

THE NETHERLANDS

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1. USE OF COMMERCIAL ARBITRATION

1.1 Describe the prevalence of commercial arbitrations as a method of settling disputes, both domestic and international.

Arbitration is, these days, the predominant method of settling disputes between larger corporations, as well as in many other types of disputes. Arbitration is, by and large, the default rule in current M&A contracts, including some of the largest and most prominent acquisitions and mergers of the last – particularly turbulent – few years. In the Netherlands, arbitration has become a widely accepted and used dispute resolution mechanism, providing a full alternative, and indeed often the preferred alternative, to state court proceedings.

An example of a high profile domestic arbitration case within the Netherlands during the past few years is a dispute between the Dutch State and the Dutch aviation industry over a contract in relation to the Dutch military's Joint Strike Fighter programme (under the auspices of the Netherlands Arbitration Institute (NAI)). An example of a high profile international dispute arbitrated in the Netherlands is a dispute between the Iranian Ministry of Defence and an arms producer located in the United Kingdom (ICC). The long lasting dispute recently ended with a judgment of the Dutch Supreme Court.

In addition to the development of arbitration between private parties, arbitral proceedings between states and investors on the basis of bilateral investment treaties have become common in the arbitration arena. This interesting area of public international law has also found its footing in the Netherlands. A paramount example within the Dutch legal community is the dispute between Dutch insurance (holding) company Eureko BV and the Republic of Poland (an arbitral award on jurisdiction and liability was published in August 2005 and the case was settled in September 2009). Such investment treaty arbitrations generally fall outside the scope of this chapter and will not be discussed in detail here.

2. LAW ON ARBITRATION

2.1 What are the principal sources of law and regulation relating to domestic and international arbitration? (Describe the role of federal or state laws and relevance of court decisions).

The Dutch legal framework for arbitration is straightforward and user friendly. The rules of national and international arbitration can be found in the Dutch Arbitration Act 1986 (Arbitration Act). The Arbitration Act is part of the Dutch Code of Civil Procedure (DCCP), incorporated into Articles 1020-1076 DCCP. These rules do not differentiate between national and international arbitrations. The Arbitration Act provides for a liberal approach to arbitration and contains mostly default rules, allowing ample flexibility for the specific needs of the parties. The Arbitration Act is applicable to any arbitration in which the seat is located within the Netherlands, but also provides rules pertaining to potential Dutch court involvement vis-à-vis arbitrations outside the Netherlands (Articles 1074-1076).

The Arbitration Act provides the parties with the ability to agree, to a large extent, upon additional or different rules for conducting the arbitration. If this is the wish of the parties, it is

usually done by way of reference to rules of arbitration adopted by institutions such as the ICC or the NAI.

The role of the Dutch courts in national and international arbitration is limited. Dutch courts are reluctant to intervene in the arbitral agreement reached between the parties and/or in arbitral proceedings, making the Netherlands an arbitration-friendly jurisdiction since the regulatory rules of the Arbitration Act and of the NAI provide for a system of arbitration that functions quite well without the interference or assistance of the courts. Courts decisions on arbitration issues pertain mostly to annulment actions (see question 17.2).

2.2 List and briefly describe relevant arbitration statutes, international treaties, and conventions.

The Arbitration Act is a comprehensive set of rules that applies to arbitral proceedings. Most elements of the arbitral process are dealt with in the Arbitration Act. However, the Act incorporates, by reference, specific Articles in other parts of the DCCP. In particular, general procedural rules contained in other parts of the DCCP and the state courts' case law are relevant for determining the scope of the arbitral tribunal's authority in arbitral interim injunctive proceedings (Articles 254 and 1051 DCCP) and with respect to the arbitral tribunal's authority to levy a penalty for non-compliance with the arbitral award (see Articles 611a to 611i DCCP, in conjunction with Article 1056 DCCP).

At an international level, the Netherlands is a party to the New York Convention of 1958 and to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 (ICSID).

Also, European Community law, to which the Netherlands is subject, is gaining importance in the arbitral arena. In particular, reference is made to the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts and the ensuing judgments of the European Court of Justice (First Chamber), for example of 26 October 2006 (Elisa María Mostaza Claro v Centro Móvil Milenium SL), Case C-168/05 and 6 October 2009 (Asturcom v Nogueira), Case C-40/08. It follows from the Mostaza Claro judgment that a national court seized of an action for annulment of an arbitral award must, if need be of its own motion, determine whether the arbitration agreement is void and annul that award where that agreement is deemed unfair, even if the relevant consumer has not pleaded that invalidity of the arbitration agreement in the course of the arbitration proceedings. In principle, national courts seized of an action for the enforcement of a final arbitral award must similarly, of their own motion, determine whether the arbitration agreement is unfair and if so, refuse leave for enforcement if the applicable national arbitration law requires the national court to refuse enforcement for reason of conflict with rules of public policy (cf. Asturcom judgment).

3. PRINCIPAL INSTITUTIONS

3.1 What are/describe the principal institutions and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

The most prominent Dutch institution for general arbitral proceedings is the NAI (www.nai-nl.org). The NAI, as the Court of Arbitration of the International Chamber of Commerce (ICC), administers, coordinates and promotes arbitral proceedings in a wide range of fields, such as disputes on construction law, contract law, joint ventures, etc.

In addition, a considerable number of industry-specific arbitral institutions operate within the Dutch arbitration world. Examples are the Court of Arbitration for the Building Industry

(www.raadvanarbitrage.nl) and the Foundation TAMARA, which specialises in Transport and Maritime arbitration (www.tamara-arbitration.nl).

4. ROLE OF THE NATIONAL COURTS

4.1 What is the relationship between agreements to arbitrate and access to the courts? Is there a presumption of arbitrability/policy support for arbitration? Will the courts stay court actions in favour of agreements to arbitrate?

In principle, an agreement to arbitrate will result in the Dutch courts denouncing jurisdiction in favour of the arbitral forum. Both Article 1022 DCCP (for arbitration agreements referring to arbitration within the Netherlands) and Article 1074 DCCP (for arbitration agreements referring to arbitration outside of the Netherlands) stipulate that a court shall declare that it has no jurisdiction if a party invokes the existence of an arbitration agreement, unless the agreement to arbitrate is invalid. A party must, however, invoke the existence of an arbitration agreement prior to submitting any substantial defence to the court.

A more diffuse situation arises when a party to an arbitral agreement wishes to obtain interim relief from a state court. Pursuant to Dutch law, a party may request and obtain interim relief from the President of the District Court if such relief, in light of the interests of the parties, is immediately required. This request may be brought before the President of the District Court notwithstanding the existence of a valid arbitration agreement. The President of the District Court may refer the petitioner to the agreed upon arbitral proceedings if they consider that to be a realistic option under the circumstances (Article 1022(2) DCCP). Among other considerations, the President of the District Court will take into account the period of time within which the arbitral tribunal may render its decision and whether that period of time is acceptable under the circumstances. See question 13.1 on whether the arbitral tribunal is authorised to grant interim relief under Dutch law.

The existence of a valid arbitration agreement does not preclude a party from requesting a court to grant leave for conservatory attachments (Article 1022(2) DCCP). In addition, an arbitration agreement does not preclude a party from requesting a court to order a preliminary witness examination, a preliminary expert report or a preliminary site visit, unless:

- (i) at the time of this request arbitrators have already been appointed (1022(3) DCCP); or
- (ii) the place of arbitration is located outside of The Netherlands.

4.2 May an arbitral tribunal rule on a party's challenge to its own jurisdiction ('competence-competence'). Need an arbitral tribunal suspend its proceedings if a party seeks to test jurisdiction in the courts?

An arbitral tribunal is authorised to decide on its own jurisdiction (Article 1052(1) DCCP) and is not required to suspend the arbitral proceedings if its jurisdiction is challenged in the courts. This is an important provision because it means that it is not possible to use the challenge, in the courts, of the arbitral tribunal's jurisdiction in order to delay the arbitral proceedings. Parties are required, except perhaps under exceptional circumstances, to await the arbitral tribunal's decision on its jurisdiction. After the arbitral tribunal has rendered its award, parties are allowed to challenge the jurisdiction of the arbitral tribunal in the courts by way of annulment proceedings (see question 17.2).

5. USEFUL REFERENCES

5.1 Provide a selected bibliography of the most influential publications in or relied upon in the jurisdiction – books, journals, newsletters and pamphlets.

Books

A. J. van den Berg, Hoe gastvrij is Nederland voor de internationale arbitrage?, Oration 11 April 1990.

A. J. van den Berg, R. van Delden and H. J. Snijders, Netherlands Arbitration Law, 1993.

C. S. K. Fung Fen Chung, Bewijsmiddelen in het arbitraal geding (Methods of presenting evidence in arbitral proceedings), 2004

G. J. Meijer, Tekst & Commentaar Burgerlijke Rechtsvordering, 3rd ed, 2008, pp1327 et seq.

G. J. Meijer, Overeenkomst tot arbitrage (Arbitration Agreements), dissertation 2010

P. Sanders, Het Nederlandse Arbitragerecht, 4th ed, 2001.

H. J. Snijders, Nederlands arbitragerecht: een artikelsgewijs commentaar, 3rd ed 2007.

Journal

Tijdschrift voor Arbitrage (Journal on Arbitration)

6. AGREEMENT TO ARBITRATE

6.1 Are there form and/or content requirements for an enforceable agreement to arbitrate? How may they be satisfied?

The agreement to arbitrate need not be in formal written form; it can be reached orally. However, if one of the parties to the dispute contests (in due time) the validity of the arbitral agreement, the existence of the agreement must be proven by way of a written document (Article 1021 DCCP).

In practice, therefore, an arbitration agreement must be uncontested or evidenced in writing.

Electronic data can also be used as written proof of the existence of the agreement to arbitrate.

Examples of electronic data are text message and email.

The arbitration clause could also be contained in general conditions. If the general conditions are accepted by the parties, either implicitly or explicitly, the arbitration clause can be considered agreed upon (Article 1021 DCCP). Furthermore, the arbitration agreement can also be part of binding articles of association or regulations.

7. ARBITRABILITY

7.1 Is arbitration mandated for certain types of disputes?

Under Dutch law, there is no obligation to arbitrate for any type of dispute.

7.2 Is arbitration prohibited for certain types of disputes (restraints of fundamental public policy)?

Certain types of disputes must be settled by the ordinary courts and cannot be resolved by way of arbitration. Arbitral proceedings may not lead to the determination of legal consequences that are not at the free disposal of the parties (Article 1020(3) DCCP). For instance, Article 1020(3) DCCP is believed to exclude certain disputes relating to family law, the granting of a bankruptcy order, certain intellectual property disputes, etc. In a landmark case, the Dutch Supreme Court held that disputes on the validity or invalidity of resolutions of corporations cannot be decided by way of arbitration (Dutch Supreme Court 10 November 2006 (Groenselect Management NV / Van den Boogaard), NJ 2007, 561). However, the scope of this decision seems limited as a party may still claim that a corporation must revoke a particular resolution, rather than claiming that the relevant resolution is null and void.

While it is seldom the case that disputes with a public law nature are brought before arbitration, this is not prohibited.

8. SEPARABILITY OF ARBITRATION CLAUSES

8.1 May an arbitral clause be considered valid even if the rest of the contract in which it is embedded is invalid?

Yes. Article 1053 DCCP states that an arbitration agreement shall be considered and decided upon as a separate agreement. The arbitral tribunal has the power to decide on the validity of the contract which contains or relates to the arbitration agreement. An arbitral award holding that the 'basic' contract is invalid is considered a valid arbitral award at Dutch law. Such an award, including the award on costs, can be enforced under Dutch law.

9. QUALIFICATION/APPOINTMENT/LIABILITY OF ARBITRATORS

9.1 Are there specific provisions regulating the qualifications of arbitrators? Are there requirements (including disclosure) for 'impartiality' and 'independence', and do such requirements differ as between domestic and international arbitrations?

Dutch law prescribes that any natural person of legal capacity may be appointed as an arbitrator. Unless the parties have agreed otherwise, no person shall be precluded from appointment by reason of their nationality (Article 1023 DCCP). This means that in international arbitrations in the Netherlands, foreign arbitrators can be appointed. The general requirement for arbitrators is that they are impartial and independent. Pursuant to Article 1033 DCCP, an arbitrator may be challenged if circumstances give rise to justifiable doubts as to their impartiality or independence. Article 1034 DCCP regulates disclosure requirements of prospective arbitrators and secretaries. The prospective arbitrator or secretary who presumes that they could be challenged shall disclose in writing the existence of the grounds to the person who, or organisation which, approached them (Article 1034(1) DCCP). A person who has already been appointed as arbitrator or secretary shall, if the parties have not previously been notified, immediately notify the parties of such grounds (Article 1034(2) DCCP). These rules apply equally in both national and international arbitrations.

In 2004, two subsequent decisions were rendered on the challenge of an international arbitrator. The District Court of The Hague, in the first decision, of 18 October 2004, held that the position of an arbitrator in a particular ICSID case was not compatible with that arbitrator simultaneously acting as counsel to a third party, which was trying to annul an ICSID award in which the same subject matter was decided upon and which award was invoked by one of the parties in the dispute that the arbitrator was adjudicating (provisional measures judge The Hague, 18 October 2004 (Republic of Ghana/Telekom Malaysia Berhad), Journal on Arbitration 2005, 106).

9.2 Are there provisions governing the challenge or removal of arbitrators? Do the courts or other jurisdictions play/have a role in any such challenge?

An arbitrator who has accepted their mandate may be released from said mandate by agreement between the parties. If the arbitrator wishes to be released from their mandate, the consent of the parties, or of a third person designated by the parties, is required, or in the absence thereof, of the President of the District Court (Article 1029(2) DCCP). An arbitrator who has become unable to perform their mandate may be released from it by a third person designated by the parties or, in the absence of such third person, by the President of the District Court, at the request of either party (Article 1029(4) DCCP). The appointment of a substitute arbitrator is governed by Article 1030 DCCP, which also applies in case of the death of an arbitrator.

An arbitrator may be challenged under circumstances that give rise to justifiable doubts as to their impartiality or independence (Article 1033(1) DCCP). The same applies to a secretary of the arbitral tribunal. A party may only challenge an arbitrator it appointed on grounds of which it became aware after the appointment was made (Article 1033(2) DCCP). Similarly, if the arbitrator was appointed by a third person or by the President of the District Court, the party may not challenge the arbitrator if they have acquiesced to this appointment, unless the party has

become aware of the grounds for challenge after the appointment was made (Article 1033(3) DCCP).

In a challenge that was raised in 2005, two of three arbitrators (all of whom were medical doctors by profession) had physically examined the claimant so as to investigate his physical complaints so as to establish the extent of his disability (the case dealt with the question whether the claimant was entitled to payments from the defendant, a medical insurance company). The President of the District Court of Rotterdam held that the arbitrators could be challenged because they had examined the claimant themselves, rather than merely assessing the evidence proffered by the parties. While this decision finally resolved the challenge in this particular case, the Dutch Supreme Court, in a subsequent judgment in the interest of the law (i.e. without affecting the position of the parties involved) ruled that, as a general rule, experts who act as arbitrators are not barred from conducting their own investigation, provided that a number of safeguards are respected (Dutch Supreme Court 29 June 2007 (N/Aegon), NJ 2008, 177). One of the safeguards mentioned by the Supreme Court was that the parties must have expressly agreed that the arbitral tribunal would conduct its own investigation (the Rotterdam District Court's earlier decision seems to imply that it had – incorrectly – assumed that such prior consent had not been given). In medical disputes, however, additional requirements are involved, such as privacy and privilege, so that, according to the Supreme Court, the Rotterdam District Court's decision on the challenge in this particular case could be upheld.

The challenging party must notify the challenged arbitrator, the other members of the arbitral tribunal, the other party and, if applicable, the third party who appointed the challenged arbitrator, of the grounds on which the challenge is based (Article 1035(1) DCCP). There is, at present, no statutory time limit to submit a notification of a challenge. However, many arbitration rules provide for a certain period of time within which the challenge must be brought. For instance, Article 19 of the NAI Arbitration Rules requires that a notice of a challenge be submitted within one week (two weeks in international arbitrations) from the date on which the challenging party received a notice of disclosure or otherwise discovered the grounds for the challenge.

The arbitral tribunal may, but need not necessarily, suspend the arbitral proceedings as from the day of receipt of the notification. If the arbitral proceedings are not suspended, the arbitral proceedings may continue, but the tribunal may not render a final award as long as the President of the District Court has not decided the challenge. If the challenged arbitrator does not withdraw within two weeks of the date of receipt of the notification, the President of the District Court shall, at the request of either party, decide on the merits of the challenge. A petition to that effect must be submitted to the District Court within four weeks after the date of receipt of the notification. This also applies if the institutional rules provide for a decision on the challenge by the arbitration institute or by any other third party, which may still be pending at the lapse of the statutory four-week period. If neither party files such request with the President of the District Court within four weeks after the day of receipt of the notification, the right to challenge the arbitrator shall be barred. In that case, the arbitral proceedings, if suspended, shall continue from the stage they had reached (Article 1035(2) DCCP). If the challenged arbitrator or one or both of the parties is domiciled or has their actual residence outside the Netherlands, the periods mentioned above (i.e. two weeks and four weeks respectively) shall instead be six and eight weeks respectively.

9.3 Does legislation govern, or have the courts developed rules regarding the liability of arbitrators for acts related to their decision-making functions?

There is, at present, no Dutch legislation on liability of arbitrators for acts or omissions in the fulfilment of their duties. The liability of arbitrators relating to their decision making has been established in case law. An arbitrator can be held liable for their decision making that results in an arbitral award that has been set aside, only in case of gross negligence or intent, or in case of apparent and gross misjudgement of what a proper discharge of their duties entails (Dutch Supreme Court of 4 December 2009 (ASB Greenworld/NAI et al), not yet published). It is common practice for most arbitration institutions to exclude liability for its arbitrators (see, for example, Article 66 NAI Arbitration Rules). Commentators have suggested including in the Arbitration Act a clause to the effect that an arbitrator or secretary cannot be held liable for acts or omissions in relation to the arbitration, except in case of gross negligence or intent.

10. PARTY REPRESENTATION

10.1 Are there particular qualification requirements for party representatives ('counsel') appearing in the jurisdictions?

The parties may appear before the arbitral tribunal in person, or represented by a practising lawyer, or by any other person expressly authorised in writing for this purpose (Article 1038 DCCP). It is not necessary for a practising lawyer to be expressly authorised, as their authority is presumed.

The NAI Arbitration Rules provide that, if a party is to be represented at a hearing by a practising lawyer or by an authorised representative, they shall notify the arbitral tribunal and the other party of such, in writing, as soon as possible after the date of the hearing is determined. However, if the request for arbitration or the short answer was filed by a practising lawyer or by an authorised representative, the notification is considered to have taken place (Article 21 NAI Arbitration Rules).

11. PLACE OF ARBITRATION/PROCEDURES

11.1 Are there provisions governing the place (seat) of arbitration, or any requirement for arbitral proceedings to be held at the seat?

The seat of arbitration determines whether or not Dutch procedural law applies. If the seat of arbitration is within the territory of the Netherlands, the first part of the Arbitration Act, on arbitral proceedings within the Netherlands, applies. The place of arbitration shall be determined by agreement between parties, or, failing such agreement, by the arbitral tribunal (Article 1037(1) DCCP).

If the place of arbitration has not been determined either by the parties or the arbitral tribunal, the place of making the award as stated by the arbitral tribunal in the award shall be deemed to be the place of arbitration (Article 1037(2) DCCP).

The arbitral tribunal may hold hearings, deliberate, hear witnesses, etc. outside of the Netherlands (Article 1037(3) DCCP).

11.2 Are specific procedures mandated in particular cases, or in general?

Dutch arbitral proceedings are conducted in such manner as agreed between the parties or, if the parties have not agreed, as determined by the arbitral tribunal (Article 1036 DCCP). There are no specific procedures mandated. Both the Arbitration Act and the NAI Arbitration Rules set out basic rules on the procedure of any given arbitration. These rules, however, may be set aside or amended by the parties to a large extent.

12. EVIDENCE GATHERING

12.1 What is the general approach to the gathering and tendering of evidence at the pleading stage and at the hearing stage (please deal with production, discovery, privilege, use of witness statements, etc.) Are there differences between domestic and international arbitrations?

The arbitral tribunal is not bound by the rules of evidence that apply to ordinary court proceedings (Article 1039(5) DCCP) and has discretionary powers to determine the relevance and materiality of evidence.

The arbitral tribunal may, at the request of either party, allow a party to produce witnesses or experts (Article 1039(3) DCCP). The arbitral tribunal has a discretionary power to hear witnesses or experts. As the arbitral tribunal is free in applying rules of evidence, it is left to the discretion of the arbitral tribunal to decide on matters of privilege.

The arbitral tribunal shall have the power to order the production of documents (Article 1039(4) DCCP). However, the arbitral tribunal does not have the power to compel parties to produce documents. If a party is reluctant to produce documents, the arbitral tribunal may draw from it the conclusions it deems appropriate.

In addition to the ability of the arbitral tribunal to order the production of documents of its own motion, the parties may request the arbitral tribunal to order the production of documents.

Dutch law does not use the Anglo-Saxon concept of discovery. The Arbitration Act provides for the authority of the arbitral tribunal to order the production of (to be identified) documents (Article 1039(4) DCCP). Furthermore, the IBA Rules on the Taking of Evidence in International Commercial Arbitration could be, and are increasingly, applied in order to agree upon a compromise between the Continental and the Anglo-Saxon approaches on this issue.

There are no strict rules on the proper place and time for submitting evidence. Arbitral tribunals customarily agree upon the procedure for the tendering of evidence with the parties, whereby the applicable law(s) and the usage thereof by the parties is considered.

12.2 What powers of compulsion or court assistance are there for arbitrators to require attendance of witnesses or production of documents, either prior to or at the substantive hearing? Is there a difference between domestic and international arbitral tribunals or as between parties and non-parties? Do special provisions exist for arbitrators appointed pursuant to international treaties (i.e. bilateral or multilateral investment treaties?)

At the request of either party, or of its own motion, the arbitral tribunal may allow parties to hear witnesses (Article 1039(3) DCCP). Pursuant to Article 1041(1) DCCP (and also Article 29(1) NAI Arbitration Rules), the arbitral tribunal shall determine the date, time and place of the examination of witnesses, as well as the manner in which the examination shall proceed.

If a witness does not appear voluntarily or, having appeared, refuses to give evidence, the arbitral tribunal may allow a party who so requests, within a period of time determined by the arbitral tribunal, to petition the President of the District Court to appoint a judge before whom the examination of the witness shall take place. The examination shall take place in the same manner as in ordinary court proceedings. The court may compel the witness to appear and to give evidence (subject to certain Dutch privilege regulations which may apply). The Clerk of the District Court shall give the arbitrator or arbitrators the opportunity to attend the examination (Article 1041(2) DCCP). The arbitral tribunal may suspend the arbitral proceedings until the day on which it has received the record of the examination (Article 1041(4) DCCP). These rules apply in both national and international arbitrations irrespective of the basis for appointment of the arbitrators (subject to international law or agreement between the parties, if applicable). See question 12.1 regarding the production of documents.

13. INTERIM MEASURES/ROLE OF THE ARBITRAL TRIBUNAL

13.1 Are there special provisions relating to the granting of interim and preliminary relief? Have the courts

recognised and/or limited any such authority? Do the courts themselves play a role in interim relief in arbitration proceedings?

The parties may agree to empower the arbitral tribunal or its chair to render an award in summary arbitral proceedings. If so empowered, the arbitral tribunal or its chair may render an award in summary arbitral proceedings within the limits imposed by Article 254(1) DCCP (which governs the authority of state courts to grant interim relief). Such empowerment is agreed upon if, for example, the parties have agreed to the application of the NAI Arbitration Rules, which contain special provisions relating to immediate provisional measures. The NAI Arbitration Rules distinguish three situations.

Firstly, Article 37 NAI Arbitration Rules authorises the arbitral tribunal, at the request of a party, to make an award in summary arbitral proceedings at any stage of the proceedings. The arbitral tribunal is authorised to do so if it determines that, considering the interests of the parties, an immediate provisional measure is urgently required. The arbitral tribunal's authority to render an award in summary arbitral proceedings is similar to the authority of the President of a District Court to render judgment in summary proceedings before the court. A provisional arbitral award in summary arbitral proceedings shall not prejudice the final decision of the arbitral tribunal with regard to the merits of the case. Pursuant to Dutch law, the award in summary arbitral proceedings can be enforced in the same way as 'ordinary' arbitral awards can (i.e. after obtaining leave for enforcement from the President of the competent District Court, Articles 1051(3) and 1062 DCCP).

Secondly, Article 38 NAI Arbitration Rules stipulates that the arbitral tribunal may, at the request of a party, provisionally make any decision or take any measure regarding the object of the dispute if the arbitral tribunal deems it useful or necessary. Such decision or measure shall be made or taken in the form of an order.

Thirdly, the NAI Arbitration Rules provide for the interesting possibility of initiating summary arbitral proceedings in a situation where the arbitrators have not yet been appointed in the arbitral proceedings on the merits (Articles 42a-42o NAI rules; summary arbitral proceedings). In this procedure, a sole arbitrator is appointed by the administrator, irrespective of the number of arbitrators and the method of appointment that was agreed upon by the parties in respect of ordinary arbitral proceedings. This procedure, which could result in an arbitral award within a few weeks, is available to parties who have agreed to the application of the NAI Arbitration Rules, whereby the seat of the arbitration is located within the Netherlands, or if no seat has been agreed upon. Commentators have argued that an arbitral award in summary arbitral proceedings can be enforced outside the Netherlands in accordance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but there is little experience in that respect.

14. TAXATION OF ARBITRATORS' FEES

14.1 Does the state, or any of its sub-divisions, purport to tax domestically the fees of foreign arbitrators conducting hearings in the state? Is there a difference if the arbitration is 'seated' in the state or elsewhere?

Fees of arbitrators who reside in The Netherlands are subject to VAT in principle. However, as of 1 January 2010, arbitrators residing in The Netherlands who decide a dispute involving a non-Dutch party, not being a consumer, need not charge VAT to such party anymore. Arbitrators residing outside of The Netherlands need not charge Dutch VAT in any case. The place of arbitration is not relevant for the purposes of VAT.

Appointed arbitrators have to report their received fees to the tax authorities, but only if they are Dutch taxpayers. Foreign arbitrators are, of course, subject to their own tax regime regarding fees received.

15. DEFAULT PROCEEDINGS

15.1 Are there provisions governing an arbitral tribunal's ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at or seek adjournment of the arbitral proceedings?

Pursuant to Article 1040(1) DCCP, the arbitral tribunal may terminate the arbitral proceedings by means of an arbitral award if the claimant, in spite of having had a reasonable opportunity to do so, fails to communicate their statement of claim without showing good cause. Similarly, if the respondent, without showing good cause and in spite of having been given an adequate opportunity to do so, fails to submit its statement of defence, the arbitral tribunal may render an award forthwith. In such award, the claimant's claims shall be granted unless the arbitral tribunal considers them to be unlawful or unfounded (Article 1040(3) DCCP). Before rendering an award, the arbitral tribunal may require the claimant to produce additional evidence in support of its allegations (Article 1040(3) DCCP).

16. THE ARBITRAL AWARD

16.1 Must an award take any particular form, e.g. in writing, signed, dated, place, the need for reasons, delivery, etc?

Article 1057 DCCP stipulates the requirements for any Dutch arbitral award. The award must be in writing and be signed by the arbitrator or arbitrators (Article 1057(2) DCCP). If a minority of the arbitrators refuse to sign the award, the other arbitrators must make mention of that under the award signed by them. This additional note must also be signed by the relevant arbitrators. Failing to follow this rule can result in the setting aside of the arbitral award. In general, arbitral awards shall contain:

- (a) the names and addresses of the arbitrator or arbitrators;
- (b) the names and addresses of the parties;
- (c) the date on which the award is made;
- (d) the place where the award is made; and
- (e) the reasons for the decision.

This last requirement need not be fulfilled if the award concerns merely the determination of the quality or condition of goods or the recording of a settlement by the parties (Articles 1057(4)(e) in conjunction with 1020(4)(a) and 1069 DCCP). The arbitral tribunal shall send a copy of the award to the parties. The original arbitral award shall be deposited with the Registry of the District Court within whose district the seat of arbitration is located (Article 1058(1) DCCP).

16.2 Are there limits on arbitrators' powers to fashion appropriate remedies, e.g. punitive or exemplary damages, rectification, injunctions, interest and costs?

The arbitrators are limited by the claim(s) or counterclaim(s) of the parties. If claimed, the arbitral tribunal may award interest and costs and may issue injunctions. Punitive or exemplary damages cannot be awarded under Dutch law.

17. RECOURSE FROM AN AWARD

17.1 Are there provisions governing modification, clarification or correction of an award?

Pursuant to Article 1060 DCCP, a party may request in writing that the arbitral tribunal rectify a manifest computing or clerical error in the arbitral award. The request has to be made no later

than 30 days after the deposit of the arbitral award with the Registry of the District Court. The same applies in case of a mistake or omission in relation to the formal requirements of the arbitral award, listed in Article 1057(4) subsections (a) to (d) DCCP (see question 16.1). A lack of reasoning in the arbitral award (cf. subsection (e) of Article 1057(4) DCCP) cannot be rectified. Either party may, within 30 days after the date of deposit of the arbitral award with the Registry of the District Court, request the arbitral tribunal to render an additional award if the arbitral tribunal failed to decide one or more matters that were submitted to it (Article 1061(1) DCCP). The arbitral tribunal shall give the parties an opportunity to be heard before deciding on such a request (Article 1061(3) DCCP).

17.2. May an award be appealed to or set aside by the courts? If so, on what grounds and by what procedures?

An application for setting aside the arbitral award may, in principle, be submitted as soon as it has acquired the force of *res judicata*, which is usually the day on which the award is made (Article 1059(1) DCCP).

Setting aside the arbitral award can take place only on one or more of the following grounds, which are listed in Article 1065(1) DCCP. These grounds do not include any review by the court as to facts or law determined in the award (the only exception to this is if they arise when considering the 'public order', discussed below). The grounds for setting aside an arbitral award are:

- **Absence of a valid arbitration agreement.** If there is no valid arbitration agreement, the arbitral tribunal may not exercise jurisdiction (Article 1065(2) and 1052 DCCP). If the arbitral tribunal, in the absence of a valid arbitration agreement, renders an award in which it incorrectly holds itself to have jurisdiction to hear the case, the arbitral award may be set aside by the District Court on the basis of Article 1065(a) DCCP.
- **The arbitral tribunal was constituted in violation of the applicable rules.** The constitution of the arbitral tribunal has to be in accordance with the Arbitration Act and the rules of the arbitration institution (if applicable). If the arbitral tribunal is not constituted in the appropriate manner, parties may request that the District Court set aside the arbitral award. However, a party who has participated in the constitution of the arbitral tribunal is barred from invoking this ground (Article 1065(3) DCCP).
- **The arbitral tribunal has not complied with its mandate.** The mandate of the arbitral tribunal may be analysed as a matter of procedure (that is, the rules of procedure to be followed) and as a matter of substance (that is, the issues to be dealt with by the arbitral tribunal). In the procedure to set aside the arbitral award, the court may judge whether the arbitral tribunal has applied the (agreed) procedural rules correctly. This ground cannot be invoked successfully by a party if it was aware of the issue during the arbitral proceedings, but failed to raise the issue with the arbitral tribunal. An arbitral tribunal does not comply with its mandate if it makes an award in excess of, or different from, what was claimed. This may lead to the setting aside of part of the arbitral award that is in excess of the arbitral tribunals' mandate. An arbitral tribunal may also not have complied with its mandate if it has failed to decide one or more of the matters submitted to it. In that case the procedure of requesting an additional arbitral award (Article 1061 DCCP and Article 53 NAI Arbitration Rules) must be tried, before a party may rely on this ground.
- **The award is not signed or does not contain reasons in accordance with the provisions of Article 1057 DCCP (i.e. signing, form and contents of the award).** If an arbitral award is not signed by the arbitrators in accordance with Article 1057 DCCP, it may be set aside. See question 16.1. An arbitral award can also be set aside if it lacks reasoning. The court is not

allowed to judge upon the content or persuasiveness of the reasoning of the arbitral tribunal. It should be noted, however, that the Supreme Court rendered a landmark case on 9 January 2004 (Nannini), NJ 2005, 190, which held that an arbitral award could also be set aside if the award contains a reasoning that lacks any well-founded explanation for the decision. Shortly thereafter, the Supreme Court clarified that a lack of any well-founded explanation can be used as a ground for setting aside of an arbitral award only in exceptional cases, where the reasoning of the arbitral award is so ill-founded that it should be put on a par with no reasoning at all (Dutch Supreme Court of 22 December 2006 (Kers/Rijpma), NJ 2008, 4).

- **The award, or the manner in which it was made, violates public policy or good morals.** The violation of public policy applies in the procedural sense (i.e. the fundamental notions of due process and fair trial) as well as in the substantive sense (including non-arbitrability, which also falls under the first ground above). The violation should regard Dutch public policy or good morals. This may include European or international public policy. An arbitral award may be set aside because of violation of public policy in the substantive sense if the contents or the enforcement of the award conflicts with mandatory rules of such fundamental character that the compliance with them may not be reduced through procedural limitations (cf. Supreme Court 21 March 1997 (Eco Swiss/Benetton), NJ 1998, 207). The arbitral award may be contrary to public order in a procedural sense if, for example, fundamental rules of procedural law have been neglected (such as the principle of hearing both sides of the argument, impartiality of the arbitrators, or the absence of a reasoning of the award).

In addition to the procedure for setting aside an arbitral award, either party may petition the competent District Court to revoke the award (i.e. *requête civile*). Revocation (Article 1068 DCCP) is exceptional in practice, as the necessary grounds are rarely satisfied. The grounds are:

- **Fraud.** The arbitral award is wholly- or partially-based on fraud which is discovered after the award is made and which is committed during the arbitral proceedings by or with the knowledge of the other party.
- **Forgery.** The arbitral award is wholly- or partially-based on documents which, after the award is made, are discovered to have been forged.
- **New documents.** After the arbitral award is made, a party obtains documents which would have had an influence on the decision of the arbitral tribunal and which were withheld as a result of acts of the other party.

The time limit for an application for revocation is three months after the fraud or forgery has become known or a party has obtained the new documents.

18. ENFORCEMENT OF AWARD

18.1 *What are the procedures and standards for enforcing an award? Is there a difference between 'domestic' and 'non-domestic' awards?*

Enforcement in the Netherlands of a final or partial final arbitral award (which is not open to appeal to a second arbitral tribunal (see question 20), or which is declared provisionally enforceable), or a final or partial final arbitral award rendered on arbitral appeal, can take place after the competent President of the District Court has granted leave for enforcement (Article 1062(1) DCCP). The competent President of the District Court is the one with whose Registry the original of the arbitral award is (or should have been) deposited (see question 16.1).

In practice the procedure for granting leave for enforcement is *ex parte*, although the President may invite the parties to appear, for example if the losing party, upon receipt of the arbitral award, has requested the District Court to be heard in the case of an application for enforcement.

The President of the District Court exercises a summary assessment only. Enforcement may be refused if the arbitral award or the manner in which it was made is 'evidently contrary to public policy or good morals' (Article 1063(1) DCCP). The term 'evidently' entails that the President should (and may) only investigate on a prima facie basis whether the arbitral award, or the manner in which it was made, is contrary to public order or good morals.

If leave for enforcement is granted, the arbitral award may still be set aside on the grounds mentioned in Article 1065(1) DCCP.

An arbitral award made outside the Netherlands may be recognised and enforced in the Netherlands, pursuant to Articles 1075 and/or 1076 DCCP. In case of a request to recognise and enforce a foreign arbitral award in the Netherlands, the respondent party is usually called to appear in the Dutch court before a decision is rendered. In all other respects, the procedure is identical to proceedings to enforce a domestic arbitral award. Article 1075 applies to arbitral awards that are made in a foreign state to which a relevant treaty applies and refers to any such treaty (which will often be the New York Convention). If no treaty concerning recognition and enforcement of the arbitral award is applicable, the award made in a foreign state may in principle be enforced within the Netherlands (Article 1076 DCCP). Article 1076 DCCP exhaustively lists the grounds that may lead to refusal of leave for enforcement of such foreign arbitral awards. These are similar, but not identical to the grounds for setting aside Dutch arbitral awards contained in Article 1065 DCCP. It should be noted that a party may choose to invoke Article 1076 DCCP if Article 1075 DCCP, in combination with the relevant treaty, could also be invoked, based on Article VII of the New York Convention. Requesting recognition and enforcement of the arbitral award pursuant to Article 1076 instead of Article 1075 may carry certain advantages for the petitioner, as Article 1076 contains slightly different criteria and exclusions than Article 1075 and, for example, the New York Convention.

In April 2009, the Amsterdam Court of Appeal granted a request for the enforcement of three Russian arbitral awards relating to the Yukos disputes, notwithstanding the fact that the arbitral awards had been set aside at the place of arbitration, i.e. by the Russian Courts (Amsterdam Court of Appeal 28 April 2009, *Journal on Arbitration* 2010, 5). Cassation proceedings were launched against this landmark decision, proceedings for which are currently pending.

19. CONFIDENTIALITY OF PROCEEDINGS

19.1 What are the confidentiality requirements of the arbitral process;

i.e. existence of the arbitration, pleadings, documents produced, hearing, award?

As in most other jurisdictions, confidentiality is a key point of arbitration. While this has never been formalised in Dutch legislation or jurisprudence, it is considered a generally accepted principle of arbitration. Historically, it is believed that confidentiality of arbitration can be considered a principle accepted by the parties. Breaching that principle could justify a claim of breach of contract or tort. As far as we know, the specific issue of the confidentiality of the arbitral process has not been discussed in Dutch case law. It should be noted that, particularly at the international level, the principle of confidentiality has become the subject of discussion, and the confidentiality of arbitral awards, documents and pleadings may be eroding. This development, and the fact that no statutory rules on confidentiality apply, justifies the use of a separate confidentiality agreement if they specifically require the arbitral process to be confidential. The NAI Arbitration Rules, effective as per 1 January 2010, expressly stipulate that the arbitral proceedings are confidential and that all involved therein are under an obligation to respect the confidentiality, subject to statutory or agreed upon exceptions.

If the parties have agreed to the application of the NAI Arbitration Rules, they agree that the NAI shall be authorised to publish the arbitral award without mentioning the names or further details of the parties involved, unless either party communicates to the NAI in writing that it objects to publication (Article 55 NAI Arbitration Rules).

UNIQUE JURISDICTIONAL ATTRIBUTES

20. Is there any particular aspect of the approach to arbitration in the jurisdiction that bears special mention?

There are few special approaches to arbitration in the Netherlands. For instance, Article 1050 DCCP, which leaves open the possibility of an arbitral appeal. This option, however, is only open to the parties if they have specifically agreed to it, and indeed the provision is rarely used.

Another distinctive feature of the Arbitration Act is the possibility of consolidating arbitrations with connected subject matter (Article 1046). The President of the Amsterdam District Court is authorised to order such consolidation if the place of arbitration of all relevant arbitral proceedings is located within the Netherlands. As Article 1046 contains an opt-out mechanism, no explicit consent by the parties involved is required to order such a consolidation.

Finally, the possibility of arbitral summary proceedings being implied into an agreement to arbitrate under the NAI Arbitration Rules, might be a surprise to a party to an arbitration agreement (see question 13.1). This, however, is a distinctive feature primarily of NAI arbitrations, rather than Dutch arbitrations in general.