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XXIV. European Congress and Colloquium of Agricultural Law –
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Jurisdiction and alternative dispute resolution in agriculture

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1. *Statutory Provisions for Arbitration*

The first Dutch statutory provisions for arbitration date from 1838. It took until 1986 for the provisions to be replaced by the current ones. In drafting the current law, experience was used which was gained in the course of the years not only in the Netherlands, but also especially in Switzerland and France. Further consideration was given, for example to the UNCITRAL Arbitration Rules and UNCITRAL Model Law on International Commercial Arbitration.

The starting point in Dutch law is that disputes are settled by the regular courts. Parties may, however, agree to subject their dispute to arbitration – to the exclusion of the regular court. This can concern an existing dispute as well as a dispute that might arise between the parties in the future. In the first case, the parties will conclude a specific agreement ('arbitration agreement'), in which they describe the dispute to be arbitrated. In the second case, a clause in general terms and conditions may have been declared applicable to a contract, or a clause, for example in an agreement to enter into a partnership, providing that all disputes arising between the parties in the performance of that agreement are to be decided by arbitrators. The arbitration agreement can be proved only by a written document.

Parties cannot bring all conceivable disputes before arbitrators; some matters are reserved for the regular court. Arbitration may not give rise to legal consequences which cannot be determined freely by the parties. This means that a case of public order cannot be brought before arbitrators. A bankruptcy and a divorce, for example, can be pronounced only by the regular court. In agricultural tenancy cases, the agricultural tenancy divisions of the district courts are declared by law to have jurisdiction. It is subject to controversy whether the explicit designation of these courts by the law as having jurisdiction implies that arbitrators can never decide on agricultural tenancy cases.

The area in which arbitrators can have jurisdiction not only has restrictions, but – since 1986 – extensions as well. Under the current law, arbitrators can also have jurisdiction in cases where a dispute has not (yet) occurred. The law mentions as examples the mere determination of the characteristics or situation of a case ('quality arbitration'), the mere determination of the level of compensation or a sum of money due (for example in the form of a valuation), and an addition or change to a legal relationship (for example to provide for a gap in what the parties had agreed in a contract).

The law contains provisions, for example on the way in which arbitrators are appointed and the requirements to be set on them. The number of arbitrators must be uneven. If a justified doubt exists as to the impartiality or independence of an arbitrator, that arbitrator can be challenged. General provisions are included on the course of the proceedings. Permanent arbitral tribunals often have their own arbitration regulations in addition to this, which include more detailed provisions. If there are no such regulations, as a rule, arbitrators can determine the course of the proceedings. Under the current law, arbitrators can examine witnesses under oath. They can also appoint experts. At each stage of the proceedings, they may order the parties to appear in person at a hearing, in order to provide information or still make an attempt to settle the matter amicably.

Arbitrators decide by way of awards. The starting point is that they decide 'according to the rules of law'. If the parties have explicitly stated this in the contract on which the arbitration is based, however, they will make make an award 'based on reasonableness and fairness'. Irrespective of the description of the assignment, an arbitral tribunal must take account of the applicable commercial practices. In the award, arbitrators can decide on their own jurisdiction. If they declare that they lack jurisdiction to hear a case brought before them, the regular court will have jurisdiction. In that case, the court may not rule that the case still has to be settled by arbitrators. The arbitral tribunal decides by a majority of votes. Should a minority refuse to sign the award, the other arbitrators will state this at the bottom of the award.

Appeal from an arbitral award is possible only if the parties have arranged this in their contract, or if this is stipulated in the applicable arbitration regulations. An award can be implemented only after the interim relief judge of the court has given leave to do so at the request of one of the parties. Leave can be refused, particularly if the award, or the way in which it was decided on, is in conflict with public order or morality. The regular court can reverse an arbitral award on a limited number of grounds. I will return to the grounds for reversal below in § 6.

Numerous permanent arbitral tribunals exist for the Dutch agricultural sector. They generally derive their jurisdiction from general terms and conditions declared applicable to

contracts within certain sectors. The administrative office of several permanent tribunals is housed at the Institute for Agricultural Law in Wageningen.

2. *Binding decision*

For a proper understanding of Alternative Dispute Resolution (ADR) in the Netherlands, attention must be paid to binding decisions. This form of ADR is not based on legislation, but has developed in legal practice. A distinction can be made between two types of binding decisions.[1]

The first type is considered as an actual or pure binding decision. The parties to a contract sometimes turned out to need a binding decision by an independent expert, for example on the content of their legal relationship, without an actual dispute existing. Until 1986, arbitration was ruled out in the absence of a dispute. For this reason, parties resorted to appointing an expert (or possibly several experts) to take a decision, without the statutory rules on arbitration being applicable to that decision.

Besides this, a second type of binding decision arose in cases in which a dispute actually existed, but in which the parties, for reasons of their own, chose nevertheless not to subject this dispute to arbitration. An expert was appointed, who decided on the dispute without that decision being considered as an arbitral award.

Both types of binding decisions were accepted in legal practice, on the understanding that, according to established case law, a party could not be bound by such a decision if it was contrary to good faith. Since 1992, Dutch law has contained one statutory provision applicable to binding decisions, which pertains to exactly this aspect. Article 904 of Book 7 of the Dutch Civil Code (*Burgerlijk Wetboek*) provides in the first paragraph that a decision by a third party – not being an arbitral award – can be reversed if the binding force of the decision would be unacceptable in the given circumstances according to the criteria of reasonableness and fairness, owing to the content or the manner in which the decision was taken. I will return to this in § 6.

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[1] See H.J. Snijders, Nederlands arbitragerecht, Kluwer, Deventer, 2003, p. 45.

3. *Statutory Tribunals dealing with Rural Disputes*

Arbitration and binding decisions must be based on a contract concluded by the parties. This means that arbitration and binding decisions take place on a voluntary basis. The same holds for mediation, the third form of ADR.

Voluntariness in the true sense of the word does not always exist if a clause in which a form of ADR is prescribed is included in general terms and conditions. The existence of a Statutory Tribunal, implying that ADR is an obligation imposed by the government, is contrary to the starting point of voluntariness.

Until recently, Dutch legislation contained an exemplary model in which the legislator prescribed a disputes tribunal other than the regular court in the Seeds and Planting Materials Act (*Zaaizaad- en Plantgoedwet*). Under this Act, the Board for Plantbreeders' Rights (Raad voor het Kwekersrecht) is charged with the registration of varieties and special bred products in the Netherlands Register of Varieties (Nederlands Rassenregister) and with the granting of breeders' rights. Under Art. 59 of the Act, appeal from several decisions by the Board could not brought before the regular court, but before the Appeals Department (Afdeling van Beroep). When the Seeds and Planting Material Act 2005 entered into effect, proceedings at the Appeals Department were replaced by ordinary court proceedings.

The rules on the quality and safety of agricultural products deserve some special attention. At first sight, it seems obvious that these are rules of public law. The enforcement of rules of public law, however, does not always prove to be effective. In this context, several attempts have been made in the Netherlands to resort to private law, in the sense that farmers can market their products only if they have joined private inspection institutions and adhere to the rules set in that context. In that case, protection of the rights of those farmers is not left to the court, but to forms of ADR (particularly arbitration or binding decisions).

In court decisions, several of those attempts have been reversed. A good example is the rules on the quality of the raw milk delivered to a factory. The basis for this was laid long ago in rules of public law. Until a few years ago, the changeover to private law took place when milk factories were given the right, in order to implement rules of public law, to apply a reduction to the price to be paid to a dairy farmer if inspection showed that the quality of his milk was inadequate. Objection could be lodged against a decision to impose a reduction with the director of the milk factory concerned. If the latter did not find in his favour, the dairy farmer could lodge objection against the director's decision with the Complaints Committee of the Netherlands Controlling Authority for Milk and Milk Products (COKZ (Centraal Orgaan voor Kwaliteitsaangelegenheden in de Zuivel)). Appeal from decisions by the Complaints

Committee could then be brought before the Board of Appeal (Raad van Beroep) of the COKZ. The Complaints Committee and Board of Appeal gave decisions in the form of binding opinion. The private law system was set aside in a ruling by the Administrative Jurisdiction Division of the Council of State of 16 May 2000, in which it was decided that the milk factory's decision to impose a reduction had to be considered as an order by a government body, so that appeal had to be brought before the administrative court.[2]

It is very doubtful whether anyone benefited from this. The amounts of the reductions were generally limited to a few hundred euros. The low-threshold proceedings at the Complaints Committee and Board of Appeal were in line with the extent of the interests at issue. Furthermore, the Complaints Committee and Board of Appeal comprised experts in the field of the quality of raw milk. Dairy farmers whose price was reduced now have to resort to formal proceedings at a regular court with no understanding of the bacterial count, cell counts and quantities of growth-inhibiting substances permissible in milk.

In the context of opposing the use of hormones in calf breeding, more or less alongside the rules of public law, a private foundation was formed – the Veal Quality Assurance Board (*Stichting Kwaliteitsgarantie Vleeskalversector (SKV)*) – which can impose sanctions on calf breeders if hormones are found in their livestock. It was beyond any doubt that the sanctions of the SKV were many times more effective than the sanctions that could be imposed by the government under criminal law. All slaughterhouses in the Netherlands had joined the SKV. All of them did, after all, have an interest in hormone-free veal. Member slaughterhouses were only allowed to slaughter calves from member calf breeders. This means that calf breeders were in fact forced to join the SKV as well. In doing so, they subjected themselves to the foundation's sanction system. Within the framework of this sanction system, it was possible to test calves to be delivered to a slaughter house for the presence of hormones. Criminal law had no possibilities for this. Legal protection against the sanctions could be sought at the SKV Disputes Committee. This Committee also decided by way of binding decision. In three decisions, the Supreme Court of the Netherlands ruled that the private law sanction system was not compatible with Dutch criminal law.[3] The Advocate-General of the Supreme Court made the same judgement in his conclusion for the most recent ruling 'with heartfelt regret, but it cannot be otherwise'. The problem was that violations of the rules of public law were punishable under the Economic Offences Act (*Wet economische delicten*), while Art. 5 of this Act provides that in this case, no sanctions can be imposed other than the penalties and non-punitive orders included in that Act. An alternative is still being sought for

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[2] Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State) 16 May 2000, AB 2000, 316.

the sanction system of the SKV, which is just as effective without being considered as contrary to criminal law.

4. *Statutory Provisions dealing with Independent Assessors*

The phenomenon of the 'Independent Assessor' is unknown in the Netherlands. The binding advisor may come close to this. As already discussed in the foregoing, Dutch legislation has only one provision that is applicable to binding decisions, namely Art. 904 of Book 7 of the Dutch Civil Code.

5. Statutory Provisions dealing with mediation

Dutch legislation has no provisions pertaining to mediation. In a recent report on a fundamental revision of the Dutch law of civil procedure, it was argued that this should above all remain so. The authors are not advocates of statutory provisions; not of a court annexed variant, and certainly not of mediation in general.[4]

This does not mean that mediation is rejected in the Netherlands. Mediation has expanded enormously, especially in divorce practice. The possibilities of mediation in other subareas of law have been examined in experiments. Courts tend to point out the possibilities to parties to disputes who seem to be eligible for this not to have their case decided by a court judgment, but to allow a mediator to deal with it. There is, however, no question of coercion.

Voluntariness is first and foremost for mediation as well. This has to do with the fairly general opinion that mediation is not automatically better (or worse) than regular court proceedings, but that the two should be considered as complementary. Depending on the type of case, the situation or the persons concerned, sometimes one is preferable, sometimes the other.[5] In this context, it is important that in 80 to 90% of the commercial cases dealt with by courts, a hearing takes place as soon as the defendant has conducted a

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[3] HR 28 February 1997, NJ 1999, 732; HR 10 December 1999, NJ 2000, 8; HR 20 December 2002, NJ 2004, 450.

[4] Asser, Groen and Vranken, *Uitgebalanceerd, Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, Boom, 2006, p. 42.

[5] Idem, p. 35.

defence, and that during such hearings a settlement is reached in 45 tot 55% of the cases handled orally.[6]

The Dutch government is not absolutely enthusiastic about the 'Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters'[7]. The Dutch Minister of Justice is attempting to temper the European drive and to convince the European Commission and the other Member States that legislation at European level is not automatically desirable or necessary.[8]

For the time being, Dutch practice, in which the possibility is pointed out to parties, on a voluntary basis, to allow a mediator to deal with their dispute, is in line with the text of the proposal.[9] Nevertheless, the general impression is that it is preferable not to subject mediation to statutory provisions but allow it to develop in practice. The authors of the aforementioned report took the position that agreements can be made in the contract between the parties on which the mediation is based concerning referral to mediators (Art. 3), the quality of the mediation (Art. 4), the granting of entitlement to enforcement to the settlement agreement concluded during the mediation (Art. 5) and confidentiality (Art. 6). Beyond these matters, the proposal only regulates the suspension of prescription periods (Art. 7). They would prefer to see that the final Directive leaves the Member States the room to regulate or continue regulating these matters as far as possible by contract. Should this not be feasible, implementing provisions from the Directive, particularly those relating to confidentiality and suspension of prescription periods, in legislation will not be viewed as an insurmountable obstacle, 'provided one limits oneself to this and is not induced to enact more comprehensive provisions covering the entire mediation process'.[10]

6. *Appeals to the courts*

In the case of both arbitration and binding decisions, the possibility exists to present the decision to the regular court for review. The possibilities of the court to intervene are limited in both cases.

An arbitral award can be reversed only if:

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[6] Idem, p. 37.
[7] COM(2004) 718 final, 2004/0251 (COD), SEC(2004) 1314.
[8] Asser, Groen and Vranken, p. 42.
[9] See especially Art. 3 of the proposal.

- a valid arbitration agreement is lacking;
- the composition of the arbitral tribunal is contrary to the applicable rules;
- the arbitral tribunal has not kept to its assignment;
- the award was not signed or reasoned;
- the award, or the way in which it was arrived at, is in conflict with public order or morals.

The jurisdiction of the regular court revives as soon as an arbitral award is reversed, unless the parties have agreed otherwise. This means that the regular court deals further with and decides on the case itself after the award is set aside, unless the parties have agreed that the case must once again be placed in the hands of arbitrators.

Revocation of an arbitral award is possible in addition to reversal. There is cause for revocation if:

- the award is based wholly or partly on fraud discovered after the decision, committed by or with the knowledge of the other party to the proceedings;
- the award is based wholly or partly on documents that prove to be false after the decision;
- a party has obtained documents after the decision which had been withheld through the actions of the other party, and which would have influenced the arbitral tribunal's decision.

An application for reversal must be brought within three months after the award was filed with the court. An application for reversal must be brought within three months after the party concerned was informed of the reason for reversal.

Book 7 Art. 904 paragraph 1 of the Dutch Civil Code applies to the reversal of binding decisions. A binding decision can be reversed if the binding force of its content would be unacceptable in the given circumstances according to the criteria of reasonableness and fairness.

It was assumed for years that the regular court could only test the reasonableness of a binding decision. The wording of Book 7 Article 904 paragraph 1 – particularly the use of the word 'unacceptable' – also points in that direction. Nevertheless, in two recent rulings, the Supreme Court seems to have taken a more balanced position, by making a distinction between, on the one hand, a binding decision which is more in the nature of a court decision

[10] Asser, Groen and Vranken, p. 43.

and, on the other, a binding decision which cannot be considered as such.[11] The position is in line with the distinction made above between two types of binding decisions.

Both cases concerned a valuation. The Supreme Court held:

No general answer can be given to the question of the extent to which a binding decision must be justified. In principle, the more the binding decision is in the nature of a court decision, the more and better the decision of the binding advisors must be justified. Conversely, it is so that the more the assignment given to binding advisors is such that they have to determine an element of the legal relationship between the parties which has not been determined (fully), and the judgement they are asked to make is based more on intuitive insight, the lower the justification requirements are that can be set on that judgement.

These rulings come down to the fact that in reviewing binding decisions in the nature of a court judgment (or rather: arbitration), the court can set higher requirements on the justification. Both cases concerned the justification of binding decisions (of the other type). The question arises whether requirements may be set on binding decisions the more it is in the nature of a court judgment also in relation to fundamental legal principles other than the justification principle which are similar to the requirements applicable to court judgments and arbitration. In the literature, this question is answered in the affirmative.[12]

The law has no special period for invoking the reversal of binding decisions. In this context, the general prescription periods for invoking reversal apply: three years after the right to invoke a ground for reversal was granted to the party entitled to that right.[13] In general, the prescription period is three years after the binding decision became known to the party concerned.

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[11] HR 20 May 2005, NJ 2007, 114 and HR 24 March 2006, NJ 2007, 115.
[12] See for example Snijders, Ynzonides and Meijer, no. 401.
[13] Book 3 Art. 52 paragraph 1(d) of the Dutch Civil Code.