

Arbitration & ADR - Netherlands

Dutch courts' jurisdiction to enforce arbitral awards

Contributed by [Hogan Lovells International](#)

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Facts

Appeal court decision

Supreme Court decision

Comment

In two recent cases⁽¹⁾ the Supreme Court held that the Dutch courts always have jurisdiction over applications to enforce arbitral awards in the Netherlands, regardless of whether the counterparty has assets in the Netherlands.

Facts

In March 2005 parties entered into a share purchase agreement on the basis of which Çukurova sold its shares in Turkcell Holding AS to Sonera for \$3.1 billion. In the agreement's arbitration clause, the parties waived the right to initiate proceedings to set aside an arbitral award.

In the final award, dated September 1 2011, Çukurova was ordered to pay \$932 million to Sonera because Çukurova did not transfer the shares to Sonera.

Sonera filed a request in, among other countries, the Netherlands to enforce the final award and obtained leave from the district court on March 28 2013. Çukurova appealed.

Appeal court decision

The court of appeal ruled that Çukurova had no cause of action. It held that it was not possible to appeal against leave to enforce a domestic arbitral award in the Netherlands since this would violate Article III of the New York Convention. Article III prohibits "substantially more onerous conditions" in relation to the enforcement of foreign arbitral awards as compared to enforcement of domestic awards. This prohibition means that it is impossible to appeal against leave to enforce an arbitral award.

There are two exceptions to this prohibition:

- if there are grounds to override this prohibition to appeal; or
- if the prohibition to appeal leads to a violation of the right to a fair trial as warranted in Article 6 of the European Convention on Human Rights.

In relation to the first exception, the appeal court rejected the defence that the president of the district court had no jurisdiction to issue the enforcement order since Çukurova had no assets in the Netherlands. The appeal court ruled that in fact the president had jurisdiction because Sonera argued that Çukurova would own assets in the Netherlands at a point in time given its corporate structure.

In relation to the second exception, the appeal court ruled that Çukurova had waived its right to initiate proceedings to set aside the award. The appeal court ruled that Çukurova had not been affected in such a way that the right to a fair trial under Article 6 of the European Convention on Human Rights was violated.

Çukurova filed an appeal in cassation against this decision. Çukurova challenged the appeal court decision that the president did not go outside the scope of Article 1075 of the Code of Civil Procedure when it declared that it had jurisdiction to decide on the request to grant leave to enforce the arbitral award.

Supreme Court decision

The Supreme Court ruled that Dutch courts "always" have jurisdiction on the basis of the Code of Civil Procedure. Article 3 of the code provides that Dutch courts have jurisdiction if the legal proceedings are "otherwise sufficiently" connected to the Dutch legal sphere.

Comment

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The Supreme Court's decision is in line with another recent decision in *NRSL v Kompas*. That case related to the enforcement of an arbitral award to which no treaty applied. The Supreme Court ruled that the case was sufficiently connected to the Dutch legal sphere. According to the Supreme Court, a request to enforce an arbitral award is "by its nature" sufficiently connected to the Dutch legal sphere.

The Supreme Court's advocate general pursued another, more restrictive course in *Sonera v Çukurova* when stating that the president of the district court had jurisdiction on the basis that Sonera (the petitioner) has its domicile in the Netherlands. In that case the Supreme Court also ruled that the president of the district court had jurisdiction because the procedure was "by its nature" otherwise sufficiently connected to the Dutch legal sphere and the Supreme Court used identical wording to that used in *NRSL v Kompas*. The Supreme Court's decision is clear in its result, but somewhat poor in its reasoning since no explanation is given to what "by its nature" means.

The Supreme Court's decision is consistent with Article V of the New York Convention. The convention does not require that the counterparty own any assets at the place of enforcement. If Dutch law were to require this, it would violate the New York Convention.

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Endnotes

(1) Supreme Court, May 1 2015, ECLI:NL:HR:2015:1194; Supreme Court April 17 2015, ECLI:HR:2015:1077.

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