Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard and Gordon E Kaiser

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This article was first published in May 2019
For further information please contact Natalie.Clarke@lbresearch.com

Publisher
David Samuels

Business Development Manager
Gemma Chalk

Editorial Coordinator
Hannah Higgins

Head of Production
Adam Myers

Copy-editor
Caroline Fewkes

Proofreader
Martin Roach

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-205-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

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Publisher's Note

Global Arbitration Review is delighted to publish this new volume, *The Guide to Challenging and Enforcing Arbitration Awards*.

For those unfamiliar with Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and a series of more in-depth books and reviews, and also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial journal of international arbitration, sometimes we spot gaps in the literature earlier than other publishers. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters has increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

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Editor's Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – i.e., efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in approximately 160 countries. When enforcement against a sovereign state is at issue, the ICSID Convention of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 161.

Awards used to be honoured

A decade ago, international corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily - of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2018, *Global Arbitration Review*'s daily news reports contained literally hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement.

A sprinkling of last year's headlines on the subject are illustrative:

- 'Well known' arbitrator sees award set aside in London
- Gazprom challenges gas pricing award in Sweden
- ICC award set aside in Paris in Russia–Ukrainian dispute
- Yukos bankruptcy denied recognition in the Netherlands
- Award against Zimbabwe upheld after eight years
- Malaysia to challenge multibillion-dollar 1MBD settlement
- Uzbekistan escapes Swiss enforcement bid
- India wins leave to challenge award on home turf

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially

since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, last summer I raised the possibility of doing a book on the subject with David Samuels (*Global Arbitration Review*'s publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said in a report 35 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide is structured to include, in Part I, coverage of general matters that will always need to be considered by parties, wherever situated, when faced with the need to enforce or to challenge an award. In this first edition, the 13 chapters in Part I deal with subjects that include (1) initial strategic considerations in relation to prospective proceedings, (2) how best to achieve an enforceable award, (3) challenges generally, (4) a variety of specific types of challenges, (5) enforcement generally, (6) the enforcement of interim measures, (7) how to prevent asset stripping, (8) grounds to refuse enforcement, and (9) the special case of ICSID awards.

Part II of the book is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This first edition includes reports on 29 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 35 questions. All relate to essential, practical information on the local approach and requirements relating to challenging or seeking to enforce awards in each jurisdiction. Obviously, the answers to a common set of questions will provide readers

with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

Through this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors, colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach with chapters on China, Saudi Arabia, Turkey and Venezuela.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this first edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

April 2019

London

Part II

Challenging and Enforcing Arbitration Awards: Jurisdictional Know-How

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Netherlands

Marnix Leijten, Erin Cronjé and Abdel Zirar[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Requirements for the form of arbitral awards are set out in the Dutch Arbitration Act (as amended, effective from 1 January 2015), which forms part of Book 4 of the Dutch Code of Civil Procedure (DCCP).

An award must be in writing and, in principle, be signed by all arbitrators. A qualified electronic signature is also permitted in terms of the DCCP. If an arbitrator refuses to sign the award, the remaining arbitrators must make mention of this in the award. A similar statement must be made if a minority of arbitrators is incapable of signing and it is unlikely that this impediment will be resolved within a reasonable time (for example, in the case of serious illness). An arbitral award that is not signed or that is incorrectly signed is liable to be set aside.

The award must contain the names and addresses of the arbitrators and the parties, and the date and place where the award was rendered. Further, the award must contain the tribunal's decision, namely an operative part of the award in which each of the claims is granted or denied in whole or in part.

Finally, the award must include reasons for the tribunal's decision; for every portion of the operative part in which a claim is granted or denied, the body of the award should provide some reasoning for that particular decision. This does not apply in certain arbitrations pertaining to the quality or condition of goods, awards recording a settlement

1 Marnix Leijten is a partner and Erin Cronjé and Abdel Zirar are senior associates at De Brauw Blackstone Westbroek NV.

reached by the parties and in all other cases where the parties have agreed in writing that no reasoning for the decision shall be given. Failure to give reasons can result in an award being set aside.

In respect of delivery of the award, the tribunal must ensure that the original of every final, partial final and interim award (or a copy, certified by an arbitrator or a third party as nominated by the parties, such as an arbitral institution) is sent to the parties as soon as possible after it is made. The tribunal may do so by requesting or permitting an arbitral institution to dispatch the award on its behalf, as is typically the practice in an institutional arbitration. The parties may also agree that the tribunal is required to have the original award deposited with the district court registry within whose judicial district the seat of arbitration is situated. In practice, awards are often sent by email to the parties if email was used to communicate between the tribunal and the parties. In such cases, the DCCP permits electronic copies to be treated as original or certified copies of the award.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

The Dutch Arbitration Act allows for correction of manifest computing or writing errors in the award after it has been delivered. Other manifest errors may also be corrected at the request of one of the parties, as long as the errors can be rectified easily. Similarly, if the names and addresses of the parties and the arbitrators, or the date and place of the arbitral award, are stated incorrectly, or are partly or entirely missing, a party may request the tribunal to correct the error or omission.

The Dutch Arbitration Act does not exclude specific types of awards, and hence final awards, partial awards, additional awards and interim awards may be subject to a request for correction. A tribunal may also interpret an earlier (partial) award, provided the tribunal's mandate is still in effect; however, corrections in this context must be distinguished from a situation in which an arbitral tribunal has failed to decide on one or more matters that have been submitted to it. In the latter case, either party may request the arbitral tribunal to render an additional award.

An application by a party to a tribunal to correct an award must be made in writing within the time limit agreed by the parties, or if there is no such agreement, no later than three months after the day when the award is dispatched to the parties. The tribunal may, on its own motion, make a correction within the same time constraints. Before a tribunal decides on a request to correct an award or before it corrects an award on its own motion, it must give the parties the opportunity to express their views on the proposed correction.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An arbitral appeal will only be possible if the parties have explicitly agreed to permit appeal, in which case an appeal is usually made to a second tribunal, depending on the parties' agreement. Dutch courts do not have jurisdiction over appeals of arbitral awards, unless the parties specifically agree to this in an arbitration agreement.

The Dutch Arbitration Act provides for two exhaustively listed forms of recourse against arbitral awards to a court: setting aside and revocation.

Setting aside

The seat of the arbitration must be in the Netherlands for the state courts to have jurisdiction in respect of a setting aside application. An application for setting aside can only be made against a final or partial final arbitral award; an application to set aside an interim award may only be made in conjunction with an application for setting aside a final or partial final arbitral award. The period within which an application must be filed is usually three months from the day the award was delivered or, in the case of an arbitral appeal provision, three months from expiry of the time limit for lodging an appeal.

The setting aside of arbitral awards is limited to two instances. An application for setting aside must be made by a writ of summons addressed to the competent court of appeal of the district of the seat of arbitration. All grounds on which the party relies for the setting aside must be mentioned in the writ of summons, failing which the party will be barred from invoking them at a later stage.

An award may only be set aside on one or more of the following grounds:

- absence of a valid arbitration agreement;
- the arbitral tribunal was composed in violation of the applicable rules;
- the arbitral tribunal has manifestly not complied with its mandate;
- the award was not signed or did not contain reasons in accordance with the DCCP; or
- the award, or the manner in which it was made, violates public policy.

After the court of appeal has given a decision, the parties can appeal in cassation to the Supreme Court, unless the parties have agreed to exclude the possibility of cassation.

Revocation

An award may be revoked only if it is wholly or partially based on fraud committed in the arbitration, on forged records that turn out to have been forged after the award was made, or if relevant documents have been withheld by the other party. A claim for revocation must be brought before the court of appeal within three months of one of the grounds for revocation becoming known to the party requesting the revocation.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

For the purposes of enforcement, Dutch arbitration law distinguishes between domestic arbitral awards and foreign arbitral awards. Domestic awards are enforced by means of a petition to the preliminary relief judge of the district court in whose judicial district the place of arbitration is located. The application can be filed and decided *ex parte*. A decision granting leave for enforcement (*exequatur*) is typically issued within one or two business days. The preliminary relief judge must grant leave if none of the grounds for refusal is present. A decision granting leave for enforcement is not subject to appeal, but a decision denying leave can be appealed. The period within which a domestic arbitral award can be enforced in the Netherlands is limited to 20 years under Dutch law.

Foreign awards require recognition in addition to leave for enforcement. For this purpose, the Dutch Arbitration Act distinguishes between awards recognised and enforced pursuant to an enforcement treaty, and awards recognised and enforced without the application of a treaty.

Recognition and enforcement based on a treaty

In respect of enforcement with an applicable treaty, the proceedings commence with the filing of a petition for leave to recognise and enforce a foreign award at the court of appeal. The application must be filed at the court of appeal in the district where enforcement is sought (i.e., in the district where an asset of the award debtor is situated or where the award debtor is domiciled). The court of appeal must order a hearing before it decides on the request. The parties against whom enforcement is sought must be summoned for the hearing by the party requesting enforcement by formal service of the court's decision ordering a hearing. The court of appeal records its decision in a separate *exequatur* judgment that must contain reasoning. Unless the relevant enforcement treaty provides otherwise, both the applicant and the respondent can appeal to the Supreme Court within three months of the day of the decision. Such an appeal does not suspend the enforceability of the court of appeal's *exequatur*, unless that court decided otherwise.

The Netherlands is a party to both the New York Convention and the ICSID Convention. In the case of New York Convention awards, the procedure is largely the same as the procedure described above. A petition for leave to recognise and enforce an ICSID award must be made to the preliminary relief judge of the District Court of The Hague, which is the designated competent court for this procedure in the Netherlands, in accordance with the ICSID Convention.

Recognition and enforcement without a treaty

If no applicable treaty exists for the recognition and enforcement of a foreign award, or if a treaty is applicable but permits a party to seek recognition and enforcement pursuant

to the law of the state where the enforcement is sought, a party can apply for recognition and enforcement of the award based exclusively on Dutch law, in accordance with the Dutch Arbitration Act and DCCP. The proceedings are largely identical to those for an application based on a treaty.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

The Netherlands has signed and ratified the New York Convention, effective on 24 April 1964. The only reservation made is the reciprocity reservation, in terms of which only awards from other contracting states will be enforced as per the Convention's terms.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

A domestic arbitral award is fit to be recognised and enforced by the district court within whose judicial district the seat of the arbitration is located. The competent court in respect of foreign awards is the court of appeal in the district where enforcement is sought.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

The competent court in the district within which the seat of arbitration is located will have jurisdiction in respect of enforcement of domestic awards.

Dutch courts have a general jurisdiction to enforce foreign arbitral awards. An application for leave to enforce a foreign award in the Netherlands is, by its nature, considered to be sufficiently closely connected to the Dutch legal order, and the presence of assets in the state is not specifically required. This certainty of jurisdiction, coupled with liberal rules on levying *ex parte* prejudgment attachments and the fact that many companies and institutions are structured through Dutch entities, makes the Netherlands an attractive jurisdiction for the enforcement of arbitral awards.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

A Dutch domestic arbitral award is enforced by proceedings before a single judge in the competent district court, which are typically handled on an *ex parte* basis. Enforcement

proceedings of foreign arbitral awards are conducted in the first instance by the competent court of appeal. There is usually one round of written submissions and both parties are given an opportunity to address the court at the hearing. Please refer also to question 4.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

The DCCP requires at least an authenticated copy of the award to be produced to the relevant court for enforcement of domestic awards. For foreign arbitral awards, the DCCP and the New York Convention require the original arbitration agreement and the original arbitral award, or duly certified copies of these documents, to be produced to the relevant court. In respect of ICSID awards, an authentic copy of the award signed by the Secretary General of ICSID must be furnished.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

In practice, Dutch courts will accept awards rendered in English and possibly in French or German. Although the New York Convention requires translation of an award into the official language of the country in which enforcement of an award is sought, Dutch courts usually adopt a pragmatic approach in these cases. There are court decisions finding that the translation requirement is not to be enforced if the arbitral award is in a language understood by both the party defending against the request for leave and the court. There is also no requirement that an ICSID award be translated into Dutch.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

There are no additional costs beyond normal legal costs associated with any other court application, such as counsel's fees, disbursements and court fees.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

An award deciding on interim measures, whether qualifying as an interim award or as a partial final award, is in principle enforceable in the same manner as an arbitral award on the merits.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

In the absence of an applicable treaty concerning recognition and enforcement, the grounds for refusal as contained in the Dutch Arbitration Act apply. The grounds closely resemble those in the New York Convention:

- there is no valid arbitration agreement under the law applicable to the arbitration agreement;
- the tribunal was constituted in violation of the applicable rules;
- the tribunal violated its mandate;
- the award is open to appeal to another arbitral tribunal or court in the country where the award was made;
- the arbitral award has been set aside by a competent authority of the country where the award was made; or
- recognition or enforcement would be contrary to public policy.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Both domestic arbitral awards and foreign awards only become enforceable after leave for enforcement (*exequatur*) has been granted by the relevant court (see question 4). Once *exequatur* has been granted, the arbitral award can be enforced in the Netherlands in the same manner as an enforceable state court judgment.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

In respect of domestic arbitral awards and where there is no applicable treaty on recognition and enforcement, the DCCP provides for an appeal process only if recognition is refused. If this is the case, the party may apply to the competent court of appeal, and if appeal is again unsuccessful, a cassation appeal can be filed with the Supreme Court.

In respect of recognition sought on the basis of the New York Convention, the Dutch Supreme Court has ruled that there is no right of appeal against a decision granting leave to enforce an award in terms of the Convention. In the case of a foreign award where the New York Convention is not applicable, and unless the relevant enforcement treaty provides otherwise, both the applicant and the respondent can appeal to the Supreme Court following a decision either refusing recognition or granting leave for enforcement.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The enforcement of an arbitral award is not automatically suspended by an application for the setting aside of the arbitral award. In terms of the Dutch Arbitration Act, upon request by a party, and if there are good grounds for doing so, the court may suspend enforcement of the award until a final decision on the application for setting aside has been made.

Similarly in respect of foreign awards for which there is no applicable enforcement treaty, the court of appeal may suspend its decision on the recognition and enforcement if proceedings to set aside the award have been initiated in the state where the award was rendered. Dutch courts also abide by the provisions of applicable treaties in this regard, for example Article VI of the New York Convention, which provides for a court to suspend recognition or enforcement proceedings if a setting aside application has been made before the court at the seat of arbitration.

When reviewing a request for suspension of enforcement, the court generally considers two cumulative requirements that must be met for the request to succeed. First, it must be probable that the award will be set aside. Second, the interest of the award debtor to delay enforcement must outweigh the interest of the award creditor in proceeding with the enforcement.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

In the event that recognition and enforcement proceedings are suspended pending the outcome of an application for setting aside, the Dutch Arbitration Act permits the court to order the party seeking suspension to provide security. Conversely, if the request for suspension is denied, the court may order the party seeking enforcement to provide security.

In nuanced cases, the Dutch courts have been willing to consider suspending their decisions on recognition and enforcement subject to the provision of suitable security; however, in practice, security is rarely sought in these situations and so there are no established factors for consideration.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

An award that was set aside at the seat of arbitration may still be recognised and enforced in the Netherlands. Although the Dutch Arbitration Act provides that an award that has been set aside at the seat is a ground for refusing recognition and enforcement, the Supreme Court has indicated that this does not automatically preclude Dutch courts from recognising an award. An award may be recognised in the Netherlands in exceptional circumstances if, for example, the award has been set aside on grounds that are not grounds for refusal of recognition as set out in the Dutch Arbitration Act and that are not internationally accepted.

The approach of the courts is similar in New York Convention cases. The Dutch courts are required to grant leave for the recognition and enforcement of a foreign arbitral award under the Convention, unless a ground for refusal as provided in Article V(1) applies. However, even if such a ground for refusal applies, the court nevertheless has a certain discretion to grant leave for recognition and enforcement, which may be applied in special circumstances. A special circumstance exists if the award was set aside in foreign proceedings on grounds that do not match with those in Article V, (1)(a) to (1)(d) of the New York Convention, and grounds that are not generally accepted according to international standards. A special circumstance also exists if the decision rendered in the foreign setting aside proceedings cannot be recognised in the Netherlands, on the grounds that one or more of the requirements under Dutch private international law for the recognition and enforcement of a foreign decision have not been fulfilled.

The party seeking recognition and enforcement has the burden of asserting and proving facts and circumstances that justify granting leave for recognition and enforcement despite a ground for refusal being applicable.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Service of any applications, writs of summons and judgments or *exequaturs* are ordinarily effected through the Dutch bailiff, instructed by the applicant or award creditor as the case may be. Service is usually effected at the respondent's domicile, which may also be the offices of the respondent's counsel if nominated. However, in light of some recognition and enforcement proceedings being *ex parte* proceedings, service in this manner will not always be required.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, and Regulation (EC) No. 393/2007 regulate service of judicial documents in the EU Member States. If service is to be effected in a state that is not a member of the European Union or not a signatory to the 1965 Convention, service is regulated by the DCCP. In such a case, the court bailiff must send the document by registered post to the foreign address, and present the document to the office of the public prosecutor in the relevant district of the competent court. The public prosecutor must provide the document to the Dutch Ministry of Foreign Affairs, which must then give notice to the foreign respondent.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

A number of databases and registers allow for the identification of assets in the Netherlands, including: the land registry (*Kadaster*), which facilitates a database of real estate and includes information about ownership, mortgages, value of properties and legal attachments; the vessel register and database, which is supported on the *Kadaster* website; the aircraft register; the patent register; the Benelux Office of Intellectual Property, including information on trademarks; and the trade register (KvK), which includes content on corporate entities registered in the Netherlands, such as directorship, financial reports and shareholding.

In addition, under new European legislation, the Netherlands is in the process of implementing a UBO register, identifying the ultimate beneficial owner of legal entities.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Dutch law does not provide for either specific legal proceedings in respect of asset disclosure, or a specific obligation for an award debtor to disclose its assets.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

An award creditor may obtain a prejudgment attachment against assets of an award debtor pending, or prior to commencing, *exequatur* proceedings. The purpose of such an

attachment is to secure assets sought to be recovered upon enforcement, which are at risk of being disposed of or alienated by an award debtor before enforcement. In fact the attachment regime in the Netherlands is very liberal and award creditor friendly.

A prejudgment attachment may be obtained against assets of a sovereign state that are not protected by sovereign immunity from enforcement measures. As discussed in questions 32 and 34, the Netherlands recognises parts of the 2004 UN Convention on Jurisdictional Immunities of States and their Property as a reflection of customary international law that governs the question of which assets may be subjected to post-judgment attachment as well as prejudgment attachment.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

In order to levy prejudgment attachment against assets of an award debtor, an award creditor must obtain leave for attachment from the preliminary relief judge of the district court in the district where the assets are located or where the award debtor is domiciled. The petition for leave to attach assets may be done *ex parte* and the leave is customarily granted within a matter of days. After obtaining the leave to attach assets, the attachment is effected through instruction to a bailiff, who will levy the attachment through service of an attachment order.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

Please refer to questions 23, 24 and 29, with the exception that sale of the property may not be permitted in the prejudgment process prior to a final decision on enforcement proceedings.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

Please refer to questions 23, 24 and 30, with the exception that sale of the property may not be permitted in the prejudgment process prior to a final decision on enforcement proceedings.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

The procedure for movable property also applies to intangible property – see question 26.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Before enforcing an arbitral award through attachment of assets, an award creditor must obtain an *exequatur* from the competent Dutch court, as discussed in question 4. After obtaining an *exequatur*, attachments may be levied against the award debtor's assets through a direct instruction to a court bailiff in accordance with the DCCP.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

The procedures for enforcement against immovable property are set out in the DCCP. Prior to attachment of immovable property belonging to an award debtor, an award creditor must instruct a bailiff to serve a payment order on the award debtor, including a summons for the debtor to complete payment under the award within two days. After this term, attachment may be levied by the bailiff through an attachment order that is entered on the public registry for immovable property. In the event that the immovable property is under mortgage, the award debtor must inform the mortgage holder of the attachment. The immovable property is sold at auction by a notary public who is designated by the award creditor (either in the attachment order served on the award debtor, or in a later order served on the award debtor). An auction of immovable property must be announced on the internet at least 30 days before the date of the auction. The designated notary public will take payment for the immovable property, pay the sums due to the award creditor, and return any residual funds to the award debtor.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

For movable property that is required by law to be registered in public registries (see question 21), the procedure is the same as with immovable property, although the time limit for complying with the bailiff's payment order is 24 hours instead of two days, and the time limit for notice of the sale of the immovable property varies (between two weeks and six weeks), depending on the type of property.

For other movable property (i.e., that is not required by law to be registered in a public registry), attachment is effected through direct instruction of a bailiff who will, after serving a payment order with a summons to pay the awarded sum within two days, seize the property and sell it or, if the property is liquid, pay out to the award creditor.

Selling off registered shares in a (public or private) company requires obtaining prior leave from the district court in the district where the company is located. The district court will summon the bailiff, the award creditor, the award debtor, the company and any

interested party (such as other parties with an attachment on the shares) before issuing a decision on the request for leave.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

The procedure for movable property also applies to intangible property – see question 30.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

When enforcing an investment arbitration award against a state in the Netherlands, Dutch law on immunity from execution applies. Although the Netherlands is not a signatory, the Supreme Court has endorsed certain parts of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property as reflecting customary international law, in particular Articles 19 and 21 thereof, which set out exceptions to the general rule of sovereign immunity in respect of post-judgment attachments. However, the Supreme Court has indicated that Article 18 of the Convention, which contains strict prejudgment attachment provisions, is not reflective of customary international law. Accordingly, prejudgment attachments would also be permissible in accordance with the exceptions to immunity set out in Articles 19 and 21, as discussed in question 34.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

For signatory states, the 1972 European Convention on State Immunity will apply to service on foreign states. Judicial process must be provided to the Ministry of Foreign Affairs of the respondent state, which then distributes it to the competent authority for the foreign state.

If the foreign state is not a signatory to the 1972 Convention, service is effected in accordance with the DCCP, in the same manner as that for non-Member States set out in question 20. For the purposes of service on a foreign state, the domicile is usually considered to be the office of the Minister of Foreign Affairs in that state's capital city.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Following international customary law and Dutch law on sovereign immunity as referred to in question 32, the general principle is that the property of foreign states is not susceptible

to attachment and execution. Under the terms of Article 19 of the 2004 Convention, exceptions to this immunity exist if:

- the foreign state has expressly consented to enforcement measures;
- the foreign state has designated or reserved property to satisfy the claim; or
- it has been established that the property is used or intended to be used by the state for purposes other than government, non-commercial purposes.

The burden of proof with respect to suitability for attachment of the property in the third category rests on the award creditor seeking attachment.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

It is possible for a foreign state to waive immunity from enforcement. The Dutch Supreme Court has confirmed that a waiver of immunity must be explicit and specific; it cannot be implied from the provisions of the relevant arbitration agreement. See also question 34.

Appendix 1

About the Authors

Marnix Leijten
De Brauw Blackstone Westbroek NV

Marnix Leijten is a noted specialist in cross-border litigation and international arbitration. His experience includes a wide variety of high-stakes international disputes, commercial and investor-state arbitrations, as well as complex enforcement and setting aside disputes. According to *Chambers* 2019, he is 'widely regarded as a leading international arbitrator' and an 'equally adept civil litigator'. He has been consistently ranked in the highest category of Dutch litigators by the leading guides since 2010. In *Who's Who Legal: Arbitration* 2018, Marnix is described as 'one of the best arbitration practitioners in the Netherlands' and 'a master of his arguments, particularly on highly technical points'. Further, Marnix was highlighted in *Who's Who Legal: Thought Leaders – Arbitration* 2018.

Marnix was the Dutch member of the ICC International Court of Arbitration from 2006 to 2015, and has been vice president of the Court since 2015. Marnix is a co-chair of the ICC Commission's Task Force on Emergency Arbitration. He is also an active member of the ICC Institute of World Business Law, the ICC Commission on Arbitration, the ICCA and the IBA Arbitration Committee.

Marnix frequently speaks and publishes on topics relating to cross-border litigation and arbitration.

Erin Cronjé
De Brauw Blackstone Westbroek NV

Erin Cronjé is a senior associate in the litigation and arbitration department. Erin specialises in international dispute resolution, including international arbitration, cross-border litigation and mediation. She has extensive experience in commercial dispute resolution and has advised multinational entities on litigation strategy in disputes spanning numerous jurisdictions.

Abdel Zirar
De Brauw Blackstone Westbroek NV

Abdel Zirar is a senior associate in the litigation and arbitration department. Abdel specialises in international arbitration and cross-border litigation. He advises and acts in disputes involving investment treaties, M&A contracts, gas purchase agreements and other commercial contracts. Abdel also regularly acts in proceedings concerning the enforcement of international arbitral awards.

De Brauw Blackstone Westbroek NV
Claude Debussylaan 80
1082 MD, Amsterdam
Netherlands
Tel: +31 20 577 1771
Fax: +31 20 577 1775
marnix.leijten@debrauw.com
erin.cronje@debrauw.com
abdel.zirar@debrauw.com
www.debrauw.com

Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

The Guide to Challenging and Enforcing Arbitration Awards is a comprehensive volume that addresses this new reality. It offers practical know-how on both sides of the coin: challenging, and enforcing, awards. Part I provides a full thematic overview, while Part II delves into the specifics seat by seat. It covers 29 seats.

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ISBN 978-1-83862-205-3