NOTES ON THE GENERAL GOVERNMENT TERMS AND CONDITIONS FOR IT-CONTRACTS 2022 (ARBIT 2022)

These Explanatory Notes are public, but do not form part of the Contract. In the event of doubts about the meaning and/or interpretation of the ARBIT 2022 these Explanatory Notes may help to resolve the matter. They do not detract from what the parties have agreed in a specific case.

1. General introduction

1.1 Background and structure

Since the early 1990s model contracts drafted by the Ministry of the Interior and Kingdom Relations (known as the BiZa model contracts) have been used by central government when placing orders for IT services and purchasing IT products. Over the years, however, there was a growing need for more flexible models suited, above all, to ordinary purchases of IT products and services (i.e. small and medium-sized projects and the purchase of standard products and services, either by means of contract award procedures in the context of category management or otherwise) and thus capable of being used for the great variety of IT orders placed by central government. Other factors necessitating modernisation of various aspects of the BiZa models were developments in the IT field and new experience with IT contracts. In 2010, the General Government Terms and Conditions for IT Contracts (ARBIT) were drawn up for this reason. Following updates in 2014, 2016 and 2018, a number of changes have been made in the 2022 version. The provisions on information security, quality assurance and audits, among other subjects, have been expanded, and the conditions have been modified so that they are better suited to the conclusion of contracts for cloud services. A separate model contract has been added with a view to the procurement of Agile software development.

Subjects related to information technology are generally fairly complicated. This is also true of contractual arrangements in this field. Some legal knowledge is therefore essential in order to be able to understand and make proper use of the ARBIT and the accompanying model contract. The ARBIT are therefore primarily intended for staff with some knowledge and experience of this field.

The ARBIT have been drawn up as general terms and conditions consisting of five parts: one set of General Provisions and four sets of Special Provisions. General terms and conditions were opted for because they can be applied easily and quickly. As a consequence of the decision to opt for general terms and conditions, the entire ARBIT are always applicable regardless of the nature or scope of the Deliverable. Applicability of the ARBIT in their entirety is also desirable because it is not always clear in advance which Special Provisions should be declared applicable in addition to the General Provisions. Another advantage is that this provides a contractual framework in the event that contracts are concluded for other, different kinds of products and services during the term of the

Contract. When contracts for Deliverables are concluded through an EU contract award procedure, which will often be the case in practice, the ARBIT and the relevant Contract should be supplied to the tenderer at the earliest possible opportunity. This should preferably be done by sending them with the other tender documents at the very start of the contract award procedure. A simple reference in these documents to the ARBIT is generally not sufficient because a tenderer must be afforded a reasonable opportunity, before concluding the Contract (see article 233 (b) of Book 6 of the Civil Code), to familiarise itself with general terms and conditions such as the ARBIT.

Sending the ARBIT to market participants in good time also serves another interest. Some of the provisions of the ARBIT have consequences for the structure and course of the contract award procedures. This is true, for example, of the duty of inquiry and disclosure in article 4 and the possibility of inspection in article 38. Logically, therefore, parties interested in a contract should be able to familiarise themselves with the content of these provisions at the start of a contract award procedure. This is also why it is important that the ARBIT should be sent to the parties at the start of the procedure.

The ARBIT contain the minimum conditions under which central government generally concludes contracts for IT products and services. A model contract, which is an inseparable part of the ARBIT, is available for the purpose of laying down conditions that are specific to a particular order. Using the model contract is therefore strongly recommended; terms, themes and optional provisions have been carefully aligned. Partly for this reason, the Contract contains a standard provision to the effect that the Terms and Conditions (that is to say the entire set of General and Special Provisions) apply.

During the preparation of the ARBIT informative discussions on their structure and content were held with representatives of other government bodies and the private sector, including the trade association, the legal profession and insurers. In the interests of uniformity, they have also been drafted as far as possible in keeping with the structure, content and wording of the General Government Terms and Conditions for Public Service Contracts (ARVODI) and the General Government Purchasing Conditions (ARIV). These three sets of conditions are similar in structure but have different areas of applicability. The ARBIT are intended specifically for all kinds of IT contracts (goods and/or services). The ARVODI are suited to the provision of services where the IT aspect is not the main focus, such as surveys. The ARIV can be used where a straightforward general set of government terms and conditions is called for, such as for the supply of non-IT products. It is advisable to carefully weigh up in particular the choice between ARBIT or ARVODI (especially since the latter deals extensively with copyright to reports and the ARBIT, as regards intellectual property, focus on software licences and property rights).

1.2 Main developments affecting the ARBIT

A principle observed in drafting the ARBIT is that a good contract should take account of the interests of both parties. As a result of this search for the golden mean, some familiar clauses such as those concerning occupational error and most-favoured-nation treatment are no longer included

in the General Provisions of the ARBIT. Moreover, the ARBIT contain fewer penalty provisions than was often case in the past and in certain circumstances even the Contracting Authority may incur penalties. In addition, the provisions governing the transfer of risk on Delivery of Products are more reasonable.

An important theme of the ARBIT is that of 'Agreed Use', which will be considered at some length below. This use should play a leading role when contracts are concluded. As already noted above, the EU procurement rules, which have become much more important in recent years, have also been taken into account at various places in drafting the ARBIT. As previously observed, this approach has meant that some articles in the General Provisions refer back to the contract award phase and attach contractual consequences to errors made during the procedure.

Concepts such as Additional Work and Vital Deadline have acquired a more specific meaning in the ARBIT, and subjects such as duties of notification and disclosure, guarantees, insurances, discounts and the handling of personal data have been dealt with in more detail in the ARBIT than was customary hitherto. Similarly, the liability clause is more balanced than was usual until recently.

On the other hand, the ARBIT now put special emphasis on the obligation of IT providers to give careful consideration in advance to how the Contracting Authority is organised and what the Contracting Authority expects the Contract to produce and, if necessary, to temper these expectations. The aim is to prevent a situation in which the parties enter into a contract too lightly. For this purpose, the Contracting Authority too is now subject to extra requirements in respect of its duty of care, in particular when placing IT orders. The concept of Agreed Use is to be given form and content through the parties' compliance with the duties of inquiry and disclosure before conclusion of the Contract.

This approach has also been implemented through the provisions on Licences, Secondment and Maintenance. It has also been decided that, unlike the provision in the BiZa models, the delivery of System Software should no longer be deemed to be included in that of IT Products.

As a result of the report submitted to the President of the House of Representatives on 15 October 2014 by the Temporary ICT Committee, a 'get-out clause' has now been included. This creates more scope for the Contracting Authority to terminate IT contracts, provided that it provides reasonable compensation to the Counterparty.

The 2018 version of the ARBIT includes several changes connected with the General Data Protection Regulation (Regulation (EU) 2016/679).

Changes have been made to the 2022 version to make the conditions more suitable for the conclusion of contracts for cloud services. For example, a perpetual licence is no longer required as standard, and the provisions on audits, exit and information security have been supplemented or amended. Besides the changes to the ARBIT themselves, changes have also been made to the model contract with a view to the conclusion of contracts for cloud services.

ARBIT users requested that the ARBIT be amended to make them better suited to Agile projects involving the development of custom software (or for example the conclusion of contracts for complex software implementation or configuration). It was decided to draw up a new model contract, the 'ARBIT Agile model contract'.

This new model contract was drafted with the cooperation of Mr W.F.R. Rinzema of the law firm Ventoux Advocaten and drawing on the knowledge of the Agile Competence Center of Rijkswaterstaat.

The new model contract defines a number of new terms relating specifically to Agile development in line with the most commonly used reference framework: *The Scrum Guide The Definitive Guide to Scrum: The Rules of the Game* by Ken Schwaber and Jeff Sutherland. In other respects the model contract follows, as far as possible, the same approach as that taken in the standard ARBIT model contract.

1.3 Scope of the ARBIT

The ARBIT are mainly intended for the more commonplace IT purchases by central government rather than for large and special custom projects. Nonetheless, they can still serve as a basis for the establishment of a more specific contractual relationship with IT providers. Owing to the flexibility of the Contract, it can also often be used for innovative or specific IT products and services. In such a case a careful and detailed description of the new product or service concerned must be included in article 2 of the Contract. Thereafter the ARBIT, which have been drafted in such a way as to be as independent of the technology as possible, can in principle be declared applicable to the Contract. The ARBIT-Contract combination can thus provide a sound basis for IT contracting in the years ahead. If the ARBIT evaluation shows that certain themes nonetheless deserve more specific attention here, this will be done at a later stage.

1.4 Derogations

One of the aims of the ARBIT is to ensure greater uniformity in the IT contracts concluded between central government and the private sector. The basic principle is therefore that these terms and conditions and the relevant model contracts and agreements should be applied in full and unchanged. Only in exceptional circumstances can there be grounds for derogating from the ARBIT or declaring other terms and conditions to be applicable as well. Usually, however, it is preferable for the ARBIT to be declared applicable in addition to the other general terms and conditions concerned. Exceptional circumstances as referred to above occur, for example, when a Counterparty uses open source software to provide a Deliverable. The use of such software is usually governed by specific licence models, such as those drawn up by various open source communities (see the explanatory notes under 'Open source' on page 28). Open source software is defined as 'Standard Software' and there is therefore no objection to bringing the licence rights and the obligations into line with those

of the ARBIT. In so far as necessary, it is noted here that the ARBIT do not state a preference for open or closed source software. If the Contract derogates from the ARBIT, you would be well advised to consult the legal department of your organisation as the provisions of the Contract will then prevail over the provisions of the ARBIT in the event of a conflict between them. Moreover, it will also be necessary to check that the person agreeing the ARBIT derogations on behalf of the government body with the private provider is competent to do so (see the applicable provisions on mandates and/or the signing authority register).

In various cases specified in the Contract, articles may be adjusted within certain specified limits to take account of the specific circumstances of the case.

1.5 Central government policy objectives

Central government supports government bodies in introducing aspects of sustainability policy into their own operations (see the PIANOo website for more information). Specific agreements on sustainability must be included in the Contract.

Central government operates an open standards policy because open standards increase interoperability and supplier independence (see the PIANOo website and the website of the Dutch Standardisation Forum for more information). In its request for tenders, the Contracting Authority should state the open standards that apply. The request for tenders forms part of the Contract (see the model contract).

1.6 Status of these Explanatory Notes

These Explanatory Notes are public, but do not form part of the Contract. Where the meaning and/or interpretation of the ARBIT is in doubt, these Explanatory Notes may help to resolve the matter. However, they cannot detract from what the parties have agreed in a specific case.

1.7 Evaluation

It is essential for the ARBIT to be kept up to date and, where necessary, adjusted and expanded. This is why the ARBIT will be evaluated periodically, taking account of users' experiences. If you have questions or suggestions concerning the ARBIT, you may contact the secretariat of the Corporate Legal Advisory Committee (CBA, contact details on Rijksportaal) or the Legal Adviser of the Ministry of Justice and Security, who chairs the ARBIT working group that reports to the CBA.

1.8 Contractual status of government bodies

Government bodies can conclude contracts just like any other legal entity. Where central government performs juristic acts under private law, for example by purchasing IT products or services, the Minister is responsible to parliament. In view of this ministerial responsibility, extra care must be observed not only in procurement and in recording the agreements made but also in contract management. This also means that buyers must guard against giving unjustified undertakings to market participants and must ensure that they monitor correct observance of what parties have agreed.

2. Explanatory notes to individual articles of the ARBIT

The following notes deal only with articles that are considered by the drafters of the ARBIT to require further explanation.

GENERAL PROVISIONS

Article 1. Definitions

The terms defined in this article either occur only in the General Provisions or are of such importance to a proper understanding of the ARBIT as a whole that they have been included among the definitions in the General Provisions. The terms defined in the Special Provisions are mainly of importance to the matters regulated in these provisions. Where a defined term is used as a verb or with a lower-case initial letter it does not have the meaning given to it in the definition. For example, 'maintenance' or 'maintain' is a general term with no defined content. By contrast 'Maintenance' must be interpreted in the manner specified in the definitions.

Licence (article 1.10), Public Service Contract (article 1.19), Deliverable (article 1.27) and Product (article 1.28) are key concepts of the ARBIT and are related to one another in such a way that they have been directly defined in the General Provisions. Deliverable is the collective term for all goods and services that can be acquired. This term is further subdivided into the specific concepts of Licence, Product and Public Service Contract. The general term Counterparty (article 1.34) is subdivided in the ARBIT into Supplier and Contractor. For example, Products are delivered and Licences granted by a Supplier (article 1.13) and Public Service Contracts are performed by a Contractor (article 1.21). The terms Licence, Product and Public Service Contract are defined in more detail in the Special Provisions on Licences, the Special Provisions on Purchases and the Special Provisions on Public Service Contracts respectively.

Paragraph 3

Aflevering (delivery) can occur only in respect of 'corporeal objects susceptible of human control', as referred to in article 2 of Book 3 of the Civil Code. As the term '*aflevering*' cannot be used in respect of '*prestaties*' (deliverables) of a purely intellectual nature (i.e. services), the term '*oplevering'*

(Completion) (see article 1.22) is used instead. As in the case of Completion, Delivery must be followed by Acceptance. Acceptance marks the transfer of title to a Deliverable (article 7.2) and provides the requisite authority for payment (article 11.1).

Paragraph 5

The term Schedule is defined as an annexe to the Contract that forms part of it. The ARBIT do not require all the pages of the Schedules to be initialled. The Contracting Authority can include additional rules on this in the Contract or make oral agreements.

Paragraph 7

Documentation can be of essential importance, for example in relation to the use and maintenance of Software. For ease of use, it should preferably be written in Dutch. However, this is not made compulsory in the ARBIT. In the case of IT, Documentation is often available only in English. Insisting on a Dutch version would therefore cause extra expense. Whether a translation would be worth this expense must be assessed from case to case. The term installation is written here with a lower-case initial letter to indicate that it does not have the meaning given to it in the definitions (article 1.12). Here it denotes work to be carried out by the Contracting Authority itself.

Paragraph 8

A time limit is deemed to be a Vital Deadline only if expressly designated as such in the Contract. This therefore presupposes a deliberate choice. Such a choice may be prompted, for example, by the implementation of a project in phases (see article 55). One result of the designation of a time limit as a Vital Deadline is that the Contract can generally be cancelled forthwith if the time limit is exceeded. If a time limit is not designated as a Vital Deadline, the Contract can almost always be cancelled only after notice of default has been given and the Counterparty has been allowed a further reasonable period for performance. Only if this time limit is also exceeded can the Contract be cancelled. Sometimes parties agree that if a Vital Deadline is not met the sanction should be something other than cancellation of the Contract. This regularly occurs, for example in relation to Maintenance, in which case the sanction for failure to meet a Fatal Deadline is usually the provision of specific service credits or discounts.

Paragraph 9

Unlike Fault as defined in article 67.8, the faults referred to here are of such a serious nature as to prevent the Agreed Use.

Paragraph 10

The definition of Licence relates to both cloud applications and on-premises software. The Contracting Authority does not carry out any installation when it concludes a contract for a cloud application. The words ‘install and’ have therefore been placed in brackets.

Paragraph 11

The purpose of Implementation is to enable the organisation of the Contracting Authority to use a new Product or new Software. This involves a combination of technical and organisational measures.

Sometimes Implementation means the conversion of data from the old to the new system. The basic assumption of the ARBIT is that Implementation does not form part of the Deliverable unless there is a specific agreement to this effect in the Contract.

Paragraph 12
The definition of a Breach is based on the definition of this term in the GDPR (breach in relation to personal data).

The loss of (personal) data includes the restriction of access to part or all of this data as in the case of ransomware.

Paragraph 13
The definition of Information Security is the same as the definition of this term in the Civil Service Information Security Order 2007.

Paragraph 14
This paragraph deals with acts performed by the Counterparty. Unless agreed otherwise, Installation is limited to the actual connection of a Product or the actual setting up of the Software. Installation is therefore of much more limited scope than Implementation. Whether the Counterparty has a duty of Installation must be apparent from the provisions of the Contract.

Paragraph 19
Byte codes are also used in practice. Unlike a true machine code such as an Object Code, a byte code cannot be executed directly on a computer. It can be executed on a virtual machine or translated into a true machine code later.

Paragraph 20
The Special Provisions on Maintenance apply to work of this kind that is separately agreed. Maintenance may be preventive, corrective or innovative.

Paragraph 21
A Public Service Contract involves a Contract within the meaning of article 400 et seq. of Book 7 of the Civil Code (contract for services). In the ARBIT, Public Service Contract is a collective term. The ARBIT distinguish between the following types of Public Service Contracts: (a) Secondment (see article 60 et seq.), where work is performed under the direction and supervision of the Contracting Authority, and (b) other forms of Public Service Contract. In the latter case, the work is performed by the Contractor independently and on its own authority. The prime consideration is the end result to be achieved by the Contractor in performing this work. The provision of consultancy services and the development of Custom Software are both examples of Public Service Contracts.

Paragraph 22

The Contracting Authority is the party for whose benefit a Contract is concluded with the Counterparty. It is of the utmost importance that the Contract should clearly describe the identity of the Contracting Authority under both civil law and procurement law.

Paragraph 24

Unlike '*aflevering*' (Delivery) (see article 1.3), '*oplevering*' (Completion) relates to a non-corporeal (i.e. intellectual) Deliverable. '*Oplevering*' can take place, for example, in the form of the presentation of a report or final report. '*Oplevering*' may be preceded by an extensive test procedure carried out by the Contractor. It is then up to the Contracting Authority to assess the Deliverable, either by means of an acceptance test or otherwise. '*Oplevering*' – unlike '*aflevering*' – need not take place in a physical form. Software, for example, is often made available to the Contracting Authority electronically (on the Internet). As it is not always clear at what point the obligation of the Contracting Authority to make payment arises in the case of a (non-physical) '*oplevering*' it is important that this moment should always be clearly defined in the Contract.

Paragraph 25

As noted above, Agreed Use is one of the key terms in the ARBIT. The term is clearly linked to the 'conformity rules' in article 17 of Book 7 of the Civil Code, which provides that the thing delivered must be in conformity with the contract. If the Deliverable does not meet the requirements of the Agreed Use throughout the term of the Contract, there is deemed to be a Defect.

Paragraph 26

The term Contract also includes a framework agreement under which further Contracts are concluded or actual Public Service Contracts are awarded. Each Contract must contain a provision that the ARBIT are applicable to it.

Paragraph 28

The term assistants in this paragraph includes enterprises (legal persons) if they have been used by a party in the performance of the Contract.

Paragraph 30

Products are corporeal things as referred to in article 2 of Book 3 of the Civil Code. The term Product has its usual broad meaning. In this context it will generally refer to computer equipment. However, a climate control system to be installed for the use of computer equipment may also be a Product.

Paragraph 34

The Fee is the consideration paid by the Contracting Authority. It is the price agreed in advance excluding the VAT payable. The Contract must clearly specify whether or not elements such as travel and accommodation expenses are included in the Fee.

Paragraph 36

The term Counterparty is used in the ARBIT as a collective term for the other contracting party or parties and is therefore not used in the sense of an opposing party in a legal dispute.

Article 2. Contacts and escalation

Paragraph 2

Contacts may perform all acts (physical and juristic) that are necessary in the course of performing the Contract, such as signing receipts and test reports. However, changes to the Contract may be agreed only by the persons who have signed the contract or their legal successors and/or persons specifically authorised for this purpose.

Paragraph 3

It is advisable to ensure that disputes that arise during the implementation of the Contract can be de-escalated. This is why it is desirable to have a procedure whereby such disputes can be referred to a higher and sufficiently independent level within the Contracting Authority's own organisation before any external action is taken. Moreover, if people within the organisation who have not previously been involved in the project are consulted about a dispute this helps to prevent a situation in which the dispute drags on for a long time within the project, often unbeknown to the Contracting Authority. Experience shows that assessment of a dispute by people not involved in the project can often resolve some of the problems. Where their involvement is not successful, the matter can naturally still be referred to the courts or, if agreed, to another form of dispute resolution. Escalation procedures are often recorded in Service Level Agreements or in an 'agreements and procedures file'.

Article 3. Status of notifications

Minutes of meetings or other documents drawn up after the conclusion of the Contract often contain agreements that differ from the Contract. Under the ARBIT such divergent agreements are valid only if they have been made in writing by persons competent for this purpose or have at least been confirmed retrospectively by such persons. Contacts do not have this authority (see article 2.2). The expression 'in writing' can in some circumstances be taken to mean 'electronically'. The requirement under the ARBIT that notifications be made or confirmed in writing is in any case fulfilled if an electronic communication satisfies the relevant requirements in article 277a, Book 6 of the Civil Code. In addition, the scope for making agreements electronically can be expanded in the Contract. Specific agreements can be made in this regard on, for example, securing communication, addressing emails, sending confirmations that a message has been received and read, and using electronic signatures.

Article 4. Duty of inquiry and disclosure

Paragraph 1

Under this paragraph, the Counterparty is obliged to acquaint itself in good time with the organisation of the Contracting Authority and to form an impression of what the Contracting

Authority expects of the Deliverable and, where necessary, to temper this expectation. This obligation compels the Counterparty to adopt a proactive pre-contractual approach. The purpose must be to ensure that the Deliverable is in keeping with what the Contracting Authority is reasonably entitled to expect of it. This culminates in the concept of Agreed Use (see article 1.23).

As the inquiries to be made by the Counterparty for this purpose must take place mainly in the contract award phase, these duties of inquiry and disclosure also have implications for the structure and content of EU and other contract award procedures. The Contracting Authority must itself make a contribution by ensuring that market participants receive timely information about the Deliverable it wishes to receive and must accordingly discharge its own duty of care in the contract award phase. This requires clear communication with market participants in order to obviate as far as possible misunderstandings about the use intended by the Contracting Authority. The participants in a contract award procedure may therefore be expected to take advantage of this opportunity to put questions to the Contracting Authority.

Paragraph 2

Completing IT projects within the parameters set by the Contracting Authority often proves difficult in practice. This paragraph compels market participants who are interested in winning a contract, in accordance with the special or increased duty of care owed by IT suppliers that has been developed in case law, to form an opinion in advance on the extent to which the parameters specified by the Contracting Authority are realistic. For example, implementing IT contracts often proves to be much more expensive than originally envisaged by the Contracting Authority when placing the order. If the Contracting Authority has specified in advance the financial framework within which the Public Service Contract must be performed, the Counterparty must express an opinion on its feasibility. The basic principle, both generally and in the case of IT Deliverables, must be that the success of the project takes precedence and that Additional Work should be an exception rather than the rule.

Paragraph 3

It must be possible for the Counterparty to gauge the expectations of the Contracting Authority in respect of the Contract. This explains why the Contracting Authority is required here to provide information or additional information.

Article 5. Quality assurance, provision of information and audits

There are various reasons why the Contracting Authority may need assurance or additional assurance concerning compliance with the Contract and associated legislation.

The Counterparty can provide assurance on its own initiative in the context of quality assurance. Quality assurance is part of quality management systems (cf. ISO 9000) and is designed to give the customer the confidence that quality standards are being met.

The Contracting Authority can also take the initiative itself. To this end it may simply issue a request for information or opt for a weightier instrument by having an audit carried out. Since an audit

generally entails costs for and demands that efforts be made by both parties, it may be expected that the Contracting Authority will only have an audit carried out if it has a concrete reason to do so or if this has been contractually agreed.

The Contracting Authority may need an audit for external reasons such as a statutory obligation, or because the Contracting Authority, as a government organisation, is subject to forms of supervision that do not always have a statutory basis or because of a special duty of accountability. For example, an audit may be needed in order to comply with:

- a corrective measure ordered by the Data Protection Authority;
- a request by the Advisory Board on ICT Assessment in connection with an ICT Assessment Office advisory opinion;
- the obligation to inform the Houses of the States General under article 68 of the Constitution.

Paragraph 1
This paragraph underlines the importance of quality management and obliges the Counterparty to take quality assurance measures in this regard. The basic principle is that a high quality Deliverable is in the interests of both the Counterparty and the Contracting Authority, with quality expressly not limited to functional suitability (cf. ISO 25010).

Paragraph 2
Because of the costs and effort associated with an audit, the Contracting Authority should simply submit a request for information if the necessary assurance can also be obtained in that way.

Paragraph 3
Under paragraph 3, the Contracting Authority can perform an audit or arrange for a third party to perform an audit with which the Counterparty must cooperate. The term audit includes any examination of compliance with the Contract and associated legislation and can relate to a range of contractual and statutory obligations such as compliance with the GDPR, legislation on working conditions, or information security requirements.

An audit costs time and money and can require access to confidential commercial information. A decision to carry out an audit should therefore not be taken lightly. It is also advisable to consult the Counterparty beforehand regarding the content and design of the audit.

Paragraph 3 does not stop the parties to the Contract from making concrete agreements on, for example, the nature or number of audits to be carried out during the term of the contract.

Article 6. Delivery

Paragraphs 2 and 3
This is not about Acceptance but about first impressions and the requirement that the Contracting Authority make an effort that is reasonable in the circumstances. For example, a substantial delivery

from abroad will require closer inspection than a small delivery from elsewhere in the Netherlands. Taking receipt of goods after a first visual inspection does not prevent the Contracting Authority from deciding subsequently not to proceed with Acceptance. Even if a Product is refused on first inspection, the agreed delivery dates continue to apply.

Paragraph 4

The issue of a receipt is important in determining at what moment the risk in respect of the delivered Product passes to the Contracting Authority (see article 7.1).

Paragraph 5

This paragraph has been included on account of the greatly increased importance of environmental legislation.

Article 8. Intellectual property rights

Paragraph 1

This paragraph sets out the basic contractual principle governing whether or not intellectual property rights (IP rights) pass. All IP rights in Deliverables that are designed specifically for the Contracting Authority are transferred to the Contracting Authority as a matter of course. An important factor is that greater weight is given to such rights in the case of an IT Contract than in the case of similar Contracts. Furthermore it is often difficult for purchasers to determine in advance which specific IP rights will have to be transferred for the undisturbed use of the Deliverable. For the sake of clarity, the aforementioned standard transfer of IP rights applies only to Deliverables that are designed specifically for the Contracting Party and not to other Deliverables. As IP rights may well have a significant commercial value for the Counterparty, it usually requires a Fee (sometimes a large one) for their transfer. As central government in its capacity as the Contracting Authority, unlike market participants, does not derive any competitive advantage from acquiring intellectual property rights, the Contract may, if required, derogate from the chosen principle of an automatic and full transfer where the Deliverable is designed specifically for the Contracting Authority. The advantage to the Contracting Authority of paying a lower Fee if the IP rights are not transferred can then be weighed in each individual case against the disadvantages of such an arrangement. An example of such a disadvantage is that if the IP rights are not transferred the Contracting Authority will usually be reliant on the Counterparty for Maintenance of the Software since it has sole access to the Source Code.

In practice, it is sometimes not clear who owns the IP rights. This may be difficult to determine, for example where a Deliverable consists of a combination of Standard Software (the IP rights to which are hardly ever transferred) and Custom Software (the IP rights to which are, in principle, always transferred). This may mean that the Contracting Authority runs risks in connection with the IP rights. Sound agreements about this in the form of clear guarantees and indemnities from the Counterparty are therefore desirable.

For the sake of clarity, finally, it is noted that strictly speaking IP rights are formally vested in a 'work' as referred to in section 10 of the Copyright Act. The ARBIT suffices in this respect with the term Deliverable, which, as noted above, can consist of a Product to be delivered, a Public Service Contract to be performed, a Licence to be granted or a combination thereof. Article 8 therefore relates to Deliverables that can also be regarded as a 'work' in the aforementioned sense.

Paragraph 7

The Contracting Authority may cancel the Contract if it becomes involved in a dispute about IP rights to the Deliverable. This may be necessary, for example, where its operations are jeopardised. Cancellation of the Contract in question need not preclude any further involvement of the Contracting Authority in such a dispute. The Counterparty's duty of indemnification as referred to in article 8.5 will therefore continue to exist in full even after cancellation of the Contract (see article 34).

Article 9. Documentation

Paragraph 1

This article is important only if Documentation is available. If this is not the case and Documentation is also not strictly necessary in order to be able to use, manage or maintain the Deliverable, the main effect of placing an order or additional order for its production will be to generate extra costs. Moreover, the Counterparty anyway has an obligation under article 13 to provide support. Documentation may be made available in physical or digital form.

Article 11. Acceptance

Paragraph 1

A basic principle of the ARBIT is that a Contracting Authority need not pay for a Deliverable before accepting it. As the Contracting Authority has no guarantee that Defects that it could reasonably be expected to have discovered during the Acceptance Procedure will be repaired entirely free of charge (see article 12.3), it is important to organise the Acceptance Procedure carefully, particularly in the case of large Deliverables. Although Acceptance legitimates payment by the Contracting Authority, it should ensure that its payments are proportionate. For example, where Completion and Acceptance of a Deliverable are to take place in phases, it may pay the Counterparty in instalments. There may also be other reasons for making payment (or partial payment) before Acceptance. This might be the case, for example, if the Counterparty would otherwise have to provide full advance financing for a lengthy project. If the Contracting Authority agrees with the Counterparty in such cases to make payment or partial payment before Acceptance, it can request the Counterparty to provide a bank guarantee (see article 16).

Paragraph 2

The Contracting Authority can give notice of Acceptance by sending an explicit notification or by forwarding the report of a test on the basis of which the Deliverable has been approved. In the latter case the sending of the test report to the Counterparty is deemed to be a notification within the

meaning of this paragraph. Notification of Acceptance can naturally be given only after the contractual obligations in relation to the Deliverable have been performed. Where Software is downloaded, the performance of the contractual obligations occurs when the Contracting Authority obtains access to the Software and thus when it receives the authorisation code enabling it to download the Software.

Paragraph 4

Even without notification as referred to in article 11.2 of the ARBIT, it must become clear at some point whether or not the Deliverable is accepted. Nonetheless, tacit Acceptance must remain the exception, not least because this has an important bearing on when the obligation to make payment arises. A Contracting Authority can avoid tacit Acceptance by notifying the Counterparty in good time that it will not be possible to state within the prescribed period of 30 calendar days whether it accepts the Deliverable. Owing to the complexity of Deliverables as referred to in the ARBIT, this situation will regularly occur in practice. In such circumstances the Contracting Authority should specify a different period within which it can feasibly notify the Counterparty whether or not the Deliverable is accepted. The extended period must also be reasonable in relation to the scope and importance of the Deliverable. Subsequently, the Contracting Authority must notify the Counterparty before the expiry of the second period whether or not it accepts the Deliverable.

Paragraph 6

A Contracting Authority may accept a Deliverable even if it has Defects. However, it is never obliged to do so, even if the Defects are what were previously termed 'minor defects'. Where a Contracting Authority accepts a Deliverable despite the presence of Defects, it is important that it should record this properly. The Counterparty might otherwise claim that the right of the Contracting Authority to have the Defects repaired completely free of charge has lapsed because it should reasonably have discovered the Defects at the time of Acceptance, but failed to do so as referred to in article 12.3.

Article 12. Guarantees

It is generally assumed that where a Counterparty does not perform an obligation in relation to the guarantees, this will immediately constitute a failure on its part, thereby entitling the Contracting Authority to exercise all its contractual and statutory rights. For this purpose the failure need not be imputable to the Counterparty. Consequently, the Counterparty cannot generally escape liability by invoking force majeure.

Paragraph 3

This guarantee concerns the repair of Defects that occur or are discovered after Acceptance. It applies for a period of 12 months after Acceptance. Extra costs incurred in connection with the Counterparty's repair of Defects that the Contracting Authority should reasonably have discovered at the time of Acceptance will be borne by the Contracting Authority. This makes it all the more necessary for the Contracting Authority to ensure that the Acceptance Procedure is properly organised and implemented.

Paragraph 5

This guarantee applies only to the repair of Defects that have already been identified by the Contracting Authority during the Acceptance Procedure but have not prevented Acceptance (see also article 11.6 of the ARBIT).

Paragraph 7

It is often important for the Deliverable to be maintained. This is particularly true of Licences. The Contracting Authority must be able to obtain this Maintenance if desired. The ARBIT contain a guarantee that the Counterparty can maintain the Deliverable for up to three years after Acceptance in the manner specified in the Special Provisions. If the Contracting Authority wishes to have the Deliverable maintained, the provisions of article 13.3 will apply. The Contracting Authority may also claim maintenance for the next two years, although this need not be the same as the defined Maintenance. If the Contracting Authority wishes to avoid uncertainty about this, it should agree the Maintenance with the Counterparty (for a longer period) upon taking receipt of the Deliverable and provide for it to start at a later date.

Article 14. Invoicing, discounts and Additional Work

Paragraph 4

Despite the proposed proactive, pre-contractual approach on the basis of which the Counterparty is also required, during the stage when the Public Service Contract is awarded, to examine the feasibility of any financial framework made known by the Contracting Authority (see article 4.2), the necessity for Additional Work may become apparent as the project progresses, particularly where the Deliverable has been agreed on the basis of a fixed Fee. Contracts for Additional Work may be awarded only by way of exception, partly because of the related risks under procurement law (these arise because the scope of the work is changed after the contract is awarded, which is permitted only in exceptional cases under procurement law). The agreed terms and conditions also apply to Additional Work. The Contracting Authority should in any event be aware that changes to a Public Service Contract that is already being performed may have additional financial consequences.

Article 15. Payment and invoice audits

Paragraph 1

Payment is to be made within the shortest possible period and in any event within 30 days of receipt of the invoice or within 30 days of Acceptance if that date is later. Internal approval is usually necessary in order to make an invoice payable. The Contracting Authority should ensure that this approval, which can naturally relate only to the data specified on the invoice by the Counterparty, is obtained as quickly as possible. If the Contracting Authority rejects an invoice because the data specified on it by the Counterparty under the Contract are incorrect or incomplete, it should notify the Counterparty accordingly with due speed and request a new invoice. Approval relates only to the invoice and does not entail Acceptance. As regards Acceptance, reference should be made to article 11.

Paragraph 2

The Contracting Authority owes statutory interest on any amount outstanding after the elapse of the 30-day period, commencing on the day following the last day agreed for payment. The interest rate is that applicable to commercial transactions. If the Contracting Authority fails to pay an invoice within the time limit, it is also liable to pay compensation for the extrajudicial costs incurred by the Counterparty to secure payment of the invoice (collection costs). The right to statutory interest and compensation of costs arises by operation of law. Under article 96, paragraph 4 of Book 6 of the Dutch Civil Code, the compensation is at least €40. To be able to pay the compensation, the Contracting Authority must know how much it is. Article 15.2 therefore stipulates that the Counterparty itself must request compensation from the Contracting Authority and send a separate invoice.

Article 16. Advances

Paragraph 1

A basic principle of the ARBIT is that no payments should be made to the Counterparty before the Contracting Authority has accepted the Deliverable. This is reasonable since enterprises doing business with a central government body as the Contracting Authority run scarcely any bad debt risk. However, there may be reasons to pay an advance in special circumstances. The Contracting Authority must then try to gauge as accurately as possible how great is the risk that the Counterparty will fail to fulfil some or all of its contractual obligations. The Central Government Financial Management Order of the Minister of Finance applies. Under this Order the Contracting Authority is obliged in certain circumstances to demand the provision of security. Where an advance payment is higher than a certain amount set by the Minister of Finance, security should be demanded in the form of a bank guarantee. This is a form that is drawn up by a bank or other credit institution at the request and expense of the Counterparty and in which the bank undertakes, subject to conditions specified in the documents, to pay out a given maximum amount if a claim is submitted by the Contracting Authority. An example of a situation in which it might be reasonable to request a bank guarantee is where a relatively long period will elapse between the payment of an invoice by the Contracting Authority and the performance of the contractual obligations by the Counterparty. As the issuing of a bank guarantee may entail considerable costs for the Counterparty, the Contracting Authority should request such a guarantee only where strictly necessary. A model of a bank guarantee is attached as a schedule to the ARBIT Model Contract.

Article 17. Duty of secrecy

Paragraph 1

A duty of secrecy can be recorded in a written non-disclosure undertaking signed by the Counterparty. The duty of secrecy agreed between the parties is not absolute. Laws that can override the duty of secrecy include the Government Information (Public Access) Act (the Open Government Act from 1 May 2022), the General Data Protection Regulation and the Constitution.

The term supervisory authority is understood to include the Advisory Board on ICT Assessment, which assesses the ICT projects of central government and autonomous administrative authorities with a view to establishing their risks and likelihood of success.

Paragraph 4

If the Counterparty wishes the Contracting Authority to return specific data, the Contracting Authority can assess the desirability and proportionality of doing so. If the result of this assessment is positive, agreements on this matter can be added to the Contract including the circumstances in which the data should be returned.

Paragraph 5

This penalty is intended primarily as an additional incentive to comply with the duty of secrecy. As it is often difficult for buyers to determine what penalty will be sufficiently effective to ensure compliance with the duty of secrecy in a given case, it has been decided to impose a standard penalty of €50,000.

Article 18. Processing of data

Paragraph 1

Unlike the other paragraphs of this article, paragraph 1 does not concern just personal data but all data provided by the Contracting Authority and data generated on its instructions.

Paragraph 2

Paragraph 2 gives the parties a contractual basis for holding each other to account for compliance with statutory obligations and the written instructions of the controller, which are usually laid down in a separate data processing agreement.

Paragraph 3

If, in performing the Contract for the Contracting Authority, the Counterparty processes personal data, the law requires this to be regulated in a data processing agreement. As a rule, the data processing agreement will be signed at the same time as the Contract. If, however, cause to conclude a data processing agreement arises only during the term of the Contract, paragraph 3 gives the parties a contractual basis to call on one another to conclude such an agreement.

Paragraph 4

The processing of personal data can give rise to administrative sanctions by the supervisory authority or civil claims by third parties. Although such legal action is usually directed at only one of the two parties, it may also be in the interest of the other party to put forward a defence against it. Paragraph 4 obliges the parties in these circumstances to involve the other party in putting forward a defence.

Article 19. Security procedures and Information Security

Although digitalisation offers opportunities, cybersecurity threats also arise. Cybercrime, cyber espionage and cyber sabotage can disrupt systems and processes, which has a major impact on public health, security and the economy. These digital threats demand suitable measures in the field of information security.

Paragraph 6

The basic principle applied in the ARBIT is that information security benefits more from the setting of specific security requirements than the inclusion of a general ARBIT provision in which all responsibility for compliance with general legislation and/or security policy of the Contracting Authority is assigned to the Counterparty. By specifying, the Contracting Authority can define the scope and deal specifically with the responsibilities of the parties concerned, which also contributes to an efficient and effective purchasing process: the Counterparty has all the necessary information and can quickly submit a good bid.

In a contract award procedure, information security is ensured primarily by means of the inclusion in the programme of requirements of security requirements that are concrete and suited to the contract. Reference may be made in this regard to the Government Information Security Baseline (BIO). The BIO lays down the basic level of information security to be maintained within the public sector. Additional information security measures are regularly needed, however, which is the premise of this paragraph.

This paragraph also places a duty of care on the Counterparty. The Counterparty is obliged to ensure a level of Information Security that may be expected of a competent IT supplier acting reasonably, which ties in with article 4 of the ARBIT. There is no paragraph that specifically provides that Staff engaged by the Counterparty must work in accordance with the information security standards because this is already addressed more generally elsewhere in the ARBIT (articles 12 and 23).

Paragraph 7

A Breach may occur despite the implementation of appropriate information security measures. If this happens, the Counterparty must end the Breach as quickly as possible. The meaning of ‘as quickly as possible’ can be set down in concrete agreements such as resolution time limits. In addition, the Counterparty must notify the Contracting Authority immediately of the Breach as set out in more detail in the Contract. The following information must be provided at a minimum: the nature of the Breach and how it came about, and its actual or potential direct and indirect consequences.

If the Breach involves personal data, even if only in part, the Contracting Authority must be notified in accordance with the specific agreements in the data processing agreement.

Paragraph 8

The Counterparty must keep the Contracting Authority informed of the additional measures the Counterparty is taking to end the Breach and to avoid such a Breach in the future.

Paragraph 9

This refers, for example, to notifications sent to the Data Protection Authority and the competent authority as designated in the Network and Information Systems (Security) Act.

Article 21. Publicity

Prior consent is not necessary if the Counterparty wishes to use the Contract as a reference in a contract award procedure. In such cases, a candidate or tenderer can comply with a reference requirement only by referring to previous clients.

Article 22. Replacement of Counterparty's Staff

Paragraph 1

The Counterparty should replace its Staff only by way of exception and only with the consent of the Contracting Authority. As a rule such consent need not be forthcoming, particularly in cases where the Staff in question are considered by the Contracting Authority to be key figures (i.e. of crucial importance to the performance of the contractual obligations).

Paragraph 2

This paragraph concerns the replacement of Staff not only where they are regarded by the Contracting Authority as incompetent but also where an incompatibility of temperament exists, in other words where there is an issue about the character of the individual concerned. A request for replacement may also be made where a certificate of good conduct is not forthcoming.

Article 24. Assignment of rights and obligations

Paragraph 1

Where rights and obligations under the Contract are assigned, this results in the legal transfer of responsibility for correct performance of the Contract. The third party to whom contractual obligations are assigned by the Counterparty itself becomes the party responsible for performing the Contract (or the assigned part of the Contract) in relation to the Contracting Authority. This differs from the situation in the case of subcontracting, as regulated in article 23. This is why the consent of the Contracting Authority is always required. If it is not given, the assignment has no effect and the parties remain bound in full by the Contract.

Paragraph 2

For the sake of certainty, this paragraph specifically states that consent is not required to establish limited rights *in rem*. The prohibition of assignment specified in article 24.1 does not mean that the Counterparty does not have right of disposal. It is only prevented from performing certain legal acts, such as assigning a right or obligation under the Contract, without the Contracting Authority's consent. The establishment of a right to hold another's property in security does not constitute the assignment of a right or obligation. The inclusion of paragraph 2 ensures that the Terms and Conditions will not prevent a Counterparty from pledging its current and future rights to a credit institution as security for credit facilities.

Article 26. Liability

The rules on liability in the ARBIT have been drawn up with a view to the proportionality principle and having regard to the rules set out in the Proportionality Guide. Nevertheless, the liability rules may be disproportionate in a particular case because of:

- an imbalanced allocation of risks (rule 3.9A in the Proportionality Guide);
- the lack of an opportunity for tenderers to make suggestions for modifications (rule 3.9B in the Proportionality Guide).

Paragraphs 1, 2 and 3

Defects in Deliverables can have major consequences, particularly in the IT field, in the form of loss or damage, including consequential loss or damage. Often these consequences are hard to predict in advance. To ensure that the resulting risks are kept manageable for the private sector and hence insurable, it was decided not to apply the statutory liability rules, which basically entail unlimited liability. Instead, a rule has been introduced that distinguishes between personal injury, damage to property and the loss or damage resulting from this (i.e. indirect or consequential loss or damage) on the one hand and other loss or damage on the other. In the case of personal injury, damage to property and the resulting loss or damage (which are generally covered by corporate liability insurance), the provision is based on the amount customarily insured in the IT market, namely €1,250,000 per event (see article 29.2 of the ARBIT). Such loss or damage and the resulting loss or damage (e.g. continued payment of salary in the event of personal injury and the costs of replacing equipment in the case of damage to property) are therefore covered by the limitation of liability in paragraph 2.

Liability for other damage, which will generally consist in practice of purely pecuniary loss (i.e. loss that occurs separately and is not a consequence of previous personal injury or damage to property) and which is generally covered by professional indemnity insurance, is limited per event to an amount not exceeding four times the Fee. The maximums mentioned in the Contract can be adjusted if this is warranted by the nature of the Deliverable, the related risks and/or the size of the Fee. For example, different arrangements can be made to avoid a situation in which loss or damage due to breaches of information security is only partly eligible for reimbursement.
The former customary increase in liability for 'occupational errors' has been abandoned as almost all mistakes by a Counterparty in performing the Contract can be classified as occupational errors. If the concept of occupational error were to be maintained, the introduction of a financial cap on liability designed to ensure the manageability of liability risks would be rendered virtually meaningless from the outset. For the sake of clarity, it is noted that 'an event' as referred to in paragraphs 2 and 3 is not an 'occurrence' for insurance purposes. A relationship between events can, in principle, occur throughout the entire term of the Contract and even thereafter if the event occurs later. If the nature of the Contract or the nature and scope of the potential loss or damage suffered warrant this, the period during which claims can be said to be interrelated may be limited in the Contract.

Paragraph 4

The exception under d relates to loss or damage resulting from breach of legislation on the protection of personal data. The protection of natural persons during the processing of personal data is a fundamental right. Violation of this fundamental right can cause natural persons serious loss or damage.

Rapid technological advances and globalisation have recently given rise to new challenges with regard to the protection of personal data. There has been a marked increase in the extent to which personal data is collected and shared. A stronger protection regime was therefore introduced in 2018 in the form of the EU General Data Protection Regulation (GDPR).

Stronger protection for personal data has substantially increased the financial risks of processing personal data. Not only because the supervisory authority can impose far higher fines, but also because of the higher cost of reimbursing, preventing and limiting loss or damage suffered by the data subjects concerned.

In the ARBIT, the approach taken to apportioning liability for privacy breaches has been aligned with that taken in the GDPR. This amounts to apportioning liability in accordance with the 'polluter pays' principle. A controller is liable unless the processor has not complied with the obligations directed specifically to processors in the GDPR/Data Protection Directive for police and criminal justice authorities or the processor has acted outside or contrary to lawful instructions of the controller (usually set out in a data processing agreement).

Setting an upper limit on the liability of processors would be detrimental to the aim pursued in the GDPR of imposing effective, proportionate and dissuasive penalties on the unlawful processing of personal data. It is partly for this reason that paragraph 4 provides that limitations of liability set out in paragraphs 2 and 3 do not apply to loss or damage due to privacy breaches.

Finally, it is expressly provided for the sake of clarity that loss or damage includes fines imposed by the supervisory authority.

Article 27. Force majeure

Paragraph 3

For the record, this paragraph repeats the provisions of article 78 of Book 6 of the Civil Code.

Article 28. Defects in compatibility with other software or hardware

Compatibility issues sometimes arise where IT Products and Software produced by different manufacturers are used together. This article obliges the Counterparty, at the request of the Contracting Authority, to engage in consultations with the third parties concerned in order to identify the causes of the problems and, if possible, find a solution.

Article 29. Insurance

Paragraph 1

Although firms are under no statutory obligation to take out insurance, many do arrange corporate liability insurance (CLI) cover. In the IT industry many firms also have professional indemnity (PI) insurance. Other forms of insurance sometimes encountered in this industry are computer equipment, data and software construction policies and insurance to cover the specific risks of the internet and e-commerce. As a rule, it is hard to obtain cover for specific IT projects and any such insurance is expensive. The Counterparty should take out insurance that is appropriate and customary by prevailing standards. Both insurers and Nederland ICT (the trade association) are generally able to provide information about what constitutes 'appropriate and customary' insurance. It should be noted here that the mere fact that the Counterparty is insured does not necessarily mean that loss or damage suffered by the Contracting Authority will always be reimbursed either in full or otherwise. This depends in part on the amount still available for payment under the Counterparty's insurance policy at the time when the Contracting Authority suffers loss or damage, and also on the excess clause and any grounds for exclusion included in the insurance policy. The requirement that provisions are 'appropriate and customary' also applies to the excess clause and any grounds for exclusion. Special consideration should also be given to the fact that insurers are statutorily entitled to alter insurance provisions unilaterally and even with retroactive effect. This may pose problems for the Counterparty, whether temporarily or otherwise, in complying with the obligation in this paragraph to take out and maintain liability insurance that is appropriate and customary by prevailing standards. In such a case the Contracting Authority will have to make allowance for this in a reasonable manner, unless explicit agreements have been made on this subject in the Contract.

If the contract has been the subject of an EU award procedure, the requirements that an insurance policy must satisfy under this article must naturally correspond with the requirements made earlier during the award procedure, above all in the selection stage.

Finally, it should be noted that the provisions of this article concerning corporate liability insurance also apply to professional indemnity insurance (see article 52).

Paragraph 3

Requests to submit proof of payment of premiums or information about claims or pending claims for compensation may encounter objections, particularly from listed companies, since such information is price sensitive and may not therefore be disclosed. Insurers too sometimes refuse to hand over an insurance policy to third parties for fear that claims behaviour will then be geared to taking advantage of the terms of the policy. As a rule, however, insurers are prepared to issue certificates containing information about the nature and scope of the policies taken out by the Counterparty.

Finally, it should be noted that the provisions of this article also apply in full to Contracts concluded with (Dutch) subsidiaries of parent companies established abroad.

Article 30. Cancellation and notice of termination

Paragraph 1

The cancellation of a Contract gives rise to certain 'cancellation obligations' (article 271 of Book 6 of the Civil Code). Under these obligations the recipient of a Deliverable is obliged to return it. In the case of ICT contracts this will often not be possible in full. In such a case the party cancelling the Contract is obliged to pay a fee for the value of the Deliverable received (article 272 of Book 6 of the Civil Code). Partial cancellation of a Contract as referred to in article 270 of Book 6 of the Civil Code is also possible where the failure does not justify full cancellation or the Contracting Authority prefers to keep the Deliverable (or part of it).

As an aid to understanding article 30, the rules laid down in article 265 of Book 6 of the Civil Code are repeated in paragraph 1.

Paragraph 2

If one of the parties invokes force majeure, this may prompt the other party to cancel the Contract. Paragraph 2 limits this right to the extent that the Contract can only be cancelled once a period of 15 Working Days has elapsed. This period of 15 Working Days begins on the date on which the circumstance causing the force majeure arose.

Paragraph 3

The ARBIT do not require cancellation by registered letter since that would be an obstacle to the use of an electronic signature. If cancellation by registered letter is considered to be necessary in a particular case, this can be stipulated in the Contract. See the notes to article 3 for further explanation of what is meant by 'in writing'.

Suspension of payments, whether provisional or otherwise, is mainly intended to give firms the chance to make a restart and avoid liquidation. This should therefore be taken into account when considering whether to cancel the Contract in the event of suspension of payments.

As the Contract will often be the result of an EU contract award procedure, a provision has been added to the article allowing the Contracting Authority to cancel the Contract if it subsequently transpires that exclusion grounds apply to the Counterparty after all. Situations may also occur in which the Counterparty no longer meets the qualification criteria or minimum requirements originally set. This depends, among other things, on the content of the award procedure. This is why no consequences are attached to this in the ARBIT themselves. Where the occasion arises, specific provisions may be included for this purpose in the Contract sent with the procurement documents.

Paragraph 4

Under part 4.3.1 of the Public Procurement Act 2012, a contract may be set aside by a court of law in certain circumstances on the grounds of procurement law. A judgment to this effect would be given by a court in proceedings on the merits. The period that elapses between the moment when the Contracting Authority becomes aware of the ground specified for having the Contract set aside

(no later than the date of the writ of summons) and the date of judgment in the proceedings on the merits may be so long that the Contracting Authority has an interest in unilaterally terminating the contract early. This occurs above all in situations in which the Contracting Authority believes there is a very great likelihood that the court will set aside the Contract and the Contracting Authority can mitigate its loss or damage by terminating the contract early.

Paragraph 5

Where contracting takes place on the basis of ARBIT there is usually a single Contract and a single Counterparty. Where there is more than one Contract and the Counterparty fails to perform one of the Contracts or is temporarily or permanently unable to perform its obligations, it may be desirable to cancel not only the Contract in question but also one or more of the related Contracts with the Counterparty. In such a case there must be an essential connection between the Contracts concerned. This may be the case, for example, where the Contracting Authority has acquired Licences from the Counterparty by separate Contract in anticipation of the execution of an IT project. If the IT project subsequently fails to materialise, the Contracting Authority will generally have no further use of the Licences. As the consequences of the cancellation extend in such a case beyond the Contract that the Counterparty fails to perform, it is necessary for such a relationship between the Contracts to be clearly recorded in them.

Paragraph 6

The Contracting Authority may give notice terminating the Contract at any time. It does not need to give a reason. This does not alter the need for the written notice of termination to be capable of meeting the requirements of reasonableness and fairness. The ARBIT do not require notice terminating the Contract to be given by registered letter since that would be an obstacle to the use of an electronic signature. If notice of termination by means of a registered letter is considered to be necessary in a particular case, this can be stipulated in the Contract. See the notes to article 3 for further explanation of what is meant by 'in writing'.

The compensation that the Contracting Authority must pay the Counterparty for the termination of the Contract is set out in paragraphs 7, 8 and 9.

Paragraphs 7, 8 and 9

The compensation that the Contracting Authority must pay the Counterparty for the termination of the Contract varies depending on the nature of the Contract. The amount of compensation follows the system laid down by law. Compensation is not required in cases where the Contracting Authority cancels the contract due to non-performance.

For one-off or fixed-term Public Service Contracts where the obligation to pay the Fee depends on the performance of the Contract or the expiry of its term, the compensation provisions set out in article 411 of Book 7 of the Civil Code are followed. For other Contracts, the compensation provisions applicable to the termination of works contracts are followed.

When terminating a Contract of the latter type, the Contracting Authority will base the settling of accounts, among other things, on the obligations the Counterparty has already entered into in so far as they cannot be restricted. The Counterparty is expected, within reasonable limits, to take measures to restrict the Fee for the obligations entered into. The Counterparty may therefore be requested, for example, to make use of a contractual right to end a contract concluded with a third party without incurring costs.

For mixed Contracts, the compensation provisions of paragraphs 7 and 8 apply to relevant parts of the Contract.

Article 32. Exit clause

Paragraph 1

As a Contracting Authority is almost always dependent to some extent on the Counterparty, it cannot do without a Counterparty after the termination of the Contract. For example, the Contracting Authority will either itself have to perform work that it thought it had outsourced or give a new Counterparty the opportunity to perform the work. Both the Contracting Authority and the new Counterparty have an interest in ensuring that the performance of an IT Contract is not hampered by migration problems caused by inadequate cooperation by the former Counterparty. If desired, further provisions on exit arrangements can be laid down in the Contract.

Paragraph 2

Where a Contract terminates 'normally', the subsequent cooperation of the Counterparty is a service for which payment is made. If the Contract is terminated on account of an imputable failure, the cooperation will form part of a duty to mitigate damage and will not be paid for separately.

Paragraphs 4 and 5

Unlike paragraph 3 of this article (which is about physical objects), these paragraphs are about data. Specifically, they are about data that the Contracting Authority has provided or that has been generated on its instructions.

An example is a report commissioned by the Contracting Authority about an IT system. In this example, the system's data is the 'data provided […] by […] the Contracting Authority'. The report contains the results of data 'generated […] on the instructions of the Contracting Authority'.

The obligation to return data extends to all data provided by the Contracting Authority and data generated on the basis thereof on the instructions of the Contracting Authority, including personal data. The manner in which the data is to be returned can be set out in more detail in the Contract.

It is necessary that the Counterparty maintains the availability of the data for unimpeded access, including when the Contract has already been ended and the data has not yet been returned. This is safeguarded by paragraph 5.

If the data has not yet been returned once the Contract has ended, this may be viewed as an extension of the Contract (which may be unlawful under procurement law). It is therefore important that the retransition period is part of the term of the Contract.

Article 37. Disputes and applicable law

Paragraph 1

Forms of dispute resolution other than adjudication by the courts are becoming increasingly common. Examples include arbitration and mediation. Although the ARBIT are still based on the assumption that disputes are referred to the courts, they expressly leave open the possibility that parties may agree a different form of dispute resolution. An optional provision has been included in the Model Contract for this purpose. If the parties choose this provision they can refer any dispute to, for instance, specialised dispute resolution organisations such as the Foundation for the Settlement of Automation Disputes (SGOA) or the Netherlands Arbitration Institute. The parties may also agree at a later date not to refer a dispute to the ordinary courts.

Often the views of an IT expert will be needed for the assessment of IT disputes. Although an expert witness can be called to testify in ordinary court proceedings, another way of getting expert input is to opt for arbitration as a form of dispute resolution. Unlike ordinary court proceedings and arbitration, mediation is primarily aimed at revealing the individual motives of the parties and less at assessing the legal and technical aspects of the dispute. It should be noted that the ordinary courts can also advise parties to refer a matter to a mediator if they consider this appropriate in the circumstances.

Paragraph 2

In keeping with general practice in the case of standard terms and conditions of buyers, the provisions of the UN Convention on Contracts for the International Sales of Goods (CISG), which deal solely with the sale of movables, are excluded, together with other rules of private international law.

SPECIAL PROVISIONS ON PURCHASES

Article 38. Installation

This is one of the articles of the ARBIT that refer back to the stage preceding the conclusion of the Contract (see also, for example, article 4). This is because it is worthwhile inspecting the place of Installation only before the Product is delivered. Consideration must therefore be given to this obligation in the contract award stage. The special requirements which the Product’s surroundings must fulfil therefore determine in part whether such an inspection is necessary. If the Supplier decides not to make an inspection and it is later found that the place of Installation should have been modified to meet the requirements of the Product, the Supplier can be held accountable for this.

Article 39. Guarantees

The term 'new' includes parts that have been refurbished.

Article 40. Special duty to provide information

This obligation applies for three years after the conclusion of the Contract. Thereafter the parties are naturally free to continue exchanging information of this kind.

Article 41. Product modifications

Compulsory modifications are always carried out free of charge. This will generally concern modifications that are or may be connected with product liability of the Supplier as referred to in article 185 et seq. of Book 6 of the Civil Code.

For the record it should also be noted that, unlike the former position under the BiZa model contracts, Licences to operating programs, for example in hardware, must be acquired separately.

SPECIAL PROVISIONS ON LICENCES

General

Standard Software licences come in various forms, including such well-known examples as ordinary user, site and MIPS (million instructions per second) licences. In fact, these are contractual agreements about the forms of use that the software owner does or does not permit the user and for which an additional fee may or may not be charged. Moreover, the contractual provisions of these licences often differ from manufacturer to manufacturer. Until recently, for example, Microsoft alone had over 100 different forms of licence.

The principle adopted in the ARBIT is that they should simply record a number of conditions considered desirable when entering into licences for Standard Software, irrespective of the licence model presented by the Counterparty. This avoids the need to supplement or amend the ARBIT whenever existing licence models are changed. If you discover in a particular case that the ARBIT cannot be applied in full when acquiring Licences, you should contact the legal department of your organisation about any derogation from the provisions. Even in such cases, however, the basic principles of the ARBIT should be observed as far as possible.

Open source

In the case of open source software ('OSS'), unlike closed source software, the Source Code is released and the user may disclose and modify the Software. By contrast, only the copyright owner may do this in the case of closed source Software. OSS is issued under its own licence conditions, which typically provide that access to the Source Code is completely free. Many dozens of OSS

licences approved by the Open Source Initiative are now in existence, the best known being the GNU/GPL and BSD licences.

Various scenarios for the acquisition of OSS are conceivable. If OSS is downloaded (free of charge) from the internet and the applicable licence conditions are accepted, the ARBIT are not applicable. If the project is put out to tender and providers of both OSS and closed source software can tender, provision should be made for a level playing field. As OSS falls under the ARBIT definition of Standard Software, firms supplying OSS will be required to accept the general obligations of the ARBIT, for example concerning liability, indemnity and guarantees. As a rule, OSS licence conditions do not prevent this. The Counterparty should always clearly indicate what specific licences are applicable to what parts of the Software.

Another possibility is that an IT contract may be put out to tender in circumstances where the tenderers are simply asked to provide a solution to a problem described in the invitation to tender. Here too a level playing field must exist and a Counterparty wishing to use OSS in its solution must in any event accept the obligations referred to above**.**

Article 42. Additional definitions

Paragraph 1

Where reference is made in these Special Provisions to 'maintenance' (i.e. with a lower case initial letter), this refers only to acts that are strictly necessary for continuity in the use of Standard Software. The term does not include other more wide-ranging activities such as the release of New Versions. This may be the case, however, where the term maintenance is capitalised (article 68 et seq.).

It should be noted that when acquiring Licences Contracting Authorities are often contractually bound to purchase Maintenance too from the Counterparty.

Article 43. Nature and content of the Licence

A Licence is a personal right obtained by the Contracting Authority under a Contract. Various forms of licence exist in the market. An important part of such a Contract is the provision determining the scope of the Licence. Suppliers often greatly limit the scope of this right, which can create much uncertainty. In the ARBIT the scope of a Licence is determined above all by the Agreed Use (see article 1.23). In this way the Contracting Authority can check that it will indeed be able to use Standard Software as it intends. To be able to determine what the Agreed Use entails in a specific case, the parties are obliged to make a proper assessment beforehand of the use to which the Contracting Authority intends to put the Software. As the State of the Netherlands always acts as the formal contracting party when a Contract is concluded by central government bodies, it is important in determining the scope of the permitted use under the Licence to know the exact identity of the actual Contracting Authority/user. This is because the intended use basically determines what must ultimately be regarded as the Agreed Use and hence the permitted use of the Standard Software. In

drawing up the Specifications buyers would therefore be well advised to carefully check who will be the actual users of the Standard Software and for what purpose they wish to use it.

Paragraph 1

The basic rule is that a Licence is perpetual and irrevocable. Nonetheless, the Counterparty may cancel the Contract in the event of a failure by the Contracting Authority (for example where it fails to pay the Fee), in which case the resulting cancellation obligations (see article 30, paragraph 1 above) may then result in termination of the Licence. Moreover, it may be advisable in certain circumstances (e.g. where the software is to be used only for a short period) to acquire not a perpetual Licence but what is often a much cheaper, temporary Licence. In that case a different provision should be included in the Contract.

Paragraph 2

This paragraph contains some specific rights that are always deemed to be included in a Licence such as the right to make, save and regularly test copies for the purposes of disaster recovery. This includes the right to use such copies if a disaster does occur. As regards the right to use the Standard Software for the purposes of testing and development, development must be understood in the narrow sense of acts involving preparation for the first use of Standard Software.

Outsourcing is an example of the use by a third party of Standard Software to which the Licence has been previously acquired by the Contracting Authority. However, in such circumstances the software may be used by the service provider only for the benefit of the Contracting Authority's own operations. Nor may Software made available to that firm under the outsourcing arrangements be used for the benefit of third parties, including other government bodies. This would no longer be in keeping with the Agreed Use. The licensor may also require the service provider to sign a non-disclosure undertaking.

Paragraph 3

To ensure the continuity of its operational activities, the Contracting Authority may copy and install its Standard Software as often as it considers necessary for this purpose. It may therefore copy Software without infringing the Counterparty's intellectual property rights. The accompanying Contract should therefore carefully record what payment model (named user or concurrent user, site etc.), was agreed when the Licence was obtained, who is to administer the total number of Licences in circulation, how this is to be done and how the Contracting Authority should pay any additional fee to the Counterparty. The Contracting Authority should therefore be sure to ask the Counterparty in advance for a reasonable estimate of the total costs it can expect to incur in using the Standard Software.

Paragraph 4

It should be clear when the full Licence will start. By choosing the moment of Acceptance, the Contracting Authority can prevent a situation in which its prior use of the Software for installation and testing purposes is treated by the Counterparty as the exercise of the actual Licence. This would mean, after all, that the Standard Software had already been accepted by the Contracting Authority.

Paragraph 5

Under the guarantee in article 12, the Contracting Authority is entitled to have Defects repaired free of charge for a period of 12 months. It is basically for the Counterparty to decide how it wishes to implement the guarantee. If the Counterparty repairs Defects in Standard Software only by issuing Patches or Improved Versions, the Contracting Authority is entitled under this guarantee to receive and use them regardless of whether the parties have agreed Maintenance as well as the use of the Software.

Article 44. Guarantees

(a)

Protection measures of any kind whatever may never in any way prevent the Contracting Authority from making the Agreed Use of the Software.

(b)

Sometimes the Counterparty will not be the 'owner' of the software. In that case it issues a licence on behalf of the owner. In such circumstances, however, it should naturally be authorised to do so.

Article 45. Provision of an Installation Copy

Paragraph 1

More and more Standard Software is provided to Contracting Authorities not in a physical form but by access to a website from which it can be downloaded. The lawful acquisition of an Installation Copy on a physical data carrier was regarded by some as important in view of the applicability of the 'exhaustion doctrine' regulated in section 12b of the Copyright Act. Essentially this doctrine provides that if a person who lawfully acquires a copy of a work as referred to in the Copyright Act (which includes computer programs) transfers that copy to a third party, he does not infringe the copyright of the maker of the work. The acquisition of a physical copy is also said to be of importance to the applicability of the statutory licence scheme under section 45j of the Copyright Act. Owing to the use of the word copy, the position taken in the past was that both the exhaustion doctrine and the statutory licence scheme were applicable only if Software was made available not only online but also in a physical form (e.g. on a CD-ROM). A judgment by the Court of Justice of 3 July 2012 (UsedSoft GmbH versus Oracle International Corp) has since clarified that the exhaustion doctrine also applies to non-physical 'copies'.

Article 46. Conversion into other Licences

One possible result of a conversion is a different manner of payment, for example due to a change from a named user licence to a server licence. As failure to reach agreement can have far-reaching consequences, both parties are always required to make a reasonable effort in the consultations referred to in this paragraph. If a proposed conversion could result in a use other than the Agreed

Use, consideration should be given to the question of whether the conversion is actually permissible under procurement law.

Article 47. Escrow

Paragraphs 1 and 4

Whether Escrow is indeed necessary, customary and reasonable must be determined from case to case. In general, Escrow is appropriate where Standard Software is critical to operational activities, where it is supplied by a relatively small Counterparty and/or where there are relatively few users. Under this article Escrow may be agreed during the course of the Contract even if no provision for it has been made initially. In addition, the parties may agree to use an existing Escrow arrangement provided the conditions do not conflict with those of the Contract. It is therefore not the case that the Counterparty must always arrange Escrow itself.

Care should always be taken to ensure that the copyright owner also provides a Licence to the third party to whom the Standard Software is given in Escrow, so that the third party can actually perform the activities agreed under the Escrow scheme. All information necessary in order to be able to use and maintain the Source Code upon release should be deposited with the Source Code.

Paragraph 2

It would be beyond the scope of the ARBIT to regulate all the requirements to be fulfilled by Escrow. That is why this paragraph simply sets out the basic principle that an agreement should satisfy the conditions normally applicable to escrow in the Netherlands. This also applies to triggering events, i.e. special circumstances that entitle the Contracting Authority to demand that the third party arrange for the release of the Source Code. If the Contracting Authority has specific requirements for Escrow, it should immediately raise this subject when acquiring the Standard Software and, where necessary, record it in the Contract.

SPECIAL PROVISIONS ON PUBLIC SERVICE CONTRACTS

Articles 48 to 53 apply to all IT Public Service Contracts. They are followed by articles dealing specifically with Consultancy Services (articles 54 to 56), the development of Custom Software (articles 57 to 60) and Secondment (articles 61 to 67).

CONTRACTS IN GENERAL

General

IT Public Service Contracts take various forms. The best known are IT Consultancy Services and Secondment. In such cases there is usually a 'contract for services' as defined in article 400 et seq. of Book 7 of the Civil Code between the Contracting Authority and the Contractor. However, this does not always apply to the legal relationship that arises between the Contracting Authority and the

Staff used by the Contractor in carrying out the Public Service Contract for the Contracting Authority. It follows that there is an essential difference between contracts for services and Secondment. This difference is examined in more detail below, including the consequences under procurement law.

Generally, Public Service Contracts that are not primarily concerned with specific IT aspects, such as the provision of IT courses, can be awarded under the General Government Terms and Conditions for Public Service Contracts (ARVODI).

Article 48. Additional definitions

Paragraph 1

The nature and content of the Public Service Contract determine whether it is a contract for services within the meaning of article 400 of Book 7 of the Civil Code (i.e. a contract involving the performance of work in connection with a particular Deliverable) or a Secondment Contract. In the case of Secondment the Staff of the Contractor perform work, whether of a specific nature or otherwise, under the direction and supervision of the Contracting Authority. Unlike the situation under a contract for services as defined in article 400 of Book 7 of the Civil Code, the work in such cases is not performed by the Contractor 'independently and on its own responsibility', as referred to in article 400, but is instead carried out under the responsibility, direction and supervision of the Contracting Authority itself. This is why the concepts of Acceptance (of the result of the work) and Additional Work do not apply in the case of Secondment.

Article 49. Time and place of work

A change to the place of work as referred to in this article involves a permanent change and not a one-off decision by the Contracting Authority to assign Staff made available to it to a place of work other than the agreed place.

Article 50. Assignment of specific Staff

The basic principle is that Staff assigned by the Contractor to perform the Contract will not be replaced. If the Contract has been concluded on the basis that it will be implemented by one or more specific persons, replacement is out of the question.

Article 52. Professional indemnity insurance

Article 29 of the ARBIT regulates the subject of corporate liability insurance. In addition, most ICT service providers have professional indemnity insurance. The article is worded in such a way as to leave a Contractor free to decide not to take out professional indemnity insurance if it shows that having such insurance would be unusual in the particular circumstances of the case. If the Contracting Authority considers that the Counterparty should have professional indemnity insurance, it should include specific requirements about this in the tender documents. Naturally, these requirements must always be proportionate and related to the circumstances.

Article 53. Employment conditions

The Contracting Authority considers it important that the Contractor, as far as its Staff are concerned, complies with the legislation and the collective labour agreement applicable to the Contractor and its Staff in relation to employment conditions (e.g. the Minimum Wage and Minimum Holiday Allowance Act, the Working Hours Act and legislation on working conditions). This is underlined in paragraph 1 of this article.

In the event of the transnational provision of services, as referred to in the Posting of Workers Directive (96/71/EC), the Employment Conditions (Posted Workers in the European Union) Act (WAGWEU) is important for determining what employment conditions are applicable to workers from other member states. This Act applies to service providers (businesses/employers) from other EU countries that, in the framework of the transnational provision of services, have their staff temporarily perform work in the Netherlands, after which they return to the member state of origin. As far as the performance of work in the Netherlands is concerned, these staff are in any event entitled to the main employment conditions prescribed in Dutch legislation, such as:

- the minimum wage;
- adequate rest periods;
- safe working conditions;
- equal treatment of men and women;
- a minimum number of paid leave days.

In addition, European employers must adhere to the same collective labour agreement provisions as Dutch employers on a number of points, provided the provisions are more favourable. This follows from section 2, subsection 6 of the Collective Agreements (Declaration of Universal or Non-Universal Application) Act (AVV Act), which provides that the key provisions in collective labour agreements that have been declared universal also apply to posted workers of service providers from other EU countries who perform temporary work in the Netherlands.

The other paragraphs (2 to 5) are included in connection with the provisions of the Sham Employment Arrangements Act (WAS), such as the vicarious tax liability system introduced in the Civil Code (whereby the main contractor is liable for any salaries tax and social insurance contributions that subcontractors fail to pay). The above-mentioned paragraphs are ultimately designed to prevent the Contracting Authority from being held liable, under the WAS, for the payment of salary owed to employees of a subcontractor which has not treated the staff it has engaged in accordance with the applicable legislation referred to above, including the payment of the correct salary owed.

SPECIFIC TYPES OF PUBLIC SERVICE CONTRACT

A characteristic of both IT consultancy services contracts and contracts for the development of Custom Software is that, unlike cases of Secondment, final responsibility for the proper performance of the contract lies entirely with the Contractor.

Consultancy services

Article 54. Day-to-day management and supervision

One of the consequences for the Contractor of being responsible for day-to-day management and supervision is that it must ensure that competent and expert Staff are deployed in sufficient numbers to ensure the proper performance of the Public Service Contract, taking account of its size and complexity.

Article 56. Project phasing

The Contract must regulate whether a project phase must first be concluded by means of Acceptance or partial Acceptance before the Contractor may start work on the following phases. The time limits agreed in the context of the project phasing are usually deemed to be Vital Deadlines (article 1.8).

Development of Custom Software

Article 57. Management and supervision, appointment of project managers and project phasing

Just as in the case of IT consultancy services, work on developing Custom Software is always carried out under the responsibility of the Contractor.

Article 58. Completion

Owing to the requirement that intellectual property rights in Custom Software be transferred to the Contracting Authority (see article 8), both the Source Code and, where applicable, the Object Code should be handed over at Completion. The functional and technical design of the Software also form part of Completion.

Article 59. Acceptance procedure

Paragraph 2

The parties may agree to draw up a test procedure, possibly jointly, before Completion. They may also agree that the Contractor will itself first assess whether the Deliverable is suitable for the Agreed Use before handing over the Deliverable to the Contracting Authority by way of Completion.

Paragraph 3

If the Contracting Authority accepts the Deliverable despite discovering Defects in it, the provisions of article 11.6 apply.

Paragraph 6

Application of the power granted in this article to the Contracting Authority to repair Defects itself (or have them repaired by a third party) may cause problems, for example because Contractors sometimes take the position that this extinguishes the Contracting Authority's rights under the guarantee. This is why it is expressly stated at the end of this paragraph that the Contractor's agreed responsibilities for the end result continue to apply in full in such a case (including its guarantee obligations).

Paragraph 7

To avoid any misunderstanding, it is explicitly stipulated that the Contractor will be in default if the Contracting Authority rejects the Custom Software after a second acceptance test.

Article 60. Maintenance of Custom Software

Paragraph 1

The basic principle of the ARBIT concerning the intellectual property rights in Custom Software is that they are transferred to the Contracting Authority (see article 8). It follows that the Contracting Authority is not exclusively dependent on the Counterparty for management and Maintenance of such software. As the Source Code must have been made available to the Contracting Authority (article 58), it may decide to have the management and Maintenance of Custom Software carried out by a party other than the Contractor. This paragraph obliges the Contractor, at the request of the Contracting Authority, to cooperate fully with such a third party and provide any additional information that may be needed to the Contracting Authority or that third party. Custom Software must also be documented in such a way that functionalities made and implemented on a customised basis can be managed and maintained by reference to it. In addition, the Source Code of Custom Software must be sufficiently documented for this purpose, which may also be done in the Source Code itself.

Paragraph 2

If the Contracting Authority has concluded a Maintenance Contract with the Contractor, the Special Provisions on Maintenance (articles 68 to 79) apply.

Secondment

Article 61. Applicability

As the Contractor is not responsible for the end result in cases of Secondment and its contractual obligations are therefore more limited than in other types of Public Service Contract, the Special Provisions on Secondment apply only if the service (or part of it) has explicitly been described as

Secondment in the Contract. If this is not the case, the articles on consultancy services (articles 54 to 56) and/or development of Custom Software (articles 57 to 60) are applicable.

Article 62. Guarantees

Keeping sufficient qualified Staff available can be a serious problem for the Contracting Authority, particularly where they are in great demand. In this provision, the Contractor therefore merely guarantees that, if the Contracting Authority so requests, it will be able to provide qualified Staff quickly.

Article 64. Secondments and foreign postings

Paragraph 1

The hiring out of seconded staff has consequences under tax law. This is why the Contractor's consent is always required.

Article 67. Hirer's liability

Paragraph 1

In the case of a Secondment, the Contractor's Staff carry out work for a Contracting Authority under its direction and supervision. Even then the Contractor itself remains liable to deduct salaries tax and social insurance contributions at source from the pay of its Staff. However, the Contracting Authority is jointly and severally liable for, among other things, the remittance of the deductions to the Tax and Customs Administration (see section 34 of the Collection of State Taxes Act). The risk in connection with this 'hirer's liability', as it is known, is limited first of all by careful selection of the suppliers. In the case of EU contract award procedures, for example, suppliers of personnel can be excluded from participation if they do not meet their tax obligations. To guard against a situation in which the Contractor (or a third party used by it) nonetheless fails to fulfil its tax obligations during the term of the Contract, article 67.1 provides that the Contracting Authority will be indemnified by the Contractor against claims brought by the Tax and Customs Administration.

Paragraph 2

In this paragraph the Contracting Authority is given a way of avoiding the risk of hirer's liability, by remitting the salaries tax and VAT owed by the Contractor to a 'G' account previously opened by the Contractor. However, not all Contractors are permitted to open such an account. For example, the Tax and Customs Administration does not allow self-employed persons who have no staff to do so. This is why the provision has been qualified by the addition of the words 'if possible'.

SPECIAL PROVISIONS ON MAINTENANCE

Articles 68 to 79 apply to all Maintenance Contracts. They are followed by articles specifically concerning Products (articles 80 and 81) and Software (articles 82 to 84).

GENERAL MAINTENANCE

The maintenance of IT products is of great importance not only because faults can seriously compromise operational activities but also because a Contracting Authority must be certain that it will be able to use the products over a lengthy period. Maintenance can be provided in various forms depending on the nature of the Deliverable, for example by means of Patches, subscriptions to Enhanced and New Versions and modifications designed to update Software and Products and through the support provided by a help desk. Even if no contractual arrangements have been made for Maintenance, it can still form part of the actual Deliverable. For example, article 43.5 provides that a Licence includes the right to receive and use Patches and Enhanced Versions free of charge if this is the only way in which the Supplier repairs Defects in the Standard Software. This is because the Supplier is obliged under the guarantee referred to in article 12.3 to repair Defects in the Deliverable for 12 months after Acceptance. If the Counterparty repairs a Defect by issuing a Patch or an Enhanced Version, users who have not made contractual arrangements for Maintenance are also entitled to receive such Patches and Enhanced Versions during the guarantee period.

Maintenance too is a contract for services as defined in article 400 of Book 7 of the Civil Code. Unlike Public Service Contracts as regulated in the Special Provisions on IT Public Service Contracts, Maintenance does not involve services designed to achieve a single result for a specific client, but concerns standard services provided in the same form to different clients. This is why a number of provisions are specifically devoted to Maintenance in the ARBIT. The party that carries out the Maintenance is described as the Contractor, just as in the case of other Public Service Contracts.

Before setting out provisions that distinguish between Maintenance of Products and Maintenance of Software, these Special Provisions from the ARBIT define some additional terms and formulate provisions generally applicable to Maintenance. Given the importance of Maintenance as described above, the preparation of a Maintenance Contract requires special consideration by the drafter. For example, the Contract must make clear what is meant by Innovative Maintenance and what service levels apply.

Article 68. Additional definitions

Paragraph 2

Unlike Preventive and Innovative Maintenance, Corrective Maintenance is about resolving Faults affecting the Contracting Authority’s Software or Faults that have occurred earlier in relation to other users. Corrective Maintenance of Software is usually carried out by the Installation of a Patch or an Enhanced or New Version.

Paragraph 3

Repair Times and Response Times should be recorded in the Maintenance Contract. The Contracting Authority's main interest is to ensure that the Maintenance Contract is carried out properly. This is why it generally does not exercise its right to cancel the Contract when Service Levels are not achieved (or not achieved in full) and instead receives specific credits or discounts from the Contractor.

Paragraph 5

Unlike Corrective Maintenance, Preventive Maintenance is designed to prevent Faults that the Contractor can reasonably be expected to know are likely to occur at some point.

Paragraph 6

What constitutes responding 'adequately' must be determined from case to case. Sometimes it is sufficient for the Contractor to provide advice or start to prepare a response, but sometimes it must come and assess the Fault immediately in person.

Paragraph 7

As noted above, the specific agreements to be made in the context of Maintenance, such as those relating to Service Levels, form part of the Maintenance Contract.

Paragraph 9

If a Fault prevents the Agreed Use it is also deemed to be a Defect within the meaning of article 1.9. It should be noted that the primary aim of Maintenance is to ensure that the (technical) operation of the Deliverable is facilitated or restored. Whether this means that the suitability of the Deliverable for the Agreed Use is continued or restored is, in principle, immaterial to an assessment of how the Maintenance is performed (unlike the position in the case of a Defect). For this reason no link is established with Agreed Use in the definition of Fault, by contrast with the definition of Defect (see article 1.9). If the Contracting Authority wishes to have certainty even after the expiry of the guarantee period that the suitability of a Deliverable for the Agreed Use has been restored by the resolution of a Fault, it must agree specific guarantees with the Counterparty for this purpose.

Article 69. Maintenance of Deliverables previously provided

Subject to the provisions of article 12.7, the Special Provisions on Maintenance apply even if Maintenance for the original Deliverable is agreed by the Contracting Authority with the Contractor only at a later date. Naturally, article 12.7 does not apply if the Counterparty contracted for the Maintenance is not the Counterparty involved in the provision of the Deliverable.

Article 70. Maintenance starting date

The parties can choose different starting dates for the Maintenance. For example, from Delivery or Completion of the initial Deliverable following Acceptance or from the expiry of the guarantee period applicable to the Deliverable. This must be clearly recorded in the Contract.

Article 72. Progress report and work consultations

Paragraph 3

Article 72 is virtually identical to article 51. Only paragraph 3 has been added. A logbook is generally used to record and file information on the causes of Faults and the results of Maintenance. One reason for recording such information is to prevent repetitions of comparable Faults, whether or not in subsequent versions. Sometimes the Documentation too must be modified.

Article 73. Corrective Maintenance and work-around solutions

Paragraph 2

These provisions of the ARBIT are based on the assumption that a professional Supplier must also be able to offer Maintenance of its Products. This applies in any event to Corrective Maintenance and also where the Contracting Authority has not initially decided to purchase Maintenance from the Counterparty. However, the duration of the obligation is limited (see article 12.7).

Paragraph 3

If the Contractor uses a work-around solution to resolve a Fault with the consent of the Contracting Authority, the Contracting Authority may not also demand that the Contractor provide a final solution within the Repair Time for the relevant Fault. The only exception is where the parties have made a different agreement before the application of the work-around solution. If such an agreement has not been made, the Contractor is always obliged to replace the work-around solution with a final solution as quickly as possible.

Article 74. Preventive Maintenance

This obligation to provide Preventive Maintenance of Software is elaborated in article 82 et seq. What constitutes 'regularly' must be determined in the case of Products by reference to the type of Product and evidence about its susceptibility to failure.

Article 75. Reporting and prioritising Faults

Paragraph 2

The Maintenance Contract should classify the different types of Fault and specify the priority accorded to them. Article 75 deals with the actual occurrence of Faults during the use of the Deliverable. These Faults should be resolved in accordance with the agreements previously made. Where there are doubts about the classification of a Fault or its priority, the matter is decided by the Contracting Authority. Where a work-around solution is provided for a Fault the provisions on this subject in article 73.3 are applicable.

Article 76. Compliance with Service Levels

The Contractor has an obligation to use its best endeavours to achieve the Service Levels, unless agreed otherwise. By contrast, the Contractor's obligation in respect of Response Times, Repair

Times and Availability included in a Maintenance Contract is to achieve a particular result. If Service Levels are not achieved, this usually triggers a specific penalty or discount scheme included for this purpose in the Contract. As the Contracting Authority's main interest is to ensure that the Maintenance Contract is carried out properly, it generally does not exercise its right to cancel the Contract when Service Levels are not achieved. Naturally, the position may be different where there is a repeated failure to meet Service Levels.

Article 79. Professional indemnity insurance

This provision is identical to that of article 52. This means that here too a Contractor need not take out professional indemnity insurance if it shows that having such insurance would be unusual in the particular circumstances of the case, for example because of the small size of the Contract or the limited nature of the risk run by the Contracting Authority.

SPECIFIC MAINTENANCE

Products

Article 80. Product modifications

Article 41 provides that where Product modifications are prescribed by a manufacturer they must be made free of charge. Where other modifications are to be made in the course of Maintenance, there should always be prior consultation with the Contracting Authority.

Software

Article 83. Support

Paragraph 3

In practice, support will be requested not by the Contracting Authority itself but by its Staff. The names of designated contacts should therefore be recorded in the Maintenance Contract for this purpose.

Article 84. Enhanced and New Versions

Paragraph 1

It is reasonable to expect a Contractor to issue New and Enhanced Versions with some regularity, since this form of Software Maintenance is an important way of guaranteeing continuity.

Paragraph 2

This paragraph requires the Counterparty to ensure that modifications made as a result of any Faults are systematically incorporated into New or Enhanced Versions. This will prevent old Faults from recurring in New or Enhanced Versions.

Paragraph 5

This provision is intended to ensure that a Contracting Authority will not suddenly be faced with extra costs because the Contractor ceases carrying out Innovative Maintenance of a version of the Software used by the Contracting Authority.