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Navigating Exequatur: The Pro-Arbitration Stance of the Amsterdam Court of Appeal

Irène Léger, Jochem Vlek (Staunch) · Friday, November 29th, 2024

The Court of Appeal of Amsterdam (the “Court”) recently [granted leave](#) to enforce a foreign ICC award in the Netherlands, despite fraud allegations and pending setting-aside proceedings in France.

The Court (i) accepted territorial jurisdiction on the basis of the claimant’s plausible intent to enforce within the jurisdiction, (ii) examined the fraud allegations with a degree of restraint, as the enforcement of awards should not serve as a ‘do-over,’ and (iii) reiterated that the fact that the annulment of an arbitral award is sought in the country where it was rendered does not oblige the Dutch courts to suspend its enforcement.

The Court noted that the grounds of fraud (substantive and procedural) arose during the arbitration, but were not raised at that time, as the respondent did not participate in the proceedings and only began to raise them after they had been closed, and the arbitrator had heard, considered, and rejected the arguments for reopening the proceedings.

This decision is a reminder of the pro-enforcement approach of the Dutch courts, which, together with a liberal attachment regime and a high number of companies with assets in the Netherlands, makes it an important and attractive jurisdiction for enforcement purposes. It also underscores the importance of raising serious allegations such as fraud as soon as they are known, rather than after the fact.

Background

The dispute relates to a consultancy agreement entered into between Cardno ME (“CME”) and the Central Bank of Iraq (“CBI”) for services in connection with the construction of CBI’s new headquarters in Baghdad.

The dispute arose when, according to CME, CBI refused to pay CME’s outstanding invoices. CME initiated an ICC arbitration seeking payment of the outstanding invoices and of the remaining value of the agreement.

Respondent CBI, although duly notified throughout the arbitration, did not participate until after the proceedings were declared closed and the award was being scrutinized by the ICC Court. Only

then did CBI suddenly raise the invalidity of the arbitration agreement for fraudulent misrepresentation by CME, and the fact that two of CME's employees had allegedly confessed to such fraud before an Iraqi criminal court.

Referencing the ICC Rules, the arbitrator declared CBI's unsolicited submission inadmissible as filed after the closing of the proceedings. The arbitrator also pointed out that CBI had not put forward any change in circumstances that occurred after the closing that would justify reopening such proceedings (the Iraqi judgment relied on was issued one and a half year earlier), and that CBI's statement was inconsistent with its conduct in failing to raise such a serious fraud allegation during the proceedings.

The sole arbitrator issued his [final award](#), finding that CBI had breached its obligations under the agreement and ordering it to pay CME around USD 11 million, plus interest.

CBI filed an application with the Paris Court of Appeal to set aside the award, which is pending, and an application to suspend enforcement, which was denied.

CME applied to the Court of Appeal of Amsterdam for enforcement of the award. CBI opposed enforcement, arguing that the award was contrary to both Dutch and international public policy on the grounds of substantive and procedural fraud. CBI also argued that the Court of Appeal of The Hague, rather than that of Amsterdam, had jurisdiction. In the alternative, CBI requested that the Court suspend enforcement pending the judgment in the French setting-aside proceedings.

Decision

Territorial Jurisdiction

The Court first examined whether it had domestic territorial jurisdiction, as CBI had argued that it was not aware of any assets, let alone enforceable ones, within that jurisdiction. The Court held that the claimant's intention to enforce within its jurisdiction is sufficient, provided that this intent appears plausible. CME had stated that it intended to levy third-party attachments under several Amsterdam-based financial institutions. The Court found this intent sufficient and did not require CME to further specify the assets.

This decision is interesting as [previous case law](#) (para. 3.3.3) on international jurisdiction suggested that merely seeking enforcement in the Netherlands was sufficient for this purpose. The present decision suggests that the Court applies a (slightly) higher threshold for its domestic territorial jurisdiction than for its international jurisdiction. It should be noted that the international jurisdiction of the Court was not at issue in this case (unsurprisingly, given the clear case law). The Court's position reflects a pragmatic approach, and, incidentally, underlines that immunity from execution (as relied on by CBI) must be considered in the context of enforcement against specific assets, not as a precondition for *exequatur*.

Public Policy

The Court then considered the alleged violations of Dutch and international public policy on the

basis of substantive fraud (the agreement was fraudulently entered into) and procedural fraud (violation of equality of arms and arbitrator's partiality).

Citing the [Supreme Court Yukos judgment of 2021](#) (para. 5.4.9), the Court examined this issue with restraint, meaning that even if public policy or due process rights are alleged to have been violated, the enforcement of awards should not serve as a 'do-over' of the arbitration. The court must examine the award with deference to the tribunal's findings. An exception to this restraint applies where there has been a violation of the right to be heard, or it is alleged that there is no valid arbitration agreement, which was not the case.

With respect to substantive fraud, the Court reiterated that under Dutch law, the ground is limited to fraud discovered after the award has been rendered, otherwise the fraud could be brought before the arbitrators, even if discovered at a late stage of the arbitration. The Court concluded that since the grounds were discovered during the arbitration, they could not lead to a refusal of enforcement. Parallels can be drawn with [case law](#) (para. 4.3.4) requiring litigants in certain circumstances to exhaust their legal remedies and seek redress in the country of origin of a judgment, lest they are estopped from invoking the relevant ground for non-recognition in Dutch enforcement proceedings.

With respect to procedural fraud, the Court concluded that CBI's arguments as to why the proceedings should be reopened were heard, weighed, and rejected by the arbitrator in accordance with the ICC rules. Therefore, his refusal to consider CBI's fraud allegations did not result in a violation of the adversarial process or equality of arms.

Further, with respect to the arbitrator's alleged bias, the Court found that the alleged facts could also have been known to CBI during the arbitration and that it was imputable to CBI that it chose not to participate in those proceedings.

The Court therefore refused to dismiss the exequatur application and examined CBI's request for a suspension of enforcement.

Suspension of Enforcement

CBI argued, following the [test](#) applied by Dutch courts for the suspension of enforcement of domestic awards and of foreign awards to which no enforcement treaty applies, that (i) there was a high probability of success of the French annulment proceedings and (ii) a balancing of interests justified a (limited) suspension.

First, the Court [recalled](#) (para. 3.5) that the mere fact that the annulment of an award has been sought in the country where it was rendered does not oblige the court to suspend its enforcement. Furthermore, the Court noted that CBI's pleadings showed that the setting-aside claim was based on the same grounds as those raised against enforcement, and reasoned that since none of those grounds had led to a refusal of enforcement, CBI's reliance on them could not be considered *prima facie* justified. In addition, the Court noted that it was significant that CBI had also sought a suspension of enforcement in France, which had been denied by the Paris Court of Appeal. The Court further held that a balancing of the interests did not lead to a different result.

Conclusion

This judgment reinforces the strong pro-arbitration stance of the Dutch courts, even when public policy allegations are raised.

A key peculiarity of this case was CBI's unwise strategic decision to delay its participation in the arbitration until after the proceedings had closed, and only then to raise allegations of fraud for the first time, even though these allegations arose during the arbitration.

The Court's decision highlights the importance of addressing concerns as they arise during arbitration proceedings. This is in line with well-established principles in both Dutch and international case law. However, the Dutch courts go further than other jurisdictions, such as France, by applying this solution to substantive and procedural public policy allegations alike.

As the same grounds were raised by CBI to oppose enforcement of the award in the Netherlands and to request the Paris Court of Appeal to set it aside, it will be interesting to see whether the Paris Court reaches the same conclusions as its Amsterdam counterpart.

In France, it is also a well-established principle, now codified ([Art. 1466](#) of the French Code of Civil Procedure), that a party who knowingly fails to raise an irregularity before the arbitrators is deemed to have waived its right to raise it to challenge an award. However, such waiver is limited to violations of procedural public policy. The right to challenge an award on the ground that its enforcement would violate substantive public policy cannot be waived. Accordingly, a party is not required to have previously raised its substantive public policy concerns before the arbitral tribunal. In addition, the French courts apply a 'maximalist' review of possible violations of public policy, which has been questioned by [French commentators](#) as it denatures the action to set aside an award and enables a first decision on an entirely new issue, where, as in this case, the issue was not previously raised before the arbitrators. In the present case, this means that the Paris Court will have the power to assess the question of whether the agreement between CME and CBI was concluded under fraud. Having said this, this review is limited to examining whether the implementation of the arbitral tribunal's solution would seriously violate the principles and values of French international public policy.

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