

# Netherlands

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In the Netherlands, arbitration has traditionally been the most important form of dispute resolution along with court litigation, particularly for the resolution of construction or trade disputes. Such disputes are usually brought before the Netherlands Arbitration Institute (NAI) or the Arbitration Board for the Building Industry. The Netherlands is also renowned for the arbitration of international trade disputes. There are many reasons why the Netherlands is an attractive seat for international arbitrations: as the host state of many international courts and tribunals – including the International Court of Justice, the Permanent Court of Arbitration and the International Criminal Court, as well as many specialised arbitration institutions – the Netherlands offers a favourable legal and logistical environment for accommodating, administering and conducting international arbitral proceedings. A much-welcomed added benefit of seating arbitral proceedings in the Netherlands is that it has cost advantages over more expensive venues such as Paris and London.

Another important factor is that the Dutch legislature and the judiciary have a favourable attitude towards arbitration. Dutch arbitration law affords the parties considerable freedom to determine the rules of procedure, and the state courts take a liberal approach to arbitration. The state courts do act as a safety net if issues arise that parties or arbitrators are unable to resolve, yet without interfering excessively in the arbitral process. They will decline jurisdiction if a party invokes an arbitration agreement before putting forward other defences, and if the arbitration agreement is valid and applicable to the subject matter in dispute.

A revision of the Dutch Arbitration Act has recently been adopted by Parliament and will apply to arbitral proceedings initiated on or after 1 January 2015. This revision is aimed at further enhancing the efficiency and flexibility of the arbitral process by avoiding delays through state court proceedings, reducing the administrative burden and maximising party autonomy.

This contribution will summarise the main characteristics of the legal framework for arbitration in the Netherlands under the revised Dutch Arbitration Act and will highlight some of its most significant amendments. Subsequently, other recent arbitration developments in the Netherlands will be discussed.

### Legal framework for arbitration in the Netherlands

Each arbitration taking place in the Netherlands, regardless of the nationality of the parties or the subject matter of the arbitration, is subject to book 4 of the Dutch Code of Civil Procedure (DCCP), also referred to as the Dutch Arbitration Act.<sup>1</sup> The Act became effective in 1986 and is inspired in large part by the UNCITRAL Model Law. Most provisions are of a regulatory, not mandatory nature. The Dutch Arbitration Act contains fairly standard provisions on:

- the arbitration agreement;
- the appointment of arbitrators;
- the disclosure and challenge of arbitrators;

- procedure;
- witness and expert hearings;
- joinder and consolidation;
- competence-competence;
- the content of the award;
- correction and addition of the award; and
- recognition and enforcement.

### No restrictive requirements for the arbitration agreement

All subject matters may be referred to arbitration, unless this would lead to legal consequences of which the parties cannot freely dispose.<sup>2</sup> Strictly speaking, the Dutch Arbitration Act does not impose special requirements on arbitration agreements beyond the rules applicable to the formation of contracts in general. However, if the arbitration agreement is contested, its existence must be proven by an instrument in writing, including electronic data fulfilling certain requirements). For this purpose, an instrument in writing that provides for arbitration or that refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party.<sup>3</sup>

An arbitration agreement is considered and decided upon as a separate agreement. The arbitral tribunal has the power to decide on the existence and validity of the contract of which the arbitration agreement forms part or to which the arbitration agreement is related.<sup>4</sup>

### Remedies

The Dutch Arbitration Act distinguishes between three legal remedies that may be available against an arbitral award: arbitral appeal, setting aside and revocation.

Appeal from the arbitral award to a second arbitral tribunal is possible only if the parties have agreed thereto. Parties, and the rules of recognised arbitration institutes, do not usually provide for the remedy of an arbitral appeal.

The setting aside of arbitral awards is an extraordinary and restricted legal remedy. The available grounds for setting aside closely resemble those laid down in the New York Convention. The court may set aside the award only if:

- a valid arbitration agreement is lacking;
- the arbitral tribunal was constituted in violation of the applicable rules;
- the arbitral tribunal has manifestly not complied with its mandate;
- the award is not signed or does not contain any reasons whatsoever; or
- the award, or the manner in which it was made, violates public policy.

The setting aside of arbitral awards is limited to a maximum of two instances. A request for the setting aside of an arbitral award must

be addressed directly to the Court of Appeal, after which it is only possible to appeal to the Supreme Court on limited grounds. This helps reduce costs, the time necessary and improves efficiency, as before the revision of the Dutch Arbitration Act parties could go through three instances after completion of the arbitration.

Finally, revocation is exceptional in practice. This remedy can be sought in case of fraud, forgery or withheld documents.

### Enforcement

The Netherlands has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in respect of which it has elected to enforce only awards from other contracting states – the ‘reciprocity’ reservation.

If no treaty concerning recognition and enforcement is applicable, or if an applicable treaty allows a party to rely upon the law of the country in which recognition or enforcement is sought, recognition and enforcement may be sought on the basis of the Dutch Arbitration Act. The grounds for refusal resemble those in the New York Convention. Leave for enforcement may be denied, if:

- the party against whom recognition or enforcement is sought asserts and proves that a valid arbitration agreement under the law applicable thereto is lacking;
- the arbitral tribunal is constituted in violation of the rules applicable thereto;
- the arbitral tribunal has manifestly not complied with its mandate;
- the arbitral award is still open to an appeal to a second arbitral tribunal or to a court in the country in which the award is made;
- the arbitral award has been set aside by a competent authority of the country in which that award is made; or
- the court finds that the recognition or enforcement would be contrary to public policy.

The Dutch Arbitration Act provides for an asymmetric system of appeal. Only decisions denying leave for enforcement can be appealed. This remedy is not, however, available against the grant of leave. The idea is that the remedy of setting aside is an adequate safeguard for the party opposing recognition and enforcement.<sup>5</sup>

### Interim measures

The Dutch Arbitration Act contains quite distinctive provisions relating to interim measures. These provisions distinguish between three types of interim relief. First, parties are allowed to request that a constituted arbitral tribunal on the merits takes provisional measures at any stage of the proceedings.<sup>6</sup> Second, parties to an arbitration agreement may agree to authorise a stand-alone arbitral tribunal to rule on an urgent interim relief request for provisional measures where no (simultaneous) arbitration proceedings on the merits are pending.<sup>7</sup> Third, state courts can provide interim measures if the requested measure cannot be obtained, or not in a timely manner, through arbitration.<sup>8</sup> Only state courts can provide for pre-judgment attachment or precautionary seizure.

The stand-alone summary arbitral proceedings are a fairly unique and successful feature of NAI arbitration that has been incorporated in the revised Dutch Arbitration Act. Similar provisions were included in the 2012 ICC Arbitration Rules. However, there are a number of significant differences. The 2012 ICC Arbitration Rules enable parties to seek ‘urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal’ (article 29 and appendix V to the 2012 ICC Arbitration

Rules). By contrast, the Dutch Arbitration Act merely requires that the provisional measure requested is urgent. An advantage of the Dutch Arbitration Act therefore is that the parties do not need to demonstrate that the relief sought ‘cannot await constitution’ of the arbitral tribunal. Furthermore, the ICC emergency arbitrator can only issue an order, which is not an arbitral award. The Dutch Arbitration Act, however, allows the tribunal in summary proceedings to render an arbitral award, which can be declared enforceable simply by leave of enforcement granted by the competent state court. Finally, under the 2012 ICC Arbitration Rules, the ICC emergency arbitrator’s order must be followed by arbitral proceedings on the merits at all times. Under the Dutch Arbitration Act this follow-up is not compulsory. The party seeking urgent interim relief is not required to initiate arbitral proceedings on the merits. The parties may therefore use stand-alone arbitral summary proceedings as their only means of dispute resolution, and in fact do so in practice on a regular basis.

### Remission

Unless the parties agree otherwise, the state courts’ jurisdiction revives only if the arbitral award is set aside due to the absence of a valid arbitration agreement. The state courts’ jurisdiction no longer revives, if and to the extent the arbitral award is set aside on another ground. The revised Dutch Arbitration Act also provides for the possibility for the Court of Appeal to suspend the setting aside proceedings to allow the arbitral tribunal to right a wrong by resuming the arbitral proceedings or by taking another measure that the arbitral tribunal deems appropriate. Such a decision of the Court of Appeal cannot be appealed. These amendments have further limited the intervention of the Dutch courts in the arbitral process, making the Dutch Arbitration Act more arbitration friendly and the arbitral process more efficient.

### Partial setting aside

The Dutch Arbitration Act provides for the partial setting aside of arbitral awards. If a ground for setting aside only involves part of the arbitral award, the remainder of the award shall not be set aside to the extent that it is – with a view to the content and purport of the award – not inextricably linked to the part of the award to be set aside.

### Maximised party autonomy

Parties choosing the Netherlands as a forum for the resolution of their arbitral disputes enjoy broad freedom in determining the procedure to be followed by the arbitral tribunal in conducting the proceedings. Examples are the parties’ right to exclude the authority of the arbitral tribunal to order the disclosure of documents or the appearance of a witness or expert.

### Reduced administrative burden

The compulsory filing of arbitral awards with the District Court has been abolished; such filing is only required if the parties agreed to it. The possibility for parties to use electronic means where the law requires a written form has also been introduced. These features help reduce the costs involved in arbitration, and further enhance the competitive position of the Netherlands as a venue for both domestic and international arbitration.

### Confidentiality

Although it is a generally accepted principle, there is no specific provision for confidentiality in arbitration in the Netherlands. The minister of justice, in response to questions posed by parliament

on the revision of the Dutch Arbitration Act, reiterated that confidentiality is the rule and public access the exception. It nevertheless remains for the parties to decide whether to include a confidentiality provision in their arbitration agreement, or to opt for a set of arbitration rules that include such provision.

### Challenges to arbitrators

The Dutch Arbitration Act provides for the District Court to decide on the merits of any challenge to an arbitrator. In accordance with international best practices, parties can agree on an alternate procedure such as letting the arbitration institute administering the dispute rule on such challenge.

### Other noteworthy recent developments: the enforcement of annulled arbitral awards

In previous editions of *The European and Middle Eastern Arbitration Review*,<sup>9</sup> we addressed the case of *Yukos Capital v Rosneft*, where the Amsterdam Court of Appeal granted Yukos leave for enforcement of arbitral awards that had been set aside by the Russian courts.<sup>10</sup> Yukos's request for enforcement was based primarily on article 1075 DCCP (Recognition and Enforcement of Foreign Awards under Treaties) in conjunction with the New York Convention, and alternatively on article 1076 DCCP (Recognition and Enforcement of Foreign Awards without Treaties).<sup>11</sup> Article V of the New York Convention lists the exclusive grounds for refusing recognition and enforcement. Recognition and enforcement 'may be refused', among others, if the arbitral award 'has been set aside [...] by a competent authority of the country in which [...] that award was made.'<sup>12</sup> The discretionary 'may be refused' in article V – similar language is included in articles 1075 and 1076 DCCP – has prompted the question as to whether a court may nevertheless decide to enforce an annulled award.<sup>13</sup> In the current academic debate and the judicial divide over the enforcement of annulled arbitral awards, the *Yukos* case is often mentioned as an example of the enforcement of a foreign arbitral award that has been set aside in the country of origin.<sup>14</sup>

Although the discussion in the first instance indeed focused on the wording of article V of the New York Convention,<sup>15</sup> the Amsterdam Court of Appeal did not consider this issue. Instead, it started by recalling that the New York Convention deals with the recognition and enforcement of arbitral awards, not with the recognition and enforcement of foreign court judgments. The Amsterdam Court of Appeal noted in this respect that Dutch courts should in principle recognise foreign setting-aside judgments, but that violation of due process is a specific ground for refusal of recognition under Dutch private international law. The Amsterdam Court of Appeal held that 'the Dutch court is at any rate not compelled to refuse the leave to enforce an arbitral award that has been set aside if the foreign judgment setting aside the arbitral award cannot be recognised in the Netherlands.'<sup>16</sup> The Court of Appeal subsequently established that the Russian judgments annulling the arbitral awards were the result of justice that had to be qualified as biased and lacking independence. The Amsterdam Court of Appeal reasoned that 'it is so likely that the judgments of the Russian civil court setting aside the arbitral awards are the result of legal proceedings that must be qualified as partial and dependent that these judgments cannot be recognised in the Netherlands.'<sup>17</sup> It then concluded that 'in assessing Yukos Capital's request to enforce the arbitral awards, the fact that these awards were set aside by the Russian court must be ignored.'<sup>18</sup> This opened the way to enforce the arbitral awards in the Netherlands despite the setting aside in Russia.<sup>19</sup>

In previous editions of *The European and Middle Eastern Arbitration Review*,<sup>20</sup> we addressed another case in which the Dutch courts were again confronted with the request to recognise (Russian) arbitral awards that had been set aside in Russia: *Maksimov v Novolipetsy Steel Mill (NLMK)*.<sup>21</sup> In this case, the Amsterdam District Court held in favour of the Russian steel corporation NLMK, dismissing Maksimov's request (based on article 1075 DCCP and the New York Convention) to enforce an arbitral award that had been annulled in Russia. Maksimov had argued in this case – referring to *Yukos* – that the Russian annulment judgments were tainted by dependence, bias, corruption and other procedural irregularities, as a result of which such judgments should not be recognised in the Netherlands. NLMK had noted in its defence that, since the Russian courts had set aside the arbitral award, it follows from article V(1)(e) of the New York Convention that Maksimov's request for recognition and enforcement should be refused. NLMK had furthermore stated that the objections of Maksimov to the Russian annulment judgments were unfounded.

The District Court did not grant leave of enforcement on the basis of the following reasoning:

*The starting point is that the arbitral award has been overturned by the Arbitration Court in Moscow (the competent authority), and consequently no longer exists. In principle, this decision (upheld by the Federal Arbitration Court in Moscow) has to be respected during the assessment of the petition in question. 'In principle', because the judge in summary proceedings, unlike NLMK, is of the opinion that the circumstance that the arbitral award has been overturned in the country of origin should not under all circumstances lead to a rejection of an application for leave for enforcement.'*<sup>22</sup>

According to the Amsterdam District Court, 'extraordinary circumstances' must be established to grant leave to enforce an annulled award, concluding that it would only

*deny the operation of the ruling of the Arbitration Court in Moscow that overturned the arbitral award (and which was upheld on appeal) if (and insofar as relevant here) the enforcement of the ruling overturning the arbitral award would constitute a breach of Dutch public order, for example because the ruling overturning the arbitral award was the result of proceedings in which by Dutch standards the principles of proper judicial procedure were unacceptably disregarded.*

However, such 'extraordinary circumstances' had not been established, according to the District Court. The Court noted that Maksimov had willingly and knowingly chosen to have disputes concerning the legal relationship between him and NLMK dealt with under Russian jurisdiction. Even if – as Maksimov argued in light of the *Yukos* case – it would be assumed that the judicial authorities in Russia are not impartial and independent in cases involving interests of the Russian state, Maksimov had failed to provide sufficient evidence that could support the conclusion that this was also the case in the particular annulment proceedings. Maksimov had provided insufficient evidence to substantiate a close link between NLMK and the Russian state, and that, partly for that reason, the annulment proceedings were biased and therefore took place in violation of the principles of proper judicial procedure. On these grounds, the Amsterdam District Court refused recognition and enforcement of the annulled arbitral award.

On 16 January 2012, Maksimov appealed the Amsterdam District Court decision. Maksimov argued, in short, that NLMK

had not requested the recognition of the Russian court's decision setting aside the award, that the Russian court's decision was still subject to appeal and that the setting aside proceedings did not qualify as a fair trial. The Amsterdam Court of Appeal rendered an interim judgment on the application for leave on 18 September 2012.<sup>23</sup> In doing so, it took the following approach.

The Court of Appeal first confirmed that enforcement of a foreign arbitral award can be refused on the basis of article V(1)(e) of the New York Convention, even though recognition and enforcement of the Russian annulment judgments had not, and would not, be requested.<sup>24</sup> With regard to the fact that the annulment judgment was still subject to appeal in Russia when the Amsterdam District Court decided to recognise the annulment, the Court of Appeal ruled that it is not required that the decision of the Russian court is final and conclusive. The New York Convention does not require the annulment to be final and conclusive.<sup>25</sup> The Court went on to reason that, while in principle Mr Maksimov's request had to be rejected on the ground of the preamble to article V(1) and article V(1)(e) of the New York Convention, it had to be determined whether in this case an exception should be made.<sup>26</sup> According to the Court, such an exception must be made

*in the event that there are sufficient indications that the proceedings to have the Arbitral Award quashed that were conducted before the foreign regular courts, viewed in their entirety in the concrete case at hand, were defective in respect of such essential issues that it no longer can be said that this was a fair trial. There is an exception to this exception – which, if applicable, would mean that the preamble to Article V(1) and Article V(1)(e) of the New York Convention of 1958 would once again apply – in the event that it is sufficiently plausible that if the trial had been fair, that would still have led to the Arbitral Award being quashed. The Court of Appeal derives its jurisdiction and obligation to assess these issues from the general Dutch international private law, which protects the Dutch public order, in addition to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (cf. European Court of Human Rights, 20 June 2001, no. 30882/96 (Pellegrini v Italy)).<sup>27</sup>*

The Court notes in this respect that it is important to exercise restraint when a court of one state has to determine whether the court of another state is biased or dependent.<sup>28</sup> Although the sources referred to in the *Yukos* case (cited by Maksimov) do present 'an extremely worrisome picture' regarding the independence and impartiality of the Russian judiciary – particularly regarding cases involving interests of the Russian state – the Court of Appeal considered this insufficient for an exception to be made. In order to justify an exception to article V(1)(e) of the New York Convention, it would need to be demonstrated that these particular annulment proceedings had been conducted in an unfair manner.<sup>29</sup> As the Court of Appeal did not have sufficient information available to determine whether this was the case, it considered it necessary to order the parties to issue an expert opinion on Russian law.<sup>30</sup> The questions that the Court of Appeal wished to be answered by experts<sup>31</sup> suggest that the Court not only liked to be advised on Russian procedural law, but also wanted the experts to comment on the way the Russian judiciary should apply Russian law to the facts. This approach is unique – both in the context of the New York Convention and in the more general context of the enforcement of foreign judgments – in that an enforcement court essentially wants to reapply foreign law to certain presumed facts.

Both parties were given the opportunity to respond to the Court of Appeal's interim judgment of 18 September 2012. Upon receipt of these responses the Court slightly amended its approach and ruled on 15 April 2014 that the experts should judge the Russian annulment proceedings as a whole, as opposed to only the first instance. The Court moreover added the instruction that, should the experts find that the Russian decisions present indications of inaccurate interpretation of Russian law, the experts should judge

*to what degree are these interpretations or applications that no reasonable legal expert with reasonable knowledge of Russian law would deem defensible?*<sup>32</sup>

At the time of writing this contribution, further judgment is awaited.

## Notes

- 1 For an extensive commentary on important elements of arbitration law in the Netherlands, see B van der Bend, M Leijten and M Ynzonides (eds), *A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law*, Kluwer Law International, 2009. A new edition, incorporating the revision of the Dutch Arbitration Act, is forthcoming early 2015.
- 2 Article 1020 DCCP. Restrictions may apply in cases concerning, eg, intellectual property rights, bankruptcy law and company law.
- 3 Article 1020 DCCP.
- 4 Article 1053 DCCP.
- 5 With the revision of the Dutch Arbitration Act, the legislator decided to hold on to the decision of the Dutch Supreme Court that – also in cases of enforcement of foreign arbitral awards in the Netherlands under the New York Convention – an appeal against the grant of leave to enforce is not permitted, and that the asymmetry in the right to appeal does not conflict with the principle of equality of arms under article 6 ECHR. See Dutch Supreme Court, 25 June 2010, case No. 09/02566, LJN BM1679, NJ 2012/55.
- 6 Article 1043a DCCP.
- 7 Article 1043b DCCP.
- 8 Article 1072a DCCP.
- 9 *The European and Middle Eastern Arbitration Review*, 2011, 2012, 2013 and 2014 Editions.
- 10 Amsterdam Court of Appeal, 28 April 2009, case No. 200.005.269/01, LJN BI2451, JOR 2009/208, TvA 2010/5.
- 11 Russia and the Netherlands are both parties to the New York Convention.
- 12 Article V paragraph 1 sub e of the New York Convention.
- 13 See also B Van der Bend, M Leijten and M Ynzonides (eds), *A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law*, Kluwer Law International 2009, p312.
- 14 See, eg, M McClure, 'Enforcement of Arbitral Awards that have been Set Aside at the Seat: The Consistently Inconsistent Approach Across Europe', 26 June 2012, available at <http://kluwerarbitrationblog.com/blog/2012/06/26/enforcement-of-arbitral-awards-that-have-been-set-aside-at-the-seat-the-consistently-inconsistent-approach-across-europe>.
- 15 *Yukos* relied on the English, Spanish, Russian and Chinese texts which provide that recognition and enforcement may be refused if an award has been set aside in the country of origin, while Rosneft relied upon the French text to argue that the enforcing judge retained no discretion to enforce an annulled award. See Amsterdam District Court, 28 February 2008, application number KG RK 07-750.

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- 16 Amsterdam Court of Appeal decision, *supra* note 12, s3.5.
- 17 *Id.*, s3.10.
- 18 *Id.*
- 19 Rosneff's cassation appeal with the Dutch Supreme Court was ultimately rejected on jurisdictional grounds, because – in cases of enforcement of an award under the New York Convention – Dutch law does not permit an appeal against the grant of leave to enforce. See Dutch Supreme Court, 25 June 2010, case No. 09/02566, LJN BM1679, NJ 2012/55.
- 20 *The European and Middle Eastern Arbitration Review*, 2011, 2012, 2013 and 2014 Editions.
- 21 Amsterdam District Court, 17 November 2011, case/application No. 491569 / KG RK 11-1722.
- 22 Amsterdam District Court, *supra* note 23, s4.8.
- 23 Amsterdam Court of Appeal, 18 September 2012, case No. 200.100.508/01. An English translation of this interim judgment is available at <http://usld.practicallaw.com/0-521-6702>.
- 24 Amsterdam Court of Appeal, *supra* note 25, s2.5-2.6.
- 25 Amsterdam Court of Appeal, *supra* note 25, s2.7. The Russian Federal Court and the Russian Supreme Court both upheld the decision to set aside the arbitral award, on 10 October 2011 and 20 January 2012 respectively.
- 26 Amsterdam Court of Appeal, *supra* note 25, s2.8.
- 27 Amsterdam Court of Appeal, *supra* note 25, s2.9.
- 28 Amsterdam Court of Appeal, *supra* note 25, s2.10.
- 29 Amsterdam Court of Appeal, *supra* note 25, s2.11-2.12.
- 30 Amsterdam Court of Appeal, *supra* note 25, s2.13.
- 31 Amsterdam Court of Appeal, *supra* note 25, s2.15.
- 32 Amsterdam Court of Appeal, 15 April 2014, case No. 200.100.508/01.





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