Interpretation and Application of the New York Convention in The Netherlands

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Abstract Although there are some exceptions, in general, the Dutch courts are very well versed in applying the New York Convention. Besides, the Dutch arbitration statutory law, which has been recently revised, presents significant improvements regarding implementation of the New York Convention in Netherlands. This chapter, while indicating the changes brought by the new law, also provides extended discussions of cases that relate to the application of the New York Convention.

1 IMPLEMENTATION

1.1 Form of Implementation of the Convention into National Law

The Netherlands has been a signatory to the New York Convention of 10 June 1958 (the Convention). It ratified the Convention on 24 April 1964, with a reciprocity reservation. The Dutch statutory arbitration law has recently been amended. It is codified in Book Four of the Code of Civil Procedure and consists of Articles 1020-1076.[1] As under the Act of 1986, the recognition and enforcement of foreign arbitral awards has been dealt with in Articles 1075 and 1076. Article 1075 relates to the

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This contribution is based on the research concluded on 1 March 2015 so that the literature and relevant cases published after this date are not considered.

[1] Book Four of the Code on Civil Procedure (*Burgerlijke Rechtsvordering (Rv) – Boek vier*), Arts 1020-1076.

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recognition and enforcement of a foreign award when this is regulated "under treaties." The Convention is the treaty that will most frequently be relied upon among these treaties concerning the enforcement of arbitral awards.[2] Article 1075 merely states that an arbitral award "made in a foreign State to which a treaty concerning recognition and enforcement is applicable, may be recognised and enforced in the Netherlands." It provides further that Articles 985 – 991 of the Code of Civil Procedure relating to the enforcement of foreign judgments accordingly apply to arbitration to the extent that the treaty does not contain deviating or contrary provisions. Under the 1986 Act, the jurisdiction to proceed upon a request for enforcement lay with the President of the District Court[3] where the party opposing the enforcement had his domicile and the President of the District Court where the enforcement was sought. The time limit for an appeal and for recourse to the Supreme Court was two months.

The recognition and enforcement of a foreign award when no treaty applies are dealt with in Title Two of the Act, which relates to "Arbitration outside the Netherlands"[4] (Article 1076).

Dutch arbitration law has been recently revised. A legislative proposal (Draft Arbitration Act)[5] was submitted to the Dutch Parliament on 17 April 2013.[6] It was anticipated that a debate on the Proposal would be held and a Report on the Proposal would be submitted by the end of 2013 or early 2014 and that the revised Act would enter into force in 2014. On 29 January 2014 amendments to the Report[7] and to the Proposal ("2014 Proposal")[8] were submitted to the Parliament and were slightly

[2] The Netherlands has concluded a number of bilateral treaties concerning the enforcement of arbitral awards (eg the Belgian-Dutch Convention of 1925, the German-Dutch Convention on Enforcement of 1962 and the Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America of 1956). Some of those treaties referred to enforcement under the 1927 Geneva Convention and thus have become redundant considering that both signatories have become parties to the *Convention*.

[3] Although it is more appropriate to translate the '*Voorzieningenrechter*" as a 'judge in summary proceedings', in the literature on Dutch law he or she is usually referred to as the 'President of the District Court', which was the expression used in a previous version of the text. For this reason this expression is maintained here as well.

[4] The Arbitration Act is divided into Title One (Arts 1020-1073) relating to arbitration within the Netherlands and Title Two which in Arts 1074-1076 deal with arbitration outside the Netherlands. The provisions of Arts 1074-1076 relate to a stay of court proceedings in the Netherlands and the referral to an arbitration abroad, interim measures of protection and the recognition and enforcement of foreign arbitral awards.

[5] Parliamentary document (Kamerstuk), 33071, n 5, supplement, 8 November 2011.

[6] Parliamentary document (Kamerstuk), 33611 Wijziging van Boek 6 en Boek 10 van het Burgerlijk Wetboek en het vierde Boek van het Wetboek van Burgerlijke Rechtsvordering in verband met de modernisering van het Arbitragerecht, nr. 2 Tweede Kamer, vergaderjaar 2012–2013, 33 611, n 2 (2013 Proposal). Commentaries on the changes suggested in the 2013 Proposal are published in the Tijdschrift voor arbitrage (TvA) special, August 2013.

[7] 33611 Wijziging van Boek 3, Boek 6 en Boek 10 van het Burgerlijk Wetboek en het vierde Boek van het Wetboek van Burgerlijke Rechtsvordering in verband met de modernisering van het Arbitragerecht Nr. 5 NOTA NAAR AANLEIDING VAN HET VERSLAG (2014 Report), http://www.nai-nl.org/nl.

[8] 33 611 Wijziging van Boek 6 en Boek 10 van het Burgerlijk Wetboek en het vierde Boek van het Wetboek van Burgerlijke Rechtsvordering in verband met de modernisering van het Arbitragerecht

altered in the draft of 6 March 2014. The proposed changes were adopted by the Parliament in the Act of 2 June 2014.[9] In addition to the amendments in Book Four of the Code of Civil Procedure, a number of new provisions have been introduced in Book 6 and Book 10 of the Civil Code. In accordance with the Decision of 30 June 2014 published in the Official Journal on 9 July 2014, the new Act has come into force on 1 January 2015 ("Act of 2015" or "Act").[10] With respect to Article 1075, there are no substantial changes. In addition to slight adaptations in the wording, the time limit for recourse in cassation is three months instead of two months. Further, there is an express reference to Articles 261-291 of the Code of Civil Procedure (ie, general rules on the allocation of jurisdiction, as well as general procedural rules on the service of documents and the conduct of proceedings). Finally, the Act of 2015 provides for the jurisdiction of the Court of Appeal to deal with requests for the enforcement of foreign arbitral awards instead of the President of the District Court. The same amendments are introduced with respect to Article 1076, which relates to the enforcement of foreign arbitral awards under national law, i.e., when no treaty applies. There is a possibility of recourse in cassation against decisions of the Court of Appeal within 3 months. Additionally, the possibility to rely on the objection of arbitrators exceeding their authority as a reason to refuse the enforcement under Article 1076 is in the Act of 2015 further limited. Thus, the enforcement of a foreign award will not be refused if the excess of authority was not serious (Art. 1076 paragraph 4). The enforcement of domestic awards – awards rendered in the Netherlands – remains within the competence the President of the District Court under the Act of 2015.[11]

NOTA VAN WIJZIGING <http://www.nai-nl.org/nl> and on https://www.eerstekamer.nl/wetsvoorstel/33611_modernisering_van_het.

[9] Act of 2 June 2014 on the amendments to Book 3, Book 6 and Book 10 of the Civil Code and the Fourth Book of the Code of Civil Procedure in order to modernise Arbitration law, published in the Official Journal 2014- 200 (Staatsblad 2014-200) ISSN 0920-2064.
https://www.eerstekamer.nl/wetsvoorstel/33611_modernisering_van_het.

[10] Decision of 30 June 2014 on determining the entering into force of the Act of 2 June 2014 2014 on the amendments to Book 3, Book 6 and Book 10 of the Civil Code and the Fourth Book of the Code of Civil Procedure in order to modernise Arbitration law, published in the Official Journal 2014-254 (*Staatsblad* 2014-254), https://www.eerstekamer.nl/wetsvoorstel/33611_modernisering_van_het. A translation in English language can be found on http://www.nai-nl.org/downloads/Text%20Dutch%20Code%20Civil%20Procedure.pdf.

[11] See Ibid, 20 under Q en R. Amendments concerning the enforcement of domestic awards are contained in the revised provisions of Articles 1062 and 1063 of the Act of 2015.

1.2 Declarations and/or Reservations Attached to the Instrument of Ratification

The Netherlands made the so-called "reciprocity reservation" within the meaning of Article I(3) first sentence of the Convention. Thus, it will only apply the Convention to an arbitral award rendered in a contracting state. In practice the reservation should have no significance, considering that the provisions on enforcement under national law (i.e., when no treaty is applicable under Art. 1076) are more favourable than the enforcement regime under the Convention. Yet it should be emphasised that this provision is more favourable only in so far as the grounds on the basis of which the enforcement may be refused are concerned. According to the decision of the Supreme Court of 25 June 2010[12] both appeal and recourse in cassation are available against leave for enforcement granted under Article 1076, but not if the enforcement is granted under Article 1075 (i.e., under the Convention). Consequently, this decision renders the provision of Article 1076 less likely to be relied upon, even though it contains more favourable grounds for enforcement. Before the ruling of the Supreme Court of 25 June 2010, the provision of Article 1076 had been rather frequently invoked,[13] as it does provide for a more liberal enforcement regime than Article V of the Convention within the meaning of Article VII(1) of the Convention. The decision of the Supreme Court is the result of an incorrect interpretation and application of both the Convention and Dutch statutory arbitration law, as will be addressed in greater detail *infra*, under 3.2.5. On first appearance, it does not seem that the final text of the 2015 law has remedied the unsatisfactory situation created by the legal reasoning of the Supreme Court in the decision in question.[14] It remains to be seen in practice whether vesting jurisdiction in the Court of Appeal for

[12] Decision of the Supreme Court (*Hoge Raad*) of 25 June 2010, First Chamber, 09/02565 EE, *Y OAO Rosneft (Russian Federation) v Yukos Capital s.a.r.l. (Luxembourg)*, original decision in Case no. LJN: BM1679 available on http://www.rechtspraak.nl, excerpt in English in *Yearbook Commercial Arbitration 2010 – Vol XXXV*, Netherlands No. 34 (Kluwer Law International 2010) 423 – 426.

[13] See eg *Dubai Drydocks v Bureau voor Scheeps- en Werktuigbouw [X] BV*, President of the District Court Dordrecht (Voorzieningenrechter, Rechtbank, Dordrecht) of 30 June 2010, Case No. 79684 / KG RK 09-85, Yearbook Commercial Arbitration, Netherlands No. 35 (Kluwer Law International) 299 et seq., relying primarily on Art 1076 and also on Art 1075 of the Act); President of the District Court/Court of First Instance Amsterdam of 18 June 2009, *Voorzieningenrechter, Rechtbank, Amsterdam, LoJack Equipment Ireland Ltd (Ireland) v A*, 411230/KG RK 08-3652, 18 June 2009, Netherlands No 32; Decision of the District Court (Arrondissementsrechtbank) of Almelo of 19 July 2000, *Société d'Etudes et de Commerce SA v Weyl Beef Products BV*, Yearbook Commercial Arbitration, Netherlands No. 26 (Kluwer Law International 2001); Decision of the President of the District Court/Court of First Instance (Rechtbank) of Rotterdam of 24 November 1994, *Isaac Glecer v Moses Israel Glecer and Estera Glecer-Nottman*, Yearbook Commercial Arbitration (1996) Netherlands No. 19.

[14] The Draft Arbitration Act published in March 2013 unfortunately did not provide for a solution to remedy the current situation. The wording in final text of the Act of 2015 does not seem to imply changes in that respect.

enforcing foreign awards in the new Act of 2015 will imply the possibility to deviate from the legal reasoning in the decision of 25 June 2010.

1.3 Definition of "Arbitral Award" and "Foreign Arbitral Award"

Except for the provision on the types of awards in Article 1049, there is no definition of an "arbitral award" or a "foreign arbitral award" in the Act. The relevant provisions of Articles 1075 and 1076 refer to a "foreign award." As already explained, the Arbitration Act is divided into Title One (Arts. 1020-1073, arbitration within the Netherlands) and Title Two (Arts 1074-1076, arbitration outside the Netherlands). The division into two Titles provides for a clear criterion with respect to the applicability of the Act (Art. 1073, para. 1). Accordingly, the provisions of Articles 1075 and 1076 in Title Two apply to an award rendered outside the Netherlands. With respect to the enforcement regime for awards rendered in the Netherlands, the relevant provisions of Title One apply. Consequently, the second sentence of Article I(1) of the Convention referring to "awards not considered as domestic awards" has no relevance for the Convention's scope of application in the Netherlands.[15]

1.4 Measures of Provisional Relief Ordered by Arbitral Tribunal as "Awards"

Courts in some jurisdictions have held that measures of provisional relief ordered by an arbitral tribunal do not present "awards" within the meaning of the Convention.[16] Under the previous statutory law in the Netherlands in general, orders or interim awards rendered in or outside the Netherlands could not be enforced through the courts in the Netherlands. Therefore, in the proceedings in the Netherlands it was useful to request the tribunal to decide on the interim measure of protection in the form of an order or interim award only when it was expected that a party, against whom a measure is sought, would voluntarily comply with an order or an interim award of the tribunal. Otherwise it was more effective to apply to the President of the District Court to rule on the request in summary proceedings (*kort*

[15] This is in contrast to some other legal systems, such as the case law in the United States, where the Convention can apply if an award is considered to be 'non-domestic', see *Bergesen v Joseph Muller Corp* 710 F.2d 928 (2d Cir. 1983).

[16] See eg Decision of Supreme Court of Queensland, 29 October 1999, *Resort Condominium v Bolwel*, excerpt published in XX *Yearbook Commercial Arbitration* 1995, 628 in which the Court has held that that an order to refrain from using the know-how and trademark covered by the licensing agreement is not final as it may be suspended, varied or reopened by the tribunal which issued it and as such does not constitute an award within the meaning of the *Convention*.

geding or *référé*)[17] or to the arbitral tribunal if the parties have agreed to provide the arbitral tribunal with the authority to render an award in so-called summary arbitral proceedings.[18]

According to previous statutory law, the parties could agree that the arbitral tribunal or its chairman was to render an award in summary proceedings "within the limits imposed by article 254(1)" (Article 1051, paragraph 1 of the 1986 Act). Summary arbitral proceedings under the 1986 Arbitration Act and the previous version of rules of the Netherlands Arbitration Institute (NAI) were a special form of interim relief. A decision rendered in such a proceeding did not preclude a subsequent different ruling on the merits. As such this procedure should be distinguished from expedited arbitral proceedings under the rules of some arbitral institutions or summary proceedings before national courts in some jurisdictions, as the latter are proceedings on the merits. A decision rendered in summary arbitral proceedings was an arbitral award proper. As such it could be subjected to enforcement or being set aside by the courts (Art. 1051(3) of the 1986 Act). Accordingly, "[t]he legal effect of Article 1051(3) … is that a decision which by its nature is supposed to be provisional is lifted to the level of an award for the sake of its enforceability."[19] Arbitral awards rendered in arbitral summary proceedings (*arbitral kort geding)* were subjected to the same enforcement regime applicable to arbitral awards on the merits of the dispute.

Thus, it was possible to request the enforcement of an arbitral award rendered in summary arbitral proceedings outside of the Netherlands in accordance with the Convention.[20] Indeed whether or not such a request would be granted would depend on the law and the attitude of the courts in the country where the enforcement would besought.[21]

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[17] P Sanders, *Het nieuwe arbitragerecht* (4th edn Kluwer, Deventer 2001) 74; Van den Berg, *Handbook International Commercial Arbitration* at 19 (replaced by the new Report in 2012).

[18] V Lazić and GJ Meijer, *Country Reports: Netherlands* in FB Weigand, *Practitioner's Handbook on International Arbitration* (Oxford University Press 2009) 661. An injunction or a restraining order in a summary provisional adjudication in *référé* proceedings (*kort geding*) before the President of the District Court (Arts 254 *et seq.* Code of Civil Procedure) is not a decision on the merits. Instead, its purpose is that a party can obtain immediate provisional relief in urgent cases, before a decision on the merits has been rendered by the competent court. The parties are usually not under an obligation to commence proceedings on the merits within a certain time limit. Although the judgment of the President of the District Court in summary proceedings is provisional, in practice the parties often consider it to be final. HJ Snijders, *Access to Civil Procedure Abroad* (C.H. Beck Verlag, Munich/Kluwer Law International, The Hague, London, Boston 1996) 269.

[19] S Kröll, *NAI Summary Arbitral Proceedings: Enforceability under the Convention*, *TvA* (*Tijdschrift voor arbitrage*) (2012) 19.

[20] Lazić and Meijer, *Country Reports: Netherlands* in FB Weigand, *Practitioner's Handbook on International Arbitration* 662 para [9.206].

[21] For criticism regarding an award rendered in summary proceedings under Dutch law, see eg S Besson, *Arbitrage international et mesures provisoires. Étude de droit comparé*, Études suisses de droit international, 105, Schulthess, Zürich (1998), n 497, 552 *et seq*. Some authors expressed doubts as to whether an award rendered in summary arbitral proceedings may be enforced on the

However, the New Act of 2105 introduces substantial changes in this respect as suggested in the 2014 Proposal. First of all, the provision of Article 1051 dealing with an arbitral award rendered in summary proceedings is omitted in the Act of 2015. Instead, a new provision in Article 1043b is introduced, which reads as follows:

> "1. During arbitral proceedings the arbitral tribunal may, at the request of one of the parties, order interim measures, with the exception of protective measures provided in Title Four of Book Three. The interim measures shall relate to the claim or counterclaim raised in the arbitral proceedings.
>
> 2. Within the limits of Article 254 (1) and regardless of whether arbitral proceedings have already been commenced, the parties may agree on the appointment of an arbitral tribunal with particular competence to order provisional measures, with the exception of protective measures provided in Title Four of Book Three.
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> 3. The arbitral tribunal referred to in paragraphs (1) and (2) may order either party to provide security in connection with the provisional measure.
>
> 4. Unless the arbitral tribunal decides otherwise, a decision of the arbitral tribunal ordering an interim measure shall be an arbitral award; the provisions in Sections 3-5 of this Title are thereby applicable.
>
> 5. Upon a request of the parties, the arbitral tribunal may render an award on the merits of the case instead of a decision on the request for a provisional measure. Such a decision is an arbitral award; the provisions in Sections 3-5 of this Title are thereby applicable.
>
> 6. Upon a request of the parties, the arbitral tribunal may, in referring to the request, convert an award rendered under paragraph (4) into an arbitral award referred to in paragraph (5)."[22]

Besides, the provision of Article 1049 relating to types of arbitral awards is revised in the Act of 2015 so as to define a partial final award. Also it provides in paragraph 2 that if an arbitral tribunal renders an award which is partly an interim award and partly a final award, such an award is considered to be a partial final award.

The Act of 2015 introduces significant alterations with respect to the enforceability of interim awards. Thus, Article 1062 refers to an "arbitral award," and not only to a "final or partial final award" as was the case under the 1986 Act. Consequently, in contrast to the previous statutory regulation, an interim award rendered in the Netherlands will be enforceable under Article 1062(1) of the Act of 2015. The provisions on setting aside remain unchanged with respect to an interim award under the Act of 2015. Thus, according to Article 1064a paragraph 3 of the Act of 2015, the application for setting aside against an interim award (*arbitraal*

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basis of Article I of the *Convention*, see, Bommel, van der, B./Leijten, M./Ynzonides, M., (eds), *A Guide to NAI Arbitration Rules* (Kluwer Law International, The Hague/London/Boston 2009) 212. See also, Kröll, at 9, stating that the limited finality of the awards rendered in summary arbitral proceedings prevents their classification as awards within the meaning of the *Convention*. On the other hand, some authors expressed the view that the decisions rendered in summary arbitral proceedings are "arbitral awards" under Dutch law and accordingly can be enforced under the *Convention*. See, B King and M van Leeuwen, "Summary Arbitral Proceedings: A Powerful New Mechanism in NAI Arbitrations", *Mealey's International Arbitration Report*, Vol 15 (2000) n3, 59.

[22] Translation VL.

tussenvonnis) may only be brought together with the request to set aside the final or partial final arbitral award.[23]

Under the Act of 2015, it is likely that the same approach will be taken with respect to the enforceability of interim awards rendered abroad. At least nothing in the amended text in Title Two - Arbitration outside the Netherlands - implies otherwise. Moreover, the new regulatory scheme in Articles 1074a-d supports this view. It should be noted, however, that the text in the Act of 2015 and 2014 Proposal differs to some extent from the text of the initial Draft Proposal. Namely, the new provision of Article 1074d of the initial Draft Proposal substantially altered the state of law under previous statutory regulation. It provided that a party by invoking the arbitration agreement before submitting a defence was to preclude the competent court from issuing an interim measure, as well as the President of the District Court from rendering a decision in summary proceedings unless the arbitration agreement was invalid under the applicable law. In order words, the court (if an interim protection measure is requested) or the President of the District Court (if a decision in summary proceedings is requested) would be under an obligation to declare its incompetence so that a decision can be brought in arbitral proceedings. Thus, if a party invokes an arbitration agreement in court proceedings where an interim measure has been requested, the court shall declare itself to be exclusively competent to issue an interim measure if such a decision cannot be obtained or cannot timely be obtained in arbitral proceedings. This new regulatory scheme obviously presumes the enforceability of such an award in the Netherlands.[24] As the provisions regulating so-called summary arbitral proceedings (*arbitral kort geding*) are to be deleted, the discussion on the enforceability of awards rendered in such a procedure will become moot.

1.5 Alternatives to Convention as Means of Obtaining Recognition or Enforcement of a Foreign Award

As already explained *supra* under 1.1., the recognition and enforcement of foreign arbitral awards has been dealt with in Articles 1075 (recognition and enforcement of foreign awards under treaties) and 1076 (recognition and enforcement of foreign awards without treaties). The latter applies to the recognition and enforcement of a foreign arbitral award when no treaty is applicable or if an applicable treaty permits

[23] In some other jurisdictions, interim awards on jurisdiction may be the subject to setting aside immediately after they have been rendered. See eg Art 16(3) of the UNCITRAL Model Law; see also decision of the United States Court of Appeal for the Seventh Circuit *Yasuda Fire et al v Continental Casualty Co*, 37F3d 345 (7th Cir. 1994).

[24] Article 1074(d) of the 2014 Act reads as follows: "If a party invokes the existence of an arbitration agreement before submitting a defence in the cases mentioned in the articles 1074(a) to 1074(c) inclusive, the court shall declare its exclusive jurisdiction if the decision requested cannot be brought in arbitration or if it cannot timely be rendered in arbitration."

a party to rely on the national law of the country where the recognition or enforcement is sought.

When Article 1076 of the Act was drafted, the provisions of Article V of the Convention were considered. The main principles expressed in the relevant provision of the Convention have been taken over and incorporated in Article 1076. Just as under Article V of the Convention, the burden of proof that any of the grounds listed in Article 1076, paragraph 1(A) lies on the party opposing the enforcement. Also, the grounds for which the recognition may be refused under Article 1076, paragraph 1 (A) of the Act present an exhaustive list. Thus, the number of reasons is limited and the grounds for refusal must be narrowly interpreted. Moreover, the possibility to rely on a number of grounds is restricted, so that some objections may not be for the first time successfully invoked in enforcement proceedings. This is particularly so with respect to the invalidity of an arbitration agreement, the improper constitution of the tribunal and the objection concerning an "excess of authority" by the tribunal. It renders the conditions for enforcement under Article 1076 more favourable than the conditions under the Convention. According to the so-called more-favourable-right provision in Article VII(1) of the Convention a party may rely upon a more favourable enforcement regime under national law. However, the decision of the Dutch Supreme Court of 25 June 2010[25] (*Yukos*) renders this provision virtually futile. Namely, the Supreme Court incorrectly interpreted both the Dutch Arbitration Act (Arts. 1062, 1063 and 1075) and Article III of the Convention holding that no appeal or recourse in cassation was available when the enforcement was granted under Article 1075 (i.e., the Convention). In contrast to this, these remedies are available when leave for enforcement has been granted under Article 1076. This clearly makes the enforcement regime under Article 1076 less favourable than the enforcement under the Convention. The wording in the Act of 2015 has not altered this unsatisfactory result. Yet is it to be hoped that interpretation and application of the new provisions vesting jurisdiction in the Court of Appeal for enforcing foreign awards in the new Act of 2015 will provide the possibility to deal with this apparent paradox.

Thus, the party bringing a claim for enforcement must rely on either the Convention or Article 1076 of the Act. It is not possible for the party to "combine elements favourable to him from the two."[26]

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[25] Decision of the Supreme Court (*Hoge Raad*) of 25 June 2010, First Chamber, 09/02565 EE,*Y OAO Rosneft (Russian Federation) v Yukos Capital s.a.r.l. (Luxembourg)*, original decision in Case no. LJN: BM1679, http://www.rechtspraak.nl, excerpt in English in *Yearbook Commercial Arbitration 2010 - Volume XXXV*, Netherlands No. 34 (Kluwer Law International 2010) at 423 – 426.

[26] AJ van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Asser/Kluwer, The Hague/Deventer 1981) 161.

2 ENFORCEMENT OF AGREEMENTS TO ARBITRATE (N.Y. Convention, Article II)

2.1 Meaning of Convention Terms "Null, Void, Inoperative or Incapable of Being Performed" and Choice of Law for That Determination

The wording of Article II(3) of the Convention, "null, void, inoperative or incapable of being performed," has not been literally taken over in the text of the corresponding provisions of Articles 1022 and 1074 (corresponding to Articles 1022(1) and 1074(1) of the 1986 Act). Yet the latter provisions are formulated along the lines of Article II(3).[27] They may be relied upon on the basis of a more-favourable-right provision of Article VII(1) of the Convention, as their application may result in a less stringent regulation concerning the formal validity of an arbitration agreement.[28] Considering that the relevant provisions of Articles 1022 and 1074 incorporate the same or even more favourable standards, the applicability of Article II is redundant.[29]

Article 1022 relates to the agreement which provides for arbitration in the Netherlands. It states that "[a] court before which an action is brought in a matter which is the subject of an arbitration agreement shall declare that it has no jurisdiction if a party invokes the existence of the said agreement before submitting a defence, unless the agreement is invalid." In a similar vein, Article 1074 which relates to the agreement providing for arbitration outside the Netherlands requires a Dutch court seised of a dispute in respect of which an arbitration agreement has been concluded to "declare that it has no jurisdiction if a party invokes the existence of the said agreement before submitting a defence, unless the agreement is invalid under the law applicable thereto." Some authors argue that the wording "arbitration agreement … from which it follows that arbitration shall take place outside the Netherlands,"[30] used in Article 1074, should be interpreted broadly. Thus, this provision applies not only when an arbitration agreement expressly provides for a place of arbitration outside the Netherlands. It applies also when it can be expected that

[27] In particular, the wording "inoperative or incapable of being performed" are omitted from the text under both provisions.

[28] See also the Recommendation on the interpretation of Art II(2) and Art VII(1) of the *Convention* adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session, www.uncitral.org.

[29] See also HJ Snijders, *Nederlands arbitragerecht* (3rd edn Kluwer, Deventer 2007) Art 1074, n1 346.

[30] "…een overeenkomst tot arbitrage … waaruit voortvloeit dat arbitrage buiten Nederland moet plaats vinden".

arbitration will take place abroad, considering various "foreign" elements of the legal relationship in question.[31]

If a party invokes the existence of the arbitration agreement before submitting a defence a court seised shall declare that it has no jurisdiction, unless the agreement to arbitrate is invalid under the applicable law. The words "before submitting a defence" must be widely interpreted. Thus, a party can invoke the arbitration agreement at some point in the statement of defence – at the beginning, the middle or the end thereof.[32]

The provision of Article 1074 refers to the invalidity of the arbitration agreement "under the law applicable thereto." Thus, the substantive validity of an arbitration agreement will not necessarily be determined according to Dutch law. Under the 1986 Act there was no express provision on the law applicable to arbitration agreements. The applicable law was to be determined by the general rules of Dutch private international law.[33]

The Act of 2015 introduces an express provision regarding the law which is applicable to the validity of an arbitration agreement to be inserted in Book Ten containing provisions on the conflict of laws. Thus, a new provision of Article 166 has been introduced under Title 16 on Arbitration in Book Ten.[34] The law which is applicable to arbitration agreements under the Act of 2015 is either the law chosen by the parties or the law of the place of arbitration (*lex arbitri*) or in the absence of the parties' choice, the rules of law applicable to the substance of the dispute (*lex causae*). Thus, when there is no choice of law, the applicability of the *lex arbitri* and the *lex causae* is alternative, *in favorem validitatis* of the arbitration agreement.[35]

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[31] AJ van den Berg, R Deldenvan and HJ Snijders, *Arbitragerecht* (2nd edn W.E.J. Tjeenk Willink, Zwolle 1992) 172.

[32] Decision of the Supreme Court (Hoge Raad) of 29 April 1994 (HR 29 april 1994) *Edelsyndicaat v Van Hout*, NJ (Nederlandse jurisprudentie) 1994, 488, Tijdschrift voor arbitrage (TvA) 1994 at 187.

[33] Legislative history/Explanatory Memorandum (*Memorie van toeliching - MvT*) II, *Tijdschrift voor arbitrage (TvA)* 1986/2 at 93. See eg decision of the Court of Appeal The Hague (*Gerechtshof Den Haag*) of 22 February 2000, *Petrasol BV v Stolt Spur Inc*, excerpt in *Yearbook Commercial Arbitration* (2004) Netherlands n 28. The Court of Appeal held that the court of first instance had correctly held that the more-favourable-right provision in the *Convention* allowed for the application of Dutch law, which provided that Dutch courts had no jurisdiction over a dispute which had been referred to arbitration abroad and that the validity of the arbitration clause had to be ascertained under the applicable law, in this case New York law as the parties had agreed that arbitration would take place in New York. The court then held that the issue on the validity of the arbitration clause in the charter party was to be examined under New York law.

[34] The 2014 Act contains a new provision on the capacity of a state or a state entity to enter into an arbitration agreement in Article 167 of Book Ten. It provides that "[i]f a state, other legal entity of public law or a state-owned company is a party to an arbitration agreement, it may not rely upon its legislation in order to contest its capacity or authority to enter into the arbitration agreement or the arbitrability of the dispute if the other party had no knowledge of such legislation and was not supposed to have such knowledge." (translation VL).

[35] Art 178(2) of the Swiss Act on Private International Law was considered when drafting the provision on the law applicable to arbitration agreements in the Netherlands. Even though it has been drafted along the lines of the provision in Swiss law, the approach taken in the 2014 Act slightly

The provision of Article 1054(2) relating to the law applicable to the substance of the dispute remains unchanged under the Act of 2015. It provides that the arbitral tribunal shall decide a dispute in accordance with the rules of law chosen by the parties. In the absence of such a choice, the arbitrator shall make an award in accordance with the rules of law which he/she considers appropriate.

The fact that the Act of 2015 implies a clear distinction between the law which is applicable to the formal and substantive validity of the arbitration agreement is to be met with approval. In general and without reference to any specific national law, conflict of law rules should be applied only with respect to the substantive validity of an arbitration agreement. As a matter of principle, the written form requirement as defined in certain arbitration legislation should be applied in arbitrations held in that particular jurisdiction and in all court proceedings related to arbitration in that same country (i.e., either the definition under Article II(2) of the Convention as interpreted and applied by the courts in that legal system or a definition provided in national arbitration law). In any case, it is almost undisputed that a definition of the written form under the law of the seat of arbitration may be relied upon when arbitration is held or is to be held in that legal system. Bearing in mind the Recommendation adopted by UNCITRAL on 7 July 2006, the same approach should be applied in proceedings for referral to arbitration under Article II of the Convention. The pertinent part the Recommendation reads as follows:

> "The Recommendation encourages States to apply article II (2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". (…) By virtue of the "more favourable law provision" contained in article VII (1) of the New York Convention, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of rights it may have, *under the law* or treaties *of the country where an arbitration agreement is sought to be relied upon*, to seek recognition of the validity of such an arbitration agreement." (Emphasis added)

Clearly, the Recommendation refers to the law "of the country where an arbitration agreement is sought to be relied upon." In the interest of consistency and legal certainty, the same approach should be applied in proceedings for the recognition and enforcement of the arbitral award, when a party relies on a more favourable national law. As already explained, Dutch courts applied a conflict of law approach with respect to both the formal and substantive validity of arbitration agreements

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differs from the relevant provision of the Swiss Act. The latter provides for the alternative application of either the law chosen by the parties, or the law governing the subject-matter of the dispute, "in particular the law governing the main contract", or Swiss law. In other words, an arbitration agreement is valid if it is valid under either the *lex arbitri*, or the *lex causae* or under the law chosen by the parties. The text suggested in the Act and 2014 Proposal differs to some extent from the text suggested in the "Proposals for Changes to Book Four (Arbitration), Articles 1020-1076 Code on Civil Procedure" drafted by a Working group led by Prof. AJ van den Berg. "Tekst van de Voorstellen tot wijziging van het Vierde boek (Arbitrage) Artikelen 1020 – 1076 Rv", *Tijdschrift voor Arbitragerecht*, 2005, 36 (the latest version of the text is dated 15 February 2005). The same text is also published on <http://www.arbitragewet.nl>. For comments on this provision and a comparison with the Swiss law, see V Lazić, *Arbitration Law Reforms in the Netherlands: Formal and Substantive Validity of an Arbitration Agreement*, vol 11.1 Electronic Journal of Comparative Law (May 2007), http://www.ejcl.org/111/art111-16.pdf.

within the context of Article 1074(1) of the 1986 Act. Thus, they do not apply the definition of the "agreement in writing" provided in Dutch law,[36] which is the law *of the country where an arbitration agreement is sought to be relied upon*, as is stated in the UNCITRAL Recommendation.

Besides, the wording in Article 166 of the Act of 2015, which is identical to the 2014 Proposal, presents an improvement compared to versions of this provision suggested earlier. In particular, it has been adjusted so as to serve as a genuine conflict of law rule to determine the law applicable to the substantive validity of an arbitration agreement also when the seat of arbitration is outside the Netherlands. Namely, it avoids any reference to "Dutch law or according to the applicable law as mentioned in Article 1054(2)" as was previously suggested. Instead, it refers to the applicability of the chosen law or the law applicable to arbitration (or *lex arbitri*), and if there is no choice of law, to the law applicable to the substance (*lex causae*). It is not clear whether the choice of law relates to the law governing an arbitration agreement or to the law applicable to the substance of the dispute. Thus, the answer would have to be given by national courts when applying and interpreting this provision.[37] Yet, it would be better to provide for an alternative application of the chosen law, the *lex arbitri* and *lex causae*, for the reasons of clarity and simplicity in legal regulation. In practice it will probably imply no substantial differences, considering that an explicit choice of law that would govern only the arbitration agreement is seldom made.

The referral to arbitration is mandatory and there is no discretion for the court in that respect, provided that the agreement is valid. There is no indication in the text of this provision that the examination is to be limited to manifest invalidity.

In general, the validity of an arbitration agreement may be examined with respect to the form and substance as determined under Articles 1020 and 1021 of the Act. Thus, the general principles on the formation of contracts are applicable, as well. Besides, the capacity of a party to enter into an arbitration agreement (in the literature sometimes referred to as "personal" or "subjective arbitrability"), as well as the question of the so-called objective or subject-matter arbitrability, may be perceived as prerequisites for the validity of an arbitration agreement. However, these are not necessarily governed by the same law as governs the validity of an arbitration agreement. Thus, the issue of subject-matter (or objective) arbitrability is likely to be governed by Dutch law, as defined in Article 1020(3) and interpreted by the Dutch courts.

Regarding formal validity, the arbitration agreement is valid if it conforms to the written form requirement defined in Article 1021 of the Act.[38]As already indicated,

[36] See eg decision of the Court of Appeal The Hague (*Gerechtshof Den Haag*) of 22 February 2000, *Petrasol BV v Stolt Spur Inc*, excerpt in *Yearbook Commercial Arbitration* (2004) Netherlands No. 28.

[37] See 2014 Proposal (*Nota van Wijziging*) at 6 and 7, where it states that it was a deliberate choice of the drafters to leave this issue to the interpretation of judiciary in the Netherlands.

[38] Art 1021 of the Act was amended on 30 June 2004 so as to implement the European Directive on Electronic Commerce of 8 June 2000 (2002/31/EC, *Stb* 2004, no. 210). Thereby a new sentence

the definition of an agreement in writing is less stringent than Article II(2) of the Convention and thus may be relied upon by a party on the basis of Article VII(1) of the Convention. In particular, there is no need for an exchange of documents, but it is merely to be "evidenced" in writing (i.e., an instrument in writing must be expressly or impliedly accepted by or on behalf of the other party).

This provision has remained unchanged in the Act of 2015. As to substantive validity, there is no express provision in the Act and no indication as to which issues of the substantive validity would be governed by the applicable law. In principle, general rules of contract law and the criteria applicable to a contract's interpretation also apply to arbitration agreements.[39] The considerations on substantive validity may include issues such as "meeting of the minds" regarding the conclusion of the arbitration agreement and the reasons for invalidity such as duress or misrepresentation, as well as the question of the scope of the agreement, its performance and its termination.

According to Dutch contract law, the interpretation of a contract is based not only on the wording of the contract, but also on the meaning which the parties may reasonably have given to the contract and on their expectations.[40] In certain circumstances depending on the nature of the agreement and the parties, the court may assume, on a preliminary basis, that the wording of the contract reflects its full meaning. It is upon the party contesting this to prove otherwise, *i.e.*, that the wording does not reflect the presumed meaning.[41] When interpreting an arbitration agreement, the right of access to the courts must also be considered.

According to the relevant case law of the Court of Justice of the EU (CJEU), when interpreting Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the national courts of the Member States must examine *ex officio* the unfairness of a choice of court agreement.[42] The same is true with respect to arbitration clauses in consumer disputes. It is for a national court or tribunal hearing an action for enforcement of an arbitral award to assess on its own motion whether an arbitration clause in a contract concluded with a consumer is unfair. It is for that court to establish all the consequences thereby arising under

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was added expressly stating that an arbitration agreement can also be proved by electronic means. Also it was referred to an analogous application of Art 227a(1) of the Book 6 of the Civil Code.

[39] See eg the decision of the Dutch Supreme Court (*Hoge Raad*) of 20 February 2004, *DSM-Chemie v Fox* (*HR* 20 *february* 2004) *NJ* 2005, 493; Supreme Court decision of 29 June 2007, *Derksen v Homburg* (*HR* 29 *juni* 2007), *NJ* 2007, 576; Decision of the Supreme Court of 19 January 2007, *Meyer v Pontmeyer* (*HR* 19 *january* 2007) *NJ* 2007, 576.

[40] Decision of the Dutch Supreme Court (*Hoge Raad*) of 13 March 1981, *Ermex c.s. v Haviltex*, (*HR* 13 maart 1981) *NJ* 1981, 635. *NJ* 1981, 635; see also the decision of the Supreme Court of 19 October 2007, *Vodafone v ETC* (*HR* 19 *oktober* 2007) *NJ* 2007, 565.

[41] Decision of the Supreme Court (*Hoge Raad*) of 29 June 2007, *Derksen v Homburg* (*HR* 29 *juni* 2007), *NJ* 2007, 576; Decision of the Supreme Court of 19 January 2007, *Meyer v Pontmeyer* (*HR* 19 *januari* 2007) *NJ* 2007, 576.

[42] Decision CJEU of 4 June 2009, C-234/08 (*Pannon GSM Zrt.*); see also Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-49 which relate to forum-selection clauses.

national law, in order to ensure that the consumer is not bound by that clause.[43] In certain circumstance the courts in the Netherlands relied on the relevant provisions of the Civil Code in order to deny effect to an arbitration clause. Thus, the Dutch Supreme Court relied on Article 6:233 of the Civil Code and held that an arbitration clause contained in the general conditions was considered unacceptable as being unreasonably onerous to the other party.[44] In this context it is interesting to mention that the Act of 2015 revises the Civil Code so as to include arbitration clauses on the "black list."[45]

Generally, a broad wording of an arbitration clause is recommended so as to avoid uncertainties relating to the scope of the arbitration agreement. The wording "concerning interpretation, performance and termination of the contract" is likely to be interpreted as being insufficiently broad to include disputes concerning the existence and nullity of the contract within the scope of the arbitration clause.[46] In general, apart from the law which is applicable to the arbitration agreement and the court decisions in the *Yukos* case relating to the enforcement of annulled awards, the Dutch courts are well versed in the practice of arbitration so that arbitration agreements are likely to be properly interpreted.

The Arbitration Act contains no provision concerning a party's capacity to enter into an arbitration agreement ("personal arbitrability" or "subjective arbitrability"). Accordingly, when Dutch law is applicable, the provisions of general contract law and the applicable provisions on legal capacity as contained in the Civil Code and other statutes shall determine this issue. As in the case when concluding a contract, a party must have legal capacity to enter into an arbitration agreement. The Act of 2015 introduces the new provision concerning the capacity of a state to enter into an arbitration agreement in Article 167 of Book Ten.[47]

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[43] See, decisions CJEU of 6 October 2009, C-40/08 (*Asturcom Telecomunicaciones SL*), of 26 October 2006, C-168/05 (*Elisa María Mostaza Claro v Centro Móvil Milenium SL)* EU:C:2006:675 and of 3 April 2014, C-342/13 *Katalin Sebestyén v Zsolt Csaba Kővári, OTP Bank, OTP Faktoring Követeléskezelő Zrt, Raiffeisen Bank Zrt* EU:C:2014:1857.

[44] See eg decision of the Supreme Court of 23 March 1990, *Botman/Van Haaster*, (*HR* 23 maart1990) *Nederlands Jurisprudentie* (1991) 214. See also, decision of the Court of First Instance Zierikzee of 19 February 1988 (*Kantonrechter Zierikzee)*, *Tijdschrift voor Arbitrage* (1988) 147.

[45] Already when the Netherlands Arbitration Act of 1986 was drafted, it was considered whether to place an arbitration clause on the "blacklist", in particular from the point of view of a consumer in arbitration. See EH Hondius, Tien jaar arbitragewet en BW, *Tijdschrift voor Arbitrage* 1996 at 139. Although the relevant CJEU case law does not expressly require so, the legislator in the Netherlands opted to place arbitration clauses on the "black list." Thus, the 2014 Act introduces the amendments to Art 236(n) of the Civil Code so as to omit the wording "one or more arbitrators."

[46] Decision of the Supreme Court (*Hoge Raad*) of 2 November 1990 (*HR* 2 november 1981) *NJ* 1991, 123.

[47] New Art 167 of Book Ten introduced by the 2014 Act reads as follows: "If a state, other legal entity of public law or a state-owned company is a party to an arbitration agreement, it may not rely upon its legislation in order to contest its capacity or authority to enter into the arbitration agreement or the arbitrability of the dispute if the other party had no knowledge of such legislation and was not supposed to have such knowledge." (translation VL).

The issues pertaining to subject-matter or objective arbitrability, which is also an aspect of the validity of the arbitration agreement, will be addressed under section 3.2.6.[48]

2.2 Objections to Arbitral jurisdiction or Admissibility that Courts are Willing to Entertain Prior to the Arbitration, if Requested

When objections, jurisdictional or non-jurisdictional, are raised prior to arbitration, the extent of control exercised by the courts may vary in different legal systems. The courts will not entertain certain objections, but instead will allow the arbitral tribunal to decide in the first instance. As already stated under section 1, the text of the arbitration statutory law in the Netherlands offers no clear answer in that respect. In particular, there is no indication in the text of provisions 1022 and 1074 that the examination is to be limited to manifest invalidity. Accordingly, the court seised of a matter in respect of which the parties entered into an arbitration agreement could decide on any aspect of the validity of the agreement. If the agreement is valid, the referral to arbitration is mandatory and there is no discretion for the court in that respect. Everything stated under section 2.1. concerning the validity and interpretation of the arbitration agreement is fully applicable in this context as well.

If a court is seised of a matter with respect to which the parties have agreed to arbitration after the commencement of arbitral proceedings the court may not examine the validity of an arbitration agreement. Accordingly, the court in such a situation must refrain from deciding on its jurisdiction when the existence of the arbitration agreement is invoked. Exceptionally, the court would not be required to decline jurisdiction if upon a *prima facie* examination it would appear that no arbitration agreement has been concluded.[49]

When requested to assist the parties in the appointment of the tribunal, the President of the District Court will appoint the arbitrator(s) without examining the validity of the arbitration agreement (Article 1027(4) first sentence of the Arbitration Act).

Apart from Articles 1022 and 1074, the Dutch Arbitration Act does not contain any provision concerning the possibility to obtain a declaration that an arbitration agreement is valid and binding. Furthermore, the Act contains no provision on the jurisdiction of the court to "compel" arbitration. Thus, it is unlikely that the parties can obtain a declaratory judgment that a given arbitration agreement is valid and

[48] For more particulars on various aspects of the binding effect of the arbitration agreement, see Lazić and Meijer, *Country Reports: Netherlands* in FB Weigand, *Practitioner's Handbook on International Arbitration* 621-625. See also National Report – The Netherlands, in J Paulsson (ed), *International Handbook on Commercial Arbitration* (2012) 17-19.

[49] See eg decision of the District Court The Hague of 19 May 2004 (*Rechtbank 's-Gravenhage*) JBPr 200.

binding in court proceedings outside the aforementioned cases under Articles 1022 and 1074 of the Act.

3 GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (N.Y. Convention, Article V)

3.1 General

The provisions on recognition and enforcement of foreign arbitral awards are contained in Title Two of the Act, "Arbitration outside the Netherlands" (Arts. 1075–1076 of the Act).[50] The only requirement for the applicability of these provisions is that the award in question must have been rendered in a country outside the Netherlands.[51] Any other criterion, such as the different nationality of the parties or the "internationality" of their relationship, is irrelevant for the applicability of these provisions. Article 1075 relates to recognition and enforcement when a treaty is applicable and Article 1076 presents a regime for the enforcement of foreign awards under national arbitration law when no treaty can apply.

The main principles expressed in Article V of the Convention have been incorporated in Article 1076. Thus, any of the grounds listed in Article 1076, paragraph 1(A) of the Act must be asserted and proved by the party opposing the enforcement. Moreover, the grounds for refusal under Article 1076, paragraph 1 (A) present an exhaustive list, the number of reasons is limited and the grounds for refusal must be narrowly interpreted.

Control over an award rendered abroad by the courts in the Netherlands is reduced to an examination of the reasons enumerated in Article V of the Convention. When the Convention does not apply, recognition or enforcement may be refused on the grounds listed in Article 1076 of the Act. Thus, the party against whom the enforcement is sought may invoke grounds for disputing enforcement which are in many respects formulated along the lines of Article V of the Convention. These include the invalidity of an arbitration agreement, the improper constitution of the arbitral tribunal, and a failure of the arbitral tribunal to comply with its mandate. Enforcement and recognition under the Act may also be refused if the "arbitral award is still open to an appeal to a second arbitral tribunal, or to a court in the country in which the award is made." In the literature, it is suggested that this ground can be understood so as to mean that the award has not yet become "binding" upon

[50] The general remarks are largely based on V Lazic and GJ Meijer, *Country Reports – Netherlands* in FB Weigand (ed), *Practitioner's Handbook on International Arbitration* (Verlag C.H. Beck München/Copenhague 2002) 943-945 paras [108-110].

[51] Van den Berg, *New York Convention*, 145.

the parties, as expressed in Article V(1)(e) of the Convention.[52] Also, enforcement may be refused if the arbitral award has been set aside by a competent authority in the country in which it was made.[53] Both the Convention and Article 1076 of the Act provide that an award will not be enforced if it would be contrary to public policy (Art. 1076(1)(B) of the Act). This ground may be applied by the court *ex officio*. An award could be considered as being contrary to public policy if it has been found, for example, that the subject matter of the dispute was not capable of being settled by arbitration.

Accordingly, the reasons for refusing to recognise or enforce foreign arbitral awards in Article 1076 are substantially similar to those listed in Article V of the Convention. However, some of the grounds are more restrictively defined under Article 1076 than the reasons for a refusal to enforce under the Convention. In other words, the possibility to invoke a number of the grounds is restricted, as will be explained in greater detail under sections 3.1.1. and 3.1.2. In particular, the Act limits the possibility to invoke the grounds listed in Article 1076, paragraph 1 (A) (a)–(c). These are: the invalidity of the arbitration agreement, irregularity in the constitution of the tribunal and the arbitral tribunal's non-compliance with its mandate. These grounds cannot be successfully invoked in the enforcement procedure by the party who participated in the arbitral proceedings, but failed to raise that objection during these arbitral proceedings (Article 1076 (2-4) of the Act).[54]

In general, the court before which enforcement of a foreign award is sought may not review the merits of the award. As already mentioned, the grounds on the basis of which enforcement of a foreign arbitral award may be refused are limited to those under Article V of the Convention or Article 1076 of the Arbitration Act and they do not include mistake in fact or law.[55] The only exception to this rule is when the award violates the substantive rules of public policy of the country where the enforcement is sought (Art. V(2)(b) Convention).[56]

The party seeking enforcement must satisfy the requirements found either in the provisions of the applicable treaty, or in Article 1076(1) of the Act. According to the latter provision, enforcement may be sought in the Netherlands upon the submission of the original or a certified copy of the arbitration agreement and award. These requirements correspond to the conditions provided under Article IV of the Convention. Enforcement may only be refused if the opposing party asserts and

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[52] P Sanders and AJ van den Berg (eds), *The Netherlands Arbitration Act 1986* (Kluwer Law and Taxation Publishers, Deventer, Antwerp, London, Frankfurt, Boston, New York 1987) 50 Art 1076, n 122.

[53] An application for setting aside may be a reason to suspend the enforcement proceedings in the Netherlands. The suspension may be conditioned by the provision of security under Art 1076(7) of the Act. See also Sanders and Van den Berg, *The Netherlands Arbitration Act 1986* 50 Art 1076, n 123.

[54] Lazić and Meijer, *Country Reports: Netherlands* in FB Weigand, *Practitioner's Handbook on International Arbitration* 687.

[55] Van den Berg, *New York Convention* 269 *et seq*.

[56] See also Court of Justice of the EC, 1 June 1999 (C-126/97) *(ECO Swiss/Benetton) NJ* 2000, 339, excerpt in *Yearbook Commercial Arbitration* Vol XXIV (1999) 629 *et seq.*

proves one of the grounds for refusal given in Article V of the Convention or those defined in Article 1076 of the Act.

3.1.1 Recognition or Enforcement of a Foreign Award Despite Presence of a Convention Ground for Denying Recognition or Enforcement

As already explained above, Article 1075 deals with recognition and enforcement when a treaty is applicable,[57] whereas Article 1076 deals with recognition and enforcement when no treaty applies. Recognition or enforcement may be based on Article 1076 also "if an applicable treaty allows a party to rely upon the law of the country in which recognition and enforcement is sought." Such a possibility is expressed in Article VII(1) of the Convention, the so-called more-favourable-right provision. It gives a party the possibility to rely on the more favourable treaty or on the more favourable domestic law of the country where the enforcement or recognition of the award is sought.

Pursuant to Article 1076, a party opposing enforcement of an award is precluded from raising a number of reasons provided therein if it has failed to invoke these objections in the arbitration. Thus, according to Article 1076(2), the invalidity of an arbitration agreement indicated in Article 1076(1)(A)(a) "shall not constitute a ground for the refusal of recognition and enforcement if the party who invokes this ground has made an appearance in the arbitral proceedings and, before submitting a defense, has not raised the plea that the arbitral tribunal lacks jurisdiction on the ground that a valid arbitration agreement is lacking." However, this does not include the right to object to the non-arbitrability of the subject-matter, as this objection may be raised regardless of whether it has been invoked earlier in the arbitral proceedings.

Similarly, Article 1076, paragraph 3, provides that the objection concerning an improper constitution of the tribunal under Article 1076(1)(A)(b) "shall not constitute a ground for the refusal of recognition or enforcement if the party who invokes this ground has participated in the constitution of the arbitral tribunal or, if he has not participated in the constitution of the arbitral tribunal, has made an appearance in these arbitral proceedings and, before submitting a defence, has not raised the plea that the arbitral tribunal lacks jurisdiction on the ground that the composition of the arbitral tribunal constituted a violation of the applicable rules."

Finally, an objection that the arbitral tribunal has failed to comply with its mandate under Article 1976(1)(A)(c) "shall not constitute a ground for refusal of recognition or enforcement if the party who invokes this ground has participated in the arbitral proceedings without raising this issue, although it was known to him that the arbitral tribunal did not comply with its mandate." In the Act of 2015 this provision has been amended so as to further limit the possibility of invoking this ground in the enforcement procedure. In particular, it provides that this ground shall not present a

[57] In practice, the Convention is the treaty that will most frequently be applicable, in the light of the number of signatories to the Convention.

reason for a refusal of enforcement if any non-compliance with the mandate is not serious.

It is important to note that the party bringing a claim for enforcement must either use the Convention or rely on Article 1076 of the Act as a basis for enforcement. It is not possible for the party to "combine elements favourable to him from the two."[58]

There are no other provisions which are more favourable than Article V of the Convention. The same is true with respect to the ground mentioned under Article V(1)(e) of the Convention. In particular, just as is provided under Article V(1)(e) of the Convention, the provision of Article 1076(1)(A)(e) states that the annulment of an arbitral award in the country where it was rendered presents a reason to refuse the recognition or enforcement of the award. Yet, the Amsterdam Court of Appeal in its decision of 28 April 2009 granted the enforcement of arbitral awards which had been set aside by the competent court in the "country of origin" (in this case the Russian Federation).[59] To the knowledge of the present author, the reasoning of the Court in this decision has so far not been followed by the Dutch courts, even though the possibility to enforce annulled awards as such has not been expressly excluded. Thus, in the decision of the President of the Amsterdam District Court,[60] the approach of the Court in the *Yukos* case was not explicitly rejected, but the request to enforce an award set aside in the Russian Federation was declined as there was no proof that the annulment decision was rendered by a court that lacked impartiality and independence in that particular case. Thus, even though the Court did not generally exclude the possibility of enforcing annulled awards, it did not apply a relevant part of the legal reasoning in the *Yukos* decision. Besides, it emphasised that such a possibility should be limited to extremely exceptional circumstances. Considering the substantial deficiencies in the legal reasoning of the Amsterdam Court of Appeal, it is unlikely that it will be followed by the judiciary in the Netherlands. This judgment will be discussed in a greater detail under section 3.2.5.

However, even though the provision of Article 1076 further limits the possibility to invoke certain grounds for refusing the enforcement than the Convention after the decision of the Supreme Court of 25 June 2010 in the same *Yukos* case, it apparently can no longer be considered as more favourable than enforcement under Convention.[61] This is because the Supreme Court held that no appeal and no recourse

[58] Van den Berg, *New York Convention* 161.

[59] Decision of the Amsterdam Court of Appeal of 28 April 2009, *Yucos v Rosneft*, *TvA* (*Tijdschrift voor arbitrage*) (2011) 15.

[60] See eg decision of the President of the Amsterdam District Court (Judge in Summary Proceedings District Court of Amsterdam; '*Voorzieningenrechter')* of 17 November 2011, *Nikolai Viktorovich Maximov v OJSC Novolipetsky Metallurgichesky Kombinat*, 491569/KG RK 11-1722, excerpt in *Yearbook Commercial Arbitration 2012 – Volume XXXVII*, Netherlands No, 41 (Kluwer Law International 2012) 274 – 276. It should be mentioned, however, that in the National Report – Netherlands, in J Paulsson (ed), *Handbook International Commercial Arbitration*, ICCA (Kluwer Law International 2012) there is a reference to an unpublished decision of the Amsterdam District Court of 17 November 2011 (n 165) in support of the determination in the *Yucos* decision of the Amsterdam Court of Appeal of 18 April 2009.

[61] See section 3.2.5.

in cassation were available if the enforcement was granted under Article 1075 (i.e., Convention), whereas these remedies would be available in enforcement under Article 1076.

3.1.2 Waiver of grounds for Denying Recognition or Enforcement of a Foreign Award

The discussion of the provisions of Article 1076(1)(A)(a), (b) and (c) of the Act in the text under section 3.1.1. is fully applicable here. Thus, a failure by a party to raise the objections concerned (i.e., the invalidity of the arbitration agreement except for non-arbitrability of the subject-matter, the improper constitution of the tribunal and an excess of powers) in good time can be considered as a waiver of the right to successfully rely on these grounds later in the procedure for setting aside and for the recognition and enforcement of the award. These grounds correspond to the reasons indicated in Article V(1)(c) and (d) of the Convention. Furthermore, as suggested in the 2013 and 2014 Proposals, the new Act of 2015 introduces a general rule on estoppel. According to the suggested rule, a party that has failed to raise an objection in due time during the arbitral proceedings is precluded from raising this objection later in the proceedings before the court (i.e., in the proceedings for setting aside the award or for the enforcement of the award).

3.1.3 Deference by the Courts to Prior Judicial Determinations in Deciding Whether a Ground for Denying Recognition or Enforcement of a Foreign Award is Established

If a party successfully invokes an arbitration agreement in court proceedings in the Netherlands, the court will declare that it has no jurisdiction. The decision relating to the existence of a valid arbitration agreement will be binding in subsequent enforcement proceedings in the Netherlands. If a party successfully invokes the existence of an arbitration agreement in court proceedings outside the Netherlands, a party may still raise the objection against the invalidity of the arbitration agreement before the arbitral tribunal if the place of arbitration is situated in the Netherlands. The final decision on the jurisdiction of the arbitral tribunal lies with the court in the Netherlands (Art. 1064a for the reasons indicated in Art. 1065 of the Act).[62]

Under the previous statutory law, if a party successfully raised the objection of a lack of jurisdiction, the jurisdiction of the court would be revived, unless the parties agreed otherwise (Art. 1052(5) of the Act of 1986). In practice the parties hardly ever agree otherwise, *i.e*., they seldom enter into a new arbitration agreement. This means that a party can no longer invoke the arbitration agreement before the court

[62] Lazić and Meijer, *Country Reports: Netherlands* in FB Weigand, *Practitioner's Handbook on International Arbitration* 634, para [9.70].

seised of a matter in subsequent proceedings, *i.e*., the court will be competent to try the case. The text of Article 1052(5) is somewhat adjusted in the Act of 2015. Thus, it provides that the jurisdiction of national court will revive if the arbitral tribunal declares that it has no jurisdiction because there is no valid arbitration agreement. If the arbitral tribunal declares its incompetence on other grounds, the arbitration agreement retains its binding effect, unless the parties have agreed otherwise. If the arbitral tribunal with its seat in the Netherlands has declared that it has jurisdiction, this decision will be the subject of "control" by the court in the Netherlands which is competent to decide in setting aside proceedings. In the case of an arbitral tribunal abroad, the decision on jurisdiction may be subject to the control of the competent court in the Netherlands in the enforcement proceedings under the conditions provided in Article V of the Convention (Article 1075 of the Act) or Article 1076 of the Arbitration Act (if no treaty applies).[63]

As to a decision in set aside proceedings abroad whereby the foreign court has held that the arbitrators' jurisdiction was validly established, such a decision in itself would have no binding effect in the enforcement proceedings in the Netherlands. In other words, the Dutch court itself would examine whether there are grounds to refuse the enforcement if raised by the party opposing the enforcement under the Convention or Article 1076. That would include issues pertaining to a lack of jurisdiction provided that the party has not been precluded from raising such objections. The issue of subject-matter non-arbitrability and public policy may be examined by the court on its own motion. Conversely, a foreign decision on the annulment of an award should be a reason to refuse the enforcement in the Netherlands considering that this ground is also provided under the more favourable provision of Article 1076. However, as has already been explained the decision of the Amsterdam Court of Appeal of 28 April 2009 suggests otherwise. But this decision should not be considered as the "state of the law" in the Netherlands. In particular, this is not a decision rendered by the highest judicial instance (the Supreme Court). So far, it has not been accepted in subsequent court decisions, although it has not been expressly rejected either. Taking into consideration serious shortcomings in the reasoning of the Amsterdam Court of Appeal, it is to be hoped that this approach will not be followed by the Dutch courts.

There is no case law in the Netherlands holding that a court is bound by a decision of a foreign court referring the parties to arbitration or denying the request for setting aside of the award by the court at the seat of arbitration. Similarly, the decision of the arbitral tribunal on the issue that may be raised in the setting aside proceedings is the subject of control by Dutch courts if the ground is provided by the Dutch statutory law, unless the right to invoke a particular reason has been waived.

As explained in detail under section 3.5., the Amsterdam Court of Appeal in its decision of 28 April 2009 held that it was not bound by the decision of the Russian court which had set aside the award rendered in Russia.

[63] Ibid para [9.71].

3.2 Particular Grounds

3.2.1 Incapacity of Parties to Agree to Arbitrate or Invalidity of the Arbitration Agreement (Art. V(1)(a))

Regarding the law applicable to arbitration agreement, Article 1076 of the Arbitration Act is formulated along the lines of the Convention. The same holds true with respect to a lack of a valid arbitration agreement as a ground to refuse the recognition or enforcement of the award, even though the provision of Article 1076 is not identical in its wording and refers to invalidity "under the law applicable thereto."[64] So far, the distinction in the wording has not given rise to differences in practice when applying this provision under the Act of 1986. Generally in enforcement proceedings under both provisions the law chosen by the parties would be the law governing the validity of the agreement to arbitrate. The same can be said when there is no agreement between the parties as to the applicable law, considering that the prevailing view in the Dutch literature is that the law of the seat of arbitration would be the law governing the validity of an arbitration agreement.[65] The arguments in favour of this interpretation are that it would be in line with Article V(1)(a) of the Convention and that an arbitration agreement is most closely connected with the arbitration law of the seat of arbitration.[66]

The same interpretation finds support in the decisions of the courts in the Netherlands. Thus, the Court of Appeal in The Hague[67] interpreted Article 1076(1)(A)(a) of the Arbitration Act in line with Article V(1)(a) of the Convention and concluded that the law applicable to an arbitration agreement was to be English law as the law of the seat of arbitration. It held, *inter alia*, that:

> "[9] The Court is of the opinion, … that the closest connection is with English law. The connecting factor is to be found in the place of arbitration and is in conformity with Art. V(1)(a) of the New York Convention which states that the validity of the arbitration agreement, in absence of a choice of law, has to be determined according to the law of the country where the award was made. This rule can be considered as a general rule of private international law as a result of the broad international influence of the Convention and in addition it has been recognized and adopted by the Dutch legislator, …"[68]

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[64] The legislative history (*Memorie van toelichting – MvT II*) refers to general conflict of law rules.

[65] Van den Berg, Van Delden and Snijders, *Arbitragerecht* (2nd edn W.E.J. Tjeenk Willink, Zwolle 1992) 192, n 10.4.3; Snijders, at 385, Art 1076, n 1.

[66] It should be mentioned that this is not necessarily the law applicable to the so-called subject-matter of objective arbitrability. See eg Sanders, at 235.

[67] Decision of the Court of Appeal (*Gerechtshof*) in The Hague of 4 August 1993, *Owerri Commercial Inc v Dielle Srl*, excerpt in *Yearbook Commercial Arbitration XIX* (1994) Kluwer Law International, Netherlands n 15 at 703 *et seq*.

[68] Ibid, 706. See also aecision of the Court of Appeal The Hague (*Gerechtshof Den Haag*) of 22 February 2000, *Petrasol BV v Stolt Spur Inc*, excerpt in *Yearbook Commercial Arbitration* (2004) Netherlands No 28, even though this decision does not relate to the enforcement of a foreign award, but concerns the referral to arbitration. Yet the same "conflict of law rule" was applied.

As already explained in Section 2.1, the Act of 2015 has introduced an express provision of Article 166 in Book Ten of the Civil Code on the law applicable to arbitration agreement. It provides for an alternative application of *lex arbitri* and *lex causae* in the absence of the parties' choice of the applicable law.

The provision of Article 1076(1)(A)(a) of the Arbitration Act is more favourable than Article V(1)(a) of the Convention. Thus, it is not surprising that it was relied upon in order to prevent the party opposing enforcement from invoking the invalidity of an arbitration agreement when it had failed to raise that objection in good time in arbitral proceedings. The decision of the Court of First Instance of Almelo[69] is illustrative. A sole arbitrator rendered two awards in favour of Securities Exchange Commission (SEC*)* in London and SEC then sought enforcement in the Netherlands. *Weyl* objected to the lack of jurisdiction of the arbitrator because no valid arbitration agreement had been concluded between the parties. The Court applied English law and dismissed the objection. It held, *inter alia*, that under the applicable English law "a party which has not exhausted all the possibilities at his disposal against an arbitrator's finding that he has jurisdiction may not ... rely later on the arbitrator's lack of jurisdiction."

3.2.2 Inadequate Notice or Opportunity to Present One's Case (Art. V(1) (b))

An award rendered in proceedings in which the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case may be refused recognition and enforcement in accordance with Article V(1(b) of the Convention. Standards of proper notice and fair hearing as required by domestic constitutional law and their relevance in international cases may differ amongst various legal systems.

The fundamental notions of due process and fair trial pertain to public policy. A violation of such basic principles of procedural law presents a ground for setting aside arbitral awards rendered in the Netherlands and for a refusal of the recognition or enforcement of foreign arbitral awards. In principle, only serious violations of due process would justify annulment or denial of enforcement of an award. Unequal treatment of the parties, failure to ensure that a party is informed about the appointment of arbitrators, the commencement of arbitration, or the submissions and evidence of the other party or failure to provide the possibility for a party to comment on such submissions within a time which is sufficient to prepare for the defence/reply can be mentioned as examples. Thus, the right to be heard is deemed to have been violated if an arbitral tribunal examined a witness that merely appeared at the hearing whereby the other party received no previous information or a request for

[69] Decision of the Court of First Instance (Arrondissementsrechtbank) Almelo of 19 July 2000, *Société d'Etudes et de Commerce SA v Weyl Beef Products BV*, Yearbook Commercial Arbitration (2001) Netherlands n 26 at 826 et seq.

the examination and was not given an opportunity to comment on the statement or to present its own witness.[70] The witness statement was given considerable probative value and appeared to be crucial evidence on which the decision in the award was based. This decision relates to the setting aside proceedings, but it is not excluded that a similar line of reasoning could be followed in enforcement proceedings under the Convention. For example, an unsuccessful attempt was made to rely on this decision by a party in the decision of the President of the District Court of Amsterdam of 26 July 2012.[71] However, it was held that the circumstances of the case at hand were to be distinguished from the Decision of the Supreme Court of 27 May 2007 (*Anova Food BV*) and concluded as follows:

> "[11] … In that decision, the Supreme Court held that the arbitral tribunal violated the principle of adversary proceedings because it based its decision largely on the statement of a party witness and did not give the other party the opportunity to comment on this witness statement or to conduct a counter-investigation. In the present case, the arbitral tribunal gave the parties a sufficient and equal opportunity to prepare for the hearing and (in)directly present their case there."

In any case, an alleged violation is not easily accepted as proven by the courts in the Netherlands. Thus, there is no violation of due process when a party "itself chose not to be present at the hearing, while this hearing had already been planned a long time before and [that party] was timely informed that its request for postponement would not be granted."[72] In that case, the arbitral tribunal did not grant the request of a party to postpone the oral hearing when the legal representative of that party had withdrawn three weeks before the date of the hearing. In the view of the Court, the right of the party to due process had not been violated, considering that the date for the hearing had been determined some seven months before the withdrawal of the legal representative, and consequently the party had sufficient time to prepare its case.[73]

In enforcement under Article 1076, there is no express provision corresponding to Article V (1)(b) of the Convention. Accordingly, recognition or enforcement of an arbitral award may be refused if the basic notion of due process and fair trial would

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[70] Decision of the Supreme Court (*HR*) of 25 May 2007, *Anova Food BV*, *NJ* 2007, 294; LJN BA2495; see also decision of the Supreme Court (HR) of 24 April 2009, *IMS v Modsaf*, *NJ* 2010, 171. NJ 2010, 171; RvdW 2009, 580; JBPr 2009, 54 NJB 2009, 923.

[71] The decision of the President of the District Court of Amsterdam of 26 July 2012, 505950/KG RK 11-3695, 26 July 2012 *Nova Shipping Ltd v. Med Marine Kilavuzluk ve Romarkaj Hizmetleri Insaat Sanayi ve Ticaret AS*, excerpt in *Yearbook Commercial Arbitration 2012 – Volume XXXVII*, (Kluwer Law International Netherlands 2012) 282 – 284, No. 43.

[72] Ibid para [10].

[73] Decision of the President of the District Court of Rotterdam (Provisions Judge – *voorzieningenrechter)* of 28 February 2011 and the Court of Appeal of The Hague of 20 December 2011, 370214/KG RK 10-3521 and 370216/KG RK 10-3523, *Catz International BV v Gilan Trading KFT*, *Yearbook Commercial Arbitration 2012 – Volume XXXVII*, (Kluwer Law International Netherlands 2012) 271 -273 No. 40. The allegations of a violation of due process were carefully examined and it was concluded that the party was in a position to react to every submission but had failed to avail itself of this opportunity.

be violated by invoking the public policy exception (Art. 1976(1)(B) of the Act)[74] or possibly, but less likely, a failure of an arbitrator to comply with its mandate (Art. 1076(1)(A)(c), depending on the circumstances of the case.

3.2.3 Decisions on Matters Beyond the Scope of the Arbitration Agreement (Art. V(1)(c))

If the award "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration," it may be refused recognition and enforcement under Article V(1)(c) of the Convention. Within that context it may be interesting to examine the relevance of this ground when the award grants a remedy specifically excluded by the main contract.

With respect to the statutory arbitration law in the Netherlands, it should be reiterated that a party may rely on a corresponding provision of Article 1076(1)(A)(c) which is more favourable than Article V(1)(c) of the Convention. It provides for a failure of the arbitral tribunal to comply with its mandate as a ground to refuse the recognition or enforcement of the award. As already explained, a party will be considered to have waived the right to rely on this ground if it has participated in the arbitral proceedings, but filed an objection of non-compliance. It is true that in practice this will usually concern an objection regarding the procedure, as it is less likely that a party would become aware of the tribunal's failure to comply with its mandate with respect to the substance.[75]

Nevertheless, it is not inconceivable that one of the parties expressly claims a remedy which is excluded in the main contract. If the opposing party would fail to object to such a claim it is not unlikely that it would subsequently be prevented from raising it in the enforcement proceedings. For example, a party was considered to be precluded from invoking the objection that the arbitrator had found the Defendant liable for a sum far higher than its contractually determined maximum liability because it had failed to raise this argument in arbitration although it could have done so. Thus, it was held that the party had to bear the consequences of its failure to object.[76] It is to be presumed that the party did indeed have the opportunity to object.

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[74] Decision of the President of the District Court/Court of First Instance (*Rechtbank*) Amsterdam of 24 April 1991, excerpt in *V/O Tractoroexport v Dimpex Trading BV*, *Yearbook Commercial Arbitration*, Kluwer Law International (1992) Netherlands No. 14, where a party raised the objection of being unable to present the case in arbitral proceedings, the Court concluding that the "defence must be considered as apparently relying on the fact that recognition or enforcement of the award would be in violation of public policy, as provided in Art 1076(1)(B) of the Code of Civil Procedure."

[75] Sanders and Van den Berg, *The Netherlands Arbitration Act 1986* Art 1076, n 122.

[76] Decision of the President of the District Court of Dordrecht (*Voorzieningenrechter, Rechtbank*) of 30 June 2010, *Dubai Drydocks v Bureau voor Scheeps- en Werktuigbouw [X] BV*, Dordrecht, 30 June 2010, excerpt in *Yearbook Commercial Arbitration 2011 - Vol XXXVI*, Netherlands No 35 (Kluwer Law International 2011) 299 – 301.

Otherwise, it could be considered as an excess of powers/non-compliance with its mandate for the purpose of the application of the provisions of Articles V(1)(c) of the Convention and 1076(1)(A)(c) of the Act.

There is no excess of authority if the arbitral tribunal based its decision on the law determined in the absence of the parties' choice. In enforcement proceedings before the President of the Amsterdam District Court of 24 February 2011,[77] a party alleged that the arbitrators had exceeded their authority when holding that there had been a duty to inform between the parties under Dutch law. In the view of the party objecting to the enforcement, the parties had not agreed on the applicability of Dutch law and the arbitration clause only permitted the tribunal to hear disputes specifically concerning the rights and obligations arising from the shareholders' agreement (the Founders' Agreement). The Court rejected the objection and granted the enforcement. It held that the clause only specified what kinds of disputes were to be submitted to arbitration, but failed to provide for the applicable law. Thus, the ICC arbitral tribunal was permitted to determine the rights and duties of the parties according to Dutch company law.

It should be mentioned that the new Act of 2015, as it was suggested in both the 2013 and 2014 Proposal even further limits the possibility to rely on the ground under Article 1076(1)(A)(c). Thus, an excess of authority shall not constitute a reason to refuse recognition or enforcement if "non-compliance with the scope of the submission to arbitration is not serious." However, this further limitation would be meaningless if the more favourable character of the provision of Article 1076 is not "restored" by altering the ruling of the Supreme Court of 25 June 2010.

3.2.4 Improper Composition of Arbitral Tribunal or Non-Compliance of Arbitral Procedure (Art. V(1)(d))

According to Article V(1)(d) of the Convention, recognition and enforcement of an arbitral award may be refused if "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." As explained previously, the provision of Article 1076(1)(A)(b) relating to the improper constitution of the tribunal is more favourable than the Convention. It provides in 1076(3) that a party shall be precluded from asserting this ground if it "has participated in the constitution of the arbitral tribunal or, if he has not participated in the constitution of the arbitral tribunal, has made an appearance in the arbitral proceedings and, before submitting a defence, has not raised the plea that the arbitral tribunal lacks jurisdiction on the ground that the arbitral tribunal was constituted in violation of the applicable rules."

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[77] Decision of the President of the District Court of Amsterdam (Provisions Judge – *voorzieningenrechter)* of 24 February 2011, KG RK 10-969, *Shalom v IPC Holland BV et al*., *Yearbook Commercial Arbitration 2012 – Vol XXXVII*, (Kluwer Law International Netherlands 2012) 268-270, No 39.

There appears to be no case law in the Netherlands directly addressing the issue of an arbitral procedure expressly adopted by an agreement of the parties that is not in accordance with the mandatory law of the country where the arbitration took place. In general, from the point of view of the enforcing court, the fact that an agreement of the parties concerning the procedure may be contrary to a mandatory provision of a foreign procedural (arbitration) law is not in and of itself a reason to refuse the enforcement of the award, provided that the violation concerned is not such as to be contrary to the "international public policy" of the enforcement state. In particular, if some basic notion of morality and justice according to internationally accepted standards (pertaining to the so-called "transnational public policy") would be violated by such an agreed procedure, the public policy exception could be invoked *ex officio* by the enforcement court. Otherwise, it would be difficult to "find" a ground under the Convention to rely upon.

If the arbitral tribunal applied to the merits of the dispute a body of law other than the body of law that the parties selected in their contract as the governing law, a party opposing the enforcement of the award may raise the objection that the award is not rendered in accordance with the agreement of the parties. Considering the generally wide discretion of arbitrators to determine the law applicable to the merits, it is unlikely that an application of allegedly "wrong" law would qualify for a reason to refuse the enforcement of the award. This is particularly so considering that in many jurisdictions the arbitrators are not required to apply any conflict of law rule to determine the applicable substantive law. The above-mentioned decision[78] is illustrative. The same holds true in other legal systems. However, if the arbitral tribunal would entirely disregard the parties' choice of the applicable substantive law and would apply some other body of law instead, that could qualify as an excess of authority, rather than as a failure to comply with the rules of procedure agreed upon by the parties. Especially if such a unilateral decision on the applicable law and disregarding the parties' choice would appear to be crucial for the decision rendered (resulting, for example, in applying shorter prescription periods with respect to the admissibility of a claim), it could be qualified as an "excess of authority."

3.2.5 Award not Binding on the Parties or Set Aside by a Court of the Arbitral Seat (Art. V(1)(e))

Recognition and enforcement of an award that "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" may be refused in accordance with Article V(1)(e) of the Convention.

In an earlier publication,[79] the present author expressed the view that the enforcement of an annulled arbitral award within the Convention could only be possible

[78] Ibid.

[79] V Lazić, 'Enforcement of the Arbitral Awards Annulled in the Country of Origin', *Croatian Arbitration Yearbook*, Vol 13 (2006) 179-204.

within the framework of the supplementary provision of Article IX of the European (Geneva) Convention to Article V(1)(e) of the Convention. In the legal literature, it is suggested that a court in the country of enforcement could use its discretionary authority following from the wording "may" in Article V(1) of the Convention and accordingly disregard a so-called "local standard annulment" on the basis of which an award has been set aside in the country where it was rendered.[80] In practice, however, the residual discretionary power in itself (the wording "may" in Art. V(1) of the Convention) appears to be an insufficient ground to grant the enforcement of annulled arbitral awards. The *Chromalloy* decision in the United States[81] is illustrative. Moreover, it is stated that "in more than 1500 published decisions, no court has applied the residual discretionary power with respect to Article V(1)(e) of the Convention in the case where an arbitral award had been set aside in the country of origin."[82]

As to the enforcement of an annulled award *outside* the Convention this could only be possible,[83] if the law of the enforcing state does not provide for the annulment of awards as a reason to refuse the recognition or enforcement of a foreign arbitral award, as is the case under French law.[84] In the latter, on the basis of Article VII(I) of the Convention a party may rely on a more favourable national law for the enforcement of foreign arbitral awards. Article 1076(1)(A)(e) of the Dutch Arbitration Act provides for the same reason to refuse recognition or enforcement as Article V(1)(e) of the Convention. Therefore, it is not to be expected that the courts in the Netherlands would follow the "French approach." The latter assumes a more favourable regime for the enforcement of foreign arbitral awards than the Convention which does not provide for this particular reason to refuse enforcement.[85] Considering that the Dutch law on the enforcement of foreign arbitral

[80] J Paulsson, 'Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA), 9 *ICC International Court Bulletin* 14, n 1 (1998)

[81] *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C. 1996); Mealey's International Arbitration Report 11 (1996) 8, C-54.

[82] AJ van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia', *Journal of International Arbitration*, Vol 27 Issue 2 (Kluwer Law International 2010) 186.

[83] V Lazić, *Croatian Arbitration Yearbook* (2006) n 80, 202-203. Generally, on the possible approaches in the enforcement of annulled arbitral awards, see A.J. van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia', *Journal of International Arbitration*, Vol 27 Issue 2 (Kluwer Law International 2010) 182-197.

[84] See eg *Hilmarton Ltd v Omnium de traitement et de valorisation (OTV)*, Cass. Civ. 1re, 23 March 1994, Revue de l'arbitrage (1994) 327, excerpt in XX Yearbook Commercial Arbitration, Kluwer Law International (1995) 663 et seq.; see also the subsequent decisions of *Ministry of Public Works of Tunisia v Société Bec Frères*, 24 February 1994, Cour d'appel de Paris, Revue de l'arbitrage (1995) 275 et seq., excerpt in XXII Yearbook Commercial Arbitration, Kluwer Law International (1997), France no 25, 682 et seq.; *Chromalloy Aeroservices v Arab Republic of Egypt*, Cour d'appel de Paris, 14 January 1997, Mealey's International Arbitration Report, 12 (1997) 4, B-1 (stating, inter alia, that the application of Art V 'must then be set aside' B-2); *Société PT Putrabali Adyamulia v SA Rena Holdings*, Cour de cassation, 29 June 2007, excerpt in XXXII Yearbook Commercial Arbitration, France no 42 (Kluwer Law International 2007).

[85] For more particulars on the issue of the possibility to follow the approach of the French courts in other jurisdictions, see Lazić, *Croatian Arbitration Yearbook* (2006) n. 80 179-204 and generally

awards does contain this ground to refuse enforcement, the French approach cannot be "imported" into the Netherlands.[86]

Yet the Amsterdam Court of Appeal in its decision of 28 April 2009[87] applied another formula to the enforcement of an award that was set aside by the competent court in the country where the award was rendered. It was the first and so far the only decision enforcing annulled awards in the Netherlands.[88] Deciding on a request for enforcement under the Convention, the President of the Amsterdam Court of First Instance (*Voorzieningenrechter*) denied the enforcement of awards rendered in Russia under the Rules of the International Commercial Arbitration Court (ICAC) at the Chamber of Trade and Industry of the Russian Federation in Russia, because the awards had been set aside by the competent court in Russia. In its judgment of 28 April 2009, Amsterdam Court of Appeal reversed this decision and granted enforcement for reasons that can be summarised as follows:

> "(1) The New York Convention does not require an automatic recognition of annulment decisions in the country where the enforcement is sought.
>
> (2) Press articles and the reports of international organisations, as well as court decisions in a number of jurisdictions, notably England and Wales, Lithuania, Switzerland and the Netherlands, illustrate that there is a lack of impartiality and independence on the part of the Russian courts in cases involving the interests of the Russian State. For these reasons, the decision of the Russian court annulling the awards shall not be given effect in the Netherlands.
>
> (3) It is irrelevant that the party requesting the enforcement of the award in Yucos Capital did not provide direct evidence of partiality and dependence in the case at hand 'in part because partiality and dependence by their very nature take place behind the scenes'".[89]

Points (2) and especially (3) do not relate to the interpretation of the Convention. From a legal point of view, they do not deserve any comment, as they are clearly not based on legal considerations. The arguments used have been rightly subjected to criticism,[90] especially the obviously inappropriate view that there was no need to

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the extensive literature on the issue of the enforcement of annulled arbitral awards following the decision in *Hilmarton* (France) and *Chromalloy* (US) referred to therein. See also, AJ van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia', *Journal of International Arbitration*, Vol 27 Issue 2 (Kluwer Law International 2010) 179 – 198, addressing the possibilities of the enforcement of annulled awards.

[86] The same appeared to be true in the unconvincing and unsuccessful attempt to apply the French formula in the *Chromalloy* case in the United States.

[87] Decision of the Amsterdam Court of Appeal (Gerechtshof) of 28 April 2009, 200,005,269, *Yukos Capital s.a.r.l. (Luxembourg) v OAO Rosneft (Russian Federation)*, (Tijdschrift voor arbitrage 2011) 15, excerpt in Yearbook Commercial Arbitration 2009 - Volume XXXIV, Netherlands No 31 (Kluwer Law International 2009) 703 – 714.

[88] Here only the relevant legal issues are addressed. References to the rather peculiar facts and circumstances of the case, as well as other "arbitration unrelated" aspects and considerations are omitted.

[89] Decision of the Amsterdam Court of Appeal (*Gerechtshof*) of 28 April 2009 200,005,269, *Yukos Capital s.a.r.l. (Luxembourg) v OAO Rosneft (Russian Federation)*, www.rechtspraak.nl case no. LJN BI2451, excerpt in XXXIV *Yearbook Commercial Arbitration*, Netherlands no 31 (Kluwer Law International (2009) para [21].

[90] For a criticism of this decision, see A.J. van den Berg, **'**Enforcement of Arbitral Awards Annulled in Russia', *Journal of International Arbitration*, Vol 27 Issue 2 (2010) 179 – 198.

prove the lack of impartiality in the case at hand. It is to be met with approval that it was not followed in subsequent decisions by the Dutch courts. Thus, the Amsterdam District Court in its decision of 17 November 2011[91] clearly took into consideration whether the issue of the lack of impartiality or independence could be determined *in that particular case*. This approach is in apparent contrast to the line of reasoning adopted by the Court in the *Yucos* case. The latter held that there was no need to ascertain the lack of impartiality in the case that it dealt with. Instead it relied on information in the press and selected literature which was entirely unrelated to the facts and circumstances of the case at hand. However, this part of the reasoning will not be further discussed, as it is of no relevance for a legal analysis and interpretation of the Convention.

As to the reasoning under point (1), the Court first held, *inter alia*, as follows:

> "[4] (…) However, neither this provision [of Art. V(1)(e)] nor the further provisions of the 1958 New York Convenion or any other convention compel the Dutch enforcement court to recognize such decision of the Russian civil court directly. The question whether the decision of the Russian civil court annulling the arbitral awards can be recognized in the Netherlands must be answered pursuant to the rules of general private international law."[92]

Then it reasoned that:

> "[6] This court shall therefore first examine under general law [*commune recht*] whether the decisions of the Russian civil court annulling the arbitral awards of 19 September 2006 can be recognized in the Netherlands, starting from the consideration that a foreign decision, regardless of its nature and scope, is recognized if a number of minimum requirements are complied with, one of them being the foreign decision came into existence [in proceedings complying with] due process. There is no due process when it must be deemed that the foreign decision was rendered by a judicial authority that was not impartial and independent."

Thus, the Court held that reliance on the reason under Article V(1)(e) of the Convention depends on whether or not a decision on the annulment in the country of origin can be recognised in the Netherlands. This reasoning finds no support either in the text and preparatory documents to the Convention or in court decisions applying the Convention (in and outside the Netherlands). There is not much to be added to the view expressed by van den Berg in his criticism of the decision.[93] Yet, another point may be raised with respect to the Court's reliance on "general private international law" (*commune recht).* Presumably it was meant to refer to the rules

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[91] President of the District Court of Amsterdam (Provisions Judge, voorzieningenrechter) of 7 November 2011, 491569/KG RK 11-1722, Nikolai Viktorovich Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat, excerpt in *Yearbook Commercial Arbitration 2012 – Volume XXXVII*, Netherlands 41 (Kluwer Law International 2012) 274 – 276.

[92] Decision of the Amsterdam Court of Appeal (*Gerechtshof*) of 28 April 2009 200,005,269, *Yukos Capital s.a.r.l. (Luxembourg) v OAO Rosneft (Russian Federation)*, www.rechtspraak.nl case no LJN BI2451, excerpt in XXXIV *Yearbook Commercial Arbitration*, Netherlands no 31 (Kluwer Law International 2009) para [4] of the excerpt.

[93] AJ van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia', *Journal of International Arbitration*, Vol 27 Issue 2 (2010) 189.

on the recognition of foreign judgments developed on the basis of case law in the Netherlands. According to the rules developed by the courts in the Netherlands, a foreign judgment may be recognized if certain conditions are satisfied, in particular: whether the foreign court had jurisdiction to decide the case on the basis of internationally accepted criteria, that the requirement of due process has been complied with and the decision is not contrary to Dutch public policy. However, it is questionable whether it is appropriate to apply the general private international law to the recognition of foreign judgments with respect to foreign judgments annulling an arbitral award, considering that the developed case law relates to the recognition of foreign declaratory and constitutive decisions and judgments rejecting a claim[94] (i.e., decisions mainly concerning a "substantive claim"). It should be emphasised that the issue of the recognition of foreign annulment decisions has never been previously raised before the Dutch courts. In a similar vein, decisions relating to arbitration, thus also decisions rendered in setting aside proceedings, fall outside the scope of the Brussels I Regulation on the recognition and enforcement of foreign judgments.

The controversial decision of the Amsterdam Court of Appeal did reach the Dutch Supreme Court.[95] However, unfortunately the latter did not engage in a discussion on the appropriateness of the enforcement of annulled arbitral awards in the Netherlands. Namely, the Supreme Court declared that a recourse in cassation was inadmissible. It based its decision on the interpretation of the relevant provisions of Article 1062 and 1063 of the Arbitration Act in connection with Article III of the Convention. The provisions of Articles 1062 and 1063 relate to the enforcement of arbitral awards rendered in the Netherlands. Considering that a recourse in cassation is inadmissible against leave for enforcement with respect to the awards rendered in the Netherlands, the Supreme Court concluded that it was also inadmissible in the proceedings for the enforcement of foreign arbitral awards, within the view of Article III of the Convention. Namely, it construed the wording in Article III that "[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards … than are imposed on the recognition or enforcement of domestic arbitral awards" so as to imply that the relevant provisions on the enforcement of domestic awards had analogously to be applied in enforcement under the Convention. This is the first time since the Netherlands ratified the Convention that such an interpretation was applied. After it was raised for the first time in the literature,[96] it received no or little support in legal

[94] L Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht* (Kluwer, Deventer 2012) 278-279.

[95] Decision of the Supreme Court (*Hoge Raad*) of 25 June 2010, First Chamber, 09/02565 EE,*Y OAO Rosneft (Russian Federation) v Yukos Capital s.a.r.l. (Luxembourg)*, original decision in Case no LJN: BM1679 available on http://www.rechtspraak.nl, excerpt in English in *Yearbook Commercial Arbitration 2010 - Volume XXXV*, Netherlands No 34 (Kluwer Law International 2010) 423 – 426.

[96] For the first time the issue of the "prohibition of discrimination under Article III of the *Convention* on leave for an enforcement procedure in the Netherlands" was raised in a publication by the Dutch

writings. Yet the Supreme Court based its decision almost exclusively in reliance on this publication. Before that it was not even doubted that an appeal or a recourse in cassation would be unavailable against a decision granting enforcement when the enforcement is requested on the basis of Article 1075 (thus, under the Convention).[97]

The correctness of the decision of the Supreme Court must be questioned, especially the relevance of the mentioned provisions of the Dutch Act for the "conditions for enforcement" within the meaning of Article III of the Convention. As rightly pointed out in the commentary to this decision, the interpretation of this provision finds no support either in the text of the Convention nor in the legislative history of Article III.[98]

It is not only that the Supreme Court incorrectly interpreted the Convention, but it also incorrectly interpreted the relevant provisions of the Dutch Arbitration Act. In particular, it is obviously inappropriate to analogously apply Articles 1062 and 1063 in the context of the enforcement of "foreign" arbitral awards. This is especially so considering that a party against whom the enforcement of a "domestic" award is granted does have a remedy against this decision, which is an action for setting aside. In other words, there is no right of appeal or a right of recourse in cassation, but there is another available remedy (means of recourse) – an action for setting aside and in exceptional circumstances a request for the revocation of the award.[99] In the procedure for setting aside, a party will have the possibility of both an appeal and recourse in cassation. Obviously, these remedies (i.e., setting aside or exceptionally revocation) are unavailable to a party against which an enforcement of a foreign arbitral award is requested in the Netherlands, as the seat of arbitration is not in the Netherlands. Consequently, the decision of the Supreme Court of 25 June 2010 leaves such a party with no remedy at all even if the lower courts (a District Court or a Court of Appeal) have rendered obviously incorrect decisions when applying the Convention or Dutch law.[100] The reasoning of the Supreme Court that a possibility for setting aside is available in a country of the seat of arbitration, so that a party is not without a remedy, is difficult to comprehend, especially considering that any such decision can apparently be ignored by the Dutch courts.

It should be emphasised, however, that the possibility to appeal and file a recourse in cassation against a decision granting enforcement is available when the enforce-

practising lawyer Ph. De Korte, "Welke consequenties heft het discriminatieverbod van artikel III van het Verdrag van New York voor de Nederlandse exequaturprocedure" TvA no 3 (2007).

[97] Decision of the Court of Appeal (*Gerechtshof*) Amsterdam of 16 July 1992, G.*W.L. Kersten & Co BV v Société Commerciale Raoul-Duval et Cie*, excerpt in *Yearbook Commercial Arbitration*, Netherlands 16 (Kluwer Law International 1992) – the Court of First Instance Utrecht granted the request for enforcement and an appeal was permitted.

[98] AJ van den Berg, Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Dutch Supreme Court of 25 June 2010, 28 *Journal of International Arbitration*, Issue 6 (2011) 617-641.

[99] For criticism of the judgment of the Supreme Court, see Berg, A.J. van den, Enforcement of Arbitral Awards Annulled in Russia –Case Comment on Dutch Supreme Court of 25 June 2010, *Journal of International Arbitration*, Vol 28 Issue 6 (Kluwer Law International 2011) 617-641.

[100] Such a result may be contrary to the constitutional right to legal remedies, a right which is also incorporated in the EU (Charter on Fundamental Rights).

ment is under Article 1076 (thus, when no treaty applies or when its applicability is permitted under a treaty, such as Article VII(1) of the Convention), because there is no requirement allegedly imposed under Article III of the Convention. This is an apparent paradox, considering that the Act provides for the applicability of the same provisions of the Code of Civil Procedure regarding the enforcement of foreign arbitral awards.[101] Consequently, the ruling of the Supreme Courts renders this provision meaningless even though it contains more favourable conditions for the enforcement of foreign arbitral awards.

Unfortunately, the Act of 2015 does not expressly overrule unsatisfactory situation created by the legal reasoning of the Supreme Court. However, under the new Act of 2015 jurisdiction for the enforcement of foreign arbitral awards is vested in the Court of Appeal, whereas the jurisdiction for the enforcement of domestic awards has remained with the District Court. Vesting jurisdiction in different courts could be seen as an indication that the analogous application of Title I on the enforcement of foreign arbitral awards is inappropriate. As already indicated under section 1.2., it is yet to be seen how this new statutory regulation will be interpreted by the Dutch courts.

3.2.6 Non-Arbitrability of the Dispute (Art. V(2)(a))

If an award deals with a subject matter that is not capable of settlement by arbitration (i.e., is non-arbitrable) under the law of the country where the enforcement is sought, recognition and enforcement of such an award may be refused. Various legal systems may employ distinct criteria when determining what kinds of disputes are considered legally incapable of settlement by arbitration.

The Netherlands Arbitration Act defines "objective" or subject-matter arbitrability in Article 1020(3). It provides that "the arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose."[102] There is no express answer in the Act as to which matters pertain to "legal consequences of which the parties cannot freely dispose." A careful study of other fields of law and guidance from the judiciary is usually needed to understand the actual "scope" of non-arbitrable matters in a certain legal system.[103] The question of arbitrability remains a rather controversial issue in legal theory in the Netherlands, certainly in the areas of law where no guidance from the judiciary has been provided so far. The controversy lies in particular in defining a uniform approach to determine the scope

[101] The different approach in applying these provisions has been explained by the Supreme Court to the effect that these provisions of the Code of Civil Procedure apply unless a treaty provides otherwise (and Article III allegedly does provide otherwise in the view of the Court).

[102] No changes in this respect are provided under the new 2014 Act.

[103] For more particulars on a comparative view concerning approaches to "define" the notion of objective arbitrability in France, Germany, the Netherlands and the United States, see Lazić, V., *Insolvency Proceedings and Commercial Arbitration* (Kluwer Law International, the Hague/London/Boston 1999), Chapter IV on the Subject-matter arbitrability, 143 *et seq.*

of arbitrable matters. It is generally held that matters of public policy are not arbitrable as they are not considered to be at the free disposal of the parties.[104] These are, in particular, matters in which a decision has an *erga omnes* effect and which are, consequently, not at the parties' free disposal (e.g., divorce, adoption, the appointment of a guardian or a declaration of bankruptcy).[105] The fact that a subject-matter is of a public law nature does not necessarily imply that it is not arbitrable. In general, arbitration is seldom used in the field of public law. Moreover, the authority of public legal persons to conclude arbitration agreements is limited.[106]

When a statute provides for the exclusive jurisdiction of national courts, arbitration is considered to be excluded by some authors.[107] However, a reference to the courts in a statute does not necessarily imply the non-arbitrability of the subject-matter. It is only non-arbitrable when adjudication over a particular subject-matter is exclusively conferred upon the judiciary with the purpose of precluding any other authority from assuming jurisdiction.[108] Such "exclusive" jurisdiction must clearly follow from the text or legislative history. It is infrequently provided for in Dutch statutory law, so that it does not significantly limit the domain of arbitration.[109]

Relevant statutory regulation in the Netherlands provides for exclusive jurisdiction of the courts in disputes involving the renting of houses, business accommodation and real estate.[110] The same is true for disputes concerning trademarks under the Uniform Benelux Trademarks Act (Article 14D), drawings and designs under the Benelux Drawings and Designs Act (Article 16) and the validity of patents under the Patents Act (Article 54). Although these statutes provide for the exclusive jurisdiction of the judiciary, it is not clear whether it necessarily implies that these issues are non-arbitrable. In particular, providing for exclusive jurisdiction may be intended merely to allocate jurisdiction amongst national courts rather than to exclude arbitration. In general, the criterion of exclusive jurisdiction should always be viewed in the context of the purpose which a particular provision intends to achieve. If it is merely part of the general rules on the allocation of jurisdiction, without any reason or intention to exclude arbitration, they should not be interpreted as implying the non-arbitrability of a subject-matter. A similar line of reasoning can also be applied when a special procedure is provided for certain disputes. Arbitrators should not be

[104] In general, on subject-matter arbitrability in the Netherlands, see V Lazić, 'Arbitration Law Reforms in the Netherlands: Formal and Substantive Validity of an Arbitration Agreement', vol 11.1 *Electronic Journal of Comparative Law* (May 2007), http://www.ejcl.org/111/art111-16.pdf.

[105] Decision of the Supreme Court (*HR) of 10 June 1955*, *Duval v Kian*, *NJ* 1955 n 570; See also Snijders, Art 1020, n 5.

[106] Ibid, Art 1020. n 5.a.

[107] P Sanders, *Het nieuwe arbitragerecht* (4th edn Kluwer, Deventer 2001) 36.

[108] P Snijders, Art 1020, n 5.a.

[109] P Sanders, *Het nieuwe arbitragerecht* (4th edn Kluwer, Deventer 2001) 36.

[110] Decision of the Supreme Court (*HR)* 20 June 1969, *NJ* 1969, n 332; Decision of the District Court of '*s*-Hertogenbosch (*Rechtbank 's-Hertogenbosch*) of 12 November 1980*, NJ* 1981, n. 372; President of the Utrecht District Court (*Pres. Rechtbank Utrecht*) 12 May 1992, *NJ* 1993, no. 443; P Sanders, *Het nieuwe arbitragerecht* (4th edn Kluwer, Deventer 2001) 36-38; Van den Berg, Van Delden and Snijders, *Arbitragerecht* (2nd edn W.E.J. Tjeenk Willink, Zwolle 1992) 33.

competent to render decisions which have an *erga omnes* effect, considering that their jurisdiction is based on a private agreement between the parties.[111]

The fact that a relationship between parties must be resolved by the application of certain mandatory rules or rules pertaining to public policy does not necessarily imply the non-arbitrability of the dispute.[112] Thus, issues of competition law, including EC competition law, are arbitrable. Similarly, arbitrators may apply mandatory rules, but the decision is subject to subsequent court control. A violation of such rules or the public policy rules may be a reason for a refusal of the enforcement or the annulment of an award. Similarly, the fact that a dispute between the parties involves a decision on the issue pertaining to fundamental principles of EU law does not imply the subject-matter's non-arbitrability.[113]

Certain issues of corporate law, in particular a decision on the validity of a resolution of a company cannot be dealt with in arbitration. In its decision of 10 November 2006, the Supreme Court held that a request for the annulment of a decision taken at the general meeting of shareholders regarding the dismissal and appointment of the management of the company is not a legal consequence of which the parties can freely dispose. In other words, a dispute concerning the validity and nature of such decisions taken on behalf of a legal person are legal consequences of which the parties cannot freely dispose. The reason is that such decisions have legal effects for the legal person itself, as well as for third parties (i.e., they have *erga omnes* effect). However, other disputes such as contractual claims arising from or related to the dissolution of a company may be resolved by arbitration.[114]

As for disputes arising from insolvency proceedings, it is clear that claims on behalf of the estate are arbitrable, as well as claims against the estate which are not aimed at payment from the bankruptcy estate. It used to be controversial whether claims that seek payment from the estate and that have been contested in verification in bankruptcy proceedings were arbitrable when no arbitral proceedings are pending.[115] The prevailing view[116] was that Article 122 of the Bankruptcy Act neces-

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[111] V Lazić, 'Arbitration Law Reforms in the Netherlands: Formal and Substantive Validity of an Arbitration Agreement', vol 11.1 *Electronic Journal of Comparative Law* (May 2007), 6. (http://www.ejcl.org/111/art111-16.pdf).

[112] P Snijders, Art 1020, n 5.

[113] Decision of the Supreme Court (*HR)* of 21 March 1997 (*Eco Swiss/Benetton*), *NJ* 1998, 207. See also the decision of the Court of Justice of the European Communities of 1 June 1999 (*Eco Swiss/Benetton)* (C-126/97).

[114] Decision of the Supreme Court (*HR*) of 26 November 2010, *Silver Lining Finance v Perstorp Waspik*, *NJ* 2011, 55.

[115] Arbitral proceedings concerning a claim for payment against the estate, which are pending at the moment of the commencement of bankruptcy, may be continued after such claim is contested in the bankruptcy verification proceedings (Art 29 of the Bankruptcy Act).

[116] Snijders, Art1020, n 6; M Ynzonide, 'De invloed van faillietverklaring op arbitrage', (1991) 6008 *Weekblad voor privaatrecht, notariaat en registratie (WPNR*) 390, 394. P Sanders, 'Arbitrage en faillissement (1988) 6 Tijdschrift voor arbitrage (TvA) 169. Generally, on the summary of the positon in the legal writings in the Netherlands, see Lazić, *Insolvency Proceedings and Commercial Arbitration*, 165. V Lazić, 'Arbitration and Insolvency Proceedings: Claims of Ordinary Bankruptcy Creditors', (1999) 3 *Electronic Journal of Comparative Law*, 8 http://www.ejcl.org/33/art33-2.html.

sarily implied the non-arbitrability of contested claims for payment (verification disputes).[117] Other interpretations were also maintained.[118] After the decision of the Supreme Court of 16 April 1999,[119] it is generally assumed in the literature that claims disputed in the verification procedure are arbitrable in the Netherlands. The above-mentioned decision of the Supreme Court did not deal with the effect of an arbitration clause. Instead, effect was given to a forum-selection clause providing for a foreign court's jurisdiction. In the legal literature it is assumed that the same approach will be taken with respect to arbitration agreements.[120]

Yet, a comparative view of the interaction between insolvency and arbitration illustrates that insolvency laws in general may attempt to modify an absolute rule on the generally binding nature of pre-bankruptcy arbitration agreements or rather to adjust it to the particular nature of insolvency procedures.[121] The enforceability of arbitration agreements in some jurisdictions may be affected by considerations such as the nature of a claim, a general fragility of the debtor's estate and the presence of other parties in the insolvency, as well as the likely substantial costs of arbitration. Besides, in circumstances outside of insolvency, the courts may also search for ways to modify the hard and fast rule on the binding nature of arbitration agreements. As already indicated *supra*, the Dutch courts have in certain circumstances "adjusted" the generally accepted rule of the binding nature of an arbitration agreement by applying general rules of contract law on "reasonableness and fairness."[122] Thus, even though it may be expected that the same line of reasoning as applied in the decision of the Supreme Court of 16 April 1999 will also be followed with respect to the enforceability of arbitration agreements, a possibility of adjusting the "hard and fast rule" should not be entirely excluded.[123]

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[117] Sanders, *TvA* 88/6, 169; P Sanders, *Het nieuwe arbitragerecht* (4th edn Kluwer, Deventer 2001) 43; AJ van den Berg, R van Delden and HJ Snijders, *Netherlands Arbitration Law* (Kluwer Law and Taxation Publishers, Deventer/Boston 1993) 33.

[118] HJ Snijders and SL Buruma, *Bouwarbitrage en civile rechter*, Publikatie van de Vereniging voor Bouwrecht, n 23 (Kluwer, Deventer 1995) 50-51.

[119] Decision of the Supreme Court (*HR)* of 16 April 1999, *NJ* 2001, 1, *Brown v Ultrafin*; *RvdW* 66.

[120] See eg, National Report – the Netherlands, *Handbook International Commercial Arbitration* 17, n 51 and 52 and the literature and case law referred to.

[121] See eg, case law in the United States, illustrating that the courts in the United States have applied various approaches when addressing the enforceability of arbitration agreements in bankruptcy, eg *Hays & Co v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 885 F.2d 1149 (3d Cir. 1989); *In re FRG*, 115 B.R. 72 (E.D.Pa. 1990); *United States Lines, Inc v American Steamship Owners Mutual Protection Association Inc, (In re United States Lines, Inc)* 199 B.R. 465 (S.D.N.Y. 1996), 1997 US Distr. Lexis 1915 (S.D.N.Y. 1997); *In re Mintze*, 434 F.3d 222, 231 (3d Cir. 2006); *In re S.W. Bach & Co.*, 2010 WL 810128, (Bankr. S.D.N.Y. Mar. 10, 2010). *In re D&B Swine Farms, Inc*, 2010 WL 358493, at 4-6 (E.D.N.C. Jan. 23, 2010); *Moglia v Public Employers Ins Co*, 547 F.3d 835, 837 (7th Cir. 2008); *In re Fleming Cos*, 2007 WL 788921, (D. Del. Mar. 16, 2007).

[122] See eg the decision of the Court of First Instance Zierikzee of 19 February 1988 (*Kantonrechter Zierikzee), Tijdschrift voor arbitrage (TvA)* (1998) 147 and the decision of the Haarlem District Court (*Rechtbank Haarlem*) of 11 May 1993*, Tijdschrift voor Arbitrage (TvA)* (1993) 238.

[123] V Lazić, 'Cross-Border Insolvency and Arbitration: Which Consequences of Insolvency Proceedings Should be Given Effect in Arbitration?' in S Kröll, LA Mistelis, P Perales Viscasillas,

3.2.7 Violation of Public Policy (Art. V(2)(b))

A violation of public policy is listed among the reasons for which an arbitral award may be set aside (Art. 1065(1)(e) of the Act) and for which enforcement may be refused (Arts. 1063(1) and 1076(1)(B) of the Act). It also presents a reason to refuse the recognition and enforcement of a foreign arbitral award under Article V(2)(b) of the Convention.

This exception is usually restrictively applied by the judiciary in the Netherlands, particularly in the context of international arbitration. If the application of a particular provision results in a decision which would violate public policy according to internationally accepted standards, such an award may be set aside and its enforcement may be refused in the Netherlands.

With respect to disputes involving consumers, even when no special regulation was to be found in statutory arbitration law, the courts have often ensured that the rights of a weaker party are protected, thereby relying on the relevant provisions of civil law.[124]

A violation of public policy applies both in a procedural sense as well as in a substantive sense. As to the latter, an award could be considered to be contrary to public policy if it was found, for example, that the subject-matter of the dispute was not capable of settlement by arbitration. Regarding the procedural issues, only a violation of the fundamental principles of procedural law, such as violations of due process and the equal treatment of the parties, would be considered to be contrary to public policy.

The fact that a particular mandatory provision has been violated in and of itself would not necessarily result in the violation of public policy. Yet an infringement of mandatory provisions of EU law, such as competition rules, will be deemed to be contrary to public policy.[125]

The Act does not expressly make a distinction between domestic and international public policy. Yet the courts in the Netherlands have accepted the doctrine of international public policy, which is usually more narrowly construed than the pub-

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V Rogers (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Liber Amicorum Eric Bergsten, Kluwer Law International 2011) 343.

[124] Dutch courts have denied effect to an arbitration clause in certain circumstances by applying the relevant provisions of the Civil Code. Thus, an arbitration clause contained in the general conditions was considered unacceptable as being unreasonably onerous to the other party by the application of Art 6:233 of the Civil Code. See eg decision of the Supreme Court of 23 March 1990, *Botman/Van Haaster*, (*HR* 23 maart1990) *Nederlands Jurisprudentie* 1991, 214; Decision of the Court of First Instance Zierikzee of 19 February 1988 (*Kantonrechter Zierikzee)*, *Tijdschrift voor Arbitrage* 1988, 147. It should be emphasized that these decisions relate to the "indirect enforcement of arbitration agreements and referral to arbitration", and not to the enforcement of an arbitral award.

[125] Court of Justice of the EC, 1 June 1999 (C-126/97) *(ECO Swiss/Benetton) NJ* 2000, 339, also published in *Yearbook Commercial Arbitration* Vol XXIV (Kluwer Law International 1999) 629 *et seq.*

lic policy exception in domestic cases.[126] For example, an award rendered by an even number of arbitrators in the Netherlands or an award without reason is considered to be contrary to ("domestic") public policy. As such it may be set aside by the Dutch courts. However, a foreign award in enforcement proceedings in the Netherlands is subject to a different standard so that criteria pertaining to "international public policy" will apply. Consequently, such an award may be enforced in the Netherlands if it is valid under the law of the country where it was rendered.[127]

The public policy exception under Article 1076 also includes the question of whether a dispute is capable of settlement by arbitration. Namely, the non-arbitrability of the subject-matter is not a separate ground for a refusal of the recognition or enforcement under Article 1076, the national law on the enforcement of foreign arbitral awards.

As for violations of public policy in the procedural sense, only severe violations of fundamental requirements of procedural law, such as the right to be heard, are likely to violate "international public policy." The relevant case law relating to the setting aside of awards because of a violation of the requirement of due process and fair trial[128] is not discussed in this context, considering that they do not deal with the question of the "recognition and/or enforcement" of foreign awards.

4 PROCEDURAL ISSUES

4.1 Requirements for Personal Jurisdiction Over Award Debtor in Enforcement Action

The provisions of Articles 985-990 of the Code of Civil Procedure, which relate to the enforcement of foreign judgments, apply to the enforcement of arbitral awards. Under Article 1075 (relating to enforcement under a treaty) these provisions apply only to the extent that the treaty does not contain provisions deviating therefrom. Just as under the Act of 1986, Articles 1075–1076 of the Act of 2015 both expressly provide that Articles 985 to 991 of the Code of Civil Procedure (now Arts.

[126] It was also the intention of the legislator to develop the concept of "international public policy" by case law as expressed in the legislative history (*Memorie van toelichting*).

[127] Sanders and Van den Berg, Art 1076, n 124. See also, decisions of the President of the District Court/Court of First Instance (*Rechtbank)* of Breda of 8 March 1995 and the Court of Appeal (*Gerechtshof*) 's Hertogenbosch of 14 July 1995, *Sneek Hardhout Import BV v Karl Schlüter KG (GmbH & Co.)*, excerpt in *Yearbook Commercial Arbitration* Netherlands No. 20 (Kluwer Law International 1993), where the Dutch Courts enforced an award rendered by two arbitrators in Germany, even though an award rendered in the Netherlands by an even number of arbitrators would be set aside as being contrary to public policy. See also, the Decision of the Court of Appeal The Hague of 3 May 1962, *S&S* (*Schip &Schade*) 1963, 42.

[128] See eg, Decision of the Supreme Court of 24 April 2009, *IMS v Modsaf*, *NJ* 2010, 171; Supreme Court 25 May 2007, *Spaanderman v Anova Food BV*, *NJ* 2007, 294.

985–990)[129] apply to the enforcement of foreign arbitral awards. According to Article 985 of the Code of Civil Procedure, the District Court where the opposing party has his domicile or the District Court where the petitioner seeks enforcement is competent to deal with a request for enforcement. As already explained in section 1.1, Article 1075 and 1076 have been slightly amended the Act of 2015. The changes can be summarised as follows: when applying the provisions of Article 985-991 of the Code of Civil Procedure, the Court of Appeal will be competent instead of the District Court and the time limit for the application in appeal to the Supreme Court will be three months. Besides, both provisions refer to Article 261-291 of the Code of Civil Procedure relating to general rules on the allocation of jurisdiction, the service of documents and the conduct of proceedings.

4.2 Prescription Period Applicable to Enforcement Action

According to Article 3:324 of the Civil Code, the right to apply for enforcement of an arbitral award must be exercised within twenty years. Thus, within this prescription period a party is entitled to enforcement in the Netherlands, regardless of the fact that the time-limit for the enforcement in the country where the award was rendered has expired.[130]

4.3 Other Bases on Which Court May Decline to Entertain Enforcement Action

There is no evident legal basis for a court to decline even to entertain an action to enforce a foreign arbitral award. It is conceivable that a request for enforcement against a company in insolvency in the Netherlands may be dealt with only within and subject to the insolvency proceedings.

As indicated above, a possible expiration of a time-limit in the country of origin is irrelevant in this respect. The decision of the President of the District Court of 10 May 2012 is illustrative, where it was held, *inter alia*, as follows:

"[26] To the extent that NRSL also argues that the arbitral award can no longer be enforced in the Netherlands, because the right to enforce the arbitral award in the Russian Federation has expired, this objection fails. Even if it is correct that the right of Kompas to enforce the arbitral award in the Russian Federation has expired,

[129] Article 991 was deleted in 1992, but the text of Articles 1075 and 1076 has not yet been adjusted.

[130] President of the District Court of Amsterdam (Judge in summary proceedings; Provisions Judge; '*Voorzieningenrechter*'), 482043/KG RK 11-362, 10 May 2012, *Kompas Overseas Inc v OAO Severnoe Rechnoe Parokhodstvo (Northern River Shipping Company)*, excerpt in *Yearbook Commercial Arbitration 2012 – Vol XXXVII*, Netherlands No 42 (Kluwer Law International 2012) 277 – 281, para [26].

this does not mean that this right has expired also under Dutch law. Pursuant to Article 3:324 of the Civil Code, the right to seek enforcement of an arbitral decision expires after twenty years."

5 ASSESSMENT

5.1 Evaluation of the New York Convention in Practice

The Convention is generally not criticised in the Netherlands. In fact, in many respects especially regarding the written form, the Convention has become "redundant", as the national arbitration law in the Netherlands is generally more liberal than the Convention. In other words, any deficiency of or an "outdated" regulation under the Convention (e.g., the written form requirement) is already or is likely to be remedied by corresponding provisions in national law (e.g., the enforceability of an interim award under the Act of 2015).

The only exception is the interpretation of the conditions for enforcement under Article 1076 and Article 1075 of the Act in connection with Article III of the Convention. This has been explained in the context of Article V(1)(e) of the Convention under section 3.2.5. and 4.4.

Except for the Supreme Court decision of 25 June 2010 (the *Yukos* case), there are no other decisions of the Dutch Supreme Court in which the Convention has been incorrectly applied. But the criticism of the reasoning of the Amsterdam Court of Appeal,[131] as well as the decision of the Supreme Court[132] in the *Yukos* case, need to be reiterated. The criticism of the latter concerns not only the interpretation of national Dutch law on enforcement, but also the interpretation of Article III of the Convention.

In general, the Dutch courts are very well versed in applying the Convention. The exceptions are the decisions on the law applicable to arbitration agreements and the isolated decision of the Amsterdam Court of Appeal of 28 April 2009, and the decision of the Supreme Court in the same case relating to the enforcement of annulled awards and the right to appeal/recourse in cassation under Dutch law respectively. With respect to the law applicable to arbitration agreements, an express provision in the Act of 2015 will bring clarification. The wording of Article 166 inserted in Book Ten under the Act of 2015 and 2014 Proposal presents a significant improvement compared to formulations suggested in previous drafts.[133] Hopefully, the recommendation of the UNCITRAL in 2006 that the more-favourable-right provision of

[131] For a criticism of this decision, see AJ van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia', *Journal of International Arbitration*, (Kluwer Law International 2010) Vol 27 Issue 2 179-198.

[132] For a criticism of the decision of the Dutch Supreme Court, see AJ van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Dutch Supreme Court of 25 June 2010, 28 *Journal of International Arbitration*, Issue 6 (2011) 617-641.

[133] See section 2.1.

Article VII(1) of the Convention applies also with respect to arbitration agreements in the context of Article II(2) will be followed by the Dutch courts.

5.2 Proposed Reforms

The provision of Article V(1)(e) has been the source of considerable debate in many jurisdictions, even though it is often stated that the problem of enforcing an award that has been set aside occurs relatively infrequently. The decisions of the Amsterdam Court of Appeal in the *Yukos* case[134] is illustrative. The same is true in other jurisdictions (e.g., in the literature the extensively discussed cases in France, in particular following the decisions of the French Court in *Hilmarton*,[135] as well as the *Chromalloy* case[136] in the United States).

Taking into consideration the controversial nature of the decisions enforcing annulled awards, as well as deficiencies in the legal reasoning that may thereby be applied, it may be appropriate to consider revising the Convention. The supplementary nature of Article IX(2) of the 1961 European (Geneva) Convention in the context of Article V(1)(e) of the Convention may serve as an example of how to deal with the problem, as suggested by the leading commentator on the Convention n A. J. van den Berg in the "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards."[137]

The decision of the Dutch Supreme Court of 25 June 2010, frequently referred to in the present Report, illustrates that problems can also arise in connection with the interpretation of Article III of the Convention.

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[134] Discussed under 3.2.5.

[135] See eg *Hilmarton Ltd v Omnium de traitement et de valorisation (OTV)*, Cass. Civ. 1re, 23 March 1994, Revue de l'arbitrage (1994) 327, excerpt in XX Yearbook Commercial Arbitration, Kluwer Law International (1995) 663 et seq.; see also the subsequent decisions, *Ministry of Public Works of Tunisia v Société Bec Frères*, 24 February 1994, Cour d'appel de Paris, Revue de l'arbitrage (1995) 275 et seq., excerpt in XXII Yearbook Commercial Arbitration, Kluwer Law International (1997), France no 25, 682 et seq.; *Chromalloy Aeroservices v Arab Republic of Egypt*, Cour d'appel de Paris, 14 January 1997, Mealey's International Arbitration Report, 12 (1997) 4, B-1 (stating, inter alia, that the application of Art V 'must then be set aside' B-2); *Société PT Putrabali Adyamulia v SA Rena Holdings*, Cour de Cassation, 29 June 2007, excerpt in XXXII Yearbook Commercial Arbitration, France no 42 (Kluwer Law International 2007).

[136] *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C. 1996); Mealey's International Arbitration Report 11 (1996) 8, C-54.

[137] Text and commentary are available at www.newyorkconvention.org. It is summarised in AJ van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia', *Journal of International Arbitration* (Kluwer Law International 2010 Vol 27 Issue 2) 195-198.

REFERENCES

- P Sanders, *Het nieuwe arbitragerecht*, 4th edn (Kluwer Deventer, 2001).
- H J Snijders, *Nedrelands Arbitragerecht*, 4th edn (Kluwer Deventer, 2011).
- 'National Report – The Netherlands', in J Paulsson (ed) *International Handbook on Commercial Arbitration* (2012).