

Kluwer Arbitration Blog

The Future of International Arbitration: The Road to Greener Arbitration and Reflections on the upcoming 2022 NAI Arbitration Rules and Recently Revised Arbitration Rules

Georgios Fasfalis, Bo Ra Hoebeke (Linklaters LLP) · Wednesday, October 6th, 2021

On 15 September 2021, the Netherlands Arbitration Institute (NAI) and Young NAI organized a webinar that focused on the upcoming 2022 NAI Arbitration Rules and also covered other developments related to green arbitration, transparency, diversity and efficiency in international arbitration. Allen & Overy hosted the webinar, with [Marieke van Hooijdonk](#) opening the event.

The 2022 NAI Arbitration Rules

The webinar commenced with a presentation on the forthcoming 2022 NAI Arbitration Rules by [Gerard Meijer](#) (Chair of the NAI) and [Camilla Perera-de Wit](#) (Secretary General of the NAI). Key features covered included:

- The creation of a Court of Arbitration at the NAI, alongside the NAI's existing bodies. The idea is that the NAI Court would perform the tasks that are presently assigned to the NAI Administrator. The advantage would be to have special external members in the Court, who could be involved where the NAI appoints an arbitrator, this in order to safeguard a widely supported, objective appointment process, in all respects (in terms of quality, conflicts, repeat appointments, diversity, etc.).
- Under Article 13 of the 2022 NAI Arbitration Rules, the mechanism for the default appointment of arbitrators – i.e., the appointment of an arbitrator if a party fails to appoint an arbitrator – will no longer use a list procedure, but be through direct appointment by the NAI.
- In relation to challenges to arbitrators, the NAI intends to introduce a fee for the challenging party and to facilitate the challenges against members of the Challenge Committee. The NAI also intends to sanction abuse of rights in relation to (repeat) challenges. Lastly, where a challenge to an arbitrator is upheld, the NAI will provide a determination as to what should happen to that arbitrator's fees.
- Opt-out expedited rules, which will apply if the amount in dispute does not exceed EUR 2 million. The expedited rules will provide for the appointment of a sole arbitrator through the list procedure, one round of written submissions and a single virtual hearing. Awards will have to be rendered within 5-6 months after the date of the case management conference (CMC).
- Although virtual hearings were already possible under Article 21(10) of the 2015 NAI Arbitration Rules, the 2022 NAI Arbitration Rules will confirm the option in a more prominent

way. The NAI also intends to explicitly reference The Hague Video Conference and Virtual Hearing Guidelines 2020, jointly drafted by the NAI and the Dutch Arbitration Association.

- Article 44(5) of the 2022 NAI Arbitration Rules will provide a basis for the scrutiny of arbitral awards by the NAI.
- Parties who agree to arbitration with a place of arbitration in Amsterdam may designate the Netherlands Commercial Court as the appropriate court for any post-award – and sometimes even pre-award – court litigation, enabling the parties to conduct the proceedings in English. The NAI and the Netherlands Commercial Court have drafted a model clause for this . The NAI is also looking into the possibility of including in its Rules that, absent party agreement otherwise, Amsterdam will be the standard place of arbitration for arbitrations conducted in the English language. In such situations this would then allow the parties to fully agree to arbitration related litigation at the Netherlands Commercial Court, even after the arbitral award is rendered.
- In order to improve transparency, the NAI is currently looking to provide for the publication of decisions on challenges to arbitrators, alongside the publication of appointments of arbitrators in NAI arbitrations. Furthermore, the NAI is looking to provide for the disclosure of third party funding in arbitral proceedings.
- The NAI will include provisions on data protection and cybersecurity in the 2022 NAI Arbitration Rules.
- The 2015 NAI Arbitration Rules already established a move from hard-copy communication to electronic communication. Taking this further, the 2022 NAI Arbitration Rules will provide for the possibility of rendering e-awards, as permitted by the Dutch Arbitration Act. The NAI is also exploring fully incorporating the Green Protocols in the 2022 NAI Arbitration Rules.

Keynote speech: green arbitration

The panel discussion on the 2022 NAI Arbitration Rules was followed by a keynote speech by [Lucy Greenwood](#), arbitrator and initiator of the Campaign for Greener Arbitrations. Ms. Greenwood referred to climate change and set out what arbitration professionals can do to address it. According to Ms. Greenwood, arbitral institutions have key role in encouraging changes and promoting initiatives to facilitate greener arbitrations; such as allowing virtual hearings to limit (air) travel and providing for digital submissions. To assist in implementing these changes, the Campaign for Greener Arbitrations has drafted Green Protocols, which provide guidance on how stakeholders can adopt more environmentally sustainable behaviours.

2nd panel discussion

Ms. Greenwood's keynote was followed by a panel discussion, which included [Thomas Stouten](#) as moderator, [Bregje Korthals Altes-van Dijk](#), [Jacomijn van Haersolte-van Hof](#), [Vanessa Foncke](#) and [Sophia von Dewall](#).

The panel first discussed sustainability measures in arbitral proceedings. The panel agreed that arbitral institutions should take a leading role in relation to sustainability, while being mindful that a one size fits all-approach may not be appropriate (e.g., with regard to the use of virtual hearings or the use of platforms for the submission of documents).

The panel then discussed the introduction of a registry fee in the NAI Arbitration Rules with regard to the challenge of arbitrators. One of the speakers noted that this could be a good instrument to avoid frivolous challenges, but wondered whether a flat fee would be the most desirable approach. The same speaker argued that an hourly fee rate would be preferable. Another speaker stated that the NAI is yet to decide between a flat fee or an hourly rate. If the NAI chooses to establish a flat fee, it should be low enough so as to ensure that parties have proper access to challenge proceedings. The third speaker concurred with the first speaker, while the last speaker questioned if a registry fee would form a sufficient hurdle to prevent frivolous claims. In the last speaker's opinion, devising other mechanisms can also assist in deterring parties from abusing challenges.

The panel then discussed the change to the role of the list procedure in case of direct appointments by the NAI. One of the speakers emphasized that the proposed changes do not mean that the list procedure would disappear: parties would still be able to agree on the application of the list procedure. However, only where a party fails to appoint an arbitrator will the arbitrator be appointed directly by the NAI. That same speaker mentioned that the change will have several benefits. The direct appointment will enhance efficiency while the direct appointment of an arbitrator by the NAI Administrator will also contribute to increased diversity. Two of the other speakers largely concurred, with one agreeing that an NAI Court should be designated as the appointing body instead of the NAI Administrator. The last speaker advocated maintaining the current use of the list procedure and stated that the list procedure is a unique selling point of Dutch arbitration, which is gaining popularity internationally. Whilst said speaker recognized the difficulties that arise with regard to the application of the list procedure, that person urged not to underestimate the importance of it, even as a fallback appointment mechanism. All panel members agreed that the list procedure would need to be maintained, as also envisaged, in case of multi-party arbitration.

The panel also discussed the thresholds for the applicability of expedited rules. One of the speakers observed that CEPANI maintains a different threshold for expedited proceedings than the one suggested in the 2022 NAI Arbitration Rules. Another speaker confirmed this, while emphasizing that it can be difficult to establish criteria for the application of expedited proceedings. That person expressed doubt as to whether a monetary value is an appropriate threshold, as disputes of lower values are not necessarily less complex. An alternative could be to establish more flexible criteria. UNCITRAL circumvented these problems by making expedited proceedings opt-in, but the speaker argued that this may reduce the utility of these proceedings, as parties would have to opt-in to them in advance, concluding that a financial threshold would still be the best option. A third speaker concurred that establishing a threshold may be challenging and encouraged offering the possibility of expedited proceedings, but argued that flexibility is needed. That person asserted that the rules should also allow for a rejoinder as well as other available options that would be applied at the discretion of the arbitrators. Another speaker noted that establishing a threshold remains a process of trial and error. The threshold in the NAI proposal is based on its own experience and experiences of other arbitration institutes. Finally, the last speaker urged the NAI to consider the impact of the threshold and stated that, with the proposed threshold, the measure would likely affect a large number of cases and would impose a rather big difference from the procedural route that parties might expect when agreeing to arbitration under the NAI Rules.

The panel discussions ended with a summary of the discussions and the conclusion that, although the panel members made some critical remarks regarding some of the details of the proposed amendments to the NAI Arbitration Rules, the overall approach was rather positive.


To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).


Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



 Wolters Kluwer

The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

This entry was posted on Wednesday, October 6th, 2021 at 8:47 am and is filed under [Netherlands](#), [Netherlands Arbitration Institute](#), [Netherlands Commercial Court](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.