

Kluwer Arbitration Blog

Let's Go Dutch! Exploring the Ease of Recognition and Enforcement in Dutch Law – Arbitral Awards vs. Foreign Judgments

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One of the reasons that parties opt in for arbitration instead of litigation as a mechanism to settle their disputes is that the recognition and enforcement of an arbitral award is easier to accomplish than the recognition and enforcement of a foreign judgment rendered by a state court. The Netherlands has been a party to the New York Convention since 1964 and its national law also permits the recognition and enforcement of foreign judgments. This post seeks to examine whether foreign arbitration awards are indeed more easily recognized and enforced than foreign judgments in the Netherlands. To this end, relevant Dutch case law concerning recognition and enforcement will be compared. The post will first describe the requirements for recognizing and enforcing both arbitral awards and foreign judgments. Relevant case law will then be compared to support a conclusion on whether arbitral awards are indeed more commonly recognized and enforced in the Netherlands as compared to foreign court judgments.

1. Legal Framework

There are two methods in which foreign arbitral awards are recognized and enforced in the Netherlands. The first method is through the [New York Convention](#). Since the New York Convention is a treaty, it should be noted that international law has a direct effect in Dutch law (Article 93 Dutch Constitution). The second method by which arbitral awards may be enforced in the Netherlands is under Dutch national law, with the [Dutch Code of Civil Procedure \(DCCP\)](#) containing rules for the recognition and enforcement of foreign arbitral awards.

Article III of the New York Convention states that the procedure for the recognition and enforcement of foreign arbitral awards shall be governed by the law of the State where recognition is sought, the relevant articles being 1075 and 1076 DCCP. Article 1075 DCCP provides that foreign arbitral awards can be recognized and enforced if a treaty concerning recognition and enforcement is applicable, and if no such treaty applies to the arbitral award (*e.g.*, due to reservations), article 1076 DCCP applies. This article stipulates that the award may be recognized upon submission of the original arbitration agreement and the arbitral award to the court. It also provides that recognition and enforcement may be refused if the arbitration agreement is invalid, the composition of the arbitral tribunal was not in accordance with applicable rules, the arbitral tribunal did not comply with its mandate, the award is subject to appeal, the award has been set

aside, or enforcement would be contrary to public policy.¹⁾

The DCCP regulates the recognition and enforcement of foreign court judgments. Article 431(1) DCCP defines the general principle that a foreign court judgment cannot be recognized and enforced. However, under certain conditions as set out in Articles 985-994 DCCP, it is possible for foreign judgments to be recognized and enforced under Dutch law. These provisions provide for a general recognition and enforcement procedure when a judgment is enforceable pursuant to a treaty or law that contains its own procedure. For example, judgments of EU Member States are automatically recognized and enforceable in other Member States under EU law through [Regulation EU no. 1215/2012](#), the sole requirement is a certificate from the issuing court. Other international sources include the [Lugano Convention](#) and the [Hague Choice of Court Convention](#).

If a foreign judgment is rendered in a state that is not a party to any of abovementioned treaties, Article 431(2) DCCP applies. According to this article, a party may initiate new proceedings before a Dutch court in order to enforce the foreign judgment in the Netherlands. The Dutch court must then assess, on a case-by-case basis, whether and to what extent it should grant authority to the foreign judgment. The general rule is that a claim based on Article 431(2) DCCP implies a complete and independent assessment of the merits of the dispute. The recognition and enforcement of a foreign judgment will depend on whether it meets the criteria set out in the [Gazprombank judgment](#) of the Dutch Supreme Court (later confirmed in the [Yukos Supreme Court case](#)). These criteria are as follows:

1. The judgment is a final judgment following valid submissions and was rendered by a court which had established its jurisdiction;
2. The judgment is not rendered in violation of elementary principles of a fair trial;
3. The judgment is not contrary to the public policy of the Netherlands; and
4. The judgment is not incompatible with either a prior judgment rendered by a Dutch court in a dispute between the same parties, or a prior judgment rendered by a foreign court in a dispute between the same parties, concerning the same subject matter and based on the same cause of action, provided that such prior judgment was also capable of being recognized in the Netherlands.

If the aforementioned conditions are met, and the claim before the Dutch court is identical to the claim in the foreign judgment, it will, in principle, be recognized and enforced.

2. Case Law Comparison

On the [website](#) of the judicial system of the Netherlands I have identified some 65 unique cases where recognition of a foreign arbitral award was sought in the Netherlands, based on either the New York Convention or relevant articles of the DCCP. Out of these 65 cases, 50 resulted in recognition and enforcement of the arbitral award, meaning that foreign arbitral awards have been recognized and enforced in the Netherlands in approximately 77% of the cases in which recognition and enforcement was sought. The Dutch courts have refused recognition in cases where the request meets one of the grounds for refusal under Article V of the New York Convention, or the equivalent articles found in the DCCP. Recent examples of Dutch courts refusing the enforcement of foreign arbitral awards based on the New York Convention are:

- The [Court of The Hague](#) rejected the request to enforce an interim award: in an arbitration procedure, a request to stay the enforcement of the judgment was granted by the arbitrator. The petitioner requested the court for recognition of the arbitral judgment and permission for its enforcement in the Netherlands. The court rejected the request because the stay is not susceptible to recognition and enforcement in the Netherlands. The interim award should be challenged through legally regulated remedies. The request was denied.
- The [Court of Appeal in Amsterdam](#) has refused the enforcement of an arbitral award since the petitioners have presented false, incomplete, or misleading information and have withheld relevant facts during the arbitration proceedings. Based on these considerations, the court concludes that the applicants have committed procedural fraud, which is contrary to public policy in the Netherlands.
- The [Court of Appeal of 's-Hertogenbosch](#) has refused to enforce the arbitral award on the following grounds: the award has been set aside by the Swiss Bundesgericht, there are doubts regarding the authenticity of the award, the document bears a stamp from a non-existent state, there is uncertainty regarding the rightful beneficiary of the claims, and the request is in conflict with Article V(1)(a) of the New York Convention.

The case law research indicates that the most frequently cited grounds for refusal are found in Section 1(e) of this article. Section 1(e) of the New York Convention has been the topic of debate in two relevant arbitration awards that were rendered in Russia. *Firstly*, in the [Yukos Capital/Rosneft](#) case, the Court of Appeal of Amsterdam concluded that if the annulment judgment cannot be recognized under Dutch PIL conditions, article V, section 1(e) of the New York Convention can be disregarded, allowing for the re-recognition and enforcement of the annulled arbitral award. *Secondly*, the Supreme Court ruled in the [NLMK](#) case that the enforcing judge has a certain degree of discretion to recognize and allow for the enforcement of a foreign annulled arbitral judgment, even if grounds for refusal apply. In such exceptional cases, the burden of proof lies with the party seeking recognition, to demonstrate that there are facts and circumstances justifying disregarding the grounds for refusal as described in article V.

Moreover, I identified a further 70 unique cases in which recognition of a foreign judgment was sought before a Dutch court.²⁾ Out of these 70 cases, 32 cases involved disputes that concern a subject that is arbitrable. Of these 32 cases, there were 19 instances wherein recognition of the foreign judgment was granted, which constitutes approximately 59% of the total number of cases. The most common grounds for courts to refuse recognition is that the foreign judgment violated public policy or fundamental principles of a fair trial.

3. Concluding Remarks

These findings indicate that recognition of foreign arbitral awards in the Netherlands is generally more frequent than recognition of foreign judgments. Thus, from a Dutch perspective, it is a valid argument to choose arbitration over litigation due to the ease of enforcement.

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A graphic for a survey report. It features a dark background with a circular inset showing a gavel on a glowing digital circuit board. The text is white and blue. A blue button with white text is present. Logos for Wolters Kluwer and Future Ready Lawyer are included.

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References

?1 Article 1076(1)(a)-(e) DCCP

Since the scope of this post is the recognition and enforcement of awards vs foreign judgment, and

?2 given that judgments of other EU Member States' courts do not require recognition in order to be enforced, these have been left outside of the scope of this research.

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