Kluwer Arbitration Blog

Consultation on revision of Dutch arbitration law opened

Daniella Strik (Linklaters) · Monday, March 19th, 2012

The Dutch Ministry of Security and Justice has launched a consultation on the revision of the Dutch 1986 arbitration law. See here. For an informal English translation of a comparison with the current Dutch arbitration law, see here. The consultation will be open until 1 June 2012. It is anticipated that the legislative proposal will be submitted to the Dutch Parliament later this year. Important proposed amendments relate to, e.g.:

i. limitation of the length of annulment proceedings;
ii. revival of the jurisdiction of the state court;
iii. confidentiality of arbitration proceedings;
iv. assistance of the Dutch state court in foreign arbitration proceedings;
v. provisional measures in pending arbitration proceedings; and
vi. a more detailed procedure for arbitral appeal.

The Netherlands has been in the forefront of international arbitration for the last two centuries. In 1838 it enacted its national arbitration law in the Dutch Code of Civil Procedure ("DCCP"). Subsequently, it became the home of *inter alia* the Permanent Court of Arbitration, the Iran-US Claims Tribunal, P.R.I.M.E. Finance (see here), the Netherlands Arbitration Institute ("NAI"), Maritime arbitration institute TAMARA and numerous other private arbitration institutions. The arbitration law of 1838 was later revised on the basis of the UNCITRAL Model Law of 1985. The current 1986 Dutch arbitration law was one of the most modern national arbitration laws of its time, aiming to facilitate international harmonisation and unification of arbitration law to make arbitration in the Netherlands both nationally and internationally attractive. The arbitration law was drafted in consultation with Professor Sanders – one of the most important Dutch experts in the international field of arbitration, and the founding father of the New York Convention 1958. However, after 25 years, it is now time to adapt the Dutch arbitration law of 1986 to the national and international developments in arbitration law that have occurred since then.

The proposed revision of the Dutch 1986 arbitration law by the Dutch Ministry of Security and Justice is intended to fully reflect the most important provisions of the UNCITRAL Model Law, as revised in 2006. The proposed amendments are also intended to improve certain aspects of the current law, i.e., to modernise the law. The aim is to strengthen the position of the Netherlands as a leading arbitration friendly country for domestic and international disputes and to facilitate arbitration as a full-fledged form of dispute resolution besides the available recourse to the state court.

The main proposed changes include e.g. that the court of appeal – rather than the first instance district court – will have jurisdiction over annulments of arbitral awards. If parties have agreed to exclude appeal in cassation, this will result in a procedure with only one court deciding on the annulment. This aims to limit the time and costs that parties may spend in annulment proceedings after having completed arbitration proceedings. The proposal also introduces the possibility for the state court to suspend the annulment proceedings and remit the matter to the consideration of the arbitral tribunal by reopening the arbitral procedure or taking other measures.

Another proposal is that in case of the annulment of an arbitral award, the jurisdiction of the state court will only revive in case the arbitral award has been annulled on the basis of lack of a valid arbitration agreement.

The court of appeal – rather than the first instance district court – will also have jurisdiction over enforcement proceedings for Netherlands seated arbitrations. Parties can lodge cassation appeal proceedings against a decision of the court of appeal, either in case the exequatur is granted or in case the exequatur is refused. Parties can agree to exclude cassation appeal.

The proposed revision also introduces a provision pursuant to which the arbitration proceedings will be confidential and all persons involved in those proceedings will have a duty to adhere to confidentiality, except when the parties have stipulated or the law provides otherwise. Such provision on the confidentiality of arbitration was already adopted in e.g. the NAI rules, but had not yet been codified in Dutch arbitration law.

Other suggested changes of the proposal relate to the possibility for a party to request the assistance of a Dutch state court with respect to foreign arbitration proceedings (i.e. arbitration proceedings seated outside the Netherlands). In this respect it is noted that the proposal does not distinguish domestic arbitration from international arbitration, which distinction is based on the parties' places of residence. Such distinction would not fit into the existing Dutch arbitration law's one-tier system in which it is irrelevant whether the parties reside in or outside the Netherlands. The Dutch Ministry of Security and Justice also deems this distinction to be unnecessary in view of the present state of communication technology.

The proposal also includes the introduction of the authority for the arbitral tribunal to order certain provisional measures in pending arbitral proceedings. This in supplement to the current option for emergency arbitrators ordering provisional measures, even in case no arbitral procedure on the merits is pending. Decisions rendered as a result of a request for a provisional ruling by such arbitrators qualify as an arbitral award.

Overall, it is noteworthy that the proposed reforms provide parties with broader possibilities to derogate by contract from the arbitration law in the DCCP, resulting in larger power to the parties to shape the arbitration procedure as they wish. This may also make it more attractive for parties to agree on instituting arbitration in the Netherlands. It is proposed that parties may, for example, agree on the number of written briefs to be submitted and whether oral presentation will be allowed; arrangements on the submission of evidence to waive the right to appeal in cassation in enforcement and annulment proceedings. Furthermore, parties may, for example, agree to exclude the possibility for an oral explanation by the parties to the arbitral tribunal, the authority of the arbitral tribunal to order the appearance of a witness or expert, to render an interim measure or to order the disclosure of records by a party and the option for a third party to join or intervene in the arbitral proceedings.

Further reforms of the Dutch arbitration law include that (i) an arbitral award that has the force of res judicata, will also have legally binding effect on those parties in other proceedings; and (ii) at least one person with a LL.M. (*meester in de rechten*) degree or another comparable degree, shall be part of the arbitral tribunal.

Twenty-five years ago Dutch law was already favourable to arbitration as it was one of first that aimed to implement the UNCITRAL Model Law to harmonise arbitration law. Upon adoption of the proposed revision, the act will be aligned with the revised UNCITRAL Model Law. Since developments in the field of arbitration have been significant during the last several years, the proposal reflects the Dutch ambition and ability to keep in step with those developments and to retain its position as an attractive venue for domestic and international arbitration.

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