

New Arbitration Act enters into force as of 1 January 2015

Introduction

On 1 January 2015, the new Arbitration Act has entered into force in the Netherlands. The present Arbitration Act dates from 1 December 1986 and is already 28 years old. Although this Act has served its purpose well all this time, it was in several respects up for renewal. The Explanatory Memorandum lists as principal reasons the modernisation of Dutch arbitration law, the codification of *best practices*, increasing the faith put by the consumer in arbitration, reducing the costs for parties, restricting the procedure for setting aside awards to one fact-finding instance, and making the Netherlands a more interesting venue for international arbitral proceedings. Below, we will briefly address the (other) major changes of the Act.

General

The new Arbitration Act stipulates, more strictly than is the case in the existing Act, which provisions are substantive law and which are mandatory law. This is expressed by stating in the substantive law articles that parties may also reach agreements in departure from the Act. Only where it is not provided that the parties may reach agreements in departure from the Act, is the provision mandatory.

The new Act retains the uniform approach, i.e. one regulation for both national and international arbitral proceedings.

It should be noted that four issues are not regulated in the new Act: the confidentiality of arbitral proceedings, a provision allowing to review the validity of resolutions passed by corporate bodies by arbitration, quality requirements stipulated for arbitrators and secretaries, and the exclusion of liability of the arbitrator, secretary, or arbitration institute. Still, these are all matters that parties may agree separately in arbitration agreements, except for the arbitrability issue.

Ordinary court and arbitration agreement

If a dispute in respect of which an arbitration agreement was concluded is brought before the ordinary court, either party may invoke by way of defence the existence of this agreement (Articles 1022 and 1074 Dutch Code of Civil Procedure, "DCCP"). The ordinary court will then determine, further to such appeal, whether the arbitration agreement is indeed valid. Article 10:166 Dutch Civil Code is new and stipulates which substantive law governs the question whether the arbitration agreement is valid. An arbitration agreement will be substantively valid, if it is valid under the law that the parties chose as governing law, or under the laws of the venue of arbitration, or, if the parties have not agreed a choice of law, under the law that governs the legal relationship that is the object of the arbitration agreement.

In addition, by deleting the phrase 'by one or more arbitrators' in Article 6:236(n) Dutch Civil Code, the inclusion of an arbitration clause in general terms and conditions is blacklisted. As a result, invoking an arbitration clause included in general terms and conditions against a consumer is held to be unreasonably onerous and thus voidable. This may be avoided by the user of the general terms and conditions (1) concluding a separate arbitration agreement with the consumer, allowing the consumer to specifically opt for arbitration, or (2) offering the consumer a period of at least one month to opt for the court that has jurisdiction according to the law to settle the dispute (Article 6:236(n) Dutch Civil Code).

Notwithstanding the arbitration agreement, a party may still ask the ordinary court to take protective measures and to provide injunctive relief and provisional evidentiary measures (see Articles 1022a DCCP and 1022b DCCP). The same holds for arbitral proceedings conducted

outside the Netherlands (Articles 1074a and 1074b DCCP). The new Act does provide, however, that the court will *solely* accept jurisdiction if the requested decision may *not* or *not timely* be obtained by way of arbitration (Article 1022c DCCP and Article 1074d DCCP).

In arbitral proceedings parties may invoke the lack of jurisdiction of the arbitral tribunal on the ground that there is no valid arbitration agreement (Article 1052(2) DCCP). If and in so far as the arbitral tribunal subsequently declines jurisdiction on the ground of absence of a valid arbitration agreement, the ordinary court will have jurisdiction to hear the case. What is new in respect of an arbitral tribunal declining jurisdiction on another ground than the absence of a valid arbitration agreement (for instance if the tribunal is not composed in accordance with what was agreed), the arbitration agreement will nevertheless remain in force, unless the parties have agreed otherwise (Article 1052(5) DCCP).

Arbitrators

Articles 1026 to 1029 DCCP have regard to the appointment of arbitrators and the discharge of their mandate (*ontheffing van de opdracht*). New is that the preliminary relief judge (the *voorzieningenrechter*) will only appoint the missing arbitrator(s) if no appointment has been made within three months of bringing the arbitral proceedings (Article 1027 DCCP) and that in the event of discharge of their mandate (in the event of an unacceptably slow execution of the instruction) the jurisdiction of the regular court will no longer be restored and the instruction of the arbitrators is not terminated. In other words: new arbitrators may handle the case.

The challenging of arbitrators is provided for in Articles 1033-1035 DCCP. New is that the arbitrators' obligation to disclose will also apply during the arbitral proceedings (and not only at their appointment) (Article 1034(3) DCCP). Also new is the possibility of *institutional* challenge, i.e. arbitrators may also be challenged by an independent third party (not being the *voorzieningenrechter*), for instance by an arbitration institute (Article 1035(7) DCCP).

Arbitral proceedings

Article 1036 DCCP contains general rules for arbitral proceedings. It provides, among other things, that the arbitral tribunal shall ensure that no unreasonable delays occur and that the parties avoid unreasonable delays as well.

Articles 1038a to 1038d DCCP are new and provide rules for the written phase of the arbitral proceedings, like the statement of claim, the statement of defence, the counterclaim, change of (counter) claim, and oral clarifications offered by the parties.

Articles 1039 to 1043 DCCP have regard to evidence. Article 1039 DCCP concerns evidence in general. Pursuant to the first paragraph, the arbitral tribunal has discretion as regards the furnishing of proof, the admissibility of evidence, the burden of proof and the assessment of the evidence. Pursuant to Article 1040(2) DCCP the arbitral tribunal may, either at the request of one of the parties or of its own accord, order the party that has these at its disposal to allow inspection or provide copies or extracts of certain documents that have a bearing on the dispute, unless the parties have agreed otherwise. The arbitral tribunal will stipulate the conditions subject to and the manner in which inspection, or copies or extracts are to be provided.

Under the new Act it also becomes possible to grant provisional relief in pending arbitral proceedings (Article 1043b(1) DCCP). In addition, if the parties have so agreed, provisional relief may also be granted in separate arbitral proceedings or in summary arbitral proceedings (Article 1043b(2) DCCP).

Pursuant to the revised Article 1046 DCCP, parties may also ask a third party, rather than the *voorzieningenrechter* of the Amsterdam District Court, to order a joinder of arbitral proceedings. This third party will usually be an arbitration institute. By offering this possibility, it will

henceforth be possible to join arbitral proceedings pending *outside* the Netherlands with arbitral proceedings pending in the Netherlands.

The new Act includes a specific provision concerning forfeiture of rights. A party that has appeared in arbitral proceedings is obliged to lodge without unreasonable delay an objection with the arbitral tribunal, with a copy to the opposite party, as soon as it is aware or ought to be aware of an act or omission in breach of the arbitration rules, the arbitration agreement, or an order, decision, or measure given by the arbitral tribunal. If a party fails to timely lodge an objection, it forfeits the right to subsequently invoke this, either in arbitral proceedings or before the ordinary court (Article 1048a DCCP).

Article 1072b DCCP provides for the possibility to use electronic means. For instance, case documents may be filed electronically and the award may be drawn up and signed electronically.

Arbitral award

New is that the parties may agree, after having instituted arbitral proceedings, that the arbitral award need not be substantiated (Article 1057(5)(c) DCCP).

The requirement of having to file the arbitral award is abolished. Filing the award is henceforth only required if the parties have so agreed (opt-in). If the parties have not agreed to the filing of the award, the time periods are effective as of the day on which the award is transmitted. The award is deemed to have been transmitted four weeks after the date of the award (Article 1058(2) DCCP).

Arbitral appeal

Parties may agree the possibility of appeal in arbitral proceedings. Usually, this is done by declaring arbitration rules applicable that provide for this. The new Act includes a separate Section for arbitral appeal (Articles 1061a-1061l DCCP).

Enforcement of the arbitral award in the Netherlands

Articles 1062 and 1063 DCCP regulate the enforcement of arbitral awards rendered in the Netherlands. Parties require leave from the ordinary court before they may enforce an arbitral award. In principle, this is an *ex parte* procedure that takes place before the preliminary relief judge (*voorzieningenrechter*). The principal change in Article 1062 DCCP is that by referring to an 'arbitral award', leave may be granted to enforce both a full and a partial final award and an enforceable interlocutory award. This may for instance be an *interlocutory* award containing an order for costs. The *voorzieningenrechter* of the court in the district where the arbitral proceedings take place has jurisdiction to grant the said leave.

The revised Article 1063(1) DCCP widens the grounds for refusal. The *voorzieningenrechter* may refuse to grant leave for enforcement if it concludes, following a '*prima facie* investigation' that the award will most likely be reversed on (1) one of the *grounds for setting aside* (Article 1065(1)(a-e) DCCP) or (2) one of the *grounds for revocation* (Article 1068(1) DCCP) (see Article 1063(1) DCCP).

The recognition and enforcement of a foreign arbitral award is regulated in Article 1075 DCCP (by way of a treaty) and Article 1076 DCCP (if there is no treaty). Both concern *inter partes* proceedings before the court of appeal (where this was formerly heard by the *voorzieningenrechter* of the district court, just as in respect of granting leave to enforce a Dutch arbitral award).

Setting aside and remission

New is that the setting aside proceedings are restricted to one fact-finding instance. The claim for setting aside must be brought before the court of appeal (Article 1064a(1) DCCP). Parties may exclude the possibility of appeal in cassation, unless the dispute involves a consumer (Article 1064a(5) DCCP).

Article 1065a DCCP is entirely new and regulates *remission*, i.e. referring the case back to the arbitral tribunal. The possibility of remission ensures that setting aside an arbitral award really is an *ultimum remedium*. Pursuant to Article 1065a(1) DCCP the court of appeal may, at the request of either party or on its own motion, suspend the setting aside proceedings for a period to be determined by it, to enable the arbitral tribunal to undo the ground for setting aside, either by reopening the arbitral proceedings or by taking such other measure as the arbitral tribunal deems fit. The court of appeal has discretionary power in this respect.

The revised Article 1065(5) DCCP widens the possibility for partial setting aside.

Article 1067 DCCP provides that as soon as the judgment in which the arbitral award is set aside has become final, the jurisdiction of the ordinary court revives upon the setting aside, on the ground of absence of a valid arbitration agreement. Unlike what was formerly the case, the arbitration agreement remains in force in the event of setting aside on another ground, unless the parties have agreed otherwise.

Transitional law

Pursuant to Article IV(1) the new Act will be applicable to arbitral proceedings that are pending on or that are brought after 1 January 2015. Pursuant to Article IV(3) the new Act is also applicable to cases that are brought before the ordinary court (by issuing a summons or submitting an application) where these have regard to arbitral proceedings that are pending on or that are brought after 1 January 2015. The other provisions of the transitional law (Article IV(2) and (4)) make clear that in all other instances the former Arbitration Act continues to be applicable.

For more information about the new Dutch Arbitration Act, please contact:

Marielle Koppenol-Laforce
Dirk Knottenbelt
Isabelle van den Nieuwendijk