

Quoted

Netherlands Commercial Court: a new international trade chamber for commercial disputes

As of 1 January 2019, the Netherlands Commercial Court and the Netherlands Commercial Court of Appeal (**NCC**) have been launched. This commercial court was recently established and is part of the Amsterdam District Court and Amsterdam Court of Appeal. It allows parties to resolve (complex) international commercial disputes in English. In this edition of Quoted we take a brief look at the objectives and the features of the NCC. We go on to summarise the key features of proceedings before the NCC. Finally, we compare the NCC procedure with the procedures of the regular Dutch courts and with international arbitration procedures.

In this edition

- Introduction
- Background to the Act
- Main points of the NCC Act
- Comparison with arbitration and the ordinary courts
- Conclusion

1. Introduction

On 1 January 2019 the Bill inaugurating the Netherlands Commercial Court and the Netherlands Commercial Court of Appeal became law. As a result, two new courts (both abbreviated below to “NCC”) have now opened for litigation. By means of this Bill, the legislator has established a new international commercial chamber: the NCC District Court (of Amsterdam), including judge for interim relief¹ and the NCC Court of Appeal (also of Amsterdam) in which (international) parties can resolve complex international trade disputes in English. The NCC offers swift, efficient and dependable dispute resolution. It seeks to do this in accordance with the Dutch law of civil procedure, while conducting the proceedings entirely in English. Proceedings before the NCC are settled by three specialist judges who have experience of complex commercial disputes. An electronic filing system can also be used.

The NCC has now been up and running for well over half a year and its first ruling was published on 8 March 2019. This was within a month of the start of the proceedings.²

In this edition of *Quoted* we take a brief look at the objectives behind the Bill and the features of the NCC. We go on to summarise the key features of proceedings before the NCC. Finally, we compare the NCC procedure with the procedure of an ordinary Dutch court and with an international arbitration procedure.³

2. Background to the Act

English-speaking commercial courts already exist in a number of big cities around the world. In Europe, there is a perceptible trend towards opening international commercial chambers.⁴ Not wanting to be left behind, in 2014 the Dutch Council for the Judiciary (*Raad voor de Rechtspraak*) presented the possibility of an English-language commercial court sitting in the Netherlands, and urged government and business circles to fully

support their idea. In 2015 the cabinet indicated that it was in favour of making the concept of the NCC a reality. There were several reasons for it.

Companies engaged at international level - not only in the Netherlands - feel the need for administration of justice in English. Economic globalisation and the associated increase in international trade in recent decades have given a considerable boost to English as the language of choice for conducting trade and business activity. Before the launch of the NCC, companies with international operations had no choice but to resort to international arbitration or Anglo-American procedures if they wanted dispute resolution in English. Proceedings of the UK/US type are however seen as cumbersome and therefore longer and more expensive than efficient Dutch proceedings. International arbitration procedures are also an increasingly costly option. The NCC procedure can provide a good alternative to these costly procedures.

The possibility of conducting international commercial cases before the Dutch national courts in English, is also good for the trading position of the Netherlands.⁵⁵ The importance of efficient, independent and, above all, reliable administration of justice to improving the investment climate and to a country's prosperity has repeatedly been demonstrated.⁶⁶ For example, it can be important to businesses to have a clear understanding of which court will be competent to resolve a dispute, at what cost, and in which language, prior to entering into complex contracts.

By setting up the NCC, the legislator and the judiciary have sought to address precisely these needs. The expectation is that legal proceedings in English, offering clarity and reliability to companies operating internationally, will improve conditions for investment in the Netherlands.

1 NCC Court in Summary Proceedings: this includes both summary proceedings and the judge for interim relief. Annex I (explanatory notes) to NCC Rules, p. 39.

2 For a thorough description of the first NCC ruling, see the note by Mijke Sinnighe Damsté, Vincent Vroom and Marit Bosselaar at the District Court of Amsterdam, 8 March 2019, ECLI:NL:RBAMS:2019:1637, JONDR 2019/103 with note by attorneys-at-law M.H.C. Sinnighe Damsté, V.R. Vroom and M.J. Bosselaar.

3 Where this article refers to 'ordinary procedure,' it means procedure before the non-NCC Dutch courts.

4 Examples are the commercial courts in London, Dublin, Delaware, Dubai and Singapore.

5 Nederland Handelsland. Het perspectief van de transactiekosten (2003, no. 66) [The Netherlands - Trading Nation. The aspect of settlement costs]

6 World Development Report 2005 - The World Bank.

3. Main points of the NCC Act

3.1 Features of the NCC

District Court and Court of Appeal of Amsterdam

The international commercial chamber is now part of the District Court (NCC District Court) and of the Court of Appeal (NCC Court of Appeal) of Amsterdam. The judiciary has chosen to make the NCC part of a single court of first instance and a single court of appeal, in order to optimize the available resources in a most efficient manner. The choice of Amsterdam made sense, given the proximity of Schiphol international airport and the number of corporate headquarters and law firms with an international outlook. Moreover the court building (*Paleis van Justitie*) in Amsterdam has quite generous facilities (including digital), which can facilitate the progress of legal proceedings.

Three specialist judges

Each case that comes before the NCC, both at first instance and in appeal, is handled by three specialist judges. A pool of judges and justices, drawn from all courts, has been assembled for this purpose. The appointed judges must have broad experience in dealing with major and complex international commercial disputes and the administration of justice in such cases. Furthermore, a NCC judge must have an excellent active and passive knowledge of legal English. In other foreign commercial courts, rulings are often given by a single judge. By using three specialist judges, the legislator is trying to make the NCC different from other commercial courts with an international context. The NCC currently has ten judges at its disposal, of whom six serve in the NCC and four in the NCCA. If their workload becomes excessive, additional judges can be recruited in future.

Digital procedure (eNCC)

Another point intended to differentiate the NCC from other commercial courts in an international context is the effort to streamline procedures and ensure that they run efficiently. The option of filing lawsuits digitally (in part) is available at the NCC. Exhibits (still) have to be entered into evidence on paper, but petitions and notifications are filed digitally via the eNCC platform.⁷⁷ This ensures that there is a constantly updated summary of the state of proceedings. Another available option is to use videoconferencing

for a pre-trial review or remote attendance of a hearing. For international and other parties, this should confer an advantage over other forms of procedure.

3.2 Key features

There are five key features of NCC procedure: (i) the use of English; (ii) the choice of an NCC procedure; (iii) settlement of international disputes; (iv) the registry charge; and (v) the rules of procedure.

3.2.1 *English language in principle*

Proceedings before the NCC are automatically conducted in English. This means that all evidence, communications relating to the proceedings, even the ruling itself, are entirely in English. One of the conditions for bringing a case before the NCC is that the parties must expressly agree to conduct the proceedings before the NCC *in English*. If the parties wish to proceed in Dutch, they can always refer the matter to a non-NCC court. However, the parties retain the option to switch to Dutch (in whole or in part) during proceedings that have begun in English. One example might be where the parties have opted for the NCC for a reason other than its use of the English language, such as the specific expertise of its judges in complex international disputes.

Defendants who contest the jurisdiction of the NCC in a dispute can file a counterclaim in Dutch. If a summons is served to a third party by one of the parties in the dispute, the proceedings will only continue in English at the express insistence of that third party. Otherwise, the proceedings involving the third party are conducted separately in Dutch (for the standard registry charge) in a different division of the Court. Parties added on either side in the proceedings, by motion, are bound by the decisions already made on the language of the proceedings. If third parties are added on their own initiative, by motion to intervene (without themselves taking the side of one of the parties), the court will decide accordingly on the implications for the language of the proceedings and the applicable registry charges.

3.2.2 *Express choice of court*

The parties must expressly agree to conduct proceedings before the NCC. Such an agreement should also specify the use of the English language for this purpose. A choice of court made in the context of general commercial

⁷⁷ The NCC Rules of Procedure state that parties proceed and communicate via eNCC, unless the NCC directs otherwise. However, an addendum to the NCC Rules of Procedure has been published because, at the end of 2018, it was decided not to introduce the "KEI" legislation for NCC. Since the addendum took effect, parties have had to go back to submitting exhibits on paper.

terms and conditions is not sufficient, because such a clause can also be accepted implicitly. A venue clause contained in general terms and conditions is only legally binding if the opposite party explicitly accepts that clause. Written evidence of such acceptance must then be produced.

An express agreement to proceed in English before the NCC also comprises appeal proceedings before the NCCA, unless the parties agree to waive this. The parties must also agree if they are referring a matter directly to the NCCA.

N.B: the NCC cannot deal with matters which fall within the sole competence of another division or court. Examples include the enterprise court at the Amsterdam Court of Appeal (*Ondernemingskamer*) or the Intellectual Property Section (*Octrooikamer*) of the District Court of The Hague.

In the event of no legally binding choice of the District Court of Amsterdam has been made and, that there are no (other) grounds on which that court is competent, the NCC will, if another court is competent, refer the matter to that court, where the proceedings will continue in Dutch. If the District Court of Amsterdam is competent, by valid choice of courts, but no legally binding agreement exists on NCC proceedings in English, the case will be referred to the ordinary commercial division of the District Court of Amsterdam.

3.2.3 *International commercial disputes within the autonomy of the parties*

The parties must expressly agree to conduct proceedings in English before the NCC. However, the NCC is only authorised to have cognisance of international disputes about relations in law of which the parties cannot freely dispose, and for which the District Court or Court of Appeal of Amsterdam is competent. Sub-district matters, including cases where the amount claimed does not exceed EUR 25,000, are excluded.

The term 'commercial disputes' must be interpreted broadly. The NCC will deal with contract disputes, claims in tort (in the context of a contract dispute or otherwise), property disputes and questions of company law, where these fall within the autonomy of the parties to decide.

If a case has an international aspect, it is designated an 'international' dispute. In line with the background of the Act and the explanatory notes to the NCC Rules

of Procedure, this is a broad term. You may consider cases in which the parties have their place of residence or establishment outside the Netherlands. Such an international aspect also exists if a dispute concerns legal facts or legal transactions outside of the Netherlands, or if foreign law is applicable to the dispute. A dispute which derives from a contract written in a foreign language is, according to the NCC Rules of Procedure, also an international dispute. Whether a case does, or does not, have an international dimension will become clearer from future decisions of the courts.

3.2.4 *Increased registry charge*

Although the NCC has been established partly with the idea of offering a good alternative to expensive international arbitration procedures and time-consuming proceedings in common law countries, the registry charge for parties in NCC proceedings is higher than for referring the matter to an ordinary (Dutch) court. The reasons for the increased registry charge were the desire of the legislator, and the established precedents of the courts, that NCC proceedings should not weigh on the budget for ordinary judicial proceedings. The mainly complex and international disputes handled by the NCC in English require extra efforts from the judiciary. By increasing the registry charge, the legislator wants to offer NCC proceedings without impact on budget. As a result, no budgetary consequences are expected for the processing of ordinary cases.

3.2.5 *Uniform Rules of Procedure.*

The Dutch Code of Civil Procedure (CCP) governs the NCC and NCCA proceedings. There is also one set of Rules of Procedure for the NCC and NCCA.

The Rules of Procedure introduced under the Act concerning the NCC therefore only relates to litigation in the lower courts and is distinct from procedure before the Supreme Court. Decisions made by the NCC or NCCA are open to review by the Supreme Court by the ordinary route, in accordance with the provisions of the Code of Civil Procedure. Proceedings of the Supreme Court must be conducted in Dutch, not least because judgments of the Supreme Court also have implications for the wider development of law.

4. **Comparison with arbitration and the ordinary courts**

The introduction of the NCC gives companies engaged in international trade another alternative for the settlement

of international commercial disputes. An international commercial dispute can be resolved through the ordinary Dutch courts, by international arbitration procedure and now also before the NCC.

Proceedings in the ordinary Dutch courts offer efficient, quick and reliable litigation under the Dutch Code of Civil Procedure. Now that the law of civil procedure has become applicable to proceedings before the NCC, this means that proceedings before that court are also efficient, quick and reliable, with the supplementary advantage that, in principle, the procedures take place in English. Moreover, the NCC consists of three specialist judges who are experienced in the settlement of international trade disputes. On the other hand, arbitration offers the advantage that the parties have wide latitude to agree on procedural aspects, and is (or may be)⁸ more confidential throughout. Besides, an arbitral award is enforceable in multiple countries, even outside Europe. Furthermore, the parties can themselves appoint arbitrators who have sector-specific knowledge.

A number of aspects play a role when companies with international operations opt for a given procedure. Parties who do not want a ruling to be made public (in anonymous form or otherwise) will quickly (have to) opt for an (international) arbitration procedure. The following is a brief summary, comparing some possibly important aspects of the different procedures:

Competence: the competence of the ordinary courts derives from the rules of private international law, whereas proceedings before the NCC or arbitration procedures require the parties' explicit agreement.

Subject of dispute: in principle, all disputes are open to settlement through the ordinary courts. For a case to be brought before the NCC, it must be an international commercial dispute. However, this is a broad definition which is easy to meet. For both the NCC and arbitration, the proceedings cannot serve to determine legal consequences of which the parties cannot freely dispose (for example, the validity of corporate decisions falls outside this scope).

Interpretation: both rulings of the ordinary courts and in NCC proceedings are recognised and can be enforced in the Member States of the European Union and countries

with which an enforcement treaty exists. The Netherlands for example has no enforcement treaties with USA and China. Arbitral awards are recognised and enforceable in various countries. There are, approximately 160 countries at the moment that have ratified the New York Convention.

Appeal: both the ordinary courts and NCC procedure leave the avenue of appeal open. Appeals against rulings of the NCC are brought before the NCCA. In addition, as in ordinary proceedings, an appeal for cassation can be brought before the Supreme Court of the Netherlands (*Hoge Raad*). In principle, arbitral awards are final unless the parties explicitly agree to allow the option of appeal.

Confidentiality: another advantage of arbitration may lie in the degree of confidentiality that such procedures offer in comparison to procedures in the Netherlands in general, and the NCC in particular. Parties in arbitration proceedings can agree to keep the procedure and resultant award confidential (i.e. outside the public eye), whereas the NCC procedure and the 'ordinary' procedure are in principle public, both the hearings as well as the rulings.

Language: the parties may also agree on which language to use in arbitration proceedings. Before the NCC, the parties will in principle proceed in English, unless the procedure switches to Dutch in an ordinary court.

Speed: proceedings in the ordinary courts are relatively quick and efficient. The aim is that NCC proceedings will take even less time than the ordinary courts. In arbitration procedures, the parties can agree their own timeline. The average duration of arbitration is closely dependent on the case, the arbitrators and what the parties have agreed upon. Experience shows that proceedings in the ordinary courts (of which the NCC is one) tend to move a little more quickly than arbitration procedures.

Quality: the Netherlands judiciary is viewed as independent, professional and effective. Dutch judges offer high quality (certainly those of the NCC). Given that three specialist judges sit in the NCC, the expectation is that the NCC will offer high quality in relation to international commercial disputes. In international arbitration procedures, quality often depends on the appointed

⁸ Arbitration proceedings are confidential in principle, unless the parties agree otherwise. This means, for example, that arbitral awards are not made public.

arbitrators. On the other hand, they may offer great sector-specific knowledge.

Costs: the costs of proceedings in the Netherlands are relatively low. The registry fee for NCC proceedings is however higher than for ordinary proceedings. In both ordinary and NCC proceedings, an award of costs against the losing party is determined against a settlement scale and is therefore limited. Arbitration procedures are generally much more expensive than proceedings before the courts. In addition to the administrative charges of the chosen institution, the arbitrators and any appointed secretary are often paid by the hour. In addition to this, there is the fee of the private counsel. Depending on what has been agreed upon, the losing party may become liable for all these costs.

5. Conclusion

The NCC was launched on 1 January 2019 and offers proceedings before Dutch judges in English. It is now possible to settle international commercial disputes in a new international commercial chamber of the District Court of Amsterdam, both at first and second instance (NCC District Court and NCC Court of Appeal). It can be seen as a pioneering forum serving the needs of the international business community whereby, quite possibly, enhancing the investment climate in the Netherlands. The first NCC proceedings have already begun and the first ruling (on the sale of shares) has now been given.⁹

The NCC has a number of features and advantages which distinguish it from other alternatives, such as:

- 1) Fairly rapid proceedings, dealt with by three specialist judges who are unbiased, independent and have experience of the settlement of complex international trade disputes;
- 2) Both the proceeding and the ruling are (in principle) in English;
- 3) Decisions are automatically recognised and enforceable in all EU Member States and countries with which the Netherlands has an enforcement treaty;
- 4) Entry of documents into evidence and communications in the proceedings can take place on a digital system (**eNCC**). The option exists to attend sessions digitally;
- 5) The registry charge is payable at a flat rate. Therefore, the parties are aware of this costs beforehand.

Loyens & Loeff has a dedicated team who provide advice on, and assistance with proceedings before, the NCC and NCCA. If you have any questions, please contact Mijke Sinnighe Damsté ([bio](#)) or Tony Vermeulen ([bio](#)).

⁹ District Court of Amsterdam, 8 March 2019, ECLI:NL:RBAMS:2019:1637.

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