Summary Arbitral Proceedings in The Netherlands

extract from:

A Guide to the NAI Arbitration Rules
Including a Commentary on Dutch Arbitration Law

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SECTION 4A

SUMMARY ARBITRAL PROCEEDINGS
(Articles 42a-42o)

This section deals with one of the two forms of summary arbitral proceedings (arbitraal kort geding). This type is provided for in Articles 42a-42o (Section 4A) of the NAI Rules. The other type of summary arbitral proceedings involves summary arbitral proceedings that are initiated subsequent to the appointment of the arbitral tribunal dealing with the case on the merits, as provided for in Article 37 (see the comments on that Article).

Because the type of summary proceedings governed by Section 4A is frequently used, it warrants a somewhat more extensive set of introductory notes. These introductory notes relate to the distinction between these summary proceedings and other types of proceedings, situations in which it is advisable to opt for summary proceedings, the application of mandatory and non-mandatory provisions of the DCCP in summary arbitral proceedings, further proceedings and the application of fundamental procedural principles of due process.\textsuperscript{198}

The NAI Rules only provide for this type of summary arbitral proceedings, as per the amendment of the rules on 1 January 1998, which amendment took immediate effect.\textsuperscript{199} In the past 10 years more than 100 cases have been dealt with in summary arbitral proceedings (in the last couple of years about 15 per year).\textsuperscript{200} The NAI Rules do not require parties who wish to initiate summary arbitral proceedings to enter into a separate agreement to that effect.\textsuperscript{201}

\textsuperscript{198} See also, for an excellent overview, B.C. Punt, ‘Sproparitirages’, Tva 2008, 85-94.
\textsuperscript{199} The validity of the immediate application of these provisions as per Art. 67 has not been challenged in published arbitral case law or proceedings to set aside an award.
\textsuperscript{200} This information is derived from the annual reports of the Netherlands Arbitration Institute.
\textsuperscript{201} Such is the case in respect of the ICC pre-arbitral referee proceedings, for which a separate agreement between the parties is required. The ICC Rules itself do not contain provisions for summary arbitral proceedings. See also Derains and Schwartz, 2005, 297-298. As to the use of the ICC pre-arbitral referee proceedings, see E. Gaillard & P. Pinsolle, ‘The ICC Pre-arbitral Referee: First Practical Experiences’, Arbitration International 20, No. 1 (2004), 1-19.
1. Distinction Between Summary Arbitral Proceedings and other Types of Proceedings

A series of proceedings are discussed in the paragraphs below. First of all, a distinction is made between summary arbitral proceedings (kort geding procedures) and proceedings on the merits (bodenprocedures). Secondly, a distinction is made between different types of summary proceedings. Thirdly, a few comments are made on summary arbitral proceedings and summary proceedings in state courts.

1.1. Distinction Between Summary Arbitral Proceedings and Arbitral Proceedings on the Merits

While arbitral proceedings on the merits will result in an award on the merits, summary arbitral proceedings result in a summary award. A summary award does not bind an arbitral tribunal dealing with the case on the merits.

The NAI Rules provide in Article 42j for the equal application of substantial parts of Section 4 ("Procedure") of the NAI Rules (Articles 20-42) on arbitral procedure to summary arbitral proceedings. However, these provisions may, and will, be deviated from in summary proceedings, to the extent the tribunal is required to deal with the case expeditiously.

The NAI Rules also provide that, upon the joint request of the parties, an arbitral tribunal in summary arbitral proceedings may render an award on the merits (Article 42l(3)). The distinction between summary proceedings and proceedings on the merits is further blurred by the fact that proceedings on the merits may, to a significant extent, adopt characteristics that are commonly associated with summary proceedings, notably by an arbitral tribunal or the parties providing for shorter time limits. The NAI Rules thus leave room for proceedings on the merits to borrow from characteristics typically associated with summary proceedings.

1.2. Different Types of Summary Arbitral Proceedings and Hybrid Proceedings

The NAI Rules contain two distinct forms of summary arbitral proceedings in Articles 37 and 42a-42o, respectively. In addition, the NAI Rules permit parties to design mixed or hybrid proceedings that borrow elements from summary proceedings but are, in a formal sense, proceedings on the merits. Furthermore, the NAI Rules also include a provision that allows arbitral tribunals dealing with a case on the merits to order provisional measures (Article 38).

The first type of summary arbitral proceedings is available if an arbitral tribunal dealing with proceedings on the merits is in place. This is provided for in Article 37 and has been discussed above (see comments on Article 37).

The second type of summary proceedings is governed by Articles 42a-42o and is discussed in this section. These provisions govern summary proceedings separate from proceedings on the merits and are, when compared to Article 37,
used most often. The relationship between these two forms of summary arbitral proceedings is set out in Article 42a(2), which is discussed below.\textsuperscript{202}

The NAI Rules also permit parties to conduct what may be described as mixed or hybrid proceedings. These proceedings borrow from summary proceedings but are proceedings on the merits and can take the form of expedited or fast-track proceedings by applying shorter time limits for both submissions and the issuance of an award. In addition, parties can agree to dispense with written memorials and/or witness examinations.\textsuperscript{203} Although parties are, in principle, at liberty to agree upon their own procedural arrangements, doing so may result in complications. These complications can arise from the fact that such arrangements form part of the mandate of an arbitral tribunal. Consequently, a deviation from that mandate – for example when the agreed time limits and/or procedural arrangements prove unworkable – may very well require an additional agreement by the parties that can be difficult to obtain when the parties are in dispute.

By the same token, summary proceedings can be turned into mixed or hybrid proceedings by designing and agreeing upon more extended summary proceedings by conducting written pleadings (see also Article 42g(2)) or full blown witness or expert examinations. Also, parties can jointly request the arbitral tribunal in summary proceedings to render a decision on the merits (Article 42t(3)).

A final distinction can be made with proceedings under in Article 38. This article provides an arbitral tribunal with the mandate to issue provisional measures in the form of an order (opdracht) during the course of arbitral proceedings (see, in more detail, the comments on Article 38).

1.3. Summary Arbitral Proceedings and Summary Proceedings in Regular State Courts

A further distinction can be made between summary arbitral proceedings and summary proceedings in regular state courts. Summary arbitral proceedings are based on Article 1051 DCCP. Summary proceedings in state courts are provided for in Article 254 DCCP.\textsuperscript{204}

Summary proceedings are very much part and parcel of the legal culture in the Netherlands and are widely applied. The availability and frequent use of summary

\textsuperscript{202} This distinction has been noted and confirmed by an arbitral tribunal dealing with summary arbitral proceedings on the basis of Art. 37, in NAI 2 Mar. 2007, TvA 2008, 99-100.

\textsuperscript{203} Given that the NAI Rules do not contain a separate arrangement for fast-track proceedings on the merits, the parties should agree on shorter time limits themselves or approach the NAI and/or, subsequent to its appointment, the arbitral tribunal to provide for a fast-track regime. In the context of the Netherlands, reference may be made to fast-track provisions in the Arbitration Rules of the Royal Netherlands Soccer Association (KNVB) in Arts 68-70 and the Arbitration Rules for the Construction Industry in Art. 14(1) of its Arbitration Rules of 27 May 2006.

\textsuperscript{204} Which is further developed in case law and supplemented by a set of uniform procedural arrangements for summary proceedings known as Procureglement Kort Geding effective as per 1 Jan. 2008.
proceedings in state courts provided an important impetus for the introduction of a provision for summary proceedings in the NAI Rules. It is also the reason why Article 1051 of the DCCP makes explicit reference to Article 254 DCCP and that quite a few elements of the provisions in Articles 42a-42o can, or are to be, interpreted by reference to the practice of summary proceedings in state courts (as will also appear from the discussion of specific articles in this section).

The provision for, or even prior or parallel conduct of, summary arbitral proceedings under the NAI Rules does preclude parties from initiating summary proceedings in state courts.\footnote{Art. 1022(2) DCCP provides that "An agreement to arbitrate does not bar a party from requesting a conservatory measure from the [state] courts or from addressing the President of the District Court in summary proceedings in accordance with Article 254 DCCP; who will rule in such matters in observance with Article 1051 DCCP".}

Article 1022(2) and 1051 DCCP arrange the correlation between summary arbitral proceedings and summary proceedings in Dutch state courts. Pursuant to Article 1022(2), the existence of an agreement to arbitrate in summary arbitral proceedings must be invoked by the respondent, if such respondent is unwilling to accept the jurisdiction of state courts in summary proceedings. The courts will not consider this point ex officio (Article 1051(2) DCCP). Furthermore, the President (voorzieningenrechter) of the District Court, in his discretion, may retain jurisdiction notwithstanding the parties' choice of summary arbitral proceedings.\footnote{A recent example is contained in a decision by the President of the Dordrecht District Court on 13 Apr. 2006, NJF 2006, 336. See also Amsterdam Court of Appeal 3 Feb. 2000, Tva 2003, 68-69 with an annotation by W.D.H. Asser.}

In making this discretionary decision, courts will consider the urgency of the matter and the time required from the initiation of summary arbitral proceedings to the moment of completion of exequentar proceedings,\footnote{See, recently, The Hague District Court 16 Oct. 2007, NJF 2008, 139 and also Burg. Rv, 2006 (H.J. Snijders), Art. 1051, note 2.} as well as the fact that the nature of the dispute may or may not call for specific expertise of an arbitrator (instead of a judge) such as knowledge of technical intricacies and/or applicable trade usages.\footnote{See for a somewhat critical view in this respect an annotation by W.D.H. Asser under Amsterdam Court of Appeal, 3 Feb. 2000, Tva 2003, 69.} If the President of the District Court retains jurisdiction even though a party has requested that the case be referred to summary arbitral proceedings, such decision is open to appeal. Such an appeal is, however, not open if the President of the District Court decides that the case should be arbitrated in summary arbitral proceedings (Article 1051(4) DCCP).

2. When to Opt for Summary Arbitral Proceedings

Whether to opt for summary arbitral proceedings is a question that only arises if the place of arbitration is in the Netherlands. The provisions in Articles 42a-42o (and also Article 37) are available only if the arbitration is seated in the
Netherlands (Article 42a(4)). The primary reason for this condition in the NAI Rules is that an award in summary arbitral proceedings is only enforceable as an arbitral award on the basis of Article 1051(3) DCCP if the arbitration is seated in the Netherlands (Article 1073(1) DCCP). Although such is not provided for in the NAI Rules, the application of summary arbitral proceedings is not inconceivable if the place of arbitration is outside the Netherlands. We do not recommend applying the NAI provisions on summary arbitral proceedings if the place of arbitration is outside the Netherlands, however, if such is considered prior consultation with the NAI is strongly advised. This follows from the fact that Section 4A, modelled as it is on summary proceedings in Dutch state courts (see e.g., Article 42a(1)), refers explicitly and implicitly to the norms and conditions reflected in Article 254 DCCP, which deals with summary proceedings in Dutch state courts.

Whether summary arbitral proceedings are expedient depends on various circumstances. Generally, the more complex and less urgent a case is, the more likely that an arbitral tribunal will not be willing to deal with the case in summary proceedings (see Article 42k).

The primary use of summary arbitral proceedings arises in scenarios demanding an urgent resolution of a dispute by means of a (provisionally) enforceable arbitral award. The urgency must be of such magnitude that regular arbitral proceedings cannot be conducted in due time (see Article 42a, note 2, regarding timing).

Cases that have been dealt with in summary arbitral proceedings cover a wide range of subjects and include intervention in takeovers, claims to pay monetary sums (geldvorderingen), post-merger disputes regarding escrow agreements, specific performance of agreements, performance of previous arbitral awards, blocking the transfer of shares as a form of security and suspension of share trading. These types of cases are comparable with the sort of cases litigated in summary proceedings in Dutch state courts.

The complexity of a case is a circumstance that is also relevant in deciding whether to grant a request in summary proceedings: if a case is too complex to be

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209 If the parties have omitted to make any prior determination of the place of arbitration, Art. 42a(4) provides that the place of arbitration is Rotterdam.

210 See, inter alia, NAI 28 Feb. 2007, Tva 2008, 19-22 and NAI 18 Apr. 2002, Tva 2003, 19-21. In both cases the norms applicable to claims for monetary sums (geldvorderingen) in summary proceedings in the state courts were applied to the same claims in summary arbitral proceedings. See also, NAI 28 Jul. 1999, Tva 2000, 11-14 applying a three-pronged test in order to decide whether or not to grant a claim for monetary sums.


213 See for an example of a case in which this claim was unsuccessful but entertained: NAI 23 Nov. 2001, Tva 2002, 63-66.
deal with in summary proceedings, the request can be denied. In this respect, a
distinction can be made between procedural complexity and complexity of the
nature of the case. From the decided matters outlined above, which are often
complex by nature and require decisions with a significant impact, it may be
concluded that arbitral tribunals will not lightly decide that a case is too complex
to be dealt with in summary arbitration, albeit that this is also subject to the
aptitude and attitude of an individual arbitral tribunal. Procedural constraints
in summary proceedings may be of greater concern when deciding whether to opt
for summary arbitral proceedings. After all, if summary proceedings are aborted
at some point due, for example, to the fact that the case requires more elaborate
consideration of evidence and/or other factual matters than can typically be
accommodated in summary proceedings, considerable time and money may
be wasted. In cases where such complexity is to be expected, parties should
be cautious not to rush into commencing summary arbitral proceedings, and
only do so if the urgency is so apparent that the arbitrators can be convinced
that the complexity of the matter and/or potential procedural hiccups should not
stand in the way of an award in summary proceedings.

3. Application of Provisions of the DCCP in Summary
Arbitral Proceedings

Article 1051 DCCP is a mandatory provision and applies if the parties have
agreed to summary arbitral proceedings. It provides a limitation on the use of
summary arbitral proceedings; arbitrators are only empowered to decide in sum-
mary arbitral proceedings within the constraints of Article 254 DCCP, which
article governs summary proceedings in state courts.

Pursuant to Article 1051(3) DCCP, Articles 1049-1068 DCCP that are designed
for proceedings on the merits also apply to summary proceedings, albeit that their
application is influenced by the summary nature of the proceedings. Consequently,
by operation of law an arbitral award in summary proceedings is put on an equal
footing to an arbitral award rendered in proceedings on the merits. Consequently
it can be enforced in a similar fashion – although this is somewhat controversial
(see further the comments on Article 421). Other provisions that also apply to
summary arbitral proceedings include those with respect to the required deposit
of an arbitral award, awards containing a settlement, provisional enforceability
of awards, arbitral appeal and the setting aside of arbitral awards.

Arbitrators in summary arbitral proceedings must observe fundamental due
process norms (fundamentale beginselen van behoorlijk procesrecht) in the same
way as they must in arbitral proceedings on the merits. They are first and

214 This also applies in the context of summary proceedings on the basis of Art. 254 DCCP, as has been
noted in a recent standard work on Dutch Procedural Law: H.J. Snijders, C.J.M. Klaassen &
foremost required to (ex officio) ensure that the parties are treated equally and receive a fair hearing. A breach of due process rules may result in setting aside of the award in summary arbitral proceedings on the basis of Article 1065(1)(c) and/or (e) DCCP (see Article 1065 DCCP, note 4 and 6 in Part III, Chapter 1). The particularities of summary arbitral proceedings may bring about that the effectuation of the right to be heard is limited to the possibility to present the case during the hearing, depending on the nature of the case and the urgency of the matter, whereas in proceedings on the merits parties are commonly given the opportunity to file and respond to submissions in writing.

Parties that have already pursued a claim in summary proceedings in state courts will not be permitted to bring the same claim in summary arbitral proceedings, absent a change of facts that justifies such second proceedings on the same matter.

4. Further Proceedings after Issuance of an Award in Summary Arbitral Proceedings

Neither the DCCP nor the NAI Rules requires the commencement of arbitral proceedings on the merits subsequent to the issuance of a new award in summary arbitral proceedings. Consequently, a successful claimant may choose to enforce an arbitral award obtained in summary arbitral proceedings without the initiation of arbitral proceedings on the merits.

Parties can agree on arbitral summary appeal proceedings as a second instance after the issuance of an arbitral award in summary arbitral proceedings. In practice, we have not observed any arbitral appeal in NAI summary arbitral proceedings, perhaps because it is hardly if ever agreed on in arbitration agreements under the NAI Rules, or because parties choose to conduct arbitral proceedings on the merits instead. If the parties have made a general provision in their arbitration agreement that provides for an arbitral appeal, such provision will probably not be interpreted to also provide for an appeal in summary arbitral proceedings. Parties should use specific wording to that effect if they wish to agree to arbitral appeal in summary proceedings.

215 Articles 1036 and 1039(1) DCCP, Art. 6 ECHR, Art. 23(1) NAI Rules (see the comments on this article). The latter article also applies to summary arbitral proceedings, pursuant to Art. 42.


217 See also Introduction to NAI Arbitration Rules, para. 9.2.