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The Netherlands

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Mathieu Raas[1]

A. Legislation and rules

A.1 Legislation

Arbitrations seated in the Netherlands are governed by a well-established arbitration friendly statutory regime. Both the 2015 Arbitration Act and the preceding 1986 Arbitration Act were inspired by a global standard, the UNCITRAL Model Law. They contain fairly common provisions relating to arbitration agreements, the competence of the arbitral tribunal, arbitrators, procedure as well as the content of arbitral awards and they contain few mandatory rules.[2] Accordingly, Dutch statutory law functions well in combination with, for example, the ICC Rules, the UNCITRAL Rules or the rules of the Netherlands Arbitration Institute.

Compared to the 1986 Arbitration Act, the 2015 Arbitration Act strengthens the finality of arbitration awards rendered in the Netherlands by limiting the duration and potential scope of setting aside proceedings. Setting aside proceedings are now commenced directly before the Court of Appeal and professional parties can contractually exclude a Supreme Court appeal.[3] The courts may only set an award aside in compelling cases, save where an arbitration agreement is absent or if the principle of hearing both sides has been

[1] Mathieu Raas is a senior associate in Amsterdam. He is experienced in commercial, post M&A and joint venture arbitrations. He also regularly acts in enforcement proceedings and advises on setting aside proceedings.
[2] I refer to our discussion in prior editions of this Yearbook.
[3] Professional parties should be aware that such an exclusion may also feature in institutional arbitration rules, such as the ICC Rules. It has not yet been tested before the Supreme Court whether a general exclusion of remedies for an award debtor in institutional arbitration rules qualifies as a sufficiently clear exclusion of a Supreme Court appeal in setting aside proceedings. Parliamentary history suggests that it does.

violated.[4] Further, a party may forfeit its rights to set aside an award if it fails to raise an objection in the arbitration proceedings.

With the New York Convention in force in the Netherlands since 1964, arbitral awards rendered in any other signatory state that satisfy the convention's criteria are enforceable.[5] Similar rules govern the enforcement in the Netherlands of arbitral awards rendered in non-signatory states.

The Netherlands is a party to the ICSID Convention and has an extensive network of bilateral investment treaties (BITs) that are widely considered to be the gold standard for investment protection.[6] Dutch BITs are the second most invoked BITs worldwide, whilst so far the Netherlands has never been sued in any BIT arbitration. Further to criticism from NGO's and pressure exercised by the EU Commission, the Dutch government is planning to renegotiate 78 BITs with non-EU member states as of 2019. In 2018, it published a draft model BIT that, for example, aims to exclude "mailbox companies" from protection. This draft was amended after a public consultation phase and the current draft now awaits approval from the EU Commission.[7] The Netherlands has signed the 2014 UN Convention on Transparency in Treaty-based Investor-State Arbitration, but has not yet ratified this treaty.[8]

In 2019 the Netherlands Commercial Court (NCC) will start its work. Actions may be brought before the NCC in various international commercial disputes, provided that the parties have expressly agreed in writing for proceedings to be heard by the NCC in English. To the

[4] This high threshold is a codification of established case-law that already applied under prior versions of the Arbitration Act.

[5] The Netherlands has made a "reciprocity reservation," according to which the New York Convention applies if the state where the award was rendered is a party too. If this is not the case, the foreign award may still be recognized and declared enforceable by a Dutch court on the basis of substantially similar Dutch statutory law.

[6] e.g., investmentpolicyhub.unctad.org.

[7] https://www.internetconsultatie.nl/investeringsakkoorden (Dutch language).

[8] uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention._status.html.

extent that language is a key driver for parties to opt for arbitration and factors such as confidentiality, the appointment of arbitrators and quick finality are not, the NCC may prove to be an attractive alternative for arbitration in international commercial disputes, especially if assets are located within the EU.[9] The NCC may also adjudicate setting aside proceedings in relation to arbitral awards, provided that the arbitration was seated in Amsterdam and the parties expressly agreed in writing for setting aside proceedings to be heard by the NCC in English. Setting aside proceedings will be heard directly by the NCC Court of Appeal and, as noted, professional parties can contractually exclude an appeal to the Netherlands Supreme Court.

A.2 Institutions, rules and infrastructure

The Netherlands hosts various international courts and tribunals. The Netherlands Arbitration Institute (Rotterdam, 1949) administers both national and international cases.[10] The Peace Palace (The Hague, 1913) houses the Permanent Court of Arbitration, which administers international investor-state and state-to-state disputes, and PRIME Finance (2012), where financial disputes are decided by expert panels. Other examples of institutes administering international cases are the Court of Arbitration for the Building Industry (Utrecht, 1907) and TAMARA (Rotterdam, 1988), which administers disputes involving shipping, transport and logistics. Several other arbitration institutes are specialized in various sorts of business, commodities and sports. The UNCITRAL Rules and the ICC Rules are often chosen as well for arbitrations seated in the Netherlands.

[9] Dutch court judgments are readily enforceable in the EU and in Iceland, Norway and Switzerland.

[10] 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*).

In 2018, the "The Hague Hearing Centre" opened its doors, within a short distance from the Peace Palace, offering excellent hearing facilities for international arbitrations.

B. Cases

In 2018, the Netherlands Supreme Court rendered two judgments in setting aside proceedings that are worth highlighting.

The Supreme Court judgment *Bursa v. Güris* of 15 June 2018 is relevant in respect of time limitations that apply to the commencement of setting aside proceedings.[11] Dutch statutory law provides for two distinct limitation periods of three months each. The first limitation period is triggered by the arbitral award itself.[12] The second limitation period is triggered if and when the award creditor notifies the award debtor of leave for enforcement granted by the court. This was the case under the 1986 Arbitration Act, which applied to the case that will now be discussed,[13] and remains to be the case under the 2015 Arbitration Act.

In the *Bursa v. Güris* case, the Turkish municipality Bursa sought the setting aside of an arbitral award in which compensation had been awarded to a consortium of contractors, including Siemens and Güris, for costs of delays that had occurred in the construction of Bursa's

[11] Netherlands Supreme Court 15 June 2018, ECLI:NL:HR:2018:914, NJ 2018, 278 (*Bursa / Güris*).

[12] To be precise: under the 1986 Arbitration Act setting aside proceedings can be commenced as of the rendering of the award up until three months as of a deposition of that award by the arbitration institute with the court of the district of the seat of the arbitration. Under the 2015 Arbitration Act, setting aside proceedings can be commenced up until three months after a final award has been sent (or, if the parties agreed to "old fashioned" deposition of the award, three months as of the deposition). If the parties contracted for an arbitral appeal possibility, setting aside proceedings against the arbitral award rendered in first instance can be initiated within three months after either (i), if no appeal is lodged, the expiry of the time period for an arbitral appeal, or (ii) a final award is rendered in the arbitral appeal proceedings.

[13] The arbitration proceedings commenced prior to 1 January 2015, the date on which the 2015 Arbitration Act entered into force.

subway network.[14] Bursa did not commence setting aside proceedings within the first time period mentioned above. Güris applied to a Turkish court for leave for enforcement in Turkey. Those Turkish *exequatur* proceedings were still pending when Bursa eventually brought setting aside proceedings in the Netherlands.

Bursa acknowledged that the first limitation period for the commencement of setting aside proceedings had expired. It contended, however, that it brought proceedings well in time in view of the second limitation period. It argued, amongst others, that (i) at the time of commencement of the setting aside proceedings it could reasonably anticipate enforcement by Güris and (ii) in the course of the setting aside proceedings Bursa had indeed been notified by Güris of leave for enforcement granted in Turkey.

In a non-surprising judgment, the Court of Appeal of The Hague declared Bursa's action non-admissible (*niet-ontvankelijk*), which was subsequently upheld by the Netherlands Supreme Court. The Supreme Court ruled that the second limitation period is triggered by a notification of the award debtor by the award creditor of leave for the enforcement thereof. Referencing the literal wording of the relevant statutory law provision, prior case law, parliamentary history and legal doctrine, the Supreme Court refuted Bursa's legal position that setting aside proceedings can also be commenced when it is sufficiently clear that an award creditor will enforce an award. It also ruled that Bursa's suggested bending of the rules would create legal uncertainty, since it would require an assessment by the court of the debtor's legitimate expectations.

The Supreme Court may have answered a relevant legal question "in passing." It accepted that in the present case the second limitation period had commenced pending the setting aside proceedings. This

[14] The Bursa subway construction resulted in various ICC arbitrations seated in The Hague. The Netherlands Supreme Court rendered final judgments in 2008 and 2013 in two other setting aside proceedings; the District Court of The Hague rendered a final judgment in 2013 in yet other setting aside proceedings.

must be a reference to the notification of leave for enforcement in Turkey, granted by the Turkish court. To date, however, it was unclear whether under Dutch arbitration law a notification of leave granted in foreign enforcement proceedings could trigger the second limitation period for setting aside proceedings in the Netherlands. Parliamentary history and leading contemporary articles by the *auctor intellectualis* of the 1986 Arbitration Act, Piet Sanders, as well as Albert Jan van den Berg, suggest that this was not the original intention of the legislature. However, since then various authors have defended the position that an extensive interpretation of the statutory provision that would allow foreign enforcement to trigger the second limitation period would be appropriate. I note that the Supreme Court's "non-principled" reasoning causes some uncertainty – which the legislature wanted to avoid per se. After all, in today's world, many award creditors may take a multijurisdictional approach in enforcement. It should be clear whether or not any such action may open a new window in the Netherlands for setting aside proceedings.

A second judgment rendered by the Supreme Court in setting aside proceedings, *Tiffany & Co v. Swatch Group*, on 23 November 2018, confirms the high threshold that applies for setting aside motions in order to succeed. An arbitral tribunal had ruled that Tiffany had violated a best efforts obligation under various contracts with Swatch to promote the sales of Swatch watches. It awarded Swatch over USD 400 million in damages. In setting aside proceedings, Tiffany argued that the arbitral tribunal would have exceeded its mandate because the arbitral tribunal would have "changed, modified or altered" the express terms of the contracts, which was not allowed according to a limitation specified in the arbitration clauses. The Amsterdam Court of Appeal, however, pointed at the arbitral tribunal's finding that the parties had expressly agreed to execute their contract in good faith and concluded that the arbitral tribunal had interpreted the express contractual terms in accordance with good faith. Tiffany also argued that the fact that the award would be invalidated by the fact that one of the arbitrators had rendered a dissenting opinion – which is rare in Dutch arbitration practice – and had made a reservation in the

signatory filed at the end of the award. The Amsterdam Court of Appeal dismissed this ground as well, noting that the dissenting arbitrator had signed the award. The Netherlands Supreme Court dismissed Tiffany's appeal on legal grounds, simply noting that Tiffany had not raised any issues that would require the Supreme Court to provide a further substantiation.[15]

C. Diversity in arbitration

The Dutch judiciary is consistently ranked in the top 5 of the World Justice Project Rule of Law Index.[16] For the last decade, it has consisted between 63% and 65% of women, although male judges are in the majority in the age bracket of 55 years and older.[17]

Experience suggests that women are currently much less represented in arbitral tribunals. In 2016, the Netherlands Arbitration Institute (NAI) signed the Pledge, which promotes equal opportunities for men and women to sit as an arbitrator. As discussed in other chapters in this Yearbook, the Pledge is part of a global initiative to increase the number of women appointed as arbitrators in order to achieve a fair representation as soon practically possible, with the ultimate goal of full parity. The NAI's powers to contribute to this end seem somewhat limited, as the NAI default rule is that, in all usual proceedings on the merits in which a sole arbitrator or a co-arbitrator is appointed, the appointment of (co) arbitrators is done by the parties. However, the NAI may exercise influence in cases in which the parties agree on applying an established procedure according to which – in brief – the NAI itself provides each party with a list of candidates from which a favorable candidate can be selected. Application of this list procedure is often suggested by the NAI in the event of appointment of a sole arbitrator since it appears that parties only manage to reach agreement

[15] Netherlands Supreme Court 23 November 2018, ECLI:NL:HR:2018:2162 (*Tiffany & Co c.s. / The Swatch Group c.s.*). The arbitral award had been rendered by Filip De Ly, Georg Von Segesser and Bernard Hanotiau, who rendered a dissenting opinion.
[16] https://worldjusticeproject.org.
[17] https://www.rechtspraak.nl/SiteCollectionDocuments/factsheet-personeel-2016.pdf.pdf (in Dutch).

on a candidate in about 20% of the cases.[18] Moreover, in certain interim relief proceedings, the NAI may directly appoint a sole arbitrator.

In 2016, the NAI pledged to publish gender statistics, but this has not yet happened. In a recent article, the NAI Administrator noted that, regrettably, there is no upward trend yet in the appointment of female arbitrators.

[18] This practice is described by the NAI's current Administrator, F.D. von Hombracht-Brinkman, in her article Drie jaar NAI Arbitragereglement 2015, TvA 2018/46.