NAI summary arbitral proceedings

“Facts and Figures 1998-2012”

March 2013
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In this document, an overview is given of current practice relating to summary arbitral proceedings under the Arbitration Rules of the Netherlands Arbitration Institute ("NAI Rules"). This overview is based on a full review of all awards rendered in summary arbitral proceedings from 1998 up to the end of 2012. This contribution thereby adds empirical data to the existing literature on summary arbitral proceedings. In § 2, an introduction is given in which the status and scope of summary proceedings under the NAI Rules is described. Subsequent thereto, the trends in the period starting with the introduction of the summary facility in the NAI Rules in 1998 through 2012 are noted (in § 3). In § 4, the awards rendered in the period 2010-2012 are described in some more detail in order to provide an impression of the sort of disputes that are dealt with in these proceedings. Finally, some references to the literature and information on the authors are provided in § 5 and § 6.

1. Executive summary

Following a review of all awards rendered in summary arbitral proceedings under section 4A of the NAI Rules from 1998 through 2012, it can be concluded that these proceedings are used by both Dutch and non-Dutch parties to resolve high value disputes in a variety of sectors. The claims made vary from the more standard interim measures (e.g. preservation of rights, payment of an advance, etc.) to far-reaching measures such as specific performance, payment of monetary sums, removal of conservatory measures and even suspension of trading and blocking of transfer of shares. Summary arbitral proceedings also allow for speedy dispute resolution: in 76% of the cases an award was rendered within 2 months following the request for arbitration. In only a relatively limited number of cases do tribunals find that they lack competence to resolve a dispute or hold that complexity of a presented case demands the matter to be resolved in proceedings on the merits. In the period from 2010 to 2012, a significant drop in issued arbitral awards was registered: in only 8 out of 30 summary arbitral proceedings initiated was an award rendered.

2. Introduction – the status and scope of summary arbitral proceedings under the NAI Rules

The NAI has provided for summary proceedings in arbitral proceedings seated in The Netherlands since 1998. The provisions that relate to summary arbitral proceedings can be found in articles 37 and 42a-o (section 4A) of the NAI Rules. Article 37 provides for summary arbitral proceedings that may be conducted subsequent to the appointment of an arbitral tribunal on the merits. Proceedings based on article 37 are quite rare. This type of summary arbitral proceedings does not form part of the review and is thus not discussed further. Articles 42a-o provide for summary arbitral proceedings that can be conducted prior to the appointment of an arbitral tribunal on the merits and the start of such arbitral proceedings. The independent summary arbitral proceedings are conducted completely separate from and without any connection to proceedings on the merits, which is quite a unique feature of the NAI summary arbitral proceedings compared to most (if not all) summary arbitral proceedings that can be conducted under common arbitration rules.
Articles 42a-o of the NAI Rules also provide for specific rules that govern these summary arbitral proceedings and provide how the procedure is to be conducted. Based on article 42a(3), a number of provisions of the NAI Rules that apply to proceedings on the merits equally apply to summary arbitral proceedings as well. In particular, the procedure regarding the appointment of the arbitral tribunal deserves further consideration.

Following the commencement of the proceedings and the notification of respondent (articles 42a-e), the arbitral tribunal is appointed (article 42f). The Administrator shall appoint the arbitral tribunal — consisting of a sole arbitrator — as soon as possible, striving to secure such appointment within 24 hours following receipt of the request. Save for agreed methods of appointment specifically applicable to summary arbitral proceedings, any method of appointment of the arbitrator or arbitrators agreed between the parties shall not apply. The same goes for the qualifications of possible arbitrators: if parties have agreed on any specific qualifications, these will be set aside save for agreements that explicitly provide that these qualifications (also) apply to summary arbitral proceedings. Contrary to a proceeding on the merits, a person cannot be precluded from being appointed as arbitrator in a summary arbitral proceeding based on his nationality (article 42f(1) last sentence). Article 42f(3) provides that articles 10, 11, 15(2) and (3), 17, 18(2) and 19 will apply without exception. Matters such as impartiality, independence and replacement are therefore handled in the same manner as in proceedings on the merits, albeit more expeditiously.

Based on the awards reviewed, it can be concluded that in general, the NAI appoints very experienced arbitrators.

A total of 109 arbitral awards in summary proceedings have been rendered in the period from 1998 through 2012. Consequently, the NAI has the longest track record in summary arbitral proceedings when compared to other institutions such as the SCC, the SIAC and, recently, the ICC. A fair number of arbitral awards in summary proceedings have been published in the Dutch Journal for Arbitration (Tijdschrift voor Arbitrage, “TvA”) over the past years (7 in the period from 2010 through 2012).

Arbitrators in, and parties to, NAI summary proceedings can in certain cases draw upon their experience of Dutch court summary proceedings in the national courts. In addition, the Netherlands Arbitration Act contains a provision in article 1051 of the Dutch Code of Civil Procedure (the “DCCP”) that governs the status of arbitral awards rendered in summary proceeding and that links the scope of such proceedings to the general provision for summary proceedings in article 254 of the DCCP (see for application the awards published in TvA 2010, 30 and TvA 2011, 59). All this provides a framework for these summary proceedings. It follows from the reference to article 254 DCCP, and the application of this article in practice that we have observed, that arbitral tribunals (like regular courts) will determine whether or not parties have indeed an urgent interest in obtaining the relief sought to decide whether or not the dispute is admissible in summary proceedings.
Subsequently, arbitral tribunals will have to balance the parties’ interests in order to determine whether the relief requested in summary proceedings should be granted. Such balancing of interests implies an assessment of, notably, the urgency in the sense that proceedings on the merits cannot be awaited, perceived strength of the merits of the case, chances of claims in proceedings on the merits and third party interests (see recently Tva 2011, 59 with reference to the literature in § 55 thereof). In so far as claims for payment of sums due (geldvorderingen) are concerned the arbitral tribunal should also consider and weigh the risk of failure to repay (resistutierisico) (see recently Tva 2011, 17). In making these determinations, (counter)claims are in principle treated separately. As discussed the NAI Rules do not demand parties to commence proceeding on the merits subsequent to summary arbitral proceedings and also provide for a request by the parties to the arbitral tribunal dealing with summary proceedings to render an award on the merits.

Furthermore, NAI summary proceedings, whether pending proceedings on the merits (article 37 NAI Rules) or prior thereto (section 4A NAI Rules), can result in an award that is enforceable (article 1051 DCCP). In this sense, the summary arbitral proceedings under the NAI Rules may be contrasted with the 2010 SCC (Appendix 2), the PRIME Finance Rules of 2012 (article 26a) and 2012 ICC Rules (Appendix 5). However, the NAI summary arbitral proceeding are comparable (to a certain extent) to the SIAC Rules of 2010 (Schedule 1, paragraph 6). Article 26b of the PRIME Finance Rules of 2012 contains a provision that is similar to the NAI summary arbitral proceedings.

Regarding the enforceability of awards in summary arbitral proceedings, the following is noted. Enforcement in The Netherlands is not controversial and can be based on article 1051 DCCP. Enforcement outside The Netherlands may be challenged by reference to the ‘finality’ requirement under the New York Convention, albeit that this is not a tried and tested argument. By reference to the legislative history of the New York Convention, the Dutch practice and article 1051 DCCP, much can be said in favour of enforceability outside The Netherlands. At any rate, the weight of an arbitral award is surely higher than that of an order or other measure.

The current proposals for amendment of the Netherlands Arbitration Act (that are reflected in a new article 1043b DCCP) do not provide for a change, or at least not a limitation, of the current regime for summary arbitral proceedings. To the contrary, summary arbitral proceedings initiated pending a proceeding on the merits (see article 37 NAI Rules) will have their own provisions.

3. General description of the cases from 1998 through 2012

An analysis of the NAI awards rendered in summary proceedings shows that these proceedings are used to resolve high value disputes in a variety of sectors. Claims for payment and claims for specific performance are often raised. Procedural and factual complexity is, by and large, not a reason for arbitrators to reject a case, and complex matters are handled relatively swiftly. Penal sums to secure enforcement of the award rendered are often imposed.
As other international arbitration institutes are starting to include a form of summary proceedings in their rules, the route of summary arbitral proceedings seems increasingly popular and recognised in (international) commercial arbitration. However, the NAI Rules have provided for summary arbitral proceedings since 1998. The chart below evidences that from the very start parties have been using this opportunity, with a notable increase in the periods 2001-2002 and 2005-2009. The chart also shows how these numbers compare to the number of summary proceedings that have been filed and registered with the NAI since 1998, as apparent from the NAI’s annual reports published in TvA.

**Year in which proceedings were initiated**

Cases that have not resulted in an award have not been reviewed and do not form part of this overview. As parties may also initiate summary proceedings to exert pressure on the other party to adhere to an agreement or refrain from certain actions, or to speed up settlement negotiations, much like summary proceedings before the state courts a fair share of the initiated summary proceedings are withdrawn before an award is rendered. These cases are not discussed in this paper.

Finally, in the chart below the number of summary proceedings that have been registered with the NAI since 1998 has been set off against the NAI proceedings on the merits over that same period. This chart also shows that summary proceedings have gained acceptance shortly after the introduction thereof. However, the proportion of such proceedings remains quite modest. We do not have a clear explanation for the low water mark in 2003 and the relative decline since 2010.
3.1 Parties involved

In 37% of the cases one or more non-Dutch parties are involved and 7% concerns multi-party disputes in which the majority of the parties involved are non-Dutch. In 25% of these international cases, which represents 9% of the total number of cases, all parties involved are non-Dutch parties. In 24 of these cases, the non-Dutch party initiated the NAI summary proceedings. Hence, the provisions on summary proceedings in the NAI Rules have been dealt with by a fair number of international parties.

Non-Dutch party involvement

International acceptance is further notable from sources listed in § 5, below.
Natural persons (i.e. non-corporate entities) have been involved in 31% of the cases, which in two cases even concerned non-Dutch natural persons. In a significant part of the cases the natural person is a shareholder, board member, partner or employee of one of the entities that is also a party to the proceedings. Especially contracts related to professional partnerships and joint ventures tend to include an arbitration clause providing disputes shall be settled in accordance with the NAI Rules. Thereby, section 4A is also applicable. This partly explains why in a relatively high number of cases, natural persons are involved.

3.2 Competence

It follows from the dispositive sections of the awards reviewed that in over half of the cases (55%) the competence of the arbitrator is not disputed by respondents. This includes defences related to both the arbitration clause allowing for summary proceedings as well as the formal requirements for initiating summary proceedings following from article 254 DCCP: i.e. urgency, complexity of the case and nature of the requested relief or interim measure (in recent years these formal requirements tend to be amalgamated in a general test regarding the relative weight of the interest of the parties involved).

Where the competence of the arbitral tribunal has been disputed, more often than not this defence is dismissed. In some cases the arbitral tribunal held that it was only competent for part of the claims made, for instance if there is an arbitration agreement in place but that agreement has not been made between all parties involved. In that case the proceedings continue between the remaining parties.

Competence
3.3 Complexity and proceedings on the merits

As indicated above, cases in summary proceedings can have a high degree of factual complexity. Arbitrators handle matters related to a variety of areas of law, including intellectual property, competition, real estate, corporate and employment. Although the NAI Rules explicitly provide that complexity may be a reason for an arbitral tribunal to decline to deal with a dispute in summary proceedings and refer the parties to proceedings on the merits, it is found that this only rarely happens.

In just under half of the cases reviewed, proceedings on the merits have been initiated subsequent to the summary proceedings. In total, 88 out of 207 cases (42.5%) were advanced to this stage. This is illustrated in the chart below.

Procedures on the merits following summary arbitral proceedings

At first glance, it may seem somewhat surprising that summary arbitral proceedings are followed by proceedings on the merits, as parties are not obliged to commence proceeding on the merits subsequent to summary arbitral proceedings and the award in summary proceedings is, in principle, enforceable (see also § 2 above). However, in some cases, parties had already initiated the proceedings on the merits prior to initiating summary proceedings, or did so when the summary proceedings had not yet been concluded. In other cases, parties have probably initiated proceedings on the merits where the arbitrator rejected (part) of the case based on the requested relief or the lack of urgency or the complexity.
3.4 Type of claims made

The nature of the (primary) claims made reflects the practice in the Dutch state courts, as is expressed in article 1051 DCCP as well. Consequently, apart from more standard interim measures aimed at the preservation of rights or the payment of an advance, claims for specific performance and payment of monetary sums can also be made and granted in summary proceedings. Also, claims have been made related to the withdrawal of an attachment or the obligation to enter into an agreement. Claims may also refer to infringements of competition clauses and (intellectual property) rights or the right of inspection of, access to or handing over of documents. Other even more innovative and/or far-reaching claims have also been made. These include the suspension of share trading and blocking the transfer of shares (see also Van der Bend et al in § 5, below, p. 193).

In about half of the cases either party has also requested the arbitrator to award the claims requested subject to a penalty. In the majority of cases, when the claim is awarded, so is the penalty requested. Arbitrators are however inclined to lower the requested penalty amount or maximise it when awarding this additional sanction. This however does not imply that the penalty sums imposed are always low: these can amount to EUR 2.5 million per breach or EUR 1 million per day with a maximum of EUR 100 million.

3.5 Value of claims made

The value of claims made varies, as also illustrated in the chart below, showing the range of the combined value of claims and counterclaims. Noticeably, in 37% of the cases the value of claims amounts to at least EUR 1 million. In addition, 39% of all claims made is of an undefined value. This includes a high number of cases in which substantial interests are at stake, which however cannot be quantified in any amount.

The large variety of claims made include: an injunction to exercise shareholder rights, the imposition of the obligation to enter into an agreement or annulment or nullification of a decision to terminate an agreement and the provision that an award in summary proceedings will come in the stead of a formal deed to deliver and transfer claims by one of the parties under a SPA (TVA 2011, 36).
3.6 Success and Failure

In 65% of the awards rendered the claims made by the claimant have been granted in part or in full. Another 6% of the awards is categorised as an award on agreed terms (schikkingsvonnis). In the remaining part of the cases, the claims made by claimants have been rejected.

Claimant’s claims awarded

The picture with respect to counterclaims is somewhat different. Counterclaims were made in 32 of the cases and were successful in 9% of the instances.
3.7 Length of proceedings

Firm conclusions regarding the length of arbitral proceedings cannot be automatically drawn from the difference between the date of commencement of proceedings and the issuance of an arbitral award. For instance parties may request a stay of the proceedings because of settlement negotiations.

Having said that, the vast majority of cases in which an award was rendered (72%) is concluded by an arbitral award rendered within 2 months following the issuance of a notice of arbitration. In 27% of all cases reviewed an award is rendered within one month following the commencement of the proceedings. In only 5% of the cases in which an award was rendered, was the award was rendered over 6 months after the proceedings have been initiated, and only 1 case was concluded after more than a year. As far as these outlier cases are concerned, proceedings have often been suspended upon request of the parties and hence been protracted. By and large, arbitral awards in NAI summary proceedings are rendered swiftly.

Length of proceedings

![Length of proceedings chart]

- < 1 month: 49 (45%)
- 1 - 2 months: 29 (27%)
- 2 - 4 months: 19 (17%)
- 4 - 6 months: 6 (5%)
- > 6 months: 5 (5%)
- Unknown: 1 (1%)

3.8 Decision making standard

As for the decision making standard, section 1 of article 45 of the NAI Rules provides that the arbitral tribunal shall decide as amiable compositur unless the parties determined that it will rule in accordance with the rules of law. For international arbitration section 2 of article 45 provides the reverse: unless provided otherwise in the arbitration agreement, the arbitral tribunal will rule in accordance with the rules of law. In little over half of the 106 summary proceedings that have lead to an award, the arbitral tribunal decided as amiable compositur – which corresponds to the statistics on the nature of the parties involved (see § 3.1 above).
4. Observations on the period 2010-2012

In this § 4, we review arbitral awards rendered in summary arbitral proceedings from 2010 through 2012. The aim is to give an impression of the type of disputes dealt with in summary arbitral proceedings and to describe trends, to the extent possible.

The period 2010-2012 saw a significant drop in issued arbitral awards in summary arbitral proceedings (1 in 2010, 4 in 2011 and 3 in 2012) when compared to the preceding years (2005-2009). However, a total of 30 summary arbitral proceedings were registered in this period. Hence, in the period 2010-2012 almost 75% of these cases concluded prior to the issuance of an arbitral award.

In order to provide a general impression of the variety of cases that are dealt with in summary arbitral proceedings under articles 42a-o, below a summary of these 8 awards is provided.

1. The first matter relates to a dispute on the release of amounts held in escrow, which are held based on an earn-out payment. The parties to this dispute are two Eastern European natural persons and a Dutch private company with limited liability. The amount at stake is not determinable from the award but a penal sum of EUR 25,000 per day was requested, granted and maximised at EUR 1 million to ensure compliance with the obligation to secure release of the funds held in escrow and pay damages including interest. Respondent filed a conditional counterclaim providing that in case claimants’ claims would be granted, the funds would remain in escrow until an award on the merits would be rendered. Respondent furthermore requested mitigation of the statutory interest due. Both counterclaims were dismissed. Finally, respondent disputed the competence of the arbitral tribunal by arguing that (i) the arbitration agreement failed to make specific reference to summary arbitral proceedings and (ii) the case was not suited to be resolved through summary proceedings. Both jurisdictional objections were dismissed and the award was rendered within 10 weeks of the commencement of the summary arbitral proceedings. Part of the award is published in TvA 2012, 21.

2. The second dispute involved an exit arrangement of an international partnership between a UK natural person and a large number of Dutch, Dutch Antilles and US parties, including natural persons. The amount at stake was relatively low (under EUR 500,000). Claimant requested payment of certain sums including interest, no counterclaims were submitted. Following respondents’ defence, the claims made were dismissed for lack of urgency, one of the formal requirements for a case in summary proceedings to be heard (articles 1051 and 254 DCCP). The award was rendered a little over 16 weeks after the proceedings were commenced.
3. The third matter relates to a dispute between Dutch natural persons regarding real estate. The total value of claims and counterclaims was relatively low (under EUR 150,000). The alternative claim of claimants, which consisted of an advance on payments, was awarded whereas the counterclaim was dismissed as the admissibility of the claim in summary proceedings has not been established sufficiently. What is interesting is that a proceeding on the merits was initiated pending the summary proceedings. The award in summary arbitral proceedings was rendered only 6 weeks after the proceedings were initiated.

4. Another matter concerns a dispute between two Dutch private companies with limited liability that entered into an agreement related to the licencing of certain intellectual property rights. Claimant’s claims included (i) the prohibition of inter alia the sale of certain products, (ii) the right to perform an internal audit and (iii) the delivery of certain data – all subject to a penal sum of EUR 50,000 per breach. In its counterclaim, respondent requested the arbitral tribunal to prohibit the claimant from holding respondent to the agreement between the parties until a proceeding on the merits regarding the validity of the agreement had been concluded, subject to a penal sum of EUR 250,000 per breach maximised at EUR 25 million. The arbitral tribunal awarded the claim under (i) including a penal sum of EUR 25,000 per breach maximised at EUR 2 million, which was considerably lower than requested by claimant. The claim under (ii) was however denied and the arbitral tribunal concluded that the claim under (iii) could not be awarded, as it was overly broad and unfit for the asserted purpose of the claim. Respondent’s claim was also dismissed as, according to the arbitral tribunal, this claim in essence amounted to a request for a declaratory award which type of award cannot be granted in summary arbitral proceedings. Bearing in mind that the parties engaged in a procedural discussion regarding the date of commencement of the proceedings (an exhibit was not received by one of the parties), the matter was concluded in little over 12 weeks. It should also be noted that there has been a discussion regarding (the possibility of) document production in summary arbitral proceedings.

5. The last award of 2011 relates to a dispute between a Dutch natural person and a Dutch private company with limited liability regarding the culling of big game. The natural person claimed (re)instatement as holder of hunting rights, access to hunting grounds, a prohibition on culling by third parties and providing certain information – all subject to a penal sum of EUR 1,000 per day. Although respondent argued there was lack of urgency, this defence was dismissed. The claims were awarded in full subject to a penal sum of EUR 1,000 per day maximised at EUR 25,000 and a penal sum of EUR 5,000 related to the prohibition on culling by third parties following notice of service of the award judgment, with a total maximum of EUR 75,000. The award was rendered within 8 weeks from the commencement of the proceedings.
6. The first matter that led to an award in 2012 regards a dispute on the delivery of foodstuffs. The value of the matter amounted to over EUR 1 million. Claimant, a Dutch private company with limited liability, has filed a claim to have respondent – also a Dutch private company with limited liability – adhere to the contract and to deliver certain goods, subject to a penal sum of EUR 25,000 per month including costs. Respondent disputed that there were grounds of urgency that would require immediate relief. This defence was dismissed by the arbitral tribunal. However, after a weighing of interests of the parties, the interpretation of the contract and applying the principle of reasonableness and fairness the arbitral tribunal also dismissed the claim. The award was rendered within 4 weeks. Following this summary arbitral proceedings, an arbitral proceeding on the merits was initiated.

7. The second matter of 2012 concerns a dispute between a Dutch limited partnership and a Dutch public limited company and relates to a turn-key agreement in respect of a residential and shopping complex. The value of the matter exceeded EUR 40 million. Claimant claimed specific performance of the agreement and the listing of the alterations made by respondent, subject to a penal sum of EUR 250,000 per day. Here, respondent also disputes, unsuccessfully, that there were grounds of urgency that would require immediate relief. The claims were awarded: changes in the design were to be listed in accordance with the turn-key agreement. Furthermore, the penal sum claimed by claimant was imposed, albeit mitigated by the arbitral tribunal. The award was rendered in just over 3 weeks. This summary arbitral proceeding has also been followed by an arbitral proceeding on the merits.
8. The final award that we discuss in this review is related to a previous award that was rendered in 2011 (discussed under 5). It concerns the dispute between a Dutch natural person and a Dutch private company with limited liability about (amongst others) operation rights and access to property. In this second summary arbitral proceeding the natural person claimed: (i) adherence to the award held in the prior summary arbitral proceedings; (ii) an order to continue negotiations on an agreement that had not yet been concluded; (iii) an advance payment of damages; (iv) the dismissal of an officer; (v) a declaratory decision; (vi) awarding a compensation of legal costs that is higher than standard because of the procedural attitude and actions of respondent; (vii) an order to provide exclusive access to the property; and (viii) an order to allow claimant to exercise his rights (based on the prior summary arbitral proceedings). All this subject to several penal sums and provisionally enforceable. Again, respondent disputed that there were grounds of urgency that would require immediate relief. The arbitral tribunal upheld this defence in relation to the claims under (iii) and (iv) and therefore dismissed these claims. In addition the arbitral tribunal dismisses the claim under (i), as claimant had already obtained entitlement to enforcement. The claim under (ii) was awarded (with determination of a term). The claim under (v) was also dismissed as a declaratory decision cannot be awarded in summary arbitral proceedings. The claims under (vi) and (vii) were also dismissed by the arbitral tribunal, where it was noted in relation to the claim under (vii) that the consequences of exclusive access had not been arranged for sufficiently but that claimant did have the right to non-exclusive access. Finally, the claim under (viii) was awarded and (mitigated and maximised) penal sums were imposed, whilst the requested provisional enforceability was denied owing to lack of interest. The award was rendered within 8 weeks and to our knowledge, no proceeding on the merits has been initiated.

We note that a fourth summary arbitral proceeding that was been initiated in 2012 is still pending, as parties have requested a stay of the proceedings.

5. Literature

Summary arbitral proceedings under the NAI Rules have been covered in a fair number of detailed publications. This survey adds empirical data to these publications. Reference may also be made to proposals for the amendment of the Dutch Arbitration Act, which currently provide for an explicit provision for summary arbitral proceedings pending arbitral proceedings in a new article 1043b subsection (2).

The following recent publications are listed for further reference:

- B.C. Punt, Spoedarbitrages, TvA 2008, 28
- B.C. Punt, Het kort geding bij de voorzieningenrechter als ‘nevenspoor’ van het al dan niet zelfstandige arbitrale kort geding, TvA, 2008, 49
- Official introduction to the NAI Arbitration Rules in force as of 1 January 2010, contained in the print version to the NAI Rules, § 9
- S. Kröll, NAI Summary Arbitral proceedings: Enforceability under the NYC?, TvA 2012, 19
- W.H. van Baren, Afschaffing van het arbitraal kort geding?, TvA 2012, 56

6. Comments and information on Authors

Please be so kind to provide comments, suggestions and input and experiences with summary arbitral proceedings to the authors.

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