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International Arbitration

Netherlands
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NETHERLANDS

Law and Practice

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Contents

1. General

1.1 Prevalence of Arbitration

International arbitration is a frequently used and broadly accepted method of dispute resolution in the Netherlands for both commercial and sector-specific disputes. In the construction sector particularly, but also in M&A contracts, arbitration is the prevalent form of dispute resolution. Depending on the parties involved, the Dutch jurisdiction – which also has a favourable tax regime – serves as a seat of the arbitration, the venue for recognition and enforcement, or both.

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, choice of language as well as enforceability of awards (at present, the latter is an advantage, particularly outside the EU).

The Dutch Arbitration Act is modern. The 2015 Act came into force on 1 January 2015, on the back of considerable support from the Dutch legislator for arbitration. This statute applies to arbitral proceedings that commenced on or after 1 January 2015 and court proceedings relating thereto. The 2015 Act comprehensively updates the Dutch Arbitration Act of 1986 (the 1986 Act), which had only seen some minor changes since 1986. Below, reference is made to the Dutch Arbitration Act and the 2015 Act.

1.2 Trends

As of 1 January 2019, the newly established Netherlands Commercial Court (NCC) offers English language proceedings in setting aside, recognition and enforcement and other matters ancillary to arbitration. It is also notable that a new arbitration hearing centre has opened in The Hague. This centre complements the existing offering at the PCA and in other venues and is within a 30-minute drive from Schiphol International Airport. It has seen a soft opening in early 2019 and is now in business. These developments further strengthen the solid infrastructure available to both Dutch and foreign-seated arbitrations. In terms of decided cases, the Dutch Courts continue their pro-arbitration stance.

The Dutch jurisdiction has proven particularly well positioned to deal with the consequences of the COVID-19 pandemic. Its modern arbitration act is one of few that explicitly provides for arbitrators to order hearings by electronic means. Dutch arbitrators have proven willing to apply this option, whilst remaining mindful of the parties' potentially legitimate interests in having hearings conducted in person – for instance, with a view on the potentially reduced effectiveness of online cross-examination and other forms of taking of evidence.

1.3 Key Industries

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). In recent times, the PRIME Finance Institute has been added to the international institutions based in the Netherlands, providing for dispute resolution in, among others, disputes involving standard form contracts published by the International Swaps and Derivatives Association.

These offerings benefit from the strong Dutch arbitration infrastructure and the prominence of the city of The Hague, a city that styles itself as the international centre of peace and justice and that also hosts the ICJ, the Iran-US Claims Tribunal and various other international tribunals. Furthermore, The Netherlands benefits from a strong network of international investment treaties.

In addition, arbitration remains prevalent in commercial (post-M&A, agency/franchising/distribution, corporate) settings, as well as in oil and gas disputes. This follows, in part, from corporate structuring through Dutch holding companies, for fiscal and other reasons. Seating an arbitration in The Netherlands ensures the benefit of swift and effective enforcement. As discussed in **12.3 Approach of the Courts**, Dutch courts are generally supportive of enforcement of foreign arbitral awards.

1.4 Arbitral Institutions

The Netherlands Arbitration Institute (NAI) is the premier Dutch commercial arbitration institute. It operates in, and out of, a market that accepts arbitration as a preferred method of resolving commercial disputes.

In addition, the Netherlands hosts many arbitration bodies, including the Permanent Court of Arbitration (PCA) at the Peace Palace in The Hague, the Panel of Recognised International Market Experts in Finance (PRIME) Dispute Resolution Centre and a range of industry-specific arbitration institutes, such as the Arbitration Board for the Construction Industry (*Raad van Arbitrage voor de Bouw*), the Transport and Maritime Arbitration Rotterdam–Amsterdam foundation (TAMARA) – recently relaunched as UNUM Arbitration & Mediation – and the Arbitration Board for the Metal Trade and Industry (*Stichting Raad voor Arbitrage voor Metaalnijverheid en–handel*).

In terms of volume of international matters, the NAI is the premier institute; in terms of case load in general, the Arbitration Board for the Construction Industry is the most-used institute.

Recently the Court of Arbitration for Art has opened its doors. CAfA is a specialised arbitration and mediation institution exclusively dedicated to resolving dispute in the art sector.

Cases are administered by the Netherlands Arbitration Institute's secretariat.

2. Governing Legislation

2.1 Governing Law

The Dutch Arbitration Act governs arbitrations seated in the Netherlands. This statutory instrument is set out, largely, in Book 4 of the Dutch Code of Civil Procedure. This arbitration act does not fundamentally 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, to significant degree, based on the UNCITRAL Model Law. Deviations are limited. Compared to the UNCITRAL Model Law, the 2015 Act provides more specific arrangements for arbitral interim relief and Dutch-style "emergency arbitration" (*arbitraal kort geding*), and in the context of set aside applications it allows the Court of Appeals to remit proceedings to the tribunal, on such court's own motion.

In this context, it is notable that the UNCITRAL Model Law does apply in the Dutch Caribbean. Hence, the Dutch Supreme Court also expresses views on this instrument, if cassation appeals are brought to the Dutch Supreme Court in such "overseas" cases.

2.2 Changes to National Law

No changes have either been made or are proposed that may alter the Dutch arbitration landscape in a significant way.

However, and as noted, the establishment of the Netherlands Commercial Court (NCC), effective per 1 January 2019, does open the door to full English language proceedings pertaining to setting aside, recognition and enforcement and other proceedings ancillary to arbitration.

The NCC operates as a court of first instance and as a court of appeals; in its latter form it is properly referred to as the Netherlands Commercial Court of Appeals (NCCA). Parties may opt in to the NCC(A)'s jurisdiction by means of a forum selection clause. If the seat of an arbitration is within the geographical remit of the NCC, proceedings ancillary to arbitration, setting aside and exequatur proceedings can indeed be brought before the NCC and shall, in such instance, be conducted in the English language.

3. The Arbitration Agreement

3.1 Enforceability

Assuming this is decided by reference to Dutch arbitration law, the general conditions for the valid formation of an agreement under Dutch civil law equally apply to agreements to arbitrate. If an arbitration agreement is part of general terms and conditions, the regime applicable thereto applies – with the addition of specific norms derived from EU law in so far as consumers are concerned.

Case law on the European Convention on Human Rights entails that the arbitration agreement should express an unambiguous and unequivocal choice for arbitration. Although, under Dutch arbitration law, an arbitration agreement may be concluded verbally that does not have significant practical effect because arbitration agreements can only validly be evidenced through written instruments.

3.2 Arbitrability

Dutch law, including the 2015 Act, is favourable to arbitration and permits arbitration of all disputes on subject matters that the parties may freely dispose of. In practice, this entails that all but a few exempted categories of disputes pertaining to commercial relationships are arbitrable under Dutch law.

Disputes that are not arbitrable include certain aspects of family law, intellectual property law, bankruptcy law and matters that 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. The most notable example of the latter follows from a case decided by the Dutch Supreme Court and concerns the non-arbitrability of disputes concerning the validity of corporate decision-making. The legislator has not changed this in the 2015 Act.

Enquiry proceedings – conducted in the Enterprise Chamber of the Amsterdam Court of Appeals and dealing with the functioning of companies and corporate bodies organised under Dutch law – are also not arbitrable.

3.3 National Courts' Approach

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 the most favourable of three regimes, namely:

- the law agreed by the parties to apply to the agreement to arbitrate;

- the law of the seat of the arbitration; or
- 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 that concern consumers are subject to the application of 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 as the selected means of dispute resolution or have not been entered into voluntarily. In highly exceptional circumstances, an arbitration agreement may be held to be incompatible with the principles of reasonableness and fairness. If the parties have agreed to summary arbitral proceedings (ie, the above-referenced Dutch form of emergency arbitration), state courts addressed in contravention of such agreement will decline to accept jurisdiction, except for highly urgent matters where the request relief cannot or cannot timely be granted by an arbitral tribunal.

3.4 Validity

The 2015 Act explicitly provides that the doctrine of separability applies. Consequently, under Dutch law, the arbitration clause qualifies as an agreement separate from the agreement in which it is contained.

4. The Arbitral Tribunal

4.1 Limits on Selection

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

4.2 Default Procedures

Where an arbitration is administered by an arbitration institute, the applicable arbitration rules generally provide for the method for selection of the arbitral tribunal. The 2015 Rules of Arbitration of the Netherlands Arbitration Institute (the NAI Rules) depart from their previous default position of a list-procedure and now use party appointment as the default position.

The default position under the 2015 Act is that arbitrators are appointed within three months, counting from the submission of a request for arbitration. If the parties fail to timely appoint arbitrators, the interim relief judge of the competent District Court may appoint the missing arbitrator(s), at the request of an interested party. The 2015 Act does not provide for a default procedure in the case of multi-party arbitrations, but applicable arbitration rules – such as the NAI Rules – generally do.

4.3 Court Intervention

In the absence of an arrangement in applicable arbitration rules, the Dutch courts may be requested to assist in in the appointment of arbitrators. Where the parties have agreed – for instance, as per the choice for an arbitration institute to administer the case – to have selection (and challenge) of arbitrators be dealt with by such institute, the courts lack jurisdiction. This is congruent to the more general rule that where relief may be obtained in arbitration, the Dutch courts refer the parties to arbitration. If institutional appointment of a tribunal (also) fails to take place, timely, the interim relief judge of the competent District Court may be requested to make the requisite appointments.

4.4 Challenge and Removal of Arbitrators

Under the 2015 Act, challenges may be decided by an independent third party (such as the ICC Court or a newly appointed so-called committee at the NAI), other than the competent state court. This constitutes a departure from the regime applicable under the 1986 Act, under which challenges to arbitrators had to be brought before the competent court at the seat of arbitration. The latter continues to apply as the default rule and thus, generally, applies in ad hoc proceedings.

4.5 Arbitrator Requirements

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, in particular insofar as purely domestic arbitrations are concerned. In an international setting the IBA Guidelines on Conflicts of Interest in International Arbitration are frequently invoked and used for guidance.

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, auditors or medical professionals. In so far as advocates are concerned, a specific provision has recently been put into place by the Dutch Bar Association and applies to support independence and impartiality of advocates acting as arbitrators (Article 23 of the 2018 Code of Conduct).

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.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Types of disputes that may not be arbitrated include those regarded as forming part of public policy, such as certain aspects of family law, intellectual property law, bankruptcy law and matters that have an erga omnes effect (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 pertaining to the validity of corporate decision-making was debated in view of a decision by the Dutch Supreme Court in which this court had rejected arbitrability thereof. The outcome of this debate is that such disputes remain non-arbitrable as a matter of Dutch arbitration law. Above reference has also been made to proceedings concerning enquiries in the Enterprise Chamber of the Amsterdam Court of Appeals.

5.2 Challenges to Jurisdiction

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

As a matter of Dutch arbitration law, no distinction is made between annulment, set aside and challenge of arbitral awards.

5.3 Circumstances for Court Intervention

If a party in court proceedings timely 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 de facto waiver.

In the context of interim relief proceedings and requests for court assistance in the taking of evidence, a party may invoke the existence of an arbitration agreement. If the interim relief court prima facie finds that an arbitration agreement exists, it will refer the parties to arbitration, unless the requested relief cannot, or cannot timely, be obtained in arbitration (see also **3.3 National Courts' Approach**).

The 2015 Act explicitly provides that an arbitral award pursuant to which a tribunal rejects jurisdiction, constitutes an arbitral award in respect of which normal remedies – including a claim for setting aside – may be sought.

5.4 Timing of Challenge

Parties must, in principle, await an arbitral award in order to challenge the tribunal's jurisdiction.

Time limitations apply. Limitation periods commence at distinct moments and may, due to differing moments of commencement, result in potential renewal of a time window to initiate set-aside proceedings. The limitation periods expire three months after:

- dispatch (*verzending*) of the award;
- deposit of an award with the competent district court (in cases where the parties have agreed to such deposit); or
- service of process of an award with an exequatur affixed thereto on the party against whom enforcement is sought.

It is important to bear in mind that the 1986 Act, including a regime regarding limitation periods that is slightly different from the 2015 Act's arrangement 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 (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.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

The standard of judicial review for questions of admissibility, due process and jurisdiction is, by and large, de novo (subject to exceptions). This entails, in particular, that the Dutch Courts

will not apply "restraint" in their review on the validity of an agreement to arbitrate and due process.

5.6 Breach of Arbitration Agreement

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. The Dutch courts and legislator (the latter per parliamentary papers) do, however, look favourably upon arbitration.

A specific regime applies when a party commences court proceedings concerning interim relief or measures pertaining to the taking of evidence.

5.7 Third Parties

In principle, third parties (ie, those who have not entered into an agreement) are not bound to an arbitration agreement. There is, however, a range of nuanced exceptions to this general rule. These exceptions may arise from Dutch Civil Code provisions on obligations and corporate law. 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 as well as group of companies doctrines (the latter may apply in cases where the distinction between legal entities constitutes a misuse of rights).

The Arbitration Board for the Building Industry (*Raad van Arbitrage voor de Bouw*) applies a liberal approach to holding non-signatories bound to an agreement to arbitrate. Pursuant thereto, third parties, such as sub-contractors, can be easily considered bound to arbitration agreements that they have not entered into. This is particular to the building and construction sector and, by and large, applies only to Dutch-seated arbitration concerning Dutch law governed construction law.

6. Preliminary and Interim Relief

6.1 Types of Relief

Tribunals may order interim measures and preliminary relief. The power to award interim measures is explicitly provided in the Dutch Arbitration Act. It is also frequently provided, in further detail, in arbitration rules, including the NAI Rules. No limitations exist regarding the form of a tribunal's decision on interim measures, which may be given in the form of both an order and/or an award and may encompass various types of relief. Interim measures are generally enforceable through obtaining an exequatur (at least in Dutch courts), certainly if they are cast in the form of an (interim) award. This follows from a provision particular to the Dutch Arbitration Act (Article 1043b).

An award containing interim measures may, if agreed by the parties, be issued in pending arbitral proceedings and/or in separate arbitral summary proceedings (*arbitraal kort geding*). The latter are also referred to as Dutch-style emergency arbitration.

The NAI Rules permit an opt-out regarding such summary arbitral proceedings and only apply in Dutch-seated arbitrations. These summary proceedings can result in interim measures that do not formally prejudice the dispute on the merits, yet may in effect do so, be far-reaching and may go significantly beyond preserving a certain status quo. 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. Relief sought and granted may include an award 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. In this aspect, the Dutch regime is quite unique.

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

6.2 Role of Courts

Courts may grant provisional relief in support of such 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) and those that are not arbitrable. Courts may intervene and grant such relief, even after the constitution of an arbitral tribunal.

The Dutch Arbitration Act permits the use of emergency arbitrators. Decisions by emergency arbitrators may be binding as an equivalent to an arbitral award on the merits and have, in some instances, even been granted an exequatur. The permitted

types of relief, both for tribunals and for courts, are as set out in **5.1 Matters Excluded from Arbitration**.

6.3 Security for Costs

Dutch civil procedure provides for security for costs orders against non-EU and non-US parties. This arrangement has limited application in arbitral proceedings, but there is no statutory provision that either prohibits or regulates security for costs in arbitration. It is thus up to tribunals, with due regard to applicable arbitration rules.

7. Procedure

7.1 Governing Rules

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. However, it does contain some provisions (primarily dealing with enforcement) specific to proceedings seated outside the Netherlands.

7.2 Procedural Steps

Firstly, in Dutch-seated proceedings, the following particular procedural steps are mandatory. Parties are required to articulate and adequately substantiate their respective claims and responses. If they fail to do so, a tribunal is, in the absence of reasons for such failure, mandated to discontinue the proceedings (in so far as claims are concerned) or to decide upon the claims made in an award (in so far as failures pertain to the responses).

Secondly, a party who has appeared in the proceedings shall raise objections to the arbitral tribunal without unreasonable delay, as soon as such party knows or reasonably should know of any act contrary to, or failure to act in accordance with, any provisions in articles 1036 to 1048(a) of the Arbitration Act, the arbitration agreement, or any order, decision or measure of the arbitral tribunal. If a party fails to do so, then the right to rely on this later in the arbitral proceedings or before the court may be forfeited.

7.3 Powers and Duties of Arbitrators

The arbitrators' mandate, which includes powers and duties, is prescribed by mandatory and non-mandatory provisions of law, the parties (whether or not through the application of arbitration rules) and by arbitrators themselves (to the extent they are authorised to do so). The key provisions in this respect are articles 1020 and 1036 of the Arbitration Act.

Such powers and duties concern, in particular, the following: the duty to treat the parties equally, to give the parties the opportunity mutually to set out and explain their positions and to comment on each other's positions and on all documents and other information brought to the attention of the arbitral tribunal during the proceedings. The arbitral tribunal is also obliged not to base its decision, where it is unfavourable for one party, upon documents and other information on which that party was not sufficiently able to comment.

The arbitral tribunal shall also guard against unreasonable delay of the proceedings and, if necessary, at the request of a party or of its own motion, take measures in that regard (as discussed in relation to COVID-19 in **1.2 Trends**).

Furthermore, absent agreement by the parties, the tribunal determines the place of arbitration and may resolve that hearings, consultations between tribunal members and witness and expert hearings may take place outside the place of arbitration and outside the Netherlands. Under the 2015 Act, the tribunal may resolve to have one of its members conduct such hearing, again absent party agreement to the contrary. In addition, the arbitrators shall afford an opportunity for an oral hearing, upon request by one of the parties or on their own motion, absent party agreement to the contrary. The same applies to matters pertaining to the taking, required submission and assessment of evidence, including appointment of experts, site visits, requests under the 1968 London Agreement and an order for parties to appear.

Finally, it is for arbitrators to decide when an award will be issued.

7.4 Legal Representatives

Parties may appear in person or be represented by a legal representative or other person. Dutch arbitration law does not prescribe particular qualifications for legal representatives that appear in Dutch-seated arbitrations, be it in domestic or international matters. So, legal representatives may indeed appear in Dutch-seated arbitral proceedings if they have qualifications other than Dutch domestic ones.

8. Evidence

8.1 Collection and Submission of Evidence

In state courts prescribed forms and limitations apply.

With respect to documents, requests must be for particular documents. In addition, requests may pertain to carefully prescribed categories of documents. With respect to document production, a request must serve a basic legal interest. Legal privilege and compelling arguments pertaining to confidential-

ity, such as trade secrets, may also apply and prevent document production requests from being granted.

Disclosure requests are generally also tested through application of relevance and proportionality criteria. Classic fishing expeditions are not permitted.

With respect to witness evidence, the Dutch courts are in principle expected to grant requests to hear witnesses prior to proceedings on the merits. However, such preliminary witness examinations (as they are known) and witness examinations in proceedings on the merits need to tie into matters that could be decisive for the case at hand, concern specific legal and factual allegations and be connected to other evidence put to courts. These criteria may, and do in practice, often serve to enable courts to avoid witness examinations.

In so far as witness and expert examination is concerned, the Dutch courts traditionally take the lead. However, in recent years, the tendency is for the Dutch courts to defer to parties' counsel first. No transcripts tend to be permitted. The outcome of such examinations is generally put down in a written summary document, prepared by the court's registrar under the auspices of the examining judge.

8.2 Rules of Evidence

Tribunals are not bound by rules on the taking of evidence provided for in the Dutch Code of Civil Procedure. However, in domestic cases, tribunals tend to be inclined to apply such rules by analogy. In international matters, the IBA Rules on the Taking of Evidence are often applied (be it directly or as guidance).

Although arbitral tribunals are permitted to order parties to produce documents, tribunals cannot, ultimately, compel parties to do so. If a party refuses to produce documents then the arbitral tribunal may draw adverse inferences – which generally serves to persuade parties to comply with orders issued.

Witness and expert evidence is generally presented in the form agreed upon by the parties or provided for by a tribunal. Cross-examination is permitted and occurs in international arbitrations seated in the Netherlands, albeit that tribunals typically also question a witness subsequent to counsel concluding its examinations. As noted, Dutch domestic court practice provides for a prominent role for an examining judge in the examination of witnesses, which influences the course of proceedings in domestic arbitrations.

Absent party agreement to the contrary, tribunals may call witnesses and appoint experts on their own motion. This power is not used often.

8.3 Powers of Compulsion

Courts may grant such assistance and relief, including with respect to hearing witnesses. Judicial assistance may also include seizure of information (eg, information contained in documents or electronic records). 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 Act, Dutch courts seem reluctant to conclude that the measure requested cannot be obtained, or cannot be obtained fast enough, in arbitral proceedings – which is in line with the legislator's directions.

Courts are also permitted to compel witnesses to appear in court and be examined by an examining judge if they fail to appear in arbitral proceedings. The arbitral tribunal may, at the request of any of the parties or of its own motion, order the inspection of a copy of or an extract from specific documents related to the dispute from the party which has these documents at its disposal, unless the parties have agreed otherwise. This power does not extend to non-parties. However, under general Dutch procedural law on the production of documents, a party to the arbitration can request court assistance in obtaining specific documents from a third party that is not a party to the arbitration.

9. Confidentiality

9.1 Extent of Confidentiality

Arbitral proceedings are generally considered to be confidential, although this is neither expressly provided for in the 1986 Act nor in the and 2015 Act. Arbitration rules do tend to explicitly provide for confidentiality, as do the NAI Rules. However, parties and tribunals may specifically provide for confidentiality agreements.

As a default, 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.

10. The Award

10.1 Legal Requirements

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.

If a minority of the tribunal members declines or is unable to sign the award, the majority must make mention thereof in the award.

10.2 Types of Remedies

Tribunals may award punitive or exemplary damages subject to party agreement and their mandate. Awards of punitive or exemplary damages are uncommon, however. Tribunals dealing with summary arbitral proceedings (see above) frequently grant requests for a conditional penal sum (*dwangsom*) to ensure compliance with their award (but such penal sums are generally not considered as a form of punitive or exemplary damages). In addition, interest, including compound interest, can be awarded, if requested by a party.

There are some further minor limitations on permissible relief, including that a tribunal is not empowered to grant permission to attach or seize property or to (directly) lift seizures (see also **6.1 Types of Relief**).

10.3 Recovering Interest and Legal 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 some restraint is exercised in awarding full costs. Such restraint is also observed in awards under NAI Rules and held out by the NAI in guidance notes to tribunals.

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

11. Review of an Award

11.1 Grounds for Appeal

Awards may only be appealed if the parties have agreed thereto. In case of an arbitral appeal, there is typically only one instance and no formal limitation on grounds that may be invoked. The 2015 Act provides for a default procedure that applies to arbitral appeal proceedings and for the status of arbitral awards against which arbitral appeals (may be or are) issued.

11.2 Excluding/Expanding the Scope of Appeal

However, parties may not waive their right to commence challenge proceedings before the competent courts (ie, the court of appeal under the 2015 Act) as the statutory provision that governs challenges is mandatory (ie, may not be opted-out of). Parties may, however, waive the right to Supreme Court review of any court of appeal decision on a challenge application.

11.3 Standard of Judicial Review

Awards rendered in arbitrations seated in the Netherlands may be challenged in the Dutch state courts – and parties cannot 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.

Challenge proceedings shall not amount to *révision au fond*. Only an award that lacks any substantiation at all may be set aside for being unreasoned. Challenges based on the absence of an agreement to arbitrate and challenges concerning an alleged violation of the right to an equal hearing are, however, assessed on a de novo basis (subject to exceptions).

12. Enforcement of an Award

12.1 New York Convention

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

12.2 Enforcement Procedure

Dutch courts are generally inclined to grant leave to enforce.

Permission to enforce (an exequatur) an award in a Netherlands-seated arbitration must be granted by the interim relief judge of the District Court (*voorzieningenrechter*) in whose jurisdictional area the place of arbitration is located. An exequatur will be affixed to the original arbitral award or a certified copy thereof. The process is relatively simple and may occur ex parte – that is, without a hearing of the party against whom enforcement is sought (subject to unregulated and proactive applications to a court by the party against whom enforcement may be sought).

If recognition and enforcement relates to a foreign arbitral award, the party against whom enforcement is sought will, in principle, be called to appear for a hearing upon the request to recognise 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. A decision granting exequatur may not be appealed. However, appeal is open when the request for exequatur is rejected by the court in first instance.

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 is not required at this stage. The party against whom enforcement is sought may bring summary proceedings to stay enforcement.

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

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 in the seat is exceptional.

States enjoy sovereign immunity for sovereign acts. Nuanced case law applies to sovereign immunity and this issue is frequently litigated in the Dutch courts.

12.3 Approach of the Courts

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 lacks (under the applicable law);
- the tribunal is constituted in violation of rules applicable thereto;
- the tribunal has grossly failed to comply with its mandate;
- the award is still open to appeal (ie, not final);
- the award has been set aside by a competent authority in the country in which the award was rendered; or
- recognition or enforcement violates public policy.

The Netherlands have issued the reciprocity reservation under the New York Convention.

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

13. Miscellaneous

13.1 Class-Action or Group Arbitration

The Dutch jurisdiction is not familiar with class-action arbitration or group arbitration. The Netherlands is, however, a prime venue for (cross-border) collective settlements. Collective settlements may be declared binding by the Amsterdam Court of Appeal under the Act on the Collective Settlement of Mass Damages, known in the Netherlands as the WCAM (*Wet Collectieve Afhandeling Massaschade*). Settlements often include an arbitration or binding advice (*bindend advies*) mechanism to resolve disputes as to whether an individual claimant may benefit from the settlement (and to what extent).

Apart from this mechanism for the binding declaration of collective settlements, Dutch law provides for the possibility for a foundation or association that, pursuant to its articles of association, represents the interests of a group of claimants to file a claim against a purported wrongdoer. It has been submitted in literature that these claims may also be brought in arbitration proceedings.

13.2 Ethical Codes

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. However, the requirements of independence and impartiality act as limitations. The delineation of such norms is influenced by guidelines applicable to state court judges insofar as purely domestic arbitrations are concerned. In an

international setting the IBA Guidelines on Conflicts of Interest in International Arbitration are frequently invoked.

No ethical duties specific to arbitrators apply (see **4.5 Arbitrator Requirements**). 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. They 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.

13.3 Third-Party Funding

Third-party litigation funding is permitted in the Netherlands. In fact, in the context of the systems for collective redress discussed in **13.1 Class-Action or Group Arbitration**, litigation or settlement through funded special claims vehicles is common. Third-party litigation funding is less common where it concerns individual claims.

Courts assess the fairness of third-party funding arrangements in the context of class settlements. There is no such review in the context of arbitration.

13.4 Consolidation

Arbitral proceedings seated in the Netherlands may be consolidated with other Netherlands or non-Netherlands seated arbitral proceedings. This may be done at the request of a party and if the parties have not agreed otherwise. Consolidation requests may be decided by a third party (if so agreed by the parties) or, if not so determined by the parties, by the interim relief judge in the District Court of Amsterdam. The latter may only consolidate Netherlands-seated arbitral proceedings.

Consolidation may occur if this does not cause unreasonable delay in the pending proceedings, also taking into account the stage of the proceedings and the connection between the two proceedings – ie, the two arbitration proceedings should be so closely connected that good administration of justice renders it expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.

13.5 Third Parties

In principle, third parties (ie, those who have not entered into an arbitration agreement) are not bound to an arbitration agreement. There are a range of nuanced exceptions that may arise from Dutch Civil Code provisions on obligations and Dutch corporate law. 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 and, in some instances, group of companies doctrines (the latter, in particular, if misuse of corporate identity can be established).

The Arbitration Board for the Building Industry (*Raad van Arbitrage voor de Bouw*) applies a liberal approach to the binding of non-signatories, pursuant to which it relatively easily considers third parties such as sub-contractors to be bound to arbitration agreements. This practice is, however, specific to this sector and, by and large, only applies in this specific domestic Dutch context.

Van Doorne is a full-service leading independent Dutch law firm. With around 175 lawyers, Van Doorne has been advising clients for almost 90 years. The firm fields two dedicated arbitration specialists, working out of both its Amsterdam and London offices. These two lead partners rely on a team of some ten associates that are embedded in Van Doorne's 75-plus lawyer dispute resolution offering. The team is bilingual (English-Dutch) and well versed in both civil law and common law concepts and procedure. The focus is on commercial and investment arbitration work, be it under the rules of the NAI or other national/international institutions (LCIA, ICC and UNCITRAL, among many others). The team acts as counsel and co-counsel on arbitration, enforcement and setting aside mandates.

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