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Netherlands

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Introduction

In the Netherlands, arbitration is governed by chapter 4 of the Dutch Code of Civil Procedure (the Arbitration Act). The current Arbitration Act came into force on 1 January 2015.

The Arbitration Act consists of Articles 1020 to 1077 and does not make a distinction between domestic and international arbitration. Articles 1020 to 1073 of the Arbitration Act determine the law applicable to arbitration if the place of arbitration is located in the Netherlands. The place of arbitration is determined by the arbitration agreement between the parties and in the absence thereof by the arbitral tribunal (Article 1037 of the Arbitration Act).

Articles 1074 to 1077 of the Arbitration Act determine the law applicable to arbitration if the place of arbitration is located outside of the Netherlands. They provide for the jurisdiction of the Dutch court, as well as recognition and enforcement of a foreign arbitration award in the Netherlands.

The Arbitration Act consists of both regulatory law and mandatory rules of law. If the text of a provision of the Arbitration Act states that "*the parties may enter into an agreement*" or "*agree otherwise*", the provision constitutes regulatory law, from which parties may derogate.

Arbitration plays an important role in the resolution of commercial disputes in the Netherlands. Well-known Dutch arbitration institutions are the Netherlands Arbitration Institute and Arbitration Board for the Building Industry. These institutions administer an arbitration on the basis of the Arbitration Act. The parties can choose to also apply an institution's arbitration rules ("*institutional arbitration*") or apply their own procedural order ("*ad hoc arbitration*").

Arbitration has several advantages compared to court litigation. In general, arbitration is more efficient and flexible. In court proceedings, it may take a year to procure a hearing date and eventually a judgment, while arbitration hearings can usually take place quickly based on the availability of the parties and arbitrator(s).

The parties can also choose the applicable legal framework, the language of arbitration, the procedural timetable and the rules on (witness) evidence and expert witnesses. The parties are also able to choose the arbitrators based on their specific expertise or experience. If desired by the parties, arbitration can lead to a private solution. The hearing and the exhibits, such as sensitive business information, will then remain confidential.

Another advantage of arbitration can be found in the enforceability and recognition of arbitral awards. Arbitral awards are recognised and enforceable in the 179 member states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

A possible disadvantage of arbitration compared to litigation is the costs of arbitration. In general, arbitration is more expensive than court litigation.

Arbitration agreement

General

Pursuant to Article 1020 paragraph 1 of the Arbitration Act, parties may submit any dispute arising from a particular legal relationship between them to arbitration. For example, parties may agree to refer an existing dispute between them to arbitration ("*submission agreement*"). Parties may also choose to refer future disputes, which may arise between them to arbitration ("*arbitration clause*"). An arbitration clause can be included in the articles of association or regulations binding on the parties (Article 1020 paragraph 5 of the Arbitration Act) or can be part of an agreement concluded between the parties.

Formalities surrounding an arbitration agreement

The validity of a submission agreement or arbitration clause is determined by the applicable law and will be concluded in accordance with this law. The Arbitration Act prescribes that it must follow from the submission agreement or arbitration clause that the parties made their choice for arbitration unambiguous and voluntary (Articles 6 ECHR and 17 of the Dutch Constitution).

A submission agreement or arbitration clause can be concluded in writing or verbally (Article 1020 paragraph 1 of the Arbitration Act). If the existence of the submission agreement or arbitration clause is disputed (in time) by one of the parties to the arbitration, the initiating party must prove the submission agreement or arbitration clause by submitting a written document where the submission agreement or arbitration clause is laid down (Article 1021 of the Arbitration Act).

If the parties refer to the arbitration rules of an arbitration institute in their submission agreement or arbitration clause, such as the arbitration rules of the Netherlands Arbitration Institute, the content of the arbitration rules is considered to be a part of the submission agreement or arbitration clause (Article 1020 paragraph 6 of the Arbitration Act).

Arbitration does not have to cover the overall dispute. Parties can also refer the determination of the quality or condition of an object, the amount of damages or of a sum of money due and the supplementation or amendment of the legal relationship to arbitration (Article 1020 paragraph 4 of the Arbitration Act).

Arbitrability

Not all types of disputes can be referred to arbitration by reason of public policy or mandatory rules of law. A submission agreement or arbitration clause cannot result in legal consequences, which are not at the free disposal of the parties (Article 1020 paragraph 3 of the Arbitration Act). This includes disputes regarding matrimonial property and maintenance, but also insolvency proceedings. An arbitral tribunal is not entitled to issue a bankruptcy order against a company or a liquidation order against a person. For reasons of legal certainty, an arbitral tribunal is also not entitled to annul resolutions of a company, which are externally enforceable.

Third parties

In principle, only the parties to the submission agreement or arbitration clause will be bound by the arbitration agreement. However, if a third party is involved in an arbitration and does not (timely) plead before the arbitral tribunal that it is not bound by the arbitral agreement, it will be presumed that the third party has (tacitly) agreed to the arbitration.

Jurisdiction of the court and competence-competence

The ordinary court will declare that it has no jurisdiction if a party invokes the existence of a submission agreement or arbitration clause to defend itself, unless this agreement is invalid (Article 1022 of the Arbitration Act). The defence that the submission agreement or arbitration clause is not valid must be made before all defences, i.e. in the first written document of the party who wishes to put forward this defence. The validity of the submission agreement or arbitration clause should be determined in accordance with the applicable law.

Under Article 1052 of the Arbitration Act, the arbitral tribunal has the power to rule on its own substantive jurisdiction ("*competence-competence*"). The parties to the arbitration must first await the decision of the arbitral tribunal on the matter. Only in an instance where the arbitral tribunal declines jurisdiction will the competence of the ordinary court be restored. If the arbitral tribunal declares itself competent, the parties will have to continue the arbitral proceedings before they can raise the issue of the competence of the arbitral tribunal before the ordinary court.

Separability

Separability of the submission agreement or arbitration clause is preserved by Article 1053 of the Arbitration Act. The submission agreement or arbitration clause is considered and decided upon as a separate agreement. For the purpose of determining the law applicable thereto, the agreement will be regarded as a separate agreement from the main agreement of which the submission agreement or arbitration clause forms a part of or to which it relates (Article 1053 of the Arbitration Act). If one of the parties successfully invokes the unenforceability of the main agreement, which the submission agreement or arbitration clause form a part of, then the arbitral tribunal does not need to declare that it has no jurisdiction. The submission agreement or arbitration clause remains in force even after the termination of the main agreement.

Arbitration and consumers

Arbitration clauses incorporated in general conditions that are applicable to contracts with consumers are deemed unreasonably onerous towards consumers and may therefore be nullified by the consumer (Article 6:236 under n of the Dutch Civil Code). However, a consumer is no longer entitled to nullify the arbitration clause if the consumer has had a grace period of one month to express his choice to seek recourse to the ordinary courts instead of an arbitral tribunal. The consumer only has to notify the other party about his choice to submit the dispute to an ordinary court. The consumer does not have the obligation to initiate court proceedings himself.

Arbitration procedure

Commencing an arbitration

If the parties agreed upon a submission agreement, the arbitration will commence on the date on which parties agreed upon the submission agreement, unless the parties agreed otherwise (Article 1024 of the Arbitration Act).

Arbitration on the basis of an arbitration clause will commence, in principle, at the time when the respondent receives a written notification from the claimant, in which the claimant notifies the respondent that it will initiate arbitration in respect of the arisen dispute (Article 1025 paragraph 1 of the Arbitration Act). Furthermore, the notification should state the subject matter of the arbitration. This is the default procedure, but the parties can also agree otherwise (Article 1025 paragraph 2 of the Arbitration Act), by referring to certain arbitration regulations.

Procedural rules

Pursuant to Article 1036 of the Arbitration Act, the arbitration is primarily governed by the mandatory rules of the Arbitration Act. Alternatively, it is governed by the applicable arbitration regulation, regulatory law and the procedural rules determined by the arbitral tribunal.

In general, each of the parties is entitled to submit one or more written statements, in order to explain their point of view and present evidence. Thereupon, a hearing will be scheduled by the arbitral tribunal to give the parties the opportunity to further outline their point of view and/or examine witnesses.

Seat of arbitration

The seat of arbitration is selected by the parties in their submission agreement or arbitration clause, in the absence of which the arbitral tribunal will decide thereon (Article 1037 of the Arbitration Act). Articles 1020 to 1073 of the Arbitration Act will only apply if the seat of arbitration is located the Netherlands. The Arbitration Act does not prescribe that procedural and evidential hearings should physically take place at the seat of arbitration.

Evidence and disclosure

The arbitral tribunal is free to determine the rules of evidence, the admissibility of evidence, the division of the burden of proof and the assessment of evidence, unless the parties have agreed otherwise. Evidence can be provided though written documents, court inspection of the premises, witnesses and experts. Pursuant to Article 1040 of the Arbitration Act, written statements submitted by the parties should, in principle, be accompanied by the written documents relied upon by the parties.

Arbitration rules chosen by the parties along with procedural guidelines, such as the IBA Rules on the Taking of Evidence in International Arbitration (2020), will guide the arbitral tribunal on the rules of procedure and evidence. Those rules can provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings.

Third parties

At the written request of a third party who has an interest in the arbitration, the arbitral tribunal may allow the third party to join the proceedings. The arbitral tribunal will give the parties the opportunity to submit a written reply to the request to join the arbitration by the third party (Article 1045 of the Arbitration Act).

In addition, a party to the arbitration can request the arbitral tribunal to allow him to implead a third party. The arbitral tribunal will not allow the impleader if the arbitral tribunal finds it implausible that the third party will be required to bear the adverse consequences of a possible award against the requesting party or is of the opinion that impleader proceedings are likely to cause unreasonable or unnecessary delay to the proceedings (Article 1045 of the Arbitration Act).

Arbitrators

Appointment

Any natural person of legal capacity may be appointed as arbitrator. There are no further requirements under the Arbitration Act. The Arbitration Act stipulates that a person cannot be excluded from appointment on the basis of his/her nationality, unless the parties have agreed otherwise in view of the impartiality and independence of the arbitral tribunal (Article 1023 of the Arbitration Act).

Arbitrators are appointed on the basis of the appointment method included in the submission agreement or arbitration clause (Article 1027 of the Arbitration Act). If the parties have not agreed on an appointment method, the arbitrators will, in principle, be appointed jointly by the parties. Arranging the number of arbitrators in a submission agreement is advisable, because at that point the nature and the extent of the dispute are already known.

An arbitral tribunal must always have an odd number of arbitrators and may also consist of a single arbitrator. If the parties have not agreed on the number of arbitrators or if the parties disagree on (the interpretation of) the provision regulating the number of arbitrators, they may request the competent interim relief judge to rule on this matter.

If the parties have appointed an even number of arbitrators, the appointed arbitrators will need to appoint an additional arbitrator (Article 1026 of the Arbitration Act).

In principle, the arbitrators should be appointed within three months after the start of the arbitration. The parties may agree on a shorter or longer period. If the arbitrators are not appointed within the required period, one of the parties may request the interim relief judge to appoint the arbitrators. The other party will in that case also be heard by the interim relief judge before it renders its judgment.

In order to avoid delay in the appointment of the arbitrator(s), the interim relief judge will appoint the arbitrator(s) irrespective of whether the arbitration agreement is valid (Article 1027 paragraph 4 of the Arbitration Act). The question of whether or not a valid arbitration agreement exists will be examined by the arbitral tribunal. By cooperating in the appointment of the arbitrator(s), the parties do not waive their right to invoke the lack of jurisdiction of the arbitral tribunal due to the absence of a valid arbitration agreement (Article 1027 paragraph 4 CCP).

Challenge of the arbitrator

An arbitrator may be challenged if there is justified doubt as to his impartiality or independence. An arbitrator appointed by a party may only be challenged by that party for reasons known to this party after the appointment of the arbitrator.

A party may not challenge an arbitrator appointed by a third party or by the interim relief judge if it has acquiesced in his appointment, unless the reason for the challenge became known to it after the appointment.

Furthermore, the parties can jointly decide to terminate the assignment of the arbitrator(s). With the termination of the assignment, the jurisdiction of the arbitral tribunal ends. However, the submission agreement or arbitration clause remains valid. If another dispute arises between the parties, the parties will have to refer their dispute to arbitration again, unless they have agreed otherwise.

Secretary of the arbitral tribunal

The appointment of a secretary is not regulated in the Arbitration Act. Often, an optional arrangement is included in arbitration regulations. If desired, the parties and the arbitral tribunal can choose to appoint a secretary.

Interim relief

Pursuant to Article 1022a of the Arbitration Act, a submission agreement or arbitration clause does not preclude a party from requesting the competent court for preservation measures, interim measures or provisional measures of evidence. The interim relief judge will only consider itself competent if the requested decision cannot be obtained (timely) in arbitration (Article 1022c of the Arbitration Act).

Arbitration award

The arbitral tribunal may render a final award, a partial final award or an interim award (Article 1049 of the Arbitration Act). An award must be in writing and signed by all the arbitrators. If one of the arbitrators does not sign the award, this should be mentioned in the award. In case of an obvious miscalculation or clerical error, the arbitral tribunal may, under Article 1060 of the Arbitration Act, amend the award.

Challenge of the arbitration award

Appeal

An arbitral appeal is only possible if the parties have explicitly agreed to the possibility of appeal. An appeal is usually made to a second tribunal, depending on the parties' agreement. Dutch courts do not have jurisdiction in respect of appeals, unless the parties specifically agree thereto in the arbitration agreement.

Challenge of domestic arbitration awards

An award can be set aside if the following conditions are met (Article 1065 of the Arbitration Act):

- the absence of a valid arbitration agreement;
- the tribunal was not appointed in conformity with the rules;
- the tribunal exceeded its mandate;
- the award is not signed;
- the award is not substantiated; and/or
- the award violates public policy.

Revocation of the award can take place on one or more of the following grounds (Article 1068 of the Arbitration Act):

- the award is (partially) based on fraud;
- the award is (partially) based on forged records; and/or
- after the award is made, a party obtains records, which would have had an impact on the decision of the arbitral tribunal, and which were withheld as a result of the acts of the other party.

Revocation of an arbitral award will result in its annulment. The consequences of revocation are thus the same as setting aside an arbitral award. However, revocation of an arbitral award can generally still be initiated, when the time limit for submitting a request to set aside the arbitral award has already expired or when the proceedings in respect thereof ended without the desired result.

Challenge of foreign arbitration awards under the New York Convention

Enforcement of a foreign arbitration award may be refused and/or opposed on the grounds set out in the New York Convention. These grounds are:

- incapacity of the parties;
- absence of a valid arbitration agreement (to be determined under the applicable law);
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of that country; and/or
- the recognition or enforcement of the award would be contrary to the public policy of that country.

Challenge of other foreign arbitration awards

Recognition and enforcement of a foreign arbitration award may be refused on the following grounds (Article 1076 CCP):

- there is no valid arbitration agreement (to be determined under the applicable law);
- the tribunal was constituted in violation of applicable rules;
- the tribunal failed to comply with its mandate;
- the arbitration award is still open to appeal, and thus not final;
- the award has been set aside by a competent authority in the country in which the award was made by the tribunal; and/or
- recognition or enforcement is in violation of public policy.

Enforcement of the arbitration award

Enforcement of domestic arbitration awards

Pursuant to Article 1062 of the Arbitration Act, a party seeking enforcement of an arbitral award made by an arbitral tribunal in the Netherlands will have to obtain an exequatur from the competent preliminary relief judge by submitting a petition. In general, these proceedings are very straightforward. The preliminary relief judge will normally not schedule a hearing, unless the other party has requested the preliminary relief judge to be heard.

The preliminary relief judge will, in principle, grant the exequatur, unless it seems plausible after a summary investigation by the judge that the award will be (i) set aside based on the grounds mentioned in Article 1065 of the Arbitration Act, (ii) revoked based on the grounds mentioned in Article 1068 paragraph 1 of the Arbitration Act, or (iii) if a penalty for non-compliance is set contrary to the provisions of the CCP, in which case the refusal concerns only the enforcement of the penalty.

If an exequatur is obtained by the party seeking enforcement, a bailiff may be engaged to enforce the award in the Netherlands.

Enforcement of foreign arbitration awards under the New York Convention or other treaties

The New York Convention is the most important treaty in respect of the enforcement of foreign arbitration awards. A leave of enforcement can be obtained upon submission to the competent court of a duly authenticated original arbitral award together with the original arbitration agreement or certified copies, including a translation thereof. Enforcement of a foreign arbitration award may be refused and/or opposed on the grounds set out in the New York Convention, which are discussed above.

The Netherlands has issued the reciprocity reservation under the New York Convention. This means that the New York Convention only applies to awards made in the territory of another contracting state.

The New York Convention contains a "*more-favourable right*" provision, which allows applicants to rely upon the law of the country in which enforcement is sought and seek enforcement based on that law instead of on the basis of a treaty.

On 24 November 2017, the Dutch Supreme Court ruled in the *Maximov v. NLMK* case that an arbitral award might be recognised and enforced by a court in the Netherlands on the basis of the New York Convention, even if the arbitral award has been annulled by a competent authority (*cf.* Article V paragraph e of the New York Convention). However, a court can only consider this if there are special circumstances. Such a special circumstance exists if the annulment is based on grounds that do not correspond with the grounds for refusal listed in Article V of the New York Convention and those grounds are generally not acceptable according to international standards.

Enforcement of other foreign arbitration awards

If there is no treaty applicable to the recognition and enforcement of the arbitration award at hand, an application may be based solely on the Arbitration Act. Recognition and enforcement of a foreign arbitral award is, in principle, possible. Recognition and enforcement of a foreign arbitration award may be refused on the grounds that are discussed above (Article 1076 of the Arbitration Act).

A leave of enforcement can be obtained upon submission of the original or a certified copy of the arbitration agreement and the arbitral award to the competent court. It is not necessary to submit evidence from which the enforceability of the arbitral award in the country where it was made follows.

Investment arbitration

The Netherlands has concluded bilateral investment treaties (BITs) with multiple states. BITs are concluded between two states in order to promote cross-border investments in these states. If an investor is of the opinion that one of these states in which he has made an investment has violated his rights under the BIT, the investor may submit a claim for compensation against this state on the basis of the BIT. Whether the state concerned is liable and needs to pay damages must be assessed on the basis of the relevant provisions of the applicable BIT.

The Dutch BIT model drafted by the Dutch Ministry of Foreign Affairs defines an investor as (i) any natural person having the nationality of a contracting party, (ii) any legal person constituted under the law of a contracting party and having substantial business activities in the territory of that contracting party, or (iii) any legal person that is constituted under the laws of a contracting party and is directly or indirectly owned or controlled by a natural person as defined under (i) or by a legal person as defined under (ii).

The Dutch BIT model defines an investment as every kind of asset that has the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk.

The effectiveness of the protection offered to the investor under the BIT also depends on whether the investor himself can initiate proceedings against the host state in order to obtain compensation for his losses. If the Dutch BIT model is applicable to a dispute that has arisen between the investor and a state, the dispute should, as far as possible, be settled amicably through negotiations, conciliation or mediation. If this does not result in a resolution, the Dutch BIT model allows the investor to start arbitration.

As a BIT (and the arbitration clause therein) is concluded between two states, the BIT (and the arbitration clause) is not an agreement between the foreign investor and the host state.

In practice, this is solved by considering the arbitration clause as an offer to arbitrate on the part of the host state – this offer may then be accepted by the foreign investor by initiating arbitration against the host state on the basis of the BIT.

In the *Achmea v. Slovak Republic* ruling (C-284/16) the European Court of Justice determined that investor-state arbitration clauses in intra-EU BITs violate the fundamental principles of autonomy and are incompatible with the laws of the European Union. On 5 May 2020, 23 Member States of the European Union, including the Netherlands, signed the Agreement for the Termination of all Intra-EU Bilateral Investment Treaties (Agreement). The Agreement entered into force on 29 August 2020. As a result, it could be said that investors from the European Union are disadvantaged compared to investors from outside the European Union. For example, a Jamaican investor in the Netherlands can still start an arbitration against the Netherlands on the basis of the BIT between the parties. However, a Dutch investor who is disadvantaged by the Estonian government can only go to the Estonian court, which might raise the threshold for starting legal proceedings.

On 2 September 2021, the European Court of Justice determined in the *Komstroy v. Moldova* ruling (C-741/19) that intra-EU investment arbitration proceedings under the multilateral Energy Charter Treaty are also incompatible with EU law.

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