Chapter 40

Netherlands

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

It is possible to conclude an arbitration agreement in respect of existing or future disputes between the parties in relation to a defined (contractual or non-contractual) legal relationship.

The arbitration agreement may not serve to determine legal consequences that cannot be freely determined by the parties (*rechtsgevolgen die niet ter vrije bepaling van partijen staan*).

Although parties may (orally) agree to refer their disputes to arbitration, if contested, the arbitration agreement shall be proven by a written document which was accepted by the opposite party (article 1021 of the Dutch Code of Civil Procedure, the **DCCP**). For these purposes, witness evidence is not permitted. A reference to general conditions – in which the arbitration clause is incorporated – could be sufficient if the other party (explicitly or implicitly) accepted these conditions. If an arbitration clause is incorporated in the general terms of a consumer contract, such a clause is annullable (*vernietigbaar*), unless the arbitration clause provides the consumer with the opportunity to submit the respective dispute before the competent national courts.

Furthermore, the written document needs to provide for arbitration in relation to a sufficiently specific legal relationship. A general arbitration clause is therefore insufficient.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Even though it is not obliged, it is recommended to incorporate the following elements in the arbitration agreement: *(a)* the place of arbitration; *(b)* the number of arbitrators; *(c)* the language of the arbitration; *(d)* the applicable arbitration rules; *(e)* the method of appointment of the arbitrators; *(f)* if not already agreed upon by the parties, the law applicable to the dispute; and *(g)* whether the arbitrators must decide in accordance with the rule of law or as an '*amiable compositeur*'.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Through entering into an arbitration agreement, the parties in principle waive their right of access to the national courts. Although the arbitral tribunal decides on its own competence (see also question 3.2), the fundamental character of the aforementioned right entails that ultimately the national courts determine whether a valid agreement was entered into (for example if this issue is raised in setting aside proceedings). To that extent, the addressed national courts will in principle apply a full test and will declare that the arbitration agreement is invalid '*ex officio*' (*ambtshalve*) on the basis of a violation of public policy.

Furthermore, please note that the arbitration agreement, although normally laid down in a single clause of the overall agreement, is considered to be a separate agreement. This entails that if the overall agreement is annulled, it should not necessarily affect the arbitration agreement.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

Book 4 of the DCCP (articles 1020 – 1076) contains the Dutch Arbitration Act and the statutory provisions for (international) arbitral proceedings. These provisions are quite detailed, also to provide adequate rules for the conduct of *ad hoc* arbitrations.

As the Netherlands is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **NYC**), the enforcement of (international) arbitration proceedings is also governed by the provisions of the NYC.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The rules for domestic arbitrations are provided in the first title of the Dutch Arbitration Act (articles 1020 – 1073 DCCP).

For international arbitrations, specific provisions are laid down in the second title of the Dutch Arbitration Act (articles 1074 – 1076 DCCP). These articles do not provide (procedural) rules for foreign arbitrations, but govern the consequences of these arbitrations for the Dutch legal sphere. These provisions contain rules on, *inter alia*, *(a)* the competence of the Dutch national courts (*e.g.* in relation to provisional relief), and *(b)* the enforcement of foreign arbitral awards in the Netherlands.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

On 1 January 2015 the new Dutch Arbitration Act entered into force. Through this new act, more alignment was sought with the UNCITRAL Model Law to improve the competitive position of the Netherlands, internationally, as an arbitration jurisdiction.

To that extent, the new Arbitration Act, for example, contains provisions on the (institutional) challenge of arbitrators, which are intended to ensure confidentiality of the arbitration proceedings.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Mandatory rules that govern national arbitration proceedings in principle also govern international arbitration proceedings; see also questions 4.2 and 11.5.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Arbitrations that establish legal consequences which cannot be freely determined by the parties are prohibited. The following matters, particularly, can for example not be subject to arbitration: *(i)* matters of public policy; *(ii)* certain family law matters; *(iii)* criminal liability; *(iv)* specific procedural matters, such as granting leave for certain protective measures (*e.g.* prejudgment attachment) and proceedings regarding the enforcement, setting aside and revocation of arbitral awards; *(v)* certain matters in the field of intellectual property law; *(vi)* the determination that a company is bankrupt or in moratorium (*surseance van betaling*); *(vii)* hearing of unwilling witnesses; and *(viii)* certain corporate disputes, *e.g.* on the validity of decisions of corporate bodies or an investigation into a company's corporate policy.

Apart from the question of whether a dispute is 'arbitrable', it also has to be determined whether the arbitration agreement covers the respective dispute. For example, an arbitration agreement which is too broadly formulated is insufficient to refer a dispute to arbitration. To that extent, in the available case law it was ruled that a claim for damages caused by cartel infringements is not covered by a standard arbitration clause in the underlying agreement.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The arbitral tribunal may rule on its own competence on the basis of the so-called '*Kompetenz-Kompetenz*' principle.

When the arbitral tribunal renders a decision in this regard, it has to consider the positions of both parties. The arbitral tribunal will, in specific circumstances, assess '*ex officio*' (*ambthalve*) whether it is competent to hear the dispute, such as *(i)* in case the defendant did not appear, *(ii)* if a consumer is a party to an arbitration clause, or *(iii)* if it is debatable whether the dispute is 'arbitrable'.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

If court proceedings are initiated – prior to the commencement of arbitral proceedings – it can be argued that the national court can rule first on its competence.

More in particular, a national court will declare itself incompetent if a party timely submits that the national court cannot hear the case because of the existence of an arbitration agreement, provided that the arbitration agreement is valid (article 1022 DCCP or article 1074 DCCP for international arbitral proceedings). However, if the defendant does not timely raise such a defence, then the national court will in principle accept competence despite the existence of an arbitration agreement.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

The national court will address the issue of jurisdiction and competence of the arbitral tribunal, if the defence that a valid arbitration agreement exists is submitted before the defences on the merits are raised. If the existence of a valid arbitration agreement is contested, then the arbitration agreement has to be evidenced by a written instrument (see also question 1.1). The national court also has to assess the validity of the arbitration agreement on the basis of applicable substantive and formal law. However, if the matter was submitted first to arbitration, then the national court will generally allow the arbitral tribunal to render a decision first on its competence.

Furthermore, when setting-aside proceedings are initiated before a national court, the latter can also address the competence of the arbitral tribunal, provided that this ground is invoked in the respective setting-aside proceedings and – to the extent possible – was also timely raised during the arbitral proceedings (except if the dispute is 'not arbitrable', which has to be established '*ex officio*' by the arbitral tribunal).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

In principle, third parties cannot be bound by an arbitration agreement. There are, however, a few specific exceptions. For example, if a creditor initiates arbitral proceedings against a severally and jointly liable debtor (*hoofdelijk schuldenaar*), the latter can also invoke the arbitration agreement towards the other severally and jointly liable debtor. Furthermore, the 'assignee' and 'debtor cessus' are considered to be bound to an arbitration agreement that was concluded between the 'assignor' and 'debtor cessus' with regard to the transferred claim. The same principle applies to subrogation (*subrogatie*), assumption of debt (*schuldoverneming*) or assumption of a contract (*contractsoverneming*), and a third party which accepts a third beneficiary clause (*derdenbeding*). In addition thereto, there are certain other specific agreements (*benoemde overeenkomsten*) in relation to which it is accepted that third parties are bound, for example a guarantee contract (*borgtochtovereenkomst*), bill of lading (*cognossement*) or mandate (*lastgeving*).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

In the Netherlands, the statutory provisions that prescribe the relevant limitation period(s) are considered to be of a substantive nature and are laid down in the Dutch Civil Code (the **DCC**).

More in particular, pursuant to article 3:310 DCC, the limitation period for the commencement of a procedure is five years as of the day *(i)* on which the party became aware of its claim, and *(ii)* the identity of the liable party. The limitation period can be interrupted (*e.g.* by sending a demand letter or initiating proceedings), which renews the limitation period with the same period. The limitation period is also interrupted in case an arbitral tribunal or a national court declares itself incompetent.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

In general, initiating arbitral proceedings against an insolvent counterparty (intending to obtain compensation from the insolvent estate) is not possible and the respective claimant must submit its claim for verification in the bankruptcy estate.

If during pending arbitral proceedings a defendant is declared bankrupt, the arbitral proceedings will be suspended. The claimant can then decide to withdraw or pursue its claim. In case the claimant decides to continue, the claim will later be confirmed or rejected during the meeting of creditors (*verificatievergadering)*. If not confirmed, claim validation proceedings (*renvooiprocedur*e) will be conducted. If the arbitral proceedings are already in the decision phase, an award is always rendered.

If a claimant is declared bankrupt during the arbitral proceedings, then the proceedings will not be automatically suspended, but these continue and the bankruptcy trustee shall – at the request of the defendant – decide to pursue the proceedings. If such a request is not made, the proceedings will nevertheless continue. However, the bankruptcy estate is not bound by the final arbitral award. In case the bankruptcy trustee decides to continue the proceedings, then the bankrupt estate is bound by the arbitral decision.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

In case the place of arbitration is located in the Netherlands, the arbitral tribunal determines the substantive law applicable to the dispute on the basis of *(a)* the law chosen by the parties, or *(b)* in case such a choice of law is lacking, in accordance with the rule of law it deems appropriate (article 1054 DCCP). Even though the arbitral tribunal is not required to apply the conflict of law rules of the place of arbitration, in practice these rules are often applied.

The arbitral tribunal only decides as '*amiables compositeurs*' if parties agreed to this standard. However, the difference between this standard and deciding on the basis of the rule of law under Dutch law is limited, as the principles of reasonableness and fairness play an important role in Dutch (contractual) law.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Generally, it is accepted that the rules of public policy (*openbare orde*) or priority rules (*voorrangsregels*) can intervene in the law chosen by the parties, which is otherwise applicable.

It is furthermore not possible to deviate from the mandatory (procedural) rules included in the Dutch Arbitration Act, for example through a choice for foreign arbitration law. In case parties want to prevent the applicability of the respective mandatory provisions, they should avoid the Netherlands as the seat of their arbitration.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The arbitration agreement is both of a procedural and substantive nature. In relation to both aspects, the arbitration agreement has to be valid. For these purposes a division is made between *(a)* formal, and *(b)* substantive law governing the arbitration agreement, which are established on the basis of different choice of law rules.

The formal law applicable to the arbitration agreement is determined on the basis of the law of the seat of the arbitration. In case the seat of arbitration is located in the Netherlands, the formal validity has to be assessed on the basis of the first title of the Fourth Book of the DCCP (article 1020 – 1073 DCCP). If, however, the arbitral seat lies outside of the Netherlands, in a state which is a party to the NYC, article II of the NYC will govern the formal validity of the arbitration agreement.

The substantial validity of the arbitration agreement is governed by the conflict of law rules laid down in article 10:166 DCC (except where the NYC applies). This article provides that the arbitration agreement is valid either on the basis of *(a)* the substantive law chosen by the parties, *(b)* the law of the seat of the arbitration (excluding the applicable conflict of law rules), or *(c)* the law applicable to the legal relationship to which the arbitration agreement relates (if the parties did not agree on the law applicable to the arbitration agreement).

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Articles 1023 – 1035a DCCP contain the rules for the selection of arbitrators.

Parties are allowed to select every natural person to preside as the arbitrator, as long as he or she is not legally incapacitated (*handlingsonbekwaam*). Furthermore, a person to be appointed as arbitrator must be independent and impartial; this also applies to party-appointed arbitrators. No person is exempted from appointment on the basis of his or her nationality, unless parties have agreed otherwise for purposes of safeguarding the impartiality and independence of the arbitrators.

The arbitral tribunal, furthermore, must comprise of an odd number (Article 1026 (1) DCCP). The parties are free to determine the appointment method of the arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In case parties did not agree on an appointment method for the arbitrators, the parties must jointly appoint the arbitrator(s). The appointment has to be completed within three months after *(i)* the arbitral proceedings have been initiated, or *(ii)* the moment the number of arbitrators is determined (by the parties or the competent national court).

Parties are furthermore allowed to extend or limit the abovementioned term. In case the appointment of the arbitrators is not completed within the respective period, the most diligent party can request the preliminary relief judge of the competent national court to appoint the (lacking) arbitrator(s).

The arbitrator(s) will be appointed, regardless of the validity of the arbitration agreement, as this element in principle will be assessed by the arbitral tribunal itself. However, from the available case law, it also follows that an appointment request can be denied if it can directly be established that a valid arbitration agreement is lacking.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The Dutch Arbitration Act sets out specific situations in which the national courts can intervene in the selection of arbitrators (at the request of one of the parties). This could, among others, be the case if: *(a)* the number of arbitrators has to be determined; *(b)* the party-appointed arbitrators are not able to appoint a third arbitrator (article 1026 DCCP para 2 and 4); *(c)* the arbitrators are not appointed within the specified term (see question 5.2 above); *(d)* the arbitrator or tribunal has to be released from its mandate (article 1029 DCCP); or *(e)* a challenged arbitrator does not resign (see also question 5.4).

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

If there are circumstances that may lead to a justifiable doubt on the independence or impartiality of an arbitrator, a party may challenge that arbitrator provided that, *(i)* the party invoking the challenge of the arbitrator (nominated by that party) became aware of the reasons for challenge after his or her appointment, or *(ii)* the party that resided in the appointment of the arbitrator (by a third party or the preliminary relief judge) thereafter became aware of the particular ground for challenge.

Subsequently, in case the respective arbitrator decides not to withdraw from the arbitration, the relevant institutional body or preliminary relief judge decides on the challenge at the request of the most diligent party. In that regard, *inter alia*, the IBA Guidelines on the Conflict of Interest could serve as standards.

Article 11 NAI Arbitration Rules provides for independent and impartial arbitrators. Prior to the acceptance by the arbitrator of his/her mandate, the arbitrator shall sign a declaration confirming his/her impartiality and independence and that no conflict of interest exists.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

In the Netherlands an arbitration shall be conducted as agreed between the parties, or if the parties have made no arrangements, as determined by the arbitral tribunal.

Exceptions to this general rule can be found in the relevant statutory provisions which are considered to be mandatory (see also question 4.2). These rules, for example, prescribe that parties should be treated equally, and each party should be allowed to present its case and substantiate its claim(s). The arbitral tribunal is not bound by the formal statutory evidence rules (*bewijsregels*) or evidentiary means (*bewijsmiddelen*).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The Dutch Arbitration Act provides for (directory) procedural rules (articles 1020 – 1073 DCCP). Parties are, in principle, allowed to agree on different procedural rules, except if these are considered to be of a mandatory nature (see also question 6.1).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

As it is not mandatory for the parties to have legal representation in Dutch arbitral proceedings, no specific rules apply to the conduct of (foreign) counsel in these arbitral proceedings. However, if both parties are represented by Dutch lawyers, their conduct is, among others, governed by the code of conduct for lawyers (*Gedragsregels Advocatuur 2018*); the rules of which do not apply to foreign legal counsel.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Under Dutch law, with his or her appointment an arbitrator agrees to resolve the presented dispute by rendering a decision or encouraging a settlement. From this main obligation, ancillary obligations can also be derived, such as *(a)* being independent and impartial, *(b)* performing the assignment, *(c)* rendering a decision as soon as possible, and *(d)* determining a procedural order if parties have not done so themselves.

The arbitrator(s) among others furthermore may: *(i)* order parties to submit additional statements; *(ii)* order parties to provide an oral explanation; *(iii)* decide on the manner in which evidence is submitted and accepted, the burden of proof, or to hear factual or expert witnesses; *(iv)* organise site visits, to render an (default) award or terminate the proceedings (in case the claimant fails to sufficiently specify its claim or defendant its defence); *(v)* grant preliminary or interim measures (except for protective measures); and *(vi)* permit the joinder or intervention of a third party.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

No, a lawyer from another jurisdiction is allowed to represent a party in Dutch arbitral proceedings as an authorised third person. However, if certain procedural steps have to be undertaken (such as requesting for conservatory prejudgment attachment, the challenge of an arbitrator or the suspension of the enforcement of an arbitral award), these can only be requested from and granted by the respective national courts and must therefore be obtained with the assistance of a Dutch lawyer.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no specific statutory rules on the immunity of arbitrators. However, from the available case law it, among others, follows that an arbitrator can be held personally liable for the adverse effects of an annulled award, if he/she acted intentionally (*opzettelijk*) or deliberately recklessly (*bewust roekeloos*) in relation to the (annulled) award, or flagrantly negligent in the performance of his or her duties. To that extent, the addressed national court must assess whether the arbitrator acted personally culpable (*persoonlijk verwijbaar*), which has to be determined on the basis of all the facts and circumstances of the case.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

In general, the national courts are only allowed to rule on procedural issues (*e.g.* on competence) after the arbitral tribunal rendered a decision. This is, however, different with regard to certain protective provisional measures (see also question 7.1).

Furthermore, during pending arbitral proceedings, the national courts are allowed to assist with certain procedural issues, such as *(i)* deciding on the challenge of an arbitrator, *(ii)* ordering the hearing of non-cooperating witnesses, and *(iii)* filing a request for information on foreign law. In addition thereto, unless agreed otherwise, a party can request the competent national court to join pending arbitral proceedings.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

An arbitral tribunal can grant preliminary or interim relief during pending arbitral proceedings on the merits, provided that the respective measures are related to the (counter) claims in the arbitration. The relief to be awarded can consist of provisional measures, such as mandatory or prohibitive injunctions or a monetary award (for example, a claim for advanced payment). Certain protective provisional measures, however, cannot be awarded by an arbitral tribunal (see question 7.3).

The parties may furthermore, by agreement, authorise a separate arbitral tribunal (appointed for that purpose) to award preliminary or interim relief, irrespective of whether the arbitral proceedings on the merits are pending.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

If one of the parties timely invokes the existence of an arbitration agreement, a national court is only entitled to grant preliminary or interim relief if these measures cannot be obtained (such as prejudgment attachment) or cannot timely be obtained in the arbitral proceedings (article 1022c DCCP; see also article 1074d DCCP for international arbitrations).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

If a national court is requested to grant interim relief, and the opposing party invokes the arbitration agreement, the respective court will verify whether the arbitral tribunal was already appointed or if the parties, for example, agreed on emergency arbitration. If that is the case, the court is expected to decide that the respective measures can be (timely) obtained in arbitration and that it is not authorised to impose these measures. The court will also verify whether the arbitral tribunal is allowed to grant the requested relief, which is, for example, not the case if it concerns certain protective measures. In relation thereto, the respective national court is expected to decide that it has authority to impose these measures.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Dutch law does not contain particular rules which provide that the national courts can only intervene in arbitral proceedings with regard to specific matters provided by law. It therefore can be argued that a party is allowed to request a national court to render a declaratory decision that a valid arbitration agreement was entered into (provided that this does not violate article 1052 paras (1), (4) and (5) DCCP).

However, it is not possible to request for such an anti-suit injunction in relation to (cross-border) proceedings which are governed by the Brussels 1 Regulation.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

An arbitral tribunal is allowed to order security for costs in relation to *(i)* requested provisional measures, and *(ii)* for a (counter) claim submitted in the proceedings on the merits. Under specific circumstances, the national courts are also allowed to order a foreign party commencing proceedings in the Netherlands – at the request of the opposite party – to provide security for costs (article 224 DCCP).

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Under Dutch law, a decision of an arbitral tribunal in which it orders preliminary relief or interim measures can be qualified as an award

(unless the arbitral tribunal decides otherwise). Such a decision is therefore, in principle, susceptible to recognition and enforcement in the Netherlands (article 1043b (4) DCCP).

If a similar decision is rendered by an arbitral tribunal in another jurisdiction, which is qualified as an 'arbitral award' (under the relevant Dutch statutory provisions or the NYC), it can be argued that such a decision would be eligible for recognition and enforcement in the Netherlands as well.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

In general, the arbitral tribunal is free to determine the rules regarding evidence – including its admissibility, the burden of proof and the assessment of the evidence. The parties are allowed to agree on different rules of evidence, provided that these do not violate the respective mandatory rules.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Unless parties have agreed otherwise, the arbitral tribunal is allowed to *(a)* order disclosure, including the manner and conditions thereof (article 1040 DCCP), and *(b)* order the parties to furnish evidence by the hearing of witnesses or experts, including the form in which the testimonies are provided (article 1041 DCCP).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

If a witness does not appear or refuses to make a statement, the arbitral tribunal may allow the party requesting the witness to be heard to apply to the provisional relief judge with a request to appoint an examining judge (*rechter commissaris*) before whom the examination of the witness will take place (article 1041a DCCP).

This examination follows the regular procedural rules of the national court, provided that the arbitrators have been given the opportunity to attend the hearing and to pose questions to the witness. The respective national court prepares and sends minutes of the hearing to the arbitrators and parties.

Furthermore, in case one of the parties is not willing to submit documents in the proceedings, a party can request the preliminary relief judge of the competent national court to grant leave for an evidentiary attachment *(bewijsbeslag)*.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The arbitral tribunal decides the place, time and manner in which the witnesses or experts are heard (article 1041 (3) DCCP). Although applicable legal provisions do not (explicitly) provide that the parties can make different arrangements, in practice the parties often specifically arrange for the manner in which the (oral) testimonies have to be given – for example, through cross-examination.

The arbitral tribunal is allowed to hear witnesses under oath. If that occurs, the witnesses are required to give the oath in the manner provided by law (in accordance with *Eedswet 1971*). In case a witness refuses to testify under oath, the arbitral tribunal can draw the conclusions therefrom which it deems appropriate. In practice, witnesses are rarely heard under oath; however, the arbitral tribunal requires them to promise to give a truthful testimony.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Lawyers – including in-house lawyers registered with the Dutch bar – are considered to have absolute legal privilege. This entails that they have the right to decline to give evidence in court (i.e. to testify or produce documents). Privilege only covers information – entrusted to the lawyer in his/her professional capacity – including notes, correspondences with the client and from or to advisors relating to the privileged information. It is generally accepted under Dutch law that legal privilege also applies to employees and advisors instructed by the respective lawyer.

The 'derivative lawyer – client privilege' does not apply if the advisor was instructed directly by the client. Furthermore, the fact that a client waived its privilege does not affect the right of a Dutch lawyer to invoke the privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

An arbitral award shall contain the following information: *(i)* the decision; *(ii)* the reasons for the decision (unless the award concerns the determination of a capacity or a settlement or in case the parties decided otherwise); *(iii)* the names and domiciles of the parties; *(iv)* the name(s) and domicile(s) of the arbitrator(s); *(v)* the date of the arbitral award; and *(vi)* the place of the arbitral award. The arbitral award should be made by a majority vote (unless parties decided otherwise), should be in writing and signed by each of the arbitrators. A refusal or impossibility by a minority of the arbitrators to sign the award must be mentioned by the other arbitrators in the award (article 1057 DCCP). Arbitrators are not required to sign every page of the award.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

In case the arbitral award contains a manifest clerical or computing error, or another mistake which can easily be corrected, rectification or correction of the award can be requested by each of the parties or made at the own initiative of the arbitral tribunal within *(i)* the term agreed by the parties, or *(ii)* three months after the date on which the award was sent to the parties (article 1060 DCCP).

Furthermore, if the arbitral tribunal failed to render a decision on one or more of the presented claims, the most diligent party may request the arbitral tribunal to render an additional award within *(i)* the term agreed by the parties, or *(ii)* three months after the date on which the award was sent to the parties (article 1061 DCCP).

The NAI Arbitration Rules provide a two-month term for the correction or completion of an award (articles 47 – 48 NAI Arbitration Rules).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Parties are entitled to challenge a (partial) final arbitral award through *(i)* setting aside, or *(ii)* revocation of the arbitral award (article 1064 DCCP). The arbitral award can also be challenged by an appeal, if the parties agreed so (article 1061a DCCP) and the respective agreement, *inter alia*, meets the requirements of articles 1020 – 1021 DCCP.

The grounds for setting aside are: *(a)* the absence of a valid arbitration agreement; *(b)* the arbitral tribunal being constituted in violation of the applicable rules; *(c)* the arbitral tribunal not complying with its mandate; *(d)* the award not being signed or not containing the reasoning for the decision; and *(e)* the content of the award or the manner in which it was constituted violates public policy (article 1065 DCCP).

Revocation (article 1068 DCCP) is a legal remedy to redress mispresentation by the parties, rather than errors of the arbitrators. The grounds for revocation are: *(i)* fraud; *(ii)* the forgery of documents; and *(iii)* withholding documents.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The Dutch Arbitration Act does not provide the possibility for parties to completely exclude the setting aside or revocation of an arbitral award.

It is, however, possible to limit the setting-aside proceedings to one instance and to exclude proceedings before the Supreme Court.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

In case parties have not provided for the option to submit an appeal against an arbitral award, it is not possible to commence such an action. Parties are allowed to provide for appeal in the arbitration agreement, or separately (article 1061b DCCP), and they are in principle free to determine the procedure of the arbitral appeal proceedings.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

If the parties made no specific arrangements thereon, an appeal has to be lodged *(i)* against final or partial final awards, or if it concerns an appeal against an interim award (except if it entails a decision rendered on the basis of article 1043b (1) DCCP), such an action can only be instituted simultaneously with appeal against the final or partial final award, and *(ii)* within three months after the award was sent to the parties.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The Netherlands is a party to the NYC and made the reservation of reciprocity in accordance with the NYC.

Dutch national enforcement law may be considered to be slightly more favourable than the NYC as it appears to set less stringent formal requirements for an arbitration agreement (as opposed to the agreement in writing required by the NYC). A party requesting enforcement (of an award rendered in another NYC contracting state) may consider to base its request primarily on national enforcement provisions and, alternatively, on the NYC.

The relevant provisions are included in articles 1062 – 1063 DCCP (in relation to awards rendered in Dutch arbitral proceedings) and articles 1075 – 1076 DCCP (in relation to awards rendered in foreign arbitral proceedings). See also question 11.3.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

The Netherlands is, among others, a party to the Belgian Execution Treaty of 1925 (*Stb.* 1929, 405).

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Recognition and enforcement of a national arbitral award may only take place after the preliminary relief judge of the competent district court – at the request of one of the parties – grants leave to enforce it. The preliminary relief judge can only refuse to grant leave for enforcement if on the basis of a *prima facie* review it can be assumed that the arbitral award will be annulled on the grounds specified in article 1065 DCCP (provided that the annulment term did not lapse) or revoked on the grounds provided in article 1068 DCCP. The enforcement of a periodic penalty is refused if that measure was imposed in violation of article 1056 DCCP. Leave is, in principle, granted *ex parte*, although a party which expects that a request for enforcement will be made can informally request the preliminary relief judge to be heard before the leave for enforcement is granted.

Article 1075 DCCP provides that a 'foreign' arbitral award is enforceable if a recognition and enforcement treaty is in force between the Netherlands and the foreign state. A request for the recognition and enforcement of a foreign arbitral award has to be filed with the competent Court of Appeal. In these proceedings the opposite party can submit a defence and a hearing of parties is, in principle, held. Article 1076 DCCP contains (similar) rules for the recognition and enforcement of a foreign arbitral award rendered in a country in relation to which no recognition and enforcement treaty is in force.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

In principle, a final award has binding force as from the date on which it is rendered, provided that regular legal remedies can no longer be exercised (such as an appeal). This binding force entails that no new decisions can be made in relation to the same legal relationship between identical parties in other (court) proceedings.

However, these rules do not apply to decisions concerning provisional or interim relief (article 1059 (2) DCCP).

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The preliminary relief judge must refuse leave to enforce a(n) (national) arbitral award if the formation or the content of the award is *prima facie* contrary to public policy – which could, for example, be the case when the dispute is not 'arbitrable', if the principle of fair trial was violated or the reasoning for the decision is lacking. In relation to the enforcement of foreign arbitral awards, the Dutch national courts can apply the international public policy standard, which seems to be more narrow than the national public policy standard.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Confidentiality is considered to be an important principle of (unwritten) arbitration law. However, because confidentiality has not explicitly been provided for in the relevant statutory provisions, it is recommended that the parties explicitly make arrangements thereon. Proceedings before the national courts in connection with arbitration (such as enforcement, annulment and revocation) are, in principle, public.

The NAI Arbitration Rules explicitly provide that all directly or indirectly involved parties are bound to secrecy, unless and to the extent that disclosure is required by law or permitted by an agreement of the parties.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Generally, information can be referred to and/or relied upon in subsequent (court) proceedings; see also question 12.1 above.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Besides the exemption that an arbitral tribunal is not allowed to grant certain protective measures, there are, in principle, no limits on the types of remedies available in arbitration.

Article 1056 DCCP provides that articles 611a – 611h DCCP also apply to the arbitration procedure, which entails that – at the request of one of the parties – the arbitral tribunal can impose periodic penalties (*dwangsommen*).

13.2 What, if any, interest is available, and how is the rate of interest determined?

Parties are allowed to agree on a contractual interest rate. If they did not make specific arrangements thereon and Dutch (substantive) law is applicable, the legal interest rate for non-commercial transactions is currently two (2) per cent and the legal interest rate for commercial transactions is eight (8) per cent.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The Dutch Arbitration Act does not provide for the recovery of fees or costs. The parties may, however, provide for the allocation of costs. If such an agreement is lacking, the arbitral tribunal may decide thereon. In practice, the arbitral tribunal will often rule that the losing party has to bear the costs of the arbitration.

Arbitrators are allowed to limit the costs allocation to the extent they deem reasonable, which often occurs in 'national arbitrations' where the prevailing party is generally only able to recover its legal fees to a limited extent. If a party's claim is partly awarded, then the costs are quite often split between the parties.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

If it concerns a national arbitration, VAT is obliged over the arbitrator's fees. In case a cost award is rendered, these fees (including VAT) are incorporated therein.

If it concerns an international arbitration (and parties are entrepreneurs established outside of the Netherlands), the arbitrators are not required to charge VAT and these taxes will not be included in the cost award.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Dutch law does not contain specific rules for the legal relationship between litigation funders, funded parties and their legal counsel. Third parties (such as litigation funders) are therefore, in principle, free to enter into arrangements. There are various professional funders active in the Dutch market, both in litigation and arbitration.

However, Dutch lawyers are restricted with regard to entering into fee arrangements. More in particular, they are allowed to use a fixed-fee or an hourly rate structure, which can be combined with a success fee. Dutch lawyers are, however, required to charge a reasonable minimum fee and they are not allowed to agree to a mere no-cure-no-pay-fee arrangement, except for claims based on physical injuries.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The Netherlands became a party to the ICSID on 14 October 1966.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Currently, there are 78 BITs in place between the Netherlands and states outside the European Union. The Netherlands is also a party to the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The Netherlands uses a standard Bilateral Investment Treaty (BIT) model for its negotiations with other states. The new model BIT was established on 19 October 2018.

One of the most significant changes included therein is the requirement that to be qualified as an 'investor' under the BIT a claimant must have substantial business activities in the territory of the respective contracting state (article 1b). This, among others, entails that 'letter box entities' (*brievenbusmaatschappijen*) are excluded from the scope of the new model BIT. Furthermore, investments which were made through corruption have to be declared inadmissible by the arbitral tribunal (article 16). The new model BIT, moreover, provides that the arbitral tribunal is appointed by the Secretary General of the PCA or the Secretary General of the ICSID.

The new model BIT also contains most favoured nation clauses and provides that a claim can only be referred to the arbitral tribunal if the respective investor *(a)* withdraws or discontinues existing proceedings before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim, and *(b)* waives its right to initiate any claim or proceedings before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to its claim (article 19 para 5).

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Overall, the approach is that an *immunity of jurisdiction* defence submitted by a foreign state is not easily accepted and is only reserved to matters in which a state acted strictly on the basis of its public task.

The approach in relation to state *immunity regarding execution* is different. More in particular, the properties of a foreign state can, in principle, not be subject to attachments or execution. This principle only covers properties with a public destination and it is not required that the goods were actually used for public purposes (on the moment of seizure).

In case a bailiff is instructed to make attachments on goods of a state, he or she is required to inform the Minister of Safety and Justice, which could decide to become involved in these proceedings and to oppose the levying of the attachments.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

As of 1 January 2019, it is possible to conduct proceedings before the Netherlands Commercial Court (the **NCC**). This is a specialised chamber of the Amsterdam District Court and Court of Appeal which is equipped to hear international commercial disputes (including proceedings regarding the setting aside of arbitral awards, which were rendered in arbitral proceedings with the seat located in the jurisdiction of the competent court in Amsterdam). All procedural submissions exchanged, as well as judgments rendered, during these proceedings are in English. Parties may choose voluntarily to conduct their case before the NCC.

On 15 January 2019, 22 EU Member States (including the Netherlands) endorsed a declaration on the legal consequences of the Achmea judgment (Court of Justice EU March 2018 Case C-284/16, *Achmea v Slovak Republic*) and on investment protection in the EU. So far, the specific consequences of the declaration are unclear.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

In April 2019, the NAI published new guidelines on the hourly rate of arbitrators.

The NAI furthermore issued guidelines to assist arbitrators in demining the costs of legal representation for the purposes of rendering a decision on cost allocation. These guidelines mainly apply to national arbitral proceedings.

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