The 2015 Revision of the Dutch Arbitration Act

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RÉSUMÉ

Le 1er janvier 2015 une nouvelle loi de l'arbitrage (« la Nouvelle Loi ») est entrée en vigueur aux Pays-Bas, qui modifie et remplace la loi de l'arbitrage en vigueur depuis 1986. La Nouvelle Loi, qui s'applique aux arbitrages initiés à compter du 1er janvier 2015, reflète et intègre les développements les plus importants des 25 dernières années, tant en arbitrage domestique qu'en arbitrage international. Elle comprend notamment un certain nombre de modifications importantes visant à améliorer l'efficacité et la flexibilité des procédures d'arbitrage dont le siège est aux Pays-Bas, permettant aux parties d'organiser et d'adapter la procédure d'arbitrage de la manière qui correspond le mieux à la nature du litige. La Nouvelle Loi introduit également des dispositions visant à simplifier et moderniser la procédure d'arbitrage, ainsi qu'à réduire les coûts et la charge administrative liés aux procédures arbitrales. Du fait de ces modifications, la Nouvelle Loi contient toutes les caractéristiques procédurales nécessaires pour faciliter une conduite efficace des procédures arbitrales internationales aux Pays-Bas, en conformité avec les normes modernes d'aujourd'hui.

ABSTRACT

On 1 January 2015, a new arbitration act (the 'New Act') entered into force in the Netherlands, which amends and replaces the arbitration act that had been in force since 1986. The New Act is applicable to arbitrations initiated on or after 1 January 2015 and reflects and incorporates the most important developments in both domestic and international arbitration over the past 25 years. Notably, it contains a number of important amendments that seek to enhance the efficiency and flexibility of arbitral proceedings, seated in the Netherlands, enabling the parties to organize and tailor the arbitral procedure in a manner that best suits the nature of the dispute. At the same time, the New Act also introduces provisions that aim to simplify and modernize the arbitral process, as well as to reduce the costs and administrative burden associated with arbitration proceedings. As a result of these amendments, the New Act provides all procedural features necessary to facilitate the efficient conduct of international arbitration in the Netherlands according to modern-day standards.

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I. – Introduction

On 1 January 2015, a new arbitration act (the 'New Act') entered into force in the Netherlands, which amends and replaces the relevant provisions of Book 4 of the Dutch Code of Civil Procedure ('DCCP') and Books 3, 6 and 10 of the Dutch Civil Code ('DCC'), as had been in force since 1986.

The New Act is applicable to arbitrations initiated on or after 1 January 2015. It contains a number of important amendments that seek to enhance the efficiency and flexibility of arbitral proceedings, seated in the Netherlands, predominantly by means of non-mandatory provisions that aim to increase the parties' autonomy and to enable the parties to tailor the proceedings to the needs of the case.

As appears from the parliamentary history, the New Act is part of the Dutch Government's '2011 Innovation Agenda' for the legal sector, which focuses on improving the efficiency of legal proceedings and eliminating existing obstacles to dispute resolution in the Netherlands. The New Act introduces provisions that aim to simplify and modernize the arbitral process, as well as to reduce the costs and administrative burden associated with arbitration proceedings.

Furthermore, the New Act forms an important step in consolidating the Netherlands' position as a premier place for international dispute resolution and seeks to enhance the attractiveness of the jurisdiction for the resolution of international disputes through arbitration by providing a high-quality legislative framework, as well as an efficient access to a qualified and predictable judiciary in aid of arbitration. To this end, the New Act reflects and incorporates the most important developments in both domestic and international arbitration over the past 25 years and includes a significant number of provisions from the UNCITRAL Model Law.

In this article we shall provide an overview of the key amendments, featuring in the New Act, which one may wish to take into consideration when arbitrating in the Netherlands or when selecting a suitable place of arbitration.

II. Key Amendments of the New Act

a) Shorter Setting Aside Proceedings

The New Act provides for a more efficient procedure for the setting aside of arbitral awards, rendered in the Netherlands. While under the 1986 Act setting aside actions could be brought in two factual instances (District Court and Court of Appeal), under the New Act, setting aside proceedings have been limited to one single factual instance, being the Court of Appeal, in whose region the place of arbitration is located (**Art. 1064(a)(1) DCCP**). By limiting the avenues for legal recourse against an arbitral award to one factual instance, the Dutch legislator seeks to limit costly and time-consuming post-arbitration proceedings. Although the judgment of the Court of Appeal may be appealed to the Dutch Supreme Court on points of law (**Art. 1064(a)(5) DCCP**), the New Act also allows parties

to exclude by agreement their recourse to the Supreme Court in cassation. This opt-out provision enables the parties to shorten the duration of the setting aside proceedings to one instance only.

b) The Partial Setting Aside of an Award and Remission

An action to set aside an arbitral award must be lodged with the Court of Appeal within three months following either (**i**) the day on which the award was sent to the parties; or (**ii**) the day on which the award was deposited with the registry of the District Court in whose district the place of arbitration is located (**Article 1058(1) DCCP**); or (**iii**) the day on which the award together with leave for enforcement was served by a bailiff on behalf of (one of) the opponent(s), irrespective of whether the period of time mentioned under (ii) has lapsed or not (**Art. 1064(a)(2) DCCP**). The New Act also specifies that parties may seek the partial setting aside of an award (**Art. 1065(5) DCCP**), which again, allows the parties to limit the time and costs spent on setting aside proceedings and to render them more efficient.

In the context of the assessment of a setting aside action, the New Act has conferred upon the Court of Appeal the power to suspend the setting aside proceedings and to remit the case to the arbitral tribunal, so as to provide the arbitral tribunal the opportunity to address the particular issue in relation to which the setting aside application is brought (**Art. 1065(a)(1) DCCP**). By remitting the case to the arbitral tribunal, the Court of Appeal provides the arbitral tribunal an opportunity to eliminate the ground(s) that could potentially lead to the annulment of the arbitral award. The remission provision of the New Act is inspired on Article 34(4) of the UNCITRAL Model Law, but it goes even further in that it does not only allow remission at the request of one of the parties, but also allows the Court to remit the case to the arbitral tribunal at its own motion. Furthermore, the New Act specifies that no appeal is possible against a decision of the Court of Appeal to suspend the setting aside proceedings pending remission to the arbitral tribunal.

While under the 1986 Act the jurisdiction of the State courts automatically revived following the setting aside of an arbitral award, the New Act limits the revival of that jurisdiction only to those cases in which the arbitral award has been set aside for lack of a valid arbitration agreement, unless the parties agree otherwise. As a result, the circumstances in which the jurisdiction of the Dutch State courts revives, are extremely limited (**Art. 1067 DCCP**). In case of a partial setting aside of the award, the unaffected parts of the award remain valid to the extent they are not inextricably linked to the part that has been set aside (**Art. 1065(5) DCCP**).

c) Shorter Enforcement Proceedings

The New Act also limits the enforcement proceedings for *foreign* arbitral awards, i.e. arbitral awards rendered outside the Netherlands, to one factual instance. Pursuant to the New Act (**Art. 1075(2)/1076(6) DCCP**), the request for leave for the recognition or enforcement of a foreign arbitral award in the Netherlands now has to be filed directly with the Court of Appeal (instead of with the Interim Measures Judge of the District Court, as was the case before and is

still the case for domestic arbitral awards). Importantly, appeal in cassation is only possible in case the Court of Appeal refuses to grant recognition and/or leave for enforcement of the foreign arbitral award.

d) Interim Measures

As regards interim measures, the New Act codifies the existing practice, affording arbitral tribunals wide discretion in granting interim measures at any stage during the proceedings on the merits, provided that the requested measure is connected to a claim or counterclaim instituted in the arbitral proceedings (**Art. 1043(b)(1) DCCP**). In addition, the New Act provides that subject to the parties' prior agreement, interim relief may also be granted on an urgent basis prior to or independent from the main proceedings in the context of summary arbitral proceedings (**Art. 1043(b)(2) DCCP**). In order to grant interim relief in summary arbitral proceedings, the arbitral tribunal, which is independent from the tribunal hearing the merits (if any), must be satisfied that the three requirements for interim relief granted by Dutch judges in ordinary summary proceedings are met. In short, the claim must **(i)** concern an urgent matter, **(ii)** which requires an immediate provisional remedy, **(iii)** taking into account the interests of the parties (**Art. 254 DCCP**). These three requirements are often brought under the common denominator of "urgent interest". In addition to these three requirements, the matter may not be too complex to be ruled on in summary proceedings, for else the request will be rejected (**Art. 256 DCCP**). Except for declaratory relief (and conservatory attachment, see below), the party seeking interim relief has a broad range of remedies at its disposal. For example, it may request an injunction or the payment of an advance on a monetary claim.

Whether the request will be granted depends on the merits of the request and the interests of the parties, whereby the implications of granting the requested provisional measure for the defendant will be measured against the implications of *not* granting the provisional measure for the claimant. Factors that may play a role in this respect are, for instance, whether the refusal to grant the requested provisional measure would cause irreparable harm to the claimant or whether the granting of the provisional measure would create a substantial (monetary) risk for the defendant. However, the fact that the granting of a certain provisional measure would have irreparable consequences, does not prevent the arbitral tribunal from granting such measure, if and when on the balance of interests the interests of the claimant so justify.

In both scenarios, any measure granted is provisional in nature and does not prejudice in any manner the arbitral tribunal's decision on the merits. Arbitrators cannot grant leave for conservatory attachment, which remains within the exclusive jurisdiction of the State courts.

Under the New Act, provisional measures may be granted for the duration deemed appropriate by the arbitral tribunal, granting the interim measure. As a result, the interim measure does not necessarily cease to have effect once the arbitration is finished. Pursuant to **Art. 1043(b)(4) DCCP** the decision of an arbitral tribunal concerning interim measures, is made in the form of an arbitral award, unless the tribunal decides to issue its decision in a different format. In light of the

statutory qualification as an arbitral award, interim measures granted by an arbitral tribunal seated in the Netherlands, may be enforced internationally under the New York Convention.

e) Recourse to Dutch State Courts in Aid of Arbitration

The 1986 Act already provided that despite the existence of an arbitration agreement, parties to an arbitration seated in the Netherlands could have recourse to the Dutch State courts in order to obtain interim measures (including conservatory measures of protection) and in order to obtain assistance in the taking of evidence. Under the New Act, the right to seek such recourse to the Dutch State courts has also been extended to arbitrations seated outside the Netherlands (**Art. 1074 DCCP**). As a result, parties to an arbitration, the place of which is located outside the Netherlands, also have the possibility of applying to the competent Dutch court for interim measures, notwithstanding the existence of an arbitration agreement (**Art. 1022(a) and Art. 1074(a) DCCP**). Similarly, such parties can apply to the competent Dutch court to order a preliminary witness hearing, a preliminary expert report or a preliminary site visit in the Netherlands (**Art. 1022(b) and Art. 1074(b) DCCP**). However, if a party invokes the existence of an arbitration agreement before submitting its defense in the proceedings before the Dutch court, the court may only exercise jurisdiction if the requested decision cannot be obtained, or cannot be obtained in a timely manner, in the arbitral proceedings (**Art. 1022(c) and Art. 1074(d) DCCP**). In particular, the Dutch courts have no jurisdiction to assess the validity of an arbitration agreement, which is the exclusive prerogative of the arbitral tribunal.

f) Validity of the Arbitration Agreement

Under the New Act, an arbitration agreement is valid if it is considered valid under either of three potentially applicable laws: **(i)** the governing law that the parties have chosen to submit their legal relation to; **(ii)** the law of the place of arbitration; or (iii) in the absence of a governing law provisions, the law that governs the legal relation, to which the arbitration agreement pertains (**Art. 166 DCC**).

In this context, the new provision of **Art. 167 DCC** clarifies the position of State entities and State parties to an arbitration agreement. It codifies the internationally acknowledged principle, also recognized in the case law of the Dutch Supreme Court,[2] that a State or a State entity is precluded from invoking its internal laws or regulations to establish a lack of capacity to enter into an arbitration agreement or to contest the arbitrability of the subject matter, to the extent the other party was neither aware, nor ought to have been aware of the relevant rule. Art. 167 DCC thus closely resembles Art. 177(2) of the Swiss Federal Private International Law Act, which embodies the same principle. In France, this principle has been recognized in jurisprudence of the French Supreme Court and the Paris Court of Appeal.[3]

2. See Decision of the Dutch Supreme Court, dated 28 January 2005, LJN: AR 3645 (*DIO/IMS*).
3. See Decision of the French Supreme Court, dated 2 May 1966 (*Galakis*). See also Decision of the Paris Court of Appeal, dated 13 June 1996.

g) Evidence

The New Act contains a specific provision, granting wide discretion to arbitral tribunals in respect of the production of evidence, the admissibility of evidence, the burden of proof and the weight of evidence, unless the parties have otherwise agreed. Although a similar provision already existed under the 1986 Act, the amended wording seeks to clarify that the tribunal's discretion encompasses both procedural rules of evidence, as well as rules of evidence embodied in substantive law.

h) Consolidation of Proceedings

In respect of the consolidation of several sets of arbitral proceedings, the New Act introduces a number of important changes (**Art. 1046 DCCP**). In particular, where the 1986 Act only allowed for the consolidation of two sets of domestic arbitration proceedings by the President of the District Court of Amsterdam, the New Act provides that a request for consolidation, including a request for the consolidation of domestic and *foreign* arbitral proceedings, can also be submitted to a third party, *i.e.*, an arbitral tribunal or an arbitration institute, unless the parties have agreed otherwise. If no such third party has been designated by agreement of the parties, a party can still file a request for consolidation of two domestic arbitrations with the Interim Measures Judge of the District Court of Amsterdam (**Art. 1046(1) DCCP**). With a view to improving procedural efficiency, the New Act no longer requires that in each of the arbitrations in respect of which consolidation is sought, an arbitral tribunal is appointed. It is sufficient that both arbitrations are pending at the moment the request for consolidation is filed.

i) Institutional Challenge Proceedings

Compared to the 1986 Act, another novelty introduced in the New Act is the explicit recognition of an institutional regime for the challenge of arbitrators. The 1986 Act provided a statutory challenge regime and omitted any reference to arbitral practice, in which parties are often bound to an institutional challenge regime as the arbitration rules incorporated by reference into their arbitration agreement, contain a specific institutional challenge regime. The New Act specifically acknowledges that parties may submit an application for the challenge of an arbitrator to an independent third party (such as an arbitral tribunal or an arbitration institute), instead of to the otherwise competent Interim Measures Judge of the District Court (**Art. 1035(7) DCCP**). This provision is intended to ensure that arbitrations, seated in the Netherlands, are conducted in line with international arbitration practice.

j) Forfeiture of Rights

Importantly, the New Act imposes on the parties to an arbitration a duty to notify the arbitral tribunal in writing (with a copy to the opposing party) without undue delay of any objection they may have in respect of any act or omission

that is contrary to (i) the statutory provisions governing the arbitral proceedings; (ii) the arbitration agreement; or (iii) an order, decision or measure of the arbitral tribunal. Failing such timely objection, the party will forfeit its right to invoke such act or omission at a later stage in the arbitral proceedings or before a State court (**Art. 1048(a) DCCP**). The purpose of Article 1048(a) DCCP is to foster a timely redress of the issue by the tribunal, thereby avoiding the need for costly and time-consuming post-arbitration proceedings, aimed at the setting aside or the refusal of enforcement of the arbitral award. The objection of a party, which is late in making its objection, is still admissible if and to the extent that it is able to demonstrate that it was unaware of the relevant violation before.

k) Procedural Flexibility

Finally, as noted above, the New Act introduces several provisions that aim to enhance the procedural flexibility and seek to improve the efficiency of the arbitral proceedings. For instance, the New Act allows the parties to agree on the use of electronic means for the filing of their written submission and other procedural acts (**Art. 1072(b) DCCP**). In addition, the New Act explicitly records that an arbitral tribunal may hold hearings, examine witnesses and/or experts and deliberate at any place other than the place of arbitration, within or outside the Netherlands, as it deems appropriate, unless agreed otherwise by the parties (**Art. 1037(3) DCCP**). In the same vein, the New Act provides that arbitral tribunals may mandate one of the arbitrators alone to hold a hearing, unless the parties have agreed otherwise (**Art. 1037(3) DCCP**). In line with the practice in international arbitration, the New Act also specifies that procedural decisions of minor importance may be taken by the chairman of the tribunal, if the co-arbitrators have delegated this power and the parties have not agreed otherwise (**Art. 1057(1) DCCP**).

In addition to the provisions that seek to improve the efficiency of the arbitral process, the New Act also introduces a number of provisions that allow the parties to limit – if they so wish – the duration and the costs of the arbitration proceedings in a number of ways. For example, the New Act provides that an award does not have to contain the reasoning for the decision if, once the arbitration is pending, the parties have agreed in writing that no such reasoning has to be provided (**Art. 1057(5)(c) DCCP**). In the New Act the previous mandatory requirement that the award had to be deposited by the arbitral tribunal with the registry of the competent Dutch Court has been eliminated (**Art. 1058(1) DCCP**). Finally, the New Act specifically offers the parties the possibility to exclude the arbitral tribunal's power to order the examination of witnesses and experts (**Art. 1041(1) DCCP**) or the production of documents (**Art. 1040(2) DCCP**).

III. Concluding remarks

A comparison of the provisions of the New Act with those of the 1986 Act demonstrate that the Dutch Arbitration Act has been amended to reflect the best-practices developed over the past decades in the international arbitration practice,

as well as to codify the important developments in the case law of the Dutch Supreme Court. In so doing, the Dutch legislator provided parties important means, enabling them to organize and tailor the arbitral procedure in a manner that best suits the nature of the dispute, while at the same time enabling them to control the duration and the costs of the arbitral proceedings.

The future will tell to what extent and in what manner parties will use the new procedural means, available under the New Act. In any event, the New Act contains all procedural features necessary to facilitate the efficient conduct of international arbitration in the Netherlands according to modern-day standards. As such, the Dutch legislator has ensured that (international) arbitration in the Netherlands is a reliable and high-quality alternative for traditional means of dispute resolution before the State courts.