The European Arbitration Review

2020

Netherlands

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Across 15 chapters, and 88 pages, the European Arbitration Review 2020 provides an invaluable retrospective from 31 authors. Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular seat.

This edition covers Austria, England and Wales, Finland, France, Germany, Italy, The Netherlands, Norway, Poland, Portugal, Russia, Spain, Sweden, and Ukraine. Among the nuggets it contains:

GAR Global Arbitration Review

Netherlands

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Summary

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, a short distance from the Peace Palace. In autumn 2019, the official International Opening Conference of this new centre is due to take place. 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 of an arbitral award implicitly also entails an alternative application for a partial setting aside.[7] 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

The Enforcement Of Annulled Arbitral Awards: Maximov V NMLK And Diag V The Czech Republic

As follows from our contributions to previous editions of *The European and Middle Eastern Arbitration Review*,[17] there is a significant amount of recent case law regarding the circumstances under which state courts can recognise foreign awards annulled at the seat of arbitration.

Article V of the New York Convention lists the exclusive grounds for refusing recognition and enforcement of an arbitral award. Recognition and enforcement 'may be refused', among other things, if the arbitral award 'has been set aside . . . by a competent authority of the country in which . . . that award was made'.[18] The ambiguous 'may be refused' in article V – similar language is included in articles 1075 and 1076 DCCP – has prompted the question as to whether a court may nevertheless decide to enforce an annulled award.[19]

In the current academic debate over the enforcement of annulled arbitral awards, the ***Yukos Capital v Rosneft*** case is often mentioned as an example of the enforcement of a foreign arbitral award that has been set aside in the place of the seat. In that case the Amsterdam Court of Appeal granted leave for enforcement of arbitral awards that had been set aside by the Russian state courts.[20] Since the Dutch Arbitration Act provides for an asymmetric system of appeal pursuant to which only decisions denying leave for enforcement can be appealed in cassation, the decision of the Amsterdam Court of Appeal to grant leave for enforcement was not tested by the Supreme Court.

The Supreme Court had the opportunity to provide more guidance regarding the possibilities to grant leave for enforcement of an annulled arbitral award, and the room for judicial discretion in this respect, in its recent decision in the ***Maximov v NMLK*** case.[21] The case concerned the attempts of Maximov to enforce an arbitral award against NMLK that had been set aside by the competent courts of the seat of the arbitration in Moscow. Notwithstanding the setting side of the arbitral award, Maximov was seeking enforcement of the arbitral award in several jurisdictions, including the Netherlands.

The Amsterdam Court of Appeal initially held that an arbitral award that has been set aside in the place of the seat of the arbitration can only be enforced in exceptional circumstances under the New York Convention as well as Dutch arbitration law.[22] The Court subsequently held that there were no such exceptional circumstances present and denied Maximov leave for enforcement of the arbitral award. Maximov filed an appeal in cassation against this decision, arguing that article V of the New York Convention does not limit the enforcement of an annulled arbitral award to exceptional situations, but instead gives the competent state courts wide discretion to grant leave for the enforcement of an annulled award.

The Supreme Court upheld the decision of the Amsterdam Court of Appeal. Interpreting article V of the New York Convention in accordance with the customary rules of international law on interpretation codified in articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT), the Supreme Court considered that the different authenticated translations of the New York Convention provide for diverging meanings of this provision. Whereas the English text with the phrase 'may be refused . . . only if' seems to provide the court hearing

an enforcement application for an annulled arbitral award with some room for discretion, the French text rather suggests that this provision leaves no room for discretion. The Supreme Court considered that subsequent practice of states parties regarding the article's interpretation and application is equally divergent, and that the New York Convention's negotiating history, likewise, does not provide a decisive answer as to which of the different meanings should take precedence. As such, in accordance with article 33 VCLT, the Supreme Court held that the different authenticated texts are best reconciled if article V is interpreted to mean that courts enjoy some discretion in their decision to recognise and enforce a foreign arbitral award, even if one of the grounds for refusal listed in this article has materialised. The Court attached weight in this regard to the fact that the purpose of the New York Convention is to further facilitate and expand the possibilities for the recognition and enforcement of foreign arbitral awards. According to the Court, this interpretation is in accordance with the English text, while not excluded by the French text, since the phrase 'ne seront refusées . . . que si' should be taken to merely stress the limitative character of the grounds for refusal listed by article V. The Supreme Court agreed with the Amsterdam Court of Appeal that the discretion that accordingly exists under article V forms an exception to the general system for recognition and enforcement provided under this article, and that, as such, its use should be limited to exceptional circumstances. As examples of such exceptional circumstances, the Supreme Court mentions the case in which the foreign arbitral award has been set aside at the seat of arbitration on grounds other than those provided for by article V of the New York Convention, or on grounds otherwise unacceptable by international standards. Relying on the Court of Appeal's finding that no such circumstance characterised the Russian setting aside of the award that Maximov was seeking to enforce, the Supreme Court concluded that, in accordance with article V, Maximov should therefore be denied leave for enforcement.

The Supreme Court reaffirmed this approach in a subsequent decision in the ***Diag v the Czech Republic*** case.[23] In this case, Diag requested the recognition and enforcement of part of a series of interim, partial and final arbitral awards that had all been subject to a review procedure foreseen by the parties in the arbitration agreement. While the interim award and partial award had in relevant part been upheld upon review, the outcome of the review of the final award was the issuance of a 'resolution' discontinuing the arbitral proceedings on the ground that the partial award had exhaustively and finally settled the dispute between the parties. Consequently, the resolution explained, the partial award acquired res judicata effect, preventing further hearing of the matter, and rendering later decisions on the same issues without effect. The Amsterdam provisional relief judge, and later the Amsterdam Court of Appeal, therefore denied Diag's request for the recognition and enforcement of the final award, which as a result of the resolution could no longer qualify as a valid, final and binding arbitral award susceptible to recognition and enforcement in accordance with article III of the New York Convention. Diag appealed this decision in cassation, arguing (among other points) that the Court of Appeal had wrongly relied on article III of the New York Convention, whereas it should have based its decision on and should have granted leave for enforcement pursuant to article V(1)(e) of the Convention. The Supreme Court, however, upheld the decision of the Amsterdam Court of Appeal. It considered that even if the Court of Appeal had based its decision on article V(1)(e) of the Convention, it would still have reached the same conclusion. In the Supreme Court's view, the effect of the resolution was the setting aside of the final award, and the recognition and enforcement of this award should therefore, in accordance with article V(1)(e), in principle be refused. No meaning should be attached in this regard, the Supreme Court considered, to the fact that the resolution did not explicitly state that its effect would be the setting aside of the final award. The Supreme Court

continued, confirming its decision in ***Maximov vNMLK***, that in exceptional circumstances the Court of Appeal nevertheless could have decided to recognise and grant leave for the enforcement of the final award. It concluded, however, that Diag had not argued for this exception, and that in any case it did not consider that any such circumstance had occurred in the present case.

Ecuador V Chevron And TexPet

A case worth mentioning is ***Ecuador v Chevron and TexPet***. From the 1970s until the early 1990s, TexPet operated a consortium for the exploration and extraction of oil in Ecuador. Following its withdrawal from Ecuador, a group of indigenous people claimed to have suffered damage resulting from severe environmental pollution. The indigenous people first lodged proceedings in New York, but after TexPet had successfully sought the dismissal of those proceedings on forum non conveniens grounds, the claimants refiled their action in the Lago Agrio Court in Ecuador. In 2009, Chevron and TexPet started an arbitration in The Hague under the US–Ecuador Bilateral Investment Treaty, claiming that the Lago Agrio proceedings breached Chevron's and TexPet's rights under a settlement agreement with Ecuador. Later, Chevron and TexPet added a due process complaint, alleging that the indigenous people were supported by Ecuador, and that the Lago Agrio proceedings were tainted by fraud. Until now, the arbitral tribunal has declined to make any substantive decision on these due process allegations.

In February 2011, by way of a procedural order, the arbitral tribunal ordered Ecuador to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against Chevron in the ***Lago Agrio*** case. Later that month, the Lago Agrio court awarded a multibillion-dollar judgment against Chevron. That judgment became enforceable when Chevron's appeal was rejected by an Ecuadorian court of appeal. At Chevron's request, the tribunal subsequently converted its procedural orders into two interim awards, and made it explicit that its orders were also directed to the Ecuadorian judiciary. After the indigenous people had sought to enforce the ***Lago Agrio*** judgment in Argentina, Brazil and Canada, the arbitral tribunal declared that Ecuador had violated these two interim awards because Ecuador, including its judicial branch, had not prevented the enforcement of the ***Lago Agrio*** judgment by the indigenous people.

In January 2014, Ecuador requested the setting aside of four interim awards and the first partial award. For the arbitration community, two of Ecuador's grounds for setting aside are particularly interesting. Ecuador argued that, even if a valid arbitration agreement existed, the power under the BIT to adjudicate on the state liability of Ecuador does not bring with it the power to give binding instructions on how to resolve civil proceedings between private parties pending in its courts. Ecuador also argued that the tribunal cannot lawfully decide on the right of the indigenous people to enforce the ***Lago Agrio*** judgment, without them being a party to the arbitration.

In its decision of 18 July 2017,[24] The Hague Court of Appeal held that the arbitral tribunal's interim measures did not violate public order, because the interim measures did not require Ecuador to exert any influence over the Ecuadorian courts in respect of the outcome of any legal proceedings or on the content of any judgment rendered. An order directed at a state to (merely) suspend or to have suspended a judgment does not in itself violate public order, in the Court of Appeal's view. Although the Court of Appeal acknowledged that the interim relief measures imposed by the arbitral tribunal may well have adversely affected the Ecuadorian

citizens who have an interest in execution of the ***Lago Agrio*** judgment and who may have suffered losses as a consequence of the suspended execution, this, according to the Court of Appeal, does not imply that the arbitral tribunal should have refrained from the contested interim relief measures. According to the Court of Appeal, the arbitral tribunal's interim measures imposed the (implicit) obligation on Ecuador to take the rights and interests of the Ecuadorian citizens into account in the execution of the interim measures. In April 2019, the Dutch Supreme Court confirmed the decision of the Hague Court of Appeal.[25]

Endnotes

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