Kluwer Arbitration Blog

New Dutch Arbitration Law Adopted

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The legislative proposal to modernise Dutch arbitration law has been unanimously adopted by the Senate of the Dutch Parliament today. For an informal English translation of the new law, please see here. A comparison between the new law and the 1986 Dutch arbitration law can also be found here. The date of entry into force shall be determined by the Minister of Security and Justice by royal decree. We assume that this will be 1 January 2015.

Important amendments introduced by the new law relate to, e.g.:
i. limitation of the length of annulment proceedings;
ii. limitation of revival of the jurisdiction of the state court after setting aside of the arbitral award;
iii. limitation of the length of enforcement proceedings of foreign arbitral awards;
iv. option for parties to elect institutional challenge proceedings;
v. assistance of the Dutch state court in foreign arbitration proceedings;
vi. provisional measures in pending arbitration proceedings;
vii. a more detailed procedure for arbitral appeal;
viii. interruption of the statutory period of limitation;
ix. validity of the arbitration agreement; and
x. limitation for a state or state entity to invoke national law to escape the arbitration agreement.

A number of changes have been made to the initial legislative proposal of 16 April 2013, the contents of which have been discussed here.

As mentioned in our previous blogs (please see here and here), the new law aims to reduce the length of annulment proceedings before Dutch state courts by giving the Court of Appeal – rather than the District Court – jurisdiction in such matters. Parties may even agree to exclude appeal in cassation at the Supreme Court against a judgment of the Court of Appeal, resulting in a procedure with only one instance deciding on the annulment. However, the new law provides for an exception if one or more parties to the arbitration is a consumer, in which case cassation appeal cannot be excluded and the two-step appeal procedure must be retained.

The new law also specifies that the three-month deadline for the application to set aside an award will be triggered by the sending of the award to the parties or, if applicable, by the registration of the award with the registry of the District Court. The legislator has, however, decided that it will also retain the other trigger for the setting aside term currently applicable: the service of the award together with a leave for enforcement on a party, irrespective of whether the deadline pursuant to

the other trigger(s) has lapsed.

Interestingly, whereas the initial idea to have enforcement proceedings heard by the Court of Appeal rather than the District Court had been abandoned in the original legislative proposal of 15 April 2013, this system has been re-introduced and adopted in the new law with respect to foreign arbitral awards. Leave for enforcement of foreign arbitral awards can therefore be sought from the Court of Appeal rather than the District Court, with a possibility for appeal in cassation. For the enforcement of domestic awards, the District Court will have jurisdiction in first instance.

The institutional challenge proceedings which had been introduced in the initial proposal have been adopted in the new law. Parties will now have the option to appoint an independent third party, such as an arbitral institution, to decide on a challenge of an arbitrator.

A party will, moreover, be able to request the assistance of a Dutch state court with respect to foreign arbitration proceedings (i.e. arbitration proceedings with a seat outside the Netherlands), e.g. for interim measures or a preliminary witness examination. The text of the new law clarifies that in case a party invokes before a state court the existence of an arbitration agreement before submitting a defence, such court shall only declare that it has jurisdiction in case the requested relief cannot be obtained, or cannot be obtained in a timely manner, in arbitral proceedings. The Dutch state court does not have to decide on the validity of such arbitration agreement.

Parties may nominate a third party to decide on a party's request to consolidate arbitration proceedings with a seat in the Netherlands. Previously, this was an exclusive authority of the President of the District Court of Amsterdam. If so agreed by the parties, such nominated party may also decide on a request to join arbitration proceedings with a seat in the Netherlands and arbitration proceedings with a seat outside the Netherlands.

Other modifications have been made to the provisions dealing specifically with provisional measures in pending arbitral proceedings. The initially proposed opt-out for parties with respect to the arbitral tribunal's authority to order provisional measures has been abandoned; tribunals will now always have the possibility to order provisional measures pending the arbitration. The duration of such measures will not, by operation of law, be limited to the duration of the arbitral proceedings, but may be determined by the arbitral tribunal in its own discretion. Such provisional measures may also be ordered by emergency arbitrators, with the exception of conservatory measures, such as the levying of prejudgment attachments, which remain the preserve of the state courts. Decisions rendered as a result of a request for interim measures by such arbitrators will qualify as an arbitral award, unless the tribunal determines otherwise.

The new law offers parties and arbitral tribunals greater procedural freedom and flexibility. In addition to the changes already introduced by the consultation document and the original legislative proposal, the new law also provides for the possibility for the arbitral tribunal to hold hearings at any place other than the seat of the arbitration, within or outside the Netherlands, unless agreed otherwise by the parties, and to designate one of its members to hold a hearing, again, unless agreed otherwise by the parties. The new law also allows for information and documents to be exchanged electronically, provided the arbitral tribunal has approved the use of such electronic means and unless (one of) the parties to the arbitration has/have opted out of the use of such means, provided that the parties have agreed to such opt-out possibility.

Some changes, although not applied directly to the provisions of the new law contained in the

Dutch Code of Civil Procedure, have been introduced elsewhere in Dutch law, and are relevant to arbitration agreements and arbitral proceedings.

For example, the legislator has decided that statutory periods of limitation for claims governed by Dutch law will also be interrupted by the initiation of arbitral proceedings in which the arbitral tribunal has declined jurisdiction. A new statutory period of limitation will start on the day following the date of the award. Such new period will be the same as the original statutory period of limitation, but not longer than five years.

With respect to the validity of arbitration agreements, such agreement will be materially valid, if it is valid (i) pursuant to the law that the parties have elected to govern the arbitration agreement, or (ii) pursuant to the law of the seat of arbitration or, (iii) in case no choice of law has been made, the law that is applicable to the (underlying) legal relationship (e.g. the contract) to which the arbitration agreement relates.

In this context, it has also been clarified that a state or state entity that is a party to an arbitration agreement, cannot invoke its national legislation to dispute its authority to enter into such agreement or the arbitrability of the dispute in case the counterparty to the arbitration agreement did not and should not have known about such legislation.

The revision of the Dutch arbitration law is intended to fully reflect the most important provisions of the 2006 UNCITRAL Model Law. The amendments are also intended to modernise the current law. The aim is to strengthen the position of the Netherlands as a leading arbitration-friendly jurisdiction for domestic and international disputes and to facilitate arbitration as a fully-fledged form of dispute resolution besides the available recourse to the state court. Arbitral institutions based in the Netherlands are expected to amend their arbitration rules to bring them in line with the new law shortly.

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