

# **NAI RULES FOR THE APPOINTMENT OF A BINDING ADVISOR IN AD HOC BINDING ADVICE PROCEEDINGS**

## **SECTION ONE – GENERAL**

### **Article 1 - Definitions**

In these Rules, the following terms and expressions shall have the following meanings:

- (a) “administrator”: the director of the NAI as provided for in the NAI’s articles of association and, in the director’s absence, the member of the executive board designated by the executive board to that end, or an acting administrator appointed as such by the executive board;
- (b) “Executive Board”: the executive board of the NAI;
- (c) “binding advice agreement”: an agreement by which the parties, to end or prevent any uncertainty or dispute about what applies between them at law, mutually bind themselves to a determination thereof by a decision assigned to the binding advisor, which determination need not be based on contract and in which assignment the binding advisor may be authorised to supplement or amend the legal relationship by way of binding advice;
- (d) “binding advisor”: a binding advisor or a council of multiple binding advisors that has been composed in accordance with the provisions of these Rules;
- (e) “council”: multiple binding advisors that have been appointed in accordance with the provisions of these Rules;
- (f) “NAI”: the Netherlands Arbitration Institute (Stichting Nederlands Arbitrage Instituut);
- (g) “Rules”: the NAI Rules for the appointment of a binding advisor in ad hoc binding advice proceedings;
- (h) “documents”: procedural and other documents, including data on a data carrier as well as data presented by electronic means;
- (i) “applicant”: one or more parties to the binding advice proceedings that submit a request for appointment;
- (j) “chair”: the chair of the council appointed in accordance with Article 13 and, in the event one binding advisor is appointed, the binding advisor where permitted by the context of the provision; and
- (k) “other party”: the parties to the binding advice proceedings, with the exception of the applicant.

### **Article 2 - Scope**

These Rules shall apply if the parties have only agreed the appointment of a binding advisor, of binding advisors or of a council of binding advisors by the NAI or the Executive Board, the chairman or the administrator of the NAI without having referred to binding advice proceedings by or before the NAI or in accordance with the Rules of the NAI.

### **Article 3 - Communications**

1. Requests and communications shall be made or confirmed in writing in the manner provided for in this article.
2. Unless the sender is unable to do so, all requests, communications and other documents to the administrator and/or the NAI shall only be sent electronically by email to the address [secretariaat@nai-nl.org](mailto:secretariaat@nai-nl.org) or to any other address to be specified by the NAI.
3. The time at which a request or communication is received electronically by the administrator and/or the NAI shall be the time at which the request or the communication has reached a data processing system for which the NAI is responsible.
4. The NAI shall send a request or communication addressed to one or more addressees electronically by email if the addressee, by providing its email address, has communicated that it may be reached for these purposes by such means.
5. The time at which a request, communication or other document is sent electronically by the administrator and/or the NAI shall be the time at which the message has reached a data processing system for which the NAI is not responsible.

### **Article 4 - Time limits**

1. For the purposes of the Rules, a time limit shall commence on the day a request or communication is sent or, if not sent in electronic form as provided for in Article 3, on the day of receipt of a request or communication, unless explicitly provided otherwise in the Rules.
2. At the request of a party or at his own initiative, the administrator is authorised in special cases to extend or shorten the time limits stated in Articles 8(3), 13(1), 14 and 17(4).

### **Article 5 - Language**

1. If any request, communication or other document is written in a language in which the administrator is not proficient, the administrator may require the party making the request or the communication or submitting the document to provide a translation in a language, in a form and within a time limit as determined by the administrator.
2. The administrator may, at the request of a party or at his own initiative, require a party to submit a translation of the requests, communications and other documents it has submitted in a language in which another party is proficient, and in a form and within a time limit as determined by the administrator.

### **Article 6 - Confidentiality**

An appointment procedure under the Rules is confidential and all persons involved either directly or indirectly shall be bound to secrecy, except and insofar as disclosure ensues from the law or the parties' agreement.

## **SECTION TWO - REQUEST FOR APPOINTMENT**

### **Article 7 - Request for appointment**

1. A request for appointment shall be submitted to the administrator. The request shall be deemed to have been made on the day of receipt by the administrator.
2. The request for appointment shall contain the following particulars:

- (a) the name, the address, the place of residence, the telephone number, the email address and, as applicable, the VAT number of each of the parties;
- (b) the name, the address, the place of residence, the telephone number and the email address of the person or persons representing the applicant in the appointment procedure;
- (c) the email address at which the applicant may be reached for electronic communication for the duration of the appointment procedure;
- (d) a brief description of the uncertainty or the dispute;
- (e) a clear specification of the claim along with, if possible, a specification of the monetary interest of each of the claims;
- (f) a reference to the binding advice agreement and any other agreement(s) to which the binding advice proceedings relate, along with copies of the relevant agreements;
- (g) the method of appointment of the binding advisor or binding advisors, if the parties have agreed a method of appointment that deviates from Article 13;
- (h) the arrangements between the parties, or the applicant's preference, in respect of the number of binding advisors and the qualifications of the binding advisors; and
- (i) insofar as relevant to the appointment procedure, any other particulars concerning the binding advice proceedings.

3. The request for appointment shall be submitted in the manner provided for in Article 3(2). If the applicant is unable to do so, the request may be submitted in another manner. The administrator shall be authorised to suspend the handling of the request as long as this does not satisfy the requirements mentioned in paragraph 2. Suspension shall not prejudice the provisions in paragraph 1.

4. The administrator shall confirm receipt of the request to the applicant, stating the date of receipt.

#### **Article 8 - Response**

1. The administrator shall send a copy of the request for appointment to the other party, stating the date of receipt, and shall invite it to submit a written response.

2. The response shall contain the following particulars:

- (a) the name, the address, the place of residence, the telephone number, the email address and, as applicable, the VAT number of the other party;
- (b) the name, the address, the place of residence, the telephone number and the email address of the person or persons representing the other party in the appointment procedure;
- (c) the email address at which the other party may be reached for electronic communication for the duration of the appointment procedure;
- (d) a reply to the information referred to in Article 7(2)(e), (f), (g) and (h) and, insofar as applicable, the other party's preference in respect of the number of binding advisors and the qualifications of binding advisors;
- (e) insofar as applicable, the information regarding any claim of its own referred to in Article 7(2) (d), (e) and (f); and

(f) insofar as relevant to the appointment procedure, any other particulars concerning the binding advice proceedings.

3. The response shall be submitted within fourteen days of the invitation referred to in paragraph 1 in the manner provided for in Article 3(2), a copy of which shall be sent to the applicant at the same time. If it is not possible for the other party to send the response electronically, it may be submitted in another manner within this time limit, while sending a copy to the applicant at the same time. The administrator shall confirm receipt of the response to the parties.

#### **Article 9 - Purport of the request for appointment and the response**

The request for appointment and the response only serve to provide the administrator with information for the determination of the number of binding advisors to be appointed and/or for the appointment of the binding advisor(s) and do not prejudice the parties' right to present a statement of claim and a statement of defence, respectively, in the binding advice proceedings.

#### **Article 10 - Plea as to the non-existence of a binding advice agreement**

1. By cooperating in the appointment of the binding advisor(s) in the manner provided for in the Rules, the parties shall not forfeit the right to rely on the non-existence of a valid binding advice agreement.

2. A plea as to the non-existence of a valid binding advice agreement shall not prevent the NAI from conducting the appointment procedure as provided for in the Rules.

### **SECTION THREE - THE BINDING ADVISOR**

#### **Article 11 - The binding advisor**

1. Any natural person of legal capacity may be appointed as binding advisor. No person shall be precluded from appointment by reason of their nationality.

2. A binding advisor shall perform his mandate independently, impartially and to the best of his knowledge and ability.

3. A person approached to be engaged as a binding advisor who has reason to suspect that there could be justifiable doubts as to his impartiality or independence shall communicate the same in writing to the person who approached him, stating the suspected reason(s).

4. A person who intends to accept his mandate shall, prior to the confirmation of appointment as provided for in Article 15(1), sign a statement confirming his independence and impartiality, availability and acceptance of the mandate on condition of confirmation by the administrator and send this statement to the administrator. Any communication as referred to in paragraph 3 that has been sent shall be included in the statement. The administrator shall send a copy of the statement to the parties and, if multiple binding advisors are appointed, to the other binding advisors.

#### **Article 12 - Number of binding advisors**

If the parties have not agreed the number of binding advisors, or if the agreed method of determining that number is not carried out and the parties cannot reach agreement on the number, the administrator shall set the number at one or three, taking account of the parties' preference, the scope of the dispute, the complexity of the case and the parties' interest in efficient binding advice proceedings.

#### **Article 13 - List procedure**

1. As soon as possible after receipt of the response referred to in Article 8 or, failing this, after the time limit for submission of the response has expired, the administrator shall send to each of the parties an identical list with the names of individuals. This list shall contain at least three names in the event that one binding advisor is to be appointed, at least six names if two binding advisors are to be appointed and at least nine names, three of which being prospective chairs, in the event that three binding advisors are to be appointed. A party may delete from the list the names of persons against whom this party has strong objections, and may number the remaining names in its order of preference. If the administrator has not received a list back from a party within fourteen days, it shall be assumed that all of the persons named on the list are equally acceptable to that party as binding advisor.

2. With due observance of the preferences and/or objections expressed by the parties, the administrator shall invite persons named on the list to serve as binding advisors. If the returned lists show that there are an insufficient number of persons on those lists who are acceptable as binding advisor to each of the parties, or a person will not or cannot accept the administrator's invitation to serve as binding advisor or proves unable to serve as binding advisor for any other reasons and an insufficient number of persons remain on the returned lists that are acceptable as binding advisors to each of the parties, the administrator shall be authorised to directly appoint one or several other persons as binding advisor.

#### **Article 14 - Other method of appointment**

If the parties have agreed a method of appointment of the binding advisor that deviates from the list procedure provided for in Article 13, the appointment shall take place in the manner as agreed by the parties. If this method of appointment is not, or not entirely, performed within the time limit agreed by the parties or, in the absence of such time limit, within four weeks after the request for appointment was made, the appointment of the binding advisor shall take place in accordance with the list procedure provided for in Article 13.

#### **Article 15 - Confirmation of appointment**

1. The appointment of a binding advisor under the provisions of this section shall be confirmed by the administrator after receipt of the statement referred to in Article 11(4) unless, in the event of appointment in accordance with Article 14, the binding advisor, in the administrator's opinion, offers insufficient safeguards for sound binding advice proceedings.

2. If the administrator does not confirm an appointment, he shall appoint a different binding advisor or chair in accordance with the list procedure provided for in Article 13.

#### **Article 16 - End of the appointment procedure**

After confirmation of the appointment of the binding advisor or all members of the council, the administrator shall send the appointment file to the binding advisor or the council, thereby completing the handling of the request for appointment under the Rules.

### **SECTION FOUR – ADMINISTRATION COSTS**

#### **Article 17 - Administration costs**

1. Upon submitting the request for appointment, the applicant shall owe the NAI administration costs in accordance with the provisions of paragraph 2. The administrator shall notify the applicant of this amount as soon as possible after receipt of the request for appointment.

2. The administration costs shall be calculated on the basis of the total monetary interest of the claims, using the scale determined by the Executive Board as included in Appendix A to the Rules. The Executive

Board may make interim changes to this scale in accordance with the provisions of Article 21. In the event that the administration costs cannot be calculated on the basis of the scale, the administrator shall decide.

3. In the event that a counterclaim is submitted by the other party, it shall also be charged administration costs according to the provisions of paragraph 2. The administrator shall notify the other party of this amount as soon as possible after the response has been submitted.

4. The administrator shall see to the collection of the administration costs owed. If the administration costs owed by a party are not received by the administrator within the time limit set by the NAI, the administrator shall be authorised to suspend the handling of the request for appointment until the administration costs owed have been paid in full. If, after a second reminder from the administrator, the administration costs owed are not received by the NAI within fourteen days, the request for appointment shall be deemed to have been withdrawn.

## **SECTION FIVE – FINAL PROVISIONS**

### **Article 18 - Timely objection**

A party that has taken part in the appointment procedure shall make objection to the administrator without unreasonable delay, sending a copy thereof to the other party, as soon as it knows or reasonably should know, with regard to the appointment procedure provided for in the Rules, of any act contrary to, or failure to act in accordance with, any provision of the Rules or the binding advice agreement. If a party fails to do so, then the right to rely on this later in the binding advice proceedings or before the court shall be forfeited.

### **Article 19 - Contingencies**

In any cases not provided for in the Rules, action shall be taken in the spirit of the Rules.

### **Article 20 - Limitation of liability**

The NAI, its board members and personnel, the members of its Advisory & Supervisory Board, the binding advisor(s) and any other persons involved in the case by any or all of them shall not be liable either by contract or otherwise for any damage caused by their own or any other person's acts or omissions or caused by the use of any aids in or involving binding advice proceedings, all this unless and insofar as mandatory Dutch law precludes exoneration.

### **Article 21 - Amendment of the Rules**

1. The Executive Board may amend the Rules at any time. The amendments shall have no effect on appointment procedures already pending.

2. The Rules shall apply in the form they have at the time at which the request for appointment is made, unless the parties agreed otherwise.