THE INTERNATIONAL ARBITRATION REVIEW

Eleventh Edition

Editor
James H Carter

THE LAWREVIEWS

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2020

Chapter 28

NETHERLANDS

Heleen Biesheuvel, Jan Willem Bitter and Jaap Tromp[1]

I INTRODUCTION

Rules on arbitration have been enshrined in Dutch law for over 200 years. The rules that form the current framework for arbitral proceedings in the Netherlands can be found in the Dutch Code of Civil Procedure (DCCP). Since 1986, they have been located in the Fourth Book of the DCCP on arbitration (following the first Three Books on domestic (court) litigation) (Arbitration Act). The Arbitration Act was inspired by foreign arbitration acts, and more particularly those of France and Switzerland, and by the UNCITRAL Model Law of 1985. In 2015, the Arbitration Act was extensively amended in an effort to:

a promote alternative ways of dispute resolution;
b improve the efficiency of arbitration proceedings;
c remove impediments;
d clarify unclear provisions;
e reduce the role of the courts relating to arbitration; and
f enlarge the parties' autonomy.

Furthermore, the legislator aimed to improve the Netherlands' position as a venue for international arbitration.[2]

The Arbitration Act does not distinguish between domestic and international arbitration. The first part (Title 1) of Book 4 of the DCCP (Articles 1020–1073) applies to all arbitration proceedings seated in the Netherlands. In Title 1, rules are set out on subject matters such as:

a the arbitration agreement;
b the lack of jurisdiction of the courts on issues meant to be resolved by arbitration;
c the authority of arbitral tribunals;
d the appointment of arbitrators;
e the challenging of arbitrators;
f provisional measures in arbitration;
g enforcement orders; and
h the setting aside of arbitral awards and their revocation.

1 Heleen Biesheuvel is a senior associate and Jaap Tromp is an associate at Florent BV, and Jan Willem Bitter is the owner of Bitter Advocacy.

2 Parliamentary Papers II, 2012-2013, 33 611, nr. 3, Explanatory Memorandum to the legislative proposal of the revised arbitration act (Memorie van Toelichting).

The second part (Title 2) of Book 4 of the DCCP (Articles 1074–1076) deals with arbitration proceedings seated abroad. These rules deal with the jurisdiction of the Dutch courts where an agreement applies for arbitration abroad, and with the enforcement of foreign arbitral awards in the Netherlands.

There are no specialist courts in the Netherlands for arbitration-related matters. The Arbitration Act does provide for court assistance to the parties to remove obstacles for arbitration proceedings to commence or to continue. Such assistance will typically be requested by the parties jointly or by one of them. It may, inter alia, consist of fixing the number of arbitrators of which the tribunal shall be composed, where the parties have failed to reach agreement on that issue (Article 1026 DCCP), the appointment of one or more arbitrators where no timely appointment has been brought about (Article 1027 DCCP), and the discharging of an arbitrator or a tribunal (Articles 1029–1031). Furthermore, courts may be requested to organise an interrogation of reluctant witnesses (Article 1041a DCCP) and to consolidate two or more arbitration proceedings seated in the Netherlands (Article 1046 DCCP).

The Netherlands hosts a variety of arbitration institutes, most of which apply their own arbitration rules. The Netherlands Arbitration Institute (NAI) is the largest general arbitration institute in the Netherlands. In 2019, the NAI celebrated its 70th anniversary. The Arbitration Board for the Building Industry (founded in 1907) is a renowned arbitration institute for construction disputes. Other specialised arbitration centres and institutes are the Netherlands Association for the Trade in Dried Fruits, Spices and Allied Products (NZV), the Royal Dutch Grain and Feed Trade Association, the Netherlands Oils, Fats and Oilseeds Trade Association (NOFOTA), UNUM Arbitration & Mediation (formerly known as TAMARA: the Transport and Maritime Arbitration Rotterdam Amsterdam), the Netherlands Association for Forwarding and Logistics (Fenex), and the Panel of Recognised International Market Experts in Finance (PRIME Finance). The Netherlands further hosts the Permanent Court of Arbitration (PCA), an institute providing administrative support in international arbitration proceedings whose Secretary General may designate an appointing authority under Article 6(2) of the UNCITRAL Arbitration Rules. In 2018, the Court of Arbitration for Art (CAfA) was founded. This is a joint initiative of the NAI and Authentication in Art, a non-profit foundation providing a forum for best practices in art authentication. CAfA is specialised in resolving disputes in the art community through mediation and arbitration. It offers parties the chance to administer their arbitration and mediation proceedings with the assistance of the Secretariat of the NAI.[3] Finally, we should mention the launch of The Hague Rules on Business and Human Rights Arbitration (BHR Arbitration Rules) in December 2019. This is an initiative of the Centre for International Legal Cooperation. The BHR Arbitration Rules, which are based on the UNCITRAL Arbitration Rules, provide a set of rules for the arbitration of disputes related to the impact of business activities on human rights.[4] According to the Business and Human Rights Arbitration Working Group, international arbitration has potential in these disputes, as they often occur in regions where no competent or fair state court is available.[5]

Although official numbers are not available, the number of arbitration proceedings initiated over the past decade has been relatively steady. The Arbitration Board for the

3 https://www.cafa.world/.

4 Introductory note to the BHR Arbitration Rules.

5 https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/.

Building Industry administered over 600 construction disputes in 2019.[6] The number of arbitrations at the Arbitration Board has been rising since the construction crisis in 2008 previously almost halved the number of cases. During the period from 2006 to 2017, the NAI has administered some 118 new cases on average on an annual basis. In 30 per cent of these cases, foreign parties were involved.[7] The Arbitration Act and the positive attitude towards arbitration taken by state courts[8] make the Netherlands an attractive venue for international arbitration proceedings, which should allow (significant) growth of the number of such proceedings to be conducted in the Netherlands in the nearby future.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Although several scholars have made recommendations for further amendments to the Arbitration Act[9] to, inter alia, (further) enhance the Netherlands' competitive position as a venue for international arbitration, major changes in legislation are not to be expected on the short term.

A notable development with a potential effect on international arbitration is the introduction of the Netherlands Commercial Court (NCC) and the Netherlands Commercial Court of Appeal (NCCA). The NCC and the NCCA were created for the resolution of complex international commercial disputes. Within the Dutch court system, the NCC and the NCCA are situated as separate chambers within the Amsterdam District Court and the Amsterdam Court of Appeal respectively. Proceedings are conducted in English before experienced judges with commercial expertise.[10] Judgments are rendered in English.

The NCC or the NCCA may assume jurisdiction if the following requirements are met:[11]

a the Amsterdam District Court or the Amsterdam Court of Appeal has jurisdiction (on the basis of a choice of forum clause or otherwise);

b the parties have expressly agreed in writing that proceedings shall be conducted in English before the NCC or the NCCA;

6 https://www.raadvanarbitrage.nl/php/main.php (last accessed on 30 March 2020).

7 Report of the Academic Research and Documentation Centre, Ministry of Public Safety and Justice, Table 3.14 (updated on 19 December 2019) and Annual Reports NAI 2014 and 2017. See also JW Bitter, 'Arbitrage in Nederland in handelsgeschillen; de Nederlandse arbitragewet en het NAI', CJM Klaasen, GJ Meijer and CL Schleijpen (eds.), *Going Dutch – ADR in Nederland, in het bijzonder bij het NAI*, Deventer: Wolters Kluwer 2019, pp. 19–54 on p. 50.

8 This attitude is shown by the often repeated statement in judgments by the Supreme Court and by the lower courts that in the Netherlands there is a general interest in an effective functioning dispute resolution by arbitration. See for example, Supreme Court 18 February 1994, ECLI:NL:HR:1994:ZC1266 (*Nordström/Nigoco*), Supreme Court 17 January 2003, ECLI:NL:HR:2003:AE9395 (*IMS/MODSAF*) and Supreme Court 9 January 2004, ECLI:NL:HR:2004:AK8380 (*Nannini/SFT*). ECLI stands for European case law identifier references and is a European standardised coding system for court decisions. Dutch court decisions are published on www.rechtspraak.nl.

9 See for instance GJ Meijer and HJ Snijders, *Arbitragerecht op de scheidslijn van oud naar nieuw?*, The Hague: BJU 2015 and N Peters, 'Drie jaar nieuwe arbitragewet: tien suggesties voor verbetering', *TCR* 2018, 4 (pp. 101–110).

10 www.rechtspraak.nl/English/NCC.

11 www.rechtspraak.nl/English/NCC/Pages/jurisdiction-and-agreement.aspx.

c the action is a civil or commercial matter within the parties' autonomy (including actions for the setting aside of arbitral awards); and

d the matter concerns an international dispute.

The NCC and the NCCA were created to accommodate the apparent need of conducting litigation in the English language. According to the legislator, the NCC and the NCCA provide an alternative to more expensive forums, including other foreign commercial courts, such as those in London, Singapore, Dublin, Delaware and Dubai, and to arbitration.[12] Although court fees of the NCC and the NCCA are considerably higher than court fees charged for cases brought before ordinary Dutch courts,[13] they are expected to be lower than the costs of international arbitration and of other international commercial courts.[14]

The differences between international arbitration and litigation before the NCC and the NCCA, for instance with regard to enforcement,[15] confidentiality[16] and flexibility,[17] imply that the question as to which forum is to be preferred is a matter to be decided on the basis of the specific circumstances of each particular case. It has been suggested that the NCC, the NCCA and arbitration should be construed as colleagues that are supplementary to one another rather than competitors.[18] Parties having opted for the resolution of their disputes by arbitration in the English language may be inclined to elect the NCC or the NCCA as the courts having jurisdiction in arbitration-related matters (such as the setting aside or the enforcement of awards).

12 Parliamentary Papers II, 2016–2017, 34 761, nr. 3 (MvT, explanatory memorandum to the legislative proposal to amend the DCCP and the Court Fees Act in relation to the introduction of the NCC and the NCCA).

13 The NCC charges a flat fee of €15,377 per party for ordinary proceedings. The NCCA charges a fee of €20,502 per party. In commercial cases before ordinary district courts, the fees depend on the value of the claim, with a maximum of €4,131 (and in appeal €5,517).

14 Parliamentary Papers II, 2016–2017, 34 761, nr. 3 (MvT), p. 2.

15 Enforcement of NCC and NCCA decisions follows the route of other state court decisions (Brussels I bis Regulation, Hague Choice of Court Convention, bilateral conventions or, in the absence of a governing treaty or regulation, a 'disguised' enforcement order via Article 431 DCCP). One scholar has argued that NCC and NCCA judgments might not be enforceable on the basis of the Brussel I bis Regulation (B van Zelst, 'De Netherlands Commercial Court (of Appeal) – mooie kansen voor arbitrage', *ORP* 2019/110). With the New York Convention in place in over 150 countries, enforcement possibilities of arbitral awards remain, in principle, broader than enforcement of court judgments outside of the European Union.

16 Litigation before the NCC and the NCCA is, in principle, not confidential, unlike most arbitration proceedings.

17 In addition to Dutch procedural law, NCC proceedings are governed by the NCC Rules of Procedure. Compared to ordinary court proceedings, parties can exert more influence on the case-specific rules of procedure under the NCC Rules, but their possibilities are not as large as in arbitration proceedings. In addition, the NCC does not provide for party-appointed judges.

18 RPJL Tjittes, 'NAI en NCC(A): concurrenten of collega's bij de beslechting van commerciële geschillen?', CJM Klaasen, GJ Meijer and CL Schleijpen (eds.), *Going Dutch – ADR in Nederland, in het bijzonder bij het NAI*, Deventer: Wolters Kluwer 2019, pp. 269–87, on p. 287. See also HJ Snijders, '5 jaar Arbitragewet 2015 én andere ontwikkelingen in het afgelopen lustrum', *TvA* 2020, 1, and (more critical) B van Zelst and JME van der Linden, 'The Netherlands Commercial Court (of Appeal): Opportunities for Arbitration?', *TvA* 2020, 2.

To date, the NCC has rendered six judgments.[19] Interestingly, the parties involved in the most recent decision have explicitly waived their right to have their dispute resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce.

With respect to alternative dispute resolution in the Netherlands, the following developments are worth noting. Private online dispute alternative resolution initiatives have gained popularity over the past few years. The three best-known private initiatives are e-Court (the first online arbitration and binding advice tribunal in the Netherlands), Stichting Arbitrage Rechtspraak Nederland and DigiTrage. These initiatives all aim to provide for a swift, efficient and affordable alternative to litigation in relatively small cases.[20] Their cases mainly deal with consumer-related matters.[21]

While Stichting Arbitrage Rechtspraak Nederland and DigiTrage are operational, e-Court has (temporarily) stopped handling cases since it was met with negative responses from, inter alia, the judiciary. According to critics, e-Court lacks independence and transparency.[22] The Amsterdam District Court found in a judgment of 31 January 2018 that procedural mistakes and flaws had occurred in e-Court-administered proceedings.[23] In February 2018, the Dutch courts decided that they would no longer grant leave for enforcement of e-Court judgments until preliminary questions on e-Court were answered by the Supreme Court. This prompted e-Court to (temporarily) stop handling cases. No preliminary questions have been submitted (yet).[24]

19 Last checked on 24 June 2020: Amsterdam District Court 8 March 2019, ECLI:NL:RBAMS:2019:1637, Amsterdam District Court 4 July 2019, ECLI:NL:RBAMS:2019:5197, Amsterdam District Court 4 March 2020, ECLI:NL:RBAMS:2020:1388, Amsterdam District Court 14 April 2020, ECLI:NL:RBAMS:2020:2277, Amsterdam District Court 29 April 2020, ECLI:NL:RBAMS:2020:2406, Amsterdam District Court 13 May 2020, ECLI:NL:RBAMS:2020:2681. The judgments rendered in April 2020 concerned an agreement that contained an arbitration clause, but also specifically provided for interim relief proceedings before the NCC.

20 The maximum value of cases dealt with by e-Court and Stichting Arbitrage Rechtspraak Nederland is €100,000. DigiTrage handles debt collection cases with a maximum value of €40,000.

21 e-Court was used by, inter alia, health insurance companies for the collection of overdue premiums. Other users were e-commerce businesses, telecom providers and energy providers. A housing association held a pilot for the collection of overdue rent via Stichting Arbitrage Rechtspraak Nederland. Other users include dentists and wholesalers. Because of the nature of the cases and the defendants, Stichting Arbitrage Rechtspraak Nederland offers a broad variety of possibilities for defendants to submit their defence, including but not limited to email.

22 National Organisation for Citizens' Advisers, 'Rechtspraak op bestelling?! Stop commerciële rechtspraak', Sociaal Werk Nederland 2018.

23 Amsterdam District Court 31 January 2018, ECLI:NL:RBAMS:2018:419.

24 In the previous edition of *The International Arbitration Review*, it is stated that preliminary questions were raised in a judgment of 27 February 2019. Although one of the preliminary questions dealt with in that judgment was prompted by e-Court's cost-saving inspired practice to consolidate several debt collection cases before requesting one exequatur solely for the consolidated cases and decisions, rather than for each single decision of which it is composed, no preliminary questions with regard to e-Court are known to have been raised at the time this edition was published.

ii Arbitration developments in local courts

In this section, two relevant judgments rendered in the period under review, 15 May 2019 to 1 April 2020, will be discussed in detail. In addition thereto, two judgments rendered by Dutch courts in relation to international arbitration proceedings that have had the attention of the international arbitration community deserve mention.

First, The Hague Court of Appeal granted leave for enforcement of an ICC award rendered on 2 July 2013 in the dispute between Leidos (previously: Science Applications International Corporation) and the Hellenic Republic (Greece) pertaining to the delivery of a security system designed for the 2004 Olympic Games.[25] The Court of Appeal held that there was no reason for an extensive assessment of Greece's position that the agreement had been procured through corruption. The Greek courts, including the Greek Supreme Court, had already made this assessment, dismissing Greece's allegations that the award was contrary to public policy.

Second, The Hague Court of Appeal, upon a joint request of the parties, adjourned its decision on a request to recognise and grant leave for enforcement of the arbitral award rendered between Petrobras and Vantage Deepwater pending an appeal in the setting aside proceedings initiated by Petrobras in the US courts.[26]

Supreme Court: interim relief judge must assess ex officio compliance with rules of consumer law before granting leave for the enforcement of arbitration awards

Arbitration clauses, contained in general terms and conditions that form part of business-to-consumer contracts must comply with European consumer law (that is, the European Unfair Contract Terms Directive[27] (Directive)), implemented in national law and national consumer law (Article 6:236 under (n) Dutch Civil Code (DCC)).

Pursuant to European case law, a consumer may rely on the Directive before the courts even if the unfairness of an arbitration clause was not debated on in the arbitration proceedings.[28] What is more, courts must assess *ex officio* whether an arbitration clause is unfair within the meaning of the Directive.[29]

Although an arbitration clause is not considered unfair by definition,[30] arbitration clauses included in general terms and conditions are blacklisted under national law (Article 6:236 under (n) DCC). This means that an arbitration clause is held to be unreasonably onerous, and voidable as a result, unless the clause would offer the consumer a period of at least one month to opt for the dispute to be settled by the court that would have jurisdiction in the absence of the arbitration clause. An arbitration clause complying with national consumer law may, however, still be unfair within the meaning of the Directive.

25 The Hague Court of Appeal 10 September 2019, ECLI:NL:GHDHA:2019:2461.

26 The Hague Court of Appeal 16 July 2019, ECLI:NL:GHDHA:2019:1845.

27 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

28 EU Court of Justice 26 October 2006, ECLI:EU:C:2006:675 (*Mostaza Claro*).

29 EU Court of Justice 6 October 2009, case C-40/08, ECLI:EU:C:2009:615 (*Asturcom*) and European Union Court of Justice 4 June 2009, C-243/08, ECLI:EU:C:2009:350 (*Pannon*).

30 Supreme Court 21 September 2012, ECLI:NL:HR:2012:BW6135 (*Van Marrum/Wolff*).

Not only arbitration clauses are subject to review; the courts must also assess *ex officio* whether the terms on which an arbitral award was based are unfair within the meaning of the Directive.[31]

Against this background, the Supreme Court issued a preliminary ruling pertaining to questions with regard to the enforcement of arbitral awards rendered in consumer cases. The case that gave rise to the preliminary questions concerned a housing association seeking enforcement of an arbitral award by default rendered against a consumer by an online arbitration tribunal.[32] The request for a preliminary ruling was prompted by the increasing popularity of e-arbitration for the collection of consumer debts, and the concerns in relation therewith regarding the independence of online arbitration institutes and the protection of (European) consumer rights.[33]

The Supreme Court ruled that the preliminary relief judge, when requested to grant leave for enforcement of an arbitral award rendered against a consumer, should asses *ex officio*:

a whether both the arbitration clause and the clause on which the claim was based is unfair within the meaning of European consumer law (the Directive); and

b whether the arbitration clause offers the consumer a period of a month to opt for court litigation and, if so, whether such period was actually granted.

Leave for enforcement is to be denied if it is held to be likely that the arbitration clause or the clause on which the claim was based are unfair, that the consumer is not granted a one-month period to submit the dispute to a court by the arbitration clause or that the consumer was not effectively granted such opportunity when the dispute arose. The Supreme Court stressed that the assessment of the preliminary relief judge may entail an inquiry by the court *ex officio*.

As exequatur applications are typically dealt with on an *ex parte* basis, this ruling may have significant consequences for the enforcement of arbitral awards rendered in cases involving consumers.[34]

Court of Appeal sets aside ICC award on grounds of corruption

On 22 October 2019, The Hague Court of Appeal set aside an ICC award rendered between Bariven SA (Bariven), a subsidiary of Venezuelan oil and gas company PVDSA, and Wells Ultimate Service LLC (Wells) on the ground that the underlying purchase contract was procured by corruption.[35]

By an arbitral award rendered on 23 March 2018 under the rules of the ICC, Bariven was ordered to pay the purchase price of approximately US$11.7 million for the delivery of two propulsion engines for a drilling rig. Bariven had, inter alia, raised the defence that the

31 EU Court of Justice 30 May 2013, case C-488/11, ECLI:EU:C:2013:341 (*Asbeek Brusse/Jahani*) and Supreme Court 13 September 2013, ECLI:NL:HR:2013:691 (*Heesakker/Voets*).

32 Supreme Court 8 November 2019, ECLI:NL:HR:2019:1731 (*Intermaris*). Referred by the interim relief judge of the District Court of Amsterdam by its judgment of 27 February 2019, ECLI:NL:RBAMS:2019:1339.

33 See CMDS Pavillon's case note under Supreme Court 8 November 2019, ECLI:NL:HR:2019:1731 (*Intermaris*) in TBR 2019, 177.

34 See CMDS Pavillon's case note as referred to above.

35 The Hague Court of Appeal 22 October 2019, ECLI:NL:GHDHA:2019:2677.

purchase contract was void as it had been procured through corruption. This argument was extensively discussed by the arbitral tribunal in its award. Based on the arguments exchanged, the tribunal decided against Bariven by awarding Wells' claim for payment.

Bariven initiated legal proceedings in The Hague Court of Appeal for the award's setting aside, inter alia, on the ground that attaching legal consequences to a contract procured by corruption would constitute a violation of public policy (Article 1065 subsection 1(e) DCCP). The Court of Appeal held that:

a an arbitral award is contrary to public policy if its content or enforcement is contrary to a mandatory rule of such fundamental nature that its application must not be impeded by procedural constraints;[36]

b the rule of law requires that no legal consequences shall be drawn from a contract procured by corruption;

c this principle is so fundamental in the Dutch legal order that its application should not be impeded by procedural constraints; and

d an arbitral award that attaches legal consequences to a contract that is procured through corruption should be capable of being set aside on the ground of a violation of public policy.

The Court of Appeal subsequently found that the rule that restraint is to be applied by the courts in setting aside proceedings is a procedural rule that should not be capable of impeding the enforcement of rules aiming to prevent corruption.[37] Notwithstanding the elaborate assessment of the tribunal, the Court of Appeal applied an independent and full review on the alleged corruption. Unlike the tribunal, the Court of Appeal found that the purchase agreement had been procured through corruption, as it would not have been concluded in the absence of corruption, or at least not under the same conditions. On that ground, the Court of Appeal set aside the award for violation of public policy.

The Court of Appeal's finding that a full review of an arbitral award would be justified in setting aside proceedings if and when a setting aside is demanded on the ground of the arbitral tribunal's attaching legal consequences to a contract procured by corruption seems to constitute a deviation from the general rule that restraint is to be applied in setting aside proceedings.

So far, deviations from that rule were only allowed in cases where the validity of an arbitration agreement was challenged[38] and in cases where the principle of *audiatur et altera pars*[39] was alleged to be violated. Currently, appeal proceedings are pending in the Supreme Court against the Court of Appeal's judgment, and it remains to be seen whether the Court of Appeal's judgment will be upheld or reversed.

36 Supreme Court 21 March 1997, ECLI:NL:HR:1997:AA4945 (*Eco Swiss/Benetton*).

37 A judge-made rule that prevails in the Netherlands. Inter alia: Supreme Court 17 January 2003, ECLI:NL:HR:2003:AE9395.

38 Supreme Court 24 September 2014, ECLI:NL:HR:2014:2837 (*Ecuador/Chrevron*).

39 Supreme Court 25 May 2007, ECLI:NL:HR:2007:BA2495 (*Spaanderman/Anova Food*) and Supreme Court 24 April 2009, ECLI:NL:HR:2009:BH3137 (*IMS/MODSAF II*).

iii Investor–state disputes

Setting aside claim can be brought against provisional measures in interim awards

Background

By an amicable settlement of disputes on the intended termination of Texaco Petroleum Company's (TexPet) exploration and production rights in the Ecuadorian Amazon region between the state of Ecuador and Corporation Estatal Petrolera Ecuatoriana (Petroecuador) on the one hand and TexPet on the other, TexPet agreed to perform environmental remedial work. Upon completion of the work, TexPet was released from all liability by Ecuador and Petroecuador. However, TexPet and its shareholder Chevron Corporation (Chevron) were sued in the courts of Ecuador by a group of Ecuadorian citizens for having caused environmental damage in proceedings known as the *Lago Agrio* case. Eventually, TexPet and Chevron were ordered to pay an amount of US$8.6 billion under the *Lago Agrio* judgment. Chevron and TexPet then commenced arbitration proceedings against Ecuador under the 1993 US–Ecuador bilateral investment treaty (BIT), seeking Ecuador's liability for and in respect of the judgment rendered against TexPet and Chevron. These arbitration proceedings, which are seated in The Hague, are still pending.[40] By provisional measures, enshrined in two interim awards, Ecuador was ordered to – put briefly – take all measures to prevent the enforcement of the *Lago Agrio* judgment. These interim awards, jointly with two other interim awards, were followed by a partial final award. Ecuador filed setting aside proceedings against the partial final award and against the provisional measures awarded by the interim awards that preceded the partial final award.

Setting aside proceedings

The setting aside as sought by Ecuador was rejected by The Hague District Court and by The Hague Court of Appeal.[41] Ecuador then entered an appeal on points of law to the Supreme Court of the Netherlands. On 12 April 2019, the Supreme Court upheld the judgment of the lower courts.[42] Ecuador's appeal was essentially based on the statement that by the provisional measures third-party rights (i.e., the rights of the *Lago Agrio* claimants) were affected and that – to the extent Ecuador would comply with these provisional measures – the *Lago Agrio* claimants would be deprived of the right of the enforcement of the *Lago Agrio* judgment, which was alleged to be contrary to public policy.

Before dealing with Ecuador's argument, the Supreme Court first considered *ex officio* whether a claim for the setting aside of provisional measures is admissible at all. This question was answered by the Supreme Court in the affirmative, basically on the ground that the law does not exempt provisional measures from the setting aside regime, as set out in the Arbitration Act. Pursuant to the Arbitration Act, the setting aside of an interim award can only be claimed in conjunction with a claim for the setting aside of a subsequent (partial) final award. The Supreme Court ruled that this is the only restriction applying to setting aside actions and that there are no other and further restrictions relating to the character or nature of the target of the action for setting aside.

40 Permanent Court of Arbitration (PCA) case No. 2009-23.

41 The Hague District Court 20 January 2016, ECLI:NL:RBDHA:2016:385 and The Hague Court of Appeal 18 July 2017, ECLI:NL:GHDHA:2017:2009. See also: *The International Arbitration Review*, ninth edition, 2018, pp. 338–9.

42 Supreme Court 19 April 2019, ECLI:NL:HR:2019:565.

The Court of Appeal rejected Ecuador's argument that the awards are to be set aside for being contrary to public policy. Taking as a point of departure that restraint is to be applied by the courts when dealing with claims for setting aside,[43] the Supreme Court seems to indicate that even if the right to enforce the *Lagro Agrio* judgment within a reasonable period of time (a right protected by Article 6 of the European Convention on Human Rights (ECHR)) is affected, this in itself does not establish a violation of public policy. What constitutes a reasonable period will depend on case-specific circumstances. The Court of Appeal held that The District Court did not violate a rule of law by deciding against Ecuador given that:

a there was no direct infringement of the *Lago Agrio* claimants' rights;
b the provisional measures are temporary by nature;
c Ecuador was ordered to take the *Lagro Agrio* claimants' interests into account; and
d the provisional measures were justified in order to prevent irreversible harm.

Referring to this reasoning, the Supreme Court confirmed The Hague Court of Appeal's decision that the interim measures did not violate Article 6 ECHR.

Court of appeal reverses setting aside of Yukos award against the Russian Federation

Background

In the seventh edition of *The International Arbitration Review*, the judgment of The Hague District Court of 20 April 2016,[44] whereby three arbitral interim awards and three final awards rendered in arbitration proceedings under Article 26(4) of the Energy Charter Treaty (ECT) between three former shareholders of Yukos Oil Company as claimants and the Russian Federation as the respondent were set aside on the ground of absence of a valid arbitration agreement, was discussed and analysed.[45] By a judgment of 18 February 2020, The Hague District Court's judgment was reversed by The Hague Court of Appeal.[46] The setting aside was lifted accordingly, and the final arbitral awards whereby claims in an aggregate amount of US$50 billion were awarded were revived.

The issue of the validity of the arbitration agreement

For ease of reference, the following essentials of the case are recalled. The ECT never entered into force for the Russian Federation. The ECT was binding upon it as a result of the duty of its provisional application as per Article 45 ECT, providing that the ECT shall be provisionally applied by each signatory to the extent that it is 'not inconsistent with its constitution, laws or regulations'. That carveout provision was understood by the Russian Federation as implying that only those sections of the ECT would provisionally apply that are not inconsistent with the Russian Constitution, its laws and regulations. This approach is referred to as the piecemeal approach. By its interim awards of 30 November 2009, the arbitral tribunal decided in favour of the all-or-nothing approach: to the extent the principle of provisional application of treaties is accepted by a signatory, the whole of the ECT shall apply provisionally. It accordingly decided in favour of its authority. In setting aside

43 Supreme Court 21 March 1997, ECLI:NL:HR:1997:AA4945 (*Eco Swiss/Benetton*). See also The Hague Court of Appeal 22 October 2019, ECLI:NL:GHDHA:2019:2677 (*Bariven/Wells*), discussed above.

44 The Hague District Court 20 April 2016, ECLI:NL:RBDHA:2016:4229 and ECLI:NL:RBDHA:2016:4230.

45 *The International Arbitration Review*, seventh edition, 2016, pp. 443–5.

46 The Hague Court of Appeal 18 February 2020, ECLI:NL:GHDHA:2020:234.

proceedings, The Hague District Court decided in favour of the piecemeal approach. Finding that the arbitration clause in the ECT was inconsistent with Russian law, the awards rendered by the arbitral tribunal were set aside.

The Court of Appeal's judgment

The Court of Appeal rejected both the piecemeal approach and the all-or-nothing approach. Instead, it found that Article 45(1) ECT would only allow for the exclusion of certain categories of clauses (as identified by domestic law) from the regime of provisional application that would otherwise apply (judgment, paragraph 4.5.33).

The District Court's position, that the arbitration clause would also be inconsistent with Russian law in the absence of a legal basis for that method of dispute resolution under Russian law, was rejected (judgment, paragraph 4.5.45).

The Court of Appeal then found that the applicability of Article 26(4) ECT would not be inconsistent with Russian law on the ground that under that law, no specific categories of rules are excluded from provisional application at all (judgment, paragraph 4.6.1).

The Court of Appeal could have stopped there, but it proceeded nevertheless to a detailed investigation of the issue of inconsistency between Article 26(4) ECT and Russian law. Even if that approach were taken, the Court found against inconsistency.

The District Court's judgment was reversed.

Observations

In both instances:

a the issue of the validity of the arbitration agreement was subject to a full review, and no restraint was applied by the courts when analysing and deciding on that issue;

b the method of interpretation of Article 26(4) ECT was that found under Articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

c the issue was not whether the arbitral tribunal decided in favour of its authority on good grounds, but the mere question of whether on any ground or for any reason the arbitration agreement can be held to be valid.

Crimea investment arbitration: request to suspend the enforcement of BIT awards against Russia is refused; Russia to produce documents

The Hague Court of Appeal has rendered two judgments relating to one of the Crimean investment arbitration proceedings.

Background

Following the Russian annexation of Crimea in 2014, Ukrainian companies seeking compensation for lost investments or properties taken from them through expropriation initiated several arbitration proceedings on the basis of the Russia–Ukraine BIT.[47] The

47 *NJSC Naftogaz of Ukraine et al v. The Russian Federation* (PCA case No. 2017-16), *Odschadbank v. The Russian Federation* (PCA case No. 2016-14), *Everest Estate LLC et al v. The Russian Federation* (PCA case No. 2015-36), *Stabil LLC et al v. The Russian Federation* (PCA case No. 2015-35 (seated in Switzerland), *PJSC Ukrnafta v. The Russian Federation* (PCA case No. 2015-34) (seated in Switzerland), *LLC Lugzor et al v. The Russian Federation* (PCA case No. 2015-29), *JSC CB PrivatBank v. The Russian Federation* (PCA case No. 2015-21), *Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky v. The Russian Federation*

majority of these arbitration proceedings are administered by the Permanent Court of Arbitration (PCA) and seated in the Netherlands.

One of these cases relates to a group of 19 investors, Everest et al (Everest), claiming compensation for properties in Crimea that were expropriated without compensation being paid. After assuming jurisdiction,[48] the arbitral tribunal awarded Everest approximately US$150 million in compensation.[49]

The Russian Federation initiated proceedings in The Hague Court of Appeal to set aside or revoke the awards.

In connection with the setting aside proceedings, the Russian Federation filed a request to The Hague Court of Appeal to suspend the enforcement of the awards commenced by Everest in Ukraine.

Decision of The Hague Court of Appeal on the suspension of enforcement

In a judgment of 11 June 2019,[50] The Hague Court of Appeal decided on Russia's application to suspend the enforcement of awards. The Court of Appeal first dismissed Everest's defence that the Dutch courts lack jurisdiction with regard to the application in the absence of enforcement measures in the Netherlands. It decided that for a request for suspension of enforcement to be successful, it is not required that enforcement measures have already been initiated in the jurisdiction of the court to whom such request was addressed.

Pursuant to settled case law, when deciding on a request for suspension, the court provides a preliminary opinion on the likelihood that a claim to set aside or revoke the awards will be successful. For the purpose of such assessment to be made, the interests of each of the parties will be considered and balanced.[51] The Court of Appeal, addressing the six arguments brought forward by the Russian Federation, concluded that it was not convinced that Russia's claims were likely to succeed.

By its first three arguments, the Russian Federation submitted that no valid arbitration agreement existed. The Court of Appeal referred, inter alia, to five different arbitral tribunals and the Swiss Supreme Court all having ruled that the BIT applies, and it concluded that this argument does not have a promising chance of success.

In relation to the fourth argument, the Court of Appeal held that most instances of corruption, fraud and violence that the Russian Federation put forward did not relate to Everest. The few cases where it did might lead to a partial setting aside at most, while remission is still a valid option (Article 1065a DCCP).

The fifth and sixth argument related to Articles 10 and 9 of the BIT. The Court of Appeal found that Article 10 (Resolution of Disputes between the Contracting Parties) does not apply to this situation, and that Article 9 does not preclude that multiple parties file a joint claim against a contracting state.

(PCA case No. 2015-07) and *PJSC DTEK Krymenergo v. The Russian Federation*. On 27 August 2019, arbitration proceedings were initiated against the Russian Federation by Ukrenergo (press release dated 28 August 2019, available on www.italaw.com). Further arbitration proceedings can be expected to be initiated by the Ukrainian Sea Ports Authority and the State Hydrographic Service of Ukraine.

48 A decision on jurisdiction was rendered on 20 March 2017 (www.italaw.com/cases/4224). The Russian Federation did not appear in the arbitration proceedings, but had the PCA know through letters that it did not recognise the jurisdiction of an international tribunal at the PCA in settlement of Everest's claims.

49 A decision on the merits was rendered on 2 May 2018 (www.italaw.com/cases/4224).

50 The Hague Court of Appeal 11 June 2019, ECLI:NL:GHDHA:2019:1452.

51 Supreme Court 21 March 1997, ECLI:NL:HR:1997:ZC2314 (*Benetton/Eco Swiss*).

Decision of The Hague Court of Appeal in the setting aside proceedings

No decision on the claim for the setting aside of the arbitral awards has been rendered yet. However, a decision was rendered on Russia's request in its statement of reply to order Everest to produce certain documents. With those documents, the Russian Federation aims to support its argument that Everest's investments were obtained through fraud, the award was based on fraud and that Everest withheld relevant documents in the arbitration proceedings. Interestingly, although having ruled in its decision on the suspension of enforcement that it is not convinced that the claims for setting aside or revocation of the awards are likely to succeed, The Hague Court of Appeal, consisting of the same judges, granted Russia's motion in part.[52]

Concluding remarks

Everest is the first and, as far as we are aware, the only 'Crimean' investment arbitration proceeding seated in the Netherlands in which a final award has been rendered. Based on the number of proceedings pending, more setting aside proceedings may be expected within the next few years.

III OUTLOOK AND CONCLUSIONS

With the Dutch court's consistently open and liberal viewpoint regarding arbitration and the modernised Arbitration Act, which celebrates its fifth anniversary in 2020, the Netherlands continues to be an attractive venue for (international) arbitration. The Dutch arbitration climate is further fostered by the introduction of the NCC and the NCCA as it allows arbitration-related proceedings (at least before the courts deciding questions of fact)[53] to be conducted in English.

In the coming year, we expect further judgments to be rendered in some of the cases discussed in Section II. As previously mentioned, an appeal in cassation has been lodged against the judgment in the *Bariven* case, and the setting aside proceedings initiated by Russia in the *Everest* case are in an advanced stage. The (other) Crimean investment arbitration proceeding now pending before the PCA in The Hague may also give rise to additional setting aside proceedings in the near future.

Finally, the NAI has announced it will release a new set of arbitration rules in 2020 or 2021. Any relevant alterations in these rules will be discussed in next year's edition of *The International Arbitration Review*.

52 The Hague Court of Appeal 28 January 2020, ECLI:NL:GHDHA:2020:544.

53 In the event a decision of the NCC or the NCCA is challenged in proceedings before the Supreme Court, the Dutch cassation court deciding on points of law, the proceedings are conducted in Dutch.

Appendix 1

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