Modernized Netherlands Arbitration Act about to Kick Off

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Last year ECL reported on the forthcoming update to the Netherlands arbitration act as proposed in an April 2013 bill for the 'modernization of Netherlands arbitration law'.[1] The bill (with a number of amendments) passed both houses of Parliament at the beginning of this year and was promulgated as law on 11 June 2014. The expected date of the act's entry into force is 1 January 2015, and it will then apply to all arbitrations with a seat in the Netherlands that commence on or after this date. Although the process of parliamentary approval did not result in a complete overhaul of the original bill that was proposed in April 2013, the act as it has been promulgated (essentially a revised bill issued by the Ministry of Justice subsequent to deliberations in the lower house) in parts differs significantly from the original bill. Below, four essential changes that international users of the revised act should take into account are discussed in further detail. As a general point, while the underlying principles of the UNCITRAL model law are very much part of the fabric of the act, both in its current and its revised form, the Netherlands remains, technically speaking, a non-model law jurisdiction.

1. PRIMACY OF ARBITRATION AGREEMENT

As part of the fundamental principle that arbitration should be a self-contained dispute resolution process, the revised act facilitates and reinforces arbitration agreements through several revised or new articles. Three articles in particular give precedence to a valid agreement between the parties to opt out of state court jurisdiction in favour of arbitration.

First, there is the issue of the substantive (or contractual) validity of the arbitration agreement and the question of according to what law this should be decided. The parliamentary process resulted in substantial amendments in this regard. Whereas the bill proposed that this issue be decided according to Netherlands law if no express choice has been made by the parties for another law to apply to the arbitration agreement, the revised act specifies that an arbitration agreement is substantively valid if it is valid according to (i) the law that the parties chose to apply to the arbitration agreement, (ii) the law of the seat, or (iii) the law of the underlying contract, insofar as the parties did not designate any particular law to apply to the arbitration agreement. This new article favours arbitration insofar as it directs the Netherlands courts to explore whether an arbitration agreement is valid under one law, even if it is invalid under another law.

Second, and in line with the original bill, the revised act clarifies that (unless the parties agree otherwise) a decision by an arbitral tribunal to decline jurisdiction or by a Netherlands court to set aside an award will only result in the revival of the jurisdiction of the courts if there is no valid arbitration agreement. Other reasons for a tribunal lacking jurisdiction or an award being set aside, such as particular claims falling outside the scope of the arbitration agreement or the arbitral tribunal being improperly constituted, do not affect the parties' agreement to arbitrate. This statutory default position is a notable improvement to the current situation, where after the setting aside of an award (regardless of the grounds for the setting aside) the parties find themselves back before the courts of a particular jurisdiction pursuant to rules of private international law.

Third, the revised act confirms that the power of the Netherlands' courts to order urgent relief in support of an arbitration is subject to the jurisdiction of the arbitrators and their prerogative to rule on their own jurisdiction. Currently, courts considering urgent relief can undertake an enquiry into the validity of the arbitration agreement if it concerns a Netherlands-seated arbitration; such potential 'judicial interference' has now been ruled out (with explicit wording to that effect from the legislator in the parliamentary notes). Moreover, the revised act directs that any residual jurisdiction of the courts to order urgent relief exists only

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1 Wouter J.L. de Clerck, 'Report from the Netherlands: Bill for Revision of Netherlands Arbitration Act Tabled – What Does It Hold in Store for International Users?', European Company Law 2013-4/5, p. 168–169.

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if the applicant cannot obtain the relief in arbitration (in a timely manner); this is a more arbitration friendly threshold than currently provided for in the act.

2. CHALLENGES OUTSIDE THE JUDICIAL REALM

The statutory option to agree that a relevant arbitration institution has the exclusive right to hear challenges to arbitrators survived parliamentary scrutiny and will apply to arbitrations initiated on or after 1 January 2015, assuming that the announced date of entry into force will be met. Although not new in an international context, this is a novelty for Netherlands-seated arbitrations. Currently, a party can challenge an arbitrator before the courts notwithstanding a prior dismissal of such a challenge by the institution that conducts the proceedings, or even bypass the institution altogether and apply to the courts directly. This change should provide a larger degree of certainty to parties who agree to arbitrate in the Netherlands according to a set of arbitration rules that exclusively provide for an institutional challenge.

3. SET-ASIDE PROCEEDINGS SHORTENED

One of the most important changes that the revised act will bring forth is that the proceedings to set aside an award will be limited to one full instance on the appellate level from 1 January 2015. While an appeal to the Supreme Court will remain possible, it will be available in relation to questions of law only and can be excluded by agreement between the parties. A decision on the merits of an application to set aside an award will be left exclusively to the Court of Appeal. Since it is unlikely that parties will make much use of the option to exclude Supreme Court appeals, set-aside proceedings in the Netherlands will in practice come to amount to two court instances instead of the current three. The gain in terms of timing of doing away with the first instance before the district courts will probably range from one to two years, taking into account that the limited test performed in set-aside proceedings usually allows for quicker results than regular proceedings on the merits. The bench dealing with an application to set aside an award will consist of three appeal court justices rather than a single judge, which is currently the norm in first instance set-aside proceedings before the district courts. It does not seem premature to conclude that this will allow for judicial oversight of higher quality. In the same vein, a reduction of the number of courts dealing with set-aside proceedings from eleven district courts to four Courts of Appeal should allow for improved consistency of decisions.

4. REVISION OF AWARDS INTRODUCED

Another novelty that was part of the original bill and made it through Parliament unscathed is revision: remittance of an award during set-aside proceedings to the arbitral tribunal with the purpose of eliminating remediable defects which may be grounds for annulment. The process of revision has been introduced in spite of criticism that too many questions remain unanswered about practicalities and, in particular, the interaction between the Courts of Appeal (which will have ex-officio powers to initiate revision proceedings) and the arbitral tribunal. Still, revision has been part of the international arbitration canon (UNCITRAL model law) for some time and concerns about procedural details – however justified – ought not distract from the potential of this process. As with several of the changes in the revised act, the introduction of revision is likely to bolster the independent position of arbitration within the dispute resolution framework of the Netherlands.