

## THE NETHERLANDS COMMERCIAL COURT: A NEW COURT FOR INTERNATIONAL COMMERCIAL DISPUTES

### Introduction

On Tuesday 11 December 2018 the Dutch Senate approved the bill to establish a commercial court in the Netherlands: the Netherlands Commercial Court ("NCC"). The relevant legislation will enter into force soon. Parties may therefore shortly bring international commercial disputes before the NCC.

Proceedings before the NCC are conducted in the English language and judgments are given in the English language as well. A judgment from the NCC is automatically enforceable in all EU Member States but may also be enforceable outside of the EU – i.e. depending on the applicable international conventions or local recognition and enforcement rules. These features make the NCC an interesting new alternative to international commercial dispute resolution.

The NCC is based in Amsterdam, the Netherlands. It is a specialised chamber of the Amsterdam District Court, respectively a specialised chamber of the Amsterdam Court of Appeal. An appeal against a decision of the NCC Court of Appeal can be heard by the Dutch Supreme Court. For reasons of readability we will only discuss the NCC as a chamber of the Amsterdam District Court, unless stated otherwise.

### Jurisdiction of the NCC

The NCC will only have jurisdiction if the following conditions are met:

- the parties have designated the Amsterdam District Court as the forum to hear their case or the Amsterdam District Court has jurisdiction to hear the case on other grounds;
- the parties have expressly agreed in writing to bring proceedings before the NCC and in the English language;
- it involves a civil or commercial matter, which is not subject to the exclusive jurisdiction of any particular court; and
- the matter concerns an international dispute.

These elements will be further discussed below.

### Key takeaways

- A special court for international commercial disputes
- Proceedings and judgment in the English language
- NCC judges can also apply foreign law
- Judgments are enforceable in all EU member states

The NCC will only be competent if the Amsterdam District Court has international jurisdiction. The NCC will assess this pursuant to EU law (e.g. Brussels I Regulation (recast)), treaties (e.g. Hague Choice of Court Convention) or domestic Dutch rules of private international law (e.g. Dutch Code of Civil Procedure).

If the Amsterdam District Court does not have international jurisdiction on objective grounds (e.g. because of the domicile of a defendant), parties can agree either before (e.g. through a jurisdiction clause) but also after a dispute has arisen that the Amsterdam District Court shall have exclusive jurisdiction.

The NCC has no jurisdiction in disputes that fall under the exclusive jurisdiction of the subdistrict courts or any other chamber or specialised court. For instance, subdistrict courts have exclusive jurisdiction over disputes concerning lease agreements and employment contracts (*kantonzaken*). Claims of less than EUR 25,000 also fall within the exclusive jurisdiction of the subdistrict courts. Furthermore, the Enterprise Chamber has exclusive jurisdiction over inquiry proceedings (*enquêteprocedures*). Parties cannot contractually deviate from these jurisdiction rules.

The agreement of parties' choice for the NCC and the English language should be made expressly and in writing. It is insufficient to include this in the general terms and conditions of one of the parties.

The NCC only deals with disputes in international civil and commercial matters. Typical matters that may be brought before the NCC are:

- (general) contractual disputes;
- SPA disputes;
- shareholder or joint venture disputes;
- director's liability cases;
- follow-on claims in relation to a competition law infringement;
- requests for injunctive relief, e.g. leave for an attachment<sup>1</sup>;
- applications for preparatory witness hearings; and
- claims to set aside an arbitral award<sup>2</sup>.

The case must involve an international dispute. This may, for example, be the case if one of the parties is domiciled outside the Netherlands, if foreign law is applicable to the dispute or if the dispute arises from an agreement prepared in a language other than Dutch. An international dispute may also exist if one of the parties is a company or belongs to a group of companies of which (i) the majority of the worldwide employees work outside the Netherlands, (ii) more than one-half of the consolidated turnover is realised outside of the Netherlands, or (iii) the securities are traded on a regulated market outside of the Netherlands. The assessment if the case involves an international dispute is based on the circumstances at the time the NCC clause was agreed by the parties.

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1 This is only possible if Amsterdam is the place where all or part of the goods to be attached are situated or where the debtor or third party has its domicile.  
2 This is only possible at the NCC Court of Appeal provided that the Amsterdam Court of Appeal has jurisdiction, i.e. the place of arbitration needs to be Amsterdam, and the parties must have agreed to conduct the setting aside proceedings in English before the NCC.

## The NCC procedure

A case before the NCC will generally be heard by a panel of three judges. A request for injunctive relief will be handled by one judge. The NCC judges may basically give any judgment that judges of the regular Amsterdam District Court could also give.

The NCC judges are experienced judges, selected for their specific knowledge and experience in international commercial cases and English-language proceedings. Although the judges are specialised in Dutch law, the judges may also apply foreign law. The applicable law will be determined pursuant to conflict rules comprised in EU law (e.g. Rome I or Rome II Regulation), in treaties (e.g. Hague Agency Convention) or in Dutch law (e.g. Book 10 of the Dutch Civil Code). This means, for instance, that if parties have validly chosen to apply foreign law (for matters where such choice is permitted), the NCC will also apply that law.

The procedural rules are laid down in the NCC rules of procedure. Please find below some key characteristics of an NCC procedure that follow from the rules:

- **Language:** the proceedings before the NCC can be conducted in the English language, if the parties expressly agree to do so. The parties may also unanimously request the NCC to conduct all or part of the proceedings in the Dutch language.<sup>3</sup>
- **Efficient procedure:** the NCC stimulates to make the most efficient use of new technologies, e.g. the court may communicate with the parties by video conferencing and court reporters can be used to record the hearings and witness and expert testimonies. This is unusual in 'regular' Dutch proceedings.
- **Court fees:** the court fees of the NCC are fixed at EUR 15,000 for a case at first instance.<sup>4</sup> This amount is higher than the court fees of the 'regular' Dutch district courts, which are approx. EUR 4,000 for large civil matters.
- **Confidentiality:** the proceedings before the NCC are not confidential and the hearing is public. The judgment of the NCC will be pronounced publicly and may be published online. Information that may directly identify a natural person will be redacted. It is possible to request the NCC to order that certain documents are only to be reviewed by the court for compelling reasons. Parties may also enter into an evidentiary agreement on access to confidential documents, e.g. by agreeing that certain materials will only be reviewed by the parties' lawyers.
- **Third parties:** third parties may be involved in the NCC proceedings. If a third party joins the proceedings as a claimant or as a defendant, that party is bound by the other parties' agreement in respect of the language of the proceedings. However, if one of the parties wishes to add a third party to the proceedings – for instance to implead that third party – or if the third

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<sup>3</sup> The same applies to a procedure before the Netherlands Commercial Court of Appeal, i.e. the proceedings and the judgment can be in the English language. The Dutch Supreme Court, which hears appeals against the decisions of the NCC Court of Appeal, is not bound by the choice of English as the language of the proceedings. The Supreme Court has indicated, however, that it will decide cases on the basis of the documents that are submitted to the NCC District Court and/or NCC Court of Appeal in English. The Supreme Court will give a judgment in the Dutch language.

<sup>4</sup> The NCC's court fees are fixed at EUR 20,000 for appeal proceedings. The court fees of the 'regular' Dutch courts of appeal are approx. EUR 5,000.

party itself wishes to intervene, different rules apply. The NCC will only allow the third party to take part in the proceedings if that third party has consented in writing to English being the language of the proceedings. The other parties may also agree that the entire proceedings will be dealt with in the Dutch language.

The NCC will apply not only its own rules, but also Dutch procedural law. This means that certain requests provided for in Dutch procedural law – e.g. the request to demand specific documents from the other party, which is more limited in scope than under English law – can also be made before the NCC.

### The NCC judgment

A judgment from the NCC is given in the English language. The judgment is automatically recognised and enforceable in all EU Member States pursuant to the Brussels I Regulation (recast).

It may be more challenging to enforce an NCC judgment outside of the European Union as enforceability must follow from a separate international convention. The Netherlands is party to various international conventions and bilateral treaties relating to the recognition and enforcement of judgments.

After Brexit, it will most likely still be possible to enforce an NCC judgment in the UK, although the legal basis is currently unclear (e.g. Lugano Convention, Hague Choice of Court Convention or bilateral treaty between the Netherlands and the UK).

### Conclusion and comparison

The NCC is a new forum for international commercial dispute resolution. It can be a good alternative to 'regular' district courts, arbitration or commercial courts that already exist (e.g. in London, Paris, Delaware, Dubai and Singapore).

Please find below some key characteristics of proceedings in first instance before the NCC in comparison to such proceedings before the 'regular' Dutch district courts and arbitration proceedings.

	<b>NCC</b>	<b>Dutch district courts</b>	<b>Arbitration</b>
<b>Language</b>	English (or Dutch)	Dutch	English, Dutch or any other language
<b>Confidentiality</b>	No	No	Yes
<b>Recognition and enforcement</b>	EU Member States and countries party to an international convention or bilateral treaty	EU Member States and countries party to an international convention or bilateral treaty	Countries party to the NY Convention
<b>Court fees / administration costs</b>	EUR 15,000	Approx. EUR 4,000	Min. EUR 25,000 (excl. arbitrators' fees and expenses)
<b>Choice of judges / arbitrators</b>	No	No	Yes
<b>Cost awards</b>	Limited	Limited	Full

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