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The Netherlands





The Netherlands

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A. Legislation and rules

A.1 Legislation

In the Netherlands, arbitration has always been an important means of dispute resolution. The past decade covered in this special edition of the *Arbitration Yearbook* (2007-2017) was no exception.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 rendered in another New York Convention contracting state⁴ and satisfying the criteria in the New York Convention are recognized and can be enforced in the Netherlands. Since its entry into force in 1966, the Netherlands has been a party to the ICSID Convention. The protection of international investments is further boosted by an extensive network of bilateral investment treaties (BITs).⁵ On 18 May 2016, the Netherlands signed the UN Convention on Transparency in Treaty-based Investor-State Arbitration. This convention essentially serves to provide consent to the application of the 2014 UNCITRAL

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⁴ The Netherlands has made the reciprocity reservation (Article 1(3) first sentence of the New York Convention).

⁵ See eg.investmentpolicyhub.unctad.org, which mentions 107 bilateral investment treaties concluded by the Netherlands, of which 97 are currently in force.

Transparency Rules in relation to disputes arising under pre-existing BITs.⁶

Whereas the Dutch history of codified arbitration rules dates back to 1811, the most recent version of the Arbitration Act⁷ is fairly modern. It entered into force on 1 January 2015 and applies with respect to arbitrations initiated as from that date⁸ and seated in the Netherlands.⁹ The 2015 statutory revision did not entail a fundamental change to the Dutch arbitration regime, but was aimed at: (i) further enhancing the efficiency and flexibility of the arbitral process; (ii) promoting party autonomy in shaping the arbitration process as they deem fit; and (iii) reducing the parties' administrative burden. Only a limited number of provisions of the 2015 Arbitration Act, often relating to the fundamental requirement of due process, are of a mandatory nature.

As we discussed in more detail in the 2015-2016 edition of the *Arbitration Yearbook*, the 2015 Arbitration Act contains fairly standard provisions relating to the arbitration agreement, arbitrators (appointment, disclosures and challenges), procedure, witness and expert hearings, joinder and consolidation, competence-competence, the content of the arbitral award, and corrections of and additions to the arbitral award. The statutory framework for limited-scope court

⁶ This convention will enter into force six months after the deposition of the third instrument of ratification. *Cf.* Article 9(2) Convention. See for the actual status, updated whenever the UNCITRAL Secretariat is informed of changes in status of the Convention: uncitral.org.

⁷ Just like its direct predecessor from 1986, (what is often referred to as) the 2015 Arbitration Act is in fact a coherent set of statutory provisions incorporated in book 4 of the Dutch Code of Civil Procedure and in the Dutch Civil Code. The DCC provisions mainly deal with EU directive-based consumer protection and issues of international private law. An unofficial translation of the 2015 Arbitration Act can be found at the website of the Netherland Arbitration Institute (www.nai-nl.org).

⁸ The 2015 Arbitration Act also applies to court litigation relating to arbitrations commenced as from 1 January 2015. See eg, District Court Rotterdam 18 September 2015, *NJF* 2015, 468.

⁹ Naturally, the requirement of the seat in the Netherlands does not apply in relation to the statutory provisions regarding recognition and enforcement of foreign arbitral awards.



proceedings potentially following the rendering of an arbitral award — setting-aside proceedings, enforcement proceedings, and (in very rare instances) revocation proceedings — is touched upon in section B.

One of the distinctive features of Dutch arbitration law — which stems from a well-developed and long-standing Dutch legal practice of *kort geding* in court litigation¹⁰ — is the possibility of summary or injunctive relief proceedings. First, at any stage of proceedings on the merits subsequent to the constitution of the arbitral tribunal, a party may request that arbitral tribunal to take measures applying for the remainder of these proceedings, provided that such measures relate to the claim or counterclaim in the proceedings on the merits.¹¹ Second, if agreed to in an arbitration agreement, either expressly or by reference to arbitration rules, at the request of one of the parties a separate arbitral tribunal may be appointed in self-standing summary proceedings.¹² As will be discussed in section A.2, the rules of the Netherlands Arbitration Institute provide for such possibility by default. Third, interim measures may be obtained through state court proceedings parallel to a pending arbitration. A court may only allow such measures if it is established that the requested measure cannot be

¹⁰ Dutch summary proceedings do not necessarily result in a merely temporal measure. The consequences may be irreversible. Measures that may be granted — and indeed feature in the past decades of Dutch case-law — include, for instance, the provision of a bank guarantee or a payment into an escrow account, the freezing of assets, the performance of a contract and even the obligation to transfer shares or a prohibition to do so. Once such relief is granted, the requesting party is not required to subsequently initiate proceedings on the merits. That being said, naturally, a summary judgment does not bind a court deciding in the proceedings on the merits. Moreover, the risk that after the execution of a judgment rendered in summary proceedings that judgment will be overruled in proceedings on the merits, is for the account of the party enforcing the decision rendered in summary proceedings.

¹¹ Article 1043b(1) DCCP.

¹² Article 1043b(2) DCCP.

obtained in a timely manner during arbitration.¹³ Only state courts can provide for pre-judgment attachment or precautionary seizure.

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 of (nearly) all sorts.¹⁴ The Peace Palace in The Hague houses both the Permanent Court of Arbitration, which administers international investor-state and state-to-state¹⁵ 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, where the vast majority of construction disputes between professional parties is decided, and TAMARA, which administers disputes involving shipping, transport and logistics. Several other arbitration institutions are specialized in various sorts of business, commodities and sports.

In parallel with the 2015 revision of the Dutch Arbitration Act, in 2015 the NAI provided for a number of amendments to its arbitration rules. The revised NAI Rules apply to arbitrations commenced on or after 1 January 2015, regardless of the date of conclusion of the arbitration agreement.¹⁶ We refer to the previous edition of the

¹³ Articles 1022a and 1022c DCCP. These statutory provisions apply regardless of the seat of the arbitration.

¹⁴ 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*).

¹⁵ See in the past year for example: PCA 12 July 2016, Case N° 2013-19 (*Philippines/China*), regarding the South China Sea.

¹⁶ A special regime of transitional rules applies with respect to consolidation of proceedings and the decision standard in arbitration, ie, either the law or *ex aequo et bono* (Articles 39 and 42 NAI Rules 2015, respectively). See with respect to the latter:



Arbitration Yearbook, in which we discussed the most significant amendments.

As noted in section A.1, a special feature of the NAI Rules is the (scope of the) possibility of arbitral summary or injunctive relief proceedings. Provided that the seat of the arbitration lies in the Netherlands, a party may in all cases of urgency request a provisional measure, regardless whether or not arbitral proceedings on the merits are pending.¹⁷ If no proceedings on the merits are pending (ie, in standalone arbitral summary proceedings), the NAI will appoint a sole arbitrator for these purposes unless the parties have agreed otherwise.¹⁸ In our experience, in particularly urgent cases this appointment can be made within a single working day.¹⁹ The decision rendered by the arbitral tribunal qualifies as an arbitral award, unless the arbitral tribunal decides otherwise.²⁰ On the basis of the NAI Rules, the arbitral tribunal may qualify its decision as an order,²¹ which is a binding but non-enforceable decision.

The possibility of standalone arbitral summary proceedings remains a fairly unique yet successful feature of NAI arbitration. Over the past decade, similar provisions were introduced in other sets of arbitration rules, such as the 2012 ICC Arbitration Rules. However, notable differences remain. For instance, under the NAI Rules, the requesting party must demonstrate that its request is urgent, but not — as is the case under the 2012 ICC Arbitration Rules — that the constitution of the arbitral tribunal in proceedings on the merits cannot be awaited.²² In fact, in line with a long-standing practice in regular Dutch court

NAI (R.P.J.L. Tjittes, D. Aarts and J.A.M.A. Sluysmans) 1 February 2016, *TvA* 2016, 70.

¹⁷ Articles 1043b(1) and (2) DCCP and Articles 35(1) and (2) NAI Rules 2015.

¹⁸ Article 36(4) NAI Rules 2015.

¹⁹ On its webpage (www.nai-nl.org), the NAI confirms this practice.

²⁰ Article 1043b(4) DCCP.

²¹ Article 35(4) NAI Rules 2015.

²² *Cf.* Article 29 and Appendix V to the 2012 ICC Arbitration Rules, which set as standard that “urgent interim or conservatory measures [...] cannot await the constitution of an arbitral tribunal.”

litigation, and other than under (for instance²³) the 2012 ICC Arbitration Rules, no follow-up of the summary proceedings by initiating proceedings on the merits is required. It is reported on the basis of NAI statistics that the parties in practice may indeed use standalone arbitral summary proceedings as their sole and final means of dispute resolution. As noted, typically NAI summary proceedings result in an arbitral award, which can be declared enforceable by leave granted by a competent state court (see section B). By contrast, an ICC emergency arbitrator can only issue a binding but non-enforceable order.

B. Cases

Dutch court practice over the past decade confirmed that the Dutch courts are mindful of the firm primacy of arbitration whenever that is the method of dispute resolution chosen by the parties. Accordingly, the courts declined jurisdiction whenever a party invoked the existence of a valid and applicable²⁴ arbitration agreement. Furthermore, very few attempts to have arbitral awards set aside or oppose their enforcement were successful. More generally, the members of the Dutch judiciary have a solid reputation of independence and impartiality, and public trust in their integrity is high.²⁵

Since the entry into force of the 2015 Arbitration Act, the District Courts no longer have competence to hear setting-aside proceedings and enforcement proceedings regarding foreign arbitral awards. Both proceedings must now be initiated before the Courts of Appeal.

²³ Cf. also Article 9(4) (iii) and (iv) of Appendix III to the 2017 Stockholm Chamber of Commerce Arbitration Rules, providing that the emergency decision ceases to be binding in the event that proceedings on the merits are not commenced within a certain time frame following the emergency decision.

²⁴ See in the past year for instance Amsterdam Court of Appeal 28 June 2016, ECLI:NL:GHAMS:2016:2502 (*Cancun*), on the scope of an arbitration agreement in a shareholders' agreement governed by Spanish law.

²⁵ See eg. Evaluation Report of the Council of Europe anti-corruption body GRECO of 18 July 2013, page 4.



Moreover, the 2015 revision introduced the option for professional parties to jointly agree to an exclusion of Supreme Court appeal. Consequently, if the parties agree, setting-aside proceedings may be confined to a single court instance.

Both the preceding 1986 version and the current 2015 version of the Dutch Arbitration Act provide for a so-called “asymmetric” system of appeal in enforcement proceedings: only court decisions *denying* leave for enforcement can be appealed. Against that background, in 2010 the Netherlands Supreme Court rendered a judgment that ended one (out of many) series of Dutch court proceedings involving subsidiaries of the former Russian oil company Yukos, the current Russian oil company Rosneft and (directly or indirectly) the Russian Federation.²⁶ The proceedings caught international media attention. First, the Amsterdam Court of Appeal rendered a daring judgment in which four Russian arbitral awards in favor of Yukos were recognized in the Netherlands (despite their annulment by the Russian courts — *inter alia*, because the setting-aside judgments rendered by the Russian courts were found to be the result of proceedings that violated Dutch public order). Then, the Netherlands Supreme Court declared the appeal by Rosneft inadmissible. The Supreme Court ruled that since the New York Convention required non-discrimination, and that therefore the asymmetry in the availability of an appeal remedy in domestic enforcement proceedings — an appeal is possible in the event of the denial of leave but is (in principle) impossible in the event that leave has been granted — equally applied in these international enforcement proceedings.²⁷ Later, in line with the Supreme Court’s judgment, the legislature decided to maintain the view that the asymmetry in the availability of an appeal remedy in enforcement proceedings does not conflict with the principle of equality of arms under the European Convention of Human Rights. Accordingly, in respect of domestic awards and foreign arbitral awards covered by the

²⁶ For transparency purposes: in 2009-2012, Mathieu Raas acted as attorney for Yukos in proceedings in the Netherlands and before the Commercial Court of the High Court of Justice of England and Wales.

²⁷ Netherlands Supreme Court 25 June 2010, *NJ* 2012, 55 (*Rosneft/Yukos*).

New York Convention, Dutch arbitration law still entails that once leave is granted by the competent Court of Appeal, that judgment is final.

C. Trends and observations

Under this heading, we would like to discuss one legal concept introduced in the 2015 Arbitration Act that seems to require further refinement in the coming years: the possibility of setting-aside proceedings of *remission* of a case by the competent Court of Appeal to the arbitral tribunal.²⁸ Essentially, the 2015 Arbitration Act allows the Court of Appeal acting in setting-aside proceedings to suspend proceedings and enable the arbitral tribunal to rectify a defect in its award that could otherwise result in its setting aside. Following this interim court decision, which cannot be appealed, the arbitral tribunal may render a new award replacing the original one, which would then be reassessed by the Court of Appeal. Naturally, the parties must be heard prior to the rendering of each of these decisions.²⁹

The concept of remission — which also features, for instance, in the UN Model Law, the 2013 Belgian Arbitration Act and the 1996 English Arbitration Act — is perceived as arbitration friendly: the arbitral tribunal is granted a “second try” within limited confines set by the Court of Appeal. Various fundamental issues and practical implications have, however, been the subject of critical scholarly publications.

Importantly, whereas at first glance the statutory provision in the Arbitration Act may suggest an unlimited possibility of remedying annulment grounds, in Parliamentary records the legislature provided views that do not support such a broad interpretation. Although Parliamentary records qualify as an authoritative source for the interpretation of statutory provisions, they do not stand on an equal

²⁸ Article 1065a DCCP. See also Article 49 of the 2015 NAI Rules. The possibility of remission also exists in revocation proceedings (Article 1068(3) DCCP).

²⁹ Namely: remission by the Court of Appeal, re-examination by the arbitral tribunal; and re-examination by the Court of Appeal.



footing with statutory law itself.³⁰ In this respect, it must be noted that in the present case, the relevant statutory provision grants a *discretionary* power to the Court of Appeal on the issue whether or not to remit a case.³¹

In Parliamentary records, the legislature indicated that remission is possible in the event that (i) the arbitral tribunal failed to decide upon any part of the claim or counterclaim or defenses forwarded.³² So far, so good. However, the legislature also stated that remission cannot be applied in instances (ii) in which an arbitration agreement is absent; nor (iii) where public order (or a rule of an equally exceptionally high standing)³³ has been violated.³⁴ Whereas the rationale of the first exclusion is self-evident, the logic of the second — categorical — exclusion seems to be debatable. In particular, a violation of the principle of hearing of both sides — the procedural side of public order — could perhaps well be remedied in continued arbitration proceedings following the remission. Furthermore, the legislature did not explain whether or not remission would be possible: (iv) in the event that an arbitral tribunal has not been composed in accordance with statutory law or the rules agreed by the parties.³⁵ In practice it seems difficult to imagine that a Court of Appeal would make use of a discretionary power to refer the case back to the — apparently not properly composed — tribunal.³⁶ After all, the composition of an

³⁰ See eg, Netherlands Supreme Court 10 April 2009, *JBPR* 2009, 25 (*Teeuwe/Trijber*).

³¹ Article 1065a(1) second sentence DCCP.

³² See Article 1065(1)(c) DCCP: a serious violation of the arbitral tribunal's mandate.

³³ Established case law of the Court of Justice of the European Union effectively requires that EU competition law is placed on the same high footing as statutory provisions of public order.

³⁴ *Cf.* Article 1065(1)(a) (absence of an arbitration agreement) and (e) (the award, or the proceedings leading to it, violates public order) DCCP, respectively.

³⁵ *Cf.* Article 1065(1)(b) DCCP. For instance, Article 1026 DCCP requires an uneven number of arbitrators. In the event the parties have agreed to the appointment of an even number, Dutch mandatory law requires that these arbitrators appoint an additional arbitrator, as their chair.

³⁶ Under the 2015 NAI Rules, the interested party must notify the NAI Administrator, who in turn notifies “the arbitral tribunal” (Article 49(2) 2015 NAI Rules).

arbitral tribunal takes place at the very initial stage of arbitral proceedings and different arbitrators may well render different awards. Similarly, whereas on the basis of Parliamentary records, remission appears to be possible in the event of: (v) a lack of grounds in the arbitral award, it is not self-evident that a Court of Appeal would indeed remit such a case. On the basis of established Dutch case law, an arbitral award can hardly ever be set aside on the basis of flawed reasoning;³⁷ whereas, as noted, the rationale of remission is to enable an arbitral tribunal to remedy a potential ground of annulment. Finally, in recent literature, it is debated whether or not remission is allowed in the event that: (vi) the award has not been signed.³⁸

To date, two years after the entry into force of the 2015 Arbitration Act, no examples can be found in published case law of interim judgments in which a Court of Appeal decided to remit a case to an arbitral tribunal. We were informed by the NAI that its administrator has not received any notice either for the reopening of NAI arbitral proceedings upon such court judgment.³⁹ Should any such development take place, we will report on this, possibly in a future edition of the *Arbitration Yearbook*. Meanwhile, for all practical purposes, the working assumption should be that although in theory the possibility of remission exists, it does not provide a solid safety net in the event that an arbitral award is not annulment proof.

³⁷ Essentially, an award can only be set aside for a lack of grounds (Article 1065(1)(d) DCCP) in the event of a total absence of reasoning or the absence of any possible valid explanation for the decisions rendered. See eg, Netherlands Supreme Court 25 February 2000, *NJ* 2000, 508 (*Benetton/Eco Swiss*) and 9 January 2004, *JBPr* 2004, 31 (*Nannini/SFT Bank*).

³⁸ Not signing an award can result in annulment (Article 1065(1)(d) DCCP) and may also result in professional liability (Netherlands Supreme Court 30 September 2016, *JOR* 2016, 324 (*QNOW/X*)).

³⁹ *Cf.* Article 49(2) of the 2015 NAI Rules, which requires a notification to the NAI Administrator upon receipt of the Court of Appeal interim judgment.