

Netherlands

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Laws and institutions

1 Multilateral conventions

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Yes, the New York Convention has been in force in the Netherlands since 1964, subject to the reservation that only awards made in another contracting state are to be recognised and enforced per article I(3).

The Netherlands is also party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which provides for the recognition and enforcement of ICSID arbitral awards.

Further, the Netherlands is a signatory to the Energy Charter Treaty (ECT), which was ratified on 11 December 1997 and entered into force on 16 April 1998.

Finally, the Belgian-Dutch Enforcement Treaty of 1925 (Stb. 1929, 405) may apply because of the more-favourable-right provision under article VII New York Convention, which recognises the conditions under the Treaty that are less onerous than those under the New York Convention.

2 Bilateral treaties

Do bilateral investment treaties exist with other countries?

Yes, there are 98 bilateral treaties (Investerings Beschermings Overeenkomst (IBO)) in existence between the Netherlands and other countries, 90 of which have been entered into force.

The list is published by the central government on the website: www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html, and on the United Nations website: http://unctad.org/Sections/dite_pccb/docs/bits_netherlands.pdf

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Dutch Arbitration Act of 1986 forms part of the Dutch Code of Civil Procedure (DCCP) in articles 1020 to 1073 DCCP. Articles 1020 to 1073 apply to arbitrations whose place of arbitration is within the Netherlands (article 1073(1) DCCP). Articles 1074 to 1076 DCCP apply to arbitrations whose place of arbitration is outside the Netherlands.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Dutch Arbitration Act (DAA) is not based on the Model Law but was considerably influenced by both the UNCITRAL Arbitration Rules of 1976 and the Model Law of 1985. Accordingly, the DAA and the Model Law do not differ greatly.

In contrast, the Model Law was adopted in the Netherlands Antilles and Aruba; Aruba being an autonomous part of the Kingdom of the Netherlands.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Although the Dutch Arbitration Act acknowledges the principle of party-autonomy in article 1036 DCCP stating, '[...] the arbitral proceedings shall be conducted in such manner as agreed between the parties [...]'. There are certain mandatory rules, such as:

- equal treatment of the parties (article 1039(1) DCCP);
- default of a party (article 1040 DCCP);
- examination of witnesses (article 1041 DCCP);
- experts appointed by the arbitral tribunal (article 1042 DCCP);
- personal appearance of the parties (article 1043 DCCP);
- requests for information on foreign law (article 1044 DCCP);
- joinder and intervention of third parties (article 1045 DCCP); and
- right of the tribunal to set a time limit for making the award (article 1048 DCCP).

6 Substantive law

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

Yes, first, the choice of law by the parties is decisive. The arbitral tribunal must make its award in accordance with the parties' chosen law (article 1054(2) DCCP). This choice of substantive law need not be in the arbitration agreement itself. It can be agreed upon in a main contract, in general terms and conditions or in another later or earlier agreement. Further, parties can agree on a substantive law that is based on internationally accepted principles, such as *Lex Mercatoria* or the UNIDROIT Principles of International Contract Law.

Second, if no choice of law is made by the parties, the arbitral tribunal may base its award on the substantive rule of law that it considers appropriate (article 1054(2) DCCP). While the Dutch Arbitration Act is based on the principle of *voie directe*, in practice, rules of international private law have been generally applied in cases where no choice of law is made.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Netherlands Arbitration Institute (NAI) is most relevant to international arbitration and it uses a list procedure (from a list of approximately 300 potential arbitrators), from which parties may agree to deviate, to select arbitrators whose fees are based on an hourly rate. The average arbitration takes approximately nine months.

Netherlands Arbitration Institute**NAI Secretariat**

Aert van Nesstraat 25 JK
3012 CA Rotterdam
The Netherlands

PO Box 21075
3001 AB Rotterdam
The Netherlands
www.nai-nl.org

The second prominent arbitration body is the Permanent Court of Arbitration (PCA) in the Hague for investor-state and state-to-state arbitration.

Permanent Court of Arbitration

Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands
www.pca-cpa.org

Both the PCA and the NAI can act as appointing authorities.

There is also a range of other institutions that administer international arbitration proceedings in the Netherlands. In many cases, their activities involve arbitration in specialised fields such as shipping and transport (Tamara Foundation, www.tamara-arbitration.nl), construction (www.raadvanarbitrage.nl: one of the few arbitration institutes in the Netherlands whose rules allow for the possibility of arbitral appeal), automation (www.sgoa.org) and different commodities, such as oil, grain, seeds, tulip bulbs, hides and leather.

Arbitration agreement**8 Arbitrability**

Are there any types of disputes that are not arbitrable?

Yes, arbitral proceedings in the Netherlands may not lead to the determination of legal consequences that are not at the free disposal of the parties, such as certain disputes relating to family law, rights in rem, the granting of a bankruptcy order, the annulment of a decision of a legal person and certain intellectual property disputes (article 1020(3) DCCP).

9 Requirements

What formal and other requirements exist for an arbitration agreement?

There are no formal requirements in the Netherlands, an arbitration agreement can even be concluded orally. However, if contested, the existence of the agreement must be proven by way of a written document (article 1021 DCCP).

An arbitration agreement can be contained in a clause in general terms and conditions, be incorporated in articles of association or in other rules that bind the parties (article 1020(5) DCCP).

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Under article 1053 DCCP, an arbitration agreement is considered and judged as a separate agreement. Under this doctrine of separability, the rescission or termination of the underlying contract will not result in the unenforceability of the arbitration agreement. Similarly, invalidity or nullity of the underlying agreement does not necessarily result in unenforceability of the arbitration agreement.

Under Dutch insolvency law, insolvency of one of the parties to the agreement will not result in unenforceability of the arbitration agreement. Similarly, death of one of the parties will not influence the enforceability of the arbitration agreement.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Generally, an arbitration agreement binds only the parties to that agreement. However, the successor in law of a party is also bound and there have been cases in which a trustee in a bankruptcy was found to be bound to an arbitration agreement.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Dutch Arbitration Act allows a third party who has an interest in arbitral proceedings to join or intervene in them. A notice of joinder can be served upon a third party who may have indemnified one of the parties in the arbitration. Such a third party will be admitted if allowed by the tribunal and if the third party agrees to submit to the arbitration agreement (article 1045 DCCP).

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine is scarcely recognised in the Netherlands and would probably only apply in exceptional cases.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Dutch Arbitration Act does not contain any specific provisions on multiparty arbitrations. Hence, the requirements for drafting a multiparty arbitration agreement are the same as for two-party arbitration agreements.

Constitution of arbitral tribunal**15 Eligibility of arbitrators**

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The arbitral tribunal must be composed of an uneven number of arbitrators (article 1026(1) DCCP) and arbitrators must be independent and impartial (article 1033 DCCP).

Any natural person of legal capacity may be appointed as an arbitrator. Article 1023 DCCP provides that no person shall be precluded from appointment by reason of his or her nationality, unless the parties agreed otherwise. Thus, foreign arbitrators can be appointed in international arbitrations in the Netherlands, so long as they are independent and impartial.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The preliminary relief judge of the district court will determine the number of arbitrators if the parties have not agreed on this, or if the agreed method for determining that number is not carried out and the parties cannot reach agreement (article 1026(2) DCCP).

The parties may also entrust the appointment of the arbitrator or arbitrators to a third person. If no method of appointment is agreed upon, the arbitrator is, or the arbitrators are, to be appointed by consensus between the parties (article 1027(1) DCCP).

The appointment must occur within two months after the commencement of the arbitration, unless appointments were already made. The period for appointment can be extended to three months if at least one of the parties is domiciled or has his or her actual residence outside the Netherlands. These periods may be shortened or extended by agreement between the parties (article 1027(2) DCCP).

If the appointment of the arbitrator or arbitrators is not made within the aforementioned period of two (or three) months, an arbitrator shall, at the request of either party, be appointed by the preliminary relief judge of the district court. The other party shall be given an opportunity to be heard (article 1027(3) DCCP).

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator may be challenged if there is justifiable doubts to his or her impartiality or independence. A secretary engaged by an arbitral tribunal may be challenged on the same grounds (article 1033(1) DCCP).

A party may only challenge an arbitrator appointed by him or her on grounds of which he or she has become aware after the appointment was made (article 1033(2) DCCP). Furthermore, a party may not challenge an arbitrator appointed by a third person or the preliminary relief judge of the district court if he or she acquiesced to the appointment, unless he or she later becomes aware of the grounds for challenge (article 1033(3) DCCP).

Article 1035 DCCP provides that the challenge and the grounds must be in writing by the challenging party and sent to:

- the challenged arbitrator;
- the other members of the arbitral tribunal;
- the other party; and
- any third person, if such person appointed the challenged arbitrator.

The arbitral tribunal may suspend the arbitral proceedings upon receipt of the challenge (article 1035(1) DCCP). If the challenged arbitrator does not withdraw within two weeks after the day of receipt of the notification, the preliminary relief judge of the district court, at the request of either party, will decide on the merits of the challenge (article 1035(2) DCCP). If no such request is made within four weeks, the right to challenge becomes barred and the arbitral proceedings, if suspended, resume (article 1035(2) DCCP). If the challenged arbitrator or one or both of the parties is domiciled or

has his or her actual residence outside the Netherlands, the periods mentioned above are six and eight weeks respectively (article 1035(4) DCCP).

If the challenged arbitrator withdraws, or if the challenge is upheld by the preliminary relief judge of the district court, the arbitrator, unless the parties have agreed otherwise, is replaced in accordance with the rules governing his or her initial appointment (article 1035(3) DCCP).

Although they are non-binding, the IBA Guidelines on Conflicts of Interest in International Arbitration are generally taken into account.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Article 1029(2) DCCP provides that once an arbitrator accepts his or her mandate (role as arbitrator), he or she may only request release from this mandate from the parties, a third person designated by the parties, or in the absence thereof, by the provisional relief judge of the district court. The parties may release the arbitrator from his or her mandate by agreement between themselves, or if an arbitrator becomes unable to perform his or her mandate, either party may request his or her release by a third person designated by the parties, or in the absence of such third person, by the provisional relief judge of the district court.

Regarding the expenses of the arbitrators, the arbitral tribunal will generally request payment of a deposit from a party making either a claim or a counterclaim, in respect to its fees and expenses. Under the NAI Rules, the NAI will administer and hold the advances. Article 59 of the NAI Rules explicitly provides for the payment of a deposit for costs (from which the fees and disbursements of the arbitrators are to be paid). The arbitral tribunal may suspend the proceedings with respect to either claims or counterclaims, or both, if payment of the deposit is not made upon request.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The Dutch Arbitration Act does not provide for an exemption from liability. However, the Dutch Supreme Court, in its decision of 4 December 2009, NJ (Dutch Law Report) 2011, 131, held, that 'recourse against the judicial officer is possible if the state might be sued successfully in that connection and if there was intent or deliberate recklessness on the part of the judicial officer'.

The conclusion is that arbitrators can only be held personally liable if they acted intentionally or deliberately recklessly with respect to the decision to set aside an award or in manifestly and grossly failing to recognise what the proper performance of their duties involves.

The NAI Rules provide for the exclusion of liability in article 66.

Jurisdiction

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Article 1052 DCCP expressly states that the arbitral tribunal has the power to decide its own jurisdiction.

If the dispute is submitted to the state court before arbitration is initiated, it is arguable that the state court would be allowed to decide (on the grounds of article 1022 DCCP) whether the court

or the arbitral tribunal has jurisdiction. If the case is subsequently submitted after a state court finds the arbitral tribunal without jurisdiction, the tribunal will declare that it lacks jurisdiction to decide on its own competence.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The parties must first await the decision of the arbitral tribunal. The competence of the state court is only revived if the arbitral tribunal declares that it lacks jurisdiction (article 1052(5) DCCP), and if the arbitral tribunal declares that it has jurisdiction, the parties must wait until they receive an award before they can challenge the competence of the arbitral tribunal before the state court (article 1052(4) DCCP). However, an exception may be made, if there is prima facie evidence that there is no valid arbitration agreement.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Article 1037(1) DCCP provides for the place of arbitration to be determined by the arbitral tribunal. If the place of arbitration is not determined by either the parties or the tribunal, then the place of making the award as stated by the arbitral tribunal in the award is deemed the place of arbitration (article 1037(2) DCCP).

23 Commencement of arbitration

How are arbitral proceedings initiated?

If the parties have agreed to an arbitration clause, the arbitration is deemed to have been commenced on the day of receipt of a notice in writing from one party informing the other party that he or she is commencing arbitration. The notice must contain a description of the matters submitted to arbitration (article 1025(1) DCCP).

If the parties did not agree to an arbitration clause, then an arbitration is deemed to have been commenced by the conclusion of a submission agreement, unless the parties have agreed to a different method of commencement (article 1024(2) DCCP). The submission agreement must be proven by an instrument in writing (article 1021 DCCP) and must contain a description of the matters submitted to arbitration (article 1024(1) DCCP).

If the parties have agreed to the applicability of institutional arbitration rules, such rules will normally prescribe the commencement of proceedings. For instance, article 6(1) of the NAI Rules provides that an arbitration commences by the filing of a request for arbitration with the NAI Secretariat.

24 Hearing

Is a hearing required and what rules apply?

Article 1039(2) DCCP requires the tribunal to provide parties an opportunity to make an oral presentation if either party requests such a hearing.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Unless the parties have agreed otherwise, the arbitral tribunal has discretion in the rules of evidence to be applied (article 1039(5) DCCP).

Evidence can be provided by any means, including, written evidence, witnesses or experts. Under article 1039(3) DCCP, the arbitral tribunal may, at the request of either party, allow a party to produce witnesses or experts.

The arbitral tribunal has the power to order the production of any documents that it deems relevant for the dispute (article 1039(4) DCCP). Parties can also make a request to that effect to the arbitral tribunal, but the arbitral tribunal cannot oblige a party to produce such documents. However, the tribunal can draw whatever conclusion it deems appropriate if a party refuses to produce the requested documents. Since the DCCP does not contain a procedure for discovery, arbitral tribunals (consisting of Dutch arbitrators) are disinclined to grant wide-ranging document disclosure.

Finally, the IBA Rules on the Taking of Evidence in International Arbitration can generally be taken into account and parties are free to adapt them to their particular arbitral proceedings.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

An arbitration agreement may not preclude a party from requesting a court to order a preliminary witness examination, a preliminary expert report or a preliminary site visit, unless arbitrators have been appointed at the time of the request (article 1022(3) DCCP).

Furthermore, if a witness does not appear voluntarily or, having appeared, refuses to give evidence, the arbitral tribunal may allow a requesting party to petition the preliminary relief judge of the district court, within a period of time determined by the arbitral tribunal, to appoint a judge-commissary before whom the examination of the witness shall take place. The clerk of the district court must give arbitrators an opportunity to attend the examination of the witness (article 1041(2) DCCP).

27 Confidentiality

Is confidentiality ensured?

The Dutch Arbitration Act contains no provisions relating to confidentiality. It is, however, generally accepted that arbitration is confidential and that the parties and arbitrators involved are bound to secrecy.

Article 55 of the NAI Rules explicitly provides for confidentiality and secrecy.

Interim measures

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Under article 1022(2) DCCP, an arbitration agreement may not preclude a party from requesting a court to grant interim measures of protection or from applying to the preliminary relief judge of the district court for a decision in summary proceedings. The main type of interim measure is leave to levy prejudgment attachments, which arbitrators are not allowed to grant.

Anti-suit injunction

An anti-suit injunction is not allowed under EC Council Regulation (EC) No 44/2001 of 22 December 2000. According to the ECJ decision of 10 February 2009 (*Allianz v West Tankers*), it is incompatible with the Regulation for a court of a member state to make an order to restrain a person from commencing or continuing proceedings before the courts of another member state on the ground that such proceedings would be contrary to an arbitration agreement. The question remains whether anti-suit injunctions would be available in respect of proceedings brought outside the EU.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Parties may agree to empower an arbitral tribunal or its chairman to give a decision in summary arbitral proceedings (article 1051(1) DCCP). Also see articles 42a-42o NAI Rules.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The Dutch Arbitration Act does not contain any provision on interim relief during arbitral proceedings (apart from the summary proceedings in article 1051 DCCP). An arbitral tribunal could derive jurisdiction to grant such interim relief from article 1036 DCCP, which states that the arbitral proceedings shall be conducted in such manner as agreed between the parties or, to the extent that the parties have not agreed, as determined by the arbitral tribunal. It has been argued that interim relief ordered by the arbitral tribunal during arbitral proceedings (not in summary proceedings) constitute an interim award and are not enforceable as a final award would be.

Article 38(1) NAI Rules provides that the arbitral tribunal may, at the request of a party, provisionally make or take any decision regarding the object of the dispute that it deems useful or necessary at any point in the proceedings. This includes the authority to order a provision of security.

Although it is not provided for in the Dutch Arbitration Act, the arbitral tribunal will generally request payment of a deposit from a party making either a claim or a counterclaim, in respect to its fees and expenses. Moreover, article 59 NAI Rules explicitly provides for the payment of a deposit for costs (from which the fees and disbursements of the arbitrators are to be paid). The arbitral tribunal may suspend the proceedings with respect to either the claims or counterclaims, or both, if payment of the deposit is not made upon request (article 59(6) NAI Rules).

See also article 37 NAI Rules, which states, *inter alia*, that the arbitral tribunal is authorised to order the provision of security on behalf of the party who requests it, in a form to be determined by the arbitral tribunal, regarding any claim or counterclaim, as well as regarding costs related to the arbitration on the merits. Article 42l(2) NAI Rules for the provision of security in summary proceedings if the arbitration has not yet commenced.

Awards**31 Decisions by the arbitral tribunal**

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Pursuant to article 1057(1) DCCP, the arbitral tribunal shall decide by a majority of votes if the arbitral tribunal is composed of more than one arbitrator, unless the parties have agreed otherwise.

32 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Article 1057(1) DCCP does not prohibit dissenting or concurring opinions. However, they are relatively rare in practice. Furthermore, the Supreme Court of the Netherlands held, in its decision of 5 December 2008 ((Dutch Law report) NJ 2009, 6), that a dissenting opinion does not form part of the award.

33 Form and content requirements

What form and content requirements exist for an award?

Pursuant to article 1057 DCCP, an arbitral award must be in writing, signed by the arbitrator(s), and in addition to the decision, the award must contain in any case:

- the names and addresses of the arbitrator or arbitrators;
- the names and addresses of the parties;
- the date on which the award is made;
- the place where the award is made; and
- the reasons for the decision, unless the award concerns merely the determination of the quality or condition of goods or the recording of a settlement.

34 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

No, the arbitral tribunal is free to determine the time when the award shall be made (article 1048 DCCP).

35 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The time frame within which an application for setting aside must be made is not later than three months from either of the following dates:

- from the date of deposit of the award with the registry of the district court;
- from the serving of the arbitral award, together with leave for enforcement, on the other party (article 1064(3) DCCP); and
- if an additional award is rendered or rejected, from the date of deposit of the additional award or the notification of the rejection with the registry of the district court (article 1065(7) DCCP).

36 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may render a final award, a partial final award, or an interim award (article 1049 DCCP).

37 Termination of proceedings

By what other means than an award can proceedings be terminated?

An arbitration may be terminated if both parties reach an agreement to terminate or at the request of either party and, after having heard the other party and the arbitrators, the third person designated by the parties, or in the absence thereof, the provisional relief judge of the district court may terminate the mandate of the arbitral tribunal if, despite repeated reminders, the arbitral tribunal carries out its mandate in an unacceptably slow manner. In these circumstances, the jurisdiction of the court shall revive, unless parties have agreed otherwise (article 1029(3) DCCP, article 1031 DCCP).

38 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards?

The 'loser pays' rule generally applies in the Netherlands. Depending on the circumstances of the case, the arbitral tribunal may consider not awarding full costs against the losing party. Unless otherwise agreed, the arbitral tribunal may award the costs of legal assistance incurred by the party in whose favour the award is rendered against the losing party if and to the extent that these costs are deemed reasonable and necessary by the arbitral tribunal (see also article 60 NAI Rules).

39 Interest

May interest be awarded for principal claims and for costs and at what rate?

Where Dutch substantive law applies, the default position is that the principal claim is often subject to compound interest at contractual or statutory interest rates (articles 6:119 and 6:119a Dutch Civil Code). The statutory interest rate is determined (for most engagements) by Order in Council or (for trade agreements) at 7 percentage points above the ECB's refinancing rate (article 6:120 Dutch Civil Code). The latter interest rate is generally much higher than the former.

Proceedings subsequent to issuance of award**40 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Articles 1060 and 1061 DCCP provide for the rectification or correction, or both, of the award and for the making of an additional award.

41 Challenge of awards

How and on what grounds can awards be challenged and set aside?

An award may only be set aside on one or more of the following grounds (article 1065(1) DCCP):

- absence of a valid arbitration agreement;
- the arbitral tribunal was constituted in violation of the applicable rules;
- the arbitral tribunal has not complied with its mandate;
- the award is not signed or does not contain reasons; or
- the award, or the manner in which it was made, violates public policy or good morals.

Revocation of an award is possible in the event of fraud, forgery and the emergence of new documents (article 1068(1) DCCP).

42 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

An appeal from the arbitral award to a second arbitral tribunal is possible only if the parties have agreed thereto.

43 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Article 1062 DCCP lays out the requirements for recognition and enforcement of domestic arbitral awards and article 1075 DCCP lays out the same for foreign awards. Both are based on the New York Convention and have similar requirements such as finality. Article 1705 DCCP provides for the recognition under an applicable treaty and recognition of arbitral awards, such as and foremost the New York Convention. Because of more favourable rights provision of the New York Convention a party seeking enforcement has a choice between articles 1074 and 1075 DCCP.

For awards made in the Netherlands, the procedure for enforcement may begin only after the president of the district court grants leave for enforcement at the request of one of the parties to the arbitration. In principle, parties will not be summoned to appear before the president of the district court, however, the losing party may request to be heard. Also, if the president of the district court wishes to refuse the request for enforcement, he or she must allow the

requesting party an oral hearing to elaborate on its request; it is likely the opposing party will also be heard. Once leave for enforcement is granted, the enforcing party must serve the arbitral award and the leave for enforcement on the other party (article 430 DCCP). If the losing party wishes to stop enforcement, applications for revocation and for the setting aside of the award are the only means of recourse available (article 1062(4) DCCP).

The grounds for refusal of leave for enforcement of domestic awards are laid out in article 1063(1) DCCP and provide for refusal if the award or the manner in which it was made is manifestly against public policy or good morals. The decision for refusal to enforce may be appealed before the court of appeal within two months after the date on which the decision is signed (article 1063(3) DCCP).

The procedure for obtaining leave for enforcement of foreign awards is almost the same as for domestic awards. Article 985 DCCP requires that the foreign award be enforceable on the basis of a treaty or on the basis of an act, for example, that the award satisfies the New York Convention articles IV and V. If the New York Convention or any other treaty does not apply to the award, article 1076 DCCP provides for nearly identical grounds for refusal of recognition and enforcement as the New York Convention.

44 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

A Dutch court is not required under the New York Convention to refuse recognition and enforcement of a foreign arbitral award because it had been annulled by the court of the seat of arbitration if the annulment cannot be given extraterritorial effect. To be given extraterritorial effect, a foreign annulment must be in observance of due process, which requires that the foreign court asserting the annulment had acted in an impartial and independent manner.

There is only one decision in which a Dutch court granted leave for enforcement of annulled arbitral awards. In a decision dated 28 April 2009, the Amsterdam Court of Appeal granted enforcement of four arbitral awards annulled by the Russian courts finding,

[...] since it is very likely that the judgments by the Russian civil judge setting aside the arbitration decisions are the result of a dispensing of justice that must be qualified as partial and dependent, said judgments cannot be recognised in the Netherlands. This means that in considering the application by Yukos Capital for enforcement of the arbitration decisions, the setting aside of that decision by the Russian court must be disregarded.

Although, generally, Dutch courts favour the enforcement of awards.

45 Cost of enforcement

What costs are incurred in enforcing awards?

The costs of enforcement are dependent on typical factors, such as the opposition given by the opponents and the presence of assets on which to enforce the award. A typical enforcement procedure will begin at €2,000 and rise with the addition of such complications.

Other**46 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Witnesses are generally heard after the court has decided on the allocation of the burden of proof for a certain submission, and in the same decision the court will also decide whether the written evidence on the file may serve as sufficient proof for that specific submission. If so, there is a possibility that a final judgment will be issued without

hearing of witnesses. Also, a Dutch judge is generally more active in questioning the witness, for example, it is only possible for the counsel for a party to ask questions of a witness after the judge has completed his or her list of questions.

A Dutch court itself can decide that an expert be appointed to produce a report on certain issues identified by the court. Though the court is not bound by such reports, in practice, it will heavily rely on such a report.

Traditionally, the possibilities to obtain documents from the other party in Dutch state court proceedings have been limited. However, the revision of the Code on Civil Procedures in 2002 has widened these possibilities. But still, the Dutch discovery system remains distinguishable from the UK or US by requiring parties to specifically identify requested documents.

47 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign practitioners should be aware of the obligation of the arbitral tribunal to ensure without delay that the original of the final or partial award is deposited with the registry of the district court within whose district the place of arbitration is located (article 1058 DCCP).

Update and trends

The Netherlands is on the verge of introducing a new Arbitration Act. A legislative proposal has been submitted to the Dutch parliament. Important proposed amendments relate to, for example:

- limitation of the length of annulment proceedings;
- revival of the jurisdiction of the state court;
- confidentiality of arbitration proceedings;
- assistance of the Dutch state court in foreign arbitration proceedings;
- provisional measures in pending arbitration proceedings; and
- a more detailed procedure for arbitral appeal.

Additionally, the Lisbon Treaty, which came into force in December 2009, may affect future BITs concluded by the Netherlands.

The Treaty on the Functioning of the European Union (the TFEU), as amended by the aforementioned Lisbon Treaty, establishes the European Union's exclusive competence on foreign direct investment, as part of the common commercial policy (article 207(1) and article 3(1)(e)). In the absence of an explicit transitional regime in the TFEU clarifying the status of member state's agreements, the Council of the European Union has published a Position (EU) No. 11/2012, which will authorise the continued existence of all investment agreements at present in force between member states and third countries.

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