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ISBN 978-0-414-03916-2
9 780414 039162

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*INTERNATIONAL SERIES*

**General Editors:** Karyl Nairn QC & Patrick Heneghan
*Skadden, Arps, Slate, Meagher & Flom (UK) LLP*

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Published in September 2015 by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell
Friars House, 160 Blackfriars Road, London, SE1 8EZ
(Registered in England & Wales, Company No 1679046.
Registered Office and address for service:
2nd floor, 1 Mark Square, Leonard Street, London EC2A 4EG)
A CIP catalogue record for this book is available from the British Library.

ISBN: 9780414039162

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# FOREWORD

**Karyl Nairn QC & Patrick Heneghan | Skadden, Arps, Slate, Meagher & Flom (UK) LLP**

We are delighted to have been invited once again by Thomson Reuters to edit this fifth edition of *Arbitration World*, published by its widely recognised legal arm, Sweet & Maxwell (and forming part of their new *International Series*).

Following the success of the previous publication, we are hoping that this revised and extended fifth edition will serve as an invaluable reference guide to the key arbitration jurisdictions, rules and institutions across the globe.

In the three years since the last edition was published, the arbitral landscape has continued to evolve, with important developments in both the law and practice of arbitration. For example, new arbitration centres have opened in New York, Seoul, Moscow and Mumbai; established institutions such as the LCIA, AAA, HKIAC, ICDR, SIAC, VIAC, UNCITRAL and WIPO have published revised arbitration rules; new arbitration legislation has been enacted in Hong Kong, Australia, Belgium and Austria; while other jurisdictions, such as India, have sought through case law to improve their "arbitration-friendly" credentials.

The global status and popularity of arbitration has also grown since the last edition of *Arbitration World*. From 2012 to 2014, ICSID saw the highest annual number of filings in its history, notwithstanding the criticisms in certain quarters about the legitimacy of the existing system of investment treaty arbitration. Arbitration is also extending its global reach – arbitral institutions are reporting that the parties to arbitration are more diversified than ever; 156 state parties have now adopted the New York Convention.

To reflect this trend of expansion, we have continued to broaden the scope of *Arbitration World*. This latest edition has 55 chapters, including 38 jurisdictions and 16 arbitration institutions. We feature 11 new chapters, comprising Belgium, Cayman Islands, Colombia, Egypt, Korea, Malta, Peru, Scotland and the arbitral institutions of CIETAC, SIAC and the SCC.

*Arbitration World* aims to provide a simple and practical guide to arbitration law and practice for parties and practitioners, enabling its readers to assess the comparative benefits and challenges of arbitrating in various jurisdictions and/or under the auspices of different institutions.

We should like to take this opportunity to express our gratitude to all the authors of *Arbitration World*, old and new. The popularity of this publication is testament to the quality and expertise of the leading law firms, practitioners and institutions who have committed their time to the project.

We should also like to thank Emily Kyriacou and her team at Thomson Reuters, including Katie Burrington, Nicola Pender and Chris Myers, for their superb management and coordination efforts. We also extend our gratitude to Michele O'Sullivan for commissioning the project all those years ago.

Finally, we wish to pay tribute to our hard-working colleagues at Skadden, Gulnaar Zafar, Ben Jacobs, Sabeen Sheikh, Bing Yan, Anna Grunseit, Judy Fu, Nicholas Lawn, Kam Nijar, Laura Feldman, David Edwards, Ekaterina Churanova, Calvin Chan, Ross Rymkiewicz, Catherine Kunz, Melis Acuner, Emma Farrow, Devika Khopkar, Sara

Nadeau-Seguin, Nicholas Adams, Ahmed Abdel-Hakam, Simon Mercouris, Anna Heimbichner, Joseph Landon-Ray, Simon Walsh, Alex van der Zwaan, Tom Southwell, Christopher Lillywhite and Eleanor Hughes, who have assisted with the review and editing of the chapters featured in this latest edition; *Arbitration World* has been a true Skadden team effort and we are most grateful for all the support received.

*Patrick Heneghan and Karyl Nairn QC, July 2015*

# THE NETHERLANDS

**Dirk Knottenbelt* | Houthoff Buruma**

## 1. EXECUTIVE SUMMARY

### 1.1 What are the advantages and disadvantages relevant to arbitrating or bringing arbitration-related proceedings in your jurisdiction?

Dutch law recognises arbitration as a full alternative to state court proceedings, in both national and international cases.

On 1 January 2015 the new Dutch Arbitration Act entered into force in the Netherlands (the Revised Arbitration Act) which has modernised Dutch arbitration law and has made the Netherlands an even more attractive venue for international arbitral proceedings. Overall, in the Revised Arbitration Act, the legislator has granted the parties more autonomy to shape the arbitration as they deem fit, providing for more time- and cost-efficient proceedings. In fact, only a few provisions in the Revised Arbitration Act, all relating to due process, are of a mandatory nature.

The Dutch legislator sought to limit and streamline the Dutch courts' involvement in arbitrations, while increasing the support provided by courts. Under the Revised Arbitration Act, the Dutch courts' assistance to arbitrators is explicitly limited to what arbitrators are not able to do themselves. Court assistance, such as the examination of witnesses, is also available with regard to arbitrations that take place outside the Netherlands.

Setting aside proceedings and enforcement proceedings regarding foreign arbitral awards are streamlined to one factual instance, before the Court of Appeal. In addition, the Revised Arbitration Act states that only a serious non-compliance by a tribunal with its mandate can provide a ground to set aside an award. In addition, upon an award being set aside – other than on the basis of a lack of a valid arbitration agreement – the Revised Arbitration Act no longer provides that, subsequently, the national court has jurisdiction, but confirms that the arbitration agreement remains in force and, thus, that the matter should be re-arbitrated.

### 1.2 How would you rate the supportiveness of your jurisdiction to arbitration on a scale of 1 to 5, with the number 5 being highly supportive and 1 being unsupportive of arbitration? Where your jurisdiction is in the process of reform, please add a + sign after the number

We would rate the overall supportiveness of the Netherlands to arbitration as a 5. In particular, the legislature has indicated its support for arbitration through the adoption of the Revised Arbitration Act, and has limited the national court's role in arbitral proceedings to mainly assisting arbitrators in the streamlining of the arbitration.

*With sincere thanks to Maarten Sturm, Thomas Stouten and Loes Stevens for their valuable contributions to this chapter.

## 2. GENERAL OVERVIEW AND NEW DEVELOPMENTS

### 2.1 How popular is arbitration as a method of settling disputes? What are the general trends and recent developments in your jurisdiction?

Arbitration is used extensively in the Netherlands to resolve commercial disputes. Arguably, arbitration has become a preferred method of dispute resolution both in most forms of construction contracts and in M&A related contracts.

The Revised Arbitration Act introduces some new developments, such as:

- Several arbitration-related changes were implemented in Dutch private international law, which now includes:
    - the rule that a state cannot invoke its internal law in order to dispute the validity of the arbitration agreement in circumstances where the other party was neither aware nor should have been aware of such internal law; and
    - the so-called "favour-principle", which provides that an arbitration agreement is valid if it is valid according to the law chosen by the parties to govern the arbitration, to the law of the place of arbitration or, absent a choice of law, to the law that applies to the legal relationship to which the arbitration agreement relates.
- An emergency arbitrator may render a decision in the form of an award. However, if a party subsequently commences arbitral proceedings on the merits, the arbitral tribunal is not bound by the findings of the emergency arbitrator.
- The Revised Arbitration Act allows the parties to agree that the challenge of an arbitrator will be exclusively decided upon in institutional challenge proceedings.
- The Revised Arbitration Act expressly sets out the principles of due process and prevention of unreasonable delay. In addition, the Revised Arbitration Act provides a statutory framework for e-Arbitration, including a provision on electronic arbitral awards.
- The Revised Arbitration Act allows the parties to agree, after the arbitration has commenced, that arbitrators need not set out reasons in the award. Further, the Revised Arbitration Act has abandoned a pre-existing requirement under Dutch law that the tribunal deposit the award with the registry of the relevant court, unless the parties agree to such requirement.
- Notwithstanding the arbitration agreement, a party may still request the state courts for protective measures and to provide injunctive relief and provisional evidentiary measures. The Revised Arbitration Act does provide, however, that the state court will solely be competent if the requested decision cannot or not timely be obtained in the arbitration. Court assistance, such as the examination of witnesses, is available with regard to arbitrations that take place outside the Netherlands.
- Setting aside proceedings and enforcement proceedings regarding foreign arbitral awards are limited to one factual instance before the Court of Appeal. It is further possible for the parties to exclude the possibility to appeal to the Supreme Court in setting aside proceedings.

- Finally, the Revised Arbitration Act has introduced the possibility of remission in setting aside proceedings. The Court of Appeal may, at the request of either party or on its own motion, stay the setting aside proceedings in order to allow the arbitral tribunal to reverse the ground for setting aside the award by either reopening the arbitration or by any other measure that the arbitral tribunal deems fit. If the arbitral tribunal decides that the ground for setting aside can be undone, it will render a new, replacing, award.

In line with the Revised Arbitration Act, the revised NAI Arbitration Rules entered into force on 1 January 2015 (*www.nai-nl.org*). A fundamental amendment relates to the appointment of the arbitrators whereby the pre-existing "list procedure" has been replaced by a mechanism of party appointment. The average arbitration takes approximately nine months.

### 2.2 Are there any unique jurisdictional attributes or particular aspects of the approach to arbitration in your jurisdiction that bear special mention?

There are several unique facets of arbitration law in the Netherlands (which to some extent have been modified by the Revised Arbitration Act):

The possibility of arbitral appeal has been maintained under the Revised Arbitration Act. However, an Arbitral appeal is only possible if and when the parties have specifically agreed to it, with the result that it is scarcely used in practice. The Revised Arbitration Act has abolished the somewhat controversial requirement for the tribunal to deposit the award with the registry of the district court at the seat of the arbitration. As part of the new regime, the legislator adopted an "opt-in" mechanism in the Dutch Code for Civil Proceedings (DCCP), to the effect that deposit of an arbitral award is not required unless the parties agree otherwise (*Article 1058(1), DCCP*).

### 2.3 Principal laws and institutions

#### 2.3.1 What are the principal sources of law and regulation relating to international and domestic arbitration in your jurisdiction?

The New Arbitration Act is set out in the DCPP and applies to all arbitrations with a seat in the Netherlands. It reflects the most important provisions of the 2006 UNCITRAL Model Law.

The Netherlands is party to the New York Convention and the Washington Convention.

#### 2.3.2 Which are the principal institutions that are commonly used and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

The Netherlands Arbitration Institute (NAI, *www.nai-nl.org*) is the foremost institute for both international and domestic arbitration.

Also prominent is the Permanent Court of Arbitration (PCA, *www.pca-cpa.org*), which is based in The Hague and deals with investor-state and state-to-state arbitration. Both the PCA and the NAI are able to act as appointing authorities.

P.R.I.M.E. Finance (which stands for the Panel of Recognised International Market Experts in Finance) is also based in The Hague. The institution was established to help resolve, and to assist judicial systems in the resolution of,

disputes concerning complex financial transactions. P.R.I.M.E. Finance has the support of key international regulatory bodies and is complementary to the ongoing financial market regulatory reform process.

There is also a range of other institutions that administer international arbitration proceedings in the Netherlands. In many cases, their activities involve arbitration in industry-specific fields such as shipping and transport (Tamara Foundation; *www.tamara-arbitration.nl*), construction (*www.raadvanarbitrage.nl*) and IT (*www.sgoa.org*).

Many of the commercial arbitrations seated in the Netherlands are administered by the International Court of Arbitration of the International Chamber of Commerce in Paris.

#### 2.3.3 Which courts or other bodies have judicial oversight or supervision of the arbitral process.

Arbitration in the Netherlands is not supervised by the courts, other than by way of *ex post* supervision in proceedings for setting aside or revocation of the arbitral award. These possibilities are discussed below in *Section 5*.

## 3. ARBITRATION IN YOUR JURISDICTION – KEY FEATURES

### 3.1 The appointment of an arbitral tribunal

#### 3.1.1 Are there any restrictions on the parties' freedom to choose arbitrators?

The arbitral tribunal must be composed of an uneven number of arbitrators, and may consist of only one (*Article 1026(1), DCCP*).

Under Dutch law, arbitrators are not required to be members of the Dutch Bar Association. Article 1023 of the DCCP prescribes that any natural person of legal capacity may be appointed as an arbitrator. No person shall be precluded from appointment by reason of his or her nationality unless parties have agreed otherwise in view of the impartiality and independence of the arbitral tribunal.

#### 3.1.2 Are there specific provisions of law regulating the appointment of arbitrators?

The arbitrator(s) can be appointed by any procedure the parties have agreed upon. The Dutch Arbitration Act expressly permits the parties to entrust appointment to a third party. If no appointment procedure is agreed upon, the arbitrator(s) shall be appointed by consensus between the parties (*Article 1027(1), DCCP*).

Parties must appoint the arbitrators within three months after the commencement of the arbitration. In the event that the parties fail to agree on the number of arbitrators, the period of three months shall start to run on the day on which the number of arbitrators is determined. Parties are permitted to shorten or extent this period by agreement (*Article 1027(2), DCCP*).

If parties fail to appoint the arbitrators within the period of three months, a party can apply for interim relief for a judge to appoint the missing arbitrator(s) (*Article 1027(3), DCCP*). The judge will appoint the arbitrator(s) without regard to the question of whether the arbitration agreement is valid. Moreover, participation in such an appointment procedure does not imply that a party forfeits its right to challenge the jurisdiction of the arbitral tribunal on the ground of absence of a valid arbitration agreement (*Article 1027(4), DCCP*).

### 3.1.3 Are there alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties?

See *Section 3.1.2* above.

### 3.1.4 Are there requirements (including disclosure) for "impartiality" and/or "independence", and do such requirements differ as between domestic and international arbitrations?

Arbitrators must be impartial and independent. The Revised Arbitration Act prescribes that a person who is either approached in connection with his or her possible appointment as an arbitrator, or has already been appointed as an arbitrator, shall, if he or she presumes that he or she could be challenged, disclose in writing the existence of such possible grounds to the parties or to the person who approached him or her (*Article 1034(1) and (2), DCCP*). If the arbitration is already pending, the arbitrator shall disclose any such grounds to all parties to the arbitral procedure and to the arbitral tribunal (*Article 1034(3), DCCP*).

The mere appearance of an arbitrator not being impartial or independent may result in a successful challenge (*Dutch Supreme Court, 18 February 1994, NJ 1994, 765 (Nordstrom v Nigoco); see Section 3.1.5*).

If the arbitral tribunal is assisted by a secretary, these rules also apply to the secretary (*Article 1035a, DCCP*).

These rules apply equally in both national and international arbitrations.

### 3.1.5 Are there provisions of law governing the challenge or removal of arbitrators?

Arbitrators and/or the secretary of the arbitral tribunal may be challenged if circumstances give rise to justifiable doubts as to their impartiality or independence (*Article 1033(1) and 1035a, DCCP*). Unless parties have agreed otherwise, a party may only challenge an arbitrator or secretary for reasons which it has become aware of after the appointment has been made unless agreed otherwise by the parties (*Article 1033(2), DCCP*).

The challenging party must give notification of the challenge and its grounds in writing to the arbitrator, co-arbitrators and the other party. This notification must be made within four weeks after the day of receipt of the disclosure of the arbitrator, or, in the absence of such disclosure, within four weeks after the day that the challenging party has become aware of the grounds for challenge (*Article 1035(1), DCCP*).

If the challenged arbitrator does not withdraw within two weeks after receipt of the notification, either party can apply to a judge for interim relief to decide on the merits of the challenge (*Article 1035(2), DCCP*). The applicant must set out in full the reasons he or she has to challenge the arbitrator in the request for interim relief, and is barred from raising such reasons at a later stage of the arbitral proceedings or in proceedings before the court (*Article 1035(8), DCCP*). A party has to make such a request within two weeks after it received a written notification from the challenged arbitrator that he or she will not withdraw from the tribunal, or, if such written notification has not been received, within six weeks after the receipt of the notification of the challenge. These time periods may be shortened or extended by agreement between the parties (*Article 1035(6), DCCP*).

The arbitral tribunal may in its discretion suspend the arbitral proceedings after receiving the notification of the challenge or afterwards (*Article 1035(5), DCCP*). However, if the arbitral tribunal decides to continue the arbitral proceedings, it cannot render a (partial) final award until the interim relief judge has decided on the challenge (*Dutch Supreme Court, 29 June 2007, NJ 2008, 177 (N/Aegon)*).

If the parties have not determined the place of arbitration, the challenge of the arbitrators shall take place in accordance with the provisions of the Revised Arbitration Act if at least one of the parties is domiciled or has its actual residence in the Netherlands (*Article 1073, DCCP*).

An arbitrator who has accepted his or her mandate in writing can only be released from this mandate in a limited number of scenarios unless the parties have agreed otherwise (*Article 1029(1), DCCP*). First, he or she may be released at his or her own request, in which case the consent of the parties or a third party designated by the parties is required, or, in the absence thereof, that of the interim relief judge (*Article 1029(2), DCCP*). Secondly, parties may agree to release the arbitrator from his or her mandate (*Article 1029(3), DCCP*). Thirdly, if the arbitrator has become unable to perform his or her mandate, he or she may, upon the request of any party, be released from the mandate by a third party designated by the parties, or, in the absence thereof, by the interim relief judge (*Article 1029(4,) DCCP*). Lastly, the parties may request release of the mandate of the arbitral tribunal by a third party designated by the parties, or, in the absence thereof, by the interim relief judge, in circumstances where the arbitral tribunal, despite being repeatedly summoned, carries out its mandate in an unacceptably slow manner (*Article 1029(5), DCCP*).

The appointment of a substitute arbitrator is governed by Article 1030 of the DCCP, which also applies in case of the death of an arbitrator. The substitute arbitrator shall be appointed pursuant to the rules applicable to the initial appointment unless the parties agree otherwise.

#### 3.1.6 What role do national courts have in any such challenges?

See *Section 3.1.5* above.

#### 3.1.7 What principles of law apply to determine the liability of arbitrators for acts related to their decision-making function?

The Revised Arbitration Act does not contain any provision regarding the liability of arbitrators for acts or omissions in their decision-making function. However, under Dutch case law the courts have found arbitrators to be liable in certain restrictive circumstances. First, it is a precondition that the arbitral award rendered by the arbitrators was set aside. Second, it must be proven that the arbitrators acted with intent or gross negligence, or were clearly ignoring the proper discharge of their duties (*Dutch Supreme Court 4 December 2009, NJ 2011/131 (ASB Greenworld v NAI)*). As such, the threshold for possible liability of the arbitrators is very high.

### 3.2 Confidentiality of arbitration proceedings

#### 3.2.1 Is arbitration seated in your jurisdiction confidential? What are the relevant legal or institutional rules which apply?

In principle, arbitral proceedings in the Netherlands are confidential, that is, not publicly accessible, which is considered to be a major advantage of arbitration over state court proceedings. There is no provision in the DCCP which specifically imposes obligations on the parties to keep all information exchanged in the arbitration confidential. The Revised Arbitration Act merely provides that no copy of or extract from a deposited award shall be issued to a third person (*Article 1058(4), DCCP*). Some parties therefore choose to include an explicit confidentiality clause in the arbitration agreement as a precautionary measure. The NAI Arbitration Rules explicitly provide that

"arbitration is confidential and all persons involved either directly or indirectly shall be bound to secrecy, except and insofar as disclosure ensues from the law or the parties' agreement" (*Article 6, NAI Arbitration Rules*).

#### 3.2.2 To what matters does any duty of confidentiality extend (for example, does it cover the existence of the arbitration, pleadings, documents produced, the hearing and/or the award)?

The Revised Arbitration Act does not provide for confidentiality with regard to the existence of arbitration proceedings, pleadings, documents produced and the hearing. It does provide explicitly that a deposited award shall not be issued to any third person (*Article 1058(4), DCCP*). Often, parties will make arrangements regarding confidentiality in commercial contracts. Moreover, Article 6 of the NAI Arbitration Rules provides for confidentiality of the arbitration. See *Sections 3.2.1* and *3.2.4*.

#### 3.2.3 Can documents or evidence disclosed in arbitration be used in other proceedings or contexts?

Documents or evidence disclosed in arbitral proceedings can be used in other proceedings or contexts by the party which submitted these documents or evidence. Whether a party is permitted to use documents or evidence disclosed by the opposing party in situations other than the arbitral proceedings at hand depends on whether or not a duty of confidentiality applies to the arbitral proceedings. See *Sections 3.2.1* and *3.2.2* above.

#### 3.2.4 When is confidentiality not available or lost?

Some aspects of the arbitral proceedings may become public if one of the parties initiates proceedings to set aside an award before a Dutch court and (part of) the record is submitted in such public court proceedings.

### 3.3 Role of (and interference by) the national courts and/or other authorities

#### 3.3.1 Will national courts stay or dismiss court actions in favour of arbitration?

A court before which an action is brought shall generally declare that it has no jurisdiction to hear a matter which is the subject of a valid arbitration agreement in circumstances where a party invokes the existence of the arbitration agreement before submitting its defence (*Article 1022, DCCP*). In such circumstances, the court shall only declare that it has jurisdiction if the requested decision cannot, or not in a timely manner, be obtained by way of arbitral proceedings (*Articles 1022c and 1076d, DCCP*). The above principles will be applied by the Dutch courts in respect of arbitrations that take place in the Netherlands or outside the Netherlands (*Articles 1022 and 1074, DCCP*).

The fact that an arbitration agreement has been concluded does not preclude parties from applying to the court for conservatory interim measures, preliminary witness examination, a preliminary expert report or a preliminary site visit, or from applying to the district court for interim relief or the subdistrict court for a decision in summary proceedings (*Articles 1022a, 1022b and 1074a, 1074b, DCCP*). HERE

#### 3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?

In principle, there are no grounds on which the national courts can order a stay of arbitral proceedings. Anti-arbitration injunctions are generally not allowed.

#### 3.3.3 What is the approach of national courts to parties who commence court proceedings in your jurisdiction or elsewhere in breach of an agreement to arbitrate?

If a party invokes the existence of an arbitration agreement before submitting its defence, a court will generally declare that it has no jurisdiction unless the arbitration agreement is invalid (*Articles 1022 and 1074, DCCP*).

The Dutch courts will generally not grant anti-suit injunctions. In international matters governed by the European Brussels I Regulation, the European Court of Justice (ECJ) has ruled that anti-suit injunctions, which restrain a person from commenting on proceedings before the courts of another member state on the ground that such proceedings are contrary to an arbitration agreement, are incompatible with this regulation and are therefore not allowed (*ECJ, 10 February 2009, Case C-185/07 (Allianz v West Tankers)*). It is, however, questionable whether the ECJ will maintain this ruling under the new Brussels I Regulation (recast), effective as per 1 January 2015 (*cf Opinion of Advocate General Wathelet, 4 December 2014, Case C-536/13 (Gazprom OAO)*).

See further *Section 3.3.1* above.

#### 3.3.4 Is there a presumption of arbitrability or policy in support of arbitration? Have national courts shown a willingness to interfere with arbitration proceedings on any other basis?

National courts are very reluctant to interfere in arbitral proceedings. In the context of attempts to set aside awards, pursuant to case law of the Dutch Supreme Court, national courts are required to exercise restraint in their examination of the existence of grounds for setting aside the relevant award. See *Section 5.1* below.

#### 3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?

See *Section 5.1* below.

### 3.4 Procedural flexibility and control

#### 3.4.1 Are specific procedures mandated in particular cases, or in general, which govern the procedure of arbitrations or the conduct of an arbitration hearing? To what extent can the parties determine the applicable procedures?

Article 1036(1) of the DCCP provides that in principle, arbitral proceedings are to be conducted in the manner agreed between the parties. To the extent that the parties have not agreed upon the conduct of the arbitral proceedings, the arbitral proceedings shall be conducted in the manner determined by the arbitral tribunal. The Revised Arbitration Act does not stipulate specific procedures for particular cases, but it does set out certain basic rules of arbitral proceedings, for example, the appointment of an arbitral tribunal, the principles of a fair hearing, the determination of the place of the arbitration, the submissions of written statements and the right to an oral hearing.

The parties are allowed, however, to deviate from these rules to a large extent. Only a few of the provisions in the Arbitration Act are qualified as mandatory provisions, for example, the equal treatment of the parties by the arbitral tribunal (*Article 1036(2), DCCP*).

### 3.4.2 Are there any requirements governing the place or seat of arbitration, or any requirement for arbitral hearings to be held at the seat?

The place of arbitration is determined by agreement between the parties, or, failing such agreement, by the arbitral tribunal (*Article 1037(1), DCCP*). If the place of arbitration has not been determined by either the parties or the arbitral tribunal, the place where the award was rendered (as stated in the award) shall be deemed to be the place of arbitration (*Article 1037(2), DCCP*).

The arbitral tribunal may hold hearings, deliberate, examine witnesses and expertsand so on at any place, within or outside the Netherlands, which it considers appropriate, unless the parties have agreed otherwise (*Article 1037(3), DCCP*).

### 3.4.3 What procedural powers and obligations does national law give or impose on an arbitral tribunal?

The arbitral tribunal has the power to:

- Give the parties an opportunity to present their case at an oral hearing on its own initiative unless otherwise agreed by the parties (*Article 1038b, DCCP*).
- Order to inspect, or to obtain a copy or excerpt of, certain records relating to the dispute from the party in possession of such records, on its own initiative unless otherwise agreed by the parties (*Article 1040(2), DCCP*).
- Order parties to provide evidence by means of hearing witnesses and experts, on its own initiative unless otherwise agreed by the parties (*Article 1041(2), DCCP*).
- Conduct a site visit or inspect objects in or outside of the Netherlands unless otherwise agreed by the parties, (*Article 1042a, DCCP*).
- At any stage of the proceedings order the parties to participate in a hearing for the purpose of providing information or attempting to arrive at a settlement (*Article 1043, DCCP*).
- Terminate the arbitral proceedings, by issuing an award or in another manner, if the claimant fails to submit or sufficiently substantiate its claim, without providing valid reasons therefor and despite having had sufficient opportunity to do so (*Article 1043a, DCCP*).
- Permit a party who has an interest in the arbitral proceedings to join or intervene in the proceedings, provided that the arbitration agreement applicable to the original parties applies or shall be appled between the parties and the third party, unless the parties have agreed otherwise (*Article 1045(1), DCCP*).
- Determine the moment at which the award shall be rendered (*Article 1048, DCCP*).
- Decide on its own jurisdiction (*Article 1052(1), DCCP*).
- In the event that the national court has the power to impose a penalty for non-compliance, the tribunal shall have such power as well (*Article 1056, DCCP*).
- At the joint request of the parties, record the contents of a settlement in the form of an arbitral award, or refuse this request without giving reasons (*Article 1069(1), DCCP*).

### 3.4.4 Evidence

*3.4.4.1 What is the general approach to the gathering and tendering of written evidence at the pleading stage and at the hearing stage?*

Article 1040(1) of the DCCP provides that the statement of claim and the statement of defence shall, to the extent possible, be accompanied by the records on which the parties rely unless the parties agree otherwise.

The tribunal may, at the request of one of the parties or on its own initiative, order to inspect, or to obtain a copy or excerpt of, certain records relating to the dispute from the party that possesses these records unless the parties have agreed otherwise. The arbitral tribunal determines the conditions subject to which inspection, copies or excerpts of records will be provided (*Article 1040(2), DCCP*).

The Revised Arbitration Act does not contain provisions concerning privilege, and it is a matter of the tribunal's discretion as to whether a party can claim privilege. It is generally considered, however, that a party who can claim privilege in court proceedings will also be entitled to claim privilege in arbitral proceedings.

*3.4.4.2 Can parties agree the rules on disclosure? How does the disclosure in arbitration typically differ to that in litigation?*

Parties are allowed to deviate from Article 1040(1) of the DCCP (*see Section 3.4.4.1 above*), and to agree on different rules of disclosure. In practice, disclosure in arbitration does not differ significantly from that in court.

*3.4.4.3 What are the rules on oral (factual or expert witness) evidence? Is cross-examination used?*

Article 1041(1) of the DCCP provides that the tribunal may, either at the request of one of the parties or on its own initiative, order parties to provide evidence by means of hearing witnesses and experts unless otherwise agreed by the parties. The tribunal can determine the time and place of the examination and also the manner in which the examination is to be conducted (*Article 1041(3), DCCP*). Cross-examination as conducted in Anglo-American jurisdictions is not common in domestic arbitrations in the Netherlands, and is mainly used in international arbitrations, frequently under the applicability of the International Bar Association Rules on the Taking of Evidence in International Arbitration (revised in 2010).

*3.4.4.4 If there is no express agreement, what powers of compulsion are there for arbitrators to require attendance of witnesses (factual or expert) or production of documents, either prior to or at the substantive hearing? To what extent are national courts willing or able to assist? Are there differences between domestic and international arbitrations, or between orders sought as against parties and non-parties?*

If a witness does not appear voluntarily, or, having appeared, refuses to give evidence, at the request of a party the tribunal may permit (within a time to be determined by the tribunal) that party to apply to the court for interim relief for the appointment of a judge before whom the examination of the witness shall be compelled (*Article 1041a(1), DCCP*). The examination shall take place in the same manner as in ordinary court proceedings, however, the clerk of the district court shall also give the tribunal the opportunity to attend the examination and to put questions to the witness (*Article 1041a(2), DCCP)*. The arbitral tribunal has the power to suspend the arbitration proceedings until receipt of the record of the examination (*Article 1041a(4), DCCP*).

Moreover, at the request of one of the parties, and also on its own initiative, the tribunal has the power to order to inspect, or to obtain a copy or excerpt of, certain records relating to the dispute from the party that disposes of these records unless otherwise agreed by the parties (*Article 1040(2), DCCP*; see *Sections 3.4.4.1 and 3.4.4.2 above*). The arbitral tribunal can only order parties to produce documents relating to the dispute.

The Dutch national courts have power to order a conservatory interim measure, render a decision in summary proceedings (*Article 1022a, DCCP*), order a preliminary witness examination, a preliminary expert report, or a preliminary site inspection or review" (*Article 1022b, DCCP*) if such decisions cannot, or not in a timely manner, be obtained in arbitral proceedings (*Article 1022c, DCCP*).

Even if the arbitration takes place outside the Netherlands, this does not preclude a party from:

- Requesting a court in the Netherlands to grant interim measures of protection.
- Applying to the interim relief judge of a district court or the subdistrict court in the Netherlands for a decision in summary proceedings (*Article 1074a, DCCP*).
- Requesting a preliminary witness hearing, a preliminary expert report or a preliminary site visit in the Netherlands (*Article 1074b, DCCP*).
- Requesting a court to appoint an examining judge if a witness, who lives or resides in the Netherlands, does not appear voluntarily (*Article 1074c, DCCP*).

However, again, if a party invokes the existence of an arbitration agreement, the court shall only declare it has jurisdiction if the requested decision cannot, or not in a timely manner, be obtained in arbitral proceedings (*Article 1074d, DCCP*).

*3.4.4.5 Do special provisions exist for arbitrators appointed pursuant to international treaties (that is, bilateral or multilateral investment treaties)?*

Under Dutch arbitration law, no special provisions exist for arbitrators appointed pursuant to international treaties.

### 3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?

The parties may appear in the arbitral proceedings in person or may be represented by a practising lawyer or by any other person expressly authorised in writing for this purpose (*Article 1038(1), DCCP*).

The parties may be assisted in the arbitration proceedings by any persons (*Article 1038(2), DCCP*).

## 3.5 The award

### 3.5.1 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 the arbitral proceedings?

Article 1043a(1) of the DCCP prescribes that the tribunal may terminate the arbitration proceedings by means of an arbitral award or in another manner that the tribunal deems appropriate, if the claimant, despite having had a reasonable opportunity to do so, fails to submit its statement of claim without providing valid reasons for so doing.

Similarly, if the respondent fails to submit its defence without providing valid reasons and despite having had sufficient opportunity to do so, that is, if the respondent fails to appear in the arbitration, the arbitral tribunal may continue to render its award (*Article 1043a(2), DCCP*). In its award, the tribunal finds in favour of the claimant unless the tribunal deems it to be unlawful or unfounded. Before rendering its award, the tribunal may instruct the claimant to produce evidence with respect to one or more elements of its claim (*Article 1043a(3), DCCP*).

**3.5.2 Are there limits on arbitrators' powers to fashion appropriate remedies, for example, punitive or exemplary damages, specific performance, rectification, injunctions, interest and costs?**

First, the arbitral tribunal is limited by the claims and counterclaims of the parties, and awards are subject to annulment in cases of *extra* or *ultra petita* decisions. Second, if the arbitral tribunal renders its award in accordance with rules of law, the powers of the arbitrators are limited by the substantive law which applies to the dispute. With regard to punitive or exemplary damages, it is argued that these types of damages cannot be awarded under Dutch law as a matter of public policy.

3.5.3 Must an award take a particular form? Are there any other legal requirements, for example, in writing, signed, dated, place stipulated, the need for reasons, method of delivery?

The tribunal is free to determine the moment at which the award shall be rendered (*Article 1048, DCCP*).

The award must be in writing and signed by the arbitrator(s) (*Article 1057(2), DCCP*). In all cases, the award must also contain the decision and:

- 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.
- The grounds for the decision.

However, in the case of (i) "quality arbitrations" or "commodity arbitrations", (ii) the recording of a settlement in the form of an arbitral award or (iii) where the parties have agreed in writing that no grounds for the decision shall be given, the award does not need to contain grounds for the decision (*Article 1057(5), DCCP*).

The tribunal must ensure that the original copy of the award, or a copy certified by an arbitrator or a third party designated by the parties, is sent to the parties without delay (*Article 1058(1)(a), DCCP*). The award shall be deemed sent when four weeks have lapsed since the date of the award (*Article 1058(2), DCCP*). If parties have so agreed, the tribunal shall also ensure that the award is deposited with the registry of the district court at the place of arbitration (*Article 1058(1)(b), DCCP*).

**3.5.4 Can an arbitral tribunal order the unsuccessful party to pay some or all of the costs of the dispute? Is an arbitral tribunal bound by any prior agreement by the parties as to costs?**

The Revised Arbitration Act does not contain provisions to the effect that the unsuccessful party must pay some or all of the costs of the dispute. Article 1036(1) of the DCCP does, however, provide that the arbitral proceedings

shall be conducted in such manner as parties have agreed upon. Therefore, the tribunal is bound by any agreement between the parties as to the costs of the arbitration. Often, the applicable institutional rules will contain provisions on this matter (for example, *section 6 of the NAI Arbitration Rules*). In the absence of an agreement between the parties, the tribunal shall determine a cost award (*Article 1036(1), DCCP*).

#### 3.5.5 What matters are included in the costs of the arbitration?

See *Section 3.5.4* above; the matters included in the costs of arbitration will in principle be determined by agreement between the parties, including the applicable arbitration rules. In the absence of such an agreement, the arbitral tribunal shall decide upon the costs and the matters included in the costs of the arbitration (*Article 1036(1), DCCP*).

#### 3.5.6 Are there any practical or legal limitations on the recovery of costs in arbitration?

In principle, Dutch law contains no practical or legal limitations on the recovery of costs in arbitration.

#### 3.5.7 Are there any rules relating to the payment of taxes (including VAT) by foreign and domestic arbitrators? If taxes are payable, can these be included in the costs of arbitration?

Domestic arbitrators must charge VAT to the party obliged to pay the costs of the arbitration, which is inclusive of the fees and costs of the arbitrators (foreign arbitrators are not subject to this requirement). However, due to an amendment in the Dutch Turnover Tax Act (*Wet op de omzetbelasting*), as of 1 January 2010, domestic arbitrators are no longer obliged to charge VAT to professional parties – not being private persons – residing outside the Netherlands.

### 3.6 Arbitration agreements and jurisdiction

#### 3.6.1 Are there form, content or other legal requirements for an enforceable agreement to arbitrate? How may they be satisfied? What additional elements is it advisable to include in an arbitration agreement?

Article 1021 of the DCCP prescribes that the agreement to arbitrate shall be evidenced by an instrument in writing. For this purpose, a document which provides for arbitration or which refers to general conditions which provide for arbitration (and which has been expressly or implicitly accepted by or on behalf of the other party) suffices. The arbitration agreement may also be proven by electronic means, in accordance with Article 6:227a(1) of the Dutch Civil Code (DCC).

In the arbitration agreement, parties should submit to arbitration disputes which have arisen or may arise out of a defined legal relationship, which can be either contractual or non-contractual (*Article 1020(1), DCCP*). The term "arbitration agreement" includes an arbitration clause which is contained in articles of association or rules which bind the parties (*Article 1020(5), DCCP*).

In consumer contracts (that is, an individual who is not acting in the conduct of a business or profession), the inclusion of an arbitration agreement by reference to general terms and conditions is deemed to be unreasonably onerous, and can therefore be nullified. According to Article 6:236(n) of the DCC, nullification of such an arbitration agreement can be prevented by:

- Agreeing on an arbitration agreement that is separate from the general terms and conditions.

- Allowing the individual a period of at least one month from the date on which the arbitration agreement has been invoked in writing, during which the individual can opt for dispute resolution by the court having jurisdiction.

### 3.6.2 Can an arbitral clause be considered valid even if the rest of the contract in which it is included is determined to be invalid?

Article 1053 of the DCCP provides that an arbitration agreement is to be treated as a discrete agreement. Therefore, in principle, the tribunal has the power to decide on the existence and validity of the principal agreement of which the arbitration agreement forms part or to which the arbitration agreement is related.

### 3.6.3 Can an arbitral tribunal determine its own jurisdiction ("competence-competence")? When will the national courts deal with the issue of jurisdiction of an arbitral tribunal? Need an arbitral tribunal suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts?

A party to an arbitration must raise the defence that the tribunal lacks jurisdiction on the ground that there is no valid arbitration agreement before submitting its defence (*Article 1052(2), DCCP*).

An arbitral tribunal is authorised to decide on its own jurisdiction (*Article 1052(1), DCCP*). As such, an arbitral tribunal which already decided on its own jurisdiction does not need to suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts. After an arbitral tribunal has declared it has jurisdiction, that decision can only be challenged in conjunction with the challenge of a subsequent final or partial final award (*Article 1052(4), DCCP*).

If a party first starts arbitral proceedings and then brings the same case before a Dutch court, the court will generally first allow the tribunal to decide on the validity of the arbitration agreement. If the tribunal rules it has no jurisdiction on the ground that there is no valid arbitration agreement, the court shall have jurisdiction to hear the case. However, if the tribunal rules it has no jurisdiction on another ground, the arbitration agreement will remain valid unless the parties have agreed otherwise (*Article 1052(5), DCCP*).

### 3.6.4 Is arbitration mandated for certain types of dispute? Is arbitration prohibited for certain types of dispute?

There is no provision in Dutch law which mandate that arbitration for a certain type of dispute. However, arbitration is prohibited for certain types of dispute. Article 1020(3) of the DCCP states that the arbitration agreement shall not serve to determine legal consequences of which parties cannot freely dispose, for example, matters relating to family law, bankruptcy law and certain issues of intellectual property law. These types of disputes, which are considered to concern matters of public policy, must therefore be brought before the state courts.

Disputes regarding the operation of a legal entity, such as amendments to articles of association, dissolution of a legal entity or the validity of resolutions of a legal entity, cannot generally be decided by way of arbitration. However, all kinds of contractual disputes, for example, between the legal entity and the shareholders, may be decided in arbitration.

#### 3.6.5 What, if any, are the rules which prescribe the limitation periods for the commencement of arbitration proceedings and what are such periods?

The Revised Arbitration Act does not contain any provisions with regard to limitation periods for the commencement of arbitration proceedings. The limitation periods under Dutch law are set out in the DCC. By way of example, the limitation period for an action for damages or to pay a fixed penalty is five years from the beginning of the day following the day on which the prejudiced person becomes aware of both the damage and the identity of the person responsible therefor. There is a long-stop period of 20 years following the event which caused the damage (*Article 3:310(1), DCC*).

The commencement of arbitral proceedings will in principle interrupt the running of the limitation period. If the arbitral tribunal does not allow the claim, the limitation period shall not have been interrupted unless a new action is instituted within six months (*Article 3:316(2), DCC*). However, even if the claim has not been allowed, the limitation period will have been interrupted if either (i) the arbitral tribunal declared that it lacked jurisdiction on the ground that there is no valid arbitration agreement or (ii) the court declared it has no jurisdiction due to the existence of an arbitration agreement (*Article 3:316(4), DCC*).

In case of conservatory attachments, the interim relief judge will set an expiry date when granting leave for attachment. Arbitral proceedings should be commenced before this expiry date, otherwise the attachment will expire.

#### 3.6.6 Does national law enable an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement?

In principle, only the parties to an arbitration agreement are bound by it. However, in certain circumstances it is arguable under Dutch law that an exception to the general rule is justifiable and that third parties may be bound by an arbitration agreement. For example, a joint and several debtor can invoke an arbitration agreement to which he or she and the creditor are party against another joint and several debtor who is not party to the agreement, but is seeking recourse against him or her.

### 3.7 Applicable law

#### 3.7.1 How is the substantive law governing the issues in dispute determined?

Dutch law prescribes that the tribunal render its award in accordance with rules of law (*Article 1054(1), DCCP*). Where the parties have agreed on the applicable law, the arbitral tribunal will respect this choice of law (*Article 1054(2), DCCP*). In the absence of an agreement, the tribunal will render its award in accordance with the rules of law it considers appropriate (*Article 1054(2), DCCP*). The tribunal is not required to apply international conflict of law rules. However, in general, the tribunal will aim to connect to such generally accepted rules of international private law. The arbitral tribunal shall decide, as amiable compositor, if the parties by agreement have authorised it to do so (*Article 1054(3), DCCP*). In all cases, the arbitral tribunal shall take into account any applicable trade usages (*Article 1054(4), DCCP*).

#### 3.7.2 Are there any mandatory laws (of the seat or elsewhere) which will apply?

Where a party starts a procedure in the Netherlands to set aside an arbitral award, the Dutch courts will apply Dutch mandatory law which is considered to be a matter of public policy.

## 4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS

### 4.1 Can an arbitral tribunal order interim relief? If so, in what circumstances? What forms of interim relief are available and what are the legal tests for qualifying for such relief?

Where arbitral proceedings are pending on the merits, the tribunal may, at the request of one of the parties, order a range of interim measures. The tribunal does not, however, have the power to order conservatory measures in the form of prejudgment attachments (*Article 1043b(1), DCCP*).

Parties can agree that a separate tribunal be appointed which is vested with the power to award interim relief at the request of one of the parties (*Article 1043b(2), DCCP*). This tribunal is empowered to make interim measures, but again does not have the power to allow a party to take conservatory measures in the form of prejudgment attachments.

Articles 35 and 36 of the NAI Arbitration Rules 2015, however, make express provision for such summary proceedings in arbitration. Moreover, Article 35(1) of the NAI Arbitration Rules 2015 prescribes that, whilst arbitral proceedings on the merits are pending, the arbitral tribunal may, at the request of any of the parties, grant provisional relief related to the claim or counterclaim (for example, anti-suit injunctions, freezing injunctions, security for costs, mandatory or prohibitive injunctions, and measures for the preservation of evidence).

### 4.2 Have national courts recognised and/or limited any power of an arbitral tribunal to grant interim relief?

In principle, the court will not limit the power of a tribunal to grant interim relief.

However, the fact that parties concluded an arbitration agreement does not preclude a party from requesting the court to order a conservatory interim measure, or from applying to the interim relief judge of the district court or the subdistrict court for a decision in summary proceedings (*Article 1022a, DCCP*). If, however, a party invokes the existence of an arbitration agreement before submitting its defence, the court will only declare it has jurisdiction if the requested decision cannot, or not in a timely manner, be obtained in arbitral proceedings (*Article 1022c, DCCP*).

### 4.3 Will national courts grant interim relief in support of arbitration proceedings and, if so, in what circumstances?

See *Section 4.2* above.

### 4.4 Are national courts willing to grant interim relief in support of arbitration proceedings seated elsewhere?

If an arbitration is seated outside the Netherlands, a party may still request a court in the Netherlands to grant interim measures of protection, or may apply to the interim relief judge of the district court or subdistrict court for a decision in summary proceedings (*Article 1074a, DCCP*). However, if a party invokes the existence of the relevant arbitration agreement before submitting its defence, the court will only declare that it has jurisdiction if the requested decision cannot, or not in a timely manner, be obtained in arbitral proceedings (*Article 1074d, DCCP*).

## 5. CHALLENGING ARBITRATION AWARDS

### 5.1 Can an award be appealed to, challenged in or set aside by the national courts? If so, on what grounds?

An arbitral award is final and cannot be appealed, unless the parties have agree to such appeal in writing (*Article 1061b, DCCP*).

Article 1064 of the DCCP provides that the only means of recourse against a final or partial award are the setting aside and revocation of the award. An application to set aside a Dutch award can be made to the court of appeal in the district of the seat of arbitration (*Article 1064a, DCCP*). In accordance with Article 1064a of the DCCP, the application must be filed within three months after the day of the sending of the award, or, if the parties agreed to deposit the award with the registry of the district court within whose district the place of arbitration is situated, in accordance with Article 1058(1)(b) of the DCCP, within three months after the day of the deposit of the award. If, however, the award is served, together with the leave for enforcement of the award, on the other party, that party is entitled to make an application for setting aside the award within three months after the said service of the award, irrespective of whether the three months period has lapsed.

Article 1065(1) of the DCCP limits to the setting aside of an award on the following grounds:

- The non-existence of a valid arbitration agreement.
- The tribunal was constituted in violation of the applicable rules.
- The tribunal did not comply with its mandate and the non-compliance is of a serious nature (*Article 1065(4), DCCP*).
- The award was not signed or did not contain reasons in accordance with the provisions of Article 1057 of the DCCP. In this respect, the Dutch Supreme Court has ruled that if an award lacks a conclusive explanation, this can only result in the setting aside of an award in the exceptional case that the reasoning of the award is so ill-founded that it could be equated to an award that does not contain any reasoning at all (*Dutch Supreme Court, 22 December 2006, NJ 2008, 4 (Ken v Rypma)*).
- The award, or the manner in which it was made, violates public policy. A procedural matter that is in conflict with public policy is, for example, the violation of the right to be heard. An example of a substantive matter that is in conflict with public policy is if the award is contrary to mandatory law (*ECJ, 1 June 1999, C-126/97 (Eco Swiss China Time Ltd v Benetton International NV), European Court Reports 1999, I-03055; also in NJ 2000, 339*).

In certain circumstances, a party can be barred from applying to set aside an award on the basis of the first three grounds (above), for example, due to a party's failure to raise its objections during the arbitration (*Article 1065(2) to (4), DCCP*).

Pursuant to case law of the Supreme Court, the national courts are required to exercise restraint in their examination of the question of whether there are grounds for setting aside the relevant award. There are two reasons for this rule:

- To avoid the risk of setting aside proceedings being used as an ordinary appeal in disguise.

- The interest of an effectively functioning arbitration system, which entails that the courts should only be allowed to intervene in clear-cut cases.

In addition, the courts are not allowed to examine the merits of the award where the application for setting it aside is based on any of the first four grounds referred to above.

However, if the setting aside is requested on the ground that the right to be heard has been violated, the national court may intervene without exercising restraint (*Dutch Supreme Court, 25 May 2007, NJ 2007, 294*).

The court of appeal may, on the basis of Article 1065a of the DCCP, on its own initiative or on request of a party, remit the case to the tribunal and suspend the setting aside proceedings to allow the tribunal to nullify the ground for setting aside the award by either reopening the arbitration or by taking another measure that the tribunal deems appropriate. No appeal to this decision is open.

As set out above, apart from the possibility of submitting an application to set aside an award (*Article 1065, DCCP*), Article 1068(1) of the DCCP provides that an award can be revoked if:

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

An application for revocation can only be made to the court of appeal of the district of the seat of arbitration within three months after the fraud or forgery of the documents has become known or when the party has obtained the new records (*Article 1068(2), DCCP*).

### 5.2 Can the parties exclude rights of appeal or challenge?

The parties cannot exclude the right to initiate setting aside proceedings. The parties may, however, exclude the possibility of appeal in cassation against a decision of the court of appeal unless one of the parties is a natural person not acting in the course of his or her professional practice or business (*Article 1064a(5), DCCP*).

An arbitral appeal against an award is only possible if the parties agreed thereto (*Article 1061b, DCCP*).

### 5.3 What are the provisions governing modification, clarification or correction of an award (if any)?

According to Articles 1060(1) and (2) of the DCCP, a party may request in writing that the tribunal corrects in the award a manifest computing, clerical or other error which is easily repairable, or a mistake or omission in relation to the formal requirements of the award. A party must make such a request no later than 30 days after the sending of the award/the award has been referred. The arbitral tribunal may also, on its own initiative, perform the correction within a time period agreed upon by the parties or until three months after the date of sending of the award (*Article 1060(4), DCCP*). Furthermore, a party may request the tribunal to render an additional award if the tribunal has

failed to decide on one or more of the submitted claims or counterclaims (*Article 1061(1), DCCP*). The request must be submitted within a period of time agreed upon by the parties or until three months after the day of the sending of the award.

Under Dutch law, it is not possible to request the arbitral tribunal to further clarify an award.

## 6. ENFORCEMENT

### 6.1 Has your jurisdiction ratified the New York Convention or any other regional conventions concerning the enforcement of arbitration awards? Has it made any reservations?

The Netherlands is party to the The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The only reservation the Netherlands has concerns reciprocity, which means that the application of the New York Convention only applies to awards made in the territory of another contracting state.

### 6.2 What are the procedures and standards for enforcing an award in your jurisdiction?

On the basis of Article 1062(1) of the DCCP, a final or partial final award rendered in the Netherlands can be enforced after the president of the district court in the district of the seat of arbitration has granted leave for enforcement to one of the parties. The procedure is, in principle, *ex parte*, but the president may request the parties to appear. The president will normally request the parties to appear if the losing party, upon receipt of the award, has requested to be heard.

The enforcement will only be refused if it is prima facie likely that the award will be set aside or revoked (*Article 1063, DCCP*). If the period to make an application to set aside the award has lapsed, the president of the district court may only refuse the leave for enforcement if it is prima facie clear that the award is in violation of public policy (*see Section 5.1 above*). If leave for enforcement is granted, the only means of recourse available to the respondent against such decision is an application to set aside the award or an application for revocation of the award (*Article 1064, DCCP*). However, if leave for enforcement is denied, the claimant may lodge an appeal against the decision with the court of appeal.

A non-domestic award can be enforced on the basis of Article 1075 of the DCCP and/or Article 1076 of the DCCP.

Article 1075 of the DCCP provides that an award rendered in a foreign state to which a treaty concerning recognition and enforcement is applicable (for example, the New York Convention) may, at the request of one of the parties, be recognised and enforced in the Netherlands.

In addition, Article 1076 of the DCCP provides that if no treaty concerning recognition and enforcement is applicable, or if an applicable treaty ""allows a party to rely upon the law of the country in which recognition or enforcement is sought, an arbitral award made in a foreign state may be recognised in the Netherlands and its enforcement may be sought by one of the parties upon submission of the original or a certified copy of the arbitration agreement and arbitral award.

Enforcement or recognition may be denied on the basis of one or more of the grounds set out in Article 1076 of the DCCP. Although these grounds are not wholly identical, they are very similar to the grounds provided by Article V of the New York Convention.

Requests for enforcement or recognition of non-domestic awards should be submitted to the court of appeal that has jurisdiction (*Articles 1075(2) and 1076(6), DCCP*). In *Rosneft/Yukos Capital*, the Dutch Supreme Court held that the losing party does not have the right to appeal if the leave for enforcement of an arbitral award is granted on the basis of the New York Convention and Article 1075 of the DCCP. The Dutch Supreme Court found that the non-discrimination provision of Article III of the New York Convention requires that the provisions of the Dutch Arbitration Act that relate to arbitrations in the Netherlands are considered applicable.

As set out above, for domestic awards, Article 1064 of the DCCP states that appeal is only available when a request for enforcement is denied. Therefore, according to the Dutch Supreme Court, these limitations should also apply to the enforcement and recognition proceedings of non-domestic awards (*Dutch Supreme Court, 25 June 2010, NJ 2012, 55 (Rosneft/Yukos Capital)*). It is not clear yet if these limitations also apply if enforcement or recognition is sought on the basis of Article 1076 of the DCCP.

### 6.3 Is there a difference between the rules for enforcement of "domestic" awards and those for "non-domestic" awards?

See *Section 6.2* above.

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