

Order to pay the costs of legal assistance in NAI arbitral proceedings

Guide for arbitrators.

1. This guide does not purport to be more than a memorandum that may be of use to arbitrators as a checklist and tool for establishing their views on the issue of an order to pay the costs of legal assistance. The arbitral tribunal is and remains fully autonomous in its decision. Obviously, it must observe the provisions of the NAI Arbitration Rules (hereinafter referred to as 'the Rules').
If the parties make a separate arrangement with regard to the costs of legal assistance, this arrangement must be observed.
2. In accordance with Article 52 of the Rules, the costs of legal assistance constitute part of the costs of arbitral proceedings which, according to Article 52, consist of the administration costs, fees and disbursements of arbitrators, the costs of legal assistance and miscellaneous costs which, in the opinion of the arbitral tribunal, were necessarily incurred in the arbitration.

Article 57 provides a rule for determining, and ordering payment of, these costs. Please note that paragraph 4 stipulates that costs may also be awarded if they were expressly claimed by a party.

3. Article 56 of the Rules specifically relates to the costs of legal assistance. It reads as follows:

"The arbitral tribunal may award against the losing party the reasonable costs of legal assistance incurred by the party in whose favour the award is rendered, if and to the extent that these costs are deemed necessary by the arbitral tribunal."

Article 56 contains the following main elements:

- a. "mayaward"

The arbitral tribunal may render an award against the losing party. The arbitral tribunal is free to refrain from making an award, or may make only a (very) moderate award, for payment of the costs of legal assistance in relation to the circumstances of the case.

The attorneys of both parties may, for example, both have made a significant contribution to the debate regarding a difficult question of fact or law, after which the a weighing-up of the arguments leads to a conclusion in favour of one of the parties. In view of the award for payment of the costs of legal assistance, such a situation might lead to another conclusion than a situation in which the

respondent attempted to avoid his payment obligation using clearly incorrect arguments.

It is also conceivable that the arbitral tribunal will allow the nature of the proceedings or the capacity of one of the parties or both parties to play a role.

b. The losing party

Only the losing party can be ordered to pay the costs of legal assistance, according to Article 56.

In many cases, the plaintiff's claim is not granted or rejected for 100%. Therefore, one might then say that both parties are successful to a certain extent and it is entirely up to the arbitral tribunal to decide to what extent that partial success also leads to one party being ordered to pay the other party's costs of legal assistance. The circumstances of the case are also weighed up in this situation. For example, has one party been mainly successful, what is the monetary interest or the complexity of the points where a party or both parties have been successful or unsuccessful, attitude in the proceedings, etc.

c. Reasonable costs of legal assistance

It is entirely up to the arbitral tribunal to decide what are reasonable costs of legal assistance.

d. If and insofar as these costs were necessary in the opinion of the arbitral tribunal

To what extent were the costs of legal assistance necessary to bring to the fore that the other party was wrong?

4. The elements referred to under 3. a – d may partially overlap each other. For example, the “may” provision takes account of the question of whether the costs were necessary and which costs the arbitral tribunal considers reasonable. All things considered, the assessment of all the relevant circumstances may lead to the successful party being awarded no costs of legal assistance at all, or part of the costs of legal assistance, or all costs of legal assistance (provided the arbitral tribunal consider that these were necessary and also reasonable).

Costs of legal assistance and court proceedings; Points System Rates

5. With regard to the costs of legal assistance, the regular court basically has to weigh up the same interests as an NAI arbitral tribunal. The Netherlands Association for Jurisprudence and the Netherlands Bar Association set a fixed rate after mutual consultation, which serves as a tool in ordering payment of costs of legal assistance, the so-called points system rates. Under this system, a certain number of points are

awarded to each procedural act, e.g. the submission of a statement, presentation of an oral argument, etc. Depending on the importance of the case, each point represents a certain amount.

The regular court is not bound by this rate, but it almost always applies it.

It is noteworthy that the Court of Arbitration for the Building Industry in the Netherlands also applies a points system as a guideline. Arbitrators are not bound by these either – they may deviate from them as they see fit.

A comparable wish for transparency or, in any case, for an initial establishment of views, can be noted in NAI arbitral proceedings. A points system could also be a first aid measure, while retaining the possibility to award more or less if this is indicated by the circumstances of the case (and/or Article 60 of the Rules).

Adjusted points system rates

6. If one wishes to compare NAI arbitral proceedings to a judicial instance, it is probably best to compare them to a court of appeal. In both cases, it is a matter of the highest fact-finding instance. In both cases, the decision is subject to a limited legal review (although this review is of an entirely different nature).

Below you will find a points system based on the rates applied by the courts of appeal. This points system has been simplified, however. Several steps regarding the monetary interest have been added to the “bottom”, while certain steps have been added to the “top”. The amounts have been adjusted for each point. This points system can aid arbitrators in establishing their views on ordering parties to pay costs of legal assistance. It is not meant to be used for calculating down to the last euro, but rather as a general tool.

Tables

7. **Number of points to be awarded**

TABLE A

Proceedings on the merits and Preliminary Relief Proceedings

Request for arbitration together with statement of claim	2
Brief statement of defence together with statement of reply	2
Every subsequent statement based on Article 24 of the Rules	1

Hearing	2
Hearing in ancillary proceedings	1
Individual examination of witnesses	1
Individual personal appearance/site visit	1

TABLE B

Monetary interest of the arbitral proceedings

Rate per point

i	less than € 50,000	€ 500 - € 1.200
ii	€ 50.000 - € 100.000	€ 1.200 - € 2.000
iii	€ 100.000 - € 200.000	€ 2.000 - € 3.000
iv	€ 200.000 - € 400.000	€ 3.000 - € 4.000
v	€ 400,000 - € 1 million	€ 4.000 - € 5.500
vi	€ 1 million - € 5 million	€ 5.500 - € 10.000
vii	€ 5 million and above	€ 10,000 – or above

Counterclaim

8. The tables are also adjusted for counterclaims. In counterclaims whereby the assessment is largely connected to the assessment of the claim in the main action, the number of points is halved.

Explanation

9. The reference to “monetary interest” in table B means the monetary interest of the principal sum plus interest on the reference date of the judgment. In the case of claims that do not demand payment of a sum of money, it is up to the arbitrators to value their “monetary interest” in order to apply the table.

Table B provides margins both in the column “monetary interest” and the column “rate per point”.

It basically goes without saying that if, for example, the monetary interest is placed in the middle of the first column, the rate per point will generally be placed in the middle of the margin.

No further steps or margins are indicated for monetary interests of more than € 5 million. If necessary, arbitrators can assess themselves the extent to which extending the previous steps in table B can help them in establishing their views.

International arbitral proceedings

10. Where a points system is commonly used in the Netherlands, it is less likely to be used in international arbitral proceedings. However, this may be different in international arbitral proceedings with a minor interest or international arbitral proceedings with a strong “national” bias.

In conclusion

11. It should be emphasised again that the arbitral tribunal has, and will continue to have, the freedom and responsibility to award or not to award the costs of legal assistance and to determine the amount of these costs independently. The points system referred to above is nothing more than a tool for establishing one’s views. Arbitrators are in no way bound by this.

In some cases, a specification of the costs of legal assistance, by which arbitrators are not bound, can also assist in the assessment.

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