

attachment on information in the possession of the opponent by means of a so-called seizure of evidence. In this way, it is possible to ensure that the items of proof will be available when the right to inspection has eventually been granted. This arrangement offers all too welcome compensation for the informational disadvantage of claimants in cartel damages cases.

Notes

- 1 Joaquín Almunia, 'Antitrust damages in EU law and policy', Brussel 7 November 2013, http://europa.eu/rapid/press-release_SPEECH-13-887_en.htm?locale=en, accessed 27 March 2017.
- 2 <http://data.worldjusticeproject.org/#table>, accessed 27 March 2017.
- 3 www.netherlands-commercial-court.com, accessed 27 March 2017.
- 4 As per 1 January 2017, with a maximum of €3,894 in the first instance and €5,200 on appeal.
- 5 Court of Appeal Amsterdam 24 September 2013, ECLI:NL:GHAMS:2013:3013 (Equilib/KLM).
- 6 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (CDC/Shell cs), para 4.26.
- 7 District Court of Gelderland 15 April 2015, ECLI:RBGEL:2015:2621, para 3.6.
- 8 European Court of Justice (ECJ) 14 December 2000, C-344/98 (Masterfoods); ECJ 1 December 2011, C-145/10 (Painer).
- 9 ECJ 21 May 2015, C-352/13 (CDC/Perioxide).
- 10 Art 6 (1) Brussels I Recast.
- 11 Court of Appeal Amsterdam 24 September 2013, ECLI:NL:GHAMS:2013:3013 (Equilib/KLM); District Court of The Hague 17 December 2014, ECLI:NL:RBDHA:2014:15722; District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (Equilib/KLM); District Court of Limburg 25 February 2015, ECLI:NL:RBLIM:2015:1791 (*Deutsche Bahn/Nedri Spanstaal ea*).
- 12 District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (Equilib/KLM); District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (CDC/Akzo cs), para 2.12.
- 13 District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (CDC/Akzo cs), paras 2.12–2.13.
- 14 District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (Equilib/KLM), para 3.4.
- 15 District Court of Limburg 25 February 2015, ECLI:NL:RBLIM:2015:1791 (*Deutsche Bahn/Nedri Spanstaal ea*), para 3.5; District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (CDC/Akzo cs), para 2.16.
- 16 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (CDC/Shell cs), para 4.17.
- 17 District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (Equilib/KLM), paras 3.6–3.8; District Court of Limburg 25 February 2015, ECLI:NL:RBLIM:2015:1791 (*Deutsche Bahn/Nedri Spanstaal ea*), para 3.5; District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (CDC/Shell cs), para 4.27.
- 18 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (CDC/Shell cs), para 4.27.
- 19 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (CDC/Shell cs).
- 20 District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (CDC/Akzo cs), para 2.23.
- 21 The settling of international mass claims in the Netherlands will be discussed below.
- 22 Court of Appeal Amsterdam 29 May 2009, ECLI:NL:GHAMS:2009:BI5744 (Shell Reserves).
- 23 Court of Appeal Amsterdam 17 January 2012, ECLI:NL:GHAMS:2012:BV1026 (Converium).
- 24 District Court of Gelderland 24 September 2014, ECLI:NL:RBGEL:2014:6118.

Going Dutch: the Netherlands as an attractive litigation forum for international disputes in English

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In January 2016, the Dutch Council for the Judiciary announced plans to create a Netherlands Commercial Court (NCC) sitting in Amsterdam after launching a review in September 2014 aimed at determining the necessity for a specialised commercial court. The April 2016 edition of *International Litigation News* highlighted this matter in two articles in its 'Focus on the Netherlands' section.

In December 2016, the Dutch government published the draft bill for the formation of the NCC and the Netherlands Commercial Court of Appeal (NCCA)¹ as well as its explanatory memorandum. Now that these documents have seen the light of day, more details are known. This article serves to outline some of the most relevant aspects of litigation before the NCC, once the NCC gets started.

Background and aim

The background of the NCC is that businesses are increasingly operating on a global scale. Given the fact that the language of international business is predominantly English, and international contracts are mainly drafted in English as well, the NCC seeks to meet the rise in a need for dispute resolution in English in a traditionally non-English speaking jurisdiction such as the Netherlands. The hearings will take place in Amsterdam.

The main aim of the NCC is to offer parties that have an international dispute a forum in the Netherlands where they can litigate their dispute in English and subsequently obtain an enforceable judgment in English. The NCC would thus take away any language barriers that may exist and therefore introduce an incentive to parties to choose the Netherlands as a forum for the resolution of their international disputes as a credible alternative to international arbitration.

According to the explanatory memorandum, the five characteristics of the NCC procedure are as follows:

1. Parties may only litigate before the NCC if they have explicitly agreed to do so. The draft bill contains safeguards to prevent consumers and small businesses from involuntarily becoming involved in NCC litigation (ie, without their express consent).
2. Parties may only submit to the NCC matters of civil and commercial law that are at the sole determination of the parties.
3. The working language of the NCC is, in principle, English.
4. The NCC will be entirely financed by the court fees of the litigating parties. The court fees will be substantially higher when compared to regular Dutch district courts.
5. The NCC and NCCA will have one set of procedural rules (the 'NCC Rules') by which parties may further shape their proceedings to the extent that this is enabled by the Dutch Code of Civil Procedure (DCCP).

Jurisdiction of the NCC

The NCC will only deal with international disputes. According to the explanatory memorandum that forms part of the draft bill, one may speak of an international

dispute, if, for example, one of the parties involved in the dispute has its domicile or place of business outside the Netherlands, when the agreement has to be carried out outside the Netherlands or when foreign law is applicable to the agreement between the parties. If and to the extent that a purely domestic dispute is submitted to the NCC, the NCC will not hear the case and will refer the matter to the competent district court.

A few examples of international disputes mentioned in the explanatory memorandum that may be submitted to the NCC are international contractual disputes, tort claims, disputes relating to property law and corporate issues. In addition to the above-mentioned examples, parties may also consider bringing international construction and infrastructure disputes to the NCC given that Fédération Internationale Des Ingénieurs-Conseils (FIDIC)-based international projects usually have English as their working language. The NCC could be welcomed by parties that, in these cases, would like to have an alternative to international arbitration.

The NCC will, however, not be dealing with disputes that pertain to specialised courts in the Netherlands, such as the Enterprise Court, the Patent Division of the Hague District Court and the Maritime Chamber of the Rotterdam District Court. The NCC would, in any case, not have jurisdiction over subdistrict court cases (*kantonzaken*), which, in the Netherlands, are cases with a claim of up to €25,000, and cases concerning labour law, consumer credit and lease disputes.

It is not the intention of the draft bill to change any rules of jurisdiction based on the Dutch Code of Civil procedure, the Hague Convention on Choice of Court Agreements or the Brussels I bis Regulation. It is a matter for the Amsterdam District Court, which will host the NCC, to determine its jurisdiction *ex officio* insofar as a case is brought before the court. The question of whether the Amsterdam District Court has jurisdiction therefore falls outside the scope of the draft bill.

The jurisdiction of the NCC will be voluntary, and parties have to specifically agree its competence through an *ex ante* choice of forum clause or through an *ex post* mutual agreement. Reference to the NCC in the general terms and conditions of one of the parties will not be considered an express choice of forum. Because the jurisdiction of the NCC is in fact to be obtained by

agreeing to the Amsterdam District Court as the choice of forum, parties are advised to expressly insert ‘Amsterdam District Court NCC’ in their (choice of forum clause in their) agreement. If, by the rules of private international law, the Amsterdam court would in any case have jurisdiction, a formal choice of forum by the parties will not be necessary and the specific choice to litigate at the NCC in English will suffice.

The NCC will, furthermore, only have jurisdiction over matters of civil law that are at the sole determination of the parties, ruling out, for example, matters of wills and succession, insolvency issues and family law matters. The provisional examination of a witness, provisional expert opinions and a court inspection of the premises are possible, provided that they are related to matters of civil law that parties are free to determine.

Moreover, the draft bill will also make it possible to conduct summary proceedings in the Netherlands in English insofar as parties have agreed to submit their disputes to the NCC. When provisional relief becomes necessary, one of the NCC judges would act as an interim relief judge prior to or during the NCC procedure. An appeal against the judgment in the summary proceedings would be held at the NCCA.

If the arbitral seat of an international arbitration is Amsterdam and parties have specifically favoured the NCC, for example, by including a clause to that extent, the NCCA may also deal with a claim for setting aside an arbitral award because, pursuant to the DCCP, the claim for setting aside an arbitral award shall be presented to the Court of Appeal in whose judicial district the place of arbitration is located.

Expertise

To ensure that the NCC as well as the NCCA have the required expertise in order to thoroughly understand and adjudicate complex international disputes, the explanatory memorandum envisages the formation of a dedicated group of experienced Dutch judges that have a proper command of the English language and English legal terms to become part of the NCC and NCCA, and to be able to serve as interim relief judges.

Working language

The working language of the NCC is English, unless parties agree to litigate in Dutch.

Summary proceedings will also, in principle, be conducted in English.

The NCC judgment shall be in English, unless parties have agreed to conduct the proceedings in Dutch. However, a decision on a procedural issue of the jurisdiction of the NCC put forward by one of the parties shall only be in Dutch.

If a judgment in English by the NCC – as a result of requirements prescribed by Dutch law – has to be entered in the appropriate public registers, the relevant parts of the judgment will also be drafted in Dutch by the NCC, thus facilitating registry, as mentioned.

When it comes to the enforcement of the judgment, the draft bill specifies that if there are parts of the judgment – on which execution may be issued in the Netherlands – that are not in Dutch, the party that wants to serve the judgment has to attach a Dutch translation of these parts of the judgment by a sworn Dutch translator. These seem to be practical requirements that can be met relatively easily.

Position of third parties

The position of third parties is also mentioned in the explanatory memorandum. Pursuant to the DCCP, a third party may become involved in litigation between two or more other parties, for example, through third-party actions. Third parties will, however, not have agreed to the jurisdiction of the NCC as chosen by the parties that have submitted their dispute to the NCC.

According to the explanatory memorandum, the third party that could potentially get involved in the NCC proceedings will have to indicate whether or not it accepts the jurisdiction of the NCC. If the third party does not accept the jurisdiction of the NCC, the third-party action will have to be filed at the regular courts. A third party may, therefore, not be obliged to litigate in English – and against higher court fees – at the NCC and NCCA.

Litigation costs

The draft bill will also amend the Court Fees (Civil Cases) Act. The amendments to this act will substantially raise the court fees for proceedings at the NCC, which, compared with the fees of regular Dutch Courts, are much higher, which makes the NCC completely self-supportive and exclusively financed by the parties making use of its services.

The NCC fees, as mentioned in the draft bill, are €15,000 for proceedings on the merits and €20,000 on appeal at the NCCA. In summary proceedings, these fees are €7,500 (NCC) and €10,000 (NCCA).

Relation to the Dutch Supreme Court

The introduction of the NCC does not alter the right of appeal or appeal in cassation. Litigation before the Dutch Supreme Court does not, however, fall within the scope of the draft bill, but this does not mean that parties that were involved in litigation before the NCC and NCCA are barred from taking their dispute to the Supreme Court. The DCCP still offers this possibility, but parties should not expect the Supreme Court to render its decision in English. Given the role of the Supreme Court within the Dutch judicial system of monitoring the uniformity of law, its decision will only be given in Dutch. The proceedings at the Supreme Court will therefore also have to be in Dutch.

Notwithstanding the above, the Supreme Court may – and will – inspect all documents pertaining to cases that were litigated before the NCC and NCCA. The Supreme Court may therefore, when deemed necessary or desirable, ask the parties to submit Dutch translations of their court documents, pleadings and other documents.

Conclusion

The draft bill will amend the DCCP in order to enable parties to conduct their legal proceedings in the Netherlands in English and to obtain an enforceable judgment in English.

As for the timeframe that should be taken into account, the Dutch Council for the Judiciary expects the Amsterdam District Court and Amsterdam Court of Appeal to have all facilities in place to enable the operating of the NCC by April 2017. It is, however, expected that the bill will enter into force on 1 January 2018. The Dutch government expects the NCC to deal with approximately 100 cases each year and the NCCA with 25 cases each year.

Given the assumption that a large number of international contracts are drafted in English and the fact that the Netherlands has a top five ranking when it comes to the rule of law,² the Netherlands may – with the NCC – very well offer parties a solid, reliable and, perhaps, financially more attractive alternative to international arbitration.

Notes

- 1 When referring to the NCC in this article, the NCCA is also meant.
- 2 World Justice Project Rule of Law index 2016 <http://worldjusticeproject.org/rule-law-around-world>, accessed 27 March 2017.

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Decision regarding corporate separateness: no liability for an indeterminate amount, for an indeterminate time, to an indeterminate class

The English High Court has recently held that that Royal Dutch Shell (RDS), a holding company that is the ultimate parent of the Shell Group, does not owe a duty of care to residents of the Niger Delta in respect of alleged environmental damage said to have been caused by the operations of one of RDS's Nigerian subsidiaries.

This decision will have particular significance for large multinational operators,

as the case deals with the issue of corporate separateness in large international corporate groups, and particularly in the context of environment, social and governance (ESG) issues. The case provides a greater understanding of the requirements and circumstances that need to be present for a parent company to potentially attract civil responsibility for the acts and omissions of a subsidiary.