Chronicle of the Netherlands Commercial Court 2019–2025[1]

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1. Introduction

This chronicle focuses on the cases brought before the Netherlands Commercial Court (NCC) and the Netherlands Commercial Court of Appeal (NCCA)[3] in the first seven years following the inauguration of these international chambers of the Amsterdam District Court, namely from 1 January 2019 to 31 December 2025 inclusive. A selection has been made of the cases most relevant to corporate litigators.

The chronicle begins with a brief quantitative overview (Section 2) and subsequently discusses the various procedural issues (Section 3) and substantive legal issues (Section 4) that arose.

2. Quantitative Overview

In the years 2019–2025, a total of 60 cases were filed before the NCC and the NCCA (50 NCC and 10 NCCA). In the year of inauguration (2019), 4 cases were filed, increasing to 17 cases in 2025. As the NCC(A) only has jurisdiction where the parties expressly designated the NCC(A) as the forum dealing with their dispute, in absolute numbers the caseload is modest. However, a clear upward trend can be observed.

The cases filed before the NCC consisted of 16 proceedings on non-urgent matters (main proceedings; *bodemprocedures*) and 34 other types of proceedings: 18 summary proceedings, 8 applications seeking permission for a private sale of pledged shares pursuant to Article 3:251 of the Dutch Civil Code ("DCC"), 7 applications for attachment of goods, and 1 request for a preparatory witness examination.

At least one Dutch party was involved in every case. The other parties were a variety of foreign parties: approximately one-third originated from the European Union and two-thirds from the rest of the world, including Turkey, the United States, the United Kingdom, Switzerland, Russia, and Asia (the Philippines, Singapore, Hong Kong, India, South Korea, and Japan).

A number of cases were settled or otherwise terminated, either by withdrawal or discontinuance. Ultimately, the NCC rendered decisions in 37 cases. Of the NCCA cases, one ended by discontinuance and five by judgment.

The average duration of main proceedings before the NCC during this period was 12 months, measured from the submission of the originating document. For the other NCC cases, the average duration was 5 weeks.

Hearings on the merits were scheduled, on average, within 7.5 months after initiation. This results

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[1] This article is an amended version in English of W.A. Visser, *Kroniek Netherlands Commercial Court 2019-2025, Geschriften van de Vereniging voor Corporate Litigation 2025/2026,* Serie: Van der Heijden Instituut, Deventer: Wolters Kluwer 2026.

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[3] For more information see the website www.ncc.gov.nl.

from the fact that NCC cases are assigned immediately after filing to a panel of judges and a designated law clerk, who then immediately commence active case management, including scheduling the hearing on the merits.

3. Procedural Issues

3.1 Jurisdiction of the NCC

The jurisdiction of the NCC is governed by Article 32a of the Dutch Code of Civil Procedure (DCCP) (formerly Article 30r DCCP):

- the Amsterdam District Court or, on appeal, the Amsterdam Court of Appeal must have jurisdiction to hear the case;
- the parties must have agreed to litigate before the NCC, or the NCCA;[4]
- the dispute must concern an international matter;
- the legal relationship in question must be within the parties' autonomy.

These requirements are outlined below.

3.1.1 Jurisdiction of the Amsterdam District Court

The issue of jurisdiction must be distinguished from the choice for adjudication by the NCC. The jurisdiction of the Amsterdam District Court is determined — where necessary *ex officio* — on the basis of the ordinary applicable rules, such as the domicile of the defendant, the place where the agreement must be performed, or the place where the tort occurred. In legal terms, the choice for the NCC is qualified as a procedural agreement.

As in virtually all NCC cases non-Dutch companies or individuals were also parties to the proceedings, the jurisdiction was assessed on the basis of private international law rules. In almost all cases, the jurisdiction was based on a choice-of-forum agreement. Article 25 of the Brussels I bis Regulation generally constituted the basis for the jurisdiction. This provision also applies where parties are established outside the European Union, such as the United Kingdom ("regardless of the domicile of the parties"), provided a choice was made for an EU court. Where a Swiss defendant was involved, the jurisdiction was based on the comparable Article 23 of the Lugano Convention.

There are, however, a number of areas in which exclusive jurisdiction applies and a choice of forum is not allowed. The area most relevant to the NCC is company law. If the case concerns the validity, nullity, or dissolution of companies or resolutions of their corporate bodies, Article 24 of the Brussels I bis Regulation and Article 22 of the Lugano Convention confer exclusive jurisdiction on the courts of the place where the company has its corporate seat.

In *Batavia I*, brief attention was given to this issue because the case concerned a corporate matter (the appointment of new directors), although the matter was not within the scope of this exception. It should be noted that the company involved was according to its articles of association seated in the Netherlands, meaning that the Dutch courts would also have had jurisdiction on the basis of this exclusive jurisdiction rule.

[4] The NCC and the NCCA are chambers of the Amsterdam District Court and the Amsterdam Court of Appeal respectively.

In proceedings initiated by application, the question occasionally arose whether the NCC may also derive jurisdiction from a choice-of-forum clause. The provisions on territorial jurisdiction in proceedings by application (Articles 262–269 DCCP) contain no provision on selection of forum, unlike in proceedings initiated by claim (Article 108 DCCP). Moreover, the DCCP contains various provisions designating a specific court, for example Article 438a DCCP in enforcement matters and Article 700 DCCP in attachment matters. According to one commentator, selection of forum is not possible in such cases, and the territorial jurisdiction rules applicable to proceedings by application — and in enforcement matters Article 438a DCCP — determine the court having jurisdiction. However, as this commentator also correctly observed in later publications,[5] parties may indicate before a court that lacks territorial jurisdiction under these rules that they do not wish referral. To that extent, parties can therefore achieve the effect of a choice-of-forum agreement.

In *IHC Merwede*, the NCC held that selection of forum may also operate differently in proceedings by application. NCC cases are international in nature. This means that private international law rules must be applied, which may result in treaties or EU regulations prevailing over domestic procedural law. Where in a choice-of-forum agreement a specific domestic court has been designated — such as the Amsterdam District Court in NCC cases — the Brussels I bis Regulation directly designates the court in the member state having jurisdiction. Domestic rules on territorial jurisdiction, such as Article 438a DCCP (for enforcement matters) and Article 700 DCCP (for attachment matters), do not apply.

3.1.2 Choice for the NCC

Pursuant to Article 32a DCCP, the choice for the NCC must be made expressly and in writing. A choice for the NCC in general terms and conditions is invalid unless that choice is subsequently expressly accepted in the agreement or other correspondence. However, it should be noted that certain legal scholars[6] take the view that this statutory requirement of an "express" agreement is incompatible with the Brussels I bis Regulation.

The NCC has held that the requirement of express consent is fulfilled if the parties' choice for the NCC is clearly expressed, is made with knowledge of the clause, and not hidden in one party's general terms and conditions. In virtually all NCC cases during the first seven years, the choice for the NCC was made in the form of an agreement — whether separate or not — designating the NCC for the adjudication of disputes in English. The NCC model clause was used frequently. Actually, in several cases the parties deviated from previously agreed arbitration by choosing the NCC.

In two cases, the parties agreed to the NCC only after proceedings had already commenced before another court or before the regular commercial chamber of the Amsterdam District Court. This demonstrates that the choice for the NCC may also be made during pending proceedings.

Even where proceedings are already pending at the NCC, the issue of consent to litigate before the NCC may still arise. This occurred in proceedings by application where the court designated an additional interested party that had not yet agreed to the NCC. In those cases, explicit consent was requested and obtained. Consent may also be requested and expressly confirmed at the hearing, or inferred from a substantive response in which no objection has been raised against adjudication by the NCC.

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[5] T. Hutten, *Pandrecht op aandelen* (Onderneming en Recht nr. 140), Deventer: Wolters Kluwer 2023, para. 5.6.3.
[6] Georgia Antonopoulou, 'Requirements upon Agreements in Favour of the NCC and the German Chambers Clashing with the Brussels I bis Regulation?', see https://repub.eur.nl/pub/120267/ELR_2019_012_001_007.pdf.

Where an agreement contains a choice for the NCC, the validity of that choice does not depend on whether the principal agreement in which it is contained actually exists, or on any formal or substantive requirements applicable to the principal agreement. Although the principal agreement in *McCourt I* had not been signed and the final judgment held that the agreement had not come into existence, the court nevertheless ruled that there was consensus regarding litigation before the NCC.

This shows that the NCC does not apply the requirement for the choice of the NCC to be in writing overly restrictively; a signature is not required. Nor is it sufficient to dispute consensus on the NCC clause merely by contesting the formation of the principal agreement.

There must, however, be actual consensus on the choice for the NCC: this means an offer and acceptance of that offer under Article 6:217 DCC. The existence of such consensus was disputed in *Benelux Wonen II*. One of the attorneys acted for two parties conducting separate proceedings against Benelux Wonen. The correspondence did not clearly demonstrate that the agreement to litigate before the NCC — instead of arbitration — extended to proceedings brought by both parties. The NCC therefore declined jurisdiction.

As noted in the parliamentary history concerning the NCC legislation, the NCC cannot hear cases falling within the exclusive jurisdiction of another specialised 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. This issue arose in *Batavia I*, concerning the appointment of new directors of a company. The NCC held that the Enterprise Chamber did not have exclusive jurisdiction in this area.

3.1.3 International Dispute

Article 32a DCCP provides that a dispute may only be submitted to the NCC if it concerns an "international dispute". The NCC Rules indicate that this requirement is satisfied not only where one of the parties is domiciled abroad, but also:

- where a party is a company incorporated under foreign law or a subsidiary thereof;
- where a treaty or foreign law applies to the dispute;
- where the dispute arises from an agreement drafted in a language other than Dutch;
- where a party forms part of a foreign group of companies;
- where the dispute concerns legal facts or legal acts outside the Netherlands; or
- where the dispute otherwise has a relevant cross-border interest.

In virtually all NCC cases a non-Dutch party was involved and therefore the requirement of an international dispute was satisfied.

In three cases, all parties were established in the Netherlands, yet the NCC still held that an international dispute existed:

- in *DuoMed I*, both parties were a part of an international group of companies;
- in *Welten*, the shareholder of the claimant was established in Belgium;
- in *Eurokeg*, the shareholder of the defendant was Swiss.

The fact that documentation is drafted in English may also contribute to satisfying this criterion and, according to the NCC judge in *Eurokeg*, could even have constituted an independent basis for

fulfilling this requirement.

3.1.4 Legal Relationship within the Parties' Autonomy

The final requirement for NCC jurisdiction is that the relevant legal relationship must be "within the autonomy of the parties to agree" (Article 32a(1) DCCP). This requirement appears in several provisions of the Dutch Code of Civil Procedure.

In the NCC cases of the past seven years, the court never held that the matter was not within the autonomy of the parties. In *Elavon*, the NCC ruled that a right of pledge is a legal relationship within the autonomy of the parties to agree. This also applies to enforcement — which is confirmed by Article 3:251(2) DCC providing that parties may also conclude an agreement concerning enforcement.

More difficult questions arise in company law matters. In *Batavia I* — concerning the appointment of new directors — the NCC explicitly addressed this issue. Referring to a passage in the Dutch literature (the *Asser series*), the court held that the party autonomy rule is limited in scope: it removes issues from NCC authority only where: (a) the public interest may be impacted, or (b) there are issues directly affecting third parties which are potentially or actually inconsistent with public policy. Although many of the statutory rules of company law are mandatory in nature, this does not mean that the appointment of directors is a matter of public order in this sense.

3.2. Confidentiality

Pursuant to Article 27 DCCP, the court may order proceedings to be conducted behind closed doors. Such an order was requested in one NCC case but denied in view of the strict requirements applicable (*McCourt II*). Where commercially sensitive information is involved, the NCC left open the possibility of ordering proceedings be held behind closed doors, but this ultimately proved unnecessary because the information was not discussed at the hearing (*Lycra*).

The NCC did, however, on several occasions prohibit parties from disclosing commercially sensitive information to third parties pursuant to Article 28 DCCP. In such cases, the court also ordered that the judgment would refer to the sensitive information only insofar as strictly necessary for substantiating the decision.(see *Lycra*).

3.3 The Concept of "Interested Party"

In requests for permission for the private sale of pledged shares, the question frequently arose which parties qualify as interested parties. This issue is discussed below in Section 4.3.

3.4 Third Parties

Because the NCC may hear a case only with the parties' prior consent, the NCC's expectations at the beginning were low with respect to proceedings being initiated involving third parties that were not bound by an NCC clause.

Nevertheless, the NCC Rules contain several provisions facilitating participation by third parties.

- A party seeking joinder in NCC proceedings is bound by the language of the proceedings.
- This does not apply to intervening parties or parties summoned in indemnity proceedings or pursuant to Article 118 DCCP. However, the NCC will permit such intervention or summons only if:
    - the third party has declared in writing that it agrees to litigate in English;
    - it is plausible that the party has sufficient command of English; or
    - the other parties agree to continuation of the entire proceedings in Dutch.

These situations occurred on several occasions during the first seven years of the NCC.

- In proceedings by application where an additional interested party was designated by the court who had not yet opted for the NCC: this party was given the opportunity to make such choice, which was subsequently used.
- In an M&A case (*Welten*), the W&I insurer joined the proceedings as an intervening party on the claimant's side. The joining party agreed to litigate before the NCC in English and maintained that consent when – following a settlement with the claimant during the proceedings – its position changed to an intervening party. This change of position (and the subsequent submission of a subrogation claim) was permitted.
- In two cases, a request was made to summon a third party pursuant to Article 118 of the Dutch Code of Civil Procedure: in one case, this concerned a party to the contract that had mistakenly not been included as a claimant (*Triple Bells*), and in the other case, it concerned the founders of the company that was the subject of the dispute, against whom the defendant wished to bring a claim (*Batavia II*). In both cases, the third party consented to litigating before the NCC in English.
- In *DiaMedica*, a request for permission to initiate indemnity proceedings was rejected, in part because the party to be summoned in indemnity had not provided written consent to litigate before the NCC. As a result, the main proceedings and the indemnity proceedings would have had to be handled by different chambers of the Amsterdam District Court and in different languages. Additional factors were: (i) the motion for indemnity was raised very late in the proceedings, and (ii) the claim for indemnity concerned only a possible order for legal costs in the main proceedings.

3.5 The Costs of Proceedings

As before the ordinary Dutch courts, in NCC and NCCA proceedings the (predominantly) unsuccessful party is ordered to pay the costs of the opposing party. These costs are in principle assessed in accordance with the NCC rates, which are higher than the rates before the ordinary Dutch courts. The applicable rate depends on the type of NCC chamber involved (Court in Summary Proceedings, NCC District Court (for non-urgent cases), or the NCC Court of Appeal) and the complexity of the matter (simple, average, or complex).

Where the NCC found in *Eurokeg* that a party had abused procedural law by raising a hopeless procedural incident, the court imposed a higher rate as a sanction.

If the parties have agreed in advance on the recoverability and the amount of costs, the NCC will generally follow such an agreement. In *South Stream*, the parties had entered into such an arrangement and the Court awarded costs exceeding EUR 400,000 without any reduction.

In proceedings by application, the court enjoys broader discretion as to whether to award costs. In cases concerning permission for the private sale of pledged shares, the court consistently refrained from awarding costs because the proceedings were legally necessary to achieve the intended result.

4. Substantive Issues

4.1 Applicable Law

Because the matters submitted to the NCC are international in nature, the question of applicable law arose in virtually every case, often *ex officio*.

Most cases concerned agreements containing a choice for Dutch law, although choices for English law and the law of the State of New York also occurred. Turkish law and Canadian law likewise applied in certain cases.

In some instances, determining the applicable law proved to be complex.

- In requests for the private sale of pledged shares, the NCC consistently distinguished between:
  - proprietary law issues relating to the pledge over the shares, which was governed by the law applicable to the company issuing the shares (*lex societatis*); and
  - contractual issues concerning the interpretation of the underlying financing agreement, which was governed by the law applicable to that agreement.
- In *DiaMedica*, questions regarding ownership of physical and digital data were held to be governed by the law of the place where the property was located.
- In company law matters, such as the appointment of directors in *Batavia I*, a distinction was made between:
  - obligations between shareholders under the shareholders' agreement; and
  - corporate law rules governed by the *lex societatis*.

4.2 Application of Foreign Law

Where foreign law applies, the court may determine its contents in several ways:

- by means of legal opinions submitted by the parties;
- by hearing party-appointed experts at the hearing;
- by involving a judge (sitting by designation) familiar with the relevant legal system; or
- by appointing its own expert.

The NCC has not yet used the last possibility above.

The NCC's competence in applying foreign law is demonstrated by a detailed article published in the European Review of Private Law, in which the authors concluded that the NCC correctly applied English law.

4.3 Permission for Private Sale of Pledged Shares (Article 3:251(1) DCC)

Over the past seven years, the NCC has regularly received cases seeking permission for the private sale of pledged shares, often in the context of a debt-for-equity swap.

These cases concern financing provided to a company or group of companies, where repayment is secured through a pledge over the shares. If the company experiences financial distress and defaults on repayment, the pledgee may proceed to enforcement.

Enforcement may occur through public auction or by another method pursuant to Article 3:251 DCC, provided that the Court in Summary Proceedings grants permission.

The first question arising in such cases is whether the NCC has jurisdiction and which law applies. The second question concerns who qualifies as an interested party.

According to settled Supreme Court case law, the qualification as interested party depends on the nature of the proceedings and the relevant statutory provisions. A person qualifies as an interested party where the outcome may affect that person's own interests to such an extent that participation is warranted for the protection of those interests, or where the person is otherwise so closely involved with the subject-matter that participation is justified.

The leading judgment applied by the NCC is the *Ramblas* decision of the Amsterdam District Court. According to *Ramblas*, the pledgee and pledgor qualify as interested parties, as does the company whose shares are pledged and the intended purchaser of those shares. Other shareholders of the pledgor generally do not qualify because the company's assets are separate and shareholders have only a derived interest. The same applies to shareholders who guaranteed the loan or to other creditors, absent additional circumstances.

The academic literature reflects differing opinions on this issue. According to some lawyers (who wrote a commentary on the judgment in *AS Adventure*), the concept of "interested party" should be interpreted more strictly: the company whose shares have been pledged and the intended purchaser should not qualify as interested parties. In a recent book[7] on this subject, however, a broader interpretation is advocated, more in line with the judgment in *Ramblas*.

In accordance with the *Ramblas* judgment, the NCC in principle regards only the pledgor, the company whose shares have been pledged, and the intended purchaser as interested parties. However, in a number of judgments the NCC has given other parties the opportunity to be heard without designating them as interested parties. These include:

- the shareholders of the pledgor, for example in a situation where the pledgor's only activity consisted of holding the shares in the company (*Elavon*);
- the company for whose benefit the loan had been granted, other than the company whose shares were concerned, whereby – as a result of an internal dispute – both the management board and the administrator were separately allowed to present their views. This was motivated by the wish to ensure that all information relevant to determining whether the private sale would achieve the maximum proceeds would come to light (*Lycra*).

An appeal has been initiated at the NCCA against the decision in the *Selecta* case by third parties, apparently because they had not been qualified as interested parties. According to the commentary, these third parties were indirectly secured creditors. It remains to be seen how the NCCA will rule on the circle of interested parties in these types of applications.

[7] T. Hutten, *Pandrecht op aandelen* (Onderneming en Recht no. 140), Deventer: Wolters Kluwer 2023.

It is striking that in half of the cases submitted to the NCC in this field, all interested parties agreed to the proposed private sale and waived their right to a hearing. As commentators on one of the judgments observed, in such circumstances the parties could also have made use of the possibility offered by Article 3:251(2) of the Dutch Civil Code to agree upon an alternative method of sale. According to the commentators, the reason may have been that the parties nevertheless wished to obtain the court's approval as a precaution because of the legal certainty this provides and the protection in insolvency against such a "voluntary legal act".[8]

When assessing the application on the merits, the court always examines (also on its own motion, if no defence is raised by the interested parties) whether there has been a default in repayment of the loan. This is a prerequisite for exercising the right of pledge (Article 3:248 DCC). The court then examines whether the proposed private sale for which permission was requested will deliver the maximum value.

In all NCC cases, valuation reports play a role, as well as:

(i) the consequences the proposed transaction would have;
(ii) the interests of the company or group of companies (although these interests carry less weight than those of the pledgees and creditors);
(iii) whether there is a potential or actual interest from other prospective purchasers. If an actual bid exists, it must constitute an "unconditional and better offer" than the proposed private sale.

In two NCC cases (*Elavon* and *Lycra*), the defence was also raised that a private sale of shares would violate the right to property protected by Article 1 of the First Protocol to the ECHR. In both cases, that defence was rejected. The interference with property rights was considered lawful because Article 3:251 DCC is accessible, precise, and foreseeable in its application. This provision serves a legitimate aim (the protection of the interests of a company's creditors), and it also strikes a fair balance between the interests of the shareholders of the pledgor, the borrower, and the pledgee.

In all NCC cases submitted to date, permission for the intended private sale was ultimately granted.

4.4 Mergers and Acquisitions

A relatively large number of cases brought before the NCC since 2019 concern mergers and acquisitions (M&A). This may be explained by the experience the NCC judges have in this field from their practice prior to becoming a judge. I will summarise the NCC's key decisions in the area of M&A below.

4.4.1 Formation of an M&A Agreement

In principle, the formation of an M&A agreement is guided by the same principles as other agreements. Dutch law requires an offer and an acceptance of the offer for contract formation, and allows the parties broad leeway as to how they communicate what may or may not be construed as an offer or acceptance. The standard is not what the parties may have thought, or meant to say; it is what a reasonable person in the same circumstances would have understood their communications

[8] See Amsterdam District Court (NCC) 11 March 2021, ECLI:NL:RBAMS:2021:990, annotated by R.R. Menasalvas Garrones & K. de Bruijn, Ondernemingsrecht 2021/69.

to mean (*Haviltex*).

In *McCourt I*, the NCC gave a ruling as to how these requirements should be construed in the context of M&A practice. In this case, a Letter of Intent contained a right to walk away from the deal: the prospective purchaser was free at any time to not execute and deliver the Transaction Agreement, but would then owe a fee of USD 30 million. The prospective purchaser did not sign the Transaction Agreement, raising the question whether an agreement had nevertheless been concluded on the basis of various acts and expectations created between the parties. The NCC held that this was not the case. Although the requirement to "execute and deliver" does not constitute a formal validity requirement under Dutch law, it is important evidence for the existence of an agreement. It also means that a high threshold applies when assuming the existence of an agreement on the basis of conduct or statements by the parties' advisers. Two considerations played a role:

- the process on the purchaser's side had been structured in such a way that none of the advisers had full authority to decide on the transaction; the crucial step was board approval; and
- the board had never created the impression that the advisers did possess such authority, which is also uncommon in M&A practice.

The conduct and statements relied upon by the seller — including statements that the deal had been finalized and that signature pages would be provided, which ultimately did not occur — were considered insufficient.

4.4.2 Construction of an M&A Agreement

As a general rule, contracts are interpreted on the basis of the *Haviltex* criterion: what a reasonable person in the same circumstances would have understood the contract to mean. In two M&A cases (*Welten* and *Triple Bells*), the NCC explicitly relied on the most obvious linguistic meaning of the agreement. These agreements had been concluded with professional legal assistance, were highly detailed, and contained an "entire agreement clause." This approach is consistent with the Dutch Supreme Court's judgment in *Meyer/PontMeyer*.

Entire agreement clause

In *McCourt I* and *Lagerwey*, the significance of an "entire agreement clause" itself was at issue. As discussed above, such a clause may support a predominantly textual interpretation of the agreement. However, the existence of such a clause:

- is irrelevant as to the question whether there was agreement on an NCC clause, since the choice for the NCC must be assessed independently from the content of the other contractual provisions; and
- does not relieve the court of its duty to examine whether alleged agreements made prior to the conclusion of the agreement containing the "entire agreement clause" are binding between the parties.

The significance of such a clause depends on the circumstances of the case, including prior statements and conduct of the parties. In *Lagerwey*, the NCC Court of Appeal (NCCA) therefore first examined whether the parties had actually made the alleged "additional agreement" (and examined witnesses for that purpose) before considering the scope of the entire agreement clause.

Conditions precedent

In *Triple Bells*, the NCC addressed the interpretation of conditions precedent. According to the Court, such conditions are intended as "hard and fast rules." Their purpose is to ensure that the obligation to complete the transaction only arises once the most fundamental obligations have been fulfilled, while also providing certainty that the obligation does arise once those conditions are satisfied. This is incompatible with an interpretation that would require extensive further investigation in order to determine whether the conditions precedent have been met.

Waiver

In the same case another issue of interpretation was raised: how to construe a clause waiving the right to rescind or annul the agreement. The relevant provision stated:

"Unless stated otherwise in this Agreement, the Parties waive their rights, if any, to in whole or in part annul (vernietigen), rescind (ontbinden) or partially rescind (gedeeltelijke ontbinding) this Agreement on the basis of article 6:228, article 6:258, article 6:265 or article 6:270 of the DCC. Furthermore, Parties waive their right to request a competent court to amend this Agreement on the basis of article 6:258 or article 6:230 of the DCC [Dutch Civil Code]*."*

According to the purchaser — who no longer wished to proceed with the transaction — the reference in the second sentence to the "competent court" meant that only judicial rescission had been waived, not extrajudicial rescission.

The NCC rejected this argument. The Dutch Civil Code (DCC[9]) provisions referred to did not concern a specific mode of rescission. Such a distinction would have required reference to Article 6:267 DCC, which distinguishes between judicial and extrajudicial rescission.

Disclosure

Another interpretative issue arose in *Welten*. In this case the purchaser relied on a contractual disclosure obligation requiring the seller: "*to disclose to the Seller or its representatives all information and documents relevant to the Claim*".

The NCC rejected the purchaser's argument that this provision should be interpreted narrowly. The seller was not required to describe with specificity the information or documents it sought to obtain. Nor was there — absent the abuse of rights or a contractual reasonableness test — any obligation to limit disclosure requests in order to avoid imposing an excessive burden on the purchaser.

This suggests that parties may contractually agree on disclosure obligations which are broader in scope than the statutory disclosure regime under Dutch procedural law. However, contractual disclosure obligations involving documents containing personal data must still comply with the proportionality test under the General Data Protection Regulation (GDPR). In this case, that requirement was satisfied because:

- the requested documents were business-related, so the persons involved had no reasonable expectation of privacy;

[9] For the translation of the DCC see *The Civil Code of the Netherlands, Second Edition*, 2nd Revised Edition by Hans C.S. Warendorf et al.

- the privacy of the persons concerned was protected through contractual confidentiality obligations; and
- there were no less intrusive means of obtaining the requested information, such as hearing witnesses.

Whether a disclosure request based on a contractual disclosure obligation succeeds depends on the wording of the clause. The clause discussed above was wide in scope: the only requirement was that the documents be relevant to a claim brought by the purchaser against the seller.

However, also in *Welten*, the seller brought a counterclaim alleging breaches by the purchaser of earn-out obligations. To substantiate that claim, the seller sought documents from the purchaser and relied on a more narrowly drafted disclosure provision: "*[provide] such information as reasonably requested by it and provide the relevant information relating to the preparation of the Earn Out Payment Calculation, in each case for the purpose of assisting the Seller in its review of the Earn Out Payment Calculation and the calculations contained therein*".

The NCC held that this obligation was limited to documents relevant to reviewing the earn-out calculation prepared by the purchaser. It did not extend to establishing possible breaches of the agreement relating to the earn-out mechanism itself. A subsidiary claim based on Article 843a of the former Dutch Code of Civil Procedure (currently Article 194 DCCP) also failed because the seller had not made it sufficiently plausible that the alleged breaches had actually occurred.

4.4.3 Attribution of the Target's Conduct and Knowledge to the Seller

In *Welten*, the NCC concluded on the basis of the evidence submitted that the Chief Financial Officer of the Target — the company sold by the selling parent company to the purchaser — had committed fraud within the meaning of Article 3:44(3) DCC. The fraud consisted of improperly approving the shifting of costs between two consecutive financial years and creating an incorrect provision for accrued holiday accruals.

The question was whether the conduct and knowledge of the CFO could be attributed to the selling parent company. The NCC answered in the affirmative. The applicable standard is whether, according to views prevalent in the community, the actions and knowledge of the individual acting or possessing the relevant knowledge can be regarded as actions or knowledge of the legal entity itself.

According to the NCC, this was the case. The CFO had a duty to communicate her actions and knowledge to the selling parent company because:

- she was aware of the ongoing acquisition process;
- she was responsible for decisions on financial matters within the target company, including accounting entries and accounting policies; and
- she had been tasked by the seller to provide information about the target company to the purchaser directly.

In addition, the selling company itself had a duty to actively inquire into the financial affairs of the target company, since it had provided warranties concerning these matters to the purchaser.

The fact that the M&A agreement contained provisions attributing the CFO's knowledge to the seller, but not specifically with regard to the breached warranties, did not help the seller's case. In addition to contractual attribution, attribution may also arise under general principles based on

prevailing views in the community. The contractual attribution clause merely confirmed that the CFO's knowledge and conduct were attributable to the seller. According to the NCC, a different outcome would also be unworkable in M&A practice, as it would undermine the integrity of the M&A process.

After the interim judgment in *Welten* above, the seller challenged this ruling, including through its own expert evidence, but unsuccessfully. The addition of the phrase "*[fraud] on the part of the Seller*" in several provisions of the M&A agreement was insufficient to conclude that the seller had excluded liability for fraud committed by employees of the target company. That wording had to be interpreted in light of the contractual allocation of risk between non-intentional and intentional breaches of warranties. The former were covered by W&I insurance, whereas the latter were not.

This also made the contents of the insurance policy itself relevant. The subrogation clause in that policy extended to fraud committed by the target company and its employees.

4.4.4 Reasonableness and Fairness

In the M&A cases brought before the NCC, parties occasionally invoked the principles of reasonableness and fairness, but unsuccessfully.

Waiver

In the already mentioned *Triple Bells* decision, the purchaser argued that reliance on the waiver to rescind the agreement was unacceptable according to standards of reasonableness and fairness because proceeding with the acquisition could seriously affect the gambling licences held by the purchaser in, among other places, the United States, and could potentially expose it to criminal liability.

The NCC accepted that such circumstances could in principle render reliance on the prohibition of rescission unacceptable. However, after extensive examination — including analysing legal opinions concerning gambling regulation — the court concluded that the risks identified by the purchaser were unlikely to materialise.

Unforeseen circumstances

With respect to an acquisition taking place during the outbreak of the COVID-19 crisis (*McCourt I*), the NCC held that the crisis did not render reliance on a break-up fee (a fee payable for not signing the M&A agreement) unacceptable, nor did it justify relief on the basis of unforeseen circumstances under Article 6:258 DCC. The break-up fee was intended both to incentivise the parties to proceed with the transaction and to allocate risks between them. Although the COVID-19 crisis could in itself qualify as an unforeseen circumstance, this did not make it unacceptable to bind the prospective purchaser to the break-up fee because the very purpose of the fee was to preserve the purchaser's freedom to decide not to proceed with the transaction under any circumstances. The fee restored the contractual balance between the parties: while the prospective purchaser was required to pay the fee for walking away (EUR 30 million), it thereby limited its liability for the impact of the COVID-19 crisis on the target business, which remained with the seller.

4.5 Ownership of Digital Data

The final topic of this chronicle concerns the issue of ownership of digital data. This issue arose in the *DiaMedica* case.

In that case, the Dutch defendant (PRA) had conducted clinical trials for a US pharmaceutical company (DiaMedica). The agreement contained the following provision: "*All data […] generated by PRA in the course of conducting the Services (the 'Data') and related to the Services will be [DiaMedica's] property.*" DiaMedica brought a claim for revindication and argued that both the physical documents and the digital data generated by PRA during the trials were its property.

With regard to the digital data, the question arose whether such data were capable of being owned at all. Dutch law applied to this property law issue (see Section 4.1 above). Pursuant to Articles 5:1 and 3:2 of the Dutch Civil Code, ownership is limited to "*corporeal objects that are subject to human control*". The NCC held that digital data do not meet this criterion, referring to various academic writings and a few judgments on the subject. Application of property law to digital data by analogy was not possible because of the closed system of property law under Dutch law and because doing so would encroach upon the domain of the legislature.

This meant that DiaMedica's argument that it already owned the digital data could not succeed. Nevertheless, the claim was granted in order to place DiaMedica in the position in which it would become owner of the digital data. The digital data had been stored on a data carrier, and such carrier is capable of being owned.

Although an appeal was brought before the NCCA, the NCCA did not address this specific legal issue because it held that DiaMedica could not derive any entitlement from the agreement to the data at issue on appeal.

Following this judgment, questions were raised in the Second Chamber of the Dutch Parliament (*Tweede Kamer*) to the Minister for Justice and Security regarding the possible regulation of ownership of intangible assets, such as digital data and crypto-assets. In September 2025, the Minister replied that the matter was for the new government to decide, given the complex considerations involved.[10]

This judgment has also been discussed in several articles specifically concerning crypto-assets, where a similar issue arises. One dilemma identified in those articles is how to determine the law applicable to ownership of digital data. Because digital data do not qualify as "property" within the meaning of Dutch law, the conflict-of-laws rules in Book 10 of the Dutch Civil Code relating to property law matters (Articles 10:126 et seq.) do not apply directly, but at most by analogy. There is also a localisation problem: how does one determine the place where digital data are located?

The resulting question is therefore: which conflict-of-laws rule should be applied to determine the law applicable to digital data? The authors of the aforementioned articles[11] offer useful suggestions, but ultimately this is a matter for the legislature.

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[10] Aanhangsel Handelingen II 2025/26, no. 73.
[11] L.F.A. Welling-Steffens, 'Een goederenrechtelijke verwijzingsregel voor crypto-assets? – Waarom makkelijk doen als het moeilijk kan?', O&F 2024/3, p. 47-71; and I. Koumans, 'Cryptoactiva en internationaal privaatrechtelijk goederenrecht: putting a square peg in a round hole', MvV 2024/4, p. 113-124.

5. Conclusion

The cases submitted to the NCC during the first seven years of its existence show that parties in international commercial disputes are increasingly finding their way to the NCC. From the very beginning, the number of cases has shown a steady upward trend, and foreign parties originate from all over the world.

As regards the types of disputes brought before the NCC, the emphasis lies on issues relating to M&A agreements and restructuring through private sales of pledged shares. Through its case law, the NCC is providing increasing clarity in these areas.