



Arbitration Guide  
IBA Arbitration Committee

# THE NETHERLANDS

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## I. Background

**(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

Arbitration is a frequently used and broadly accepted method of dispute resolution in the Netherlands for both commercial and sector-specific disputes (eg, construction projects). The Netherlands frequently hosts investment arbitrations (often seated in The Hague and administered by the Permanent Court of Arbitration at the Peace Palace, see [www.pca-cpa.org](http://www.pca-cpa.org)). In recent times, the PRIME Finance Institute has been added to the international institutions based in the Netherlands, providing for dispute resolution in, among others, disputes involving standard form contracts published by the International Swaps and Derivatives Association. Since 2015, the City of The Hague has been coordinating efforts for, and investing in, the establishment of a new arbitration hearing center in The Hague.

From a Dutch perspective, the principal advantages of arbitration are considered to be flexibility of procedure, dedication of time and expertise by tribunals, the ease of working with foreign laws, foreign languages and commercial practices as well as enforceability of awards (the latter, in particular, outside the EU).

The Dutch government has recognized the importance of arbitration to the Netherlands and has thus pushed for an amendment of the Dutch Arbitration Act. The amendment (the ‘2015 Act’) came into force on 1 January 2015. The 2015 Act applies to arbitral proceedings that commenced on or after 1 January 2015 and court proceedings relating thereto. The 2015 Act does not provide for a fundamental change of the Dutch Arbitration Act but rather an update of the well-functioning – and still often applicable – Dutch Arbitration Act of 1986 (the ‘1986 Act’). Below, reference is made to the ‘Dutch Arbitration Act’ if no distinction is made between the 1986 and 2015 Acts.

**(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

Most arbitrations are institutional. The leading (international) arbitral institutions are the Netherlands Arbitration Institute (NAI) and the Permanent Court of Arbitration (PCA). The NAI and its arbitration rules are frequently used and have been updated as of 1 January 2015. The NAI provides rules and expertise to both national and international cases. In terms of volume, most (domestic) cases are administered by the *Raad van Arbitrage voor de Bouw* (Arbitration Board for the Building Industry or RvA), which has also updated its arbitration rules as of 1 January 2015. Ad hoc arbitrations are also conducted, including on the basis of the UNCITRAL Rules, by parties seeking the Netherlands as a neutral venue. The Permanent Court of Arbitration in The Hague and the NAI act as appointing authorities under the UNCITRAL Rules.



**(iii) What types of disputes are typically arbitrated?**

Commercial disputes relating to commercial contracts, revision-clauses, joint venture and M&A arrangements and various substantive matters such as energy, distribution, and construction projects.

**(iv) How long do arbitral proceedings usually last in your country?**

NAI proceedings in standard commercial cases generally last about one year. Although the process in arbitration is generally aimed at cost and time efficiency, complex large commercial disputes may last several years. The Dutch Arbitration Act provides for so-called summary arbitral proceedings (*arbitraal kort geding*), which can result in an order and/or an enforceable award in weeks or even days if the case is very urgent. The 2015 Act and the new NAI Rules provide for expanded means to accelerate proceedings.

In addition, parties may opt for fast-track arbitration proceedings on the merits either under the NAI's *Traject Geringe Vorderingen* (TGV) Rules or under Article 14 of the RvA Rules. The TGV provisions apply, in principle, to small monetary claims.

**(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?**

The Dutch Arbitration Act contains no such restrictions. The Act expressly provides that parties are at liberty to be represented by a person of their choosing, and sets no qualitative requirements to arbitrators. However, the NAI Rules do provide for the appointment of a national of a third country as chairman to an arbitral tribunal, if either of the parties to an international arbitration (i.e. arbitrations with parties originating from different countries) so requests.

## **II. Arbitration Laws**

**(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

The Dutch Arbitration Act governs arbitrations seated in the Netherlands. This Act is largely contained in Book 4 of the Dutch Code of Civil Procedure. The law is monistic and thus does not distinguish between national (domestic) and international arbitration, but does contain some provisions (primarily dealing with enforcement) specific to cases seated outside the Netherlands. The 1986 and the 2015 Act are in significant part based on the UNCITRAL Model Law, but also contain deviations from the Model Law regime.



The 2015 Act is effective as of 1 January 2015. The 1986 Act remains in force with respect to both arbitral proceedings commenced prior to 1 January 2015 and court proceedings related thereto.

- (ii) **Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

Making such a distinction has been considered during the process of revising the Dutch Arbitration Act. However, neither the 1986 nor the 2015 Act make such distinction.

- (iii) **What international treaties relating to arbitration have been adopted (eg, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

The New York Convention and Washington Convention have been adopted as have most of the treaties under the Hague Private International Law Conference.

- (iv) **Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?**

No, the applicable substantive law is for the tribunal to decide. Tribunals do refer, however, to general international private law concepts but are not bound by the Dutch conflicts of law rules or to any other conflicts of law rules.

### III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

Arbitration agreements must provide for an unambiguous and unequivocal choice of arbitration (this follows from case law on the European Convention on Human Rights). An arbitration agreement may be entered into verbally but, if contested, it must be proven by a written instrument, including by electronic means.

The 2015 Act contains a more elaborate set of default (i.e., not mandatory) rules governing the structure of arbitral proceedings. If parties wish to deviate therefrom, an arrangement to that effect is required (which may be done by adopting a set of arbitration rules).

Recommended arbitration agreements are provided by the NAI and other arbitral institutions.

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?**

Traditionally, the courts look favorably upon arbitration agreements and the enforcement thereof. This approach is reinforced in an express provision on international private law in the new Dutch Arbitration Act. It is now provided that an arbitration agreement is valid if it is valid under either (1) the law agreed by the parties to apply to the agreement to arbitrate; (2) the law of the seat of the arbitration; or (3) if no choice has been made for the law applicable to the agreement to arbitrate, the law that applies to the legal relationship that is covered by the agreement to arbitrate.

Arbitration agreements involving consumers are subject to particular (*ex officio*) scrutiny by the courts, pursuant to EU case law and regulations. Arbitration agreements may not be enforced if they are not unequivocal in the election of arbitration or have not been entered into voluntarily. In (highly) exceptional circumstances an arbitration agreement may be held incompatible with the principles of reasonableness and fairness. If the parties have agreed to summary arbitral proceedings, state courts addressed in contravention of such agreement will decline to accept jurisdiction, except for highly urgent matters where an award cannot be expected quickly enough through summary arbitral proceedings.

The 2015 Act provides that arbitration agreements included in general conditions not to be binding on consumers, if such consumers are not given the right to elect to go to the regular state courts instead (subject to a one month limitation period).

- (iii) **Are multi-tier clauses (eg, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

Multi-tier arbitration clauses are prevalent and may include all common forms of dispute resolution (as mentioned in the question posed). Adjudication, however, is not a concept with a defined legal meaning in Dutch law. Dispute Review Boards are rarely provided for, except in some very large construction projects. The negotiation and mediation stages of a multi-tier clause can be the subject of a claim for specific performance, which claim is not likely to be granted. Depending on the wording of the arbitration agreement, such provisions may not prevent a tribunal from accepting jurisdiction and in any event do not provide a basis for a finding of non-arbitrability.

(iv) **What are the requirements for a valid multi-party arbitration agreement?**

A valid multi-party arbitration agreement presupposes consent to arbitration and evidence of such consent (if contested) in writing.

(v) **Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

Yes, such an agreement is enforceable.

(vi) **May arbitration agreements bind non-signatories? If so, under what circumstances?**

In principle, third parties (i.e., those who have not entered into an agreement) are not bound. There are a range of nuanced exceptions that may arise from Dutch Civil Code provisions on obligations. Such exceptions include matters involving the transferee of a claim to which an arbitration agreement applies. Other exceptions include co-debtors, certain types of agency, surety and bankruptcy administrators.

The Arbitration Board for the Building Industry (*Raad van Arbitrage voor de Bouw*) applies a liberal approach to the binding of non-signatories, pursuant to which it relatively easily considers third parties such as sub-contractors to be bound to arbitration agreements.

#### IV. Arbitrability and Jurisdiction

(i) **Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

Types of disputes that may not be arbitrated include those regarded as forming part of public policy, such as certain aspects of family law, intellectual property law, bankruptcy law and matters that have an *erga omnes* effect (i.e., a binding effect on parties not privy to the arbitration). The involvement of rights of such third parties and the seriousness of the consequences for third parties indicate potential non-arbitrability of a dispute.

In the context of the adoption of the 2015 Act, the arbitrability of disputes involving the validity of corporate decision making was debated in view of a decision by the Dutch Supreme Court in which this court had rejected arbitrability thereof. The outcome of this debate is that such disputes remain non-arbitrable as a matter of Dutch arbitration law.

The issue of arbitrability is probably rightly viewed as a matter of jurisdiction, though an arbitral award deciding a non-arbitrable matter may be challenged in setting-aside proceedings both for lack of jurisdiction and for breach of public policy. The decision on arbitrability is part of the *competence-competence* of arbitral tribunals.

- (ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

If a party in court proceedings invokes an arbitration agreement, the court will (subject to a decision that the agreement to arbitrate is not invalid if validity is contested) find that it does not have jurisdiction to decide upon the dispute. The court will deal with this situation in a separate decision on jurisdiction. Dutch arbitration law requires that an arbitration agreement be invoked in the first written pleadings or, in the absence of written pleadings, the first oral argument. Invoking the arbitration agreement as an objection to the court's jurisdiction at any later stage will lead to a dismissal of the objection and may thus be considered a waiver.

- (iii) Can arbitrators decide on their own jurisdiction? Is the principle of *competence-competence* applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

Dutch arbitration law applies the principle of *competence-competence*. The control over the tribunal's decision on jurisdiction is exercised in annulment (i.e., setting aside) proceedings. In such proceedings the court may decide on the existence of a valid arbitration agreement *de novo*. If a valid arbitration agreement is found to be absent, the arbitral award is annulled and the competence of the competent regular court is (re)instated. This is made clear, explicitly, in the 2015 Act.

## V. Selection of Arbitrators

- (i) How are arbitrators selected? Do courts play a role?**

Arbitrators are selected in accordance with the method of appointment provided for in the parties' arbitration agreement including the rules of arbitration agreed to be applicable by the parties. If the parties have not agreed upon a method of appointment, the default rule is that the parties jointly appoint the members of the arbitral tribunal. This default option applies for a limited period of three months under the 2015 Act, after which the parties may, together or separately, request the President of the District Court to appoint the members of the tribunal.

The 2015 NAI Rules depart from their previous default position of a list-procedure and now use party appointment as the default position.

**(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?**

An arbitrator who is aware of a real or apparent basis for a challenge is obliged to disclose the potential conflict. Parties may, under the 2015 Act, agree to use a particular mechanism for dealing with challenges outside of the courts, such as through arbitration rules meaning that an appointing authority or arbitral institution will decide the challenge. Absent party agreement, the courts are competent to decide on challenges. The first step is to submit a reasoned challenge to the arbitrator, the tribunal and the counterparty. A four-week limitation period applies, by virtue of the 2015 Act. Subsequently, a two-week limitation period commences during which the arbitrator facing a challenge may withdraw. Then, the institution empowered by the parties to decide on the challenge or, in the absence of such arrangement, the President of the competent District Court, decides on the challenge.

**(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?**

There are no limitations on the nature and qualifications of a person who may serve as arbitrator, but for legal capacity and being a natural person. The requirements of independence and impartiality do, however, act as limitations. The delineation of such norms is influenced by guidelines applicable to state court judges insofar as purely domestic arbitrations are concerned. In an international setting the IBA Guidelines on Conflicts of Interest in International Arbitration are frequently invoked.

No ethical duties specific to arbitrators apply. Ethical duties may, however, apply pursuant to professional rules applicable to arbitrators that are, for example, also advocates or medical professionals.

The Arbitration Rules of the NAI contain some rules on the nationality of arbitrators in international arbitrations. The NAI Rules provide for the appointment of a national of a third state as sole arbitrator or chairman of an arbitral tribunal, if either of the parties to an international arbitration (with parties originating from different states) so requests.

**(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

The IBA Guidelines are known and applied (directly or for guidance) in international arbitrations seated in the Netherlands. In domestic arbitrations, the

criteria used for conflicts of interest of members of the Dutch judiciary are used for guidance.

## VI. Interim Measures

- (i) **Can arbitrators enter interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Tribunals may order interim measures and preliminary relief. The power to enter interim measures is explicitly provided in the 2015 Act and also frequently, and in further detail, in arbitration rules. No limitations exist regarding the form of a tribunal's decision on interim measures, which may be given in the form of both an order and an award and may encompass various types of relief. Interim measures are enforceable through obtaining an exequatur (at least in Dutch courts), if they are cast in the form of an (interim) award.

It is thus notable that a tribunal may issue an *award*. Such an award containing interim measures may be rendered both in a pending arbitration and in separate arbitral summary proceedings (known as *arbitraal kort geding*). The NAI Rules contain an opt-out arrangement that provides for such summary arbitral proceedings in Dutch seated arbitrations. These summary proceedings are typically aimed at interim measures that do not formally prejudice the merits, yet may be far-reaching and may go significantly beyond preserving a certain status quo. Awards rendered in summary proceedings are enforceable per an explicit reference in the Dutch Arbitration Act. Arbitral summary proceedings are provided for (absent agreement to the contrary) under the Arbitration Rules of the NAI and some other institutions. The NAI publishes statistics of, and information on, the use of this procedure. The scope for these summary proceedings is, generally, much broader than those typically available in other jurisdictions (such proceedings can result in, for example, an award providing for: specific performance, *de facto* freezing of assets, or blocking of a share transfer). Finally, the enforceability of an award in arbitral summary proceedings is not conditional upon the commencement of proceedings on the merits, and no requirement to commence proceedings on the merits exists.

Tribunals, however, are not empowered to grant or lift prejudgment attachments or prejudgment seizures, which could conceivably be an interim measure sought. This is the prerogative of the state courts. Tribunals dealing with summary arbitral proceedings are also empowered, and often impose, (conditional) penal sums to ensure compliance with their awards.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?**

Courts may grant provisional relief in support of arbitrations in case of urgency (i.e., per the 2015 Act, if the requested measure cannot be obtained or cannot be obtained fast enough in arbitral proceedings) and, typically, in matters outside the remit of tribunals (such as seizures). Courts may grant such relief even after the constitution of an arbitral tribunal, if the requested relief cannot be obtained at all in the arbitration or cannot be obtained fast enough.

- (iii) **To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

Courts may grant such assistance and relief relating to evidentiary assistance, for example the hearing of witnesses. Judicial assistance may also include seizure of information (e.g., contained in documents). Taking such measures does not require consent from the tribunal and is a power derived from the Dutch Arbitration Act. If an arbitration agreement is invoked, however, the courts will only exercise this jurisdiction if the measure requested cannot be obtained in arbitral proceedings or cannot be obtained fast enough in arbitral proceedings (as per the 2015 Act). The 1986 Act was somewhat more liberal on this point in the sense that it allowed the court more leeway to offer such assistance. Under the 2015 Arbitration Act, Dutch courts seem reluctant to conclude that the measure requested cannot be obtained, or cannot be obtained fast enough, in arbitral proceedings.

## **VII. Disclosure/Discovery**

- (i) **What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

The general approach is liberal, and increasingly so (following proposed amendments of the Dutch Code of Civil Procedure on this point). Tribunals are not bound by rules on the taking of evidence provided for in the Dutch Code of Civil Procedure, although – in Dutch cases – tribunals would be inclined to take note thereof and/or even apply such rules by analogy. In addition, the IBA Rules on the Taking of Evidence are often applied (be it directly or as guidance), particularly in international matters.

Disclosure/discovery will typically relate to documents and may include information stored electronically.

- (ii) **What, if any, limits are there on the permissible scope of disclosure or discovery?**

There are no formal limits except for rules of legal privilege and compelling circumstances such as trade secrets. Relevance and proportionality would also be an argument parties could use to limit the scope of disclosure or discovery. Classic fishing expeditions are not permitted.

Although the arbitral tribunal can order parties to produce documents, it cannot compel the parties to do so. If a party refuses to produce documents the arbitral tribunal may draw from it the conclusions it deems appropriate.

- (iii) **Are there special rules for handling electronically stored information?**

No.

## VIII. Confidentiality

- (i) **Are arbitrations confidential? What are the rules regarding confidentiality?**

Arbitrations are considered to be confidential, although this has not been codified in the 2015 Act and was not codified in the 1986 Act either. In significant commercial arbitrations, parties may enter into confidentiality agreements or request the tribunal to order confidentiality arrangements. NAI Arbitrations are confidential through a specific provision in the NAI Arbitration Rules. A lower degree of confidentiality applies in cases of a public law nature including investor-state arbitrations, which mirrors international developments in this field of arbitration. Arbitration-related proceedings that may take place in the state courts are not confidential, yet documents filed with the courts are not, generally, publicly accessible. In highly exceptional cases, state courts may determine that their proceedings are confidential.

- (ii) **Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?**

No explicit provision on this is contained in the Dutch Arbitration Act. The protection of trade secrets and confidential information may, however, be dealt with in orders or interim awards upon request of a party. Generally, tribunals are willing to make such provisions. In practice, the protection of confidential information is not an issue of concern in arbitral practice in the Dutch jurisdiction.

- (iii) **Are there any provisions in your arbitration law as to rules of privilege?**

The Dutch Arbitration Act does not contain specific rules on privilege. However, some arbitration rules do provide for the recognition of rights of privilege, as do the often applied IBA Rules on the Taking of Evidence. If a party requests the

state courts to examine a witness, the witness may invoke rights of privilege, including those derived from applicable foreign laws.

## **IX. Evidence and Hearings**

- (i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?**

These IBA Rules on evidence are commonly adopted. There is no data available, specific to the Netherlands, to answer the second question, but our experience is that tribunals often seek to retain discretion and thus provide that these rules will be used for guidance (implying that they will not be applied without exception).

- (ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?**

Tribunals' discretionary powers to govern the proceedings, including hearings, are limited by party agreement and fundamental principles of procedural law. The latter include, notably, the right to equal treatment and the right to be heard (which right derives from Article 6 of the European Convention on Human Rights).

- (iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?**

Witness testimony is generally presented in the form agreed upon by the parties or provided for by the tribunal. Cross examination is permitted and occurs in international arbitrations seated in the Netherlands – with arbitrators typically posing limited questions to a witness at the end of an examination by counsel. That being said, cross examination is not part of the Dutch legal culture and not practiced in the state courts except in the limited instances under the Hague Evidence Convention of 1970. Dutch court practice provides for a prominent role for an examining judge in the examination of witnesses, which influences the course of proceedings in domestic arbitrations.

- (iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?**

No, there are no rules preventing persons from appearing as a witness. A witness may be examined under oath or subject to affirmation, but this is not compulsory and is only done if the tribunal deems it necessary.

- (v) **Are there any differences between the testimony of a witness specially connected with one of the parties (e.g., legal representative) and the testimony of unrelated witnesses?**

The distinction between the testimony of a witness connected with a party and unrelated witnesses is dealt with through the tribunal's power to weigh the evidence presented. No formal rules apply.

- (vi) **How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

The same requirements generally apply to expert testimony as to witness evidence. Tribunals may, absent party-agreement to the contrary, appoint experts on their own motion.

Experts, including party-appointed experts, are required to be independent and impartial and may also be placed under oath or subjected to affirmation.

In order to ensure their independence and impartiality and to provide the parties with a fair hearing, arbitrators wishing to use their own expertise when conducting their own inquiry do have to observe principles of due process and may only do so with the explicit approval of the parties.

- (vii) **Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

No, this is not common. There are no formal rules applicable to these issues. Experts do not have to be selected from lists, although lists do exist in the state courts and at some arbitration institutes..

- (viii) **Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

While it is permitted, witness conferencing is not often used. No data exists to make statements on typical practice.

- (ix) **Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

Arbitral secretaries are subject to the same rules of independence, impartiality and challenge as arbitrators. The use of arbitral secretaries is common, especially if substantial interests are at stake and/or if the members of the tribunal lack relevant legal experience or qualifications.

## X. Awards

**(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

Yes, awards must be in writing, be signed by a majority of all tribunal members and include: the name and place of residence of each of the members of the tribunal and parties; the date of the issuance of the award; the place of issuance of the award; and the grounds for the decision taken. Under the 2015 Act, the parties may decide, after commencement of arbitral proceedings, to relieve the tribunal from its obligation to provide grounds for its decisions.

There are some minor limitations on permissible relief, including that a tribunal is not empowered to grant permission to seize property or to lift seizures (see also Section VI(i) above).

**(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?**

Tribunals may award punitive or exemplary damages subject to party agreement and the boundaries set by their mandate. Awards of punitive or exemplary damages are uncommon, however. Tribunals dealing with summary arbitral proceedings (see above) frequently grant requests for a penal sum (*dwangsom*) to ensure compliance with their award. In addition, interest, including compound interest, can be awarded if requested by a party.

**(iii) Are interim or partial awards enforceable?**

Interim awards are explicitly provided for as enforceable in the 2015 Act. Partial final awards are equally enforceable. Rules distinguishing interim and partial final awards are nuanced. The title of an award is not determinative.

**(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?**

Arbitrators are allowed to issue dissenting (and concurring) opinions, subject to party agreement to the contrary. A dissenting opinion does not form part of the arbitral award itself and, hence, is not subject to rules applying to the form and content thereof.

**(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?**

Awards by consent are permitted. An award by consent may be issued upon joint request by the parties to the arbitral tribunal. Awards by consent need not contain

reasons but must be signed by the arbitral tribunal. Proceedings may also be terminated by agreement.

**(vi) What powers, if any, do arbitrators have to correct or interpret an award?**

Tribunals may correct manifest errors, including drafting and calculation errors, that are capable of easy correction. The correction of an award may be done, ex officio, by a tribunal (which happens very rarely) or upon request, within three months after the issuance of the award to the parties. The tribunal may correct or add the names and place of residence of each of the members of the tribunal and parties, the date of the issuance of the award and the place of issuance of the award, but not the grounds for the decision taken.

Tribunals do not have powers to interpret their awards by virtue of the Dutch Arbitration Act. They may, however, supplement their award if they have failed to decide upon claims that they were asked to decide upon.

Under the 2015 Act, courts of appeal dealing with annulment proceedings may remit the matter to the arbitral tribunal for the purpose of remedying the ground for annulment. The procedure has not been tested yet and is not provided for in a detailed manner in the 2015 Act. The 2015 NAI Rules, however, provide a more detailed arrangement on the procedure to be applied by a tribunal in these circumstances.

**XI. Costs**

**(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?**

In principle, the allocation of costs depends on agreement by the parties and the parties' requests for costs. The Dutch Arbitration Act does not contain a specific rule on this point.

Typically, and in the absence of a specific agreement by the parties, the unsuccessful party bears a substantial proportion of the costs, assuming costs are claimed. Dutch court practice, which provides for costs awards on the basis of fixed nominal sums, influences arbitral practice in the sense that restraint is exercised in awarding costs. Such restraint is also observed in awards under NAI Rules of Arbitration and propagated by the NAI.

**(ii) What are the elements of costs that are typically awarded?**

Direct costs (counsel, experts, arbitration costs) are typically awarded, subject to policy concerns at some institutions regarding the costs of experts. Management fees and costs of in-house counsel are typically not part of a cost award but there is no rule preventing that per se.



- (iii) **Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?**

Yes, typically. If not, arbitral institutions decide on the basis of applicable arbitration rules.

- (iv) **Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?**

Yes, on the basis of discretionary powers that are considered to be inherent to tribunals.

- (v) **Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

Courts do not have specific powers to that effect.

## **XII. Challenges to Awards**

- (i) **How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

Awards rendered in arbitrations seated in the Netherlands may be challenged in the Dutch state courts – and parties cannot agree to exclude such right to challenge. The grounds for challenge are limited and set out in the Dutch Arbitration Act. Awards may be challenged for:

- lack of a valid arbitration agreement;
- constitution of a tribunal in violation of the rules applicable thereto;
- gross breaches of mandate;
- lack of signature and/or reasoning; and/or
- if the award or the manner in which it was made violates public policy.

Time limitations are applicable. Limitation periods commence on various moments and may, due to differing moments of commencement, result in potential renewal of an option to challenge. The limitation periods expire three months after (a) dispatch (*verzending*) of the award, (b) deposit of an award with the competent district court (in cases where the parties have agreed to such deposit); or (c) service of process of an award with an exequatur affixed thereto on the party against whom enforcement is sought. In connection with this matter, it is important to bear in mind that the 1986 Act, including its regime regarding limitation periods which is slightly different than the 2015 regime described

above, remains in force with respect to arbitration proceedings that commenced prior to 1 January 2015.

Under the 2015 Act, challenge proceedings are brought directly to the court of appeals. Decisions by the court of appeals may be subject to limited (so-called cassation) review by the Dutch Supreme Court (for which leave is not required).

Challenge proceedings do not stay enforcement proceedings. Parties may, however, request a stay of enforcement pending challenge proceedings.

**(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

Parties may not waive their right to commence challenge proceedings before the court of appeal as the provision governing challenges is mandatory. However, parties may waive the right to Supreme Court review of any court of appeal decision on a challenge application.

**(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

Awards may only be appealed if the parties have agreed thereto. In case of an appeal, there is typically only one instance and no formal limitation on grounds that may be invoked.

**(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?**

Yes, this may be done under the 2015 Act, subject to hearing the parties on such option to remand. Tribunals' powers have not yet been tested in this regard, but in essence tribunals are expected to reopen the proceedings with a view to remedy the alleged ground for annulment or by taking such other measure as the tribunal deems fit. This does not apply to an instance of lack of an arbitration agreement, of course. The NAI Rules of 2015 provide for a specific arrangement for these remission proceedings.

### **XIII. Recognition and Enforcement of Awards**

**(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

Permission to enforce (an exequatur) an award in a Netherlands-seated arbitration must be granted by the President of the district court (*voorzieningenrechter*) in whose jurisdictional area the place of arbitration is located. An exequatur will be

affixed to the original arbitral award or a certified copy thereof. The process is relatively simple and may occur *ex parte*, that is, without a hearing of the party against whom enforcement is sought (subject to unregulated and proactive applications to a court by the party against whom enforcement may be sought).

If recognition and enforcement relates to a foreign arbitral award, the party against whom enforcement is sought will, in principle, be called to appear for a hearing upon the request to recognize and enforce the award. Moreover, under the 2015 Act, the application is to be made with the court of appeal in the judicial district where enforcement is sought. The applicant does not need to demonstrate that the award debtor has assets in the Netherlands that may serve as recourse.

Recognition and enforcement of a foreign award may be refused and/or opposed on the grounds set out in the New York Convention. Alternatively, in cases where the New York Convention does not apply or where the applicant does not wish to avail itself of the Convention, an application may be based solely on the 2015 Act, in which case recognition and enforcement may be refused if: a valid arbitration agreement is lacking (under the applicable law); the tribunal is constituted in violation of rules applicable thereto; if the tribunal has grossly failed to comply with its mandate; if the award is still open to appeal (ie, not final); if the award has been set aside by a competent authority in the country in which the award was rendered; or if recognition or enforcement violates public policy. The New York Convention applies in instances that comply with the reciprocity reservation made by the Netherlands.

The initiation of setting aside proceedings, and other forms of opposition, does, in principle, not stay enforcement.

**(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?**

If an exequatur is obtained in the Dutch courts, a bailiff may be engaged to enforce the award in the Netherlands. Recourse to the court is possible for assistance but not required at this stage. The party against whom enforcement is sought may bring summary proceedings to stay enforcement.

**(iii) Are conservatory measures available pending enforcement of the award?**

Yes, the courts may be requested to grant leave to seize property in the form of a conservatory attachment. Such leave may be obtained and acted upon prior to, or pending, enforcement of the award.

**(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?**



Dutch courts are generally inclined to easily grant leave to enforce.

Dutch courts have also (in specific circumstances) permitted enforcement of an award set aside at the place of arbitration. However, the enforcement of an award that has been set aside is exceptional.

**(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?**

Enforcement of a foreign award may be done in a matter of weeks; enforcement of a domestic award may be done in a matter of days. The time for enforcement may take longer if substantially contested. An arbitral award can – as a main rule and subject to limited exceptions – no longer be enforced upon expiry of a 20 year limitation period commencing the day after issuance of the award.

**XIV. Sovereign Immunity**

**(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

Yes, states enjoy sovereign immunity for sovereign acts. Nuanced case law applies to sovereign immunity.

**(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?**

Yes, limitations apply in respect of the assets against which enforcement may be sought. State property used or intended for use for government non-commercial functions may not be subjected to enforcement action. The burden of proof that the assets are not immune is on the creditor.

**XV. Investment Treaty Arbitration**

**(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

The Netherlands is party to the Washington Convention (the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966) and the Energy Charter Treaty.

**(ii) Has your country entered into bilateral investment treaties with other countries?**

Yes, the Netherlands has entered into approximately 100 BITs containing, typically, wide provisions on jurisdiction and relatively broad protections for investors. The Netherlands has structured and maintains a large network of BITs



and tax treaties to support finance and holding structures for foreign corporations linked to the Netherlands.

## XVI. Resources

- (i) **What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?**

The main treatise published in English is ‘A Guide to the NAI Arbitration Rules. Including a Commentary on Dutch Arbitration Law,’ Kluwer Law International (2009 with an update forthcoming). Primary sources in Dutch are H.J. Snijders’ *Nederlands Arbitragerecht, een artikelsgewijs commentaar op de art. 1020-1076 Rv.*, Kluwer (2011) and G.J. Meijer ‘T&C Burgerlijke Rechtsvordering’ (2016). The main arbitration journal is the Dutch Journal on Arbitration (*Tijdschrift voor Arbitrage*). The amendments to the Dutch arbitration act have seen extensive coverage in the Dutch Journal on Arbitration of October 2013 and subsequent contributions. The parliamentary papers and a comparison between the old and new Dutch Arbitration Act may be found in G.J. Meijer’s ‘Parlementaire Geschiedenis Arbitragewet’, Kluwer (2015).

- (ii) **Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?**

Yes, Dutch universities offer such events and conferences on a regular basis as does the Dutch Arbitration Association and the Netherlands Arbitration Institute.

## XVII. Trends and Developments

- (i) **Do you think that arbitration has become a real alternative to court proceedings in your country?**

Yes, and it has and has long been so.

- (ii) **What are the trends in relation to other ADR procedures, such as mediation?**

Mediation is looked upon favorably, especially by the government. Court-annexed mediation is on the increase.

- (iii) **Are there any noteworthy recent developments in arbitration or ADR?**

Yes, the adoption and introduction of the 2015 Act. Consequently, arbitration rules of the major Dutch institutions have also been revised.

The introduction of Article 1072b DCCP provides a statutory framework for online arbitration (*e-arbitration*). This places the Netherlands in a competitive position on the international arbitration market as it is one of the first countries to provide such a procedure. Through this Article, parties may, amongst others,



submit documents electronically (such as agreements and requests) and they may directly contact witnesses, experts or parties through electronic means.