

ANNUAL REVIEW

Commercial arbitration

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Timo Jansen is a specialist in the prevention and resolution of corporate and contractual disputes. His extensive experience includes pre-contractual liability, M&A, joint ventures, directors' and shareholders' liability and franchises.

He acts in professional liability and fraud cases. His clients are mainly active in the insurance, retail and telecommunications sectors.

He studied law at Universiteit Utrecht and completed the Law & Economics master's programme. Thereafter he studied corporate litigation and advanced financial statement analysis in postgraduate specialisation courses at Grotius Academie and the Amsterdam Institute of Finance.

Netherlands ■

■ Q. Reflecting on the past 12-18 months, what key trends and developments do you believe have dominated the commercial arbitration space in the Netherlands?

JANSEN: The Dutch administration of justice established the Netherlands Commercial Court (NCC) on 1 January 2019. The NCC offers a swift resolution of international commercial disputes by specialised judges in the English language, against a slightly higher administration fee. With this initiative, the NCC is positioned as an alternative dispute resolution mechanism to arbitration. Because parties can only voluntarily appear before the NCC, a forum clause to that effect is required, similar to arbitration clauses in commercial contracts. Consequently, parties to a commercial contract can now choose between an arbitration clause or NCC clause, to which end the NCC itself drafted boilerplate clauses.

■ Q. Have any recent commercial arbitration cases gained your attention? What can they tell us about arbitration in the Netherlands?

JANSEN: The Yukos oil saga gained attention in Dutch jurisdictions. It emphasised the importance of The Netherlands as a legal hub in international business structures, which also proves to be a source for corporate litigation work, especially mismanagement proceedings before the Enterprise Chamber of the Amsterdam Court of Appeals.

■ Q. What challenges and issues exist for parties undertaking commercial arbitration in the Netherlands?

JANSEN: Parties undertaking commercial arbitration in The Netherlands face the challenge of selecting the right arbitrators and counsel to handle their dispute efficiently. Experience shows that parties often rely on branding rather than character. The misconception is that arbitration is a people business.

■ Q. In your opinion, how might the processes and protocols for conducting commercial arbitration be improved to enhance aspects such as speed, cost and efficiency for the benefit of the parties involved?

JANSEN: Speed, cost and efficiency would be improved if a hearing is scheduled as a first procedural step. If the hearing is suitably scheduled, all other procedural steps can be planned from that moment. This would take away one of the biggest frustrations – endless delays – that clients experience when undertaking commercial arbitration.

■ Q. How robust, would you say, is arbitral enforcement in the Netherlands? What can parties expect when trying to compel an award through local courts?

JANSEN: Arbitral enforcement is very robust. Parties can expect speedy proceedings. Although it cannot be excluded that an award will be challenged before a court, the threshold for successfully doing so is high.



■ Q. Would you advise companies to include arbitration provisions in their commercial agreements? What factors should they address when doing so?

JANSEN: Including arbitration provisions very much depends on the circumstances. The Dutch Civil Justice system is ranked number one worldwide in the Rule of Law Index 2017–2018 of the World Justice Project. Consequently, litigation in The Netherlands provides for effective, accessible and affordable dispute resolution, resulting in enforceable decisions, rendered without undue delay by unbiased officials. Typically, factors addressed by clients when considering arbitration include confidentiality, enforceability of an award in foreign jurisdictions under the New York Convention, expertise of arbitrators, raising a cost threshold for proceedings which provides a disincentive for frivolous claims, and arbitration compensation costs.

■ Q. How do you expect commercial arbitration to develop in the Netherlands over the coming months and years?

JANSEN: A Q4 2018 survey of our clients on how disputes are managed revealed that dispute resolution is considered a fact of corporate life. The question whether an increase in disputes is expected for 2019 was answered in the negative. Survey respondents expect the level of disputes to be similar to that seen in previous years. ■

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