

CONSTRUCTION 2023

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LOCAL MARKET

Foreign pursuit of the local market

- 1 | If a foreign designer or contractor wanted to set up an operation to pursue the local market, what are the key concerns they should consider before taking such a step?

The starting point for any foreign designer or contractor contemplating setting up an operation in the Netherlands to pursue the Dutch market would be to familiarise itself with Dutch laws, regulations and customs and to analyse the local prospects and the fiscal implications. This knowledge could be obtained by engaging local expertise – often, the principals for construction projects require proof of engagement in relation to knowledge of Dutch laws and regulations.

There is no specific supervision for foreign designers or contractors in the Netherlands. When engaging in design and construction activities, all relevant Dutch laws and regulations must be complied with.

For a local office, the general options are leasing and acquisition. Leasing or the acquisition of an existing office (brownfield investment) would be the most time-efficient approach. Leasing would likely provide the desired flexibility, as in the case of an exit the property can be re-delivered to the landlord in accordance with the arrangements made.

Staff can be hired from abroad and locally. Dutch employment law should be taken into account, such as – for (foreign) contractors in particular – the relevant collective bargaining agreement.

A foreign contractor or designer could opt for entering into a corporation with a local partner or for incorporating a Dutch branch. The corporation can be structured in multiple ways. This is often done by means of a general partnership, a jointly owned private limited liability company or contractual arrangements (eg, subcontracting). For either approach, the incorporation of a private limited liability company may be desired for practical, liability and other legal reasons. This can be arranged in a short time frame.

REGULATION AND COMPLIANCE

Licensing procedures

- 2 | Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

Dutch laws do not provide for specific licensing regulations for foreign designers and contractors operating in the Netherlands.

However, foreign contractors from another EU member state who bring their employees to the Netherlands must report this to the Dutch Social Insurance Bank (SVB) on the basis of the Dutch Act on Posted Workers (WagwEU). This reporting must be done digitally on the website of the SVB.

Also, contractors using employees from outside the European Economic Area (third-country nationals) on a construction project in the Netherlands must have work permits for these employees. This also applies to self-employed persons that are third-country nationals unless these self-employed persons can show a residence permit allowing them to work as a self-employed person in the Netherlands. In the absence of work permits, the Dutch Social Affairs and Employment Inspectorate may impose fines on the contractor (acting as employer) and on the principal of the contractor. Further, the contractor and the principal will be registered in a publicly available register as companies that have violated the Foreign Nationals (Employment) Act.

Competition

- 3 | Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

Dutch laws do not provide advantages to domestic contractors in competition with foreign contractors.

In the event of publicly tendered contracts by public entities, it is specifically prohibited to discriminate against contractors from other European Economic Area member states (as of 1 January 2021, the EEA no longer includes the United Kingdom). In practice, when organising limited tenders, local authorities have a tendency to favour regional contractors over other domestic or foreign contractors.

In many cases, domestic contractors do have practical advantages over foreign contractors. For example, domestic contractors tend to find it easier to fulfil criteria, such as having a local branch or meeting language requirements. In addition, foreign contractors from outside the European Union working on a construction project in the Netherlands must have work permits for their employees if they are third-country nationals.

Competition protections

- 4 | What legal protections exist to ensure fair and open competition to secure contracts with public entities, and to prevent bid rigging or other anticompetitive behaviour?

The EU and Dutch public procurement rules ensure transparent and non-discriminative tender procedures to compete for all contracts with public entities that exceed the applicable thresholds (as at April 2021: €5.35 million for works contracts), although certain specific exemptions apply. These tender procedures are open to all undertakings within the European Economic Area and all member states of the Government Procurement Agreement under the World Trade Organization. Although the United Kingdom is no longer subject to the EU public procurement rules, the EU and the United Kingdom agreed on public procurement rules in the Trade and Cooperation Agreement, in which the Government Procurement Agreement is declared applicable. Public entities may restrict access to contracts below the applicable thresholds if they have

valid reasons to do so; however, in practice, those contracts are often publicly tendered as well.

Bid rigging (which also includes 'cover pricing' (ie, submitting a bid with no intention of winning the tender in concert with another party bidding with the aim of winning)) is prohibited as a hardcore infringement of both the EU and the Dutch cartel prohibition. Since its inception, the Authority for Consumers and Markets (ACM) has imposed fines for bid rigging and cover pricing practices in, among others, the construction industry on many occasions. For example, on 16 June 2020, the ACM imposed a fine on two roofing contractors for impeding competition in a tender process (bid rigging). Parties that have been sanctioned for bid-rigging agreements by the ACM or another competition authority may also be excluded from participating in public tenders.

Bribery

- 5 | If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

The award of a contract that has been illegally obtained may lead to the contract being void or subject to annulment pursuant to Dutch law. The relevant consequence depends on the matter of illegality. If declared void or annulled, the contract will not be enforceable.

The main legislation relating to anti-bribery and anti-corruption offences is detailed in the Dutch Penal Code and includes rules regarding active and passive bribery of public officials (public bribery) and non-public officials (commercial bribery). Combating bribery and corruption is the task of the Public Prosecution Service and other authorities. Facilitation payments fall within the scope of public bribery under the Dutch Penal code and are, therefore, punishable under Dutch law.

There is a range of maximum sentences that can be imposed as a result of the different bribery and corruption offences. The maximum penalty that can be imposed on legal entities is €900,000 or 10 per cent of the annual turnover of the bribing entity.

Reporting bribery

- 6 | Under local law, must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

The Dutch Penal Code penalises bribery. Neither the Dutch Penal Code nor other Dutch laws include rules that oblige members (ie, individuals) of a project team to report bribery.

Political contributions

- 7 | Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

Making political contributions is not part of doing regular business in the Netherlands. Making these payments with the intention to gain – directly or indirectly – a business advantage could very easily constitute an act of bribery under the Dutch Penal Code.

Compliance

- 8 | Is a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) subject to the same anti-corruption and compliance rules as government employees?

According to Dutch case law, a very broad scope applies to the definition of public officials – the Dutch Supreme Court has ruled that a public official includes any person appointed by a public office to exercise some of the powers of the state or its agencies. This also applies to a person who is appointed to a position (with a public character) that the person cannot be denied to perform part of the government's tasks. Consequently, it is possible that a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) may be qualified as a 'public official' within the meaning of the anti-bribery provisions for government employees. However, this is not always the case and depends on the circumstances of the case.

Other international legal considerations

- 9 | Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

Work permits are required if third-country nationals work on a construction project in the Netherlands. If foreign workers are working in the Netherlands, certain employment law rules (eg, the Dutch Minimum Wage Act) apply immediately, as well as (part of) the collective bargaining agreement in the construction sector. If the foreign workers who are being employed by a contractor from another EU member state and posted to the Netherlands work for 12 months in the Netherlands, almost all Dutch employment legislation will apply to them. The period of 12 months can be extended to a maximum of 18 months.

CONTRACTS AND INSURANCE

Construction contracts

- 10 | What standard contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

In Dutch construction practice, standard form or model contracts and accompanying general terms and conditions have been developed. Which model contract or set of general terms and conditions is the best to use, depends on, for example, the type of project, its complexity and size, and the commissioning party and its need for innovation and involvement in realising the project. The three most commonly used contracts for consultancy services, construction works and integrated works are those based on the DNR 2011, the UAV 2012 and the UAV-GC 2005, respectively. The general terms and conditions may be deviated from, as is often the case in practice.

There is a considerable degree of freedom of contract concerning contracting parties and the content of contracts for design and construction works pursuant to Dutch law. The contracts can be made in any form; however, written contracts are preferred. Contracting parties have freedom in choosing the language of the contract (not necessarily Dutch).

Contracting parties are, in principle, free to agree on the law governing their construction contract. Usually, Dutch law is chosen as the governing law for projects being realised in the Netherlands. However, without a choice of forum the contract will be governed by the laws of the country in which the contractor is domiciled. Despite another

choice of law, Dutch public law will apply to construction projects realised in the Netherlands.

Contracting parties are, in principle, also free to agree whether a dispute will be resolved by the ordinary court or through alternative dispute resolution arrangements. If the parties have not agreed on a forum, the competent ordinary court will have jurisdiction.

Payment methods

11 | How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

In Dutch construction practice, generally, the contract price is paid to contractors and subcontractors in instalments per completed milestone or on a monthly basis. Instalments are usually payable in line with the progress of the work, and contractual procedures on inspection, approval and invoicing must be followed. Payment takes place by means of electronic payment.

Lenders to construction projects typically require that the owners-borrowers inject all of the required equity (ie, sponsor equity) before the credit line can be used for payment of instalments owed to the contractor. Lenders often pay instalments due directly to the contractor.

For payments in advance, principals will stipulate security from their contractors and transfer of title. Contractors do not generally accept payment arrangements on a 'pay when paid' or 'pay if paid' basis and will stipulate securities from their principal. However, there are no legal restrictions in this respect.

Vendors (suppliers) are usually paid by electronic payment on delivery at the latest. Workers are mostly paid electronically, typically once a month.

Contractual matrix of international projects

12 | What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

The contractual matrix for a construction project in the Netherlands depends on many aspects, such as the scale and complexity of the project, the expertise and the team of the owner, and the envisaged exit strategy.

Traditionally, owners or end-users contract directly with the designers (architect and other consultants) and the general contractor if the project concerns merely the construction of a building. The general contractor will then often engage more than one subcontractor and supplier. Alternatively, one general contractor can be contracted for both the design works and the construction works.

Investors often involve a project developer for the entire project if there is a development risk or a vacancy risk, or both, in addition to the construction risk. If the investor is already the owner or has purchased the property to be developed by means of forward funding, they will stipulate direct agreements or multiparty agreements to be entered into between the investor, the developer and the respective designers and general contractors in the event of the developer's insolvency.

PPP and PFI

13 | Is there a formal statutory and regulatory framework for PPP and PFI contracts?

There is no formal statutory regulatory framework for PPPs and PFIs in the Netherlands. This applies to contracts and the structure of the partnership.

Possible legal forms into which PPPs are legally cast include a jointly established entity, a private limited liability company or a limited partnership, within which the project is executed and both the public

and private parties have authority and contribute capital (financing), knowledge or property (land). A PPP can also be structured through a cooperation contract.

Joint ventures

14 | Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

Dutch laws do not provide for specific regulations pertaining to the structuring of consortia for construction projects. Whether the members of a consortium are jointly liable for the entire project or solely for their own contribution usually depends on the requirements of the relevant tender or the result of contract negotiations.

If contractors have jointly submitted a tender or have been contracted for the entire project, they will be jointly liable towards the principal (this may be different if specific arrangements have been made with the principal to that effect). The members of such a consortium will likely have allocated liabilities and responsibilities between themselves.

A consortium may also be structured by means of a legal entity, such as a private limited liability company. In principle, such legal entity will be the responsible party towards the principal.

The liabilities and responsibilities are often divided between the partners based on the expertise or other contributions they bring to the table or simply based on the works they must execute. As joint venture vehicles are often set up for a specific project and do not have endless resources, the principal will likely stipulate that the parent companies provide sufficient security.

Tort claims and indemnity

15 | Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

Under Dutch law, the parties to a construction contract may agree on a full indemnification of either one of them. However, as this would otherwise be deemed contrary to public order and morality, such indemnification does not apply where it concerns the indemnified party's wilful misconduct or deliberate recklessness. Furthermore, a party cannot invoke an indemnification – or any provision, for that matter – if the result of successfully invoking the indemnification would be unacceptable based on the standards of reasonableness and fairness. In construction practice, the contractor usually indemnifies the principal against claims from third parties in relation to the project.

Liability to third parties

16 | Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

In principle, a contractor is only obliged to perform its obligations towards its principal under the construction contract under Dutch law. However, there are quite a few exceptions to this general rule. For example, if a certain right towards the contractor is attached to the capacity of being the owner of a building, that right may transfer to a third party obtaining the ownership of the property. Usually, the contractor will provide warranties of which both the principal and its legal successors are beneficiaries. To a limited extent, a third party could claim damages based on a tortious act of the contractor.

Insurance

- 17 | To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards? Does the local law limit contractors' liability for damages?

Liability owing to the injury of workers, damage to property of third parties and damage due to environmental hazards

In Dutch construction practice, the insurance most commonly taken out is a construction all-risk (CAR) insurance. This insurance always provides all-risk coverage with respect to damage to the construction work (limited exclusions may apply).

In addition, coverage can be taken out for, among other things, liability of any of the parties involved in the project in relation to property damage (such as damage to adjacent buildings) or personal injury of third parties in connection with the construction works. Liability in relation to injury of workers (generally not qualified as third parties under this section of the CAR insurance) is generally not covered under CAR insurance.

A contractor also often takes out business liability insurance, which provides coverage for liability of the contractor for, and as a consequence of, property damage or personal injury (of workers or third parties). Damage to the property of third parties in connection with the construction works is often excluded in business liability insurance. Additional coverage can be taken out.

Damage to the work itself due to environmental hazards is ordinarily covered under the CAR insurance if it concerns material damage to the work that arose during the construction period. If coverage for the property of the principal is concluded as part of the CAR insurance, damage to property of the principal due to environmental hazards is covered if the environmental hazard causing damage is a sudden uncertain event and this event is not the direct result of a slow process. If the liability section of the CAR insurance is concluded, or if a separate (business liability) insurance applies with coverage for environmental hazards, coverage can exist for damage to third parties due to environmental hazards, but again only if the environmental hazard causing damage is a sudden uncertain event and this event is not the direct result of a slow process.

Delay damages

In general, no coverage for liability in connection with delay damages exists under CAR insurance. However, it is possible to take out coverage for delay damages that are the consequence of damage to either the work constructed or to the property of the principal owing to the construction works.

Business liability insurance generally provides coverage in connection with liability for damages as a consequence of property damage caused by the contractor. Liability of the contractor for delay damages of the principal owing to property damage is, therefore, covered as a starting point. However, an exclusion applies in most policies regarding damages as a consequence of damage to the work constructed; although, sometimes this exclusion is removed, especially in business liability policies taken out by contractors.

In addition, if the contractor is responsible for design and professional indemnity insurance that was taken out in that respect, liability for delay damages as a consequence of a design error is, mostly, covered.

If liability for delay damages is covered under any insurance, this coverage is generally limited to the liability that the contractor would have had towards the principal had no provision been included in the construction contract. In other words, liability as a consequence of liability-increasing clauses (such as a penalty clause) is generally excluded.

Dutch law does not limit contractors' liability for damages, other than general limitations regarding damages that can be claimed by any party (such as a sufficient causal link).

LABOUR AND CLOSURE OF OPERATIONS

Labour requirements

- 18 | Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

Dutch laws do not require a minimum amount of local labour to be employed on a particular construction project. If a construction contract is publicly tendered by a public entity, there may be a minimum requirement to use at least a certain percentage of disabled persons when performing the contract. A requirement in the tender documents to use a minimum amount of local labour is less common and may even contradict public procurement rules (ie, the freedom of establishment).

Local labour law

- 19 | If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

Employees can get an employment contract for a definite term pursuant to Dutch law (ie, the term of the project); this is the case even if it is not yet clear on what date exactly the project will be completed. Upon completion of the project, the employment contract terminates automatically. After termination of the employment contract, there are no legal obligations of the former employer, except the obligations following from the employment contract itself (payment of wages, transitional payment and pensions, etc) in relation to its duration.

Labour and human rights

- 20 | What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

Work permits are required for employees from outside the European Economic Area or Switzerland (third-country nationals) on a construction project in the Netherlands.

Employees who are 21 years or older are entitled to the statutory minimum wage under Dutch law (€1,725.00 gross per month as at 1 January 2022 and based on full-time employment).

Further, special provisions for foreign construction workers are included in the collective bargaining agreement for the construction sector. The collective labour agreement is declared generally binding most of the time – this means that it applies regardless of whether the employer or employee is a member of an employer's organisation or union.

Furthermore, the Dutch Health and Safety Act, the Dutch Act on Minimum Wages, the Dutch Working Hours Act and the Dutch Waadi Act are important pieces of legislation for construction workers. These provide regulations for on-site working conditions. The Waadi Act is important if a foreign contractor lends its workers to a Dutch recipient and the workers are going to work under the supervision of the recipient.

Close of operations

- 21 | If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

If a foreign contractor has incorporated a Dutch entity through which it performed its operations, this entity may be dissolved and liquidated once the contractor decides to close its operations and the Dutch company is no longer necessary.

The liquidation of the entity comprises two stages: the formal resolution to dissolve the entity and the winding up of its assets and liabilities.

The dissolution 'reduces' the legal existence of the company; it continues to exist only insofar as is required for the purpose of the liquidation of its assets and liabilities and it cannot transact any business other than what is necessary for the winding-up.

The winding-up consists of the settlement of the accounts and the realisation of the non-financial assets for the purpose of making a final distribution to the shareholders who are entitled by virtue of the articles of association. A two-month waiting period applies, during which any interested person may institute opposition to the published final accounting of the company.

Whether there will be termination payments assessed against a foreign contractor at the end of a project will also depend on the contractual agreements made in this regard.

There may also be fiscal consequences for the contractor to consider when closing the operations.

PAYMENT

Payment rights

22 | How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

First, contractors and subcontractors can secure payment by invoking their statutory right of retention. This effectively means that they do not have to provide their principal or third parties with access to the construction site until their due and payable claims have been paid in full. In addition, the contractor may suspend its work in the case of non-payment by the principal. Both rights can be duly exercised only if certain legal requirements have been met, and these rights have not been contractually waived. Further, a contractor may have stipulated security from its principal, such as a bank or company guarantee.

Lastly, the contractor can attach all the principal's assets, such as the land on which the project is realised, other real estate and bank accounts.

'Pay if paid' and 'pay when paid'

23 | Does local law prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner, thereby causing the subcontractor to bear the risk of the owner's non-payment or late payment?

Dutch law does not prohibit the use of 'pay when paid' or 'pay if paid' provisions. However, it is common practice that subcontractors are paid in line with the progress of the work.

Contracting with government entities

24 | Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

A Dutch government agency or entity does not have special status when concluding civil law contracts with contractors; however, specific rules on representation of the government apply, and arrangements with respect to public law competences are limited. The Dutch Civil Code provisions pertaining to contracts apply, as well as the procurement rules for tendering works. Sovereign immunity cannot be used as a defence against claims of a contractor under a contract based on Dutch law.

Statutory payment protection

25 | Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Dutch laws do not provide protection for unpaid contractors in the case of interruption or cancellation. Pursuant to the Dutch Civil Code, the principal is authorised to terminate the construction contract in whole or in part, and is, upon termination, obliged to pay the entire contract sum minus any savings resulting from the termination for the contractor. The UAV 2012, a set of general terms and conditions often used in Dutch construction practice, contains a similar provision, also in the case of a long-term interruption attributable to the principal. Often, construction contracts include further arrangements deviating from the Dutch Civil Code and UAV 2012.

FORCE MAJEURE

Force majeure and acts of God

26 | Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

Force majeure events are defined in the Dutch Civil Code as a failure in performance that cannot be attributed to the obligor; that will be the case if the failure is not owed to the obligor's fault pursuant to the law, a juridical act or generally accepted principles. As a result of force majeure, the contractor will not be in default and cannot be held liable for a delay in completing the project. However, the contractor is still obliged to perform, and the other party is entitled to terminate the contract based on non-performance.

The parties to a construction contract can limit or extend the circumstances that constitute force majeure. This is common practice in some construction sectors. The rules of mandatory law and the standards of reasonableness and fairness apply and may restrict these arrangements.

DISPUTES

Courts and tribunals

27 | Are there any specialised tribunals that are dedicated to resolving construction disputes?

The parties to a contract governed by Dutch law are free to agree that disputes will be resolved by the ordinary court or through alternative dispute resolution, such as mediation, a binding decision and arbitration. For example, the Arbitration Board for the Building Industry is a specialised arbitral tribunal that rules on construction-related cases. However, if the parties have not agreed on a forum, the competent ordinary court will have jurisdiction to settle the disputes.

Dispute review boards

28 | Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

The parties to a contract governed by Dutch law may agree on the appointment of experts for dispute review. Review by a DRB is often used in construction projects on behalf of the government, such as by the Dutch Directorate-General for Public Works and Water Management. In most cases, each party is entitled to appoint one expert, after which the two appointed experts will jointly appoint a third expert. The decision made by the experts is generally non-binding; however, often, the arrangements made in relation to the DRB provide that if the matter is not brought before the competent court within a certain period of time, the decision will become binding and, in principle, final.

Mediation

- 29 | Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

In Dutch construction practice, the parties generally try to negotiate and reach an amicable settlement without the interference of an ordinary court or an arbitral tribunal. Mediation has gained acceptance over the years but is not often used in Dutch construction practice. A mediator chosen by the parties, who does not need to have a legal background, guides the negotiations between the parties.

Confidentiality in mediation

- 30 | Are statements made in mediation confidential?

Arrangements on confidentiality are typically set out in the mediation contract signed by all parties before the mediation process. If the parties agree, they are contractually obliged to keep confidential all the information that becomes available during mediation and would not have become available otherwise. If this contract is deemed to be an 'evidence contract', it effectively excludes the information from being used as evidence in legal proceedings. In Dutch cases, mediators, unlike attorneys, do not have the right to refuse making a sworn witness statement in court.

Arbitration of private disputes

- 31 | What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Disputes in the Dutch construction sector are frequently resolved by arbitration. The Arbitration Board for the Building Industry specialises in construction disputes and is often appointed as the arbitral tribunal to resolve construction disputes. Most standard general terms and conditions used in the construction sector refer to the Arbitration Board as the competent tribunal. Disputes are also regularly resolved by the Netherlands Arbitration Institute. When it comes to dealing with construction matters, the Arbitration Board for the Building Industry is generally preferred over a court and the Netherlands Arbitration Institute because of its in-depth construction knowledge.

Governing law and arbitration providers

- 32 | If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

There are not many projects in Dutch construction practice in which the foreign contractors pursuing a contract for works insist upon international arbitration – if so, the parties will usually appoint the arbitral board at the International Chamber of Commerce. However, generally, the parties opt for having disputes resolved by the competent ordinary court or the Arbitration Board for the Building Industry, which specialises in construction matters.

Dispute resolution with government entities

- 33 | May government agencies participate in private arbitration and be bound by the arbitrators' award?

Dutch government agencies may participate in private arbitration. When a government agency enters into a construction contract that includes an arbitration agreement (or choice of court), the state will be deemed to have relinquished its claim to immunity from jurisdiction.

Arbitral award

- 34 | Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

The enforcement of an award by a foreign or international tribunal in the Netherlands requires an exequatur issued by the competent local courts. This concerns formal proceedings, and the court will grant this exequatur except in exceptional circumstances; for example, if the award was issued in conflict with public order or morality.

The Netherlands is party to several conventions regarding the recognition and enforcement of foreign arbitral awards. If a convention is applicable to an arbitral award, the grounds for rejection of the arbitral award follow from the relevant convention. If there is no convention applicable, the grounds for rejection are included in the Dutch Code of Civil Procedure.

Limitation periods

- 35 | Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

Dutch construction law provides for a number of statutory limitation and expiry periods. In addition, there are often contractual expiry periods to take into account. The main difference between the two is that a limitation period can be interrupted, after which a new period begins to run, whereas an expiry period cannot. One must plead prescription and expiry for the legal consequences to take effect.

For the performance of a contractual obligation, the general statutory limitation period of five years applies. The statutory limitation period for claims towards the contractor regarding hidden defects is two years starting from the principal's complaint in this respect. A 20-year limitation period applies to defects after completion. The lapsing of these periods will lead to prescription of the claim against the contractor.

Upon discovery of a defect, the principal must complain to the contractor promptly. If a complaint is not made within a reasonable time, the principal may no longer be entitled to hold the contractor to account. The definition of a timely complaint depends on the circumstances of the case; in any case, the reasonable time should prevent the contractor from finding itself in a more difficult legal position to defend itself against a claim from the principal.

Expiry periods are included in several sets of general terms and conditions often used for Dutch construction projects. Two common expiry periods start from completion or after the defects liability period, which are the five-year period for 'normal' hidden defects and the 10-year period if the work has collapsed or threatens to (partly) collapse or has or will likely become unsuitable for the purpose for which it is intended. Legal actions will not be admissible if instituted after the expiration of the relevant period.

ENVIRONMENTAL REGULATION

International environmental law

- 36 | Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

The Netherlands was a member of the United Nations at the time of the conference at which the Stockholm Declaration was established. More relevant in practice, however, is the applicability of the legislation of the European Union in the Netherlands. Specifically, with respect to preservation of environment and wildlife, the Habitats Directive (92/43/EEC) and

the Birds Directive (2009/147/EC) are relevant. These directives have been implemented in the Netherlands in the Nature Preservation Act.

Under the Dutch Nature Preservation Act, it is forbidden to carry out a project that has – in short – a detrimental effect on the conservation objectives of a Natura 2000 area. In addition, it is forbidden to disturb threatened species or their breeding or feeding places. Therefore, a construction project that has an effect on the conservation objectives of a Natura 2000 area or on threatened species may be prohibited unless a permit or exemption is obtained.

Further, construction projects must comply with all (other) relevant Dutch legislation and may require several permits. Most permits can be integrated in an integrated environmental permit (eg, for construction, zoning plan deviation and demolition). The legislation governing the construction sector is spread over many laws and regulations.

Local environmental responsibility

37 | What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

Under the Dutch legislation relating to environmental activities, the General Environmental Permitting Act (GEPA) and the Environmental Management Act, an environmental notification or an environmental permit is required for activities with a (substantial) environmental impact.

An environmental permit is generally required for an activity with a material environmental impact (such as large electrical installations and storage of large volumes of hazardous substances). An environmental permit can be obtained from the municipal executive in most cases and requires a permit application that covers the relevant environmental aspects (eg, an environmental impact assessment, soil surveys and noise assessments). In the environmental permit, the competent authority can include conditions relating to the operations of the activities (eg, the maximum amount of hazardous materials and the hours of operation of a noisy installation).

An environmental notification is obligatory when the environmental activities do not exceed the thresholds to obtain an environmental permit but do exceed the threshold to file a notification. A notification can be filed with the municipal authority. If the notification is filed, the general rules of the Activities Decree may apply. For example, noise hindrance rules apply if a noisy activity is notified, or soil protection rules apply if a soil-threatening activity is notified. For construction projects that have a minor environmental impact, such as warehouses, office buildings or similar objects, general rules can also apply with respect to energy efficiency rules.

In addition to the general environmental obligations, specific legislation relating to topics such as waste, water, chemicals, etc, may apply (depending on the operations and use of commodities and utilities).

Lastly, when discussing environmental legislation in the Netherlands, it should be noted that a new Environmental and Planning Act is currently expected to enter into effect from 1 January 2023 which will fully integrate all acts, decrees and regulations that apply to the physical environment – such as the Spatial Planning Act, the GEPA, the Crisis and Recovery Act, the Noise Abatement Act, the Soil Protection Act, the (new) Nature Conservation Act and the Water Act – into one all-encompassing Environmental and Planning Act. Although the Environmental and Planning Act will, at least initially, not change much of the material requirements described above, it is expected that over time such effects are to be expected *inter alia* because local governments will have more room to tailor (certain parts of) the environmental regulations and requirements to specific local circumstances. In any event, this (legislative) development is expected to remain a hotly debated topic in the coming years, if only because the law-making process and implementation have proven to be much more complicated than initially expected due to a range of difficulties (relating to the IT infrastructure required, among other factors).

CROSS-BORDER ISSUES

International treaties

38 | Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

The Netherlands is party to a large number of bilateral investment treaties (BITs) that may provide recourse to foreign investors in construction and infrastructure projects in addition to the Dutch courts and commercial arbitration under specific contractual provisions. The Netherlands has concluded more than 100 BITs, approximately 90 of which have been in force periodically.

The BITs to which the Netherlands is party are regarded as the 'gold standard'. These BITs generally take a strong protection approach by providing for:

- easy investor qualification by the simple test of incorporation;
- the full range of protective standards, including expropriation; and
- immediate, unconditional and unqualified access to investor–state dispute settlement.

At present, these BITs all contain a definition of 'investments' that corresponds to the definition of the 2004 Netherlands model BIT (or a slight variation). Pursuant to that definition, the term 'investments' means every kind of asset; for example, movable and immovable property as well as any other rights in rem in respect of every kind of asset.

Owing to developments in the European Union and at the Dutch national level (where a renegotiation of Dutch BITs has been announced, but with, for the moment, no concrete results), foreign investors may not or may no longer qualify for investment protection if they do not have sufficient business activities in their home state. It is recommended that both new and existing construction and infrastructure projects are regularly assessed on a case-by-case basis to establish that they meet and continue to meet all applicable requirements for investment protection.

Tax treaties

39 | Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

The Netherlands has concluded several double tax treaties with other countries. The content thereof may vary per treaty. In principle, a Dutch contractor is subject to Dutch tax on its worldwide profits. If a contractor is active in other countries, it needs to be assessed whether those activities result in a permanent establishment in the relevant country. If so, the right to tax is generally allocated to the country in which that permanent establishment is situated. Exceptions may apply for minor or preparatory activities, but, in principle, developing a real estate project in another country will result in a permanent establishment, as a result of which the results can be taxed in that other country. Likewise, foreign contractors that are active in the Netherlands may be subject to Dutch taxation in respect of those activities.

Currency controls

40 | Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

The nominal value of the shares in a Dutch private limited liability company may be in a foreign currency. This currency is recorded in the articles of association of the company, which are included in the

deed of incorporation. After the incorporation of the company, its articles of association can be amended by executing a notarial deed of amendment.

The functional currency is also important for reporting purposes. Normally, the currency of the economic environment in which the Dutch company operates is used for the presentation in the annual accounts. However, it is also possible that the annual accounts will be presented in a currency different to the functional currency if justified by the activity of the company or the international organisation of its group.

From a Dutch corporate income tax perspective, you can request to file your corporate income tax returns in a currency other than the euro, provided that certain conditions are met. This decision is, in principle, valid for 10 years.

Removal of revenues, profits and investment

41 | Are there any controls or laws that restrict removal of revenues, profits or investments from your jurisdiction?

A decision to distribute profits or reserves of a Dutch private limited liability company must be made by the general meeting of shareholders. This power can be limited in the articles of association or attributed to another corporate body, such as the management board or the supervisory board. Distributions can only be made if the equity capital exceeds the legal reserves and the reserves provided for in the articles of association.

Although the resolution to distribute is made by the general meeting of shareholders, the decision has no consequences if the management board does not give its approval and does not make the payment. The management board can only withhold its approval if it is aware, or reasonably ought to be aware, that the company will not be able to continue to pay its debts that have become due and payable (after this distribution is made).

There are several tax rules to take into account in this regard and there might be fiscal consequences.

UPDATE AND TRENDS

Emerging trends

42 | Are there any emerging trends or hot topics in construction regulation in your jurisdiction?

Trends in Dutch project development and construction practice include the redevelopment of existing buildings and the promotion of sustainability and innovation in laws and regulations. Sustainability is increasingly becoming more important because of higher market standards, energy transition and stricter EU law requirements pertaining to environmental, social and governance investing.

Construction projects face stricter requirements on quality assurance and are being challenged by nitrogen deposition rules and related regulations.

The demand for housing, logistics and data centres is high, while investors show an appetite for forward-funded turnkey projects. The current conflict in Ukraine, however, creates challenges for contractors and other stakeholders of construction projects, such as steep price increases and scarcity of building materials.

Further, recent and expected tax rules will likely lead to different ways of structuring projects, which will affect the number of entities used, financing and the moment of legal transfer.

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