

Arbitration procedures and practice in The Netherlands: overview

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A Q&A guide to arbitration law and practice in The Netherlands.

The country-specific Q&A guide provides a structured overview of the key practical issues concerning arbitration in this jurisdiction, including any mandatory provisions and default rules applicable under local law, confidentiality, local courts' willingness to assist arbitration, enforcement of awards and the available remedies, both final and interim.

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Use of arbitration and recent trends

1. How is commercial arbitration used and what are the recent trends?

Use of commercial arbitration and recent trends

In The Netherlands, arbitration is mainly used:

- In commercial disputes where special knowledge of the industry is required (for example in shipping disputes).
- When parties wish to keep the dispute or the contract under which the dispute arose confidential.
- In construction disputes.

Most of those arbitrations are conducted at arbitration institutes such as the:

- Netherlands Arbitration Institute (*Nederlandse Arbitrage Instituut*).
- Arbitration board for the building industry (*Raad van Arbitrage voor de Bouw*).
- Transport and Maritime Arbitration Rotterdam – Amsterdam foundation (TAMARA).
- ICC (International Chamber of Commerce).

Some arbitrations are also conducted as *ad hoc* arbitrations, that is, in accordance with rules agreed between the parties without the involvement of an established arbitration institute.

Arbitration is also used by traders dealing in oils, fats and oilseeds who are members of The Netherlands Oils, Fats and Oilseeds Trade Association (NOFOTA). Lawyers are usually not involved in NOFOTA arbitrations. The same applies to traders dealing in nuts who are members of The Nut Association.

It is also possible for parties to only arbitrate about the quality or condition of certain goods (for example, the quality of fresh fruit). This type of arbitration is known as "quality arbitration" and it is specifically governed by the provisions of Dutch statutory law. Until 2015, arbitral awards had to be deposited at the court in the court district of the place of arbitration. Between 1997 and 2001 about 5,800 awards were deposited at the district courts in The Netherlands which is an average of 1,160 deposited awards per year. In 2014 about 1,150 awards were deposited. This shows that there has been no increase or decrease of the amount of deposited awards in the 17 years between 1997 and 2014. It is estimated that, taking into account awards which were not deposited at court, about 2,000 arbitral awards a year are handed down.

Dutch statutory law governing arbitration proceedings is contained in Book 4 (Articles 1020 to 1077) of the Dutch Code of Civil Procedure (DCCP) which was first enacted in 1986 and amended in 2015. The amendment in 2015 was aimed at improving the efficiency of arbitration procedures and removing obstructions from opting for arbitration instead of litigation. The arbitration procedures have been simplified and the administrative costs have been reduced, for instance by the removal of the obligation to deposit arbitration awards at court.

The possibility to have an arbitral award set aside by the national courts has now been limited. Since 2015, the party must apply to the court of appeal to have an award set aside. The court of first instance is no longer involved in setting aside proceedings. This is to reduce the amount of time and money that the parties must spend after arbitration proceedings if one of the parties attempts to have the arbitral award set aside by the court. Finally, the amended arbitration act gives parties more freedom to make agreements regarding the arbitration procedure which deviate from the provisions in the DCCP (for example, the provisions regarding the division of the burden of proof and an appeal against an arbitral award).

In The Netherlands, arbitration plays an important role in the resolution of commercial disputes. The reasons for parties to an international transaction to choose arbitration include:

- Expertise of the arbitrators in the field of the dispute.
- Confidentiality.
- Potential unenforceability of a court judgment in one of the jurisdictions involved due to the absence of a treaty between the relevant countries regulating the enforcement of foreign judgments. Foreign arbitral awards are enforceable in 156 member states of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

Advantages/disadvantages

Advantages of arbitration compared to court litigation are as follows:

- The proceedings are confidential.
- The parties can choose arbitrators with specific expertise that court judges may not have without employing the services of a court expert.

- Arbitral awards are enforceable in the 156 member states of the New York Convention. Especially in disputes involving a party domiciled outside the EU (where judgments of the member states can be enforced under the Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation)), this could be a reason for parties to opt for arbitration.
- The parties can choose the language of arbitration.
- The arbitration procedure can be more flexible than the rigid court procedures as the parties can make their own procedural agreements.
- Arbitration proceedings are conducted in a more modern manner than court litigation. Communication between the parties and the arbitrators takes place by email as opposed to the fax which is still the primary means of communication with the courts in The Netherlands. Further, arbitration documents and exhibits can be submitted electronically as opposed to hardcopy which must be sent to the courts in The Netherlands.

Disadvantages of arbitration compared to litigation include:

- The costs of arbitration. Litigation in The Netherlands is usually cheaper than arbitration.
- The speed of arbitration. Arbitration in The Netherlands is sometimes slower than litigation. It can take months only to appoint an arbitration tribunal (this is particularly the case in institutional arbitration).

Applicable legislation

2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (either with or without the amendments adopted in 2006) (UNCITRAL Model Law)?

Arbitration is governed by the Dutch Arbitration Act which is contained in Articles 1020 to 1077 of the Dutch Code of Civil Procedure (DCCP).

The Dutch Arbitration Act 1986 was largely based on the UNCITRAL Model law on International Commercial Arbitration. The Dutch Arbitration Act 2015 is even more strongly based on the UNCITRAL law on International Commercial Arbitration than the Arbitration Act 1986. It modernised the law of arbitration and brought it in line with national and international developments in the field of arbitration.

Mandatory legislative provisions

3. Are there any mandatory legislative provisions? What is their effect?

The Dutch Arbitration Act 2015 contains mandatory and non-mandatory provisions. Non-mandatory provisions contain wording such as "unless parties agreed otherwise" or "the parties can agree to deviate from this provision". Mandatory provisions do not include the possibility to deviate from them. The Dutch Arbitration Act 2015 is contained in Articles 1020 to 1077 of the Dutch Code of Civil Procedure (DCCP). The following provisions of the Dutch Arbitration Act 2015 are mandatory:

- Article 1020: written proof of the arbitration agreement is required.
- Articles 1022 to 1022c: provisions regulating the competence of the state courts in the situation that the parties agreed to arbitration.
- Articles 1026: there must be an uneven number of arbitrators. This can be a sole arbitrator.
- Article 1028: if one of the parties agreed that one of them will have a privileged position to appoint an arbitrator or arbitrators then each of the parties can request the president of the district court to appoint the arbitrator or arbitrators.
- Article 1029: dismissal of an arbitrator.
- Article 1030: replacement of a dismissed arbitrator.
- Article 1031: the parties can agree to modify their instructions to the arbitrators.
- Article 1033 to 1035: a party can request that an arbitrator is dismissed due to bias.
- Article 1035a: the arbitrators must be supported by a secretary.
- Article 1036: the arbitrators must treat the parties as equals and prevent unreasonable delay of the proceedings.
- Article 1038: the parties can either represent themselves or be represented by a lawyer.
- Article 1038d: as long as the other party is not unreasonably harmed in its defence, during the arbitration a party can change its claim or counter claim and the grounds for it.
- Articles 1041 to 1042: the hearing of witnesses.
- Article 1043: the arbitrators can order the parties to appear at a hearing in person to give information.
- Article 1043a: if one party does not submit its statement after having been asked to do so the arbitrators can hand down an award.
- Article 1043b: the parties can request an injunction.
- Article 1045a: the parties can request the arbitrators to be allowed to summon a third party in hold harmless proceedings under the condition that there is an arbitration agreement with that third party.
- Article 1048: the arbitrators determine when the arbitral award will be handed down.

4. Does the law prohibit any types of disputes from being resolved through arbitration?

The law prohibits certain types of disputes to be subject to arbitration. Article 1020(3) of the Dutch Code of Civil Procedure (DCCP) provides that the arbitration agreement cannot lead to legal consequences which are not at the disposal of the parties. This means that matters of public order cannot be the subject of arbitration. Whether a matter concerns public order is decided on a case-by-case basis. Matters relating to family law and bankruptcy are deemed to be matters of public order. An indication as to whether a particular matter is of public order is whether the desired judgment can only be invoked against the opponent or if it can be invoked against anyone. If it can be invoked against anyone it will usually concern a matter of public order. Only the judges of the state courts have the authority to give permission to arrest assets and only the same judges can order the release of attached assets.

Limitation

5. Does the law of limitation apply to arbitration proceedings?

Certain claims are subject to limitation periods. These periods are not affected by the existence of an arbitration clause. The most common limitation period is contained in Article 3:310(1) of the Dutch Civil Code (DCC). A claim for indemnification of loss or damages expires five years after the day on which the claimant became aware of the loss or damage. The period of limitation can be interrupted by a written statement in which the claimant informs the debtor that it is maintaining its claim.

Arbitration organisations

6. Which arbitration organisations are commonly used to resolve large commercial disputes?

The three most common Dutch arbitration organisations are:

- Netherlands Arbitration Institute (*Nederlandse Arbitrage Instituut*) (www.nai-nl.org).
- Arbitration board for the building industry (*Raad van Arbitrage voor de Bouw*) (www.raadvanarbitrage.nl).
- Transport and Maritime Arbitration Rotterdam – Amsterdam foundation (TAMARA) (www.tamara-arbitration.nl).

The ICC is also often used in contracts with Dutch companies.

Jurisdictional issues

7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

Under Article 1052 of the Dutch Code of Civil Procedure (DCCP) the arbitral tribunal can decide whether it has jurisdiction or not (kompetenz-kompetenz). If a party denies that the tribunal has jurisdiction, it must challenge the jurisdiction before using any other defences in the arbitration proceedings (*Article 1052(2), DCCP*). After the final arbitration award has been rendered, a party can dispute the arbitrators' decision on jurisdiction at the local court.

Arbitration agreements

Validity requirements

8. What are the requirements for an arbitration agreement to be enforceable?

Substantive/formal requirements

The arbitration agreement can be made in writing or orally (*Article 1020 par. 1, Dutch Code of Civil Procedure (DCCP)*). If an agreement is oral, its existence must be proven by a written document (*Article 1021, DCCP*). As a minimum, the parties must agree to submit disputes arising from a legal relationship between them to arbitration.

Separate arbitration agreement

No separate arbitration agreement is required. For example, a clause in a contract is sufficient.

An arbitration clause incorporated in a contract only by reference to another document such as general terms is enforceable if it can be shown that the parties agreed on the general terms. The ordinary rules of contracting apply when considering whether an arbitration clause has been agreed on.

Unilateral or optional clauses

9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?

The authors of this article have found no published cases regarding the enforceability of unilateral or optional clauses, where one party has the right to choose arbitration. There are no provisions in the Dutch Arbitration Act forbidding a unilateral or optional clause which gives one party the right to choose arbitration. Therefore, as an arbitration agreement is entered into in accordance with the rules of contract, those rules must be used to determine whether such an optional clause is unenforceable. Dutch law provides for the freedom of contract. However, under Article 3:40 of the DCC, a legal act is null and void if it is contrary to mandatory law, public order or good morals. An optional arbitration clause where one party has the right to choose arbitration is not contrary to mandatory law, public order or good morals so it is probably valid.

10. In what circumstances can a party that is not a party to an arbitration agreement be joined to the arbitration proceedings?

Under Article 1045 of the Dutch Code of Civil Procedure (DCCP), unless the parties have agreed differently, the tribunal can, on the written request of a third party that has an interest in the arbitration proceedings, allow that third party to join or intervene in the arbitration proceedings, if the same arbitration agreement exists or comes into existence between the original parties to the arbitration and the third party as applies between the original parties to the arbitration.

11. In what circumstances can a party that is not a party to an arbitration agreement compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement?

The authors of this article have found no published cases regarding the possibility of a third party compelling a party to an arbitration agreement to commence arbitration against its contractual counterpart under that arbitration agreement.

Separability

12. Does the applicable law recognise the separability of arbitration agreements?

Dutch law recognises the separability of arbitration agreements. Under Article 1053 of the Dutch Code of Civil Procedure (DCCP), an arbitration agreement is considered and judged as a separate agreement. Under Article 1053 of the DCCP, the tribunal does not need to rule that it lacks jurisdiction if one of the parties correctly invokes the unenforceability of the main agreement in which the arbitration clause is contained. An arbitration clause remains in force even after the termination of the agreement in which it is contained.

Breach of an arbitration agreement

13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

Court proceedings in breach of an arbitration agreement

Under Article 1022 of the Dutch Code of Civil Procedure (DCCP), if a party commences court proceedings where there is a valid arbitration agreement between the parties, the court must declare that it lacks jurisdiction.

Arbitration in breach of a valid jurisdiction clause

Under Article 1052(1) of the DCCP the arbitration tribunal can decide whether it has jurisdiction. If a party is of the opinion that the arbitration tribunal lacks jurisdiction, it must inform the tribunal before using any other defences (*Article 1052(2), DCCP*). If the arbitration tribunal holds that it lacks jurisdiction because there is no valid arbitration agreement, the court will have jurisdiction (*Article 1055(5), DCCP*). If there is a valid jurisdiction clause nominating a specific court, that court will have jurisdiction.

14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

The Netherlands is a member state of the EU and therefore subject to European law. In *Allianz SpA v West Tankers Inc (Case C-185/07)*, the European Court of Justice held that it is incompatible with Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels

Regulation) (which does not apply to arbitration) for a court of a member state to grant an anti-suit injunction to restrain a party from commencing or pursuing proceedings in the courts of another member state in breach of an arbitration agreement. This decision is still valid under the Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) which entered into force on 1 January 2015. Therefore, a Dutch court cannot grant an injunction to restrain proceedings started in an EU member state in breach of an arbitration agreement. Although the authors do not know of any published cases on this matter, in principle it is possible that a Dutch injunction judge can grant an injunction to restrain proceedings started outside the EU in breach of an arbitration agreement. Such an injunction will have to be based on Article 3:13 (abuse of authority) and/or Article 6:162 of the Dutch Civil Code (DCC) (unlawful act). The facts of the specific case will determine if the injunction will be granted or not. For examples of awarded anti-suit injunctions not involving arbitration, see:

- The Hague District Court, 5 August 2004, *ECLI:NL:RBSGR:2004:AQ6495*.
- Rotterdam District Court, 29 December 2010, *ECLI:NL:RBROT:2010:BP1040*.
- Rotterdam District Court, 27 July 2011, *ECLI:NL:RBROT:2011:BR5442*.

Arbitrators

Number and qualifications/characteristics

15. Are there any legal requirements relating to the number, qualifications and characteristics of arbitrators? Must an arbitrator be a national of, or licensed to practice in your jurisdiction to serve as an arbitrator there?

There must be one or an uneven number of arbitrators (*Article 1026, Dutch Code of Civil Procedure (DCCP)*).

Every competent natural person can be nominated as an arbitrator (*Article 1023, DCCP*). Therefore, a person cannot be prevented from nomination because of his or her nationality unless the parties agree otherwise.

Independence/impartiality

16. Are there any requirements relating to arbitrators' independence and/or impartiality?

Arbitrators must be independent and impartial. An arbitrator can be requested to step down if there is justified doubt about his impartiality or independence (*Article 1033(1), Dutch Code of Civil Procedure (DCCP)*).

Appointment/removal

17. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of arbitrators

Arbitrators are appointed in the manner that the parties agreed (*Article 1027(1), Dutch Code of Civil Procedure (DCCP)*). Under *Article 1027(2)* of the DCCP, in principle, the arbitrator or arbitrators must be appointed within three months from the start of the arbitration proceedings. Arbitration proceedings start on the day when a party informs the other party in writing that it is commencing arbitration proceedings (*Article 1025(1), DCCP*).

Removal of arbitrators

An arbitrator who has accepted his appointment can be relieved of his appointment:

- At his own request, by the agreement of the parties or by the decision of a third party nominated by the parties or, failing such agreement, by the injunctions judge (*Article 1029(2), Dutch Code of Civil Procedure (DCCP)*).
- At the joint request of the parties (*Article 1029(3), DCCP*).
- If he or she is no longer legally or factually capable of fulfilling his appointment, at the request of one of the parties or by a third party appointed by the parties or by the injunctions judge (*Article 1029(4), DCCP*).

Under *Article 1029(5)*, a tribunal which has accepted its appointment but fulfils its obligations in an unacceptably slow way even after repeatedly having been asked to act faster, can be relieved of its appointment by:

- One of the parties.
- A third party who was appointed by the parties.
- The injunctions judge.

Articles 1033 to 1035 of the DCCP contain the procedure to remove an arbitrator whose independence or impartiality is justifiably doubted by one of the parties.

Procedure

Commencement of arbitral proceedings

18. Does the law provide default rules governing the commencement of arbitral proceedings?

Article 1025 paragraph 1 of the Dutch Code of Civil Procedure (DCCP) provides that arbitration starts on the date of a written notice in which a party notifies the other party that it is commencing arbitration. The notice must contain an indication of the subject that the party wants to arbitrate about.

Parties can agree that arbitration will start in a different manner than the manner provided for in Article 1025, paragraph 1 (*Article 1025, paragraph 2*).

Applicable rules and powers

19. What procedural rules are arbitrators bound by? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Applicable procedural rules

The procedural rules which apply directly to arbitration are contained in Articles 1020 to 1077 of the Dutch Code of Civil Procedure (DCCP). See [Question 3](#) for mandatory procedural rules which the arbitrators must follow. Apart from the mandatory rules (*Articles 1020- 1073, DCCP*), the arbitral procedure is governed by the rules agreed on by the parties. If the parties have not agreed the rules of procedure, the tribunal can determine the rules (*Article 1036(1), DCCP*).

Default rules

If the claimant for no reason fails to submit its statement of claim or the grounds for his claim after having been given the opportunity to do so, the tribunal can end the arbitration proceedings (*Article 1043a(1), DCCP*).

If the defendant for no reason fails to submit its statement of defence after having been given the opportunity to do so, the tribunal can directly hand down its award (*Article 1043a(2), DCCP*). The award will allow the claim unless the claim seems unlawful or unfounded to the tribunal. Before handing down the award, the tribunal can request the claimant to submit more evidence regarding his claim or part of it. This is a mandatory provision as it does not allow parties to agree otherwise.

Evidence and disclosure

20. If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The tribunal can order a party to disclose or submit relevant documents as evidence (*Article 1040(2), Dutch Code of Civil Procedure (DCCP)*) without express agreement. However, the parties are free to agree otherwise as Article 1040(2) of the DCCP is not mandatory law.

The tribunal can order the attendance of both factual and expert witnesses without express agreement. If a witness does not voluntarily provide a witness statement, the tribunal can allow a party to ask the injunction judge to appoint a judge to hear the witness (*Article 1041a, DCCP*). A witness must give evidence in a civil court if requested to do so.

An arbitration tribunal does not have jurisdiction over persons who are not party to the arbitration agreement. Therefore, if evidence such as documents is required from a non-party to the arbitration then the party requiring that evidence must commence disclosure proceedings against the person holding the required evidence. Such disclosure proceedings are governed by Article 843a DCCP which contains strict requirements to allow the requested disclosure.

21. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

Scope of disclosure

Disclosure in arbitration is the same as in court proceedings. In both arbitration and court proceedings the parties can request specific documents from each other and they can agree to give each other certain documents. This is entirely at the discretion of the parties.

There is no rule of general disclosure as under English law. Although Article 21 of the Dutch Code of Civil Procedure (DCCP) provides that parties must submit all the relevant facts completely and truthfully, in practice it is unusual for the parties to disclose all documents that relate to the case.

Parties will decide which documents they wish to disclose and which documents they do not wish to disclose.

If one party is aware of the existence of documents that the other party refuses to disclose, that party can ask the arbitrator to order the disclosure of specific documents in a separate disclosure procedure under Article 843a DCCP. Alternatively, the party that wishes the other party to disclose a document can suggest to the arbitral tribunal that unless the other party discloses the requested document the burden of proof should be reversed and placed on the party that is refusing the disclosure of the document.

The tribunal can also, of its own accord, order a party to disclose certain documents (see [Question 20](#)).

Validity of parties' agreement as to rules of disclosure

Under Article 1039(1) of the DCCP, the parties can agree to rules regarding the provision of and allowability of evidence. Such an agreement will be valid.

Confidentiality

22. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

Although there are no provisions in the Dutch Arbitration Act regarding confidentiality, it is generally accepted that arbitration proceedings are confidential. Indeed, that is one of the reasons that parties agree to arbitration. Parties can make a separate agreement regarding the confidentiality of the arbitration proceedings. The scope of the confidentiality will be agreed between the parties and the arbitrators.

Courts and arbitration

23. Will a local court intervene to assist arbitration proceedings seated in its jurisdiction?

There are various provisions regarding the assistance of the local courts. For example, the local court can assist in the appointment of arbitrators and the hearing of third party witnesses. Also, it can be used in disclosure proceedings against a third party.

The judge who usually has jurisdiction in matters concerning arbitration is the injunction judge of the district court of the place of arbitration.

24. What is the risk of a local court intervening to frustrate an arbitration seated in its jurisdiction?
Can a party delay proceedings by frequent court applications?

Risk of court intervention

The authors are not aware of any risks of a local court intervening to frustrate an arbitration seated in its jurisdiction.

Delaying proceedings

A party could delay proceedings by requesting the court to hear witnesses under Article 1022b of the Dutch Code of Civil Procedure (DCCP). This will, however, be rare as the arbitrators can also hear the witnesses. A party can also challenge an arbitrator and apply to the court for his removal (*Articles 1033- 1035a, DCCP*).

Insolvency

25. What is the effect on the arbitration of pending insolvency of one or more of the parties to the arbitration?

There are no statutory regulations regarding the effect of pending insolvency of one or more of the parties to the arbitration they are involved in. Further, the authors do not know of any published cases regarding this matter. A practical problem that can arise is that a party that is threatened by insolvency will probably not have the money to continue the arbitration and pay the associated costs.

Remedies

26. What interim remedies are available from the tribunal?

Interim remedies

At the request of one of the parties the tribunal can grant interim remedies but cannot order the attachment of assets (*Article 1043b, Dutch Code of Civil Procedure (DCCP)*). An arbitral tribunal can grant the same interim remedies as a court. Usually, an interim remedy will be an order by the tribunal to a party to do something or to refrain from doing something.

Ex parte

Under Article 1036(2) of the DCCP, which is mandatory law and of public order, a tribunal cannot hand down an ex parte award. The tribunal deals with the parties equally, giving them an equal opportunity to argue and respond to each other's arguments and any information presented in the case, and it will not rely on information that the other party did not have an opportunity to respond (*Article 1036 par 2, DCCP*).

Security

Article 1043b, paragraph 3 of the DCCP provides that the arbitral tribunal can, together with an interim award, require each party to provide sufficient security.

27. What final remedies are available from the tribunal?

Under Article 1049 of the Dutch Code of Civil Procedure (DCCP), the arbitral tribunal can award or reject the claim in whole or in part in a final judgment. As long as the claim is within the arbitrator's authority (*see Question 4*) (*Article 1020, paragraph 3*), this can be any remedy that is available to a court of law. The arbitrator can give:

- A declaratory judgment.
- A money judgement.
- An order to do something or refrain from doing something.

Under Article 1056, the tribunal can also impose penalty sums that a party that is subject of an order will become liable to pay the other party if it refuses to comply with the arbitrator's order.

Appeals

28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

Rights of appeal/challenge

Arbitral awards cannot be appealed or challenged in the local courts. They can only be set aside or invalidated after a "judicial review". If a request to set aside or judicially review an award is granted, the award is nullified.

Grounds and procedure

The grounds for setting an arbitral award aside are as follows (*Article 1065, DCCP*):

- There is no valid arbitration agreement.
- The tribunal was not appointed in accordance with the applicable rules.
- The tribunal did not fulfil its instructions.
- The award was not signed by the arbitrator or arbitrators or was not justified.
- The award or the way it was handed down is contrary to public order.

The request to set the award aside is filed at the court of appeal in the court district of the place where the award was handed down (*Article 1064a, DCCP*).

The grounds for judicially reviewing an arbitral award are as follows (*Article 1068, DCCP*):

- A party learned after the award was handed down that the award is completely or partially based on deception by, or with the knowledge of, the opponent.
- The award is completely or partially based on documents that were found to be false.
- After the award was handed down, a party obtained documents which would have affected the award but were withheld by the other party.

The application for the judicial review of the award is filed at the court of appeal in the court district of the place where the award was handed down.

Waiving rights of appeal

The Supreme Court of The Netherlands held that an agreement made before the arbitration tribunal not to have an arbitral award set aside is valid as long as each party agreed out of their own free will and there is no conflict with any important public interest (*judgment of 1 May 2015, ECLI:NL:HR:2015:1194, Çukurove/Sonera*).

29. What is the limitation period applicable to actions to vacate or challenge an international arbitration award?

The request to set an award aside must be filed within three months from the date when the award was sent to the parties or, if parties agreed to do so, within three months after the award was deposited at the district court (*Article 1064a, Dutch Code of Civil Procedure (DCCP)*).

The request to judicially review an award must be filed within three months after the date when the misrepresentation or the deception came to a party's knowledge (*Article 1068, DCCP*).

30. What is the limitation period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

Under Article 3:324 paragraph 1 of the Dutch Civil Code (DCC), the authority to enforce a court or arbitration decision expires:

- 20 years after the first day after the decision was given.
- 20 years after the day when the enforcement formalities were fulfilled if formalities are required for the enforcement of the decision and their completion is not dependent on the will of the person who obtained the decision.

The Supreme Court of The Netherlands held that the fact that an arbitral award was no longer enforceable under the law of the state where it was handed down is not one of the reasons to refuse an application to enforce it under Article 1076(1) of the Dutch Code of Civil Procedure (DCCP) (*ECLI:NL:HR:2015:1077, Northern River Shipping Company v Kompas Overseas Inc., 17 April 2015*). Further, declaring such an award enforceable in The Netherlands is not contrary to public order.

Costs

31. What legal fee structures can be used? Are fees fixed by law?

Usually lawyers have an hourly fee and charge for the hours they worked. Dutch lawyers are not allowed to work on a "no cure, no pay" basis. However, contingency fees are allowed as long as a lawyer's costs are covered by a minimum guaranteed fee. In practice, this guaranteed fee can be quite low.

Third party funding is allowed and does exist in The Netherlands. There are active third party funders in the market.

32. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost allocation

Costs are not regulated by the law in The Netherlands. Parties are free to make their own agreements regarding costs. They can either agree that:

- The losing party pays the full costs of the winning party.
- Costs will be awarded in accordance with the liquidation tariff system used by the Dutch court. Under this system, every submitted statement and hearing is awarded one point and each point is worth a fixed amount of money which depends on the quantum of the claim. Usually costs awarded in accordance with the liquidation tariff system will be lower than the actual costs.

Cost calculation

The calculation of costs by the tribunal will either be in accordance with:

- What the parties agreed.
- The applicable arbitration rules of the relevant arbitration institution.

Factors considered

Factors taken into consideration in calculating the costs are the costs which were actually incurred and whether they were reasonable.

Enforcement of an award

Domestic awards

33. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

The application to have a domestic arbitral award declared enforceable is made at the district court of the place of arbitration (*Article 1062, Dutch Code of Civil Procedure (DCCP)*).

Foreign awards

34. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

The Netherlands have been party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) since 7 June 1964.

35. To what extent is a foreign arbitration award enforceable?

Under Article 1075 of the Dutch Code of Civil Procedure (DCCP), foreign arbitration awards made in a jurisdiction which is party to the New York Convention are enforceable in The Netherlands after they have been declared enforceable by the injunctions judge of the district court of (*Article 269, DCCP*):

- The place of the applicant's domicile.
- The Hague, if the applicant is not domiciled in The Netherlands.

Under Article 1076 of the DCCP, foreign arbitration awards made in a jurisdiction which is not party to the New York Convention are enforceable in The Netherlands after they have been declared enforceable by the injunctions judge of the district court of:

- The place where the applicant is domiciled.
- The Hague, if the applicant is not domiciled in The Netherlands (*Article 269, DCCP*).

The application procedure is contained in Articles 985 to 991, DCCP. The application must:

- Be made by an advocate (member of the Dutch Bar Association).
- Contain a legalised copy of the award and of the arbitration agreement as well as legalised translations of the award and the agreement.

The court will determine a hearing to hear the parties. The applicant must ensure that the party against whom enforcement is required is summoned to that hearing. That party is allowed to submit a statement of defence in writing. After the hearing if there are no grounds to deny the application and all the required documents are in order the court will schedule a day for the judgment. The duration of the procedure depends on where the

parties are domiciled. Arbitral awards from any jurisdiction can be declared enforceable in The Netherlands if they meet the requirements. As Article 1076 of the DCCP allows the respondent additional defences than Article 1075, proceedings to obtain enforcement of a non-New York Convention award could take longer than proceedings to obtain enforcement of a New York Convention award.

Length of enforcement proceedings

36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?

The duration of the procedure depends on where parties are domiciled. For example, fairly complicated and disputed enforcement proceedings under the New York Convention can take nine months, but most enforcement proceedings take considerably less time.

Reform

37. Are any changes to the law currently under consideration or being proposed?

No changes are currently under consideration. The present Arbitration Act which came into force at the beginning of 2015 is the most recent change.

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Publications

- *Construction of Contracts Under English Law – Arnold v Britton Et Al*, <http://margetsonlaw.nl/publications>.
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