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COUR PERMANENTE D'ARBITRAGE

PERMANENT COURT OF ARBITRATION

Door Reg. DSC kopie
aan DW

H.E. Mr. Ivo Opstelten
Minister of Security and Justice
Postbus 20301
2500 EH Den Haag

BY MAIL,
FACSIMILE (5 PAGES): 070 370 79 00,
AND INTERNET SUBMISSION

May 31, 2012

RE: REVISION OF THE NETHERLANDS ARBITRATION ACT

Dear Minister,

I write to you on behalf of the Permanent Court of Arbitration (the "PCA") regarding the proposed draft for the revision of the Netherlands Arbitration Act (the "Draft"). Based in The Hague and established in 1899 to facilitate the resolution of international disputes, the PCA administers arbitration proceedings in disputes involving various combinations of States, State entities, intergovernmental organizations, and private parties. Arbitrations administered by the PCA include many of the largest arbitrations seated in the Netherlands.

As a general matter, the PCA agrees that the current Netherlands Arbitration Act, adopted in 1986, should be improved. I also concur with the goals of modernization and the reduction of costs that stand as guiding principles behind the proposed revision. Nevertheless, I am concerned that a number of provisions of the current Draft may negatively impact arbitrations administered by the PCA and will, if adopted, reduce the attractiveness of the Netherlands as a place for the conduct of international arbitration. Equally, I fear that the proposed Draft misses the opportunity to incorporate a number of important best practices into Dutch law.

In the course of administering arbitration proceedings, the PCA is frequently consulted by parties and tribunals regarding the potential of the Netherlands as a place of arbitration. Arbitrations before the PCA are commonly based on international treaties that, unlike commercial contracts, tend not to specify a place of arbitration. In such cases, the place of arbitration must be determined by the parties or the tribunal, once arbitration is commenced. In making this decision, parties routinely consider and compare the arbitration laws of different jurisdictions, including the Netherlands.

In the PCA's experience, parties to an *international* arbitration proceeding will seek a place of arbitration with legislation that is simple, clear, and in line with practices with which they may already have experience. To facilitate international proceedings, mandatory provisions of the law should be kept to the absolute minimum necessary to ensure due process, lest an award be inadvertently annulled as a result of technical noncompliance with an unfamiliar provision of law. Against this background, I am concerned that in developing the proposed Draft, its proponents have relied inordinately on the particular context and practice of Dutch commercial arbitration. While I am confident that such revisions are well-intentioned, I fear that certain provisions of the revised Draft may produce unintended results in international arbitration proceedings with their legal seat in the Netherlands.

Having reviewed the proposed Draft in detail, I will highlight some of the issues that pose the greatest concern from the perspective of the PCA. I would be grateful if you would treat these comments as confidential within the confines of the revision process.

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1. Mandatory Provisions

Mandatory provisions constitute the most important element of any arbitration act. Whereas other provisions of the law provide only a default rule, to be applied unless the parties agree otherwise, noncompliance with mandatory provisions may result in the annulment of an award by the courts of the place of arbitration – irrespective of the terms of the parties' agreement to arbitrate – or in a refusal by the courts of another State to enforce the award under the terms of the New York Convention.[1] It is accordingly critical that mandatory provisions of the Draft be clearly identified.

In this respect, I am mindful that the working group producing the Draft has sought to clarify which provisions will be mandatory, principally by specifying expressly the provisions from which the parties are free to deviate. While I agree that the current Arbitration Act is critically in need of improvement in this area, it is my view that the proposed revision remains unnecessarily complicated, and does not resolve the problem of uncertainty as to which provisions are mandatory. As currently proposed, the Draft requires practitioners to identify certain expressions (*e.g., may, shall, unless the parties agree otherwise*) in every provision in order to determine whether compliance is mandatory. This approach relies upon an appreciation of linguistic nuance that international counsel may well lack and, in a law comprising over 70 separate articles, may easily result in a mandatory provision being overlooked.

A far better and simpler approach can be found in other jurisdictions, including the formulation used by the 1996 English Arbitration Act, which provides a schedule listing in concrete terms the mandatory articles. A simple provision identifying the mandatory provisions of the Dutch Act (*e.g.*, "The following provisions of this Act shall be mandatory: article [w], articles [x-y] and article [z]") would avoid unnecessary complication and would be of great assistance to counsel as they consider the Netherlands as a place of arbitration. In reviewing the mandatory provisions of the Draft, I would further encourage the Ministry, as noted in several instances below, to consider whether all of the provisions currently categorized as such should indeed remain mandatory.

2. Education Requirements for Arbitrators

Article 1023(2) of the proposed Draft introduces, for the first time, the requirement that at least one member of an arbitral tribunal have "the Degree of Master of Laws or a comparable degree," or otherwise be assisted by a legal secretary with such qualifications. In the PCA's view, this requirement constitutes an unnecessary additional burden and unduly restricts the autonomy of parties to structure an arbitration as they see fit. I am also concerned that this requirement may prove particularly problematic for international arbitrators and counsel.

As it has been explained to me, the purpose behind this additional requirement is to rectify certain problems that may have arisen in the field of Dutch construction arbitration, where arbitrators with a technical, rather than legal, background are common. In the PCA's experience, there are many highly competent arbitrators in technical fields who have never received a formal legal education and have no difficulty in properly managing proceedings. Applied to such arbitrators, this new requirement could produce the absurd situation of an award being annulled on a technicality, notwithstanding that the proceedings may otherwise have been executed flawlessly. International parties and arbitrators will be particularly vulnerable due to lack of awareness, as such requirements are not present in the laws of

[1] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), Article V(1), June 10, 1958, 330 UNTS 38 ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if . . . (d) 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*;" (emphasis added)).

other major arbitral jurisdictions. If any specific type of education is required in the context of particular arbitrations, it should be for the parties to determine or for arbitral institutions to require in their rules – not for the law to demand indiscriminately of all arbitration proceedings.

Additionally, the requirement itself is currently unclear when applied in an international context. Although a master of laws is the minimum degree requirement for the practice of law *in the Netherlands*, there are many jurisdictions in which a bachelor's degree suffices for legal practice and many senior international arbitrators who may not formally meet the requirement. Although the proposed Draft also permits "a comparable degree," it remains unclear what international qualifications would meet this standard. For parties evaluating multiple potential jurisdictions in which to seat an arbitration, uncertainty alone serves to diminish the attractiveness of the Netherlands as a potential seat.

3. *Challenges to Arbitrators*

Challenges to the independence or impartiality of an arbitrator are an unavoidable, although hopefully rare, aspect of the practice of arbitration, and the arbitration legislation of all major arbitral jurisdictions includes some provision to address challenges. Internationally, the approach in many major jurisdictions is for challenges to be resolved through the procedure agreed upon by the parties – typically by the arbitral institution empowered to do so in rules adopted by the parties – or, in default of such agreement, by the courts or other procedure established by law.

In contrast to this international practice, Article 1035(2) of the proposed Draft provides for the President of the District Court to decide on the merits of any challenge to an arbitrator. This provision is now explicitly mandatory. In the PCA's view, this approach runs counter to international best practices and significantly reduces the attractiveness of the Netherlands in comparison to other jurisdictions.

As proposed, the approach taken in the Draft reduces the efficiency of arbitral proceedings. Even if the President of the District Court is able to act promptly upon the receipt of a challenge, the introduction of an additional forum will imply the waste of an important amount of time and resources for the parties, who will likely need to retain additional counsel. This burden is particularly onerous for parties to international arbitrations who are unlikely to have Dutch counsel or be prepared to litigate a challenge in the Dutch language, as recourse to the courts would require.

Further, in the PCA's view, the arbitral institution administering a dispute will consistently be better placed to decide on a challenge, a process that requires a combination of neutrality *and* familiarity with the details of the case. In contrast to the President of the District Court, who will be approaching the matter for the first time, an arbitral institution will already be familiar with the circumstances of the arbitration and of the challenge. While both approaches offer neutrality, only an arbitral institution combines this with the requisite knowledge of the case. In light of this, although the PCA can appreciate the value of a court procedure in default of the parties' agreement (as is the approach taken in the English Arbitration Act), I cannot see that parties to an arbitration taking place in the Netherlands should be disabled entirely from selecting the better option.

Finally, by refusing to allow parties to agree upon an alternate procedure, the proposed Draft casts a cloud on the validity of any arbitration conducted in the Netherlands in which a challenge is decided in accordance with arbitration rules agreed upon by the parties. Many arbitration rules that are widely used in the Netherlands, including the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules") and the Arbitration Rules of the International Chamber of Commerce, include their own provisions for the resolution of challenges. In light of the exceptional nature of the Dutch procedure, international tribunals and parties arbitrating under these

rules may simply assume the applicability of the rules and proceed to resolve a challenge in accordance with the procedure therein, in the process placing the constitution of the tribunal in formal violation of Dutch law.

In light of the foregoing, in the event that the Draft is adopted in its current form, the PCA would not consider that an arbitration under the UNCITRAL Rules should be seated in the Netherlands.

4. Timing of Jurisdictional Challenges

Article 1052(2) of the proposed Draft requires that a party raise any objection to the jurisdiction of the arbitral tribunal on the ground that there is no valid arbitration agreement "before submitting a defense." Like the challenge procedure discussed previously, this provision imposes a mandatory requirement that deviates from the provisions of major international arbitration rules and which may place a tribunal inadvertently in violation of the Dutch act.

In contrast to the Draft provision, Article 23 of the UNCITRAL Rules, as revised in 2010, requires a party to raise objections to jurisdiction by "no later than in the statement of defense," and permits a tribunal to "admit a later plea if it considers the delay justified." A party conscientiously complying with the UNCITRAL Rules may well find its opportunity to raise an objection unexpectedly foreclosed by Dutch law. Equally troubling, a serious jurisdictional defect may well be discovered only late in the proceedings, in which case the proposed Draft would operate to remove the flexibility of the rules, permitting arbitral proceedings to continue under an invalid arbitration agreement without any of the parties being able to raise an objection.

As a general matter, there are good reasons to impose limitations on objections to jurisdiction and many other aspects of arbitral procedure for the sake of efficiency. Mandatory provisions of law, however, should constitute the floor – not the ceiling – to such limitations, imposing only the minimum constraint necessary and leaving stricter requirements for default provisions of law, for the rules of arbitral institutions, or for the parties to agree upon in forming their agreement to arbitrate.

5. Deposit of Awards

Article 1058 of the proposed Draft maintains the current Arbitration Act's requirement that final or partial final awards be deposited with the registry of the District Court of the place where the arbitration is situated. In the PCA's view, this provision constitutes an archaic formality that is not reflected in the legislation of any other major arbitral jurisdiction and which imposes an entirely unnecessary burden on parties and tribunals. While I appreciate that the Draft has added the possibility for the parties to deviate from this requirement, it is the PCA's view that the provision should be eliminated entirely.

As I understand it, the alleged purpose of this requirement is to provide a clear end to the arbitration in the event that a party ceases to participate and cannot readily be located for service of the award. In my view, the burden imposed by the provision entirely outweighs any benefit that might be gained from addressing what is, in the experience of the PCA, a non-existent problem. In the event that a party disappears before the close of the proceedings, the ultimate award may always be served on the last known address of that party, providing constructive, but sufficient, notice of the tribunal's decision. If the Ministry deems some form of deposit system necessary, a better approach would be to provide for the deposit of the award *only* in the event that uncertainty exists as to the contact details of one or more of the parties.

Additionally, in the PCA's experience, the deposit system has been poorly implemented by the registries of the Dutch courts and has proved highly inconvenient for international parties. Problems

with the current system have included difficulties in contacting the appropriate individuals at the registry (sometimes for long periods of time), the apparent absence of restrictions on access to confidential awards after their deposit, the inability of the courts to explain the process for depositing an award in any language other than Dutch, and one instance in which a court registry, unsure of how to proceed, elected to forward the award of another arbitral institution to the PCA. In light of this experience, the PCA is not optimistic that a deposit system would be implemented in an efficient manner, even if it were for some reason deemed necessary.

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In the PCA's view, the Netherlands is a natural jurisdiction for the conduct of international arbitration, combining neutrality, accessibility, excellent services, and a highly-skilled judiciary. Accordingly, the PCA sees the revision of the Netherlands Arbitration Act as an important opportunity to increase the attractiveness of the Netherlands as a place for arbitration by enshrining international best practices and modernizing the somewhat particular features of the current Arbitration Act. We remain available and eager to assist the Netherlands Government with this process and to provide an international perspective on the arbitral process at any juncture at which such input would be appropriate.

In the meantime, please permit me to convey to you the assurances of my highest consideration.

Yours sincerely,

Garth Schofield

Garth Schofield
Legal Counsel