DELOS
dispute resolution

THE NETHERLANDS

DELOS GUIDE TO ARBITRATION PLACES (GAP)

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The Netherlands have been always at the heart of international trade. With its location and infrastructure (including English as a working language), The Netherlands have also become a hub for financial services. This has led to a thriving cross-border industry that, given its nature, requires suitable means of resolving disputes.

Accordingly, arbitration has become widely accepted and is commonly used to settle disputes in the Netherlands, both where it concerns international as well as complex domestic disputes. To facilitate arbitration even further, the Dutch Arbitration Act ("DAA") has been updated and modernized in 2015. With its highly-specialized and internationally-trained lawyers, the Dutch legal profession manages to deliver high-quality work at competitive rates.

Key places of arbitration in the jurisdiction	Amsterdam, The Hague and Rotterdam.
Civil law / Common law environment?	Civil law
Confidentiality of arbitrations?	While there are no Dutch statutory rules regarding confidentiality, it is generally assumed - and confirmed in legislative history - that arbitration proceedings are, as a rule, confidential.
Requirement to retain (local) counsel?	There is no requirement to retain local legal counsel in arbitrations. Parties can represent themselves or have themselves represented by an attorney or other representative.
Ability to present party employee witness testimony?	No restrictions apply with respect to the possibility to present party employee witness testimonies.
Ability to hold meetings and/or hearings outside of the seat?	Meetings and/or hearings can be held outside of the seat of arbitration.
Availability of interest as a remedy?	Φ
Ability to claim for reasonable costs incurred for the arbitration?	While the DAA does not contain rules with respect to the allocation of arbitration costs, this is typically addressed in the arbitration rules (*e.g.*, the rules of the Dutch arbitration institute provide that the losing party will be ordered to pay legal fees in full as long as they are reasonable and were necessary).
Restrictions regarding contingency fee arrangements and/or third-party funding?	Dutch law does not restrict the use of contingency or alternative fee arrangements. However, restrictions apply with respect to 'no cure no pay' arrangements to attorneys who are admitted to the Dutch Bar. There are no prohibitions on the use of third-party funding.
Party to the New York Convention?	Φ
Other key points to note	Annulment is only possible based on a narrowly defined and exhaustive list of annulment grounds (art. 1065 DCCP).
WJP Civil Justice score (2017-2018)	0.85

ARBITRATION PRACTITIONER SUMMARY

In addition to dealing with disputes relating to international trade, The Netherlands have also become a hub for financial services. This has led to a thriving cross-border industry (with English as a working language) that, given its nature, requires suitable means of resolving disputes. Accordingly, arbitration has become widely accepted and is commonly used to settle disputes in the Netherlands, both where it concerns international as well as complex domestic disputes. To facilitate arbitration even further, the Dutch Arbitration Act ("DAA") has been updated and modernized in 2015.

Date of arbitration law?	The DAA entered into force in 1986. A substantial revision aimed at modernizing and improving the DAA entered into force on 1 January 2015.
UNCITRAL Model Law? If so, any key changes thereto?	The UNCITRAL model law has served as an inspiration for the original DAA and has also been drawn upon as part of the 2015 revision of the DAA.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The competent courts in the key seats within the Netherlands are the District Court of, respectively, Amsterdam, The Hague and Rotterdam that are experienced in dealing with arbitration-related matters. There are no specialized courts that have special jurisdiction over arbitration matters.
Availability of *ex parte* pre-arbitration interim measures?	Dutch courts can grant *ex parte* conservatory measures, such as pre-judgement attachment of assets. Other interim measures are generally granted only after the other party has been heard.
Courts' attitude towards the competence-competence principle?	The competence-competence principle is applied in the Netherlands. Accordingly, arbitrators decide on their own jurisdiction. Control is exercised through annulment proceedings after the award has been rendered.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Annulment is only possible in case of (i) absence of a valid arbitration agreement, (ii) irregular constitution of the arbitral tribunal, or if (iii) the arbitration tribunal has exceeded its mandate, (iv) the award has not been singed or motivated, (v) the award or the manner in which it has been established violates public order (art. 1065 DCCP).
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	In the absence of a treaty, the annulment of foreign awards in the jurisdiction where the seat of arbitration is located will mean that the award can no longer be enforced in The Netherlands (art. 1076 (1)(A)(e) DCCP). With respect to foreign awards to which a treaty is applicable, the rules of the latter will apply. In the context of the New York Convention, the Dutch Supreme Court recently ruled that the national courts must be considered to have some discretion with respect to the recognition and enforcement of arbitral awards, also if the grounds for refusal

	under article V(1) apply.[1] This discretion should, however, be applied restrictively.
Other key points to note?	Assistance of the Dutch courts: The Dutch courts can assist in matter such as (i) constitution of the arbitral tribunal, (ii) challenge of arbitrators, (iii) granting provisional or conservatory measures, and (iv) taking evidence in cross-border settings.

[1] Supreme Court 24 November 2017, ECLI:LN:HR:2017:2992 (*X / OJSC Novolipetsky Metallurgichesky Kombinat).*

JURISDICTION DETAILED ANALYSIS

1. The legal framework

Arbitration in the Netherlands is governed by the Dutch Arbitration Act (the "DAA"), which is incorporated in Book IV of the Dutch Code of Civil Procedure (the "DCCP"). The DAA is applicable if the seat of arbitration is located in the Netherlands (art. 1073(1) DCCP). If the parties have not determined the place of arbitration and the place of arbitration has not been determined yet (*e.g.* by an arbitration institute), the appointment or the challenge of an arbitrator or secretary may take place on the basis of the DAA if one of the parties is domiciled or has his actual residence in the Netherlands (art. 1073(2) DCCP). The DAA also contains a number of provisions that relate to arbitrations with a seat outside the Netherlands (art. 1074 ff. DCCP). These provisions relate, for example, to the competence of the Dutch courts in cases where the parties have provided for arbitration with a seat outside the Netherlands and the possibility to enforce arbitral awards rendered in arbitrations with a seat outside the Netherlands. Most of these provisions are of a mandatory nature.

The DAA provides for a so-called monistic system, *i.e.*, the same provisions apply to both national and international arbitration. A part of the statutory provisions in the DAA is of a mandatory nature, such as the provisions that set out which types of disputes can be resolved through arbitration (art. 1020 (3) DCCP), the requirement that the arbitral tribunal consists of an uneven number of arbitrators (art. 1026 DCCP) and the provisions that safeguard the principles of a due process (*e.g.*, art. 1033(1) and 1036 (2) DCCP. The majority is, however, of a default nature and can therefore be deviated from by agreement. The parties therefore have substantial freedom to shape the arbitration proceedings in the manner they deem fit. A deviation from the statutory rules can also take place by way of agreeing on the applicability of certain arbitration rules, which are considered to form part of the arbitration agreement (art. 1020 (6) DCCP). The procedural rules that apply to an arbitration are therefore determined to a large extent by the selected arbitration rules (if any) and the specific procedural rules issued by the arbitral tribunal in question, rather than merely by the provisions of the DAA. This is obviously different in case of ad hoc-arbitration, where the parties have generally not agreed on detailed arbitration rules. In addition to the DAA and the relevant arbitration rules (where applicable) and specific procedural rules issued by the tribunal, Dutch case law plays an important role. In most cases, case law provides guidance on how the statutory rules should be applied. Some topics are only regulated in case law. The regime that applies to the liability of arbitrators, for example, follows exclusively from case law.

International arbitration institutes, such as the ICC and ICDR, are commonly used in the Netherlands. Important Dutch arbitration institutes include the Netherlands Arbitration Institute (the "NAI"), as well as some branch specific arbitration institutes such as the Stichting Geschillenoplossing Automatisering ("SGOA") for IT-related disputes and the Arbitration board for the building industry (Raad van Arbitrage voor de Bouw or "RvA").

The DAA initially entered into force in 1986. Several arbitration laws including the UNCITRAL Model Law served as an inspiration for the DAA. A substantial revision of the DAA entered into force on 1 January 2015. This revision was aimed at modernising Dutch arbitration law and at improving effectiveness and flexibility of arbitration proceedings with a seat in the Netherlands. As part of this revision, more provisions that were in whole or in part inspired by the UNCITRAL Model Law have been incorporated into the DAA.[2]

In the context of the recognition and enforcement of foreign arbitral awards in the Netherlands it is important to note that the Netherlands is a party to the New York Convention on the Recognition of Foreign Arbitral Awards (the "New York Convention"). The Netherlands has made a reciprocity reservation and therefore only

[2] Parliamentary Documents II 2012-2013, 33 611, no. 3, Explanatory Memorandum to the Act, p. 2.

recognizes and enforces awards from other contracting states. With respect to recognition and enforcements of arbitral awards from non-contracting states, the DAA contains specific provisions.

2. The arbitration agreement

2.1 Law governing the arbitration agreement

The law that governs the material validity of the arbitration agreement is determined on the basis of article 10:166 of the Dutch Civil Code (the "DCC"). Article 10:166 of the DCC provides that an arbitration agreement is valid if the agreement is valid under *either* (i) the applicable law as agreed by the parties, (ii) the laws of the seat of the arbitration or, (iii) if the parties have not agreed on the applicable law, the laws applicable to the legal relationship to which the agreement to arbitrate applies. Article 10:166 DCC applies the favoured-nation principle, meaning that it is sufficient if the arbitration agreement is valid in *one* of the jurisdictions referred to in article 10:166 DCC. No hierarchy applies between these jurisdictions.

When determining whether the parties have agreed on a choice of law for the arbitration agreement, a distinction must be made between the law that applies to the principal agreement and the law that applies to the arbitration agreement. In practice, parties rarely make an explicit choice of law with respect to the arbitration agreement as such. Whether the parties intended to reach an agreement on the law applicable to the arbitration agreement, to the legal relationship or both will be a matter of interpretation, which ultimately takes place before and by the court.[3]

As explained above, the parties can also rely on the validity under the laws of the seat of arbitration, provided that the latter can already be determined. It is not clear from the wording of article 10:166 DCC whether it is sufficient that the seat of arbitration *can* be determined on the basis of the rules of the arbitration institute chosen (if any) or that an explicit reference in the agreement is required. From the parliamentary history, however, it seems to follow that the latter is the case and that an explicit reference to the seat of arbitration is required.[4]

The applicable law governing the legal relationship between the parties must be determined based on the applicable choice-of-law rules. The reference to the 'legal relationship' in art. 10:166 DCC implies that a tort or wrongful act can also be resolved by arbitration, if the parties have concluded an arbitration agreement with respect to such a tort or wrongful act.

2.2 Separation of the arbitration agreement from the principal agreement

Under Dutch law, the arbitration agreement is considered and decided upon as a separate agreement (art. 1053 DCCP). As a consequence, arbitrators can rule on the validity of the principal agreement without undermining their own authority if they conclude that the principal agreement is invalid.[5]

2.3 The formal requirements for an enforceable arbitration agreement

No form requirements apply to arbitration agreements. If, however, the existence of the arbitration agreement is disputed, the arbitration agreement must be proven by an instrument in writing or by electronic data which meets certain requirements (art. 1021 DCCP). It is sufficient if the instrument in writing provides for arbitration or refers to standard conditions providing for arbitration, as long as this instrument is expressly or implicitly accepted by or on behalf of the other party. The acceptance as such does not have to be evidenced in writing. Strictly legally speaking, article 1021 DCCP does not affect the validity of the arbitration agreement, but stipulates a mere requirement of proof.[6] In practice, however, an arbitration

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3 Parliamentary documents II 2013-2014, 33 611, no 6, Memorandum of alterations to the Act, p. 7.

4 Parliamentary documents II 2013-2014, 33 611, no 6, Memorandum of alterations to the Act, p. 7.

5 Parliamentary documents II 1983-1984, 18 464, no. 3, p. 22 and Parliamentary documents II 2012-2013, 33 611, no. 3, p. 29.

6 Parliamentary documents II 1983-1984, 18 464, no. 3, p. 6.

agreement must be in writing (electronic data included) in order for the arbitration agreement to be enforceable.

In the European Union, arbitration agreements that are concluded with consumers are subject to strict scrutiny. Under Dutch civil law, for example, a consumer can declare any arbitration agreement that is included in general terms and conditions void, if he is not provided with the possibility to choose for dispute resolution by a regular court within one month after the arbitration agreement is invoked (art. 6:236 (n) DCC).

A party that is bound by an arbitration agreement can, in principle, no longer effectively initiate proceedings at the Dutch courts. Being bound by an arbitration agreement therefore limits that party's right of effective access to a court, as laid down in article 6 of the European Convention on Human Rights and article 17 of the Dutch Constitution. The European Court of Human Rights has assumed that a waiver of this right is possible, provided that such rights are waived at the own free will of the party and in an unequivocal manner.[7] Any arbitration agreement must also comply with these requirements.

2.4 Third-parties and arbitration agreement

As explained above, an arbitration agreement limits a party's right to effective access to a court, which can only be waived at a party's own free will. As a consequence, only the parties to the arbitration agreement are bound by such an agreement.

There are some exceptions to this rule. First of all, a third-party beneficiary can become a party to the principal agreement (under Dutch law on the basis of article 6:254 DCC). In that case, the third party is also bound by the arbitration agreement that is applicable to that agreement, unless agreed otherwise. A third party may also be bound by – or be able to invoke – an arbitration agreement if he is jointly and severally liable for a claim in relation to which another joint and several debtor has concluded an arbitration agreement with the creditor (art. 6:10 – 6:12 DCC). Other circumstances in which a third party can be bound by an arbitration agreement are assignment (art. 6:145 in conjunction with 6:142 DCC), subrogation (article 6:150 in conjunction with article 6:145 and 6:142 DCC), debt transfer (article 6:157 DCC), and a contract takeover (article 6:159 DCC).[8] The same applies in the context of, *inter alia*, certain types contracts (such as "surety contracts") to which specific statutory provisions apply.

2.5 Restrictions to arbitrability

In principle, any type of dispute can be arbitrated. An arbitration agreement may, however, not serve for determining legal consequences that may not freely be determined by the parties (art. 1020 (3) DCCP). This limitation relates to cases concerning public order. Important examples are family law matters, such as matters relating to custody of children, marriage and divorce, declarations of bankruptcy and annulments of decisions of an entity. It is also accepted that certain intellectual property disputes (in particular disputes relating to the validity of trademarks or patents) cannot be arbitrated.

In addition to dispute resolution, arbitration can be used for the determination of the quality or conditions of goods, the determination of the quantum of damages or a monetary debt or the filling of lacunae of the legal relationship between the parties (art. 1020(4) DCCP). Most of the procedural rules that are set out in the DAA do not apply to this type of arbitration (art. 1047 DCCP). In these cases, the procedure will take place in the manner determined by the parties or, in absence thereof, by the arbitral tribunal (art. 1047 DCCP). While these proceedings formally qualify as arbitration, they show more resemblance to procedures such as binding expert determination.

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7 See, for instance, ECHR 27 February 1980, no. 6903/75 (Deweer s. Belgium), ECHR 10 February 1983, no. 7299/75 and 7496/76 (Albert and Le Compte v. Belgium); ECHR 25 February 1992, no. 10802/84 (Pfeiffer and Plankl v. Austria).

8 See, also, Supreme Court 20 January 2006, ECLI:NL:HR:2006:AU4523 (*ASB Grünland en ASB Greenworld/Sagro*), par. 3.4.

3. Intervention of the domestic courts

3.1 Consequences of a valid arbitration agreement for litigation initiated at the ordinary courts

A Dutch court will declare itself incompetent to rule on a matter if a party initiates proceedings that are covered by a valid arbitration agreement and a party invokes the arbitration agreement before putting forward any other defences (article 1022 DCCP). This also applies if the place of arbitration is located in another jurisdiction, provided that the arbitration agreement is not invalid under the law that is applicable to the arbitration agreement (article 1074 DCCP). In such cases, the court renders a final judgement in which it declares itself incompetent, which can be appealed at the Dutch court of appeals and, on matters of law, at the Supreme Court as the last and final instance.

The requirement that the arbitration agreement is invoked before putting forward any other defences means that the competence of the Dutch court must be challenged in the first written or – in absence thereof – the first oral pleadings.[9] The competence of the Dutch court can also be challenged by way of a separate preliminary motion that only deals with this topic.

If a party does not, or does not timely, invoke the arbitration agreement, the Dutch court will *not* at its own motion declare itself incompetent to rule on the matter based on the arbitration agreement. In such cases, the parties are generally considered to have made an implicit choice to have the Dutch courts rule on the matter.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Injunctions by arbitrators enjoining such courts to stay litigation proceedings are rare in the Netherlands. As explained above, a Dutch court will respect an arbitration agreement and declare itself incompetent if the arbitration agreement is invoked. This applies irrespective of whether the seat of arbitration is in the Netherlands or abroad, provided, however, that in the latter case the arbitration agreement is not invalid under the law that is applicable to the arbitration agreement.

In the event of litigation pending in the ordinary courts at the same time as arbitration proceedings, the Dutch court will therefore, in principle, stay the proceedings before it until the arbitral tribunal has decided whether it is competent to rule on the matter.[10] If the arbitral tribunal declares itself competent to hear the case, the Dutch court will deny jurisdiction. The only available remedies are reversal or revocation of the final arbitral award. If the arbitral tribunal declines jurisdiction, litigation before the Dutch courts will be continued.

3.3 Interventions by the Dutch courts in arbitrations outside the Netherlands

Dutch courts do not have the competence to intervene in arbitrations outside the Netherlands.

The DCCP does not contain provisions which prevent parties from requesting an anti-suit injunction. It can therefore be argued that an anti-suit injunction can be obtained under Dutch law. Anti-suit injunctions are, however, uncommon under Dutch law and there is little guidance on this topic. Moreover, on 10 February 2009, the European Court of Justice ("ECJ") ruled in the *Allianz/West Tankers* case that an injunction by a court of an EU member state that prevents a party from initiating or continuing proceedings in another member state on the basis that such proceedings are in breach of an arbitration agreement, is incompatible with the Brussels I Regulation.[11][12] It has not been decided whether the same applies under the Brussels I Recast,

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9 Supreme Court 29 April 1994, NJ1994/488 (*Edelsyndicaat/Van Hout*).

10 See, for a recent example, District Court Amsterdam 27 September 2017, ECLI:NL:RBAMS:2017:7265.

11 Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

12 ECJ 10 February 2009, C-185/07 (*Allianz/West Tankers*).

which entered into force on 10 January 2015.[13] This is, however, expected by some legal scholars.[14]

4. The conducts of the proceedings

4.1 Representation of the parties

Parties can either represent themselves in the arbitration or have themselves represented by an attorney or by another representative (who does not need to be an attorney) if the representative is expressly authorized in writing for this purpose by the party involved (art. 1038 DCCP). This provision is mandatory and cannot be deviated from by agreement.

4.2 Intervention of the courts to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)

The arbitrator or arbitrators are appointed by the method agreed upon by the parties. In most cases, this method is agreed upon by choosing for the arbitration rules of a particular arbitration institute. Under the rules of the Netherlands Arbitration Institute, sole arbitrators are appointed through a list procedure, unless the parties agree on a joint appointment (art. 13(1) and 14 NAI Rules). Arbitral tribunals that consist of three arbitrators, are generally appointed by the appointment of one arbitrator by each of the parties, whom will jointly appoint a chair of the arbitral tribunal (art. 13(2) NAI Rules). Under the NAI Rules, arbitrators are not precluded from appointment by reason of their nationality (art 11(1) NAI Rules).

If the parties have not agreed upon a method of appointment, the arbitrator or arbitrators are appointed jointly by the parties (art. 1026(1) DCCP). If the appointment is not made within three months of the commencement of the arbitration, the arbitrator or arbitrators will, upon request of the first party making this request, be appointed by the interim relief judge (art. 1207(2) and (3) DCCP).[15] The other party will be given the opportunity to be heard about the request (1027(3) DCCP).

If the parties have not agreed on the number of arbitrators or the agreed method of determining that number of arbitrators is not carried out, either of the parties can request the provisional relief court determine such number (art. 1026(2) DCCP).

4.3 How strictly do courts control arbitrators' independence and impartiality?

An arbitrator can be challenged if there are *justifiable doubts* regarding his independence or impartiality, but only for reasons that became known to the challenging party after the appointment of the arbitrator (art. 1033 DCCP). The party that challenges the arbitrator can do so by providing a timely written notice to the arbitrator concerned, the other arbitrators (if any) and the other party (art. 1035(1) DCCP). If the arbitrator does not resign at its own motion within two weeks after such notice, the provisional relief judge will upon request of the party requesting such a decision decide whether the challenge is well-founded (art. 1035(2) DCCP). While the right to challenge an arbitrator cannot be excluded, the parties can agree that a challenge will be dealt with by a third party other than the provisional relief judge (art. 1035(7) DCCP). This can, for example, be done through a mechanism that is set out in the rules of the chosen arbitration institute.[16]

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13 Council Regulation (EU) 1215/2012 on jurisdiction and recognition of judgments in civil and commercial matters (also referred to as the Brussels I-bis Regulation).

14 F. de Ly, Herschikking van de EEX-Verordening en arbitrage – Deel I, *TvA (Magazine for Arbitration)*, 2015/67.

15 An extended period of time applies in case the parties are in dispute about the number of arbitrators.

16 The arbitration rules of the Netherlands Arbitration Institute (the "NAI"), an important arbitration institute in the Netherlands, for example, provide that such challenge of arbitrators is dealt with by a committee of the NAI (Art 19 (5) NAI arbitration rules). That such a committee can qualify as the third party referred to in Article 1035(7) of the DCCP has recently been confirmed by the interim relief judge of the District Court of Rotterdam in: District Court Rotterdam 28 September 2017, ECLI:NL:RBROT:2017:7456. The legislator has furthermore indicated that the institutional regimes of the ICC and the Permanent Court of Arbitration provide sufficient safeguards in this context. See: Meijer & Van Mierlo, Parliamentary History Arbitration Act, Deventer: Kluwer 2015, p. 69.

Lack of independence or impartiality can also lead to a reversal of the arbitration award. An arbitral award may be set aside if the award or the manner in which the award was made violates public policy (art. 1065(1)(e) DCCP). A lack of independence and impartiality of an arbitrator can qualify as such. The threshold for setting aside an award on this basis is, however, higher than for a recusal. An award will only be set aside on this basis if facts or circumstances have come to light based on which it must be assumed that the arbitrator *was in fact* not independent or impartial or if there are such serious doubts regarding the independence and impartiality of the arbitrator that it would in light of all the circumstances of the case be unacceptable to require from the party that was ruled against that he acquiesces in the award.[17]

An award will not be set aside based on facts or circumstances that the requesting party was or should have been aware of already during the proceedings. In such cases, the requesting party has had the option of challenging the arbitrator during the proceedings.[18] If a party does not object against a breach that it becomes aware of – or should have become aware of – such a breach cannot be invoked at a later stage in the arbitration proceedings or before an ordinary court.

4.4 The power of courts to issue interim measures in connection with arbitrations

A valid arbitration agreement does not prevent a party from (1) requesting a court in the Netherlands to grant conservatory measures (such as the right to attachment of assets prior to a judgement), (2) initiating interim relief proceedings in the Netherlands; and/or (3) requesting the court in the Netherlands to order preliminary witness hearings, a preliminary expert report, a preliminary examination and viewing, or an inspection, copy or extract from specific documents (art. 1022a and 1022b DCCP, see also art. 1074a and 1074b DCCP).

If, however, a party timely invokes the arbitration agreement in such cases (*i.e.*, no later than in its first written or – in the absence thereof – oral pleadings), the court will *only* declare itself competent to rule on the matter if the requested decision cannot or cannot in a timely manner be obtained in arbitration (art. 1022c and 1074d DCCP).[19] Whether the parties have agreed on interim relief in the arbitral proceedings is not decisive. If this is the case, however, it is more likely that the ordinary courts will have no jurisdiction to issue interim measures.[20] If the parties have not agreed on interim arbitral relief, it is relevant whether the arbitration on the merits has already been initiated and whether the arbitrators have already been appointed. If this is not the case, the regular courts are more likely to be competent to issue an interim measure.

An arbitration agreement which provides that the seat of arbitration is outside of the Netherlands, does not prevent a party from requesting the ordinary courts to appoint a delegated judge in case a witness that has his residence or is factually residing in the Netherlands does not voluntarily appear in the arbitration proceedings (art. 1074c DDCP).

4.5 Regulations regarding the conduct of arbitration, other than the arbitrators' duty to be independent and impartial

4.5.1 Confidentiality of the arbitration proceedings

The DAA does not contain provisions regarding the confidentiality of arbitration proceedings (including the documents submitted, the hearing and the final award that is rendered). Such a provision was included in the preliminary proposal for the revised DAA[21] and including such a provision has been advocated by several

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17 Supreme Court 18 February 1994, ECLI:NL:HR:1994:ZC1266 (Nordström/Van Nievelt Goudriaan & Co).

18 See, also, article 1048a of the DCCP, which provides – in short – that a party should protest against the breach of (i) any of the procedural rules in the DAA, (ii) the arbitration agreement or (iii) any decision or order of the arbitral tribunal without undue delay.

19 Conservatory measures can only be granted by a regular court. With respect to such requests, the Dutch court will therefore in principle declare itself competent.

20 Parliamentary Documents II, 2013-2014, 33611, no. 6, p. 9.

21 Preliminary proposal revised DAA, Article 1069A.

Dutch legal scholars. While this has not led to the inclusion of an *explicit* provision on confidentiality in the DAA, the minister of Justice and Security clarified during the debate of the legislative proposal in the Dutch Senate that arbitration proceedings are – with the exception of arbitrations that pertain to public law such as investment arbitrations – in principle confidential, also under the revised version of the DAA.[22] In the view of the minister of Justice and Security codification of this principle would have more cons than pros, as there is no consensus on whether and how this principle should be codified and including such a provision may create more discussion (*e.g.*,with respect to the scope) than it provides clarity. For that reason, this principle has not been included in the DAA. While the principle of confidentiality is not codified in the DAA, confidentiality is therefore the starting point in the Netherlands. Still, it is recommended to explicitly agree on confidentiality if this is important for the parties involved.

4.5.2 The length of arbitration proceedings

The DAA does not regulate the length of the arbitration proceedings in the sense that a maximum duration is not provided for by law. The arbitral tribunal and the parties to the arbitration do, however, have an obligation to respectively refrain from and prevent unreasonable delaying the proceedings (art. 1036(3) DCCP). The arbitral tribunal can, at its own motion or the request of the parties, take measures against such unreasonable delay (art. 1036(3) DCCP). While the provision itself does not contain any sanctions in case parties breach this provision, the arbitral tribunal may impose sanctions (such as not taking into considerations certain information).

If an arbitral tribunal is, taking all circumstances of the case into consideration and despite reminders, carrying out its mandate in an unacceptably slow manner, the tribunal can be relieved from its mandate by a third party designated by the parties or, in absence thereof, by the provisional relief judge (art. 1029(3) DCCP).

4.5.3 The place where hearings and/or meetings may be held

There are no restrictions with respect to the place where hearings or meetings relating to the arbitration may take place. The arbitral tribunal can hold hearings, deliberate and hear witnesses and experts at any place it considers appropriate, independent of whether this is within or outside the Netherlands (art. 1037(2) DCCP).

4.5.4 Interim measures by the arbitrators

During pending arbitration proceedings on the merits, the arbitral tribunal may at the request of any of the parties, grant provisional relief (art. 1043b DCCP). These measures must be related to any of the claims in the arbitral proceedings. An arbitral tribunal cannot take the far-reaching conservatory measures that a Dutch court can take, such as a prejudgement attachment.

The parties can agree on the possibility to initiate arbitral proceedings for interim relief (art. 1043b DCCP). This is mostly done by way of a reference to arbitration rules which provide for emergency arbitration proceedings.

4.5.5 The right of arbitrators to admit/exclude evidence

Unless the parties have agreed otherwise, the tribunal is free to determine the rules of evidence, the admissibility of evidence, the allocation of the burden of proof and the assessment of evidence (art. 1039(1) DCCP).[23] The ordinary Dutch rules on evidence applied by Dutch courts do not apply in arbitration and the tribunal can choose to admit or exclude evidence, as long as this does not constitute a breach of the principle of hearing both sides of the argument (*audi alteram partem*) as laid down in article 1036(2) DCCP.

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22 Parlementary Documents I, 2013-2014, 33 611, C, p. 2 (Memorandum of Reply).

23 Note that this does not apply to the arbitration agreement which, in case disputed, must be proven by an instrument in writing (including electronic data that meets certain requirements) (art. 1021 DCCP).

The arbitral tribunal may furthermore, unless the parties have agreed otherwise, at the request of any party or of its own motion:

- order the inspection of, a copy or an extract from specific documents related to the dispute from the party which has these documents at its disposition (art. 1040 DCCP);
- order parties to furnish evidence by hearing witnesses and experts (art. 1041 DCCP);
- appoint one or more experts (art. 1042 DCCP);
- carry out an inspection, outside the Netherlands (art 1042a DCCP); and/or
- order the parties to appear in person, for the purpose of providing information (or attempting to arrive at a settlement (art. 1044 DCCP)).

We note that, in the Dutch legal culture, the focus is less on evidence and more on legal argumentation. This also follows from the Dutch procedural rules that apply to litigation before the courts. For example, the Dutch rules of evidence do not provide for disclosure obligations and witnesses are not heard by default. Document-production requests are permissible, but only to a limited extent. While the Dutch rules on evidence are – as explained above – not directly applicable in arbitration and the parties are free to agree on a more Anglo-American style of proceedings, this can impact the manner in which evidence is approached by, for example, Dutch arbitrators.

4.5.6 Is it mandatory to hold a hearing

If the parties have not agreed otherwise, the tribunal will provide the parties with the opportunity to explain their case at an oral hearing (art. 1038b DCCP). The tribunal can also order a hearing at its own motion if deemed necessary. Holding a hearing is, however, not mandatory.

4.5.7 Principles governing the awarding of interest and allocation of arbitration costs

The DAA does not contain specific principles with respect to the awarding of interest and/or the allocation of arbitration costs. Such principles are typically agreed upon in the applicable arbitration rules. With respect to legal fees incurred by the parties, the rules of Dutch arbitration institutes generally provide that the losing party will be ordered to pay them in full, as long as they are reasonable and were necessary.[24]

4.6 Liability of arbitrators and the parties to the arbitration

Like the UNICTRAL Model Law, the DAA does not contain any provisions regarding the civil liability or immunity of arbitrators. The preliminary proposal for the revised DAA did contain such a provision, [25] but this provision was not taken over in the legislative proposal for the revised DAA and, consequently, also not in the revised version of the DAA that was adopted in 2014.

This does not mean that civil liability of arbitrators is *unlimited* in the Netherlands. In the landmark case *ASB/Greenworld* from 2009, the Dutch Supreme Court held that arbitrators can only be held liable in exceptional circumstances for arbitral awards that are reversed after a legal remedy has successfully been invoked.[26] The Dutch Supreme Court specified that this will only be the case if wilful misconduct or gross negligence is found in the context of the reversed award, or when the arbitrators have acted with a gross misjudgement of what a proper performance of their duty would entail. This is currently still the prevailing doctrine. This has recently been confirmed by the Dutch Supreme Court in its *Qnow/B* ruling.[27] In this case, it was clarified that the criterion set out in the *ASB/Greenworld* case does not only apply if an arbitral award is

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24 See, for instance, Article 56 of the rules of the Netherlands Arbitration Institute.

25 Preliminary proposal for the revised DAA, Article 1069B.

26 Supreme Court 4 December 2009, ECLI:NL:HR:2009:BJ7834 (*ASB / Greenworld*).

27 Supreme Court 30 September 2016, ECLI:NL:HR:2016:2215 (*Qnow / B*), par. 3.4.3. In this ruling, the Supreme Court also provides a more detailed explanation on how the Greenworld...

reversed based on the substantive arguments, but also if such a reversal takes place based on a breach of procedural rules (such as the absence of a signature of the arbitrators). The aforementioned Greenworld case *only* applies to cases where the arbitral award is reversed. This high threshold for liability does not apply in case of "operational faults" (*bedrijfsfouten*), such as – for example – causing documents to be lost. Such faults cannot lead to a reversal of the arbitral award and do moreover not relate to the judicial task of the arbitrator.[28]

Therefore, while full immunity for arbitrators does not apply in the Netherlands, there is a high threshold for holding arbitrators personally liable for errors in their awards. In practice, civil liability of arbitrators is rare in the Netherlands. There is only a very limited number of cases in which civil liability of an arbitrator was assumed for the damages suffered by the party as a consequence of his behaviour.[29]

An arbitrator can in the Netherlands be subject to criminal liability, for example if he or she accepts bribes (art. 364 Criminal Code). Arbitrators are in this context considered equivalent to judges (art. 84(2) Criminal Code). The same applies to parties that are involved in bribery of an arbitrator (art. 178 Criminal Code). Criminal prosecution in the context of arbitration is, however, rare.

5. The Award

5.1 The possibilities for waiving the requirement for an award to provide reasons

The arbitration award should, in principle, contain the reasons for the decision given in the award (art. 1057(4) DCCP). The parties can agree that no reasons for the decision have to be given, but only *after* the arbitration has commenced (art. 1057(5)(c) DCCP). Moreover, no reasons for the decision have to be included if (i) the award only concerns the determination of the quality or condition of goods or (ii) the award only contains a recording of a settlement (art. 1057(5)(a) and (b) DCCP).

5.2 The possibilities for waiving the right to have the award set aside

Article 1064 of the DCCP provides that the only remedies against arbitral awards are reversal and revocation. Given that this provision is of a mandatory nature, it is argued that the parties can *not* waive the right to such remedies under Dutch arbitration law.[30]

In the Cukurova/Sonera-case the Dutch Supreme Court has ruled that it is not incompatible with article 6 European Convention of the Human Rights to waive the right to challenge an award before a regular court beforehand.[31] Further, the European Court of Human Rights confirmed in the *Tabanne/Switzerland* case that such a right can indeed be waived, provided that the waiver is made freely and unequivocal.[32] It does, however, not follow from this case law that such a waiver is also valid under *Dutch arbitration law*.[33]

5.3 Is it possible to appeal an award (as opposed to seeking annulment)

Appealing an award in an arbitral appeal is only possible if this has been agreed upon by the parties (art. 1061b DCCP). The majority of the provisions regarding arbitration in first instance are also applicable in case of an arbitral appeal. Arbitral appeal is generally agreed upon in the arbitration rules. In practice, however, arbitral appeal rarely takes place. The Netherlands Arbitration Institute, for example, does not provide for arbitral appeal. Arbitral appeal is therefore relatively uncommon. A notable exception are the rules of the

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28 Ibid., par. 3.4.4.

29 See, also, P. Ernste and G. Meijer, De rol van de vernietiging van een arbitraal vonnis bij de aansprakelijkheid van arbiters, *Ars Aequi* 2017/9, p. 682 and the case law referred to there.

30 Meijer, Commentary to article 1064 under 1, in A.I.M. van Mierlo and C.J.J.C. van Nispen, *Tekst & Commentaar Burgerlijke Rechtsvordering* (Commentary to the DCCP), Deventer: Kluwer 2016.

31 Supreme Court 1 May 2015, ECLI:NL:HR:2015:1194 (*Cukurova/Sonera*).

32 ECHR 1 March 2016, no. 41069/12 (*Tabbane v. Switzerland*).

33 Meijer, Commentary to article 1064 under 1, in A.I.M. van Mierlo and C.J.J.C. van Nispen, *Tekst & Commentaar Burgerlijke Rechtsvordering* (Commentary to the DCCP), Deventer: Kluwer 2016.

Dutch Arbitration Board for the Building Industry ("*Raad van Arbitrage voor de Bouw*"), an important arbitration institute that is commonly used for disputes in the construction industry. The rules of this arbitration institute do provide for arbitral appeal (art. 22(1) of the arbitration rules).

5.4 Recognition and enforcement of arbitral awards

In the DAA, a distinction is made between enforcement of local arbitral awards (*i.e.*, awards that have been rendered in an arbitration with a seat in the Netherlands) and foreign arbitral awards.

5.4.1 Enforcement of local awards

A local arbitral award can be executed after a leave for such execution (a so-called *exequatur*) has been obtained from the provisional relief judge (art. 1061 DCCP). This can be obtained quite easily by submitting a request to that end and without the other party having been heard (*i.e.*, *ex parte*). A leave for enforcement can only be refused based on limited grounds. If the time-limit for setting aside the award has not yet expired, the enforcement can be refused if it is, in the opinion of the provisional relief judge after a summary investigation, plausible that the award will be set aside or revoked (art. 1063(1) DCCP) or if a penalty for non-compliance has been awarded in breach of the provisions regarding penalties. In that case, enforcement will only be refused with respect to the penalty. If the time-limit for setting aside the award has expired without being used, the request may only be refused if it appears plausible that the award is contrary to public order (art. 1063(2) DCCP). Note that – aside from cases where an arbitral appeal has been agreed upon – this will rarely be the case, as a second time-limit for setting aside the award starts running on the date that a leave for enforcement is served on a party.

An appeal can be lodged against a refusal of enforcement at the court of appeals (art. 1063(4) DCCP). If the leave is also refused in appeal, a party can lodge an appeal in cassation at the Dutch Supreme Court (art. 1064(5) DCCP). If the leave is granted, no appeal of that decision is possible. In that case, the only remedy for the other party is having the award set aside or revoked.

5.4.2 Recognition and enforcement of foreign arbitral awards

With respect to foreign awards a distinction is made between awards rendered in states to which a treaty regarding the recognition and enforcement of arbitral awards applies and states to which such a treaty does not apply.

Given that the Netherlands is a party to the New York Convention, the first category is by far the most important. It is important to note that the Netherlands has made a "reciprocity reservation", meaning that the Netherlands only recognizes and enforces awards from other contracting states.

If an arbitral award is rendered in a state which falls within the first category, such an award is recognized and can be enforced in the Netherlands (art. 1057 DCCP). The procedure for recognition and enforcement will be determined on the basis of the relevant treaty. Insofar as the treaty does not contain any specific provisions, articles 985 through 991 of the DCCP apply, except that instead of the district court the court of appeals is competent to rule on the matter (art. 1075(2) DCCP). The procedure set out in these provisions is similar to the one that applies in case of enforcement of a local arbitral award, except that the parties will be heard (art. 987 DCCP).

Arbitral awards can also be recognized and enforced if no treaty applies. Also in this case, a leave for enforcement is required. The procedure is similar to the one that applies with respect to awards in the first category. The award will be recognized and can be enforced, upon submission of the original or a certified copy of the arbitration agreement and the arbitral award, except if:

i. The party against whom recognition is sought, asserts and proves that:

   a. No valid arbitration agreement under the law applicable thereto exists (unless the party has appeared in the arbitration proceedings and has, in short, not argued that no valid arbitration agreement was concluded);

   b. The arbitral tribunal was composed in violation of the applicable rules (unless the party invoking this ground has – in short – cooperated in the composition of the arbitral tribunal or has not timely argued that the composition was in violation of the applicable rules;

   c. The arbitral tribunal did not comply with its mandate;

   d. The arbitral award is open to appeal to the arbitrators or the courts in the country where the award was made; or that

   e. The arbitral award was set aside by the competent authority of the country in which the awarded.

ii. The court finds that the recognition or enforcement would be contrary to public policy.

5.5 Consequences of the induction of reversal or appeal proceedings for exercising of the rights to enforce an award

Initiation of reversal or revocation proceedings in the Netherlands does not automatically suspend the exercise of the right to enforce the award (art. 1066(1) and 1068(2) DCCP). The right to enforce the award can, however, be suspended by the court that rules on the reversal or revocation upon request of one of the parties (art. 1066(2) and 1068(2) DCCP). A Dutch court that is requested to recognize or enforce a foreign arbitral award can suspend the enforcement of such an award if reversal proceedings are initiated in the relevant jurisdiction (art. 1076(8) DCCP, see also Article VI of the New York Convention).

5.6 Annulment of foreign awards in the jurisdiction of the seat of arbitration

If no treaty is applicable, the annulment of foreign awards in the jurisdiction where the seat of arbitration is located will have as a consequence that the award can no longer be enforced in The Netherlands (art. 1076 (1)(A)(e) DCCP).

With respect to foreign awards to which a treaty is applicable, the rules of the relevant treaty will apply in principle. In a recent case, the Dutch Supreme Court had to determine whether under art. V(1)(e) of the New York Convention enforcement of an arbitral award in the Netherlands *must* or *can be* rejected by a Dutch court.[34] The Dutch Supreme Court considered that the answer to this question can neither be deducted from the wording of the Convention, nor from the *travaux préparatoires*. The manner in which Article V(1)(e) of the Convention is interpreted in other jurisdictions is, moreover, according to the Dutch Supreme Court, not unambiguous. The Dutch Supreme Court eventually concluded that, based on the rationale of the Convention, the national courts must be considered to have some discretion with respect to the recognition and enforcement of arbitral awards, also if the grounds for refusal under article V(1) apply. This discretion should, however, be applied restrictively. The party that desires that an arbitral award is recognized or enforced despite the fact that one of the grounds for refusal applies, therefore bears the burden of proof of all facts and circumstances that justify that the ground of refusal are not considered. If, in other words, the New York Convention applies, a Dutch court *can* under very specific cases recognize and allow enforcement of an arbitral award which has been reversed in the jurisdiction of the seat of arbitration.

[34] Supreme Court 24 November 2017, ECLI:LN:HR:2017:2992 (*X / OJSC Novolipetsky Metallurgichesky Kombinat).*

5.7 Enforceability in practice

In practice, enforcement of foreign awards is relatively easy in the Netherlands. Courts generally grant requests for a leave to enforce an arbitral award, especially if none of the parties objects to such enforcement.

6. Funding Arrangements

6.1 Restrictions to the use of contingency or alternative fee arrangements or third-party funding

Dutch law does not restrict the use of contingency or alternative fee arrangements, or third-party funding. It must, however, be noted that article 25 of the Rules of Professional Conduct for Dutch attorneys prohibits attorneys admitted to the Dutch bar from working on a full 'no cure no pay' basis, except in personal injury claims.[35]

7. Reforms expected in the near future

A substantial reform of the DAA has taken place in 2015. No significant reforms are expected in the near future.

[35] Willem van Boom, *Third-Party Financing in International Investment Arbitration* (2011) p. 32.