

ANNEX I: Explanatory notes to these rules of procedure

GENERAL

The NCC applies the same laws as any other Dutch court. The proceedings are not that different from other courts in the Netherlands. However, the NCC relies more on case management in complex civil litigation, and is focused on international practices. All is done in English. A digital portal, eNCC, is used for all communication.

SECTION 1

Article 1.1.3

Pursuant to Dutch procedural law, a party initiates an action either by claim or by application. An action is initiated by application where required by law; other actions are initiated by claim. A claim is governed by the procedural rules for claims (*dagvaardingsprocedure*); applications are governed by the procedural rules for applications (*verzoekschriftprocedure*).

In proceedings initiated by claim, parties are referred to as claimant and defendant; in proceedings initiated by application as applicant and interested party. An interested party is a party against whom an application is directed or whose rights and obligations are directly affected by an application, or a party with another interest in the proceedings.

Article 1.3.1(a)

The term “civil or commercial matter” is used in Article 1 of the Brussels I Regulation (recast) (no. 1215/2012), but obviously is broader than the scope of this regulation. All matters dealt with by a commercial chamber of a Dutch court are in scope in Article 1.3.1(a). This provision requires that the dispute relate to civil law in a broad sense, such as contractual disputes, claims in tort, property law disputes and corporate law matters. Insurance, finance, intellectual property, public procurement, competition, telecommunications, transportation and government liability may be within the scope of civil or commercial matters. Insolvency-related matters such as director’s liability in bankruptcy, or a trustee’s annulment of legal acts, may also qualify. Family or inheritance disputes could also be in scope, although the NCC was not created mainly to focus on them; but such matters may not be within the parties’ autonomy.

For the NCC Court of Appeal, several particular matters are noteworthy:

- a claim to set aside an arbitral award may also be heard in English before the NCC Court of Appeal, provided the Amsterdam Court of Appeal is competent, which is the case where Amsterdam has been designated as the place of arbitration (see Article 1064a CCP as amended by the NCC Law).
- The NCC Court of Appeal may hear claims to declare that a settlement agreement is universally binding, if the settlement is for compensation for damages and was made with foundations or associations that advocate for victims. The requirements of Articles 7:907-910 CC and Articles 1013-1018a CCP apply.

The NCC does not hear cases that are within the exclusive jurisdiction of a different chamber, such as the Enterprise Chamber of the Amsterdam Court of Appeal, the Patent Chamber of the District Court of The Hague, or the Maritime Chamber of the Rotterdam District Court. Nor does the NCC hear cases that are within the jurisdiction of the Subdistrict Court, such as cases related to employment, tenancy, hire purchase and consumer matters and cases where the claim is € 25,000 or less (see Article 93 CCP).

Article 1.3.1(b)

NCC proceedings are available for international disputes, so that it will not be appropriate for NCC to deal with a matter that is solely national in scope. A matter would typically concern an international dispute when:

- (a) at least one of the parties to the proceedings is resident outside the Netherlands or is a company established abroad or incorporated under foreign law, or is a subsidiary of such company;
- (b) a treaty or foreign law is applicable to the dispute or the dispute arises from an agreement prepared in a language other than Dutch;
- (c) 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;
- (d) 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 realised outside of the Netherlands;
- (e) at least one of the parties to the proceedings is a company, or belongs to a group of companies, the securities of which are traded on a regulated market, as defined in the Dutch Financial Supervision Act (*Wft*), outside the Netherlands;
- (f) the dispute involves legal facts or legal acts outside the Netherlands; or
- (g) the dispute otherwise involves a relevant cross-border interest.

If the above circumstances have changed after the NCC clause was agreed by the parties (subsequently parties to the action) but before the action was brought, the ruling on whether the criteria for an "international dispute" have been met will be based on the circumstances at the time the NCC clause was agreed.

Article 1.3.1(c) (claims)

The provision under (c) is satisfied if the Amsterdam District Court is competent to hear the case on the basis of the ordinary rules, such as the domicile of the defendant or a choice-of-court agreement. Such a choice-of-court agreement may be made before the action is initiated in the contract that is the subject of the dispute, or in the event of a dispute arising from tort, for example, by a separate agreement. A choice-of-court agreement may also be made in proceedings pending at another Dutch court. A motion contesting jurisdiction before this court may also be made after the statement of defence is filed if the occasion for raising it only arose later (such as where a claim is amended; see *Tekst en Commentaar Burgerlijke Rechtsvordering*, note 4 on article 128 CCP and note 1d on article 95 CCP).

If the proceedings were initiated before a court other than the Amsterdam District Court, the other court may (upon request or with the parties' consent) refer the case to the Amsterdam District Court for further proceedings and judgment by the NCC District

Court. The same applies - mutatis mutandis - to proceedings initiated before an ordinary commercial chamber in the Amsterdam District Court. The referral is binding on the NCC District Court (Articles 71(5), 74(3) and 110(3) CCP).

Article 1.3.1(c) (applications)

The NCC Rules also apply to proceedings initiated by application. In proceedings initiated by claim, parties may in principle choose a court (article 108 CCP); they may not do so in proceedings initiated by application.

Where proceedings by application have been initiated in the NCC and the Amsterdam District Court or the Amsterdam Court of Appeal is not competent on other grounds, parties can remain at the NCC, provided that they (including all interested parties) indicate they do not wish to refer the case (article 270(1) CCP). This will be interpreted as a choice-of-court agreement, as meant in Article 1.3.1(c), and as an agreement, as meant in Article 1.3.1(d), by all parties involved for proceedings to be before the NCC in English. However, the requirement that in proceedings initiated by application all interested parties must agree for (i) the Amsterdam District Court to be the competent court and (ii) proceedings to be before the NCC in English may be an issue, particularly if the number of interested parties is large.

Additionally, jurisdiction may be established where the application relates to proceedings initiated by claim that have been or will be brought before the NCC, unless the law provides otherwise or the Amsterdam District Court or the Amsterdam Court of Appeal, respectively, does not have subject matter jurisdiction (article 262 CCP).

Article 1.3.1(d) (claims and applications)

Parties must expressly agree in writing that proceedings will be before the NCC in English. 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, does not satisfy this requirement. In such event, this designation has no legal effect, 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 (see the Explanatory Memorandum ("*Memorie van Toelichting*") to article 30r(1) CCP of the NCC law, p. 11).

Article 1.3.2

This provision is intended to particularly refer to summary proceedings in the meaning of article 254 CCP. But it also concerns proceedings initiated by application where the Court in Summary Proceedings (CSP) has subject matter jurisdiction. If the CSP does not have personal jurisdiction under the other ordinary rules, the CSP will only have jurisdiction if all the interested parties agree to adjudication by (i) the CSP (ii) in English.

The CSP may decide on applications to grant leave for an attachment if (i) Amsterdam is the place where all or part of the goods attached are situated or where the debtor or third party has its domicile (article 700 CCP) and (ii) the provisions of Article 1.3.2 are satisfied. The CSP may also decide on an application to lift an attachment for which it granted leave. If this application is made by a third party, the third party is bound by the language that applied to the application for leave for the attachment. This is reasonable

since the third party could have decided to bring the action to lift the attachment before the ordinary CSP of the Amsterdam District Court.

Additionally, the CSP has the authority to hear an application for a European Account Preservation Order, where the provisions of Article 1.3.2 are satisfied, as long as (i) the Amsterdam District Court has jurisdiction to rule on the substance of the matter or (ii) the NCC has already issued a judgment on the substance of the matter (Regulation no. 655/2014, article 6).

Pursuant to Article 30r(3) CCP (the NCC Law) an NCC clause means the CSP is also designated. Accordingly, it is not strictly necessary for the NCC clause to specify that the CSP is designated.

Article 1.3.3

The provision under (c) constitutes a basis for the NCC Court of Appeal to hear and decide claims seeking to set aside arbitral awards issued in the Netherlands, provided the parties designated Amsterdam as the place of arbitration (cf. article 1064a CCP and as amended by the NCC law) and agreed that the proceedings would be before the NCC Court of Appeal in English. The place of arbitration is determined by agreement by the parties. It is the place where the award will be made. The arbitrators may of course decide to hold the hearing elsewhere (Article 1039 CCP).

Article 1.3.4 and 1.3.5

Whether the condition set in Article 1.3.1(b) is satisfied is reviewed by the court of its own initiative, as required by Article 30r CCP.

SECTION 2

Article 2.1

The 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, but has indicated that it will decide cases on the basis of the documents that are submitted to the NCC District Court or NCC Court of Appeal in English. Preliminary references to the Supreme Court under article 392 et seq CCP must, however, be submitted by the NCC District Court or NCC Court of Appeal in Dutch.

Article 2.1.2

In its judgment of 15 January 2016 (ECLI:NL:HR:2016:65) the Supreme Court ruled that translations are not required for documents in the specified languages. Where Dutch is the language of the proceedings, translations of English-language documents are not required.

Article 2.2.

Where a third party is added to the action on the side of a party, it is bound by this party's consent to the language of the proceedings.

This does not apply to other third parties wishing to participate in an action. Such a third party has the right for Dutch to be the language of the proceedings. However, the addition of a party for indemnity/contribution or as an intervention should not result in unreasonable delay in the main action. Such delay will generally obtain where the third party withholds its consent for English to be the language of the proceedings, as this will mean the main action will have to be dealt with in Dutch and all documents exchanged may need to be translated.

Accordingly, the Explanatory Memorandum to the NCC law (Second Chamber, session 2016-2017, 34761, no. 3) notes that – if the third party to be added for indemnity/contribution does not agree for English to be the language of the proceedings – the proceedings for indemnity/contribution will not be at the NCC District Court but will be a separate action before the ordinary commercial chamber of the Amsterdam District Court.

SECTION 3

Article 3.1.1

The exception in this provision is inter alia applicable to the defendant in proceedings before the CSP in the meaning of articles 254 CCP and in certain proceedings by application.

Article 3.2.1

The purpose of this Rule is to implement the requirement for designating an electronic data processing system for the electronic submission of requests, messages and documents (Article 33(1) CCP and Article 2(2) DPD).

The court may “direct otherwise” under this Article where:

- a party who is acting pro se and is not represented by a lawyer, wishes to litigate without the use of digital means. Acting pro se is generally not allowed at the NCC, but it is possible f.e. in summary proceedings. The court will allow this party to submit his documents on paper. This will require the clerk to upload into eNCC any documents submitted by this party. The other parties must submit their requests, messages and documents in eNCC, as well as send paper versions of these filings to the party who is acting pro se.
- the eNCC portal is unavailable over a longer period of time.

Article 3.2.3

The technical requirements for the electronic submission of documents are set out in the “eNCC Rules” (Annex IV to these Rules). Further requirements are specified by the Digital Proceedings Decree (Stb. 2020, 410).

Article 3.2.8

Special naming conventions apply. For details, see the eNCC Rules (Annex IV to these Rules).

Article 3.4.2

The following standard time limits are applicable in proceedings before an ordinary commercial chamber of the Amsterdam District Court:

- (a) for a statement: six weeks;
- (b) for an extensive brief: four weeks;
- (c) for a simple brief: two weeks.

Given the expected complexity of the matters brought before the NCC, these time limits will generally be too short and longer time limits will be directed. Parties may communicate their wishes with respect to the time limits in writing, orally (in the manner described in Article 3.2.2), or at a case management conference (see Article 7.1).

A brief is a document:

- (a) setting out a concise point, such as a simple admission or denial or an offer to produce evidence;
- (b) presenting a party's comments regarding specific issues as directed by the court;
- (c) submitting an exhibit;
- (d) responding to an exhibit submitted by another party.

A statement is a document containing more substance than a brief.

“Compelling reasons” means circumstances that reasonably prevent a party from carrying out the act of process within the set time limit or from appearing at the hearing.

Article 3.5.1

NCC District Court cases are generally heard by a three-judge chamber. Matters such as an application for preparatory witness hearings, or where the CSP has subject matter jurisdiction, may be assigned to a single-judge chamber. Cases in the NCC Court of Appeal are heard by a three-judge chamber.

Article 3.5.2

The president of the NCC District Court or NCC Court of Appeal, as the case may be, will assign each case to a single-judge panel or a three-judge panel. See the NCC Case Assignment Rules on the NCC website. A delegated judge may e.g. be appointed to preside over a case management hearing, an examination of witnesses or a site inspection, or to supervise an expert investigation.

SECTION 4

Article 4.1.2

Parties must “expressly” agree for the proceedings to be in English before the NCC. See Explanatory Notes Article 1.3.1(1) (c) and (d).

SECTION 5

Article 5.3

See the notes to Article 6.2.

SECTION 6

Article 6.2

Article 30r(2) of the NCC Bill provides that – as an exception to article 128 CCP – a party challenging jurisdiction or relying on other defences to the effect that the matter will not be dealt with by the NCC may assert these defences, without concurrently responding to the claims in the main action. This defence may be presented in Dutch and the court will issue a decision in Dutch (Article 30r(4)). Accordingly, the claimant's response to this defence should generally be in Dutch, which will typically be the language of any hearing on this point (Second Chamber, session 2016-2017, 34761, no. 3, p. 12).

Article 6.5

Cases may be consolidated by a motion to that end, or of the court's own initiative (articles 220 and 222 CCP). A matter is "closely connected" if the factual or legal points of dispute in one matter are identical to those in the other, or have such a connection that consistent judgments are desirable. The relevant provisions of Regulation no. 1215/2012 (Brussels I (recast)) apply where a closely connected case is pending in another EU Member State.

SECTION 7

Article 7.1

According to the Explanatory Memorandum to the CCP, the law does not impose restrictions with regard to a hearing by means of video conferencing (Second Chamber, session 2014–2015, 34 059, no. 3, p. 31). See *Tekst en Commentaar* on Article 174 CCP, Article 10(4) EU Evidence Regulation No 1206/2001 and Article 8(1) EU Regulation No 861/2007 establishing a European Small Claims Procedure.

Article 7.8

This Article reflects international practice and may be of assistance to avoid the risk of irreconcilable judgments.

SECTION 8

Article 8.3

This provision is derived from article 153 CCP. The limitation "within the autonomy of parties to decide" particularly relates to rules of evidence that also serve to protect the interests of third parties. An evidentiary agreement, or reliance on such an agreement, may be unenforceable under the CC for reasons including defects in its formation, it being unacceptable by standards of reasonableness and fairness (article 6:2 and 6:248 CC), or it being unreasonably onerous (when the evidentiary agreement has been incorporated in general terms and conditions; Articles 6:233 and 236 CC).

Article 8.4.6

The term "documents" also includes data recorded to a data carrier.

Article 8.5

It is noteworthy that the CCP provides substantial flexibility to tailor the procedure during a hearing, such as an evidentiary hearing for the examination of witnesses or experts, to the parties' interests and preferences, wherever this is in the interest of fair process, due process and the sound administration of justice. The parties may make agreements on these topics, which the court will consider in case management decisions.

SECTION 9

Article 9.5

Judgments will be published on www.rechtspraak.nl, subject to redaction. The basic rule in the redaction guidance, as adopted by the Dutch Courts, is that all information that directly identifies a natural person will be redacted.

Article 9.6

The court may issue a final judgment from the bench at a hearing, where the action was initiated after 1 September 2017 (see Article 30p CCP, Stb. 2016, 288, and *Koninklijk Besluit* Stb. 2017, 174).

Article 9.7

Examples of European Regulations and international conventions to which the Netherlands is a party include:

- Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), (Brussels I (recast) (no. 1215/2012, OJ EU L 351)) on the basis of which judgments of Dutch courts can be enforced in other EU Member States (excluding Denmark) without requiring a declaration of enforceability in the other Member State concerned (Article 39);
- the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 30 October 2007 (OJ EU L 339) on the basis of which the same applies for Norway, Iceland and Switzerland;
- the Convention on choice of court agreements (Trb 2009, 31), on the basis of which the enforcement in a different contracting state can only be refused on the grounds listed in the Convention (Article 8);
- the Agreement between the Kingdom of the Netherlands and the Republic of Suriname regarding the mutual recognition and enforcement of judicial decisions and authentic instruments in civil matters (Trb 1976, 144).

SECTION 10

Article 10.1

The NCC Law inserted a new article 9a in the "Court Fees (Civil Cases) Act" ("*Wet griffierechten in burgerlijke zaken*"; "CFA"), with special rules on court fees for the NCC. If the defendant/interested party only wishes to argue that the conditions of Article 1.3.1 are not satisfied, and gives notice within the applicable time limit, the standard court fee will be charged. If the defence is rejected, the higher NCC fee will apply.

Failure to pay the court fee on time has an impact on the proceedings where this is directed by law. If the court fee is increased at a later stage, failure to pay this increase within the time limit has no impact on the proceedings. However, the clerk will take action to collect the claim and will if necessary issue a collection order.

On the basis of article 11 CFA any court fee already paid is to be deducted from the court fee to be paid at a later stage in the same case. For example, the court fee paid for an application for leave for a pre-judgment attachment will be deducted from the court fee to be paid later by the claimant for the main action.

Article 10.3

The term "expenses" refers to the following cost categories: the costs of service of the writ of summons, the court fee paid, and the costs of witnesses who have been examined and of experts who have been appointed by the court.