

Recent changes to the Dutch Arbitration Act and the NAI Arbitration Rules allow for further tailor-making

On 1 January 2015 the new Dutch Arbitration Act (the new act) entered into force replacing the former Dutch Arbitration Act of 1986 (the former act). The amendments regard Book IV of the Dutch Code of Civil Procedure and some provisions of the Dutch Civil Code. Several arbitration institutions in the Netherlands, such as the Netherlands Arbitration Institute (NAI) and the Transport and Maritime Arbitration Rotterdam-Amsterdam foundation (TAMARA), adopted new arbitration rules in order to align them with the new act.

Background

The former act, which had been in force for almost 30 years, needed an update to reflect developments in (international) arbitration. The new act simplifies the arbitration and related administrative acts, for example by abolishing the obligatory deposit of the arbitral award, and further enhances the efficiency and flexibility of the arbitral process, limiting the need to involve the courts.

The new act will apply to arbitral proceedings initiated as from 1 January 2015. The former act will remain applicable to all arbitral proceedings initiated before this date, as well as to court proceedings relating to arbitral proceedings (eg procedures to obtain leave for the enforcement of foreign arbitral awards) initiated before 1 January 2015.

The revised NAI Arbitration Rules, which also became effective as of 1 January 2015 (the "NAI Rules"), are in line with the new act and apply (where parties agreed to NAI arbitration) to arbitral proceedings initiated on or after such date. Certain provisions of the NAI Rules, such as the below mentioned NAI Rule in relation to consolidation of arbitral proceedings, only apply if not only the arbitral proceedings are initiated but also the arbitration agreement has been concluded on or after 1 January 2015.

In this briefing:

- Background
- The Act and the NAI Rules
 - E-arbitration
 - Appointment of arbitrators
 - Challenge of arbitrators
 - Consolidation of arbitral proceedings
 - Provisional relief and summary arbitral proceedings
 - Post-arbitral award actions
 - Consumer protection
 - Validity of arbitration agreement
- Conclusion

The Act and the NAI Rules

The new act and the NAI Rules apply to both national and international arbitrations. This is, however, no change to the former versions. The most important changes to the new act and the NAI Rules lead to a larger degree of party autonomy as well as time and cost efficiency in the conduct of arbitral proceedings. Some of the key changes are set forth below.

- **E-arbitration:**
The new act now includes a framework for so-called E-arbitration in which submissions may be filed and arbitral awards may be rendered electronically. Accordingly, the NAI Rules stipulate that in principle all correspondence and documents shall be sent in electronic format by e-mail.
- **Appointment of arbitrators:**
Under the former NAI Rules, parties often opted out of the so-called list-procedure because parties felt they had less control over the appointment of the arbitrators. Under the list-procedure the NAI sends an identical list of candidate arbitrators compiled from the NAI's database to each of the parties from which they strike out the names of those persons against whom they have overriding objections and rank the remaining candidates in order of preference. The NAI then proceeds and appoints the arbitrator(s) based on the returned lists. Under the new NAI Rules the appointment of arbitrators by the parties is the (general) rule. The list-procedure only comes into play if parties have agreed so expressly or if an arbitrator is not appointed within the specified period of time. In case of replacement of an arbitrator, the applicable rules to the original appointment method apply. Again, parties can provide otherwise.
- **Challenge of arbitrators:**
Parties can now agree to submit challenges to an independent third party, for example an arbitral institution, as opposed to the provisional relief judge of the district court. The NAI has installed the so-called NAI Committee, a committee, appointed by the NAI Executive Board, to function as such independent third party to deal with challenges.
- **Consolidation of arbitral proceedings:**
Under the new act, parties can now agree that a third person, instead of the provisional relief judge of the district court of Amsterdam, orders consolidation of arbitral proceedings. The third person can consolidate an arbitration pending in the Netherlands with an arbitration pending in or outside the Netherlands. Accordingly, the new NAI Rules provide that parties jointly appoint a third person, failing which the Administrator of the NAI appoints such third person. The so appointed third person may order consolidation of an arbitral proceeding pending in the Netherlands with one pending in or outside the Netherlands, provided the NAI Rules are applicable to both arbitrations. In order for the provisional relief judge of the district court of Amsterdam to order consolidation, both arbitrations have to be pending in the Netherlands. Consolidation remains an opt-out clause.
- **Provisional relief and summary arbitral proceedings (also referred to as emergency arbitration):**
This is not a change but the reworded provisions set out clearly the possibilities. Under the new act parties to arbitral proceedings can request the arbitral tribunal that decides on the merits to order provisional measures, provided that such measures are related to the claims on the merits. Parties can also agree to appoint a separate arbitral tribunal to deal with provisional measures in case of urgency and irrespective of whether arbitral proceedings on the merits are pending. The arbitral tribunal's decision, whether in main or in summary arbitral proceedings, is rendered in the form of an award, unless otherwise provided by the tribunal, and is thus in principle enforceable. By referring to the NAI Rules in the arbitration agreement parties agree to this possibility of bringing summary arbitral proceedings to a separate arbitral tribunal, provided the seat of the arbitration is in the Netherlands. This separate tribunal consists of one arbitrator to be appointed by the NAI, unless the parties have expressly provided otherwise with respect to these summary arbitral proceedings.
- **Post-arbitral award actions:**
The new act now provides that annulment and foreign award enforcement proceedings have to be brought before the Court of Appeal. This will reduce the maximum duration of such procedures, as there will just be one appeal opportunity instead of two. Unless one of the parties is a consumer, parties may exclude appeal to the Supreme Court from a decision on the annulment and thereby limit these proceedings to a single instance. Following annulment the arbitration agreement remains in force. This is different if the award was annulled for lack of a valid arbitration agreement. In that case, as in the past, the courts' competence revives. The Court of Appeal can suspend

the annulment proceedings and remit the matter to the arbitral tribunal for it to correct its errors or omissions by resuming the arbitral proceedings, hearing the parties and render a new award. The new award replaces the award of which annulment is sought. The court of appeal takes this new award into account in the annulment proceedings.

In addition to the aforementioned amendments of the Dutch Code of Civil Procedure, the following important amendments were made to the Dutch Civil Code:

- **Consumer protection:**
The Dutch Civil Code now provides that an arbitration clause which is included in general terms and conditions in relation to a consumer is considered unreasonably onerous and therefore is voidable unless the arbitration agreement allows for the consumer within at least a month from the written notice of the other party that it relies on the arbitration clause, to opt for the courts to hear the dispute.
- **Validity of arbitration agreement:**
The Dutch Civil Code now includes private international law provisions relating to arbitration. A State or government-owned party to an arbitration agreement cannot rely on its own laws and dispute the validity of the arbitration agreement (or arbitrability of the dispute) if the other party did not know or should not have known these laws. The validity of an arbitration agreement is determined (i) under the governing law chosen by parties, or (ii) under the laws of the place of arbitration, or, (iii) if the parties have not agreed on the choice of law, under the governing law applicable to the legal relationship being object of the arbitration.

Conclusion

The changes in both the Dutch Arbitration Act and the NAI Rules will keep the Netherlands included in the lists of attractive seats for international arbitrations. The new provisions allow for parties to further tailor-make their arbitration agreements and arbitral proceedings to their specific needs whilst the provisions ensure a fully fledged legal process with the required safeguards.

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