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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 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. The city of The Hague is to have a new hearing centre, which will be located across from the Peace Palace.[1] 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.

On 1 January 2015, a revised Arbitration Act entered into force in the Netherlands.[2] The revision was 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. The main features of the legal framework for arbitration in the Netherlands under the revised Dutch Arbitration Act will be discussed below. Subsequently, the most recent arbitration developments in the Netherlands will be addressed.

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.[3] 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.[4] 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 (or by 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.[5]

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.[6]

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.

Recourse to a court against a final or partial final arbitral award that is not open to appeal in arbitration, or a final or partial final award rendered on arbitral appeal, may be made only by an application for setting aside or revocation.[7]

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. The application for setting aside must be addressed to the Court of Appeal of the district of the seat of arbitration. After the Court of Appeal has rendered a decision on the application for setting aside, the parties can appeal in cassation to the Supreme Court. The parties may, however, agree to exclude the possibility of cassation, and by doing so, limit the state court's review to one instance.

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

Partial setting aside

Under the Dutch Arbitration Act, it is possible to have an arbitral award set aside only in part, provided that the remainder of the award is not inextricably linked to the part of the award that is to be set aside. In the event that the arbitral tribunal has awarded in excess of, or differently from, what was claimed, the arbitral award shall be partially set aside to the extent that the part of the award that is in excess of, or different from, the claim can be separated from the remainder of the award.[8] The Supreme Court has ruled that an application for the setting aside of an arbitral award implicitly entails an alternative application for a partial setting aside.[9] This means that, in practice, an award may be set aside in part even where the applicant has not explicitly requested the court to partially set aside the award.

Remission

As soon as a decision that has reversed the award has become final, the state courts' jurisdiction revives only if the arbitral award is set aside due to the absence of a valid arbitration agreement.[10] In the event the award is set aside for another reason, the court will refer the case back to the arbitral tribunal.

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 state courts in the arbitral process, making the Dutch Arbitration Act more arbitration friendly and the arbitral process more efficient.

Recognition and 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.[11]

Interim measures

The Dutch Arbitration Act contains quite distinctive provisions relating to interim measures. There are three ways for parties to obtain interim relief under the Dutch Arbitration Act. First, parties are allowed to request that an arbitral tribunal that has already been constituted takes interim measures at any stage of the proceedings on the merits.[12] The interim measures should relate to the claim or counterclaim in the pending arbitral proceedings, and shall only apply for the duration of the proceedings. Second, parties to an arbitration agreement may agree that a separate arbitral tribunal may be appointed, irrespective of the arbitral proceedings on the merits being pending, with the power to award interim relief at the request of one of the parties.[13] Third, interim measures can be obtained through state court proceedings if the requested measure cannot be obtained, or not in a timely manner, through arbitration.[14] Only state courts can provide for pre-judgment attachment or precautionary seizure.

The provisions in the Dutch Arbitration Act regarding interim measures in arbitration are based on the strong and long-standing Dutch tradition of *kort geding*, which can be characterised as provisional or preliminary relief proceedings before the state courts. Through these proceedings, which can be initiated prior to the proceeding on the merits, a party can obtain provisional relief for the preservation of rights or a status quo. The interim measures that are obtainable through a *kort geding* are generally much broader than those typically available in other jurisdictions. They can include, for instance, enforcement of a contract, specific performance, freezing of assets, blocking of a share transfer, payment into escrow accounts or providing a bank guarantee. Courts provide for speedy and easy access, and generally show little hesitation in granting interim measures. When the requesting party can show that the requested interim measure is of a provisional nature and that, taking the interests of the parties into consideration, an immediate interim measure is required, the court is likely to award such measure.[15] Once awarded, the requesting party is not required to initiate proceedings on the merits. The interim measure is enforceable regardless of whether further proceedings are initiated.

The stand-alone 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 introduced 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 interim 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.

It should be noted that summary arbitral proceedings are only available when the seat of the arbitration is in the Netherlands. In contrast, interim measures can be obtained through the Dutch state courts if parties are bound by an arbitration agreement regardless of the seat of the arbitration.

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 with the revised Dutch Arbitration Act. 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 includes 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.

Noteworthy recent developments

Yukos: the battle continues

On 20 April 2016, The Hague District Court set aside the US$50 billion Yukos awards rendered against the Russian Federation in arbitration proceedings administered by the Permanent Court of Arbitration in The Hague.[16] Few arbitration-related matters in recent years have attracted so much attention as these proceedings between three former shareholders of the OAO Yukos Oil Company (Yukos), formerly the largest oil company in post-Soviet Russia, and the Russian Federation (Russia). In 2005, the former Yukos shareholders brought three parallel arbitrations under the 1994 Energy Charter (ECT) according to the UNCITRAL arbitration rules, alleging that Russia had unlawfully expropriated their investments by taking a series of abusive and discriminatory tax assessments against Yukos eventually resulting in the oil giant being declared bankrupt in August 2006. Among the measures alleged to have breached the ECT were the criminal prosecution of the company and its management; artificial tax reassessments, VAT charges, fines and asset freezes imposed against Yukos; threats to revoke its licences; annulment of its merger with Russian oil company Sibneft; and the forced sale of YNG, its most important production facility. These measures led to Yukos' bankruptcy and the auctioning off of its assets to the eventual benefit of Russian state-owned companies including Rosneft and Gazprom. In the arbitrations against Russia, claimants sought compensation of US$114 billion in damages for losses resulting from the alleged systematic dismantling of Yukos. All three arbitrations were seated in The Hague, and heard by the same arbitral tribunal consisting of Yves Fortier QC, Charles Poncet and Stephen Schwebel.

Russia disputed jurisdiction of the arbitral tribunal on the ground that it had signed the ECT on 17 December 1994 but had not ratified it, and that it was thus not bound by the treaty including the dispute resolution clause providing for arbitration. Russia also argued, in the alternative, that the 'denial of benefits' clause in the ECT, the tax provision carve-out in the ECT, and the 'unclean hands' doctrine under international law barred the claim.

On 30 November 2009, the arbitral tribunal issued three parallel interim awards upholding jurisdiction. While acknowledging that the ECT had not been ratified by Russia, the tribunal held that the ECT provisionally applied to Russia in the period between signing of the ECT until Russia informed the depository in 2009 of its intention not to ratify. The arbitral tribunal also dismissed Russia's objection to jurisdiction based on the denial of benefits clause, determining that this clause only 'reserves the right' to deny benefits and Russia never did so in regard to claimants. The objection based on the tax provision carve-out in the ECT and the 'unclean hands' doctrine were left for determination at the merits stage, and ultimately dismissed by the arbitral tribunal.

In three final awards dated 18 July 2014, each totalling over 600 pages, arbitrators held that Russia had violated the ECT and ordered Russia to pay over US$50 billion in compensation for the indirect expropriation of Yukos. This is the largest monetary award yet known in investment treaty arbitration. After the final awards were rendered, the former Yukos shareholders started enforcement proceedings against Russia's overseas assets in various countries including France, Belgium, Germany, the UK, the US and India. Russia at the same time decided to seek annulment of the three interim awards dated 30 November 2009 and three final awards dated 18 July 2014 before the Dutch courts (with a view to The Hague being the seat of arbitration). One of the grounds put forward by Russia in its application for annulment was lack of jurisdiction due to the absence of a valid arbitration agreement. Russia argued that it had not ratified the ECT, and had not given consent to investment arbitration under any treaty before its ratification, as this would be against Russian law.

In its judgment of 20 April 2016, The Hague District Court annulled the Yukos awards for lack of jurisdiction. The Hague District Court at the outset of its judgment clarified that in annulment proceedings under the Dutch Code of Civil Procedure an arbitral tribunal's jurisdiction is subject to a full review on the merits. Counter to the arbitral tribunal's reasoning, The Hague District Court found that the ECT can apply provisionally to a signatory state but only to the extent the individual treaty provisions are reconcilable with the Constitution, laws or regulations of that state. Following its analysis of evidence of Russian law, The Hague District Court concluded that 'the arbitration clause of Article 26 ECT does not have a legal basis in Russian law and is incompatible with the starting points laid down in that law.'[17]

The question that remained was whether article 26 ECT – the dispute resolution provision – could be applied provisionally based on its signing, or that the provisional application required the approval of the Russian legislature. In this context, Russia, in brief, argued that the principle of separation of powers enshrined in the Russian Constitution entails that the parliament must ratify treaties that supplement or amend Russian law by adopting a federal law. According to Russia, the ECT, and particularly article 26 ECT, warrants such an approach, and this provision could not be provisionally applied without ratification. The Hague District Court held that:

> *Russian law does not offer an independent legal basis for the settlement of such disputes in international arbitral proceedings. Considering existing Russian legislation, Article 26 ECT constitutes a new form of dispute resolution, namely a form which limits the sovereignty of the Russian Federation in the settlement of international public-law disputes to such an extent that an international tribunal would be competent to rule on the exercise of public-law government actions rather than a national court. The Constitution and the principle of the separation of powers enshrined therein preclude a representative of the executive from being able to bind the Russian Federation to Article 26 ECT.*

This led to the conclusion that, based only on the signature of the ECT, Russia was not bound by the provisional application of the arbitration regulations of article 26 ECT, and that there was no valid arbitration agreement. The Hague District Court determined that the arbitral tribunal lacked jurisdiction, and set aside the interim and final awards. With a view to this decision, the Court deemed it unnecessary to consider the other grounds for setting aside the awards that had been invoked by Russia.

The decision of The Hague District Court is currently under appeal. In the meantime, former Yukos shareholders continue enforcement and recognition proceedings in other jurisdictions.

The enforcement of annulled arbitral awards

As follows from our contributions to previous editions of *The European and Middle Eastern Arbitration Review*,[18] there is a significant amount of recent case law where courts have recognised foreign awards annulled at the seat of arbitration. Interestingly, one of these cases is *Yukos Capital v Rosneft*, where the Amsterdam Court of Appeal granted a different Yukos entity leave for enforcement of arbitral awards that had been set aside by the Russian courts.[19]

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).[20] 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.'[21] 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.[22] 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.[23]

Although the discussion in the first instance indeed focused on the wording of article V of the New York Convention,[24] 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.'[25] 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.'[26] 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.'[27] This opened the way to enforce the arbitral awards in the Netherlands despite the setting aside in Russia.[28]

Ecuador v Chevron and TexPet

Another case worth mentioning is *Ecuador v Chevron and TexPet*. From the 1970s until the early 1990s TexPet operated a consortium for the exploration and extraction of oil in Ecuador. Following its withdrawal from Ecuador, a group of indigenous people claimed to have suffered damages resulting from severe environmental pollution. The indigenous people first lodged proceedings in New York, but after TexPet had successfully sought the dismissal of those proceedings on forum non conveniens grounds, the claimants refiled their action in the Lago Agrio Court in Ecuador. In 2009, Chevron and TexPet started an arbitration under the US-Ecuador Bilateral Investment Treaty claiming that the Lago Agrio proceedings breached Chevron's and TexPet's rights under a settlement agreement with Ecuador. Later, Chevron and TexPet added a due process complaint, alleging that the indigenous people were supported by Ecuador, and that the Lago Agrio proceedings were tainted by fraud. Until now, the Tribunal has declined to make any substantive decision on these due process allegations.

In February 2011, by way of a procedural order, the Tribunal ordered Ecuador to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against Chevron in the Lago Agrio case. Later that month, the Lago Agrio Court awarded a multi-billion dollar judgment against Chevron. That judgment became enforceable when Chevron's appeal was rejected by an Ecuadorian court of appeal. On Chevron's request, the Tribunal subsequently converted its procedural orders into two interim awards, and made it explicit that its orders were also directed to the Ecuadorian judiciary. After the indigenous people had sought to enforce the Lago Agrio judgment in Argentina, Brazil and Canada, the Tribunal declared that Ecuador had violated these two interim awards because Ecuador, including its judicial branch, had not prevented the enforcement of the Lago Agrio judgment by the indigenous people.

In January 2014, Ecuador requested the setting aside of four interim awards and the first partial award. For the arbitration community, two of Ecuador's grounds for setting aside are particularly

interesting. Ecuador argued that, even if a valid arbitration agreement existed, the power under the BIT to adjudicate on the state liability of Ecuador does not bring with it the power to give binding instructions on how to resolve civil proceedings between private parties pending in its courts. Ecuador also argued that the Tribunal cannot lawfully decide on the right of the indigenous people to enforce the Lago Agrio judgment, without them being a party to the arbitration.

The Hague District Court largely overstepped these legal issues and justified any adverse effects of the interim awards on the rights of the indigenous people on the basis of special circumstances. The Hague District Court considered that the Tribunal must have had serious indications that Chevron's and TexPet's fraud allegations were true. According to The Hague District Court, the Tribunal did therefore not exceed its mandate, nor do the awards violate public policy within the meaning of article 1065 DCCP.

The decision of The Hague District Court is currently under appeal.

The authors would like to thank Jan-Jaap Kuijpers for his contributions to this article.

Notes

1 This new hearing centre is meant to serve various purposes, including (i) the further facilitation of international arbitration in the Netherlands while meeting the under capacity of the Peace Palace, (ii) the accommodation of the Dutch local division of the Unified Patent Court, and (iii) the accommodation of the Netherlands Commercial Court.

2 The amendments to the Dutch Arbitration Act necessitated a revision of the Arbitration Rules of the NAI (see www.nai-nl.org/en). With these new Rules the NAI has implemented some measures to speed up arbitral proceedings. Both the revised Dutch Arbitration Act and the new Arbitration Rules of the NAI apply to arbitral proceedings initiated on or after 1 January 2015.

3 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.

4 Article 1020 DCCP. Restrictions may apply in cases concerning, eg, intellectual property rights, bankruptcy law and company law.

5 Article 1021 DCCP.

6 Article 1053 DCCP.

7 Article 1064 DCCP.

8 Article 1065(5) DCCP.

9 Dutch Supreme Court, 25 April 2009 (*International Military Services/Iran II*), NJ 2010/171, ECLI:NL:HR:2009:BH3137.

10 Article 1067 DCCP.

11 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.

12 Article 1043b(1) DCCP.

13 Article 1043b(2) DCCP.

14 Article 1022a DCCP.

15 An award may be rendered within a matter of days after submission of the request.

16 The Hague District Court, 20 April 2016, case No. C/09/477160 / HA ZA 15-1. An English translation of this judgment is available at http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:4230.

17 The Hague District Court, supra note 16, s5.56.

18 *The European and Middle Eastern Arbitration Review*, 2011–2016 editions.

19 Amsterdam Court of Appeal, 28 April 2009, case No. 200.005.269/01, LJN BI2451, JOR 2009/208, TvA 2010/5. Meanwhile, the English High Court has also considered whether an award set aside at the seat of arbitration can nevertheless be enforced in England. This concerns the second enforcement action brought by Yukos Capital in England. For the text of the judgment, see www.bailii.org/ew/cases/EWHC/Comm/2014/2188.html.

20 Russia and the Netherlands are both parties to the New York Convention.

21 Article V paragraph 1 sub e of the New York Convention.

22 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.

23 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.

24 Yukos relied on the English, Spanish, Russian and Chinese texts which provide that recognition and enforcement may be refused it 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.

25 Amsterdam Court of Appeal, supra note 19, s.3.5.

26 Id, s3.10.

27 Id.

28 Rosneft'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.

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