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The Netherlands





The Netherlands

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A. Legislation and rules

A.1 Legislation

In the Netherlands, arbitrations seated in the Netherlands and commenced after 1 January 2015 are governed by the 2015 Arbitration Act. Arbitrations commenced before that date, as well as related court proceedings, continue to be governed by the 1986 Arbitration Act. Both acts were inspired by the 1986 UNCITRAL Model Law and contain fairly standard and arbitration-friendly provisions relating to the arbitration agreement, arbitrators (appointment, disclosures and challenges), procedure, witness and expert hearings, competence-competence and the content of the arbitral award.³

The Netherlands is a party to various international treaties relating to international arbitration. The New York Convention has been in force in the Netherlands since 1964. Consequently, arbitral awards that are rendered in another New York Convention signatory state and which, according to the competent Dutch court, satisfy the criteria from that convention are recognized and can be enforced in the Netherlands.⁴ As will be discussed in Section B below, in the past year the Netherlands Supreme Court rendered two notable judgments in relation to enforcement under the New York Convention. The

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³ We refer to our discussion in prior editions of the *Yearbook*.

⁴ The Netherlands has made the "reciprocity reservation": the Convention applies if the state where the award was rendered is also a party to the Convention.

Netherlands has also been a party to the ICSID Convention since it entered into force in 1966. Protection of international investments is further boosted by an extensive network of bilateral investment treaties (BITs).⁵ The Netherlands has signed the 2014 UN Convention on Transparency in Treaty-based Investor-State Arbitration, but has not yet ratified this treaty.⁶

A.2 Institutions, Rules and Infrastructure

The Netherlands is a host to various international courts and tribunals. The Netherlands Arbitration Institute (NAI), founded in 1949, is seated in Rotterdam and administers both national and international cases.⁷ The 1913 Peace Palace in The Hague houses both the Permanent Court of Arbitration, which administers international investor-state and state-to-state disputes, and PRIME Finance, an institution founded in 2012 in order to promote the settlement of complex financial disputes before panels of financial experts. Other notable examples of institutes administering international cases are the Court of Arbitration for the Building Industry and TAMARA, which administers disputes involving shipping, transport and logistics. Several other arbitration institutes are specialized in various sorts of business, commodities and sports.

In parallel with the 2015 revision of the Arbitration Act, the NAI, the Court of Arbitration for the Building Industry and TAMARA amended their arbitration rules as well. Over the past year, no changes

⁵ See eg. investmentpolicyhub.unctad.org, which mentions 108 bilateral investment treaties concluded by the Netherlands, of which 90 are currently in force. The EU Commission is pushing for the termination of BITs that were concluded with states that are — now, since 2004 or 2007 — EU member states (“intra-EU” BITs), arguing that a sufficient level of protection would be ensured by the EU “acquis”.

⁶ See uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

⁷ Detailed statistics of the arbitrations administered by the NAI can be found in its annual reports, published at its webpage www.nai-nl.org. A selection of, *inter alia*, notable NAI arbitral awards is published in a quarterly Dutch journal on arbitration (*Tijdschrift voor Arbitrage*).



were made to the 2015 versions of these sets of rules. We refer to our coverage of these rules in prior editions of the *Yearbook*.

In terms of infrastructure, in early 2018 “The Hague Hearing Centre” is expected to be opened, a short distance from the Peace Palace. It promises to offer excellent additional hearing facilities for international arbitrations and may also accommodate the Dutch division of the Unified Patent Court and serve as an additional location for the Netherlands Commercial Court.

B. Cases

In 2017, the Netherlands Supreme Court rendered two notable judgments in the field of international arbitration, both relating to the recognition and/or enforcement of foreign arbitral awards governed by the New York Convention.

Firstly, on 31 March 2017 the Netherlands Supreme Court rendered a judgment in proceedings in which the applicant sought recognition and enforcement of an arbitral award that had been rendered in New York State, primarily on the basis of the New York Convention.⁸ The grounds raised provided the Supreme Court with an occasion to shed light on two aspects of appeal remedies in Dutch *exequatur* proceedings in respect of awards rendered abroad in a New York Convention signatory state. To summarize from previous editions of the *Yearbook*: in national situations, no possibility of appeal exists for the defendant once the court of first instance has granted the applicant leave to enforce the award. By contrast, the applicant does have possibility of appeal, in the event that the court of first instance has dismissed the application. This phenomenon has been referred to in case law and legal doctrine as an “asymmetric appeal” (which asymmetry is not uncommon in Dutch procedural law relating to *ex parte* decisions). Naturally, under both the 1986 Arbitration Act and the 2015 Arbitration Act, the defendant does have the possibility to initiate setting-aside proceedings. This can be done at two moments in

⁸ Netherlands Supreme Court 31 March 2017, ECLI:NL:HR:2017:555 (*Nelux a.o./Y*).

time: (a) within a three month time period after the arbitral award has been rendered, or (b) within a three month time period after notification by the applicant of the defendant of a decision by a Dutch court to grant leave to enforce the arbitral award.⁹ Hence, the “asymmetry” in the parties’ appeal possibilities in *exequatur* proceedings is balanced (to some extent) by alternative remedies that the defendant has at its disposal. For that matter, the applicant in national *exequatur* proceedings does not need to apply for a decision to recognize an arbitral award, since final domestic arbitral awards have a binding status (*res judicata* effect) by operation of law.¹⁰

In a ground-breaking decision in one out of many cases relating to the former Russian oil company Yukos, the Netherlands Supreme Court in 2010 ruled that Yukos’ adversary party Rosneft was unsuccessful in its appeal against a decision rendered by the Court of Appeal in which, on the basis of the New York Convention, leave had been granted to Yukos to enforce arbitral awards that been rendered in Russia.¹¹ Essentially, the Netherlands Supreme Court had ruled that Article III of the New York Convention requires non-discrimination: no “substantially more onerous conditions or higher fees or charges” may be imposed upon the applicant seeking recognition and/or enforcement of a foreign arbitral award covered by the New York Convention than those that are being imposed in domestic situations. And since, as discussed, in domestic situations there is no possibility of appeal for the defendant once the court of first instance grants leave to enforce the award, the Netherlands Supreme Court made clear that no such possibility exists under the application of the New York

⁹ Article 1064 DCCP (old) and Article 1064a (2) DCCP (new).

¹⁰ The exception is, of course, the situation in which the arbitral award has been set aside or has been revoked by the competent court (Article 1064 DCCP (old)/DCCP (new)).

¹¹ Netherlands Supreme Court, ECLI:NL:HR:2010:BM1679 (*Rosneft/Yukos Capital*). The awards had been set aside by the Russian state courts, but the Amsterdam Court of Appeal had found that, in view of fundamental due process requirements, the Russian setting-aside state court judgments violated Dutch public order. Before that, the District Court, acting in first instance, had denied the leave sought by Yukos Capital.



Convention either. The Supreme Court formulated an important caveat: naturally, the lack of an appeal possibility may not entail that the defendant would be prejudiced to such extent that it would no longer have a “fair trial” within the meaning of Article 6 of the European Convention on Human Rights. And, the Supreme Court continued, in that respect it is relevant whether or not the foreign law of the seat of the arbitration provides for the remedies of setting-aside and revocation proceedings.¹²

This asymmetric appeal system only applies in situations covered by the New York Convention; not in situations in which recognition or enforcement of an award from a non-signatory state has been applied for.¹³ Under the 2015 Arbitration Act, this line of case law still stands.¹⁴ In the present judgment of 31 March 2017, the Supreme Court makes express reference also to provisions of the 2015 Arbitration Act (even though the proceedings were conducted under the 1986 Arbitration Act).¹⁵

¹² Strictly speaking, the Supreme Court referred to “setting-aside or [ie, not “and/or”] revocation proceedings”. This may be an unintentional error, since revocation proceedings can often, depending on the law of the seat of the arbitration, only be conducted in extreme cases, such as instances of fraud.

¹³ Netherlands Supreme Court 24 December 2010, ECLI:NL:HR:2010:BO4929 (*Vastint/Svensson*) and Netherlands Supreme Court 17 April 2015, ECLI:NL:HR:2015:107 (*NSRL/Kompas*). As noted, the Netherlands has made the reciprocity reservation. Accordingly, Dutch Courts apply the New York Convention only in instances in which the New York Convention is equally in force in the state of the seat of the arbitration.

¹⁴ The Dutch legislature has not codified this case law, but has endorsed it in explanatory notes to the bill for the 2015 Arbitration Act. The Netherlands Supreme Court, and the lower courts alike, have applied this established line of case law in various judgments under the regime of the 2015 Arbitration Act.

¹⁵ Under the 1986 Arbitration Act the (Presidents of) District Courts act as courts of first instance, which allows the applicant two potential rounds of appeal. Under the 2015 Arbitration Act, the Courts of Appeal act as courts of first instance in recognition and/or enforcement proceedings regarding arbitral awards rendered abroad, which allows the applicant only one appeal remedy, on limited legal grounds, before the Netherlands Supreme Court.

In the present case, the applicant had commenced recognition and enforcement proceedings before the (President of the) District Court, in compliance with the 1986 Arbitration Act.¹⁶ The District Court rendered a favourable declaratory decision: the arbitral award was being recognized in the Netherlands. It refused to grant leave to enforce the arbitral award, since the defendant, Nelux, had already furnished securities in accordance with the arbitral award. Nelux appealed the District Court's decision before the Court of Appeal, which found the appeal inadmissible. Nelux then went on to appeal the Court of Appeal's decision before the Supreme Court.

Nelux's first of two arguments was that the non-discrimination provision in the New York Convention (Article III) would only prevent an appeal with respect to leave granted for the enforcement of an arbitral award; not an appeal in respect of the mere recognition of an arbitral award. The Netherlands Supreme Court disagreed. It ruled that Article III of the New York Convention applies with respect both to applications for recognition and enforcement. It simply stated that in cases covered by the New York Convention no appeal remedy exists with respect to either a decision to recognize the arbitral award or a decision to grant leave to enforce the arbitral award, subject to the fair trial exception.

In its second and final argument, Nelux invoked the fair trial exception. It stated that in the present situation there was no equality of arms, because federal US arbitration law would not provide for a second, alternative term to commence setting-aside proceedings (ie, after notification of the court decision to grant leave to enforce). The Netherlands Supreme Court dismissed this argument as well. It stated that it is up to parties to an arbitration agreement to carefully choose

¹⁶ Under the 1986 Arbitration Act the (Presidents of) District Courts act as courts of first instance, which allows the applicant two potential rounds of appeal. Under the 2015 Arbitration Act, the Courts of Appeal act as courts of first instance in recognition and/or enforcement proceedings regarding arbitral awards rendered abroad, which allows the applicant only one appeal remedy, on limited legal grounds, before the Netherlands Supreme Court.



the legal seat of the arbitration, in this case New York State. Nelux had had the possibility to challenge the arbitral award before the competent court in New York. The fact that the law of the seat of the arbitration does not provide for a second term to commence setting-aside proceedings, does not entail that Nelux had not been granted a fair trial within the meaning of Article 6 of the European Convention on Human Rights.

In sum, the 31 March 2017 Netherlands Supreme Court judgment teaches us two things. Firstly, the Dutch appeal prohibition applies also in situations in which the court of first instance has only rendered a declaratory decision stating that the foreign New York Convention award is being recognized in the Netherlands but has not granted leave to enforce the award. Secondly, the circumstance that the law of the seat of the arbitration does not provide for a second alternative time window to commence setting-aside proceedings — a first term triggered by the rendering of the award and a second term triggered by a notification of the defendant of court approval to enforce the award — does not, as such, justify a fair trial-exception to the rule that no appeal by the defendant is admissible.

On 24 November 2017, the Netherlands Supreme Court rendered a second notable judgment in *exequatur* proceedings in a case governed by the New York Convention.¹⁷ This judgment has international bearing, as it demonstrates how, according to the highest court in the Netherlands, one aspect of the New York Convention must be interpreted and applied in practice. As per the Vienna Convention on the Law of Treaties,¹⁸ which reflects international custom,¹⁹ such leading views must be taken into account in the interpretation of the New York Convention in other signatory states as well.

¹⁷ Netherlands Supreme Court 24 November 2017, ECLI:NL:HR:2017:2992 (*Maximov/OJCS Novolipetsky Metallurgichesky Kombinat*).

¹⁸ Article 31(3), introduction and sub (b), Vienna Convention on the Law of Treaties.

¹⁹ Netherlands Supreme Court 29 June 1990, ECLI:NL:HR:1990:AD1191 (*Nillsen & Noll/Delta Lloyd*) and Netherlands Supreme Court 15 September 2017, ECLI:NL:HR:2017:2363 (*High Point/KPN*).

This case dealt with an arbitral award that had been rendered in Russia, but was subsequently set aside by the Russian court of first instance, which court judgment had been upheld on appeal and before Russia's highest federal court. The applicant in the Dutch recognition and enforcement proceedings, Mr. Maximov, however, requested the Dutch courts to essentially bypass the Russian court judgments. He argued that Article V(1)(e) of the New York Convention vested a discretionary power on the Dutch court to do so.

The Netherlands Supreme Court interpreted Article V(1) of the New York Convention and ruled that a national court enjoys a certain margin of appreciation whether or not to recognize and/or grant leave to enforce a foreign award in the event that one (or more) of the grounds for refusal listed in that treaty provision is present. This discretionary power may, however, only be exercised in special cases and alleged facts and circumstances that constitute such special cases must be proven by the applicant. Focusing on the current situation in which an award had been set aside by the state courts of the seat of the arbitration, the Netherlands Supreme Court mentioned that a special case may exist if the state courts have set aside an award on national legal grounds that (a) do not correspond with the grounds for refusal listed in Article V(1) (a)-(d) of the New York Convention, and (b) are not in accordance with international standards either.²⁰ Furthermore, a special case may be present if the setting-aside judgment would fail to meet the (minimum) standards that apply in the Netherlands with respect to the potential recognition of a foreign judgment. This exception, according to case law that has been established for about a century,²¹ includes the case in which fundamental requirements of due process have been violated in the foreign proceedings.

In the present case, the Court of Appeal had rigorously assessed the Russian court proceedings on the basis of Russian expert evidence

²⁰ See eg, J. Paulsson, *Enforcing arbitral awards notwithstanding a Local Standard Annulment (LSA)*, The ICC International Court of Arbitration Bulletin 1998, pages 14-15.

²¹ See eg, Netherlands Supreme Court 14 November 1924, *NJ* 1925, 91 (*Bontmantel*).



furnished by both sides. It found that it was common ground between the experts that under applicable Russian arbitration law at least one valid ground to set aside the award had been present, which related to the obligations on the arbitrators to disclose certain potential conflicts of interest. The Netherlands Supreme Court qualified this ground as a ground within the meaning of Article V(1)(d) of the New York Convention.²² And even though various curious events had happened along the way in the Russian court proceedings, the Court of Appeal had found that Mr. Maximov had provided insufficient evidence that he had exhausted all national Russian remedies to correct those potential errors. The Netherlands Supreme Court concluded that the Court of Appeal had applied the correct legal tests and, accordingly, denied Mr. Maximov's appeal.

C. Funding in international arbitration

Investing in dispute resolution is increasingly debated in the Netherlands. As investors struggle to find sufficient business cases within the traditional scope of their objects of investment, investment money increasingly flows to litigation funders. In the Netherlands, this can be explained by several factors. First, there is no regulation of third-party funding. The only obstacles for fee arrangements of whatever nature ensue from the Dutch Bar Rules that require the independence of the lawyers acting on behalf of their clients (Article 2(1) of the Dutch Bar Rules) and also prohibit *no cure, no pay* (no win, no fee) arrangements (Article 25(2) of the Dutch Bar Rules). They also prohibit linking the fees a lawyer is charging to the outcome of a dispute, for instance a percentage of the awarded amount (Article 25(3) of the Dutch Bar Rules). Such fee arrangements are considered to have bearing on the independence required by Rule 2(1) of the Dutch Bar Rules.

²² Article V(1)(d) New York Convention: “*The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place [...].*”

There is no statistical or other data to measure the popularity of third-party funding in the Netherlands in general or in relation to arbitration specifically. Of course, there are several cases pending in the Netherlands in which the funding by third parties is a publicly known fact. For instance, reference can be made to mass damages claims related to Petrobras and in relation to certain cartel damages matters. These concern civil litigation, and the aim of these proceedings is to come to a settlement with the defendants, which settlement can then subsequently be declared binding worldwide by the Court of Appeal in Amsterdam under the Dutch Act on Settlement of Mass Damages Claims. For these kind of proceedings, special purpose vehicles (typically in the legal form of foundations) are incorporated that file claims on behalf of several claimants. Once a settlement is reached between such special purpose vehicle and the defendant, such settlement can subsequently be declared binding on all other parties that have suffered the same or similar damages from the same event, even if these parties have not participated in the proceedings. There is a right of opt-out available to claimants and parties that have not participated in the proceedings.

With the implementation of the legislation that facilitates the settlement of mass damages, funders became increasingly interested in participating for a return on their investment. In order to avoid unreasonable situations in terms of competing special purpose vehicles and other issues inherent to mass damages class action litigation, the legislation is up for an overhaul. The private sector has also self-regulated in the form of a Code of Conduct, the “Claim Code”. Recently, in relation to a mass damages settlement, the Court of Appeals rejected the fees that representatives had demanded for themselves in the settlement, and sent the parties back to the drawing board for better terms.²³ When compared to what is customary and acceptable in other jurisdictions, such as the US, the conclusion that can be drawn is that returns in the Netherlands for third-party funders of mass damages actions may not be as attractive.

²³ Court of Appeal Amsterdam 16 June 2017, ECLI:NL:GHAMS:2017:2257.



In the area of international investor-state arbitrations, we have recently seen some activity by private equity funds, purchasing awards that investors won against foreign governments. Generally, these transactions regard awards that are not voluntarily paid by the foreign government. Although there is very limited visibility of third-party funding of these arbitration proceedings, there are no obstacles under Dutch law for third-party funders to fund the cost of arbitration (bearing in mind of course the Dutch Bar Rules as mentioned above). Funding the costs of arbitration is more attractive than funding of court proceedings before the Dutch courts, because cost awards in arbitration are generally more generous. The public information on private equity interest in awards already obtained indicates that private equity funds prefer to purchase the entire claim and award instead of funding a party's efforts to enforce such an award. As might be expected, once a foreign state decides that it will not voluntarily pay an award, enforcing it may be a time-consuming and (very) costly exercise. The difficulties parties come across when enforcing against a foreign state are state sovereignty, protection of assets that serve a public purpose, protection of assets that have a diplomatic status and the fact that many assets are structured as subsidiaries of state-owned enterprises, so legally only indirectly the property of the State, causing an award unenforceable against such assets. All these factors, as well as the economic situation of a foreign state (see, for instance, Venezuela) mean that private equity generally is able to purchase ICSID and similar awards at a 40-50% (or more) discount.

Agreements for funding of arbitration (or litigation) are only subject to mandatory Dutch law requirements and hence the freedom of contract rule fully applies. Typically, such agreements are concluded between claimants and funders, although there are instances where defendants could rely on the funding of their cost. The structure of agreements between funders and litigants raises the question of privilege, confidentiality and influence on procedural decisions. Obviously, it ultimately comes down to what the parties agree. However, there are things to keep in mind: who is the lawyer actually representing? In name it will be the litigant. In fact, it may well be that the funder is

effectively the lawyers' client, who brings in the business. There are inherent ethical and procedural issues to be aware of and to consider when instructing lawyers to act for litigants paid by funders. In principle, communications between funders and litigants are not protected by privilege, and confidentiality agreements or NDAs will only go so far in protecting information shared with a funder in order to enable the funder to make an assessment of the matter and hence the risk.