

NCC and applicable law



Who are we?

The Netherlands Commercial Court (which consists of 3 chambers: the NCC District Court, the NCC Court in Summary Proceedings and the NCC Court of Appeal) is a part of the Dutch Judiciary, which is ranked among the most efficient, reliable and transparent worldwide. The NCC is based in Amsterdam – a prime location for business and a gateway to Europe, with a long history of justice and global business. Proceedings are in English. Judgments are in English.

Jurisdiction

The NCC is a chamber of the Amsterdam District Court. Therefore, for the NCC to deal with a case the Amsterdam District Court must have jurisdiction. The ordinary private international law rules apply. The jurisdiction may be based on grounds such as the defendant's domicile, the place where the harmful event occurred, or on a choice-of-court agreement. For the NCC Model Clause see the NCC website.

Applicable law: procedure

The guiding principle is that court proceedings are governed by the procedural rules of that court: the *lex fori processus*. This means that in NCC proceedings the Dutch Code of Civil Procedure (DCCP) applies. An English translation of the most relevant DCCP rules is available for purchase on the Eleven International Publishing website. The Dutch procedural rules are also reflected in the NCC Rules of Procedure which is available at no charge on the NCC website.

The *lex fori processus* only applies to rules that are strictly procedural by nature. For example, on how court proceedings are initiated, whether parties need to be represented by a lawyer, what the time limits are for submitting documents and how to raise a motion. Evidence is only in part a procedural matter. The ways evidence may be gathered is regarded as such, whereas the burden of proof and presumptions of law are not. Those areas of evidence are determined by the law applicable to the merits of the case.

Dutch procedure is highly regarded for its pragmatic approach and efficient operations. The Netherlands consistently ranks top 10 when it comes to the efficiency of the legal framework in settling disputes (World Economic Forum Global Competitiveness reports).

One area where this is apparent is document disclosure. Under Dutch law there is no general duty to disclose any and all documents to the other party. Obviously, documents relied on to support a party's allegations must be disclosed. But beyond that, generally it is only where a party has a legitimate interest that the counterparty may be required to disclose specific documents pertaining to a legal relationship involving that counterparty. The requirement of "specific documents" is not as strict as it seems: it may be a type and range of documents containing certain keywords. But the duty to disclose is more narrow than in common law countries such as the UK and the US, where only the disclosure or discovery alone can give rise to substantial costs.

Applicable law: the merits

The law applicable to the merits of the case is determined by the rules of private international law. The main sources for private international law rules on applicable law in the Netherlands are the EU regulations on applicable law: no. 593/2008 ("Rome 1") and no. 864/2007 ("Rome 2"). In general, the applicable law depends on the legal ground for the claim.

A claim based on contract may be governed by a different law than a claim founded on tort. It may also vary by the type of contract: there are different conflict of law rules for consumer contracts and commercial contracts, and special rules for certain types of contracts, such as employment and insurance contracts.

Conflict of law rules also vary when it comes to claims arising from torts. The applicable law may differ, depending on whether the tort consists of unfair competition, intellectual property or product liability.

Dutch civil law

Even where Dutch law is not applicable under the ordinary rules of private international law, parties may make a choice-of-law clause in favour of Dutch law for the merits of the case. Both in contract as in tort cases parties generally are allowed to make a choice-of-law clause. The main exceptions to this rule are listed in the Rome 1 and Rome 2 Regulations on applicable law.

The advantages of Dutch civil law are:

- the main source of law is legislation which is under democratic control and reliable and foreseeable in its application, due to the comprehensive parliamentary history and Netherlands Supreme Court case law,
- the Dutch Civil Code deals with all civil relationships imaginable, in one way or another, and in a structured way (Book 1 Family law, Book 2 Company law, Book 3 Property law, Book 4 Inheritance law, Book 5 Rights in rem, Book 6 Contractual and non-contractual obligations, Book 7 Specific contracts, Book 8 Transport law, (there is no Book 9), Book 10 Private international law),
- Dutch civil law is firm and reliable where warranted, but flexible where necessary so as to promote a just and fair outcome of the dispute, for example in circumstances that were beyond the realm of possibilities when the parties concluded the contract, such as COVID-19.

English contract law is often said to be inspired by freedom of contract and legal certainty, while Dutch contract law is supposedly steeped in the notion of good faith. That is a caricature: the starting point for contract construction under Dutch law differs from common law jurisdictions

(the parties' intentions vs the literal wording), but the outcome is mostly similar in business relationships. For more information on this topic, see the article "The Netherlands Commercial Court and business certainty in Dutch and English commercial contract law" on our website.

Application of foreign law

Where the applicable law is not Dutch law, there are several tools available for the NCC to ascertain the contents of foreign law. Several NCC judges can draw on international experience and on a general working knowledge and understanding of legal systems outside of the Netherlands, particularly English law of contract. The court may also request both parties to produce a legal opinion, and hear the parties' experts in a subsequent hearing. For an example of such an NCC case, read the article "A NCC Case on Contract Interpretation from an English and Dutch Law Perspective" on our website. The court may also appoint its own expert. The costs for this expert are paid by the court, as it is the court that needs to establish the substance of the foreign law, and not the parties (as in common law countries).

Need to know more on NCC?

If you have any questions, please contact us at NCC@rechtspraak.nl. Or visit our website www.ncc.gov.nl. You can also follow us on Twitter ([@NethComCourt](https://twitter.com/NethComCourt)) and/or LinkedIn.

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