since the Solvency II Directive (2009/138/EC) entered into force. Insurers under the scope of the Solvency II regime require Solvency II authorisation, while limited risk insurers can apply for Basic authorisation only. However, they are free to apply for Solvency II authorisation on a voluntary basis. Only the smallest non-life and funeral expenses and benefits in kind insurers are exempted from the authorisation requirement. The following key principles apply.

All life and non-life insurance companies come under the scope of the Solvency II regime, unless they meet specific requirements, in which case they may qualify for Basic authorisation.

Reinsurers always come under the scope of the Solvency II regime and must apply for Solvency II authorisation.

Funeral expenses and benefits in kind insurers never come under the scope of the Solvency II, and can apply for Basic authorisation.

A "Basic insurer" or an "exempted insurer" is not permitted to pursue activities abroad (no single licence).

The application process for an authorisation comprises several steps. On its website, DNB has published a factsheet providing for some guidance on the application process. The requirements for a licence application can be found in article 2:26b (for a reinsurer), article 2:31 FSA (for the Solvency II authorisation for an insurer), article 2:49 FSA (for the Basic authorisation for an insurer) and the Market Access for Financial Undertakings (Financial Supervision Act) Decree (*Besluit Markttoegang financiële ondernemingen Wft*). The process starts with filling in a standardised application that can be accessed via the DNB website. The application includes submitting a scheme of operations. The details of the scheme of operations depend on the nature of the business of the (re)insurer. In general, the scheme of business has to include: the nature of the risks or commitments which the insurance or reinsurance undertaking concerned proposes to cover; the kind of reinsurance arrangements which the reinsurance undertaking proposes to make with ceding undertakings; the guiding principles as to reinsurance and to retrocession; the basic own-fund items constituting the absolute floor of the minimum capital requirement; estimates of the costs of setting up the administrative services and the organisation for securing business; the financial resources intended to meet those costs; and the resources at the disposal of the insurance undertaking for the provision of the assistance promised – in which the nature of the insurance business – and the risks which should be covered, are described.

An insurer wishing to extend its operations must apply for an extension of the scope of its licence. Aforementioned licensing requirements apply; however, most of the required information might already be in the possession of DNB.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Insurers having their registered office in an European Economic Area (EEA) country can set up a branch office in the Netherlands or provide services into the Netherlands directly from its home Member State (the so-called cross-border service provision). Prior

to taking up their activities in the Netherlands, insurers from other EEA Member States must follow a notification procedure through their home supervisors and submit a notification form to DNB. If an EEA insurer intends to provide cross-border services, it can start its operations after submitting the notification. Contrary to cross-border service provision, the activities of a branch office may not start until two months after DNB has confirmed receipt of the full notification, or after it has informed the EEA insurer, through its home supervisor, of any additional conditions to be observed in the public interest. The branch office may start its operations two months after DNB's confirmation of receipt, or directly upon receipt of information on additional conditions.

After completion of the notification (procedure) an EEA insurer may market and write its insurance products directly. A notified EEA insurer may only do business (in the Netherlands) in the insurance classes that were included in the notification procedure. In principle, the supervision of a foreign (EEA) (re)insurer – and its branch office in the Netherlands and/or its cross-border services provided in the Netherlands – rests with the supervisor in the home Member State rather than with DNB.

Insurers located outside the EEA require a licence from DNB to perform activities from a branch office in the Netherlands and must meet the same requirements as those inside the EEA. Insurers located outside the EEA who intend to perform activities in the Netherlands from an office outside the EEA must go through a notification procedure and meet specific requirements.

(Re)insurers located outside the EEA require a licence from DNB to perform activities (from a branch office) in the Netherlands.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The guiding principle is the freedom of contract when it comes to insurance contracts. However, insurance contracts should comply with the insurance law section of the Dutch Civil Code, DCC (*Burgerlijk Wetboek*). This section contains some mandatory provisions (from which the insurer cannot deviate to the detriment of the insured) and some exceptions on the general rules. Furthermore, the FSA and the Code of Conduct for Insurers also limit the freedom of contract for insurance contracts. In addition, no contract is allowed contrary to fundamental public policy rules.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Under Dutch law, companies are permitted to indemnify directors and officers both against internal liability towards the company (*vrijtekening*) and against external liability towards third parties (*vrijwaring*). No specific provisions apply in Dutch legislation, although under specific conditions, the indemnity can be declared null and void. Most companies indemnify directors and officers in the articles of association or in a contract.

Many D&O insurers also provide coverage for the indemnity given by the company. An excess usually does not apply.

When adopting the annual accounts, a general meeting usually discharges directors from their responsibilities for the preceding accounting year (with validity in terms of the internal affairs of the company), which extends to activities and facts made known to the shareholders by the annual accounts.

Indemnification is deemed not to be possible in case of breach of specific conditions in the DCC relating to acts committed in a seriously negligent manner to the extent that it qualifies as intentional or deliberate.

1.6 Are there any forms of compulsory insurance?

Dutch law provides for various types of mandatory insurance, of which we note only a few. Mandatory insurances are social security, healthcare, motor vehicle (third party), professional indemnity (for certain professions, e.g. lawyers and civil-law notaries) and marine.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The Dutch Insurance Act provides for provisions on insurance law in the DCC, many of which are (semi-)mandatory, aiming to give a better protection to policyholders and insureds. Generally, Dutch insureds rather than insurers may count on a fair protection of their interests by the substantive law.

2.2 Can a third party bring a direct action against an insurer?

A third party may bring a direct action against a liability insurer if he has suffered damages resulting from death or bodily injury (thus excluding material or financial damages). This means that he is entitled to request payment directly to his account. It is a right derived from the right the insured has against an insurer. As a consequence, the third party cannot claim when the insured has not notified the insurer of the claim or when the insurer denied coverage towards the insured. The insurer can invoke the same defences given by law and policy terms.

Besides, a direct action can also be brought in case of an accident caused by a motor vehicle or in case of damages resulting from pollution caused by an oil tanker.

2.3 Can an insured bring a direct action against a reinsurer?

A direct action cannot be brought against a reinsurer. This is solely a contractual matter between the reinsurer and the insurer. Only the latter can bring its contractual claim against the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Non-disclosure or misrepresentation by the insured may have serious consequences. These may only be invoked if the insurer notifies the insured within two months from the discovery of such non-fulfilment, pointing out the consequences. The starting point of this term might be subject to discussion.

One of the consequences might be that no or less payment will be due or that the premium increases. Termination of the insurance contract with immediate effect is only allowed if the insured acted with the intention of misleading the insurer or if the insurer would not have concluded the insurance contract if it had been aware of the true state of affairs.

Discovery of the non-disclosure after the occurred loss allows the insurer to only pay in accordance with the situation that he had been aware of the true state of affairs. If the insurer would not have concluded the insurance contract at all, had it been informed correctly, then it may fully refuse coverage. The same

goes when the insured acted with the intention of misleading the insurer. If the insurer requests a higher premium or offers a lower sum to be insured, the payment can be reduced in proportion to the higher premium or the lower sum insured. If other terms and conditions would have been stipulated or if the non-disclosure or misrepresentation would not have taken place, payment might only be due based on those terms and conditions. Payment is due in full when the non-disclosure relates to facts which have not resulted in the realisation of the relevant risk.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Under the Dutch Insurance Act (included in the DCC), a prospective insured should disclose to the insurer prior to concluding the insurance policy all information he knows or ought to know and which may be material to the decision of the insurer to write the insurance and its terms. If the cover relates to interests of a known third party, the same applies to disclosure of his information.

We see a tendency in some D&O policies to include a severability clause, which means that the knowledge of the one insured cannot be attributed to the other, resulting in protection of insureds against the remedies the insurer might use due to a breach of duty to disclose by another of the insureds.

Most insurers work with a questionnaire, which limits the duty to disclose to the extent that if questions have not been answered, or not properly, or if facts other than those asked for have not been disclosed, this will not be to the detriment of the prospective insured. An exception to this rule is made in case there was intent to mislead the insurer. A catch-all question aiming to obtain all relevant facts or circumstances in general does not resolve the lack of information.

Irrespective of the duty to disclose in a precontractual stage, the insured should notify the insurer of the occurrence of an insured event as soon as he knows or ought to know.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

According to article 7:962 DCC, a claim for damages by the insured against a third party that caused an insurance loss to the insured automatically transfers to the insurer upon payment of the loss by the insurer. After realisation of the risk, the insured is required to withhold from any act which may be detrimental to the insurer's claim against a third party. The subrogated rights cannot be fully exercised if the payment of the insurer does not cover all of the insured's damages, in which case the insured has a privilege on the possible recovery. In general, the insurer will not assume rights against the policyholder other insureds or persons in a close relationship to the insured such as an employer, a spouse or first-degree relatives. The DCC limits subrogation in rights of recourse of the insured against a party that is liable on certain grounds of strict liability. This limitation is not applicable to subrogation based on culpable liability, such as tort.

Under circumstances, contractual assignment of rights (cession) of the compensated third party may be preferred above subrogation in order to avoid detrimental contractual clauses such as an exoneration clause. Cession should be arranged before payment to the third party is made.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

First instance cases are heard by one of the 11 district courts (depending on the size and complexity of the case, the case is heard by a single judge or by a panel of three judges). Cases up to EUR 25,000 and cases on rent or employment contracts are generally dealt with by subdistrict courts (with a single Cantonal judge). Civil appeals before one of the five courts of appeal are heard by three judges and the Supreme Court generally sits with three or five judges. Appeals from decisions at the first instance in district courts (and subsequently Supreme Court appeal) may be possible.

Since 2010, a victim may start so-called sub-proceedings against an allegedly liable party in a personal injury case in order to determine only part of the dispute (e.g. only the alleged liability). This victim-friendly procedure is less costly and less time-consuming than a regular court procedure (as a rule, the liable party bears the costs of the procedure), and is meant to simplify and accelerate the settlement of (alleged) loss and damage.

Dutch civil procedure and Dutch criminal procedure do not involve trial by jury and/or laypersons.

Additionally, the consumer may bring complaints against their insurer in insurance policy matters before the Financial Services Complaints Board (KIFID), which rulings are generally binding for and followed by the parties involved.

Furthermore, insurance policy disputes between insurers and disputes between insurers and large policyholders (non-consumers) may be solved via alternative dispute settlement procedures.

An expected new possibility for alternative dispute resolution in civil or commercial matters with an international aspect is the anticipated launch of The Netherlands Commercial Court (NCC) (expected to launch mid-2018). Being part of the Dutch court system, the NCC is a special and specialised chamber of the Amsterdam District Court and of the Amsterdam Court of Appeal. The NCC operates under Dutch procedural law, while the working language of the NCC is English. Parties may voluntarily choose to bring a case to the NCC on the basis of fixed fees.

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

First instance cases usually take about one to two years. Court of Appeal or Supreme Court cases may take an additional two or more years.

Civil proceedings are to a large extent conducted in written documents. Legal proceedings are initiated either by writ of summons (*dagvaarding*) or by petition (*verzoekschrift*). There is no hard and clear distinction between these two types of jurisdiction, although the general distinction is that a writ of summons is used for contentious jurisdiction (where the court has to resolve a dispute between parties) and a petition is used for voluntary jurisdiction (matters in which the court is requested to grant a provision or appropriate measure).

In first instance summons proceedings, a claimant will serve a writ of summons, after which the defendant will need to file its (written) statement of defence. The court may then (mostly after an interim judgment) order a post-defence hearing or a second written round

with (sequentially) a statement of reply and a statement of rejoinder. After that, a hearing with oral pleadings may be ordered before the court delivers its final judgment.

A new development is that civil proceedings are or will be conducted digitally. The so-called KEI-programme aims to digitalise, improve, accelerate and simplify civil procedures (e.g. by amending some procedural rules and terms for filing statements). The KEI legislation will be implemented in five phases. At the courts of Gelderland and Central Netherlands, KEI has already entered into force, and other courts (and courts of appeal) will follow.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Dutch law does not provide for discovery proceedings as the UK/USA legal systems do. However, parties may request the court to order a party to disclose documents pursuant to article 843a of the Dutch Code on Civil Procedure (DCCP). The request for disclosure of certain documents can be made in pending proceedings against a (counter)party or as a separate request against another (third) party. In short, article 843a DCCP enables a party to gain insight to documents that are not at his disposal (if – among other things – the requesting party has a legitimate interest and the requested document pertains to a legal relationship to which he or his legal predecessors are party).

Besides, a judge may order a party in a pending litigation to prove statements by ordering the disclosure of certain documents or evidence. Parties may only refuse on compelling grounds. In any event, if a party does not disclose the requested evidence, the judge may draw the conclusions on the matter he deems appropriate.

For information or documents available at a government body, an interested party may file a specified request for such information or documents from that government body on the basis of the Government Information (Public Access) Act (*WOB-verzoek*). E.g., in a product liability matter, an interested party may request the Dutch Healthcare Inspectorate for access to information used for its decision-making or reports.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Parties have a general obligation to testify and substantiate comprehensively and in accordance with the truth (article 21 DCCP). Evidence can be brought forward in writing (contracts, reports by party experts, etc.) or by means of witnesses.

However, lawyers may rely on their professional legal privilege (article 165(2)(b) DCCP) when requested to testify. Communications between a lawyer and the client are also protected by privilege, with the exception of documents that are clearly the object of a criminal offence. It is generally held that a party cannot be required to produce a document (e.g. in a 843a-request) protected by legal professional privilege. This may also apply to documents prepared in contemplation for litigation and/or for invoices from a party's lawyer. As for out-of-court settlement negotiations (verbal and in writing) between lawyers, the Dutch rules of conduct for lawyers also apply (to lawyers; the court is not bound by these rules), which means that lawyers may face disciplinary measures if they disclose such information without consent.

Private persons are privileged not to testify against certain (close) relatives (article 165 DCCP).

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The court may order an examination of witnesses. Apart from limited exceptions, a witness is obliged to appear and in any case to testify truthfully. During a hearing of witnesses, the judge leads and will ask the questions. At the discretion of the judge, the counsel of parties may also ask questions. The possibility for cross-examination of witnesses is limited. The court may also appoint an independent expert if an expert opinion is required; for example, in highly technical matters.

An examination of witnesses or an expert opinion may also be requested by the parties (prior to proceedings or in pending proceedings).

If a witness refuses to attend the hearing without sufficient excuse, the court may order that the witness bears the costs incurred by his default and that the witness' hearing will be enforced.

4.4 Is evidence from witnesses allowed even if they are not present?

Generally, in a formal hearing of a witness procedure (as part of a pending litigation or as a separate provisional examination procedure), a witness needs to be present.

Apart from that, evidence from (party) witnesses may be made by personal testimony and also by writing. In practice, witness evidence by personal testimony is generally seen as stronger evidence than a witness' written statement.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Parties are allowed to introduce their own expert witness reports as part of the pleadings (both for the party bearing the burden of proof and the party introducing counter evidence). Such party opinions are generally not seen as sufficient evidence to prove certain statements if the statement is disputed by the other party.

It is also fairly common for courts to appoint an independent expert (to do research on the facts and/or answer certain questions); for example, in highly technical matters. The court will then summon the expert to answer specific questions and to render a written expert opinion on which the parties may comment. Such a court-appointed expert opinion is generally important for the outcome of (parts of) the case.

4.6 What sort of interim remedies are available from the courts?

Summary proceedings may be brought before the President of the District Court. A claim in summary proceedings must serve an urgent interest, the matter must require immediate remedy (e.g. a request to lift attachment measures or to stop an unwanted publication in the media). Summary proceedings are, by their nature, not conclusive. However, in practice, the consequences of preliminary relief measures taken in summary proceedings can have quite a final character. Apart from some exemptions, neither of the parties in summary proceedings have an obligation to start proceedings on the merits.

Besides that, upon motion, a court may apply certain interim measures during a pending litigation on the merits (article 223 DCCP) if such measure is connected to the case on the merits. Such measure may include a request to receive advance payment or precautionary measures to secure future execution of a verdict.

Furthermore, prior to or during court proceedings, a party may request the President of the District Court leave to take conservatory measures (e.g. third-party attachment).

It is relatively easy to obtain the necessary court permission to take prejudgment attachment measures (e.g. prejudgment attachment of bank balances).

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

First instance cases (including Cantonal judge's decisions), where the amount involved exceeds EUR 1,750, can be taken to the Court of Appeal. Leave of the court is not required. The Court of Appeal is allowed to deal with the case itself (after setting aside a judgment, reference back to the first instance is not required).

The Supreme Court is a court of cassation, for seeking restricted review of judgments in appeal (points of law only). The Supreme Court can quash a judgment of a lower court. If the Supreme Court does so, it generally refers the case back to a Court of Appeal for further resolution of the case. If the Supreme Court considers that a complaint cannot result in cassation and does not warrant the answering of questions of law or the development of the law, it may confine itself to this consideration when stating the grounds for its decision.

District courts and courts of appeal can also request the Supreme Court for a preliminary ruling on legal questions.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Statutory interest is due if payment of a sum is delayed (article 6:199 of the DCC). The statutory interest is calculated on the basis of the sum over the period that the debtor is in default (generally the date of the liability claim until the date of full and final payment). The statutory interest rate is determined by governmental decree and is a compound interest. The statutory interest rate for non-commercial transactions is 2% and 8% for commercial transactions.

In a trade agreement, the contractual rate may be applicable and due the day following the agreed final payment date. If there is no agreed final payment date, the DCC sets out the effective date of statutory interest. If the contractual interest is more than the valid statutory interest, contractual interest is due.

Parties must claim statutory or contractual interest explicitly. The court has no discretionary power to award interest.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Apart from the legal fees for a lawyer, court fees are payable (both by the claimant and the defendant) as a contribution to costs of the court proceedings. These court fees depend on the type of proceedings, the financial interest at stake and the capacity (private person or legal entity) of the parties. Court fees currently vary from around EUR 900 at the first instance for a private person when the claim is less than EUR 100,000, up to EUR 6,000 per party at the Supreme Court for a company with a claim of over EUR 100,000. In the final judgment, the successful party will (also) be awarded their court fees paid for.

The (awarded) legal fees are generally considerably lower than in the US. Whilst in the final judgment, the successful party will be awarded his legal fees (attorneys' fees for assistance during the court procedure). These are limited and based on certain (limited) fixed amounts. The allowability of out-of-court legal fees (e.g. attorneys' fees for assistance *prior to* court proceedings) is limited.

Unlike the UK, the Netherlands has no formalised procedure to make a pre-trial settlement offer with certain cost advantages.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

It is not compulsory to attempt a (formal) settlement at an early stage, but it is common practice that a court of first instance explores (e.g. during a post-defence hearing) the possibilities to arrange a settlement between the parties without a final judgment of the court.

A Dutch court may propose mediation to the parties but a court cannot oblige parties to mediate. If the matter seems eligible for mediation, a court may propose mediation.

4.11 If a party refuses to a request to mediate, what consequences may follow?

Mediation is based on voluntary participation by all the parties. There are no specific consequences if a party refuses or if the mediation fails.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Arbitration is a fully recognised alternative to court proceedings in the Netherlands. The DCCP sets specific rules (of which some are mandatory law) applying to arbitration procedures and the recognition and enforcement of arbitration awards. The DCCP assumes party autonomy and contractual freedom, enabling parties to contractually arrange the outline of the procedure, often by referring to the arbitration rules of a permanent arbitration tribunal such as the Netherlands Arbitration Institute (NAI) or to the rules of the DCCP. The DCCP contains provisions on the basis of a monistic system, making no distinction in rules for national and international arbitration.

If a case is brought before a regular court, although the parties have validly agreed on arbitration proceedings, the court is not competent to decide on the matter if one of the parties makes a respective motion referring to arbitration.

The new Dutch Arbitration Act (implemented in the DCCP under articles 1020–1076) entered into force on 1 January 2015 and applies to arbitrations commenced as from that date. In general, the act contains fewer mandatory rules and grants parties more autonomy to shape the arbitration as they deem fit. The act sets certain new rules, among other things, on the execution and on the annulment of awards.

Before execution of a (final or partial) award in the Netherlands, a party needs permission from a Dutch court. This is a procedure with a relatively limited court review of the award and limited grounds for refusal.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Arbitration can only be initiated if parties agree or have agreed on arbitration. The Dutch Arbitration Act does not impose special requirements on arbitration agreements beyond the rules applicable to the formation of contracts in general. The existence of agreement on arbitration has to be proven by the party making an appeal on the clause, which makes a written clause recommended. An arbitration clause is allowed to be included in general terms and conditions, but the general requirements for the applicability and validity of such terms and conditions should be met (as specified in the DCCP). However, an arbitration clause included in general terms and conditions is regarded to be unreasonably onerous and therefore is voidable if the agreement is concluded with a consumer (which may also apply to smaller entrepreneurs). An exception is made if the consumer is given the option for at least one month to submit the dispute to a regular court.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

If court proceedings are initiated by the one party in spite of an arbitration clause and the other party files a competence motion prior to its other defences, the court should dismiss the case if the arbitration clause is validly agreed upon. In any case, the court is competent to order conservatory measures or preliminary evidence measures. A Dutch court is also competent to handle a case if the requested measure cannot be granted, or not in a timely manner, in arbitration.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The Dutch Arbitration Act contains quite distinctive provisions relating to interim measures. These provisions distinguish between three types of interim relief. Firstly, parties can request the arbitral tribunal on the merits to take provisional measures at any stage of the proceedings. Secondly, parties to an arbitration agreement may agree to authorise a stand-alone arbitral tribunal to rule on an urgent interim relief request for provisional measures where no (simultaneous) arbitration proceedings on the merits are pending. Thirdly, states courts can provide interim measures if the requested measure cannot be obtained, or not in a timely manner, through arbitration.

Only state courts can provide for pre-judgment attachment or precautionary seizure.

The stand-alone summary arbitral proceedings are a fairly unique and successful feature of NAI arbitration that has now been incorporated in the revised Dutch Arbitration Act (similar provisions were included in the 2012 ICC Arbitration Rules).

The Dutch Arbitration Act contains some specific features here, including the (mere) requirement of urgency (parties do not need to prove that the relief sought cannot await constitution of the tribunal). Furthermore, the Dutch Act enables the possibility to render a summary judgment in an arbitral award, and a follow-up of arbitral proceedings on the merits is not compulsory.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Article 1057 of the Dutch Code of Civil Procedure (DCCP) provides that the award shall in any event contain the reasons for the decision. Absence of such reasoning in the award may result in the award being set aside in court proceedings.

This differs when parties agree in writing after the arbitration has commenced that the arbitral tribunal is not bound to give detailed reasons for its award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Three legal remedies are available against an arbitral award: arbitral appeal (only if the applicable arbitration rules between the parties provide for this); setting aside; and revocation.

Article 1064a sets rules for possible annulment of an arbitral award. This is limited to one hearing on the merits. The Court of Appeal has jurisdiction to hear such a request for annulment. Supreme Court appeal is only possible on limited grounds (points of law only) and the Dutch Arbitration Act enables parties to opt out of Supreme Court appeal.

Annulment is only possible on specific limited grounds (resembling those laid down in the 1958 New York Convention) and annulment of an arbitral award by a court is a true *ultimum remedium* and not very common.

Article 1065a DCCP introduces a procedure for referral of an arbitral award back to the arbitral tribunal to repair a possible ground for annulment. Such referral may take place as part of an annulment procedure before the Court of Appeal at the discretionary request of the court or one of the parties.

The setting aside of arbitral awards is a restricted legal remedy. The available grounds for setting aside: no valid arbitration agreement; the tribunal was constituted in violation with the rules; the tribunal has manifestly not complied with its mandate; the award does not comply with fundamental procedural rules; or the award violates public policy.

The Dutch Arbitration Act provides for the partial setting aside of arbitral awards.

The setting aside of arbitral awards is limited to one hearing on the merits. A request for the setting aside of an arbitral award must be addressed directly to the Court of Appeal. Supreme Court appeal is only possible on limited grounds (points of law only) and the Dutch Arbitration Act enables parties to opt out of Supreme Court appeal.

Daan Baas
Dirkzwager advocaten & notarissen N.V.
Velperweg 1
6824 BZ, Arnhem
Netherlands

Tel: +31 26 353 8416
Email: baas@dirkzwager.nl
URL: www.dirkzwager.nl

Daan Baas works as attorney/partner in the Liability and Insurance department at Dirkzwager. He studied at the Maastricht University (the Netherlands, graduated with an A+) and the University of Stellenbosch (South Africa).

Daan specialises in insurance law, liability law and complex dispute resolution. He focuses on (international) disputes relating to insurance coverage, product liability, professional liability, corporate liability insurance and D&O liability. He is regularly involved in cross-border and international disputes.

He has extensive experience on (litigating in) civil liability and insurance matters on behalf of insurers and brokers.

Daan was Deputy Registrar at the Board of Discipline in Amsterdam. He pays special attention to professional liability (notaries/lawyers/doctors/brokers/etc.) and disciplinary law. He frequently publishes and teaches within his field of expertise.

Niels Dekker
Dirkzwager advocaten & notarissen N.V.
Velperweg 1
6824 BZ, Arnhem
Netherlands

Tel: +31 26 353 8416
Email: n.dekker@dirkzwager.nl
URL: www.dirkzwager.nl

Niels Dekker was admitted to the Bar in 2007 and is a senior attorney at Dirkzwager's Liability and Insurance department since 2012. Before joining Dirkzwager, Niels worked as an attorney-at-law at De Brauw Blackstone Westbroek in Amsterdam. He studied at Maastricht University (the Netherlands) and the University of Uppsala (Sweden).

Niels is highly experienced in commercial litigation before Dutch courts and in arbitration in various liability and insurance matters.

His practice focuses on complex liability matters, with a particular focus on contractual disputes, product liability and the professional liability of lawyers, civil law notaries and medical doctors.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com