Requirements upon Agreements in Favour of the NCC and the German Chambers – Clashing with the Brussels Ibis Regulation?

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Abstract

In recent years, the Netherlands and Germany have added themselves to the ever-growing number of countries opting for the creation of an international commercial court. The Netherlands Commercial Court (NCC) and the German Chambers for International Commercial Disputes (Kammern für internationale Handelsachen, KfiH) will conduct proceedings entirely in English and follow their own, diverging rules of civil procedure. Aspiring to become the future venues of choice in international commercial disputes, the NCC law and the legislative proposal for the establishment of the KfiH allow parties to agree on their jurisdiction and entail detailed provisions regulating such agreements. In particular, the NCC requires the parties’ express and in writing agreement to litigate before it. In a similar vein, the KfiH legislative proposal requires in some instances an express and in writing agreement. Although such strict formal requirements are justified by the need to safeguard the procedural rights of weaker parties such as small enterprises and protect them from the peculiarities of the NCC and the KfiH, this article questions their compliance with the requirements upon choice of court agreements under Article 25 (1) Brussels Ibis Regulation. By qualifying agreements in favour of the NCC and the KfiH first as functional jurisdiction agreements and then as procedural or court language agreements this article concludes that the formal requirements set by the NCC law and the KfiH proposal undermine the effectiveness of the Brussels Ibis Regulation, complicate the establishment of these courts’ jurisdiction and may thus threaten their attractiveness as future litigation destinations.

Keywords: international commercial courts, the Netherlands Commercial Court (NCC), Chambers for International Commercial Disputes (Kammern für internationale Handelsachen), Brussels Ibis Regulation, choice of court agreements, formal requirements

1 Introduction

In recent years, the Netherlands and Germany have added themselves to the ever-growing number of countries opting for the creation of an international commercial court.1 The Netherlands Commercial Court2 (NCC) and the German Chambers for International Commercial Disputes3 (Kammern für internationale Handelsachen, KfiH) allow for a wholesale trial, including the pronouncement of the judgment in English and recast of civil procedure by adopting their own, diverging rules. In this way, the NCC and the KfiH aspire to attract international commercial disputes and thus gradually become the future venues of choice. The NCC law and the legislative proposal for the establishment of the KfiH provide that parties should agree on the jurisdiction of these courts and entail detailed provisions regulating such agreements. Yet, a glance at the respective provisions reveals that the formal requirements set upon agreements in favour of the NCC and the KfiH are multiple and stricter when compared to


3. German Parliament (Deutscher Bundestag), Legislative proposal for the establishment of Chambers for International Commercial Disputes (Entwurf eines Gesetzes zur Einführung von Kammern für internationale Handelsachen), Drucksache 19/1717 of 18 April 2018 available at: http://dipbt.bundestag.de/dip21/btd/19/107/1910717.pdf (last visited 14 July 2018) (hereinafter Legislative proposal 2018);

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Sections 2 and 3 discuss the provisions regulating the jurisdiction of the NCC and the KfH. Having demonstrated that the NCC law and the KfH proposal set various formal requirements on agreements in favour of these courts, Section 4 explores whether, and to what extent, these requirements contradict the formal requirements on choice-of-court agreements as provided in Article 25 (1) Brussels Ibis Regulation. By alluding to the origins of Article 25 (1) and the related case law of the European Court of Justice (ECJ), this article demonstrates that the proposed restrictions clash with the wording and the underlying rationale of the Brussels Ibis Regulation. Section 5 explores the consequences of such a clash by qualifying agreements in favour of the NCC and the KfH, first, as functional jurisdiction agreements and, then, as procedural or court-language agreements. Based on this analysis, Section 6 concludes that the formal requirements set by the NCC law and the KfH proposal undermine the effectiveness of Article 25 (1) Brussels Ibis Regulation, complicate the establishment of these courts’ jurisdictions and may thus threaten their attractiveness as future venues for international commercial disputes.

2 The Jurisdiction of the NCC

2.1 Agreements in Favour of the NCC

On 1 January 2019, the NCC opened its doors to prospective litigants after the Dutch Senate finally voted in favour of the respective legislative proposal. The idea for the creation of an English-language court specialised in international commercial disputes took root in 2014, when Frits Bakker, chairman of the Dutch Council for the Judiciary, first heralded the NCC. A mere year later, the Council for the Judiciary published its plan for


8. Official Gazette of the Kingdom of the Netherlands (Staatsblad van het Koninkrijk der Nederlanden), 475 Decree of 18 December 2018 determining the date of entry into force of the Act of 12 December 2018 amending the Code of Civil Procedure and the Act on court fees for civil cases in connection with making English-language jurisprudence possible at the international trade chambers of the Amsterdam District Court and the Amsterdam Court of Appeal (475 Besluit van 18 december 2018 tot vaststelling van het tijdstip van inwerkingtreding van de Wet van 12 december 2018 houdende wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam) available at: https://www.eerstekamer.nl/behandeling/20181220/publicatie_inwerkingtreding/document3/f-/viku4m8ic2za.pdf (last visited 20 December 2018).


the establishment of the NCC and lend to the court its basic contours. According to the judiciary’s plan, high-value and complex international commercial matters are increasingly decided by foreign courts, such as the London Commercial Court, or arbitral tribunals. As a result, Dutch courts deal less and less with complex international cases, despite their knowledge and expertise.\(^\text{11}\) It is, therefore, the NCC’s aim to attract commercial litigants that often flee abroad or resort to arbitration for the resolution of their disputes.

The provisions regulating the NCC’s jurisdiction are geared towards this aim to attract international commercial disputes. According to the new Article 30r of the Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering, \(^\text{12}\) Rv) and the NCC Rules, \(^\text{13}\) an action can be brought before the NCC as long as it concerns a civil or commercial matter with an international aspect.\(^\text{14}\) Unlike its name suggests, the NCC is only a chamber of the Amsterdam District Court, \(^\text{15}\) and, therefore, its jurisdiction cannot be larger than the jurisdiction of the latter. This means that the NCC does not judge cases falling within the jurisdiction of the Subdistrict Court, such as cases with a claim of up to 25,000 Euros, disputes related to employment, tenancy and consumer matters.\(^\text{16}\) In addition, the NCC does not hear cases falling within the exclusive jurisdiction of other courts such as the Enterprise Chamber of the Amsterdam Court of Appeal, the Patent Chamber of the District Court of the Hague and the Maritime Chamber of the Rotterdam District Court.\(^\text{17}\)

Furthermore, the NCC is competent when the parties have designated the Amsterdam District Court as the competent forum or the Amsterdam District Court has jurisdiction on another ground.\(^\text{18}\) Since English is the language of proceedings before the NCC and since the NCC applies its own set of procedural rules, the parties should, moreover, have expressly agreed in writing on the use of the English language and the application of the NCC Rules.\(^\text{19}\) By agreeing on the NCC Rules, the parties also implicitly agree on bearing the higher NCC court fees, amounting to 15,000 Euros in first instance and 20,000 Euros on appeal.\(^\text{20,21}\) Lastly, the agreement of the parties to litigate before the NCC shall be included in the originating document.\(^\text{22}\)

The legislative proposal and subsequent parliamentary papers highlighted that since the NCC is only a specialised chamber, the parties’ agreement to litigate before it is not a choice-of-court agreement. An agreement in favour of the NCC is merely a procedural agreement, where parties agree to litigate in English and in accordance with the NCC Rules.\(^\text{23}\) Consequently, a choice-of-forum clause indicating as a competent court, the Amsterdam District Court should not be interpreted as a choice in favour of the NCC, even if the dispute is a civil and commercial matter with an international character.\(^\text{24}\) However, since a request for referral of the case to the NCC is possible, the parties may request the Amsterdam District Court to refer their case to the NCC.\(^\text{25}\)

Article 30r Rv and the NCC Rules pertaining to the jurisdiction of the NCC reflect its international commercial focus and, in addition, stress the importance of the parties’ agreement to litigate before it. The NCC distinguishes itself from the rest of the Dutch courts since it conducts trials in English and applies its own rules of civil procedure. The parties’ agreement justifies such a deviation and safeguards that these will not get unwillingly caught in an expensive trial in English. Hence, the NCC draws and owes its competence to the parties’ agreement.

\[\text{2.2 The Requirement of an Explicit Agreement in Writing and Its Rationale}\]

So as to ensure the parties’ will, Article 30r Rv and the NCC Rules do not suffice to require an agreement. They additionally introduce the requirement of an explicit and in writing agreement.\(^\text{26}\) Similarly, the explanatory notes to the NCC Rules repeat the explicitness requirement and clarify that when, for instance, an agreement in favour of the NCC is included in a party’s general terms and conditions, it is without legal effect unless the other party has expressly and in writing accepted the clause. In support of the requirement for an explicit agreement in writing, the notes subsequently refer to the Explanatory Memorandum to the NCC law.\(^\text{27}\)

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\(^\text{11}\) Ibid., at 5; Explanatory Memorandum 2017, at 1-3.


\(^\text{13}\) Council for the Judiciary (Raad voor de Rechtspraak), Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal), NCC Rules/NCCR, December 2018, available at: https://www.rechtspraak.nl/English/NCC/Pages/rules.aspx (last visited 20 December 2018).

\(^\text{14}\) Art. 30r (1) Rv; Art. 1.3.1. (a) and (b) NCC Rules.

\(^\text{15}\) Art. 30r (1) Rv; Art. 1.1.1. NCC Rules.

\(^\text{16}\) Art. 30r (1) Rv in combination with Art. 93 Rv; Art. 1.3.1. (a) NCC Rules; Explanatory notes to Art. 1.3.1 (a) NCC Rules.

\(^\text{17}\) Explanatory Memorandum 2017, at 14; Art. 1.3.1. (a) NCC Rules; Explanatory notes to Art. 1.3.1 (a) NCC Rules. See also Council for the Judiciary, Plan, above n. 9, at 12.

\(^\text{18}\) Art. 30r (1) Rv; Art. 1.3.1. (c) NCC Rules; Explanatory notes to Art. 1.3.1 (c) NCC Rules.

\(^\text{19}\) Art. 30r (1) Rv; Art. 1.3.1. (d) NCC Rules.

\(^\text{20}\) Art. 9a Act on court fees for civil cases (Wet gofferechten in burgerlijke zaken); Explanatory Memorandum 2017, at 17.

\(^\text{21}\) See the article of E. Bauw in this issue of Erasmus Law Review.

\(^\text{22}\) Art. 4.1.2. (b) NCC Rules.


\(^\text{25}\) Art. 4.1.5. NCC Rules; Explanatory notes to Art. 1.3.1 (c) NCC Rules. See also Ernste and Vermeulen, above n. 24, at 127-29.

\(^\text{26}\) Art. 30r (1) Rv; Art. 1.3.1. (d) NCC Rules.

\(^\text{27}\) Explanatory notes to Art. 1.3.1 (d) NCC Rules.
According to the Explanatory Memorandum, three conditions are set so as to safeguard that procedurally weaker parties, such as consumers and small enterprises, will not be unexpectedly sued before the NCC. The first condition is that the NCC only hears cases with an international element. Second, an explicit agreement is required. Therefore, the Explanatory Memorandum underlines that an agreement to litigate before the NCC shall not be included in general terms and conditions. Third, as noted above, cases falling under the jurisdiction of the Subdistrict Court (e.g., claims up to 25,000 Euros or consumer matters) are excluded from the NCC’s subject-matter jurisdiction. The Explanatory Memorandum further clarifies that the NCC law applies without prejudice to provisions of the Dutch civil procedure law or other international instruments setting additional restrictions for the protection of weaker parties. If despite these restrictions, a consumer or a small enterprise, nevertheless, finds itself before the NCC, it can question the jurisdiction of this court in Dutch and will be charged with the regular lower court fees. Hence, the NCC law provides for multiple safeguards that, as the Explanatory Memorandum explains, ensure that consumers and small enterprises will not unexpectedly litigate in English before an expensive court.

### 3 The Jurisdiction of the KfiH

#### 3.1 Agreements in Favour of the KfiH

The NCC is not the only international commercial court currently established or about to be established in Europe. In April 2018, a legislative proposal for the establishment of the KfiH was submitted to the German parliament. It is the third time the proposal is being submitted to the parliament, succeeding two previous unsuccessful attempts. The proposal authorizes the governments of the Federal States to create a chamber focusing on international commercial cases within the lower State Courts (Landgerichte). Alternatively, more States may agree on the creation of common and, therefore, centralised KfiH.

The use of English as a court language and its importance for the jurisdictional appeal of the German courts is highlighted throughout the legislative proposal. The proposal underlines that the conduct of trials in English aims to attract international parties that usually, so as to avoid litigation in German, are driven to litigate abroad or before arbitral tribunals. That the use of English as court language is the ‘selling’ feature of the KfiH becomes, moreover, apparent in the subsequent sections of the proposal, where a lot of ink is spent on the principle of the publicity of trials and how this is maintained despite the use of English in court.

A dispute can be brought before the KfiH as long as it falls under the jurisdiction of the lower State Courts. Hence, just as the NCC, the jurisdiction of the upcoming chambers cannot be larger than the jurisdiction of the court they form a part of. Subsequently, additional requirements are set to determine which cases are eligible to be heard by the chambers. Since the KfiH are an alternative – English – version of the already-existing Chambers for Commercial Disputes (Kammern für Handelsachen), the same provisions apply. In consequence, the first condition is that the dispute should be a commercial dispute in the sense of Article 95 of the German Courts Constitution Act (Gerichtsverfassungsgesetz, GVG). Second, the dispute should have an international element. Since, as remarked, the use of English as court language is the most prominent feature of the upcoming chambers, the agreement of the parties to litigate in English constitutes the third and most important condition for the establishment of their jurisdiction. Accordingly, draft Article 253 (3a) of the German Code of Civil Procedure (Zivilprozessordnung, ZPO) pro-

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29. Explanatory Memorandum 2017, at 6, 14, 16; Art. 30r (4) Rv; Arts. 1.3.4, 6.2 and 10.1 NCC Rules.


35. Legislative Proposal 2018, Explanatory Statement (Begründung), at 8-10.

36. See also for Art. 93 GVG W. Zimmermann, in W. Krüger and T. Rauch (eds.), Münchener Kommentar zur Zivilprozessordnung (2017) Art. 93 GVG, at margin no. 1; Art. 94 GVG, at margin no. 2.


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vides that the parties should attach their agreement to litigate in English or the defendant’s written declaration of consent to the statement of claim.  

As opposed to the NCC legislative documents, which characterise agreements in favour of it as procedural agreements, the German proposal employs a different term. In particular, the proposal qualifies agreements to litigate before the KfiH as court-language agreements where parties merely agree to litigate in English. Subsequently, the proposal draws a parallel between court-language agreements and choice-of-court agreements. It stresses the proximity of a court-language agreement to a choice-of-court agreement and points towards the need to limit the parties’ freedom to choose the court language just as the freedom to choose a court is limited under German law. The underlying rationale of such a limitation is once again the need to protect weaker parties, such as consumers. As a result, draft Article 114b GVG repeats in part Article 38 ZPO, which sets various restrictions upon choice-of-court agreements. More specifically, draft Article 114b GVG distinguishes between agreements concluded before and agreements concluded after the dispute has arisen. Agreements to litigate in English concluded before the dispute has arisen are permissible irrespective of the condition that the parties to the agreement are merchants, legal persons under public law or special assets (Sondervermögen) under public law. Agreements to litigate in English concluded after the dispute has arisen are permissible irrespective of the identity of the parties as long as they are explicit and in writing.

3.2 Requirements upon Agreements in Favour of the KfiH and Their Rationale

It becomes apparent that as opposed to the single obligation to conclude an explicit and in writing agreement in the NCC provisions, the German proposal sets a bundle of limitations. In particular, the requirement for an explicit and in writing agreement depends upon the time the agreement was concluded and the identity of the parties.

Since merchants are considered parties experienced in commercial and legal matters, the second sentence of draft Article 114b GVG grants them the freedom to agree on the use of English as court language and thus litigate before the KfiH without the obligation to abide by a specific form.  

Whether a party is a merchant depends on the lex fori, including its conflict-of-laws rules. The German proposal, and its more liberal handling of commercial parties, is driven by the consideration that these are familiar with legal matters and thus fully aware of the implications of an agreement to litigate in English. In addition, the freedom to conclude ex ante agreements, before the dispute has arisen, serves the predictability of the competent forum and, thus, in turn, enhances legal certainty — something that is highly regarded in international commercial relationships.

In contrast, the third sentence of draft Article 114b GVG refers to agreements to litigate in English concluded after the dispute has arisen and declares these permissible irrespective of the parties’ identity under the condition that they are express and in writing. Hence, consumers may also bring their disputes before the KfiH as long as they have concluded the respective agreement after the dispute has arisen and have additionally abided by the stricter form requirements. The German proposal for the establishment of the KfiH opens up the upcoming chambers to consumers based on the consideration that when parties enter an ex post agreement, they are more conscious of the implications of such an agreement and thus less in need of legal protection. However, it should be borne in mind that since the KfiH will exclusively handle cases that qualify as commercial under Article 95 GVG, only a few consumer cases will meet the requirements set in this provision and thus hit trial before the specialised chambers. Nevertheless, a literal reading of the German proposal may give the misleading impression that after the dispute has arisen, merchants should also conclude an explicit and in writing agreement. Drawing from Article 38 ZPO, upon which draft Article 114b GVG is based, it should be noted that merchants are free to conclude their agreement to litigate in English without abiding by any form requirement irrespective of the point in time such an agreement was concluded. If specific parties enjoy the freedom to conclude a formless agreement even before the dispute arose, it would make all the more sense to retain this freedom after the dispute arose.

41. Ibid., at 16.
44. Legislative Proposal 2018, Explanatory Statement (Begründung), at 15.
47. Draft Art. 114b and 114c (1) GVG; Legislative Proposal 2018, Explanatory Statement (Begründung), at 14, 15.
For Art. 38 ZPO, see also Bork, above n. 42, Art. 38 ZPO, at margin no. 65; Heinrich, above n. 42, Art. 38 ZPO, at margin no. 13, 22.
4 Clashing with the Brussels Ipsis Regulation

4.1 Choice-of-Court Agreements under the Brussels Ipsis Regulation

The formal requirements set by the NCC provisions and the German proposal on agreements in favour of the NCC and the KfH give us pause. They catch and direct our attention to the Brussels Ipsis Regulation, the leading instrument under which choice-of-court agreements in international civil and commercial matters are determined. The subsequent sections get into the nitty-gritty of Article 25 (1) Brussels Ipsis Regulation and Articles 30r (1) Rv, 1.3.1. (d) NCC Rules and 114b GVG. They demonstrate that the formal requirements the latter provisions pose on agreements in favour of the NCC and the KfH are stricter and, therefore, clashing with the wording and the underlying policy of Article 25 (1) Brussels Ipsis Regulation. The final section of this article explores the consequences of such a clash.

According to Article 25 (1) Brussels Ipsis Regulation, if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are competent to settle any disputes that have arisen, or which may arise in connection with a particular legal relationship, the jurisdiction agreement should comply with so as to be valid. The jurisdiction agreement should be either: (a) in writing or evidenced in writing, (b) in a form which accords with the practices between the parties or (c) in a form which accords with international trade or commerce usages. These formal requirements evidence the consensus between the parties and ensure that the jurisdiction agreement does not go unread. It, thus, becomes apparent that Article 25 (1) Brussels Ipsis Regulation does not merely regulate the formal validity of an international jurisdiction agreement. On the contrary, the parties’ consensus is intertwined with the formal validity of the agreement.

In its Elefanten Schuh ruling, the ECJ stated that Article 17 Brussels Convention, today Article 25 (1) Brussels Ipsis Regulation, is intended to exclusively lay down the formal requirements that jurisdiction agreements must meet. In consequence, the formal requirements set in Article 25 (1) Brussels Ipsis Regulation cannot be nullified by national provisions requiring compliance with additional conditions as to form. By barring the Member States from setting additional requirements, Article 25 (1) establishes unified standards throughout Europe, thereby enhancing the predictability of the chosen court and achieving legal certainty. National provisions remain inapplicable even if their aim is, just as Article 25 (1) Brussels Ipsis Regulation, to achieve legal certainty and ensure the actual agreement of the parties.

In this context, the question rises whether the additional requirements set by the NCC provisions and the German proposal collide with Article 25 (1) Brussels Ipsis Regulation. If, as remarked, the Brussels Ipsis Regulation exclusively lays down the formal requirements that jurisdiction agreements must meet, negating any recourse to national law, then any additional requirements, such as the ones prescribed in the NCC provisions and the German proposal, would clash with the Brussels Ipsis Regulation.

4.2 The NCC Rules versus the Brussels Ipsis Regulation

As mentioned, Articles 30r (1) Rv and 1.3.1. (d) NCC Rules require an explicit and in writing agreement in favour of the NCC. In addition, the Explanatory Memorandum to the NCC proposal and the NCC provisions


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exclude the insertion of an NCC clause in general terms and conditions since this would run counter to the explicitness requirement. Although the Explanatory Memorandum and the NCC provisions only refer to the exclusion of an NCC clause in general terms and conditions, such an exclusion gives away that the requirement for an explicit and in writing agreement stands in the way of other forms of jurisdiction agreements too.

4.2.1 Implicit Agreements

The requirement for an explicit NCC clause contrasts with Article 25 (1) Brussels Ibis Regulation. Although Article 25 (1) aims to ensure that the consensus between the parties on the chosen court is, in fact, established and requires that such a consensus must be clearly and precisely demonstrated, it does not depend the validity of jurisdiction agreements on an explicit agreement. As a result, as long as the form requirements set in Article 25 (1) Brussels Ibis Regulation are fulfilled, an implicit choice-of-court clause would suffice. The following examples constitute implicit choice-of-court clauses that have been deemed valid by the ECJ despite lacking the parties’ explicit consent.

4.2.2 Agreements in General Terms and Conditions

First, the exclusion of inserting an agreement in favour of the NCC in general terms and conditions comes at odds with the established case law of the ECJ. Indeed, as early as 1976, the ECJ ruled that where a jurisdiction clause is included in the general conditions printed on the back of a contract, the writing requirement is fulfilled if the contract signed by both parties expressly refers to those general conditions. Two further requirements should be fulfilled so as to validly incorporate a jurisdiction clause, contained in general terms, into a contract. The jurisdiction agreement is valid only if a party exercising reasonable care could check the express reference to the general terms and conditions and only if the latter have, in fact, been communicated to the party. The ECJ’s case law on jurisdiction agreements in general terms and conditions reveals that the court managed to strike a balance between two competing interests. On the one hand, the provisions regulating jurisdiction agreements in commercial matters should not excessively overburden the parties with formalistic requirements that are practically difficult to follow. On the other hand, the provisions regulating jurisdiction agreements should protect the parties from clauses that have been smuggled into a contract against their will.

4.2.3 Agreements According to the Parties’ Practices or International Trade Usages

Nevertheless, a jurisdiction agreement contained in general terms and conditions could still comply with the formal requirements under the Brussels Ibis Regulation even if an express contractual reference is lacking. This is the case when, for instance, the general terms and conditions containing the choice-of-court clause are used in the parties’ continuing commercial relationships and thus constitute an established practice between them in the sense of Article 25 (1) (b) Brussels I Regulation. Alternatively, these general terms and conditions could reflect an international trade and commerce usage, in the sense of Article 25 (1) (c) Brussels I Regulation.

However, the persistence of the NCC provisions on an explicit and in writing agreement leaves no room for the selection of the NCC in a form that accords with the practices established between the parties or, alternatively, international trade and commerce usages. Letter (b) was initially inserted in Article 17 Brussels Convention in 1989. It aimed at codifying the ECJ’s case law, which had acknowledged that the parties’ longstanding business practices may, under circumstances, overcome the prescribed writing requirement. The


57. von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 25, 42; Magnus, above n. 54, Art. 25 Brussels Ibis Regulation, at margin no. 78.


60. Jenard, Report, above n. 50, Commentary on the sections of Title II, Section 6, Prorogation of jurisdiction, Art. 17.


The ECJ has been more than once called to interpret the agreement requirement set in Article 25 (1) Brussels I Regulation in respect of third parties that neither were a party nor had expressly consented to the jurisdiction agreement. The rationale underpinning this amendment was to adequately cater for the customs and requirements of international trade. The international commercial ‘flair’ of the letters (b) and (c) becomes all the more apparent when taking into consideration that their wording was based on Article 9 (1) and (2), respectively, of the 1980 Vienna Convention on International Contracts for the Sale of Goods (CISG). In light of the above, the NCC jurisdictional requirements clash with Article 25 (1) (b) and (c) Brussels I Regulan and the underlying considerations that lead to the provision’s present wording. The strict requirement for an express and written agreement disregards the requirements of non-formalism, simplicity and speed in international commercial relationships and complicates the establishment of the NCC’s jurisdiction.

4.2.4 Third Parties

Furthermore, the requirement for an explicit jurisdiction clause hinders the involvement of third parties in trial before the NCC. Indeed, according to the Explanatory Memorandum, the provision on an express agreement was not solely driven by the need to protect consumers and small enterprises. It was additionally prompted by the need to secure the procedural rights of third parties who have not expressly agreed to litigate before the NCC in English and according to its rules. The ECJ has been more than once called to interpret the agreement requirement set in Article 25 (1) Brussels I Regulation in respect of third parties that neither were a party nor had expressly consented to the jurisdiction agreement. Despite the absence of an express consent, the court extended the effects of jurisdiction agreements on third parties under specific conditions.

In its very first decision on the matter, the court was called upon to examine whether a jurisdiction clause inserted in the statute of a company constitutes an agreement between the company and its shareholders within the meaning of Article 17 Brussels Convention. The ECJ answered this question in the affirmative, regardless of the fact that a shareholder may have opposed the adoption of the clause or may have become a shareholder after the clause was adopted. The formal requirements set in Article 17 Brussels Convention are satisfied if the jurisdiction clause is contained in the statutes and those are lodged in a place accessible by the shareholders or contained in a public register. The ECJ based its ruling in the Powell Duffryn case on the principle of legal certainty. Any other interpretation would lead to a multiplication of fora for disputes between the company and its shareholders, even though they arise from the same factual and legal relationship.

Contrary to the ECJ’s ruling in the Powell Duffryn case, the NCC provisions’ requirement for an explicit jurisdiction clause and the exclusion of the insertion of such a clause in general terms and conditions suggests that an NCC jurisdiction clause could not be validly inserted in the statute of a company.

Another prominent example among the court’s case law concerning the third-party effect of jurisdiction agreements are the ECJ’s rulings on bills of lading. The ECJ extended the effects of jurisdiction agreements in bills of lading on third parties under the double condition that the jurisdiction clause is valid pursuant to Article 25 (1) Brussels I Regulation between the initial parties and that the third party, by acquiring the bill of lading, has succeeded to the shipper’s rights and obligations under the relevant national law. The ECJ’s rulings on bills of lading and the conditions set therein for the third-party effect of jurisdiction agreements are equally applied in every situation involving third parties that succeed one of the initial parties to a jurisdiction agreement.

68. Ibid., at Paras. 17-19.
69. Ibid., at Paras. 26-29.
71. Dutch Bar Association (Nederlandse Orde van Advocaten), Internet Consultation Netherlands Commercial Court Proposal (Internetconsultatie Wetsvoorstel Nederlandse Commercial Court), 1 February 2017 available at: https://www.internetconsultatie.nl/ncc/reactie/6cc7700f-31e5-44b1-862a-9d192268687a (last visited 14 July 2018); Vlaar, above n. 58, at 202. See also De Brauw Blackstone Westbroek N.V., Internet Consultation Netherlands Commercial Court Proposal (Internetconsultatie Wetsvoorstel Nederlandse Commercial Court), 31 January 2017 available at: https://www.internetconsultatie.nl/ncc/reactie/efabcc64e-d666-4525-b2a9-726db026478c (last visited 14 July 2018).
However, the NCC’s jurisdictional requirements contradict Article 25 (1) Brussels Ibis Regulation and the ECJ’s rulings on the third-party effect of jurisdiction agreements. By excluding third parties from the NCC’s jurisdictional reach, the NCC provisions disregard that legal and, in particular, commercial relationships frequently ‘change hands’.

4.2.5 Submission by Appearance
Lastly, the requirement for an express NCC clause stands in the way of a submission by appearance. According to Article 26 (1) Brussels Ibis Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction, unless the appearance was entered to contest the jurisdiction or where another court has exclusive jurisdiction pursuant to Article 24. Just as Article 25, Article 26 (1) Brussels Ibis Regulation establishes the jurisdiction of a court based on the parties’ implicit agreement to litigate before it. 74 The claimant brings his lawsuit before this court, and the defendant appears before it, leaving the court’s lack of jurisdiction unchallenged and willing to contest the lawsuit on the merits. 75 However, contrary to jurisdiction agreements, a submission by appearance takes place at a later stage, during the trial. 76 The fact that a submission by appearance is one more form of an implicit jurisdiction agreement hints at the conclusion that the mere appearance of the parties before the NCC would not suffice to establish the jurisdiction of the latter. This section has shown that the requirement for an explicit agreement in writing clogs up the way to the NCC to various forms of agreements, such as agreements in the statute of a company or agreements concluded in a form that accords with the parties’ practices or international commercial usages. In consequence, the NCC provisions come at odds with Article 25 (1) Brussels Ibis Regulation and the rationale underpinning the provision’s present wording. The NCC’s jurisdiction appears, thus, enmeshed in formal requirements that do not reckon with the realities of commercial transactions.

4.3 The German Proposal versus the Brussels Ibis Regulation
Just as the NCC provisions, the requirements set on agreements in favour of the KfiH by the German provis...
requirements listed in Article 25 (1) Brussels Ibis Regulation.\(^8\) On the contrary, draft Article 114b GVG requires an express and in writing agreement. Just as the previous section on the NCC has shown, the requirement for an express agreement stands in the way of various forms of choice-of-court agreements, which have been deemed valid by the ECJ despite the lack of an express consensus. First, the requirement for an express agreement necessitates an unambiguous clause that clearly states the competent court as well as the legal relationship such an agreement refers to.\(^8\) Furthermore, the requirement for an express agreement excludes the insertion of a choice-of-court agreement in general terms and conditions.\(^8\) However, the likelihood of including a choice-of-court clause in general terms and conditions after the dispute has arisen is rather low. At this stage of the dispute, the parties have already concluded a contract. Hence, after the dispute has arisen, a choice-of-court agreement will most probably be a separate, self-standing agreement.\(^8\)

Finally, it is needless to say that the requirement for a written agreement sharply contrasts with Article 25 (1) Brussels Ibis Regulation, which also allows for agreements evidenced in writing, in a form which accords with the practices established between the parties or in a form which accords with international trade or commerce usages.

5 The Consequences of the Clash

5.1 A Matter of Characterisation

The previous sections have demonstrated the various clashing points between the provisions regulating the jurisdiction of the international commercial courts in the Netherlands and Germany and the Brussels Ibis Regulation. Contrary to the latter, the NCC provisions require parties to conclude an explicit agreement in writing when opting in favour of the NCC. The German proposal, on the other hand, promises commercial parties a greater freedom when agreeing on the jurisdiction of the KfiH. However, the draft provisions requiring the claimant to attach the agreement or the defendant’s declaration of consent to litigate in English to the statement of claim put a leash on this freedom and, in effect, cancel it. As depicted, the strict formal requirements set by the proposals are driven by the concern to ensure the will of the parties and, in particular, the weaker parties, such as consumers and small enterprises, to litigate before the NCC and the KfiH. The aim to protect the unsuspecting consumers, small enterprises and third parties from an expensive trial in a foreign language found its expression in the provisions regulating the jurisdiction of the NCC and the KfiH and was, in particular, translated into additional formal requirements. Thus, the requirement for an explicit or written agreement embodies some of the biggest challenges surrounding the creation of international commercial courts, namely the use of a foreign language before court and the high court fees several international commercial courts, such as the NCC, introduce. However, this article has so far questioned the compliance of these requirements with the formal requirements set by the Brussels Ibis Regulation on choice-of-court agreements.

These divergences lay bare the question whether the formal requirements upon agreements in favour of the NCC and the KfiH contravene Article 25 (1) Brussels Ibis Regulation. The answer depends on the characterisation of agreements in favour of the NCC and the soon-to-be KfiH. If agreements in favour of the NCC and the KfiH were characterised as international jurisdiction agreements, then, under the principle of the primacy of European Law, the Brussels Ibis Regulation would prevail over national rules on jurisdiction. Accordingly, the Brussels Ibis Regulation would outlaw Articles 30r (1) Rv, 1.3.1. (d) NCC Rules and 114b GVG. If, on the other hand, agreements in favour of the NCC and the KfiH were characterised as functional jurisdiction agreements, where parties merely agree on the jurisdiction of a specific chamber within a court, then the Brussels Ibis Regulation and the NCC provisions or the KfiH proposal would not collide, since they regulate different kind of agreements. Hence, it all boils down to the characterisation of agreements in favour of the NCC and the KfiH. The following sections undertake the tricky task to characterise agreements in favour of the NCC and the KfiH by demarcating the regulatory scope of the Brussels Ibis Regulation, the NCC law and the legislative proposal for the establishment of the KfiH.

5.2 Functional Jurisdiction Agreements

The Brussels Ibis Regulation primarily regulates the international jurisdiction of the Member States’ courts. However, some of its provisions also designate the territorially competent court within a Member State. This is the case for Articles 7 and 8 as well as Article 25 Brussels Ibis Regulation.\(^8\) Whether the Brussels Ibis Regulation determines both the international and the territorial

83. Bork, above n. 42, Art. 38 ZPO, at margin no. 39. For Art. 19 Brussels Ibis Regulation, see Markowski and Nielsen, above n. 46, Art. 19 Brussels Ibis Regulation, at margin no. 18.
84. For the previous Art. 5 Nr. 1 lit. b Brussels I Regulation, see Case 386/05 Color Drack GmbH v. Lexx International Vertriebs GmbH, [2007] ECR I-3699, at Para. 30. Jenard, Report, above n. 50,
jurisdiction of a Member State’s courts depends on the wording of the relevant provision.\textsuperscript{85} In particular, under Article 25 (1) Brussels I\textsuperscript{bis} Regulation, the parties may choose ‘a court or the courts of a Member State’. As a result, an agreement under Article 25 (1) designates the internationally competent court and, upon the parties’ choice, also the territorially competent court. If the parties have omitted to confer jurisdiction on a certain court, then – and only then – the national law of the designated Member State will determine the territorially competent court.\textsuperscript{86} In contrast, the Brussels I\textsuperscript{bis} Regulation does not touch upon national rules pertaining to the subject-matter or functional jurisdiction of a Member State’s courts.\textsuperscript{87} It remains, therefore, largely a matter of the Member States to identify the court with specific jurisdiction to rule on specific disputes.\textsuperscript{88}

As noted above, the NCC and the KfiH are not self-standing courts but chambers of the Amsterdam District Court and the lower State Courts, respectively. In this sense, the Explanatory Memorandum to the NCC proposal clarified that the provisions pertaining to the jurisdiction of the NCC do not decide whether a case can be brought before the Dutch courts. That is left to the relevant European regulations or international conventions and the Dutch civil procedure law. The NCC law solely decides whether a case can come before the NCC or the Amsterdam District Court.\textsuperscript{89} In a similar vein, the proposal for the establishment of the KfiH clarifies that just as the already-existing Chambers for Commercial Disputes, the KfiH are specialised chambers within the lower State Courts, whose jurisdiction is a matter of allocating cases to the various judges and chambers within a court and is regulated by law.\textsuperscript{90}

The structure of the NCC and the KfiH as court divisions points, indeed, towards the conclusion that agreements in favour of the NCC and the KfiH are not international jurisdiction agreements but functional jurisdiction agreements,\textsuperscript{91} where the parties merely agree on the jurisdiction of a specific chamber within a court. This leads us, in turn, to the conclusion that the additional formal requirements set by the NCC law and the KfiH proposal on agreements in favour of these courts do not clash with the formal requirements on jurisdiction agreements set by Article 25 (1) Brussels I\textsuperscript{bis} Regulation. As a result, an agreement contained in general terms and conditions to resolve an international dispute before the NCC would be valid under Article 25 (1) Brussels I\textsuperscript{bis} Regulation and thus establish the international jurisdiction of the Dutch courts as well as the territorial jurisdiction of the courts in Amsterdam. However, such an agreement would fail to meet the formal requirements prescribed in the NCC provisions, and therefore, it would fail to establish the jurisdiction of the NCC.

5.3 Lost in Terminology

Notwithstanding the Explanatory Memorandum to the NCC law and the KfiH proposal, it should be underlined that the distinction between the various kinds of jurisdiction is not always crystal clear. The example of the existing German Chambers for Commercial Disputes, of which the KfiH are an alternative, English version, is indicative. Although the Chambers for Commercial Disputes are mere chambers of the lower State Courts, doubts have been expressed as to the characterisation of the provisions pertaining to their jurisdiction as functional jurisdiction provisions. First, Article 95 GVG sets multiple conditions so as to determine which cases are commercial and can thus be litigated before the Chambers for Commercial Disputes. Second, Articles 96 and 98 GVG provide that the parties shall apply so as to bring their dispute before the Chambers. The parties’ ability to influence the internal allocation of cases between the chambers of the lower State Courts questions the characterisation of the relevant provisions as functional jurisdiction provisions, since the distribution of cases within a court is typically exempted from the parties’ choice.\textsuperscript{92} It has been, therefore, claimed that the jurisdiction of the Chambers of Commercial Disputes strongly resembles the subject-matter jurisdiction of a

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Commentary on the sections of Title II, Section 2 Special jurisdiction, Art. 5 and 6; Schlösser, Report, above no. 51, at Para. 70...

85. von Hein, above n. 51, Preliminary remarks to Art. 2 Brussels I Regulation, at margin no. 3; Mankowski, above n. 43, Preliminary remarks to Art. 4 Brussels I\textsuperscript{bis} Regulation, at margin no. 44.

86. Case C-222/15, Hőszig Kft. v. Alstom Power Thermal Services, [2016] ECLI:EU:C:2016:525, at Para. 48; Rechtbank Rotterdam, ECLI:NL:RBROT:2018:594, at 4.5; von Hein, above n. 51, Art. 23 Brussels I\textsuperscript{bis} Regulation, at margin no. 75–76; Gancimartin, above n. 51, Art. 25 Brussels I\textsuperscript{bis} Regulation, at margin no. 9.11; Schlösser, above n. 61, Art. 25 Brussels I\textsuperscript{bis} Regulation, at margin no. 4, 14; Magnus, above n. 54, Art. 25 Brussels I\textsuperscript{bis} Regulation, at margin no. 30; Gottwald, above n. 51, Art. 25 Brussels I\textsuperscript{bis} Regulation, at margin no. 66.

87. Exceptions are Art. 8 (3) and 47 (1) Brussels I\textsuperscript{bis} Regulation. Schlösser, Report, above no. 51, at margin no. 81; von Hein, above n. 51, Preliminary remarks to Art. 2 Brussels I Regulation, at margin no. 4; Schlösser, above no. 61, Preliminary remarks to Art. 4-35 Brussels I\textsuperscript{bis} Regulation, at margin no. 2; Mankowski, above n. 43, Preliminary remarks to Art. 4 Brussels I\textsuperscript{bis} Regulation, at margin no. 47; Gottwald, above n. 51, Art. 4 Brussels I\textsuperscript{bis} Regulation, at margin no. 15; R. Geimer, in Zöller (ed.), Zivilprozessordnung (2018) Art. 4 Brussels I\textsuperscript{bis} Regulation, at margin no. 57.


89. Explanatory Memorandum 2017, at 5-6.


91. In this article, the term ‘functional jurisdiction’ is used in the broader sense and therefore encompasses the internal allocation of cases within a court; see H. Roth, in R. Bork and H. Roth (eds.), Stein/ Jonas Kommentar zur Zivilprozessordnung (2014) Art. 1 ZPO, at margin no. 58, 60.

Since the KfiH are an alternative form of the Chambers for Commercial Disputes, the same doubts could be raised. The multiple requirements set on disputes so as to be eligible to be heard by the upcoming chambers, such as the internationality of the dispute as well as the conditions of Article 95 GVG, question their classification as mere chambers of a court. In a telling way, the proposal for the establishment of the KfiH uses, in some instances, the term ‘subject matter’, whereas in others, the term ‘internal allocation of cases’ when referring to the jurisdiction of the upcoming chambers. Furthermore, characterising the provisions pertaining to the jurisdiction of the KfiH as mere functional jurisdiction provisions may take into consideration their organisational structure as chambers but disregards the parties’ choice as one of the most important conditions to gain access to them.

However, as remarked above, the German proposal throws one more term on the table. So as to justify the multiple formal requirements imposed on agreements in favour of the KfiH, it characterises such agreements as court-language agreements. On the other hand, the Explanatory Memorandum to the NCC law in combination with the subsequent parliamentary papers characterised agreements in favour of the NCC as procedural agreements. Yet there are reasons to question such a characterisation, too.

For instance, an international jurisdiction agreement may confer jurisdiction on a third state’s neutral court, which has no ties to the dispute or the parties. This choice of a neutral ‘unrelated’ court is common in international commercial disputes, since it ensures that none of the parties will enjoy the advantages of litigating before its home-state courts. As a result, jurisdiction agreements in international disputes may confer jurisdiction on a court that conducts proceedings in its national, but foreign to the parties, language and according to its national, but alien to the parties, rules of civil procedure. When a German company concludes with a Dutch company a choice-of-court agreement in favour of the London Commercial Court, the parties will necessarily litigate in English and according to English civil procedure law. In addition, the parties will pay the fees of the London Commercial Court and will be subjected to the reputedly high lawyers’ fees in England. Hence, every choice in favour of a foreign court entails a choice in favour of a foreign language, a foreign set of rules governing proceedings and the associated legal fees.

Beyond this perspective, the distinction between procedural agreements and court-language agreements appears a fictitious distinction that overlooks the realities of international commercial dispute resolution by adopting a confusing nomenclature. It could be, therefore, claimed that the strict formal requirements set by the NCC provisions and the KfiH proposal upon agreements in favour of these courts, although not directly colliding with Article 25 (1) Brussels Ibis Regulation, nevertheless, undermine its effective application. Despite the harmonisation of the rules of international jurisdiction on a European level, it remains a matter for the Member States, in the framework of the organisation of their courts, to identify the court with specific jurisdiction to rule on specific disputes. However, although the Member States enjoy procedural autonomy, the national laws should not undermine the objectives of the Brussels Ibis Regulation or render it ineffective. In consequence, even if agreements in favour of the NCC or the KfiH are simply agreements on the competence of a chamber within a court or procedural agreements or court-language agreements, excessive national formal requirements may circumvent the formal requirements under the Brussels Ibis Regulation and, in effect, threaten its effectiveness.

Litigants in international disputes who wish to choose the NCC or the KfiH cannot, in drafting their choice-of-court agreement, solely rely on the provisions of the
Brussels *Ibis* Regulation. A detour via the cumbersome and strict provisions of domestic law is necessary.\(^{103}\) Hence, although the NCC law and the KfH proposal do not directly clash with Article 25 (1) Brussels *Ibis* Regulation, they, nevertheless, undermine its effectiveness.

The German proposal for the establishment of the KfH illustrates how national provisions may bypass the provisions of the Brussels *Ibis* Regulation and, in result, vacate their effective application. In disputes falling under the Brussels *Ibis* Regulation, Article 25 (1) Brussels *Ibis* Regulation takes precedence over national rules on international jurisdiction agreements. As a result, the respective Article 38 ZPO and the stringent limits it sets upon jurisdiction agreements\(^{104}\) remain inapplicable.\(^{105}\) However, draft Article 114b GVG partly copies Article 38 ZPO. Thus, draft Article 114b GVG revives a national rule that would have otherwise remained inapplicable through the back door of the German Courts Constitution Act and under the disguise of a court-language agreement.

Although the formal requirements set by the NCC provisions and the German proposal aim to protect parties from the peculiarities of the upcoming courts, such as the high court fees of the NCC and the use of English before court, they disregard that the Brussels *Ibis* Regulation already safeguards the parties’ agreement on the chosen court\(^{106}\) and sufficiently protects procedurally weaker parties, such as consumers.\(^{107}\) While Article 25 (1) lists various formal requirements to ensure that the parties are *ad idem*, Article 19 prohibits disadvantageous for the consumer jurisdiction agreements. Furthermore, the Regulation’s provisions are driven by the aims to facilitate the parties’ access to a court, respect party autonomy and secure the foreseeability of the competent forum.\(^{108}\) As a result, the national laws of the Member States should not place access to justice, party autonomy and the foreseeability of the jurisdiction at risk by adding additional and complex layers of national provisions to the existing rules of the Brussels *Ibis* Regulation.\(^{109}\)

With respect to the foreign language of the proceedings, it is recommended that the proposals shift their focus on the definition of international disputes. A clear definition of the international aspect of a dispute, which safeguards that only truly international disputes end up before the NCC and the KfH, would pay heed to the parties’ increased in international disputes ability to expect and thus foresee an English-language litigation.\(^{110}\)

Leaving aside the clash between the Brussels *Ibis* Regulation and the jurisdictional provisions of the NCC and the KfH, a final remark should be made. Requirements for an explicit or in writing agreement turn their back to the policy considerations underlying the Brussels *Ibis* Regulation. The regulation and the respective ECJ case law gradually relaxed the formal requirements set upon choice-of-court agreements driven by the aim to adequately cater for the customs and practices in international trade. Excessive formalities disregard the need for speed and simplicity in commercial transactions. Moreover, the demanding formal requirements set by the proposals complicate the establishment of the international commercial courts’ jurisdiction and increase the possibility of litigation over jurisdictional issues. Such ‘boundary’ litigation, which protracts the length of the trial and increases the litigation costs,\(^{111}\) favours the better funded party and burdens weaker parties, such as small enterprises, which the proposals after all strive to protect.\(^{112}\) Hence, the strict formal requirements on agreements set by the proposals for the establishment of the NCC and the German KfH overburden international commercial parties, complicate the establishment of the courts’ jurisdiction and may undermine their attractiveness as future venues for the resolution of international commercial disputes.

### 6 Conclusion

The establishment of the NCC and the KfH has been accompanied by various concerns and objections focusing on the high court fees of the NCC and the use of


\(^{105}\) von Hein, above n. 51, Art. 23 Brussels I Regulation, at margin no. 16; Schlosser, above n. 61, Art. 25 Brussels *Ibis* Regulation, at margin no. 7; Magnus, above n. 54, Art. 25 Brussels *Ibis* Regulation, at margin no. 14; Mankowski, above n. 43, Art. 25 Brussels *Ibis* Regulation, at margin no. 62; Gottwald, above n. 51, Art. 25 Brussels *Ibis* Regulation, at margin no. 76-77; Rosenberg, Schwab and Gottwald, above n. 82, § 31. Die internationale Zuständigkeit, at margin no. 44.

\(^{106}\) See above Section 4.1.


\(^{108}\) Recitals 1, 3, 15, 19 and 22 Brussels *Ibis* Regulation. See also Case 533/08, TNT Express Nederland BV v. AXA Versicherung AG, [2010] ECLI:EU:C:2010:243, at Para. 49.


\(^{110}\) See also Schlosser, above n. 61, Art. 25 Brussels *Ibis* Regulation, at margin no. 20a.


\(^{112}\) See also Fentiman, above n. 45, at 248; Wagner (2017), above n. 34, at 217.
English as court language before both courts. These concerns were, in particular, projected on the provisions regulating agreements in favour of the respective international commercial courts. The NCC law and the legislative proposal for the establishment of KfiH set additional formal requirements in order to secure that the will of the parties to litigate before them has been clearly manifested. Yet, this article demonstrates that these formal requirements undermine the effectiveness of the Brussels Ibis Regulation, complicate the establishment of the courts’ jurisdiction and may, as a result, undermine their attractiveness to international commercial parties. It is, thus, recommended that the national legislators ensure the compliance of the provisions regulating the jurisdiction of the NCC and the KfiH with the Brussels Ibis Regulation and safeguard that the formalities of the provisions pertaining to the jurisdiction of these courts do not override the informalities of business practices.