The European Arbitration Review

2021

Netherlands

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The European Arbitration Review, across 15 chapters, and 97 pages, is part invaluable retrospective and part primer on the characteristics of different seats, with a little crystal-ball gazing thrown in for good measure. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, they capture and interpret the most substantial recent international arbitration events of the year just gone, with footnotes and statistics. This edition covers Austria, Finland, France, Italy, the Netherlands, Norway, Portugal, Russia, Spain, Sweden and Ukraine, and has overviews on econometrics; the direction of travel for construction disputes in Europe; and on the use (and non-use) of multiples for valuating things in investment treaty disputes, among other topics.

Netherlands

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Summary

IN SUMMARY

The Netherlands has a modern Arbitration Act (revised in 2015), securing efficiency and flexibility by providing an extensive degree of party autonomy and limiting administrative burdens and procedural delays. The main features of the legal framework are discussed below. We also discuss in detail the recent judgment of the Hague Court of Appeal in the setting aside proceedings relating to the arbitral award pursuant to which the Russian Federation was ordered to pay US$50 billion to three former indirect shareholders of oil company Yukos Oil.

DISCUSSION POINTS

- Legal framework for arbitration in the Netherlands
- Setting aside proceedings in respect of the US$50 billion arbitral awards against the Russian Federation

REFERENCED IN THIS ARTICLE

- Dutch Arbitration Act
- Netherlands Arbitration Institute
- the Court of Arbitration for Art
- The Hague Hearing Centre
- *Yukos shareholders v Russian Federation*

In the Netherlands, arbitration has traditionally been the most important form of dispute resolution (along with court litigation), particularly for the resolution of construction or trade disputes. Such disputes are usually brought before the Netherlands Arbitration Institute (NAI), which recently celebrated its 70th anniversary, or the Arbitration Board for the Building Industry. The Netherlands is also renowned as a place for arbitration of international disputes. There are many reasons why the Netherlands is an attractive seat for international arbitration; as the host state of many international courts and tribunals – including the International Court of Justice, the Permanent Court of Arbitration and the International Criminal Court, as well as many specialised arbitration institutions – the Netherlands offers a favourable legal and logistical environment for accommodating, administering and conducting international arbitral proceedings.

In 2018, the Court of Arbitration for Art (CAfA) was established by the NAI together with Authentication in Art, a not-for-profit foundation that promotes best practice in art, particularly in art authentication. The CAfA administers domestic and international arbitrations conducted by arbitrators with significant expertise in art and art law.

Another welcome addition is The Hague Hearing Centre, which opened its doors in 2019. This dedicated hearing centre offers state-of-the-art hearing facilities and is meant to serve various purposes, including the further facilitation of international arbitration in the Netherlands while supplementing the under-capacity of the Peace Palace and the

accommodation of the Dutch local division of the Unified Patent Court. A much-welcomed added benefit of seating arbitral proceedings in the Netherlands is that it has cost advantages over more expensive European venues such as Paris, Geneva or London.

Another important factor is that the Dutch legislature and the judiciary have a favourable attitude towards arbitration. Dutch arbitration law affords the parties considerable freedom to determine the rules of procedure, and the state courts take a liberal approach to arbitration. The state courts act as a safety net if issues arise that parties or arbitrators are unable to resolve, without interfering excessively in the arbitral process. They will decline jurisdiction if a party invokes a valid arbitration agreement that is applicable to the subject matter in dispute before that party raises all its other defences.

The Netherlands has a modern Arbitration Act (revised in 2015), securing efficiency and flexibility of the arbitral process by providing an extensive degree of party autonomy and limiting administrative burdens and procedural delays. The main features of the legal framework for arbitration in the Netherlands under the Dutch Arbitration Act are discussed below. Subsequently, the most recent arbitration developments in the Netherlands are addressed.

LEGAL FRAMEWORK FOR ARBITRATION IN THE NETHERLANDS

Each arbitration taking place in the Netherlands, regardless of the nationality of the parties or the subject matter of the arbitration, is subject to Book 4 of the Dutch Code of Civil Procedure (DCCP), also referred to as the Dutch Arbitration Act.[1] Most provisions are of a regulatory, non-mandatory nature. The Dutch Arbitration Act contains common provisions on the arbitration agreement, the appointment of arbitrators, the disclosure and challenge of arbitrators, procedure, witness and expert hearings, joinder and consolidation, competence-competence, the content of the award, correction and addition of the award, and recognition and enforcement.

NO RESTRICTIVE REQUIREMENTS FOR THE ARBITRATION AGREEMENT

All disputes are capable of being decided by arbitration, unless the subject matter would lead to legal consequences of which the parties cannot freely dispose.[2] Strictly speaking, the Dutch Arbitration Act does not impose special requirements on arbitration agreements beyond the general rules applicable to the formation of contracts. However, if an arbitration agreement is contested, its existence must be proven by an instrument in writing (or by electronic data fulfilling certain requirements). For this purpose, an instrument in writing that provides for arbitration or that refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or implicitly accepted by or on behalf of the other party. [3]

An arbitration agreement is considered and decided upon as a separate agreement. The arbitral tribunal has the power to decide on the existence and validity of the contract in which the arbitration agreement is incorporated, or to which the arbitration agreement is related.[4]

REMEDIES

The Dutch Arbitration Act distinguishes between three legal remedies that may be available to challenge an arbitral award: arbitral appeal, setting aside and revocation.

Appeal of the arbitral award to a second arbitral tribunal is possible only if the parties have agreed to this. Parties usually do not provide for the remedy of an arbitral appeal in

their arbitration agreement and neither do the rules of recognised arbitration institutes. A noteworthy exception to this are the rules of the Arbitration Board for the Building Industry, which do provide for the possibility of arbitral appeal.

Recourse to a court against a final or partial final arbitral award that is not open to appeal in arbitration, or a final or partial final award rendered on arbitral appeal, may be made only by an application for setting aside or revocation.[5]

The setting aside of arbitral awards is considered an extraordinary and restricted legal remedy. The available grounds for setting aside closely resemble those laid down in the New York Convention. The court may set aside the award only if:

- a valid arbitration agreement is lacking;
- the arbitral tribunal was constituted in violation of the applicable rules;
- the arbitral tribunal has manifestly not complied with its mandate;
- the award is not signed or does not contain any reasons whatsoever; or
- the award, or the manner in which it was made, violates public policy.

The set-aside proceedings of arbitral awards are limited to a maximum of two instances. The application for setting aside must be addressed to the court of appeal of the district of the seat of arbitration. On 1 January 2019, the Netherlands Commercial Court of Appeal (NCC) was instituted. This is the first appeals court in the Netherlands with English as its working language. The NCC can, if the parties so agree and the seat of arbitration is located in Amsterdam, hear set-aside applications in English. After the court of appeal has rendered a decision on the application for setting aside, the parties can appeal in cassation to the Supreme Court. The parties may, however, agree to exclude the possibility of cassation and, by doing so, limit the review by state courts to a single instance.

Revocation can be sought in case of fraud, forgery or withheld documents. However, granting this remedy is exceptional in practice.

PARTIAL SETTING ASIDE

Under the Dutch Arbitration Act, it is possible to have an arbitral award set aside only in part, provided that the remainder of the award is not inextricably linked to the part of the award that is to be set aside. In the event that the arbitral tribunal has awarded in excess of, or otherwise differently from, what was claimed, the arbitral award shall be partially set aside to the extent that the part of the award that is in excess of, or different from, the claim can be separated from the remainder of the award.[6] The Supreme Court has ruled that an application for the setting aside[7] of an arbitral award implicitly also entails an alternative application for a partial setting aside. This means that, in practice, an award may be set aside in part even where the applicant has not explicitly requested the court to partially set aside the award.

REMISSION

The jurisdiction of the state courts revives only if the arbitral award is set aside due to the absence of a valid arbitration agreement.[8] In the event that the award is set aside for another reason, the court will refer the case back to the arbitral tribunal.

The Dutch Arbitration Act also provides for the possibility for the court of appeal to suspend the set-aside proceedings to allow the arbitral tribunal to correct a wrong by resuming

the arbitral proceedings or by taking another measure that the arbitral tribunal deems appropriate. Such a decision of the court of appeal cannot be appealed.

RECOGNITION AND ENFORCEMENT

The Netherlands has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in respect of which it has elected to enforce only awards from other contracting states – the 'reciprocity' reservation.

If no treaty concerning recognition and enforcement is applicable, or if an applicable treaty allows a party to rely upon the law of the country in which recognition or enforcement is sought, recognition and enforcement may be sought on the basis of the Dutch Arbitration Act. The grounds for refusal resemble those in the New York Convention. Leave for enforcement may be denied, if:

- the party against whom recognition or enforcement is sought asserts and proves that a valid arbitration agreement under the applicable law is lacking;
- the arbitral tribunal is constituted in violation of the applicable rules;
- the arbitral tribunal has manifestly not complied with its mandate;
- 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;
- the arbitral award has been set aside by a competent authority of the country in which that award is made; or
- the court finds that the recognition or enforcement would be contrary to public policy.

The Dutch Arbitration Act provides for an asymmetric system of appeal regarding enforcement decisions. Only decisions denying leave for enforcement can be appealed. In other words, the decision to grant leave for enforcement cannot be appealed. The rationale for this is that the remedy of setting aside is considered an adequate safeguard for the party opposing recognition and enforcement. On the basis of article 3 of the New York Convention, which provides that '[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Treaty applies than are imposed on the recognition or enforcement of domestic arbitral awards', the Supreme Court has held that the asymmetric system of appeal also applies to enforcement of foreign arbitral awards in the Netherlands pursuant to the New York Convention.[9]

INTERIM MEASURES

The Dutch Arbitration Act contains quite distinctive provisions relating to interim measures. There are three ways for parties to obtain interim relief under the Dutch Arbitration Act. First, parties are allowed to request that an arbitral tribunal that has already been constituted takes interim measures at any stage of the proceedings on the merits.[10] The interim measures should relate to the claim or counterclaim in the pending arbitral proceedings, and shall only apply for the duration of the proceedings. Second, parties to an arbitration agreement may agree that a separate arbitral tribunal may be appointed, irrespective of the arbitral proceedings on the merits pending, with the power to award interim relief at the request of one of the parties.[11] Third, interim measures can be obtained through state court proceedings if the requested measure cannot be obtained, or cannot be obtained in a

timely manner, in arbitration.[12] Only state courts can provide for prejudgment attachment or precautionary seizure. In the context of the International Chamber of Commerce (ICC) Arbitration Rules, the Amsterdam District Court held in a January 2017 decision that if interim measures can be obtained pursuant to the Emergency Arbitrator Rules, the Dutch state courts do not in principle have jurisdiction to order such measures. [13]

The provisions in the Dutch Arbitration Act regarding interim measures in arbitration are based on the strong and long-standing Dutch tradition of ***kort geding***, which can be characterised as provisional or preliminary relief proceedings before the state courts. Through these proceedings, which can be initiated prior to the proceedings on the merits, a party can obtain provisional relief for the preservation of rights or a status quo. The interim measures that are obtainable through a ***kort geding*** are generally much broader than those typically available in other jurisdictions. They can include, for instance, enforcement of a contract, specific performance, freezing of assets, blocking of a share transfer, payment into escrow accounts or providing a bank guarantee. Courts provide for speedy and easy access, and generally show little hesitation in granting interim measures. When the requesting party can show that the requested interim measure is of a provisional nature and that, taking the interests of the parties into consideration, an immediate interim measure is required, the court is likely to award such a measure.[14] Once awarded, the requesting party is not required to initiate proceedings on the merits. The interim measure is enforceable regardless of whether further proceedings are initiated.

The stand-alone arbitral summary proceedings are a fairly unique and successful feature of NAI arbitration that has been incorporated into the revised Dutch Arbitration Act. Similar provisions were introduced in the 2012 ICC Arbitration Rules (known as Emergency Arbitrator provisions). However, there are a number of significant differences. The 2012 and 2017 ICC Arbitration Rules enable parties to seek 'urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal' (article 29 and appendix V to the 2017 ICC Arbitration Rules). By contrast, the Dutch Arbitration Act merely requires that the interim measure requested is urgent. An advantage of the Dutch Arbitration Act, therefore, is that the parties do not need to demonstrate that the relief sought 'cannot await constitution' of the arbitral tribunal. Furthermore, the ICC emergency arbitrator can only issue an order, which is not an arbitral award and for that reason arguably not enforceable under the New York Convention. The Dutch Arbitration Act, however, allows the tribunal in summary proceedings to render an arbitral award, which can be declared enforceable simply by leave of enforcement granted by the competent state court. Finally, under the 2012 and 2017 ICC Arbitration Rules, the ICC emergency arbitrator's order must be followed by arbitral proceedings on the merits at all times. Under the Dutch Arbitration Act this follow-up is not compulsory. The party seeking urgent interim relief is not required to initiate arbitral proceedings on the merits. The parties may therefore use stand-alone arbitral summary proceedings as their only means of dispute resolution and, in practice, do so on a regular basis.

It should be noted that summary arbitral proceedings are only available when the seat of the arbitration is in the Netherlands. In contrast, interim measures can be obtained through the Dutch state courts if parties are bound by an arbitration agreement, regardless of the seat of the arbitration.

MAXIMISED PARTY AUTONOMY

Parties choosing the Netherlands as a forum for the resolution of their arbitral disputes enjoy broad freedom in determining the procedural rules to be followed by the arbitral tribunal in conducting the proceedings. Examples include the parties' right to exclude the authority of the arbitral tribunal to order the disclosure of documents or to order the appearance of a witness or expert.

REDUCED ADMINISTRATIVE BURDEN

The compulsory filing of arbitral awards with a district court has been abolished by the 2015 revision of the Dutch Arbitration Act; such a filing is only required if the parties have agreed to it. The possibility for parties to use electronic means where the law requires a written form has also been introduced with the revised Dutch Arbitration Act. These features help reduce the costs involved in arbitration and further enhance the competitive position of the Netherlands as a venue for both domestic and international arbitration.

CONFIDENTIALITY

Although confidentiality is a generally accepted principle in arbitration, there is no specific provision for it in the Dutch Arbitration Act. The Minister of Justice, in response to questions posed by parliament on the 2015 revision of the Dutch Arbitration Act, reiterated that confidentiality is the rule and public access the exception. It nevertheless remains for the parties to decide whether to include a confidentiality provision in their arbitration agreement, to opt for a set of arbitration rules that includes such a provision or request the arbitral tribunal to impose confidentiality obligations on the parties.

CHALLENGING ARBITRATORS

The Dutch Arbitration Act provides for a district court to decide on the merits of any challenge to an arbitrator.[15] In accordance with international best practices, parties can agree on an alternative procedure, such as authorising the arbitration institute administering the dispute to rule on the challenge.[16]

NOTEWORTHY RECENT DEVELOPMENTS

Setting Aside Proceedings In Respect Of The US$50 Billion Arbitral Awards Against The Russian Federation

On 18 February 2020, the Hague Court of Appeal ruled in set aside proceedings that the arbitral awards ordering the Russian Federation to pay US$50 billion to three former indirect shareholders of oil company Yukos Oil – Hulley Enterprises, Yukos Universal and Veteran Petroleum – should be reinstated.[17] De Brauw represented the former shareholders in the set aside proceedings.

The saga is rooted in allegations made over a decade ago that officials had manipulated the legal system to bankrupt Yukos Oil to expropriate its assets. The former shareholders sought compensation in arbitration proceedings under the Energy Charter Treaty (ECT). On 18 July 2014, the arbitral tribunal, consisting of Yves Fortier QC, Stephen Schwebel and Charles Poncet, and seated in The Hague under the auspices of the Permanent Court of Arbitration, ordered Russia to pay over US$50 billion in compensation for the indirect expropriation of Yukos Oil.

The Russian Federation initiated setting aside proceedings before the Hague District Court. By judgment of 20 April 2016, The Hague District Court initially set aside the Yukos awards on the ground that the arbitral tribunal that had rendered the awards lacked jurisdiction.

Accordingly, the Court annulled the three interim awards of 30 November 2009, as well as the three final awards of 18 July 2014. The decision by the District Court to set aside the award was made on the grounds that while Russia's government was a signatory to the ECT, the Duma had not ratified the treaty. In its judgment of 18 February 2020, the Court of Appeal dismissed this argument on the grounds that under Russian law even treaties that require ratification are provisionally applied by the government when the treaty is signed, and it pointed to other treaties that have been in force despite not being ratified.

Once the Court of Appeal overturned that element, it moved on to consider the other grounds for setting aside advanced by the Russian Federation. Yukos Oil's assets were seized following its prosecution for tax offences and the Russian Federation had argued that the only authority with the power to consider whether these penalties amounted to an expropriation was the Russian tax authority. The court rejected this argument, stating that while the ECT allowed the tribunal to take the tax authority's views into account, it could make its own determinations. Similarly, the court dismissed challenges to the constitution of the tribunal, the calculation of the award, and the reasoning for its award. It further rejected the argument that the award was a violation of public order and good morals by, among others, ignoring fraud by the shareholders – the 'unclean hands' argument. A major point of contention had been the role played in the award by PCA assistant Martin Valasek. Russia had alleged that Valasek had written various parts of the award, rather than simply assisting the panel. Russia claimed that the tribunal had delegated responsibility to an unaccountable assistant. The Court of Appeal disagreed, however, finding that even if Valasek had written part of the award, it did not constitute a breach of the arbitral rules.

The Russian Federation has filed an appeal to the Dutch Supreme Court.

Endnotes

1 For an extensive commentary on important elements of arbitration law in the Netherlands, see B van der Bend, M Leijten and M Ynzonides (eds),***A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law***, Kluwer Law International, 2009. A new edition is forthcoming. ^ Back to section

2 Article 1020 DCCP. Restrictions may apply in cases concerning, eg, intellectual property rights, bankruptcy law and company law. ^ Back to section

3 Article 1021 DCCP. ^ Back to section

4 Article 1053 DCCP. ^ Back to section

5 Article 1064 DCCP. ^ Back to section

6 Article 1065(5) DCCP. ^ Back to section

7 Supreme Court, 25 April 2009 (International Military Services/Iran II), NJ 2010/171, ECLI:NL:HR:2009:BH3137. ^ Back to section

8 Article 1067 DCCP. ^ Back to section

9 Supreme Court, 25 June 2010, Case No. 09/02566, ECLI:NL:HR:2010:BM1679, NJ 2012/55 and Supreme Court, 31 March 2017, Case No. 16/02825, ECLI:NL:HR:2017:555. Back to section

10 Article 1043b(1) DCCP. Back to section

11 Article 1043b(2) DCCP. Back to section

12 Article 1022a DCCP. Back to section

13 District Court of Amsterdam, 12 January 2017 (Cygne/COFCO), ECLI:NL:RBAMS:2017:282. Back to section

14 An award may be rendered within a matter of days after submission of the request. Back to section

15 Article 1035(2) DCCP Back to section

16 Article 1035(7) DCCP. Back to section

17 The Hague Court of Appeals 18 February 2020, ECLI:NL:GHDHA:2020:234. Back to section

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