Adjournment of Enforcement Proceedings in the Netherlands Based on the New York Convention

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Annette Scholten (De Brauw Blackstone Westbroek N.V.)

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The issue of adjournment of enforcement proceedings relating to foreign arbitral awards that are subject to setting aside proceedings has featured prominently before national courts in recent years and has been the subject of other contributions on this blog (see here and here). This topic is especially significant in the Netherlands, an important jurisdiction for enforcement purposes due to its liberal attachment regime and the high number of companies having assets located in the country. A particularly pressing question regarding the enforcement of foreign awards is what standard Dutch courts should employ when reviewing a request based on Article VI of the New York Convention for adjournment of the enforcement proceedings pending a setting aside application at a court of the seat of the arbitration. No clear standard can currently be identified in the case law and this has led to undesirable legal uncertainty. As I argue in this post, a potential solution is the adoption of the test currently used for similar requests concerning the enforcement of domestic awards under Dutch law. This solution would ensure a measure of guidance regarding the application of Article VI by Dutch courts and thus enhance the arbitration-friendliness of the Netherlands.

Lack of clarity in the Dutch case law

In the Netherlands, a foreign award to which enforcement treaties such as the New York Convention are applicable can be recognised and enforced based on Article 1075 of the Dutch Code of Civil Procedure ("**DCCP**"). Pursuant to Article 1075 DCCP, adjournment of such recognition and enforcement proceedings can be requested based on the New York Convention itself.

Under the New York Convention, a foreign award is in principle subject to recognition and enforcement, even if subject to an application for setting aside or suspension at the seat of the arbitration. By way of exception, Article VI provides national courts in enforcement proceedings the discretionary power to adjourn the proceedings and order the award-debtor to provide security if an application for setting aside or suspension of that award is pending at the seat of the arbitration. Article VI does not contain guidance on when courts should adjourn. Although national courts have chosen a variety of approaches when deciding this issue, a common trend is for courts to develop a standard for the application of Article VI, rather than leaving matters entirely to the court's discretion (see here).

For many years, the Netherlands was an exception to this trend. Rather than using a single standard, Dutch courts confronted with requests for adjournment based on Article VI exercised their power in different ways. For instance, one court refused adjournment based on the prospects of success of the setting aside proceedings (here); another court refused adjournment by referring to the New York Convention's purpose of facilitating and expediting the enforcement of foreign awards (here); and yet another court adjourned the proceedings based on a balancing of the parties' interests (here).

This inconsistent application of Article VI came to an end in 2011. Between 2011 and 2015, a line of Dutch district court case law emerged where courts consistently applied the same standard (see *inter alia* here and here). However, in these cases, the courts set the bar for adjournment particularly low. Adjournment was granted until the setting aside proceedings were concluded, unless the enforcing party could prove that the setting aside proceedings had no chance of success. In practice, this low threshold meant that proceedings were consistently adjourned. This standard created a heavy burden for the enforcing party and has

been rightly criticised in the literature (here and here) for being incompatible with the pro-enforcement principle of the New York Convention.

Since 2015, Dutch courts have departed from this approach in two judgments. In one judgment, the court adjourned based on a joint request from the parties. In another judgment, the court refused to adjourn stating that the mere fact that setting aside proceedings were pending was not sufficient for adjournment. The pro-enforcement approach adopted in this judgment is an improvement on the previous line of case law in terms of conformity with the New York Convention. However, this judgment reverts back to the earlier ambiguity concerning the applicable standard, leaving open the question what *does* constitute sufficient ground for adjournment.

This uncertainty makes it difficult for litigants to formulate requests based on Article VI, or defences against such requests, and it is aggravated by the fact that a court's decision to adjourn generally cannot be appealed. Since Dutch courts are already familiar with a standard for temporarily halting the enforcement of awards subject to set aside proceedings – albeit with regard to domestic awards –, the preferable approach would be to also employ this test with regard to New York Convention awards.

The test for the suspension of enforcement of domestic awards

Suspension of the enforcement of domestic awards for which setting aside proceedings are pending before Dutch courts is regulated by Article 1066(2) DCCP. For a request under Article 1066(2) DCCP to succeed, two requirements have to be met (see also here). First, it must be *probable* that the award will be set aside. When making this assessment, the court should exercise restraint, because suspension proceedings are not concerned with the merits of the setting aside claims. Second, the interest of the award-debtor to delay enforcement must outweigh the interests of the enforcing party. When weighing these interests, the duration of the setting aside proceedings, the irreversible consequences of enforcement and the risk of restitution can *inter alia* play a role.

The 'suspension' of the enforcement of a domestic award is formally different from the 'adjournment' of the enforcement proceedings relating to a New York Convention award, because the proceedings to enforce the two types of awards

are different under Dutch law. Leave to enforce a domestic award is granted *ex parte* in the Netherlands. Therefore, the award-debtor can only request the enforcement of the award to be temporarily halted in separate suspension proceedings after the enforcement proceedings have already been concluded. In contrast, both parties are present during the recognition and enforcement proceedings in relation to a New York Convention award. The award-debtor thus can request the court to adjourn (or, postpone) *its decision on enforcement* during these proceedings.

However, aside from this difference, the two concepts are equivalent in nature and serve the same goal: a stay of enforcement of an award whilst setting aside proceedings are still pending. Support for this analogy can also be found in the literature. Consequently, there is a compelling case for a uniform approach based on the "domestic award test" outlined in the previous paragraph.

Suitability of the domestic award test for New York Convention awards

A potential objection to the adoption of the domestic award test to requests based on Article VI could be that a test adopted in relation to domestic awards cannot automatically be considered appropriate for foreign awards. Indeed, Dutch courts may find it more difficult to assess the prospects of success of setting aside proceedings in foreign jurisdictions. However, this concern seems overblown. The domestic award test only requires courts to make *provisional* assessments of the likelihood of success of such proceedings. If courts are in doubt as to the expected outcome of these proceedings, courts will refuse adjournment, unless there is a compelling interest in favour of adjournment. This is in line with the purpose of Article VI and of the New York Convention as a whole.

The *travaux préparatoires* of the New York Convention reveal that Article VI is meant to prevent the use of setting aside proceedings as a delaying tactic, whilst allowing enforcement courts to adjourn the proceedings if there are good grounds to do so. The first requirement of the domestic award test – that it must be probable that the award will be set aside – puts a halt to such dilatory tactics, because it ensures that enforcement proceedings cannot be delayed by the commencement of meritless setting aside proceedings. The second requirement – that the award-debtor's interests must outweigh the award-creditor's interests –

ensures that enforcement courts still have the opportunity to take other circumstances into account. By making sure that adjournment only occurs in exceptional circumstances, this test is in keeping with the New York Convention's goal to promote the swift and effective enforcement of awards.

Finally, adopting the domestic award test would provide additional coherence to the system of Dutch arbitration law. This test already applies *mutatis mutandis* to requests for the stay of enforcement proceedings of foreign awards to which enforcement treaties such as the New York Convention are not applicable (Article 1076(8) DCCP in conjunction with Article 1066(2) DCCP). Declaring this test applicable to requests based on Article VI would thus contribute to a uniform and consistent legal system.

Conclusion

Dutch courts confronted with requests for adjournment of enforcement proceedings based on Article VI of the New York Convention should use the test that they currently already apply to requests for the suspension of enforcement of domestic awards and the stay of enforcement proceedings of foreign awards to which no enforcement treaties are applicable. This would resolve the uncertainty surrounding the applicable standard and thus make the Netherlands a more arbitration-friendly jurisdiction.