

# Kluwer Arbitration Blog

## NAI Annual General Meeting 2023: A Recap

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On 14 September 2023, the [Netherlands Arbitration Institute](#) (NAI) held its [Annual General Meeting](#) at the Peace Palace in The Hague, attracting over 160 participants from the Netherlands and beyond. This post provides an overview of the event's highlights.

### Welcoming Remarks

The General Meeting started with [Prof. Gerard Meijer](#), (President of the NAI) welcoming the participants at the Peace Palace. Prof. Meijer revealed the launch of the new [NAI website](#). He also highlighted the NAI's latest accomplishments, including the fact that the NAI and Thompson Reuters are preparing a state-of-the-art online arbitration platform, which will shortly be made publicly available. Prof. Meijer was also proud to share that the NAI statistics show a (significant) increase in female arbitrators acting in NAI arbitration proceedings:

- 31% appointed female arbitrators in 2022 compared to 18% in 2021 for party/co-arbitrator appointed arbitrators;
- 39% appointed female arbitrators in 2022 compared to 20% in 2021 for appointed arbitrators via the list procedure; and
- 53% appointed female arbitrators in 2022 compared to 29% in 2021 for NAI appointed arbitrators.

Further to that, Prof. Meijer provided an update on the new NAI rules ([recently discussed on the Blog](#)). The latest (yet to be published) revisions, include inter alia:

- a focus on cost-efficiency by introducing (i) an early determination possibility, and (ii) expedited arbitration proceedings. The former is designed to address issues promptly before they escalate in complexity and costs, and the latter allows the parties to obtain an award within six months while safeguarding the respondent's position;
- introduction of a Midstream Conference that will, in principle, be held after a first exchange of written statements by the parties. It offers the parties an opportunity to discuss the case progress, identify prevalent issues, and streamline the proceedings.

These revisions are aimed at attracting more disputes to the Netherlands in an ever increasingly competitive international commercial arbitration market.

## The New York Convention as Interpreted by the Dutch Supreme Court

After paying tribute to the founding father of the New York Convention (“NYC”), Prof. Pieter Sanders, [Prof. van den Berg](#) provided a thorough overview of how the Dutch Supreme Court has interpreted the NYC in several of its landmark decisions, particularly focusing on decisions concerning Articles I(1), III and V(1)(e) of the NYC, such as in [DIAG](#), [Yukos Capital/Rosneft](#), [Nelux](#) and [Maximov](#). He observed that the Dutch Supreme Court is “obsessed” with exceptions, creating a risk that they become a norm. He indicated that the interpretation of the NYC by the Dutch Supreme Court does not align with the main objective of the convention to ensure expeditious enforcement of arbitral awards.

Prof. van den Berg concluded that Prof. Pieter Sanders would “spin in his grave” if he were to learn about the Dutch Supreme Court’s practice, as it goes against the philosophy of the uniform application of the Convention.

## ChatGPT, Smoking Guns, Opera Lovers and Other Ethical Dilemmas in International Arbitration

[Tom Claassens](#) opened the first panel discussion around ethics in arbitration with a thought-provoking quote by Aldo Leopold: *“Ethical behavior is doing the right thing when no one else is watching – even when doing the wrong thing is legal”*.

The panel, which included [Prof. Pietro Ortolani](#), [Prof. Catharine Titi](#) and [Otto L.O. de Witt Wijnen](#) explored several ethical dilemmas. The first regarded the question of whether it is ethical for an arbitrator to use ChatGPT to summarize the parties’ submissions and procedural orders when preparing an arbitral award.

One speaker submitted that uploading the parties’ submissions and other information on ChatGPT would involve sharing information with a third party, which gives rise to various confidentiality and data protection issues. Another speaker pointed out that confidentiality is constantly under threat, irrespective of the introduction of new technological developments. In the digital age there are no secrets, and everything can be hacked, listened in, which is a far greater concern.

The panel then discussed a dilemma in the context of document production. In this scenario, a firm comes across a ‘smoking gun’ type of document that surfaces as an internal memo that could potentially kill the client’s case if produced. The firm explains to the client that the document must be submitted, but the client, that is one of the firm’s top three in terms of turnover, disagrees and says “No way, it’s just an internal memorandum, so we’ll take our chances.” What to do?

The majority of the audience agreed that they would withdraw from the case. One panelist drew attention to the [IBA Rules on the Taking of Evidence in International Arbitration](#), emphasizing the technical aspect of the situation rather than the ethical dimension. Article 9 of these rules provides for exceptions in case of sensitive information. The provision was inspired by the predecessor to the [Open Government Act](#) (“WOO”), that contained an excellent exception to the obligation of disclosure, including the introduction of a mechanism involving a third party to assess the legitimacy of invoking exceptions for sensitive documents, rather than the arbitral tribunal.

Another dilemma that was discussed involved the following scenario: a lawyer involved in an arbitration seizes the opportunity to attend a captivating opera performance and encounters one of the arbitrators during the opera's first intermission, leading to a brief conversation unrelated to the case. The next morning the hearing resumes without the opera rendezvous being brought up by anybody.

The dilemma opened the door to a broader discussion about ethical considerations and the arbitrator's duty of disclosure. Most panelists and audience members agreed that a brief encounter at the opera did not raise ethical concerns.

### ***Quo Vadis Energy Disputes?***

The next panel included an introduction by [Barbara Benzoni](#) (ENI), followed by a discussion on energy disputes and arbitration moderated by [Jeroen Ouwehand](#) and [Marie Stoyanov](#).

An audience member indicated that challenges arise for arbitration on the aftermath of the *Achmea* decision of the Court of Justice of the European Union ("CJEU") and that the coordinated withdrawal of EU member states from the Energy Charter Treaty ("ECT") complicates the landscape even further. Questions were raised around how the arbitration community should deal with the risk of disappearance of intra-EU investment arbitration and how arbitral institutions, such as the NAI, should deal with that.

Against this background, the panel asked thought-provoking questions to the audience about whether we can achieve investment protection through commercial arbitration. This may happen, for example, on the basis of investment contracts with state owned entities. It was also suggested that the ECT is over, especially considering that the CJEU and the European Commission are very good at "legal acrobatics" which also may prevent investment protection through international commercial arbitration.

Turning to investment treaty protection in the context of climate change, it was suggested to carve-out fossil fuel investment protection, which, however, would also require governments to step in. Arbitral tribunals should be open to a more dynamic interpretation of existing treaties in light of sustainability goals.

In conclusion, the discussion underscored the intricate challenges and uncertainties facing energy disputes and arbitration.

### **Discussion on Quantum and Damages**

The third panel, moderated by [Adriana San Roman](#), dealt with quantum and damages, identifying key aspects and challenges that both lawyers and experts face.

The panelists, [Elizabeth Oger Gross](#), [Juliette Fortin](#), and [Erik Bos](#), spoke about how quantum and damages in arbitration are multi-faceted concepts that require an understanding of the applicable law and the intricacies of each case. Furthermore, the panel acknowledged that lawyers and experts can face several challenges, including (i) identifying the causal link between the breach and

damage occurred, (ii) making use of different causality theories, (iii) establishing the relevant date of assessment for damages, and (iv) contractual limitations on damages.

The panel concluded that counsels continue to refine their strategies to ensure successful navigation of these complexities, by, for example cooperating with an expert.

## Differences of Perceptions in a Pre- And Post-Dispute World

The last panel of the day started with the keynote of [Judith Sawang](#) who suggested that although we live in interesting times, including, inter alia, the COVID-19 pandemic and the Russian invasion on Ukraine, the volume of M&A transactions has skyrocketed in the recent past with an approximately 60% increase on a year-on-year basis compared to 2020.

While the legal framework (and applicable disclosure obligations) are known from the outset, there is a difference in how M&A deals are perceived before the deal is concluded and in a post-M&A dispute reality. Trying to secure the deal, buyers and sellers play a cat-and-mouse game when it comes to information disclosure about the target. Conversely, when the deal goes sour, in the post-M&A scenario, the perception changes to very principled approaches regarding the duty to fair disclosure and the seller's role to diligently inform the buyer.

This narrative created a very interactive discussion moderated by [Werner Eyskens](#) and [Rogier Schellaars](#) about complexities surrounding post-M&A disputes. It was stressed that parties in arbitrations often engage in lengthy debates and produce evidence, including witness statements to decipher the contract's meaning under the *Haviltex* standard in contract interpretation under Dutch law, dating back to a Supreme Court [decision](#) rendered in 1981. The *Haviltex* standard entails that the interpretation of a contract comes down to the meaning that the parties could, in the given circumstances, reasonably attribute to the contractual provisions. This also included what they could reasonably expect from each other in that regard. It allows the court to consider the parties' intentions and expectations and go beyond a purely textual interpretation of the contract. This can involve pre-contractual interpretations, post-contractual communications, and the parties' behavior during the execution of the contract. With this perspective, it was considered whether excluding this standard could enhance efficiency or would the focus be too much on the text rather than the reality of the transaction. Such clauses could narrow down the parties' debate on the interpretation of a share purchase agreement and avoid lengthy arbitration proceedings.

It was further suggested that the newly introduced Midstream Conference provision of the NAI Rules could help in the context of post M&A disputes and multi-party arbitrations. It is, however, still an unresolved dilemma whether post M&A disputes are in fact suited for arbitration considering how often fraud is alleged. All in all, arbitration plays an increasingly vital role in the context of post-M&A disputes.

## NAI Will Celebrate its 75<sup>th</sup> Anniversary Next Year

NAI's Secretary General [Camilla Perera – De Wit](#) finally highlighted that the NAI will celebrate its 75<sup>th</sup> anniversary next year and cordially invited participants to join the celebrations during the

next NAI Annual General Meeting in 2024. Will we see you there?

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