Amsterdam Appeal Court: appeal courts competent to rule on requests for enforcement of foreign arbitral awards

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In *Terra Raf Trans Traiding Ltd and others v Republic of Kazakhstan and others (ECLI:NL:GHAMS:2018:4155)*, the Amsterdam Appeal Court ruled that the Appeal Courts, rather than the District Courts, are competent to rule on requests for enforcement of foreign arbitral awards filed after 1 January 2015. The court further decided to stay the enforcement proceedings pending the outcome of parallel enforcement proceedings before the London High Court.

Speedread

The Amsterdam Appeal Court has ruled that the Appeal Courts, and not the District Courts, have jurisdiction to hear requests filed after 1 January 2015, for recognition and enforcement of foreign arbitral awards. The defendants had argued that the Appeal Court lacked jurisdiction in light of the transitional law of the Dutch Arbitration Act (DAA) as revised from 1 January 2015. However, the court considered that the transitional law did not apply to foreign arbitrations.

According to the court, the fact that a request for enforcement of a foreign arbitral award is only subject to one fact-finding instance, as opposed to two fact-finding instances, does not qualify as a more onerous condition within the meaning of Article III of the New York Convention.

Further, the court dismissed the request for enforcement insofar as it was directed against parties that were not party to the arbitration agreement or the arbitration itself.

Notably, in light of parallel enforcement proceedings before the London High Court, the Amsterdam Appeal Court stayed the proceedings partly to await the decision of the London High Court on a fraud committed in the arbitration.

The decision confirms that the current practice in the Netherlands, is that Appeal Courts have jurisdiction over requests for recognition and enforcement of foreign arbitral awards filed after 1 January 2015, irrespective of the date arbitral proceedings were initiated. However, the reasoning of the Appeal Court seems flawed, as it assumes that the DAA does not apply to foreign arbitration proceedings until a request for enforcement is filed in the Netherlands.

This seems to ignore that the DAA (new and old) contains a number of provisions pertaining to foreign arbitrations even before an application for enforcement is made, for instance in respect of the duty to reject jurisdiction when an arbitration clause is invoked and the ability to apply for attachment of assets to satisfy a foreign arbitral award even before the arbitration is initiated. (*Terra Raf Trans Traiding Ltd and others v Republic of Kazakhstan and others (ECLI:NL:GHAMS:2018:4155) (6 November 2018)*.)

Background

On 1 January 2015, the provisions on arbitration law of the *Dutch Civil Procedural Code* (*Wetboek van Burgerlijke Rechtsvordering*) (the Code) were amended. Prior to 1 January 2015, requests for recognition and enforcement of both Dutch and foreign arbitral awards were to be filed with the District Courts. Only if the request was rejected by the District Court would the applicant have the right to appeal (on questions of fact and law) to the Appeal Court and only if the Appeal Court rejected the request, would the applicant have the right to file a further appeal (on questions of law) with the Supreme Court.

This system remained the same for arbitral awards rendered in the Netherlands, but as of 1 January 2015 Articles 1075(2) and 1076(6) of the Code provide that requests for enforcement of foreign arbitral awards should be filed directly with the Appeal Courts. The provisions on transition to the new arbitration act provide that the old arbitration act remains applicable to arbitrations initiated before 1 January 2015, but does not specify whether this rule applies to both domestic and foreign arbitrations or to domestic arbitrations only, causing uncertainty as to where to file a request for enforcement of a foreign arbitral award resulting from arbitration proceedings initiated before 1 January 2015.

Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) provides:

> "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

Article II and Article IV(1)(b) of the New York Convention provide as follows:

Article II

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of

> the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article IV(1)(b)

...

"(b) The original agreement referred to in article II or a duly certified copy thereof."

Article VI of the New York Convention provides:

> "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

Facts

On 26 September 2017, Terra Raf Trans Traiding Ltd and others (the requesting parties) filed a request for recognition and enforcement of two arbitral awards with the Amsterdam Appeal Court against Kazakhstan, including the National Fund of Kazakhstan, and Samruk, an affiliate of Kazakhstan (jointly the defendants). The request concerned arbitral awards rendered in Stockholm on 19 December 2013 and 17 January 2014.

In May 2018, the defendants separately requested the Appeal Court to stay the proceedings, but the Appeal Court dismissed that request. The defendants subsequently filed a defence, disputing among other things, the jurisdiction of the Appeal Court. The defendants submitted that the transitional law of the Dutch Arbitration Act (DAA) as in force from 1 January 2015, also applies to foreign arbitral awards and provides that the former arbitration act should be applied to arbitral awards issued before 1 January 2015, in order to prevent Dutch enforcement proceedings of foreign arbitral awards being governed by different regimes.

Kazakhstan further argued that the requesting parties committed fraud in the arbitration, as they manipulated the building costs of the LPG installation that was the subject of the arbitration and wrongfully claimed compensation of some USD 116 million in costs. In this regard, Kazakhstan referred to decisions of the London High Court in parallel enforcement proceedings concerning the same arbitral awards.

On 6 June 2017, the London High Court ruled that there was a 'prima facie case of fraud' which was to be dealt with further in the proceedings. In a decision of 11 May 2018, the High Court stated that it expected to render a decision on the fraud issue in 2018. Following disclosure in the English proceedings, Kazakhstan was provided access to 5,600 pages concerning the fraud and was subsequently provided with over 70,000 documents, of which Kazakhstan argued that it had not been able to analyse these in full by the time the hearing in the Dutch proceedings took place. On the basis of these circumstances, Kazakhstan requested that the Amsterdam Appeal Court stay the proceedings.

On 18 June 2018, the National Bank of Kazakhstan filed a defence as well, arguing, among other things, that it should be treated as an interested party and that the request against the National Fund should be dismissed, as the National Fund was not an independent legal entity and its assets belonged to the National Bank.

Decision

The Amsterdam Appeal Court held that it had jurisdiction over the request for recognition and enforcement of foreign arbitral awards and granted a stay of proceedings.

The rule is that the legislation which is in force on the date a request is filed, will apply. As the request for enforcement was filed on 26 September 2017, the new DAA applied. The transitional law of the revised DAA provides that the former arbitration act continues to apply to arbitrations initiated before 1 January 2015. According to the parliamentary explanatory memorandum, this provision aims to prevent an arbitration from being governed by two different arbitration acts. The court ruled that this provision does not apply to foreign arbitrations, as the rules that apply to Dutch arbitrations never applied to such arbitrations in the first place. Therefore, the appeal courts are the competent courts for requests for enforcement of foreign arbitral awards filed on or after 1 January 2015.

Further, the court ruled that, despite Kazakhstan's arguments, Article III of the New York Convention did not change its view. Although a request for enforcement of a foreign arbitral award will now only be dealt with by one fact-finding instance, being the Appeal Court, as opposed to a party seeking enforcement of a Dutch arbitral award having recourse to two fact-finding instances, the District Court and the Appeal Court, this statutory difference will still apply to requests to enforce foreign arbitral awards filed after 1 January 2015. Moreover, according to the court, the fact that a request for enforcement of a foreign arbitral award is only subject to one fact-finding instance does not qualify as a more onerous condition within the meaning of Article III of the New York Convention.

The Appeal Court *ex officio* granted the parties the right to file an intermediate appeal against this jurisdictional decision to the Supreme Court.

The court also dismissed the request for enforcement of the arbitral awards against Samruk, as Samruk was not a party to the arbitration agreement or the arbitration itself. According to the court, Article II and Article IV(1)(b) of the New York Convention prevented it from granting the request for enforcement against Samruk, so that granting the request would also be in violation of the public order. Similarly, the court dismissed the request for enforcement against the National Fund.

The court further ruled that the proceedings should be stayed partly justified by the fact that the requesting parties waited over three and a half years to file the request for enforcement in the Netherlands. According to the court, it made sense to await the judgment in the English proceedings, expected at the end of 2018. The court ordered Kazakhstan to file a further submission in February 2019, following which the requesting parties may respond and a further hearing will be scheduled. The court ruled that in doing so, the requirement to issue a judgment within a reasonable time as referred to in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms would not be violated, nor would Article III of the New York Convention be violated. The court also held that this stay of the proceedings to investigate the arguments, should be distinguished from the limitation of grounds to stay a request for enforcement under Article VI of the New York Convention.

Comment

The decision confirms that the Appeal Courts have jurisdiction over requests for recognition and enforcement of foreign arbitral awards filed after 1 January 2015, irrespective of the date the arbitral proceedings were initiated. The Amsterdam Appeal Court previously ruled similarly in its judgment of 29 May 2018 *(ECLI:NL:GHAMS:2018:1842*), so this appears to be the court's current practice, unless the Supreme Court rules otherwise in the future.

However, the reasoning of the Appeal Court seems flawed, as it assumes that the DAA does not apply to foreign arbitration proceedings until a request for enforcement is filed in the Netherlands. This seems to ignore that the (new and old) DAAs contain a number of provisions pertaining to foreign arbitrations even before the application for enforcement is made, for instance regarding the duty to reject jurisdiction if an arbitration clause is invoked and the ability to apply for attachment of assets to satisfy a foreign arbitral award even before the arbitration is initiated.

It is also questionable whether the Appeal Court was right to hold that it is not substantially more onerous for the applicant to have only one fact-finding instance, instead of two, to argue in favour of enforcement of the arbitral award. However, it would, be for an applicant, and not for the defendant, to make such an argument. After all, Article III of the New York Convention aims to protect against discrimination to the detriment of the applicant only. If the applicant has accepted a limitation of one fact-finding instance by applying to the Appeal Court in first instance, and thus forego one factual instance, the defendant can hardly complain.

Remarkably, the court temporarily stayed the proceedings in light of parallel proceedings in England, even though the enforcement of an arbitral award is a local matter that only has effect in the applicable jurisdiction and parallel enforcement proceedings are not listed in Article VI of the New York Convention as a possible ground for a stay.

Case

Terra Raf Trans Traiding Ltd and others v Republic of Kazakhstan and others (ECLI:NL:GHAMS:2018:4155) (6 November 2018).

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