TvA 2020/3

Arbitral Emergency Proceedings – à la Hollandaise: Twenty Years of Practice

Mr. M.L. Verhoeven-de Vries Lentsch & mr. R. Schellaars, datum 30-01-2020

Datum
30-01-2020
Auteur
Mr. M.L. Verhoeven-de Vries Lentsch & mr. R. Schellaars[1]
Folio weergave
Download gedrukte versie (PDF)
JCDI
JCDI:ADS186150:1
Vakgebied(en)
Burgerlijk procesrecht (V)

In recent years, a plethora of arbitration institutes has introduced emergency arbitration facilities. We counted over 25 examples. The ICC's (in 2012)[2] and the LCIA's (in 2014)[3] adoption of the concept seem, however, to have further paved the way. The approach taken by the ICC and the LCIA has been reported on in earlier publications in this journal.[4]

Emergency arbitration has been the topic of a broad international study. On this work, a Task Force set up by the ICC has recently published its findings. It is not without reason that the co-chair to this ICC Task Force originates from the Netherlands.[5] After all, mainstream emergency arbitration is pretty much a Dutch invention. Hollandaise sauce, however, is not - to which we shall return later and for which we offer the readers a 368-year old recipe.[6]

In this publication, we focus on what the Netherlands Arbitration Institute's Arbitration Rules of 1 January 2015 (the "**NAI Rules**") refer to as "summary arbitral proceedings".[7] In an international context, these would most aptly be referred to as Dutch arbitral emergency proceedings.[8] The reason for preparing this publication is that we wish to update readers on the offering of these services by the Netherlands Arbitration Institute (the "**NAI**"). This is opportune because, due to its early entry into the world of emergency arbitration facilities in 1998, the NAI has established the longest track record in summary arbitral proceedings and similar offerings of all main arbitral institutions. Since 1998, over 275 summary arbitral proceedings have been registered with the NAI, resulting in 145 awards up to 1 January 2019. We have studied all these awards and thus cover twenty years of practice.[9]

Before sharing our views and insights on the basis of this empirical research, it is useful to delineate the concept of these summary arbitral proceedings.

1. Summary Arbitral Proceedings – The Concept

The Dutch legislator has provided for proceedings that are also referred to as summary arbitral proceedings in Article 1043b of the Dutch Arbitration Act (the "**DAA**"), which is set out in the fourth book of the Dutch Code of Civil Procedure ("**DCCP**") and applies in arbitrations seated in the Netherlands. The NAI has published the following translation on its website:

"By agreement, the parties may authorise an arbitral tribunal separately appointed for that purpose, irrespective of whether the arbitral proceedings on the merits are pending within the limits set by Article 254(1), to grant provisional relief at the request of any of the parties, except for conservatory measures as referred to in the Fourth Title of the Third Book."[10]

Article 254(1) DCCP, which is referenced in this provision, may (loosely) be translated as follows:

"*In all urgent cases which, in view of the interests of the parties, require an immediately available provisional measure, the provisional relief judge is competent to grant such measure."*

While Article 254(1) DCCP provides for summary proceedings in which courts can render summary decisions that can have an influence on proceedings on the merits for a considerable time,[11] awards rendered in summary arbitral proceedings formally do *not* bind tribunals dealing with the same issue in proceedings on the merits.[12] This is the main distinguishing factor with expedited arbitral proceedings, which do provide for a final award on the merits.

Expedited proceedings on the merits are also prevalent. After the Swiss Rules of International Arbitration introduced an

expedited procedure in 2004, many institutions have since followed suit. For instance, the ICC has introduced expedited arbitral proceedings in its rules revision of 2017. These expedited proceedings are, presently, also conceivable at the NAI through application of inherent flexibility on application of time limits etcetera under the NAI Rules.[13] However, the NAI Rules do not (yet) contain a distinct set of provisions for expedited arbitral proceedings, with the exception of a pure small claims arrangement called “TGV-proceedings”.[14]

As noted, the NAI Rules have provided for summary arbitral proceedings in Dutch seated arbitrations since 1 January 1998. Currently, this facility is set out in Articles 35 and 36 of the 2015 NAI Rules. These provisions apply automatically if parties opt for arbitration under the NAI Rules and choose a place of arbitration in the Netherlands, all with the option to opt out.

Importantly, summary arbitral proceedings may be conducted prior to and pending arbitral proceedings on the merits.[15] The summary arbitral proceedings are independent (*i.e.* self-standing) proceedings because parties are *not* compelled to commence proceedings on the merits, pending or subsequent to the proceedings. They can also result in an enforceable arbitral award that may be enforced through operation of Article 1043b(3) DAA.[16] This arrangement and its longstanding application sets the NAI offering apart from summary or emergency arbitral proceedings offered by other institutes, including the ICC and the LCIA which do not allow emergency arbitrators to render awards.

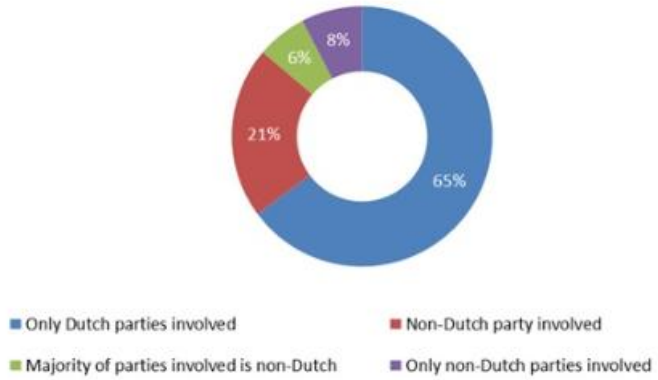
Because the best way to test a dish is in the eating, this contribution shall now focus on insights gained from empirical research and personal experience. We researched the practice of summary arbitral proceedings empirically and first published an overview in 2012 on the NAI's website.[17] Our updated research paper was published on the NAI's website on 30 December 2019.[18]

2. Summary Arbitral Proceedings – Research

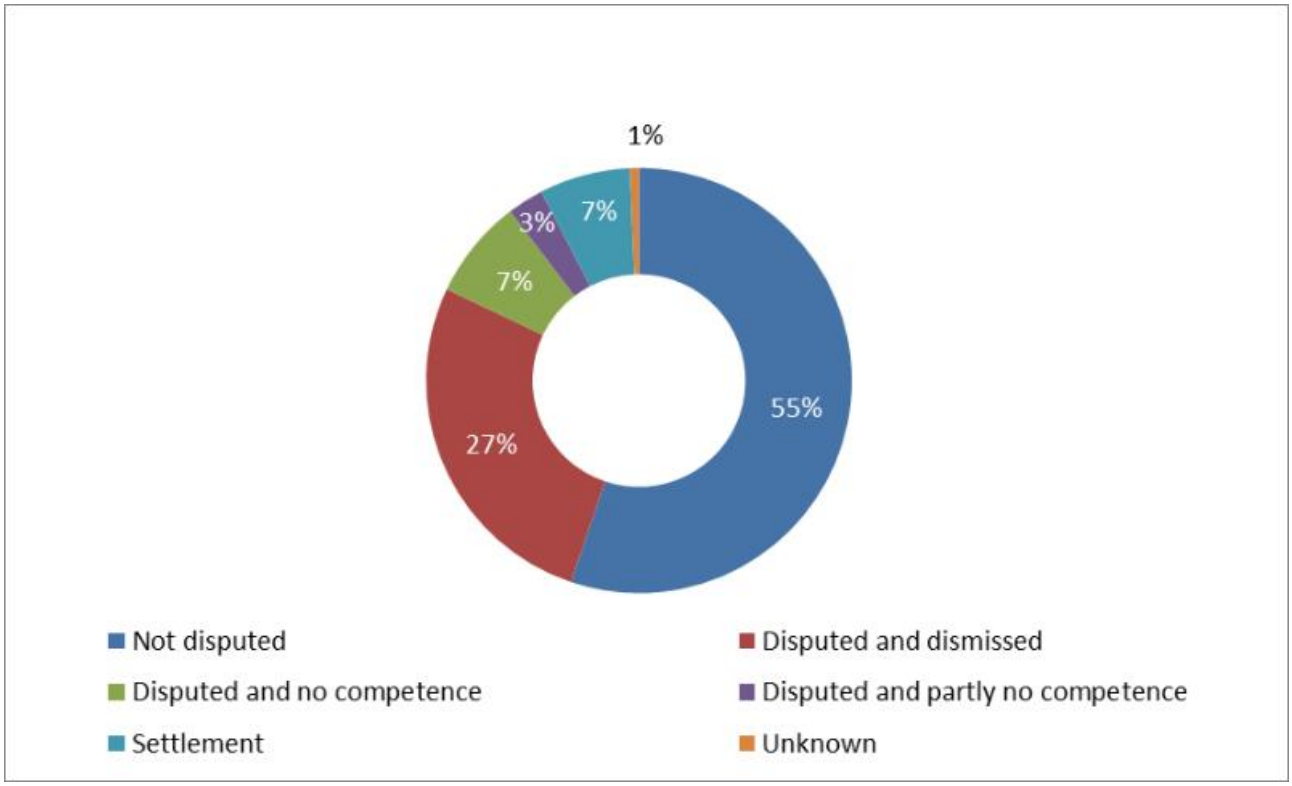
The bottom line of our research findings is that these proceedings provide a valuable addition to the offering of arbitration as a means of dispute resolution. We are convinced that the NAI's summary arbitral proceedings can safely be used by both Dutch and international parties to achieve a swift and – generally[19] – enforceable resolution of disputes. For this reason, we also support an earlier call to the NAI to remove the condition of a Dutch seat of arbitration for the NAI's summary arbitral proceedings regime to apply (which would entail an amendment of Article 35(2) of the NAI Rules).[20]

On the basis of our experience and research, the following may serve as a fair characterisation of NAI summary arbitral proceedings under article 35(2) NAI Rules. The proceedings commence upon filing of a request for arbitration subsequent to which the NAI initiates a highly accelerated appointment procedure in which it selects a sole arbitrator. To give an indication of the swiftness of this process: the target of appointment within 24 hours following submission of a request for summary arbitral proceedings turns out to be feasible. Generally, the tribunal provides for one round of written pleadings and a hearing. At the hearing, taking of evidence is possible, albeit with some – yet not prescribed – restraint in terms of the number of witnesses, expert evidence and length of potential examination given the nature of the proceedings.[21]

We shall now present and discuss some key findings, which are to be published on the NAI's website in a comprehensive fashion.
First, both Dutch and non-Dutch parties make use of the option to initiate summary arbitral proceedings: 35% of the awards involved one or more non-Dutch party, and in 8% of the cases, all parties involved were non-Dutch parties.



Second, there do not seem to be pressing issues concerning jurisdiction of tribunals. Parties fully or partially dispute competence in just under half the cases. Such jurisdictional objections are, however, rarely successful, notwithstanding that undue complexity can – by analogy to the regime for summary proceedings in the Dutch state courts – be a basis for the tribunal to deny jurisdiction. This follows from the fact that complexity is one of the factors weighed in the context of the balancing of the interests of the parties on the basis of Article 254(1) DCCP, which is cross-referenced in Article 1043b DAA as illustrated above.
We consider this to be a key finding: perceived or real complexity should thus not easily be seen as a reason to shy away from filing summary arbitral proceedings.



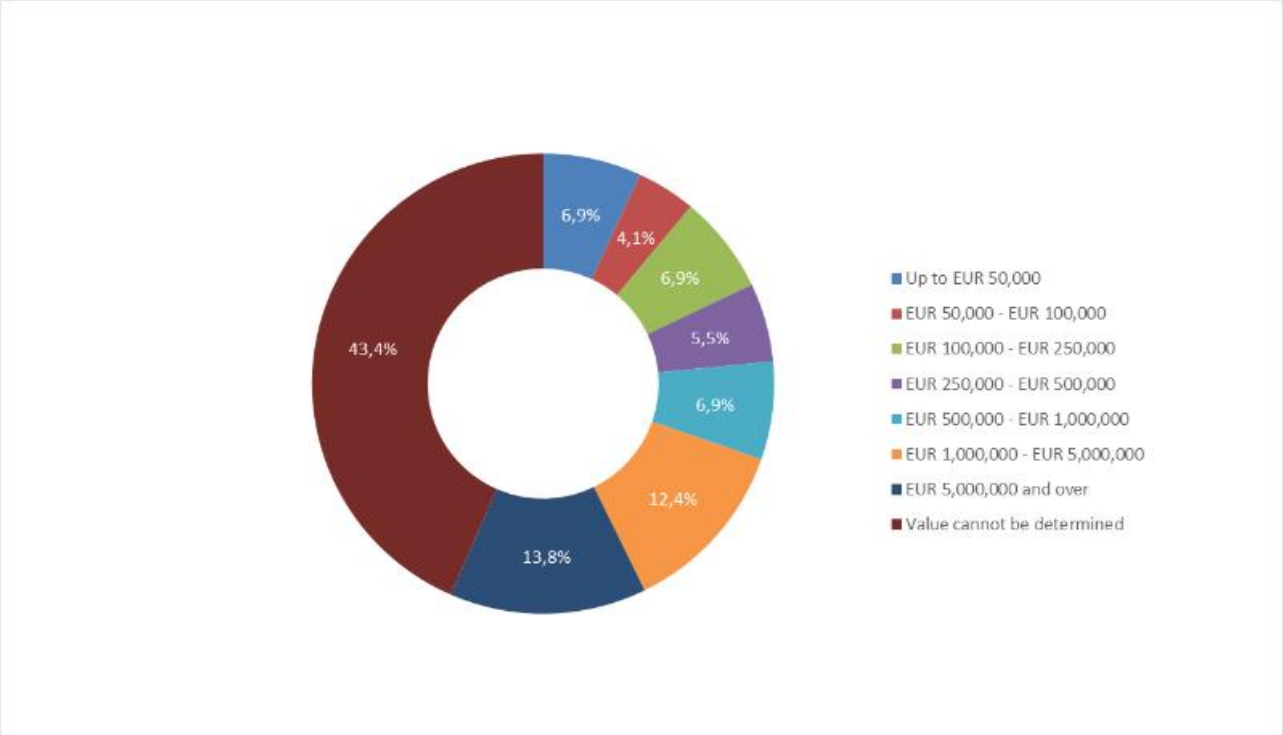
Third, in 65% of the awards rendered, the relief sought by the claimant is granted in whole or in part. The picture with respect to counterclaims is different. Out of the 44 cases in which counterclaims were raised, only 25% were successful. This is quite a finding. We have the impression that claimants generally come well prepared and do not lightly initiate these proceedings. Respondents are well advised to use experienced counsel in these matters and not take these proceedings lightly. In this context, we note that tribunals are not required to apply any condition pertaining to the likelihood of success of the claims in proceedings on the merits.[22]

Fourth, we observe a very wide variety of relief granted. This includes: claims for specific performance (*nakoming*); monetary payment; lifting of attachments/garnishment orders; enforcement of an obligation to conclude an agreement; halting infringement of competition clauses and intellectual property rights; enforcement of a right of inspection of, access to or handing over of documents; an injunction to exercise shareholder rights; and nullification of a decision to terminate an agreement.

Notably, we have also seen cases where an award in summary arbitral proceedings came in the place of a formal deed to deliver and transfer claims by a party under a share purchase agreement[23] and claims pertaining to suspension of share trading and blocking the transfer of shares. These are, however, rare or otherwise not representative of the general practice.[24] They do, however, illustrate that parties should not hold back and can be creative when formulating the relief sought.

Not infrequently, Parties request tribunals to impose periodic penalty payments in case of non-compliance. These are often granted. Such penalty payments can be quite significant in terms of gross monetary value – we have seen high water marks of amounts running up to EUR 2.5 million per breach or EUR 1 million per day with a maximum of EUR 100 million.

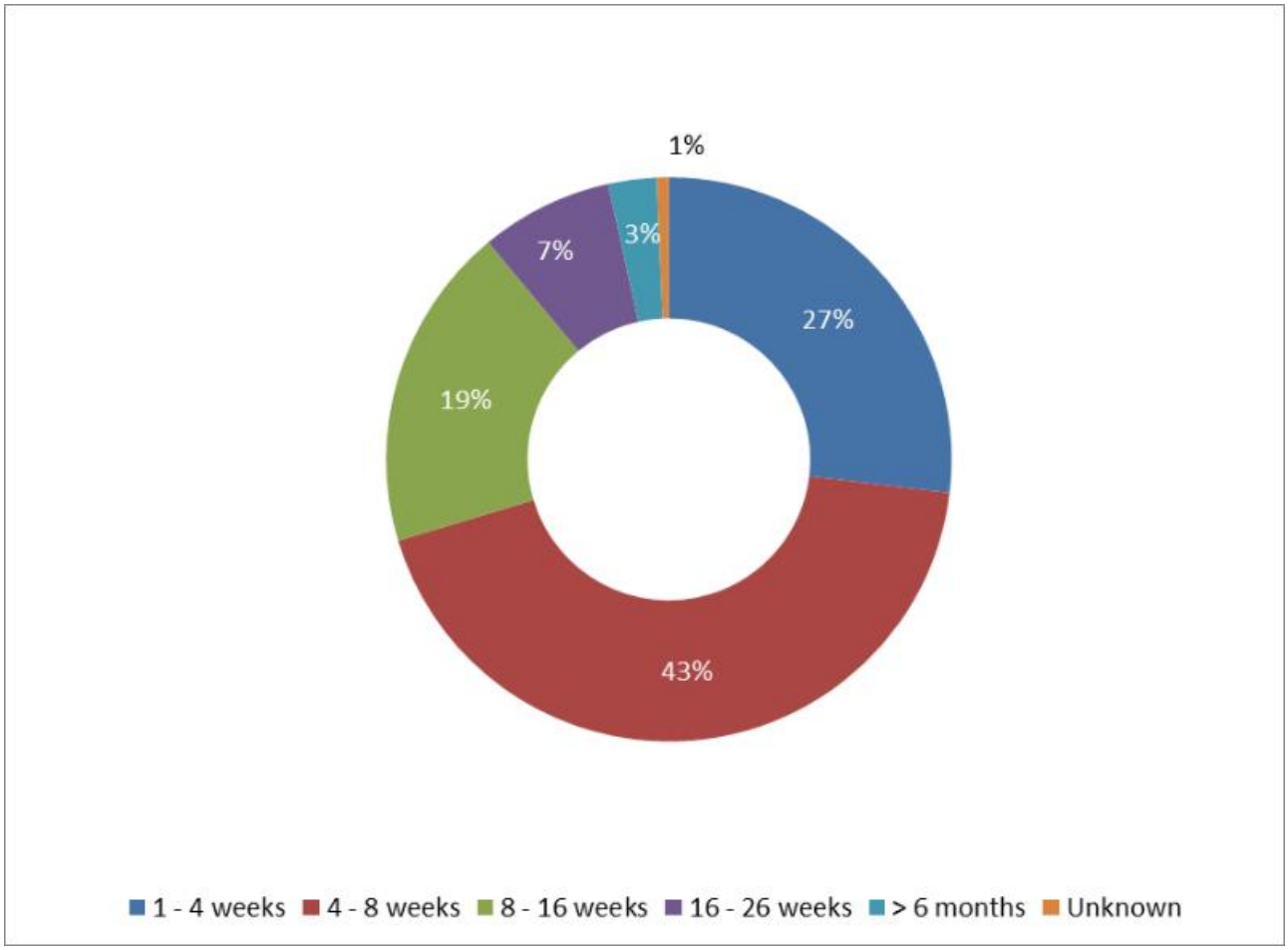
Fifth, these proceedings can – but of course do not have to – concern disputes in which substantial monetary sums are at stake. The following picture emerges, showing that in over 25% of the cases, the amount at stake is EUR 1 million or more:



In cases where a monetary value could not be ascertained, for example because the case did not involve claims for monetary sums, the implied stakes can nonetheless be high.

Sixth, although there is no obligation on parties to initiate proceedings on the merits pending or subsequent to arbitral summary proceedings, we established that 103 NAI proceedings on the merits are linked to 271 requests for summary arbitral proceedings. There may be various reasons for this finding. Without limitation, we note that these may include full or partial denial of jurisdiction, unavailability of relief in summary arbitral proceedings, and disputes concerning execution of awards. This finding does not, in our view, in any way diminish the independent function of summary arbitral proceedings.

Finally, and crucially, our research shows that 70% of the awards are handed down within 8 weeks, counting from the submission of a request for of arbitration. On this, we have compiled the following data:



3. Concluding Remarks

Our research confirms that summary arbitral proceedings can provide parties with effective and swift resolution of high value and complex disputes with access to a wide variety of potential relief and a decent chance of success. This can be realised at relatively low cost and without the need to initiate proceedings on the merits. Therefore, we do recommend Dutch and international parties to use this option more often to resolve their disputes. In addition, we consider this practice to be sufficiently ascertainable for non-Dutch parties to engage in.

Finally, we encourage readers and users to take note of our updated research paper that shall soon be published at the NAI's website. That publication is planned to occur well before the commencement of the Dutch asparagus season in April 2020, which delicacy may – like arbitral emergency proceedings – be best served *à la Hollandaise*.[25]

Voetnoten

[1]
Martje Verhoeven-de Vries Lentsch is a partner and advocate at De Brauw Blackstone Westbroek in Amsterdam.Rogier Schellaars is a partner and advocate at Van Doorne N.V. in Amsterdam and also active as member of the NAI's advisory board and member of the ICC International Court of Arbitration. Martje and Rogier act as counsel and arbitrator in NAI matters and write this contribution strictly in a personal capacity.

[2]
M. Van Leeuwen, 'Het nieuwe ICC-Arbitragereglement 2012', *TvA* 2012/2. En R. Schellaars, 'Het nieuwe ICC-Arbitragereglement 2017 – de ICC timmert aan de weg', *TvA* 2017/21.

[3]
R. Schellaars, 'Het nieuwe LCIA Arbitrage Reglement', *TvA* 2015/2.

[4]
See the footnotes, above.

[5]

Marnix A. Leijten co-chaired this effort (with Diana Paraguacato-Mahéo and James Hosking). See:https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report/ for a publication of the full report. Co-author R. Schellaars was also a member of this 'Task Force'.

[6]
Hollandaise sauce is referenced in M.E. Snodgrass' Encyclopedia of Kitchen History, Fitzroy Dearborn (London) 2014, who traces the recipe back to the recipes of the 17th century French Chef Pierre François de la Varenne.

[7]
This terminology was also used in the NAI's Arbitration Rules of 1 January 1998, upon introduction of summary arbitral proceedings. Per 1 January 1998, the NAI Rules were amended to give effect to a decision made, in 1997, by the (then) Governing Board of the NAI "to make provision for summary arbitral proceedings." See the "Introduction to NAI Arbitration Rules in force as of 1 January 1998", para 2.5 as printed in the booklet containing the NAI Rules of 1 January 1998 and published by the NAI.

[8]
These proceedings are comprehensively described in English in: B. van der Bend, M. Leijten & M. Ynzonides (*eds.*), *A Guide to the NAI Arbitration Rules, Including a Commentary on the Dutch Arbitration Act*, KLI 2009, p. 189 and following.

[9]
Subject to ensured confidentiality, of course.

[10]
The 1986 iteration of the Dutch Arbitration Act first provided for summary arbitral proceedings in Article 1051 and read as follows in its subsection 1: "The Parties may agree to empower the arbitral tribunal or its chairman to render an award in summary proceedings, within the limits imposed by Article 289(1) [which was the predecessor-provision to Article 254 DCCP]." This translation is taken from P. Sanders & A.J. van den Berg, *The Netherlands Arbitration Act 1986, Text and Notes English Français, Deutsch*, Kluwer 1987, p. 29.

[11]
This is generally attributed to J.P.A.N. Caroli, a Dutch jurist who published on the topic in 1906 and the *auctor intellectualis* of the Dutch Civil Code, Professor E.M. Meijers & J.P.A.N. Caroli, *Het kort geding voor den president der arrondissements-rechtbank: eerste deel*, 's Gravenhage: Bellifante 1906. E.M. Meijers published a second part thereto in 1915.

[12]
A recent and elaborate publication on the distinction between Dutch summary arbitral proceedings and expedited proceedings by F.M.A. Potter & R. Schellaars is included in the NAI's 70th anniversary publication: C.J.M. Klaassen, G.J. Meijer & C.L. Schleijpen, (*eds.*), *Going Dutch: ADR in Nederland, in het bijzonder bij het NAI*, Wolters Kluwer 2019, p. 495 and following.

[13]
The ICC's expedited arbitral proceedings have been discussed in this journal: See R. Schellaars, 'Het nieuwe ICC-Arbitragereglement 2017 – de ICC timmert aan de weg', *TvA* 2017/21.

[14]
https://www.nai-nl.org/en/small_claims_arbitration/.

[15]
The latter option is not utilised often, probably because Tribunals that deal with proceedings on the merits are empowered under the NAI Rules to grant considerable interim relief.

[16]
Enforcement within The Netherlands is secured through article 1043b(4) DCCP, and although much can be said in favour of enforceability outside The Netherlands, this is not very tried and tested and may be challenged by reference to the "finality" requirement under the New York Convention. See further publications by S. Kröll & R. Schellaars in *TvA* 2012/19 and *TvA* 2013/15 and District Court Amsterdam, 12 January 2017, ECLI:NL:RBAMS:2017:282.

[17]
www.nai-nl.org, on which was partially published. See R. Schellaars, 'NAI arbitraal kort geding – kort, goed en met executabel resultaat', *TvA* 2013/15.

[18]
See https://www.nai-nl.org/downloads/NAI%20Summary%20Proceedings%202019.pdf. See https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report/ for similar research on the ICC's Emergency Arbitration proceedings.

[19]
Enforcement in The Netherlands is not controversial and can be based on Article 1043b DCCP. Enforcement outside The Netherlands is not unknown, but may be challenged by reference to the "finality" requirement under the New York Convention. This is, however, not a very tried and tested argument and we do know of unpublished but noted instances in which arbitral awards rendered in summary arbitral proceedings have been enforced outside The Netherlands. See further publications by S. Kröll & R. Schellaars in *TvA* 2012/13 and *TvA* 2013/42 and District Court Amsterdam, 12 January 2017, ECLI:NL:RBAMS:2017:282.

[20]

F.M.A. Potter & R. Schellaars, ibid, p. 527.

[21]
This does not apply to summary arbitral proceedings before a tribunal that has already been appointed to deal with proceedings on the merits (as per Article 35(1) NAI Rules), which are proceedings different from those we have researched.

[22]
See, for example and in contrast, with respect to the practice on the basis of the ICC Rules: the ICC Task Force's.Report, ibid, paras. 152-156. As a matter of Dutch law, this is not to be part of the tribunal's mandate: Netherlands Supreme Court 15 March 1968, *NJ* 1968/228.

[23]
TvA 2011/36.

[24]
B. Van der Bend, M. Leijten & M. Ynzonides, ibid, p. 193.

[25]
The 1651 recipe by Varenne: make a sauce with some good fresh butter, a little vinegar, salt, and nutmeg, and an egg yolk to bind the sauce; take care that it doesn't curdle. See M.E. Snodgrass' Encyclopedia of Kitchen History, Fitzroy Dearborn (London) 2014.