THE NETHERLANDS COMMERCIAL COURT

THE FUTURE OF LITIGATION IN INTERNATIONAL COMMERCIAL DISPUTES

You may ask yourself why this special feature of this magazine contains a contribution in English. Litigation before the Dutch courts is, after all, a purely national matter with Dutch as the written and spoken language. But this will change as we are about to witness the birth of the so-called Netherlands Commercial Court (NCC)

As the name suggests, this court will be dedicated to commercial and - more importantly, international (i.e. cross-border) - disputes. This will be achieved by establishing a special branch at the courts of Amsterdam by 1 January 2017, both at the District Court as well as the Appeal Court level. The NCC will consist of chambers of three judges who will adjudicate matters of commercial law in English, in an expedient matter supported by, inter alia, a digital process and on the basis of Dutch procedural law.

In addition to enabling proceedings in English, this will result in the creation of a specialized court for commercial and trade law. This is in line with the practice in other countries where commercial law disputes have long since been decided by specialized courts, such as the Commercial Court in England, the Tribunaux de commerce in France and the Handelsgerichte in various German-speaking countries.

The need for an international court: why bother?

It is fact that the practice of commercial law has become more and more international during the last decades. While trade has, as a cornerstone of the Dutch economy and tradition as a seafaring nation, always been international, commercial transactions in general have followed suit. Not only has English become the lingua franca for cross-border transactions, it has also conquered the domestic domain as many companies in the Netherlands are either part of an international concern or doing business with foreign companies. As a result, the bulk of commercial contracts is drafted in English and often based on common-law terminology, albeit still subject to Dutch law and Dutch courts.

As disputes arising from these contracts end up in the regular Dutch courts, there is need for a more efficient, expedient and swift way of litigation. Currently, there are several challenges to achieving this goal.

First, proceedings before the Dutch courts can only be conducted in Dutch as the official court language. Translations often become a major bottle-neck in proceedings, not least given the tight deadline for submission with limited to no possibilities to request extra time (see, for instance, the pilot at the appeal court of Den Bosch which only provides for 10 weeks to answer in an appeal). This does not only relate to, and impact on, the briefs that need to be translated before the foreign client is actually able to provide his input both regarding its own submissions and those of the opposing party, but also to translations of evidence to be submitted to the court. Luckily, the Dutch Supreme Court has recently held that evidence in a foreign language may not be disregarded as such and that evidence in English, French or German may, in principle, be submitted without a translation (ECLI:NL:HR:2016:65). However, litigation practice shows that the current way of litigating before the Dutch courts often results in foreign clients being under the impression that they are somewhat distant and alienated from their own proceedings as they can only read translation of all submission and, on top of this, are also only heard in court by means of an interpreter.

Second, international commercial disputes are often very complex (as witnessed by the length of the briefs and amount of evidence submitted) and, thus, time-consuming. As a result, such cases are very rarely decided quickly and also suffer from the overall work pressure at the Dutch courts. In fact, it is not uncommon that parties need to wait, for instance, for more than a year for a final decision in an appeal or that

decisions, also in the first instance, are often postponed several times. Needless to say, such delay cannot be reconciled with the needs of international trade and transactions that require a swift and efficient conduct of litigation. At present, parties often have to wait for too long while time becomes a factor of its own as interest over the amounts claimed becomes a decisive factor and considerable risk of proceedings.

Third, The Netherlands strive to become an international player in the realm of civil and commercial litigation as well (as is already the case in public international law with some of the high profile institutions located in The Hague). In fact, the government is very ambitious by proclaiming its aim to create an "infrastructure for trade and commerce" in The Netherlands as the role of international forum for dispute resolution is still in the hands of common law jurisdictions, notably the UK with London as the European hub for commercial arbitration and litigation. After having already modernized the rules on arbitration in an attempt to make The Netherlands more attractive to foreign parties, the current focus is now on litigation before the courts as another important means of resolving commercial disputes.

Getting prepared

The government has already given its approval for the launch of the NCC based on the initiative from the courts themselves (i.e., the Raad van de Rechtspraak). However, it still needs to amend Dutch procedural law by introducing the possibility to conduct litigations in English as well as a separate system of court fees for the NCC.

With a view to the intended 'go-live' on 1 January 2017, commercial parties should consider whether the NCC is a viable alternative to the current way of resolving commercial litigations in The Netherlands. If that is the case, they can already change the choice of forum clause in their contracts by referring to "Court of Amsterdam NCC". As an express choice is required, existing contracts can only be subject to the jurisdiction of the NCC if the parties are able to agree to such venue after the dispute has arisen. While international trade and cross-border commercial transactions, as well as transactions with an international element (such as contracting companies with a foreign parent company or internal and external communications only in English) are obvious candidates for a referral, parties should, in my opinion, also consider the NCC for mere domestic contracts in the field of commercial law as they may require a specialized dispute resolution process (which are, at present, often referred to arbitration instead).

Practicing lawyers, and therefore the readers of this magazine, should get acquainted with conducting litigations, and thus practicing Dutch law, in English. This is not merely a question of mastering legal English, both in writing and orally, but also a question of legal terminology. As shown by prevailing contract practice - which already spills over in court proceedings - international transactions are often subject to foreign concepts transferred - or rather, slavishly copied - into Dutch law as the applicable law to an otherwise common-law based contract template. This poses new challenges that will hopefully be resolved in a uniform matter by the NCC.

To name a few examples from international contract law and disputes. How do 'representations' fit into the Dutch legal systems? While they may look like warranties (garanties) at first sight, they are, however, closer to our notion of error (dwaling), more in particular to information provided by one party on which the other party may have relied on when concluding the contract. Or to address notions that are bound to be lost in translation: is there actually a difference between cancellation, termination, rescission similar to our Dutch law distinction between termination for breach (wanprestatie) and termination for convenience (opzegging)? The answer is not clear-cut as, under common law, the exact legal consequence will actually be spelled out in the contract as such or follow from case law. This is in stark contrast to our legal system which is, to a great extent, based on default rules in our civil code.

Conclusions

While we are eagerly awaiting the arrival of the Netherlands Commercial Court - which may be delayed as the launch date of 1 January 2017 is not that far away but a concrete sign of the implementing law is yet to be seen – it is certainly worthwhile thinking about its benefits.

In my opinion, this proposition should be attractive to foreign parties, not least as litigating before the NCC is considerably cheaper than, for instance, in the UK. To start with, while the NCC will use cost-covering fees which will therefore be higher than the current fees (griffierecht), the suggested court fees are still lower than in other countries. More importantly, the Dutch court system is (with the exceptions of IP disputes) not based on a “winner takes all” system, i.e. a full restitution of the legal fees incurred. Therefore the risk of excessive litigation costs due to facing a potentially high bill from the opposing party is mitigated, while at the same time hourly fees charged by Dutch lawyers are still considerably lower than those charged in, for instance, London.

In addition, the launch of the NCC also provides commercial parties during contract negotiations with a workable alternative to, or otherwise solution for, the vexed question of jurisdiction in an international setting. In light of the current language barrier, this question will often be answered by opting for a court abroad or for arbitration altogether, both of which are bound to be more expensive than litigation in The Netherlands. What is more, such choice may also result in legal work moving away from Dutch lawyers, both in terms of contract drafting and, eventually, resolving commercial disputes.

Last, but not least, the NCC may also offer a specialized and swift manner to resolve commercial disputes as such. In doing so, its case law is likely to contribute to a course of justice than is more in line with the needs and realties of the international commercial law practice. It remains to be seen whether the NCC can also live up to the promises made in respect of the other requirements for a sound dispute resolution at international level, that is efficient, expedient and swift proceedings.

Dr. Christoph Jeloschek is gespecialiseerd in procederen, zowel voor de rechtbanken als ook in arbitrage, met een sterke focus op internationale handelsgeschillen (zoals handelskoop, agentuur, distributie en andere beëindigingen van duurovereenkomsten) en mislukte IT-projecten (zoals geschillen over automatiseringen en andere IT-diensten contracten). Hij kan daarbij terugvallen op zijn jarenlange ervaring in het adviseren over een breed spectrum van contractenrechtelijke vraagstukken, zijn deskundigheid in het opstellen van contracten en zijn betrokkenheid bij tal van internationale projecten c.q. transacties.

In de context van internationaal handelsrecht kan hij voortborduren op zijn eerdere academische carrière die gewijd was aan het uniformiseren van onder meer het kooprecht in de EU en aan de zoektocht naar civielrechtelijke beginselen voor de oplossing van internationale handelsgeschillen (de zogenaamde “lex mercatoria”).

Christoph is afgestudeerd in Oostenrijks en Nederlands recht, heeft een goed begrip van het common law en een diepgaande kennis van Europees recht (waaronder IPR). Daarnaast is hij volledig drietalig en spreekt Duits [moedertaal], Engels en Nederlands.


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