



LITIGATING AT THE NETHERLANDS COMMERCIAL COURT AND THE RECOGNITION AND ENFORCEMENT OF ITS JUDGMENTS

Mike Joshua van de Graaf and Lotte te Linde Dirkzwager

INTRODUCTION

Inspired by the London Commercial Court and the rise of international commercial courts such as the Dubai International Financial Centre Courts and the Singapore International Commercial Court, the Netherlands Commercial Court (the NCC) was established on January 1, 2019, in order to swiftly and effectively resolve international civil (commercial) disputes.

The NCC, forming part of the Amsterdam District Court (the NCC District Court) and the Amsterdam Court of Appeal (the NCC Court of Appeal), is located at the Amsterdam Palace of Justice and tries cases of a diverse nature with an international aspect, such as private sales of pledged shares and disputes regarding a party's contractual obligations under sales and distribution agreements.

In this article, we focus on the following topics:

- the NCC's jurisdiction;
- court fees; and
- a brief overview of the recognition and enforcement of NCC judgments.

TYPE OF CASES TO BE HANDLED BY THE NCC

The NCC – meaning both the NCC District Court and the NCC Court of Appeal

– has jurisdiction over a civil or commercial matter in connection with a particular legal relationship within the autonomy of the parties. In essence, this means that the dispute at hand needs to be related to civil law in a broad sense, such as contractual disputes, claims in tort, property law disputes and corporate law matters. Depending on the facts and circumstances, disputes regarding insurance, finance, intellectual property, public procurement, competition, telecommunications transportation and insolvency-related matters such as director's liability in bankruptcy may also be within the scope of 'civil or commercial matters'.

However, the NCC does not hear disputes that are subject to arbitration or the exclusive jurisdiction of any other foreign or Dutch chamber/court, such as the Enterprise Chamber of the Amsterdam Court of Appeal for certain types of corporate law-related cases, the Patent Chamber of the District Court of The Hague for

cases involving among others infringement and validity of Dutch and European patents designated for the Netherlands, or the Maritime Chamber of the Rotterdam District Court which deals in short with maritime, transport and trade matters.

It furthermore is required that the 'civil or commercial matter' at hand is not subject to the jurisdiction of a Dutch subdistrict court. This would be the

case if (i) the value of the 'civil or commercial matter' claim is 25,000 euros or less or (ii) the matter relates to employment, consumers, tenancy or hire purchase.

INTERNATIONAL SCOPE OF THE NCC CASES

The NCC will not handle a matter that is solely national in scope. This means that the dispute at hand must relate to a civil or commercial matter with an international aspect, which will – without limitation – be the case if:

- at least one of the parties to the proceedings is a resident outside the Netherlands or is a company established abroad or incorporated under foreign law, or is a subsidiary of such company;
- a treaty or foreign law is applicable to the dispute, or the dispute arises from an agreement prepared in a language other than Dutch;

- at least one of the parties to the proceedings is a company, or belongs to a group of companies, of which the majority of its worldwide employees work outside the Netherlands;
- at least one of the parties to the proceedings is a company, or belongs to a group of companies, of which more than one-half of the consolidated turnover is realized outside of the Netherlands;
- at least one of the parties to the proceedings is a company, or belongs to a group of companies, of which securities are traded on a regulated market outside the Netherlands; or
- the dispute involves legal facts or legal acts outside the Netherlands.

NCC CHOICE OF FORUM CLAUSE

In order to create competence for the NCC to have conduct of an 'international civil or commercial matter' it is required that the parties in dispute have expressly agreed in writing that proceedings will be before the NCC in the English language.

If, for example, an agreement in which the designation of the NCC was included in a party's general terms and conditions and was accepted tacitly by the other party (Party B), it does not satisfy the requirement that Party B has expressly agreed to such clause for NCC proceedings. In practice, this means that the NCC has, in principle, no competence to handle the dispute, unless at the time the agreement was concluded, or at a later time, there is express acceptance in writing of the clause in the general terms and conditions, showing agreement for the proceedings to be before the NCC in English. By drafting contracts, including general terms and conditions, it should therefore be taken into account that Party B should explicitly consent to such choice of forum clause. Depending on the facts and circumstances of the case at hand, this might be done by pointing out the choice of forum clause in email correspondence and having the person authorized to represent Party B explicitly sign for acceptance of such clause.

COURT FEES

Each party in proceedings is obliged to pay a fixed court fee in the amount of (as of the publication date of this article):

- EUR 7,928 for NCC District Court summary proceedings;
 - EUR 15,856 for NCC District Court main proceedings;
 - EUR 10,571 for NCC Court of Appeal in summary proceedings;
 - EUR 21,141 for NCC Court of Appeal main proceedings;
- all regardless of the duration of the case or the amount of the claim involved.

The losing party will, however, be ordered to compensate the successful party for the court fees it had to pay in full.

RECOGNITION AND ENFORCEABILITY OF NCC JUDGMENTS

NCC judgments have the same legal status as a 'regular' judgment rendered by a Dutch court. In practice, this means that NCC judgments are not only enforceable in the Netherlands but also in other European Union countries and the Kingdom of the Netherlands (being the Netherlands, Aruba, Curaçao and Saint Maarten) without any declaration of enforceability being required. With respect to other European Union countries, the recognition and enforcement of NCC judgments is based on the EU Regulation 1215/2012 of the European Parliament and of the council of December 12, 2012, on jurisdiction and the recognition of judgments in civil and commercial matters (the Brussel I Recast Regulation).

The fact that an NCC judgment is immediately enforceable by the competent enforcement authority in the country where the judgment needs to be enforced, means, in concrete terms, that if the debtor (of your client) owns assets within the European Union and/or the Kingdom of the Netherlands, a condemnatory judgment of the NCC can be enforced without further form of process. In view thereof, and depending on the facts and circumstances at hand, we suggest with some regularity to clients to opt for the NCC when it does business in a commercial relationship with a foreign party with assets in the European Union and the vehicular language of the contracting parties is in English.

The enforcement of an NCC judgment outside the European Union is governed by applicable treaties and/or conventions to which the Netherlands is a party, as well as general private international law rules in the jurisdiction where enforcement is sought. Regarding the recognition and enforcement of judgments, there is no treaty or convention concluded between the Netherlands or the European Union on the one hand and the United States (U.S.) on the other hand. This makes it uncertain whether an NCC judgment can be easily enforced in the U.S. and depends on the assessment subsequently made by a U.S. court under U.S. enforcement law. The U.S. court is not required – in the absence of a treaty or convention – to automatically recognize the content of the NCC judgment. In view thereof, and to the extent there are (possibly) only possibilities of recourse on the other party to the contract in the U.S. (in the future), opting for the NCC is not an obvious choice. In such cases, we typically

suggest to clients to include an arbitration clause in the contract, as the U.S. and the Netherlands do, in principle, mutually recognize each other's arbitral awards without an extensive process.

CONCLUSION

In this article we focused on the key characteristics of the NCC for resolving civil and commercial disputes involving an international element, as well as the recognition and enforcement of NCC judgments.

If parties wish to potentially proceed for a regular Dutch Court in English, we – depending on the facts and circumstances at hand – largely advise opting for the NCC as the exclusive choice of forum. One of the key questions to be answered in that respect is whether there are sufficient assets of the debtor (to be expected) within the European Union and/or the Kingdom of the Netherlands, mainly in view of the ease of enforcement of NCC judgment within these countries. If such assets are to be expected outside the European Union and/or the Kingdom of the Netherlands and parties wish to proceed in English no matter the costs involved, we normally advise to include an arbitration clause in the contract as more than 160 nations are party to the 1958 New York Convention which governs the recognition and enforcement of arbitral awards. This means that the nations, in principle, do mutually recognize a 'foreign' arbitral award without an extensive process.



Mike Joshua van de Graaf is a senior corporate lawyer at Dirkzwager and mainly advises on (cross-border) mergers and acquisitions and joint ventures and represents clients in cases involving complex matters in the areas of corporate governance, corporate litigation and on other corporate aspects. In addition, he regularly publishes on developments in the fields of company and corporate law.



Lotte te Linde is a senior corporate and commercial lawyer at Dirkzwager. Lotte's daily practice consists of advising on and assisting with disputes within companies, assisting with national and international transactions (buying and selling of companies), and advising and litigating on commercial contracts (such as distribution, franchise and agency agreements).