IBA ARBITRATION COMMITTEE

Arbitration Guide

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, energy joint-ventures and 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). To this offering, 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. Recently, new initiatives have launched, including a Hague Court of Arbitration for Aviation (**www.haguecaa.org**).

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 sought to make the Netherlands an attractive venue for international arbitration through the Dutch Arbitration Act. The most recent amendment thereof (the 'DAA' and 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 occasionally 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.

The primary Dutch commercial arbitration institute, the Netherlands Arbitration Institute (NAI), has overhauled its arbitration rules with effect per 1 March 2024. Reference is made thereto, below.

(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 NAI and the Permanent Court of Arbitration (PCA). The NAI and its arbitration rules are frequently used and have been updated per 1 March 2024 (the NAI Rules). 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 in Bouwgeschillen (Arbitration Board for the Building Industry or RvA), which has also updated its arbitration rules per 1 August 2021. 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 with more complex disputes lasting about one and a half year. The Dutch Arbitration Act and the NAI Rules provide for so-called Dutch-style emergency arbitral proceedings (*arbitraal kort geding*), also referred to as 'summary arbitral proceedings'. These emergency proceedings may result in an order and/or an enforceable award in weeks or even days if the case is very urgent.

Per 1 March 2024, the NAI Rules also provide for expedited proceedings on the merits. These proceedings must be completed within five months of the first case management conference that follows shortly upon the constitution of the arbitral tribunal comprising one arbitrator.

(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 (ie arbitrations with parties originating from different countries) so requests. If, under the NAI Rules, the co-arbitrators shall appoint the chair of the arbitral tribunal they must consult with the NAI on this appointment.

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. Although the 2015 Act is now about ten years old, it remains pertinent – in particular with respect to setting aside and enforcement actions following an investment arbitration – to be alert to the fact that the 2015 Act may not apply.

(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 and the Dutch courts). 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 (ie, 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 favourably 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 emergency (summary) arbitral proceedings, state courts addressed in contravention of such agreement will decline jurisdiction if the measures sought can and can timely be obtained in arbitration. The application of these criteria does require adequate explanation of a particular set of arbitration rules, and its practical implications, to the Dutch courts.

The 2015 Act provides that arbitration agreements included in general conditions are not 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. Pursuant to 2024 'case law' from the Dutch Supreme Court, the mediation stage of a multi-tier clause can be enforced by requesting the tribunal to stay the arbitration proceedings to allow the parties to comply with their obligations under the mediation clause. This requires that the mediation clause, as interpreted by the tribunal, compels the parties to mediate before commencing arbitration (as opposed to merely permitting but not compelling the parties to mediate). Even if the clause compels the parties to mediate, the tribunal is not required to stay the arbitration proceedings, and may decide not to stay the proceedings, for instance because the matter is too urgent to allow for a stay or because it would be futile to require the parties to mediate. Such provisions thus do not categorically prevent a tribunal from accepting jurisdiction.

(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. This may be subject to de novo testing in setting aside proceedings.

The 2024 NAI Rules contain a new provision regarding multi-contract arbitration, permitting claims relating to disputes arising from more than one contract to the extent that such disputes between the same parties are subject to arbitration before the NAI.

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

Yes, such an agreement is generally enforceable.

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

In principle, third parties (ie, those who have not entered into an agreement) are not bound. There are certain 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.

(vii) How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The courts apply the in *favorem validatis* principle. This means that under Dutch law, an arbitration agreement is substantively valid if it is valid under just one of the following sets of applicable law (regardless whether it is invalid under any of the other sets of applicable law): (a) the law that the parties have agreed to apply to the validity, (b) the law of the seat of the arbitration or (c) if the parties have not agreed a law to apply to the validity, the law that applies to the legal relationship to which the arbitration agreement pertains.

(viii) Do courts in your jurisdiction distinguish between the seat (or legal place) of the arbitration and the venue of meetings/hearings?

Dutch law distinguishes between the seat (or legal place) of the arbitration and the venue of meetings and hearings. In a Netherlands-seated arbitration, the tribunal is expressly permitted to conduct hearings, deliberations, hear witnesses and experts at any place, whether within or outside the Netherlands, that it deems appropriate (subject to party agreement to the contrary).

(ix) Are blockchain- and NFT-related disputes arbitrable in your jurisdiction?

Yes. There is no authority suggesting that they would not be arbitrable.

(x) Are there circumstances in which courts find that a valid arbitration agreement has become inoperable?

Such circumstances are rare. This only occurs where courts find that the parties had not agreed to arbitrate per se, but had agreed to arbitrate only before a particular arbitral institution (or through appointment of a particular appointing authority) and that institution (or authority) has ceased to exist. The Dutch Arbitration Act also contains specific remedies for the event that the parties are found to have agreed to arbitrate per se, but the method of appointment has become inoperable (in which case the courts may make the appointment).

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 are to have an *erga omnes* effect (ie, 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 concerning the validity of corporate decision making was debated in view of a decision by the Dutch Supreme Court in which the 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 an arbitral tribunal's decision on jurisdiction is exercised in annulment (ie, setting aside) proceedings after the completion of proceedings on (any part of) the merits of the dispute (and, in principle, not at an earlier stage). 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 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 arbitration rules 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 2024 and 2015 NAI Rules depart from their previous default position of a list-procedure and now use party appointment as the default position. That said, the list-procedure is still in place at the NAI for its new expedited proceedings on the merits (as default).

(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 (as is the case at the NAI). The 2024 NAI Rules contain detailed provisions on arbitrator challenges, including a provision that the Challenge Chamber deciding the challenge may determine that a subsequent challenge will not be considered if it finds that the challenging party has abused its right to raise a challenge.

Absent a party agreement to designate an independent entity (typically a branch of an arbitral institution) to decide the challenge, 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 particular in an international setting the IBA Guidelines on Conflicts of Interest in International Arbitration are frequently invoked (and will likely be so in their 2024 iteration as well).

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 NAI Rules 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 also used for guidance.

VI. Interim Measures and Emergency Arbitration

(i) Can arbitrators issue 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 issue interim measures is explicitly provided in the 2015 Act and also frequently, and in further detail, in arbitration rules. Under the 2015 Act, 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 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 emergency/summary proceedings (known as *arbitraal kort geding*). The NAI Rules contain an opt-out arrangement that provides for such emergency/summary arbitral proceedings in Dutch seated arbitrations. The NAI Rules, in the 2024 iteration, no longer require the arbitration to be seated in the Netherlands for the emergency arbitrator facility to apply. These emergency 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 (and thus not be strictly interim in the eye of international practitioners). Awards rendered in summary proceedings are enforceable per an explicit reference in the Dutch Arbitration Act. Arbitral emergency/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 the constitution of the arbitral tribunal?

Courts may grant provisional relief in support of arbitrations in case of urgency (ie, 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 (eg, 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. In these cases, it is pertinent to clearly explain the available options, and practice, under applicable arbitration rules to courts.

(iv) Are decisions by emergency arbitrators enforceable in your country?

Yes, provided such decisions constitute awards (which is the default position).

(v) What is the approach in your country to anti-suit injunctions or injunctions by arbitrators preventing parties from initiating litigation proceedings?

Dutch law is not opposed to anti-suit injunctions, and specific performance is a frequent civil law remedy. In practice, Dutch courts have only rarely entertained and ordered anti-suit injunctions.

(vi) Do courts provide assistance in aid of foreign-seated arbitrations, including for disclosure of documents?

The DAA provides, in Articles 1074a-1074d, that the Dutch courts may provide assistance in aid of foreign-seated arbitrations, including for purposes of witness and expert examinations. Although disclosure of documents is not expressly provided for in these provisions but such assistance will generally also be available in this regard. The courts will generally review whether the requested measure (witness or expert examination, document disclosure) can be obtained, and can timely be obtained, through the arbitral tribunal (per Article 1074d of the DAA). If not, the courts may lend assistance. If so, the courts will leave it up to the tribunal to resolve on the requested measure.

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. Tribunals are not bound by rules on the taking of evidence provided for in the Dutch Code of Civil Procedure, although – in particular Dutch-centric 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 and/or connect penal sums to the refusal.

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

The DAA does not contain special rules applicable to arbitration that supplement or deviate from the general rules applicable in the Netherlands (regarding privacy).

The 2024 NAI Rules do, however, contain a provision (in Article 63) that was introduced in 2024 that pertains to the handling of electronically stored information. The NAI references, in this provision, the applicable regulations on the protection of personal data, as well as its own so-called 'privacy notice', which can be consulted on the NAI's website. In addition, in a subsection (2), this Article mandates the NAI and arbitral tribunals acting under its rules to: "with due

observance of the applicable provisions of mandatory law, issue instructions regarding the security of information and/or protection of (personal) data that are binding on the parties, and, in the case of instructions from the NAI, also on the arbitral tribunal".

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 or investment 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 take such measures if they are satisfied that they are warranted. In practice, the protection of confidential information is not a major cause for concern in arbitral practice in the Netherlands, if only because the NAI Rules provide for confidentiality and because legal briefs and other documents submitted in Dutch court proceedings (e.g. setting aside or enforcement proceedings) are not made publicly available (including not to attendees to a hearing that are not party representatives or members of the judiciary hearing the case). .

(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 directly and 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, notably, 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 and the use of witness statements 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 Dutch-centric 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 precluding 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 (eg legal representative, director or employee) 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, although a witness who is also a party representative is generally not sequestered it the same manner as other witnesses will be.

(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. That said, the international attention given to the direct appointment of experts by arbitral tribunals has not gone unnoticed.

(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. Secretaries are also frequently appointed in emergency arbitration.

(x) Are there any ethical codes or other professional standards applicable to counsel and arbitrators conducting proceedings in your jurisdiction?

No.

(xi) Have arbitral institutions in your jurisdiction implemented rules empowering arbitral tribunals to exclude counsel based on conflicts of interest or other reasons?

No, but the power to exclude counsel in appropriate, exceptional, circumstances is considered part of the tribunal's general power to conduct the proceedings.

(xii) Has your jurisdiction adopted any rules with regard to remote hearings and have there been any court decisions on same?

The Dutch Arbitration Act contains express provisions permitting the conduct of remote hearings in Articles 1072b. These were introduced prior to the COVID-pandemic.

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?

It is uncertain whether tribunals may award punitive or exemplary damages. 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 based on whether the award grants or dismisses a part of the claim in the dispositive section (partial final award) or does not (interim award). The title of an award is not determinative: substance trumps form.

(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, in principle, allowed to issue dissenting (and concurring) opinions, subject to party agreement to the contrary. A dissenting opinion does not, however, 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 is provided for in the 2015 Act and has been used, albeit not very often.

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 full costs (without a degree of moderation that is). Such restraint is also sometimes observed in awards under NAI Rules.

The 2024 NAI Rules make explicit that the tribunal may take into account whether a party has unreasonably delayed the arbitral proceedings when deciding on the division of the costs of the arbitration and of legal assistance.

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

Direct costs (counsel, experts and 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 may in some cases still be relevant 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 'appeal' to the Supreme Court for a 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?

Arbitral wards 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. Appeals are common in construction cases.

(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, often, 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.

(v) Is there a specialist arbitration court in your jurisdiction?

The Court of Arbitration of Art (CAfA) and the Hague Court of Arbitration for Aviation (Hague CAA) are relatively new specialist arbitration courts established in the Netherlands. They exist alongside several older specialist arbitration courts, the most prominent of which is the Arbitration Board for the Building Industry (Raad van Arbitrage in Bouwgeschillen).

In terms of state courts, the trend is to concentrate cases in the courts in Amsterdam, which include a commercial court section in which proceedings may be held in English. This, however, is not a specialist court in the strict sense.

(vi) To what extent do courts in your jurisdiction allow arbitrators to amend and/or replace wrongly invoked law or the law not invoked by the parties (iura novit arbiter)? Could this be a basis to set aside the award?

The tribunal is permitted to rely on law not invoked by the parties, but may not render a so-called 'surprise decision', meaning a decision which the parties did not have to expect in view of the procedural debate (in which case the award may be liable to be set aside). This will generally require the tribunal to seek the parties' views before giving a decision based on law not invoked by the parties.

XIII. Arbitrator Liability

(i) Does the arbitration law in your jurisdiction expressly provide for the immunity of arbitrators, experts, translators, interpreters and/or other participants in arbitration proceedings from civil liability in connection with their mandate? If so, are there exceptions to this immunity?

Immunity of arbitrators is provided for in case law of the Dutch Supreme Court. Arbitrators can be liable only where they breached their mandate intentionally or through grossly negligent conduct, or where there has been an evident gross failure to recognize the requirements of a proper fulfilment of duties, also known as a gross dereliction of duty. The Supreme Court has confirmed that the threshold for accepting arbitrator liability is high.

Additionally, the 2024 and 2015 NAI Arbitration Rules contain exclusions and limitations of liability which further limit the scope for potential arbitrator liability.

(ii) Does this immunity, if any, extend to criminal liability?

There is generally no basis for criminal prosecution of arbitrators.

XIV. 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 relate 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 domestic award may be done in a matter of days. The time for enforcement may take longer if substantially contested, as may be the case in the event of a foreign award. 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.

XV. 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 actions. The burden of proof that the assets are not immune is on the creditor.

(iii) Are there any requirements for arbitrations involving sovereign entities?

The Netherlands is a seat for a large number of arbitrations involving sovereign entities, principally through arbitrations conducted before the Permanent Court of Arbitration and generally seated in The Hague. There are no requirements specific to arbitrations involving sovereign entities.

We note one rule specifically applicable to arbitration involving sovereign entities. This pertains to the authority to arbitrate and the arbitrability of disputes under the law of the sovereign entity. This rule is that a State, other public law

entity or State enterprise that is a party to an arbitration agreement cannot invoke provisions of its own laws to contest its authority to conclude an arbitration agreement or the arbitrability of the dispute, provided the other party to the arbitration agreement was not aware nor should have been aware of such provision of law.

XVI. 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). The Netherlands has on 27 June 2024 notified its withdrawal from 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.

(iii) Have there been any recent court decisions in your country in relation to intra-European investor-state arbitration?

The Dutch courts have rejected applications from the Republic of Poland to compel an investor to cease a London-seated investment arbitration against Poland. Poland invoked the CJEU's Achmea judgment. The courts have further held that the investment arbitration was not abusive, because it was not evidently without any merit.

XVII. 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:

- 'International Arbitration in the Netherlands, with a Commentary on the NAI and PCA Arbitration Rules'' Kluwer Law International (2021).

Primary sources in Dutch are:

- H.J. Snijders' '*Nederlands Arbitragerecht, een artikelsgewijs commentaar op de art. 1020-1076 Rv.*', Kluwer (2018);
- G.J. Meijer '*T&C Burgerlijke Rechtsvordering*' Kluwer (2023); and
- The Asser-series volume 8 2023/10 on Arbitration and Binding Advice Kluwer (2023).

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 do the Dutch Arbitration Association and the Netherlands Arbitration Institute.

XVIII. 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 favourably, 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 and the 2024 NAI Rules.

The introduction of Article 1072b DAA 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. This arrangement has been tried and tested, successfully, during the Covid-19 pandemic.

(iv) Are there any official plans to reform the arbitration laws and practice in your jurisdiction?

The Dutch Arbitration Act has been revised in 2015, is considered up to date, and there are no official plans to reform it. The primary commercial arbitration institute, the Netherlands Arbitration Institute, has published revised 2024 Rules.

(v) Are there any rules governing third-party funding in your jurisdiction? Is there an obligation to disclose the identity of any non-party who has an economic interest in the outcome of the proceedings, including any third party funder? Have there been any recent court decisions in your jurisdiction in relation to third-party funding?

There is no express statutory duty to disclose the identity of any non-party who has an economic interest in the outcome of the proceedings. The 2024 NAI Rules require the disclosure of any party that has made an arrangement with a party to the arbitration for the financing of claims or counterclaims on the basis of which the former party has a beneficial interest in the outcome of the arbitration. The rationale of this disclosure obligation concerns potential challenges of members of a tribunal.

(vi) Has your country implemented a sanctions regime? Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent court decisions in your country in relation to the impact of sanctions on international arbitration proceedings?

A case is pending before the Hague Court of Appeal in which these matters are at issue.