IBA International Construction Projects Committee

ADR in Construction

The Netherlands

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Table of Contents

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1 Background

1.1 Which type of dispute resolution is most often used in construction matters in your jurisdiction? Can you give reasons why one type of dispute resolution is preferred above another? If there have been changes in preference in the past ten years, what has caused this?

In construction matters disputes are traditionally resolved through arbitration, even though many disputes also go to court.

Frequently used standard terms and conditions[1] in domestic construction contracts contain a dispute resolution clause referring disputes to arbitration under the arbitration rules of the Arbitration Council for the Construction Industry. This is a specialized arbitration institute that only deals with construction matters.

The Arbitration Council is an independent institute. It chooses its experts based on their (proven) expertise in the field of construction. Although the Arbitration Council does have lawyers as their members, most arbitrators are field experts in construction. These experts could be contractors, engineers or architects. A sole arbitrator or tribunal will be assisted by a secretary who is a lawyer.

The benefit of trying a case before the Arbitration Council is that the arbitrators themselves have the knowledge and expertise required to assess the technical matters in construction disputes. Civil law judges would require experts (party or court-appointed), where the Arbitration Council's arbitrators are the experts and will be able to understand it on their own accord.

Hearings are most often held at locations near the project or work that is the subject of the dispute. Depending on the matters at hand in the dispute, the arbitrators and the parties may visit the work in order to, for example, assess the quality of the work or the extent of damages. Parties do not necessarily need representation by a lawyer. They can choose to argue their own case or to have any random person represent them.

In addition to the Arbitration Council, the Netherlands Arbitration Institute (NAI) also provides arbitration services for many different types of disputes, including construction disputes. This institute also provides mediation and adjudication services.

1.2 Are there special laws on resolving construction disputes in your jurisdiction (for example statutory adjudication)?

[1] E.g. UAV, UAV-GC, AVA.

No. Disputes arising from construction contracts do not have a special status within Dutch law. Parties are free to agree on arbitration, mediation or adjudication or a combination of those. If parties have not agreed on any of those, a dispute is settled in (civil law) court. This general rule applies to construction disputes as well as many other types of disputes.

1.3 Are there provisions in the legislation concerning civil procedure or in the civil code (if your jurisdiction has one) or other legislation that would apply to binding decisions of non-statutory dispute adjudicators? What type of binding decisions are known in your jurisdiction that are used for construction disputes (please state the names used in the language of your jurisdiction and describe the main characteristics).

Yes. The agreement between parties to have disputes settled by means of binding decision, as well as the binding decision itself are considered to be 'contracts of settlement.' The Dutch Civil Code (DCC) contains provisions on contracts of settlement in Articles 900 to 910 of Book 7.

The binding decision is often referred to as a 'binding advice' (*bindend advies*). Article 7:900 DCC states that a settlement can be established pursuant to a joint decision of the parties, or to a decision entrusted to one of them or to a third person (article 7:900 (2) DCC). The law does not contain specific rules as to how the binding procedure has to be conducted. However, the parties can agree on the rules of the procedure in their contract. For example, article 3 of the previous NAI Arbitration Rules (2010) stipulates that those rules shall apply to binding advice if the parties have agreed so. The new NAI Arbitration Rules that entered into force on 1 January 2015 do not contain such a clause, because at the same date separate rules for binding advice entered into force.

1.4 What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)? Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

One of the main differences between arbitration and binding decisions relates to the enforceability of the award or decision. The arbitral award is enforceable after obtaining permission by the court. A binding decision, however, does not have the same status as an award. A party who wishes to enforce a decision would have to file a case before a court and request an order for compliance by the other party. It is the court's decision that is enforceable.

Another important difference is that the arbitration procedure is extensively regulated in the law. The procedure leading to a binding decision is not.

1.5 Does your country have special institutions (arbitral or otherwise) dealing with construction disputes? What is the role of these institutions, for example are they supervising the proper conduct of the proceedings or involved in appointments?

Yes, as mentioned above, the Arbitration Council is an arbitration institution for the construction industry. The main role of the Arbitration Council is to offer and facilitate arbitration.

The NAI is a generic arbitration institute, which also facilitates – amongst other types of disputes – arbitration (but also other ADR methods such as binding advice or mediation) regarding construction disputes as well.

Both institutes have their own registered arbitrators, from which they either propose candidates to the parties, or appoint the arbitrators (see also paragraph 4.2 below). The new NAI Arbitration Rules gives the parties the initiative to choose the arbitrators (Article 13 NAI Arbitration Rules (2015)). The NAI still has a list procedure for the appointment of arbitrators, which procedure will be applied in the event the parties agreed thereto, or if a party does not nominate an arbitrator under Article 13.

1.6 How prevalent is mediation for construction disputes in your country? What other forms of non-binding dispute resolution for construction disputes are used in your country (for example dispute recommendation boards)? Are hybrid forms of dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested).

Over the past ten years, mediation has become a very important dispute resolution technique. It has also found its way to the construction industry, but it is, however, not yet as extensively used in the construction industry as in other sectors.

Other forms of non-binding dispute resolution are for example the use of DABs and advisory boards on construction projects. Advisory boards are similar to DABs.

1.7 Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction? What would the role of these DAB decisions be for further proceedings?

DAB decisions would be considered valid evidence in subsequent arbitration or court proceedings in the Netherlands. Article 1039 (1) DCCP expressly stipulates that arbitrators have discretion in the rules of evidence they wish to apply. Moreover, Article 1039 (1) DCCP also expressly states that the arbitral tribunal is also free to determine the admissibility of evidence, the division of the burden of proof and the assessment of the evidence. Article 152 DCCP, which applies to court proceedings, contains the rule that evidence can be provided through all means, unless that law states differently. From

these rules it follows that both in arbitration and in court proceedings a DAB decision could be accepted as evidence.

1.8 What form of ADR is considered to be cost effective for construction disputes in you jurisdiction? Please explain what type of costs is usually allocated to which party and how this compares to court litigation.

Of all the different forms of ADR, mediation would be considered to be the most cost effective. Next to mediation, also a binding advice proceeding (for example by a DAB) could also be relatively cost effective.

Court litigation and arbitration, on the other hand, are the more expensive procedures.

Generally speaking, arbitration is more expensive than court litigation. Court fees are relatively low in the Netherlands, ranging from EUR 613.—up to EUR 3,864.—in cases before the district courts, and from EUR 711.—up to EUR 5,160.—at the court of appeals. The costs for an arbitration procedure are generally higher, as the parties would have to pay administrative fees (in the case of institutional arbitration) as well as the fees of the arbitral tribunal.

2 Dispute resolution agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement? Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause? Would this clause prevent a party from seeking interim measures from a competent court?

The requirement for a valid arbitration agreement is the agreement of the parties to submit a dispute to a third party for arbitration. There are no formal requirements for an arbitration agreement. Also an oral agreement can be a valid arbitration agreement. However, Article 1021 DCCP requires that the arbitration agreement must be proven by an instrument in writing. Also an instrument which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party.

Clause 20.6 of the FIDIC Red Book would be considered a valid arbitration clause. This arbitration clause would, however, in principle not prevent a party from seeking interim measures from a competent court. Moreover, Article 1022a DCCP expressly states that an arbitration agreement shall not preclude a party from requesting interim measures from a court, or applying for a decision in summary proceedings. Under the new Arbitration Act that entered into force on 1 January 2015, during pending arbitral proceedings the parties can request the arbitral tribunal to grant provisional relief, as

long as it is related to the claim or counterclaim in the pending arbitral proceedings. If a party files a request with the court seeking interim measures and the other party invokes the existence of an arbitration agreement, the court shall only declare that it has jurisdiction, if the requested decision cannot, or cannot timely, be obtained in arbitration (Article 1022c DCCP).

2.2 Are there any restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts, including consumer protection laws or similar laws? Is this the same for other forms of ADR?

Arbitration clauses in standard forms of contracts are valid for both commercial parties as well as consumers.

However, with respect to arbitration and other forms of ADR there are some restrictions, which intend to protect consumers. Consumers have some protection under Article 6:236 (n) DCC. This article states that a provision in general conditions is deemed to be unreasonably onerous if such a provision provides for arbitration or other forms of dispute resolution by a person other than the court having jurisdiction under the law or by one or more arbitrators, unless it allows the other party a period of at least one month to opt for dispute resolution by the court having jurisdiction under the law. The one month period starts running as of the date when the user of the general conditions has invoked the stipulation in writing against the other party.

As of 1 January 2015 this clause has been extended to cover arbitration as well. Consumers will be able to nullify an arbitration clause in general conditions, unless these conditions allow the consumer a period of at least a month to choose for dispute resolution by the courts.

2.3 In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration? If so, is reference made to an arbitral institution and the rules of this institution? Are other forms of dispute resolution more common in these standard conditions?

Yes, the standard conditions which are most often used for construction contracts contain an arbitration clause. For example, the UAV (the uniform contracting conditions) and the UAV-GC (uniform contracting conditions for integrated contracts) are some of the most often used standard conditions. They both contain an arbitration clause. These arbitration clauses refer to arbitration by the Arbitration Council for the Construction Industry under the rules of the Arbitration Council.

The same has also applied to the general conditions used for tendering (for example the UAR 2001). However, this has changed with the latest versions of the general tender conditions. The Tender Regulation for Works 2005 or AWR 2005 (*Aanbestedingsreglement*

Werken 2005) provided for dispute resolution by the courts instead of arbitration. This was maintained in the AWR 2012 which was published in 2013.

2.4 May arbitration agreements bind non-signatories (for example subcontractors)? If so, under what circumstances? Is this different for other forms of ADR?

No, non-signatories are not bound by arbitration agreements if they have not agreed to it. The same is the case for other forms of ADR. Agreement by these third parties is required.

2.5 If expert determination is not supported by legislation and the binding nature of expert determination derives solely from the agreement of the parties to submit their dispute to the expert, is this process mandatory and is any resulting determination binding on the parties? What needs to be in the contract to ensure this?

Expert determination is not a mandatory process by law. If the parties wish to have a dispute resolution clause that provides for expert determination that is binding on the parties, they should clearly specify and define this in their contract. Once agreed, the expert determination procedure is binding on the parties (and as such the "mandatory" procedure to be followed). Only with the other party's or parties' agreement, can the expert determination procedure be by-passed.

2.6 Construction contracts may contain dispute resolution clauses requiring several tiers of dispute resolution processes typically culminating in arbitration or court litigation. In your jurisdiction, would a party be allowed to skip one or more tiers before starting litigation or arbitration? How would a contractual multi-tiered dispute resolution process be characterized in your jurisdiction? Is the multi-tiered dispute resolution clause common in construction contracts and if so, are there problems with the use of this type of clause?

Many construction contracts contain multi-tiered dispute resolution clauses. A clause could for example consist of mediation as a first tier, followed by arbitration or court litigation if mediation does not lead to a solution.

If a party does not perform the multitier approach and skips part of it, the type of provision that is skipped will affect the nature and extent of the consequences. For example, a mediation clause is not enforceable in the Netherlands. This means that skipping mediation and going straight for arbitration or litigation would have no immediate consequences. Where a party skips a DAB procedure or a non-binding advice procedure which contractually have to be followed, one could argue with some chance of success before the court or the arbitral tribunal that the claims are not admissible.

Moreover, the contract may bring specific contractual consequences with it (loss of rights).

3. ADR and jurisdiction

3.1 Are there disputes that can only be decided by a court or by an administrative law tribunal/court? What type of disputes regarding construction projects cannot be subjected to ADR? (For example, are disputes relating to decennial liability arbitrable?)

With respect to construction disputes, parties have the freedom to choose court litigation, arbitration or any ADR method as a dispute resolution method.

However, with respect to specific administrative matters, such as for example disputes regarding the (non-)issuance of permits, tax related matters, immigration, etc., the disputes against the administrative authority involved will be resolved before an administrative court.

3.2 Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

There is no restriction on the matters that may be the subject of a binding expert determination or other binding third party decision, provided that the parties have agreed to this form of dispute resolution. In the Netherlands, this form of dispute resolution is called binding advice (*bindend advies*). The contents of the binding advice are regarded as agreed upon between the parties. For the enforcement of a binding advice, if one party does not comply with it, the other party or parties would have to file a claim with the courts for specific performance.

Any dispute that is arbitrable can also be decided upon in a binding advice procedure.

3.3 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued (For example, may a FIDIC Red Book type DAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAB may decide)?

No, in principle there are no restrictions other than those that follow from the parties' agreement.

Furthermore, there are certain issues that may not be arbitrable. Article 1020 (3) DCCP states that the arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose. For example, issues concerning public policy

cannot be arbitrated. Another example is the annulment of a resolution of the board of directors / corporate entity. An arbitral award that has been issued in violation of the principle of arbitrability can be set aside.

A DAB can rule on both issues of fact and issues of law.

3.4 Are public entities barred from settling disputes by ADR (arbitration, DAB/DRB and/or mediation)?

No, public entities are not barred from settling disputes by ADR. Moreover, contracts with public entities often contain dispute resolution clauses that allow for arbitration or other forms of ADR.

3.5 Do state parties enjoy immunities in your jurisdiction? Under what conditions?

State parties enjoy certain immunities, for example the state enjoys immunity from public prosecution for criminal acts, while other state parties enjoy limitations to the possibility of civil liability.

However, a state party that has engaged in commercial activities does not enjoy immunity. This is the case with, for example, state parties that enter into construction contracts. The same applies to state parties who are involved in tender proceedings, or who act tortiously.

3.6 Can procurement disputes be decided by ADR? If so, are there special requirements for this type of dispute or is only arbitration allowed?

Procurement disputes can be decided by ADR. There are no special requirements for this type of dispute.

In the Netherlands, procurement disputes have historically often been subject to arbitration as the applicable dispute resolution method. The procurement regulations, such as for example UAR 2001 and UAR–EG 1991, which are often chosen by the tenderer [aanbesteder] to apply to tender procedures, all contained dispute resolution clauses specifically referring to arbitration under the rules of the arbitration council for the construction industry.

This has changed in the past ten years after a new procurement regulation, the ARW 2004, was published. The ARW 2004 refers disputes to the civil courts.

3.7 In the FIDIC Red Book, Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated "*The Employer and the Contractor empower the DAB, among other things to (b) decide upon the DAB's own*

jurisdiction and as to the scope of the dispute referred to it,". **In your jurisdiction, in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAB clause), would the DAB be allowed to decide on issues outside the contract with the DAB clause? If the DAB purports to make a decision on a matter not referred to it, will that decision be deemed to have been made outside its jurisdiction?**

Whether the DAB would be allowed to decide issues outside the contract with the DAB clause depends on the parties' agreement. The DAB's jurisdiction is limited to those issues that the parties' have agreed upon.

If the parties' agreement does not allow this, then any such decision made by the DAB would have been made outside its jurisdiction.

4 Arbitrators, adjudicators, dispute board members, mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (like for example DAB's) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

Book 4 of the Dutch Code of Civil Procedure contains the rules applicable to arbitration, which include the appointment of arbitrators. The DCCP requires arbitrators to be impartial and independent and bear no prejudice against any of the parties or their dispute (see Article 1023 DCCP). If the parties cannot agree on the arbitrator(s) to be appointed, the preliminary measures judge of the district court will appoint the arbitrator(s) at the request of the either party (Article 1027 DCCP).

In addition, if the parties have agreed to institutional arbitration, the institution's arbitration rules will be applicable. These rules contain specific provisions on the appointment of an arbitrator.

Contrary to arbitrators, the DCCP does not contain specific rules regarding the appointment of adjudicators. However, institutions may have specific rules applicable to the appointment of adjudicators. For example, the Netherlands Arbitration Institute has mediation rules which contain provisions on the appointment of mediators.

There is no requirement for the arbitrators, adjudicators, etc. to have special qualifications in order to perform their duties.

4.2 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators? Do these institutions

appoint the arbitrators or do the parties appoint the arbitrators? Do the parties have to choose from these lists or are they free to have arbitrators that are not on the list? How are these lists composed? Is there a difference with other forms of ADR?

The Arbitration Council for the Construction Industry (de *Raad van Arbitrage*) is an arbitration institute that only deals with construction disputes. The arbitrators that can be appointed are those that are admitted to the Board of Arbitrators of the Arbitration Council. The names of the arbitrators are available to the parties (for example on the website of the Arbitration Council).

The parties have the possibility of proposing to the Arbitration Council the arbitrators from this list for whom they have a preference. This does not guarantee that these arbitrators will be appointed, but the chairman of the Arbitration council can take the parties' preferences into account. The parties do not have a possibility of proposing a candidate arbitrator who is not on the Arbitration Council's list.

The members of the Board of Arbitrators are appointed by the board of the Arbitration Council after a recommendation by organizations with direct ties to the construction industry, such as the association "Bouwend Nederland" and the Royal Institute of Engineers KIVI-NIRIA, as well as the Association for Dutch Municipalities (*Vereniging Nederlandse Gemeenten*), the Association for Social Housing (AEDES) and the Ministry of Infrastructure and the Environment.

Another arbitration institute that also deals – but not exclusively – with construction disputes is the Netherlands Arbitration Institute (NAI). The parties have the freedom to propose arbitrators of their choice to the NAI. However, if the parties have agreed to the list procedure, or a party does not appoint an arbitrator when required, the NAI follows a list procedure for the appointment of arbitrators (Article 13 and 14 NAI Arbitration Rules 2015).

With respect to other forms of ADR, how adjudicators or experts are appointed mainly depends on the parties' agreement. If that agreement refers to an institution that institution's rules will determine how an adjucator, expert, etc. will be appointed. If the agreement itself provides for the rules of appointment, these should be followed.

4.3 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer? If not, are there requirements that the secretary added to the tribunal must be a lawyer? Would the presence of a lawyer, either as member of the tribunal or as secretary added to the tribunal, be required if these tribunals are to rule on issues of law?

It depends on the parties' choice as well as the institution (if any) that appoints the arbitrators. The parties have the freedom to appoint non-lawyers as arbitrators, such as for example engineers, architects, etc.

Furthermore, the Rules of the Arbitration Council allow for the appointment of an arbitral tribunal that does not include a lawyer. Only if the parties have agreed to this, can they request the tribunal that one of the arbitrators is a lawyer. If the chairman of the Arbitration Council finds it necessary, it can decide to appoint a lawyer as one of the arbitrators.

However, the secretary appointed to the tribunal is a lawyer (Article 7 Rules). He has an advisory role to the tribunal.

Furthermore, the rules allow for an appeal. In appeal the arbitral tribunal consists of three or five arbitrators. The rules require that at least one arbitrator has to be a lawyer (Article 23 Rules).

4.4 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession? Are panels integrated both by lawyers and construction professionals possible/common? Is there a difference with other forms of ADR?

It is not uncommon that arbitrators are appointed that belong to the engineering/construction profession (see also above). However, it is more common that the arbitrators are lawyers. The same can be said about other forms of ADR such as, for example, DABs.

4.5 Are arbitrators and tribunals issuing binding decisions allowed to use their own technical expertise without consulting the parties regarding the results of using this expertise?

Arbitrators that wish to use their own technical expertise are of course allowed to do so. However, they have to be careful, as they would violate their mandate if they reach conclusions without having heard the parties first. This could lead to an annulment of the arbitral award.

4.6 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide "ex æquo et bono", as "amiable compositeur", or in "equity"? Is there a difference with other forms of ADR?

The main rule of the DCCP is that the tribunal has to apply the rules of law to the merits of a case. With respect to other forms of ADR, the DCCP is silent on this issue.

The rules of the Arbitration Council and the Netherlands Arbitration Institute both state as the main rule that the tribunal decides as amiable compositeur. The NAI will adopt a new set of arbitration rules on 1 January 2015. Under these arbitration rules, the main rule will be that the tribunal has to apply the rules of law.

As other forms of ADR are concerned, this would depend on the parties' agreement or the relevant rules in the case of an institution administrating the ADR.

5 ADR procedure

5.1 Are arbitrators and others making binding decisions required to follow any minimum due process rules? Does a party usually have a right to have legal representation?

Yes, arbitrators and also, for example, binding advisors are required to follow the minimum due process rules. This includes the right of the parties to be heard, the principle of independence and impartiality, etc.

Article 1036 (2) DCCP specifically states that the parties have to be treated equally.
A party has the right to have legal representation.

5.2 Is the focus in the arbitral procedure and the procedure for tribunals issuing binding decisions on written submissions or on oral presentations?

The procedure generally consists of filing written submissions as well as a hearing. The focus of the arbitral procedure lies more on the filing of written submissions.

This is different with respect to evidentiary matters, such as for example the hearing of witnesses or experts.

5.3 Are there rules on evidence in the laws or your country and/or the arbitration rules and/or the rules for tribunals issuing binding decisions most commonly used or is this left to the discretion of the tribunal?

The main rule of the DCCP is that the arbitral tribunal has discretion in regard to the rules of evidence it wishes to apply (Article 1309 (1) DCCP). This means that arbitrators are not bound by the general rules of evidence applicable to court proceedings. A similar rule can be found in the Arbitration Rules (2010) of the NAI, which state in Article 27 that unless the parties have agreed otherwise, the arbitral tribunal shall be free to determine the admissibility, relevance, materiality and weight of evidence as well as the allocation of the burden of proof.

However, parties have the freedom to agree otherwise, such as, for example, on the application of the general rules of evidence of the DCCP, or on a different set of evidentiary rules such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

5.4 Is a hearing mandatory for all forms of ADR?

As far as arbitration is concerned, Article 1038b DCCP stipulates that the arbitral tribunal shall give the parties an opportunity to make an oral presentation, if they so request. The arbitral tribunal can also hold a hearing on its own initiative. As follows from this article, in principle a hearing is not mandatory.

Also, for other forms of ADR, a hearing is not mandatory.

5.5 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (c) *conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules*,". Under your jurisdiction, would the DAB still be bound to conduct a hearing according to rules of "natural justice"? If so, what would this mean for conducting the hearing?

No, a hearing is not mandatory. The DAB is not required to hold a hearing.

5.6 What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)? Is there a difference on this topic between arbitration and court litigation in your jurisdiction? Are experts used in the same manner in procedures for tribunals issuing binding decisions?

The type of experts which will be used depends on the issues in the arbitration. With construction disputes, most experts that are heard are experts with a technical background. The most common construction disputes, and therefore the most common experts, are planning and programming experts (i.e. delay and disruption) and technical engineering experts regarding issues of a complex technical nature.

There is no difference between arbitration and court litigation or DABs.

5.7 Are these experts mostly party appointed or appointed by the tribunal? Is there a difference as to the evidential value? How are the costs of experts allocated?

In arbitration most experts are party appointed. This does not, however, lead to a lesser evidential value of the expert's report or findings.

Each party that appoints an expert has to bear the costs thereof. The costs of an expert appointed by the arbitral tribunal are generally born by both parties equally. In the final award, the arbitral tribunal may decide that the losing party has to bear (a large portion of) the costs of the expert(s).

5.8 Is the expert supposed to be independent to the parties/counsel?

Yes, the expert is supposed to be independent.

5.9 Does the expert normally give written evidence or oral evidence?

Normally, the expert prepares a written report which is submitted in the proceeding. The arbitral tribunal may decide at the request of the parties, or on its own, that the expert has to attend a hearing to give oral evidence, or to provide a further explanation of its report. The arbitral tribunal also has the power to designate one of its members to examine the expert (see Article 1039 (2) DCCP). The main reason to do this is to save costs.

5.10 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert? Does the tribunal need to give reasons for following or not following the statement of an expert? Can part of the decision by the tribunal be "delegated" to the expert?

Yes, irrespective of whether the arbitral tribunal appointed the expert or not, it can ignore the expert's statements in its decision. It is up do the arbitral tribunal to take the decision in the arbitration, and it can decide what weight it wishes to give to the expert's statements.

The tribunal has a duty to provide a reasoned award which means the award must contain the reasons supporting the award (Article 1057 (4)(e) DCCP). This is different if the award merely concerns the determination of quality or condition of goods. Furthermore, the parties can also agree that the arbitral tribunal shall not give the reasons for its decision. Such an agreement has to be in writing and can only be made after the arbitration proceeding has started (Article 1057 (5)(c) DCCP).

An arbitral award that is not reasoned at all or highly insufficiently reasoned can be set aside (article 1065 (1) (d) DCCP). However, an arbitral award that is not well-reasoned will survive a setting aside procedure. This being said, only in the event that failing to provide reasons for (not) following the expert's statement would constitute a not reasoned or highly insufficiently reasoned award, the award could be set aside. Evidently, if the parties had agreed that the arbitral tribunal would not give the reasons for its decision, they cannot invoke this ground for setting aside the award.

The tribunal cannot delegate its authority to make decisions to the expert or any other person. This is only different if the parties have agreed differently, for example that an expert will decide a particular technical issue in the arbitration.

5.11 Is "hot tubbing" (this involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other's presence) a feature in construction arbitrations or procedures of tribunals issuing binding decisions in your jurisdiction?

Hot tubbing is not a common feature of domestic construction arbitrations. However, it is common at hearings that each party brings its own experts, who can provide further explanations to their statements, if needed or so desired by the tribunal. This is, however, not an examination of experts.

5.12 Are site visits by the arbitral tribunal and tribunals issuing binding decisions regulated by the laws of your country and/or by the arbitration and other rules most used in your country? If not, are they allowed/mandatory?

No, there are no specific laws regulating site visits. The NAI Arbitration Rules (2015) contain in Article 30 a brief provision regarding site visits. It states that if the tribunal deems it appropriate, it may order a site inspection. The parties shall be given the opportunity to be present at the inspection.

Site visits are allowed, but not mandatory. It will depend on the tribunal whether they deem it necessary.

5.13 Do all parties need to be present during the site visit and be given an opportunity to comment on the findings of the tribunal?

There is no requirement for the parties to be present during a site visit.

As mentioned above, the NAI Arbitration Rules (2015) stipulate that the parties shall be given the opportunity to be present at the inspection.

The principles of due process bring with it that a party has a right to be heard. If the findings of the tribunal are essential for its decision, a party has the right to comment on those findings. The risk the tribunal runs is that a party who was not given that opportunity may successfully set aside the award based on, for example, a violation of public policy (Article 1065 (1) (e) DCCP).

5.14 How common and how important are generally witness testimonies in construction arbitrations and other forms of ADR in your jurisdiction? Under the rules most often used in your jurisdiction for construction disputes, are there any restrictions on either not admitting testimony, or not giving value to the

declaration of witnesses that are employees or consultants of the party presenting their testimony?

Witness statements are quite common in construction arbitrations. In other forms of ADR they are generally much less used or not used at all.

As mentioned above, the arbitral tribunal has its own discretion as to which rules of evidence it wishes to apply (article 1309 (1) DCCP). They are not bound by the general rules of evidence applicable to court proceedings. Therefore, the arbitrators can assign the value they feel fit to each statement. Normally, testimony from the party itself, as well as its employees, are looked at more critically because the party has an interest in the outcome of the case.

5.15 Under the rules most often used in your jurisdiction for construction disputes, what degree of discretion do the arbitrator(s) or tribunals issuing binding decisions have in weighing evidence, including balancing potentially contradictory pieces of evidence or disregarding any piece of evidence? Are there any rules on valuation of evidence in the law or in such rules?

The arbitral tribunals have a great amount of discretion. As mentioned above, the tribunal is, in principle, free to determine the value of the evidence presented to it. There are no rules on valuation of evidence in the law.

6 Interim measures and interim awards

6.1 Are measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement allowed in your jurisdiction? Are these measures usually decided by the arbitral tribunal or by a judge?

Dutch courts have an extensive power to grant interim relief. This includes injunctions to preserve a situation of fact or of law, evidence as well as preserving assets. The law specifically describes some legal actions providing such interim relief, such as, for example, the request to produce a copy of specific documents or to produce specific (financial) records (Articles 162, 843a and 843b DCCP), to hold a preliminary witness hearing (Articles 186 – 193 DCCP) or to request a preliminary expert report or to hear an expert (Articles 202 - 207 DCCP). Furthermore, a party can also request a preliminary site visit. Often, such matters are decided by the judge. One of the main reasons for this is that the judge's decision is immediately enforceable.

An arbitration agreement, however, does not preclude a party from requesting the courts for conservatory measures or interim measures (Article 1022a DCCP). Furthermore, an

arbitration agreement also does not preclude a party from requesting the courts for a preliminary witness hearing, a preliminary expert report, a preliminary site visit, or to order the production of specific documents (Article 1022b DCCP).

However, if in such a proceeding a party invokes the arbitration agreement, the court will only accept jurisdiction if the decision cannot or cannot timely be obtained in arbitration. Such a situation in arbitration proceedings can arise where, for example, after the filing of the arbitration request the arbitral tribunal, or the arbitrators are not yet appointed.

This being said, it is also possible for an arbitral tribunal to impose specific measures in summary proceedings. The DCCP contains in Article 1043b the possibility for the parties to empower the arbitral tribunal or its chairman to render an award in summary proceedings. The decision in summary arbitral proceedings shall be regarded as an arbitral award.

As mentioned above, during pending arbitral proceedings, the parties can also request the arbitral tribunal to take provisional measures, provided it is related to the claim or counterclaim in the proceedings. However, there are some measures that an arbitral tribunal cannot impose. For example, the attachment of assets or moneys (freezing orders) can only be issued by a court.

6.2 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated *(g) decide upon any provisional relief such as interim or conservatory measures (...)* The FIDIC Red Book has no explicit provisions for DAB decisions that have a provisional nature. It is not clear if, how and when these should be followed by decisions that are meant to be final and binding. Would this lead to problems in your jurisdiction?

If a DAB were to issue interim or conservatory measures, such a decision would not have the status of an arbitral award. If a party would want to enforce such a decision, it would have to go to court and request the court to issue an order to the other party to comply with the DAB's interim or conservatory measure.

Such a request could be best filed in a summary proceeding, as that would be the fastest way of getting a court order.

7. Awards, decisions, recommendations, negotiated agreement

7.1 Is a binding decision (for example the decision of a DAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced? Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

No, a binding decision from a DAB is not directly enforceable. In order to enforce such a decision, it is necessary to file a claim with the court asking the court to order the other party to comply with the DAB's decision. Such a claim can be filed in a summary proceeding.

7.2 Does the award or binding decision have to be reasoned?

As stated above, under Dutch law, in principle, an arbitral tribunal has to provide the reasons for its decision (Article 1057 DCCP). Furthermore, if an arbitral award lacks reasoning that could be grounds for setting aside that award.

The law does not contain a similar provision regarding a binding decision. However, for the procedure leading to a binding decision (in for example a binding advice procedure) the fundamental principles of due process apply as well. This includes the right to be heard. A binding advice that does not contain any reasoning may very well not be enforceable, if the court has doubts as to the manner in which it was reached. Case law shows that binding decisions are not considered binding on the parties if the reasoning is flawed (for example District Court The Hague, 23 April 2014, NJF 2014, 305). The more the process leading to a binding decision contains elements of a procedure, the higher the standards will be on the reasoning of that decision. However, from case law it also follows that the reasoning can be provided after the binding decision has been given.

7.3 Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award? Are they allowed in other forms of ADR?

The DCCP remains silent as dissenting opinions are concerned. In domestic arbitrations it is not common to have dissenting opinions, and they appear not to occur. This is different in international arbitrations.

Article 43 (4) of the NAI Arbitration Rules (2015) states that the award shall not state a minority opinion. However, a minority has the possibility to express its opinion to the co-arbitrators and the parties in a separate written document. Article 43 (4) clearly stipulates that such a document shall not be considered to be part of the arbitral award. However in respect to international arbitration these rules expressly allow for the possibility of a dissenting opinion. However, a dissenting opinion will not form part of the award.

There is some limited case law on dissenting opinions. In 2008 the Supreme Court rules that if an arbitrator disagrees with the decision, refuses to sign the award, but only provides his dissenting opinion, the dissenting opinion does not form a part of the award (Supreme Court 5 December 2008, ECLI:NL:HR:2008:BF3799).

As the law does not provide for a regulation regarding dissenting opinions, it is likely that in other forms of ADR dissenting opinions would be allowed, provided that the essential requirements of the decisions are met, and the applicable ADR agreement and rules do not exclude that possibility.

7.4 Can an award or (binding) decision be corrected, clarified or reconsidered? If so, can the tribunal do this on its own accord or only if parties request it to do so?

If the award contains a manifest computing or clerical error, the parties may request the arbitral tribunal to rectify this (Article 1060 (1) DCCP). If the award does not contain (a) the names and addresses of the arbitrator or arbitrators, (b) the names and addresses of the parties, (c) the date on which the award was made, or (d) the place where the award was made, then a party may request in writing that the arbitral tribunal correct this mistake or omission.

The arbitral tribunal also has the possibility of making these rectifications or corrections on its own. In that case, the arbitral tribunal shall make a record of the rectification or correction, and sign it on the original and copies of the award. The arbitral tribunal can also set it out in a separately signed document, which shall be considered to form part of the award (Article 1060 (4) and (6) DCC).

If the arbitral tribunal has failed to decide on one or more matters which have been submitted to it, either party can request the arbitral tribunal to render an additional award (Article 1061 (1) DCCP).

8. Enforcement of and challenges to awards and decisions

8.1 What steps would a party have to take to get to the enforcement of binding third party decisions in your jurisdiction?

In the case of a domestic arbitration, the enforcement of a final or partial arbitral award in the Netherlands can only take place after the interim measures judge of the District Court has granted leave for enforcement (Article 1062 DCCP). This makes it necessary for a party to file a request to the District Court in order to obtain this leave for enforcement. In an international arbitration, the recognition and enforcement will have to be requested at the Court of Appeal (Article 1075 DCCP).

In the case of a decision from a binding advice procedure (for example a DAB decision), such a decision is not enforceable. A party who wishes to enforce it will have to start a procedure before District Court and request an order to the other party to comply with the binding decision.

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book DAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

The New York Convention is limited to arbitral awards only. As such it does not apply to DAB-type awards that do not qualify as arbitral awards. It is unlikely that an agreement between parties that a DAB-type award between them should be considered an arbitral award for the purposes of recognition and enforcement would suffice to have the New York Convention apply to it.

8.3 Would your country allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book type DAB decision?

Yes, such an arbitral award should be enforceable.

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book type DAB decision in case of fraud, failure to follow minimum due process or other serious irregularity? Will these remedies make a DAB decision unenforceable in court without first having to go through arbitration (clause 20.6 FIDIC Red Book)?

A DAB decision would qualify under Dutch law as a determination following from a settlement agreement between the parties (Article 7:900 Dutch Civil Code). This article 7:900 states that a settlement can be established pursuant to a joint decision of the parties, or to a decision entrusted to one of them or to a third person (Article 7:900 (2) DCC). In the case of a DAB decision, it is the latter situation described in this article that is relevant. There are different types of remedies available.

Article 7:902 DCC states that if the determination violates mandatory law (other than in the field of the law of property, proprietary rights and interests), or the determination is in breach of good morals and public police, such a determination is invalid.

Under Dutch law, the standards of reasonableness and fairness may also impact a DAB decision. These standards can supplement or derogate from, or correct (contractual) obligations. The derogating or corrective effect of these standards means that reasonableness and fairness can be used against explicit (contractual) obligations: an obligation can be set aside if its application is clearly against what is reasonable and fair. If a decision by a DAB would be unacceptable under these standards, that decision could be annulled.

These remedies can be applied out of court. A party can nullify a decision by making an unilateral extra-judicial declaration to that extend, for example, by giving notice in writing. If the other party does not accept such unilateral declaration and would try to enforce such decision, then the court would have to rule on this (see also para. 8.1

above). If a court rules that the extra-judicial declaration is validly given (i.e. the requirements for such a declaration have been met), then it will have effect as of the date of the declaration.

8.5 Would a binding expert determination be subject to review on the merits by the law courts on your jurisdiction?

No, if the binding expert determination is validly given, the courts will not review the merits again.

This is different in case the determination is nullified. In that case, the court can give its decision on the matter, unless the parties' agreement determines differently.

9 Trends and developments

9.1 Please comment on any new trend or developments relating to ADR in construction in your country.

Law on the Modernization of Arbitration

On 27 May 2014 the Law on the Modernization of Arbitration was passed. This law will enter into force on 1 January 2015. The most important changes are the following.

One of the changes is with respect to consumer protection. As also mentioned above, as of 1 January 2015 an arbitration clause in general conditions is deemed to be unreasonably onerous unless it allows the consumer a period of at least one month to opt for dispute resolution by the court having jurisdiction under the law. A contractor who concludes a contract with a consumer will have to take this into account.

Also with respect to site visits there are some changes. The new law introduces Article 1042a DCCP which allows an arbitrator to decide to hold a site visit. The arbitrator can decide to do so after receiving a request by one of the parties, or on its own authority.

Furthermore, another important change is in respect to the arbitral award. Under the current Article 1058 DCCP the original of the final or partial arbitral award is deposited with the Registry of the District Court within the district where the place of arbitration is located. With the depositing, the mandate of the arbitral tribunal ends. The date of the depositing is also of importance in relation to the setting aside of the award. The possibility of filing a setting aside procedure end after 3 months following the date of the depositing.

The Article 1058 DCCP allows the parties to waive the possibility of depositing the arbitral award. In this case, the arbitral tribunal's mandate ends on the date of sending the arbitral award to the parties.

Another change is in relation to the setting aside of the arbitral award. Under the current legislation, it is the district court that decides on a claim for setting aside the award. As of 1 January 2015 it will be the court of appeals that decides on setting aside claims (Article 1064a DCCP). The court of appeals has the right to refer the case back to the arbitral tribunal to allow the arbitral tribunal to reopen the arbitration to deal with the issue that is the ground for annulment, or to take any another measure that it deems appropriate (Article 1065a DCCP). There is no remedy available against the decision to refer the case back to the arbitral tribunal.

Furthermore, the only remedy against a decision by the court of appeals is to appeal to the Supreme Court. The parties can agree to waive the right to appeal to the Supreme Court (Article 1064a DCCP).

The new law also anticipates on the modernization of litigation. It allows for the possibility to have the arbitration procedure take place in an electronic manner (Article 1072d DCCP). This allows for the electronic filing through e-mail of statements and other documents, but also to have electronic hearings. Furthermore, it also allows for arbitral awards that are issued digitally and signed by a digital signature.

<u>New NAI Arbitration Rules</u>

On 1 January 2015 the NAI issued a new set of Arbitration Rules which contains some significant changes to the current rules.

10 Other Important Issues

10.1 Please comment on any other important topics affecting ADR in construction in your jurisdiction.

Since 1 September 2013 the Arbitration Council for the Construction Industry has introduced a new service, the Advisory Board (*Advies Raad*). The purpose of the Advisory Board is similar to a DAB. The Advisory Board is appointed at the start of a project by the parties and consists in principle of three members, one appointed by the contractor, another by the owner, and the third member chosen by the two appointed members. The third member is the chairman of the Advisory Board and is a member of the Arbitration Council (see also above).

The Advisory Board's task is to follow the project and function as a sounding board during the project. It can provide the parties advice on its own initiative, mediate and if necessary deal with upcoming disputes. The Advisory Board decides disputes as a (conditional) binding advisor. In case the parties disagree with the (conditional) binding advice, they can file for a fast track arbitration in accordance with article 14 of the Rules of Arbitration of the Arbitration Council.