CHRONICLE ON DUTCH M&A DISPUTES 2021

Mrs. B.A. de Ruijter and D. Glazener

The courts of appeal have certainly not been idle in M&A disputes in 2021. There has been an interesting legal development in the full width of disputes in large and small takeovers. This article provides an overview of relevant case law and literature concerning Dutch international and national civil M&A disputes that appeared in 2021.

1. INTRODUCTION

In the spring of the first COVID-19 year (2020), the disruptive consequences of the first lockdown had a major impact on ongoing acquisition processes. Because of the arisen uncertainty, parties tried in all sorts of ways to postpone ongoing transactions or to avoid takeovers. This situation turned out to be a pressure cooker for legal developments in literature and case law in preliminary relief proceedings.[1]

In the second half of 2020, the market recovered resulting in an enormous increase in deals. This upward trend continued in the second COVID-19 year (2021), despite the lockdowns in the spring and autumn of 2021, since corporates and private equity players had accumulated considerable capital in the preceding years.[2] In addition, the complexity around deals had increased with greater focus on Material Adverse Change, Material Adverse Effect and Force Majeure clauses. In 2021, there was also a trend towards a more 'buyer-friendly' environment in M&A deals. In Europe, for example, liability caps and longer limitation periods increased and there were fewer locked box deals.[3]

The first COVID-19 year (2020) not only resulted in a lockdown of society. The judiciary also prioritized urgent disputes due to COVID-19 restrictions and the nature of the disputes that arose.[4]

In 2021, we saw more judgments in takeover disputes in all aspects of the takeover process: broken-off negotiations, agreement interpretations, breaches of guarantees, suspensive and resolutory conditions, exceeding the complaint period for purchase agreements and breach of non-competition obligations. This usually concerned disputes in which the pandemic did not play a role. An exception, of course, are some afterthoughts with regard to the first COVID-19 year: the appeal of the preliminary relief proceedings in the Corendon and Sunweb takeover battle and a new episode in the eyewear war between EssiLux and HAL/GrandVision.

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[1] This chronicle is a sequel to the chronicle 'Takeover disputes in times of (corona) crisis' as published in Geschriften door de Vereniging Corporate Litigation 2020-2021, p. 221-245.

[2] S. Drooglever Fortuyn, 'Hoe de M&A-markt zichzelf herpakte', *Advocatenblad* 19 mei 2021.

[3] CMS European M&A Study 2021.

[4] M. de Boer, JW. Meijer, ' Kroniek van het burgerlijk procesrecht', *NJB 2021/2598.*

It is expected that the increased deal activity in 2021 will also lead to more disputes in the years following. According to recent research, disputes worldwide will mainly occur in sectors with performance issues, such as hospitality and leisure.[5] Technology, life sciences and financial services are also struggling with an increased number of disputes. It is interesting to note that according to our research, private equity parties are involved in more than 65% of international post-M&A disputes.

In this article we will discuss what we believe to be the relevant case law and literature published in 2021. We will not consider the case law of the Enterprise Chamber that was also regularly involved (in the preliminary or follow-up phase) in takeover disputes in 2021 (including squeeze-out proceedings). In (international) disputes in 2020 and 2021, arbitration is increasingly chosen as the dispute resolution mechanism.[6] Because of the confidentiality of arbitration, information is unfortunately not available (with the exception of the civil summary proceedings in the eyewear war arbitration).

2. PRELIMINARY PHASE: ABORTED NEGOTIATIONS

There have been several rulings that refer to the pre-contract phase. During negotiations, the parties must always comply with the requirements of reasonableness and fairness pursuant to Article 6:2 paragraph 1 of the Dutch Civil Code (DCC). According to the prevailing judgment CBB/JPO, negotiating parties are obliged to allow their conduct to be partly determined by each other's legitimate interests, including when negotiations are aborted.[7] This implies that the parties must give timely notice that they will not conclude an agreement in order to avoid further costs. However, certain interests of the aborting party may - in view of unforeseen circumstances - mean that by way of exception breaking off the negotiations is justifiable, even if the party had given the legitimate impression that an agreement would be reached.[8] The Supreme Court starts from a strict and restraining standard when determining the unacceptability. This judgment was used in almost all judgments in 2021.[9]

In disputes concerning the formation of M&A agreements, witness evidence and the evaluation of evidence may be decisive, especially in smaller acquisitions with less expertise

In its judgment of 30 April 2021, the Supreme Court criticized the Amsterdam Court of Appeal, which should have taken the alternating positions taken by the party witness when evaluating the evidence more into account. This is relevant for the probative value in the context of the question whether a cooperation agreement was concluded between the parties in a general partnership for the purpose of property development.[10] A party-witness statement has limited evidential value under Article 164

[5] See M&A Disputes Report 2021 van Berkely Research Group.

[6] CMS European M&A Study 2020 and 2021.

[7] See Supreme Court 12 August 2005, ECLI:NL:HR:2005:AT7337, NJ 2005/467 (CBB/JPO) and Supreme Court 15 November 1957, ECLI:NL:HR:1957:AG2023, NJ 1958/67 (Baris/Riezenkamp).

[8] Supreme Court 14 juni 1996, *NJ 1997,481* (De Ruijterij/MBO).

[9] See Court of Gelderland 30 June 2021, ECLI:NLRBGEL:2021:3373; Court of Appeal of Arnhem-Leeuwarden 31 August 2021, ECLI:NL:GHARL:2021:8320; Court of Overijssel 8 June 2021, ECLI: NL:RBOVE:2021:2387.

[10] Supreme Court 30 April 2021, ECLI:NL:HR:2021:672, NJB 2021/1463, *RvdW 2021/500.*

paragraph 2 of the Dutch Code of Civil Procedure (DCCP): such a statement cannot constitute evidence on its own, unless the statement serves to supplement incomplete evidence.

In a judgment (after an interlocutory injunction) dated 30 August 2021, the Court of Appeal of Arnhem-Leeuwarden, measured the statement of a party witness against the same critical bar in the context of the assessment of evidence whether a purchase agreement concerning a hotel and catering company had been concluded. Eventually, the conclusion was drawn (in combination with an assessment of other evidence) that no agreement had been concluded.[11] With regard to the assessment of the abortion of negotiations, the Court of Appeal applied CBB/JPO as a starting point: in principle the parties to the negotiations may break the negotiations off, unless this would be unacceptable on the grounds of the other party's justified faith in the conclusion of the agreement or in connection with the other circumstances of the case.[12]

In a judgment of 29 December 2021, the District Court of Midden-Nederland also applied the CBB/JPO judgment critically when negotiations were broken off in the context of a takeover of a general medical practice.[13] After a negotiation process with a prospective buyer, the retiring GP sold his practice to another party. Crucial to the deal was the takeover of the pharmacy department, for which no agreement was reached with the prospective buyer. Although the prospective buyer had already resigned from his job and had already taken preparatory steps, the court ruled that he was not entitled to compensation for the negative contractual interest.

In a dispute brought before the North Holland District Court, the question arose whether a purchase agreement had been concluded after extensive negotiations in a relatively small transaction.[14] A term sheet was signed, with a possibility of dissolution if the results of the due diligence deviated substantially from the available information. Since the purchaser was unable to obtain financing, the delivery was postponed. Funding was eventually obtained via crowdfunding and an addendum to the term sheet was sent on 26 February 2020. An agreement on the main points was reached by e-mail between the advisors. The buyer finally tried to worm his way out of the sale by invoking dissolution on 24 March 2020 on the grounds that he no longer wanted to take out a subordinated loan.

According to the court, there was agreement on many essentials of the purchase agreement, as expressed in the addendum. There had been extensive correspondence about the subjects to which the resolutive conditions applied. Correspondence weighs heavily in the assessment of evidence. The buyer disputed that there was agreement on the distribution of profits. The burden of proof that there was agreement was placed on the seller. The court gives an interesting shot across the bow. If the seller succeeded in proving that there was an agreement in outline form (in line with the Gelderland-South Region Police Force's decision/Hovax[15]), then, in so far as there were gaps, these gaps would be

[11] Court of Appeal of Arnhem-Leeuwarden 31 August 2021, ECLI:NL:GHARL:2021:8320, consideration 2.2 with reference to Supreme Court 31 March 1995, ECLI:NL:HR: 1995:ZC1688.

[12] Court of Appeal of Arnhem-Leeuwarden 31 August 2021, ECLI:NL:GHARL:2021:8320, consideration 2.8.

[13] Court of Midden-Nederland 29 December 2021, ECLI:NL:RBMNE:2021:6188.

[14] Court of Noord-Nederland 3 February 2021, ECLI:NL:RBNNE:2021:309.

[15] Supreme Court 26 September 2003, ECLI:NL:HR:2003:AF9414, *NJ 2004, 460*.

filled by the supplementary effect of reasonableness.[16] However, if the seller did not succeed, then there would be a resolutive condition and the facts and circumstances would be taken into account when assessing whether the contract was terminated unlawfully. The District Court indicated that, in that case, it wanted to assess the damage.

The aforementioned ruling in the case of a small takeover is at odds with a judgment of 24 March 2021 of the district court of Amsterdam concerning a large take over.[17] A dispute arose between the seller Detron ICT Holding c.s. (enterprise value of about EUR 68 million) and the buyer Staples Solutions about an agreement following an auction initiative by Detron ICT Holding c.s. to acquire the company (a so-called controlled auction). Staples made proposals for the creation of a joint venture and the parties reached agreement on a number of key points. This was confirmed by e-mail and during meetings, and it was offered to record the proposals in a term sheet and share purchase agreement. In subsequent correspondence, clear reservations were expressed, such as "Subject to approval of Company's board and Shareholders". The negotiations were aborted by Staples. Detron ICT Holding et al. took the view that parties had come to an agreement because agreement had been reached on the essentials pursuant to Section 225(2) of Book 6 of the DCC.

The court did not follow this argument, precisely because of the negotiation process. Both sides explicitly stipulated that a binding agreement could not be reached until the final contract documents had been signed. These stipulations were later repeated. However, no contract documents had been negotiated, let alone signed. The fact that reservations were not expressly made in all correspondence does not mean that they were waived.

As far as the abortion of negotiations is concerned, the District Court also ruled that there can be no trust in the realization of the contract, even if there is agreement in outline. After all, there were mutual stipulations that there would be no agreement until both parties had signed the contract documentation. Staples is not liable for damages. This judgment is in line with jurisprudence and literature on reserved negotiations.[18] A stipulation can be made at any stage of the creation process.[19]

In addition to proceedings on merit, in 2021 several attempts were made in summary proceedings to demand compliance with the execution of the takeover agreement. In general, we see cautious assessments of whether there is agreement on the essentials of the purchase agreement.[20]

In a judgment dated 1 April 2021, the judge in preliminary relief proceedings of the District Court of Gelderland did not hold back.[21] The preliminary relief judge in charge of preliminary relief proceedings ruled that there was agreement on the essentials of the purchase agreement which could

[16] Court of Noord-Nederland 3 February 2021, ECLI:NL:RBNNE:2021:309.

[17] Court of Amsterdam 24 March 2021, ECLI:NL:RBAMS:2021:1809.

[18] M. Van Hooijdonk en R.P.J.L. Tjittes,, Precontractuele aansprakelijkheid bij onderhandelen met een voorbehoud, *Contracteren 2008/3.*

[19] See A-G Rank-Berenschot in her conclusion (consideration2.2.) for Supreme Court 5 March 2020, *RvdW 2010, 382* (Fair Play Centers/Geveke).

[20] Court of Overijssel 8 June 2021, ECLI:NL:RBOVE:2021:2387; Court of Midden-Nederland 10 September 2021, ECLI:NL:RBMNE:2021:5714.

[21] Court of Gelderland 1 April 2021, ECLI:NL:RBGEL:2021:3813.

be executed by an offer of financing. Although there is no deed of sale or deed of delivery as yet, the judge in preliminary relief proceedings was of the opinion that in principle the buyer was obliged to execute the deal. According to this judge, the weighing of interests implies that in preliminary relief proceedings a provision is made to be able to effectuate performance. The Court in preliminary relief proceedings ordered the seller to cooperate in the implementation of the agreement reached, with delivery to a designated company. The court ordered the seller to cooperate and to draw up the deed of realization, under penalty of a substantial fine.

Also worth mentioning is a judgment by the District Court of Rotterdam, in which a claim of the seller on the grounds of a negative contractual interest was rejected because negotiations were aborted at a very late stage.[22] After the failure of the transaction, the seller sold the shares to a third party for a higher price than the price originally intended. There is no loss on account of the additional proceeds.

3. EXPLANATION OF PURCHASE AGREEMENT

In 2021, there was a significant amount of case law about explanation of purchase agreements within the beacons as set out by the Supreme Court. The Supreme Court puts the so-called Haviltex standard[23] (objectivated subjective explanation) at the center, in which all circumstances of the case are important,[24] assessed according to reasonableness and fairness.[25] This criterion implies that the explanation of a contractual term is based on the meaning that the parties in the given circumstances could reasonably attribute to the provision and on what they could reasonably expect from each other in this respect. Within the Haviltex standard, a primarily textual (objective) interpretation is also possible, if the nature of the transaction entails this and if it concerns professional parties who, with expert assistance and after intensive negotiations, have concluded a detailed written agreement (with a clause such as the so-called "entire agreement clause"[26] from which it can be deduced under certain circumstances that the parties have agreed to focus on the wording). This is usually the case in M&A transactions. In a case of objective interpretation, (a) the text of the clause is read in (b) the context of the entire agreement, whereby (c) the known scope of the relevant term and (d) the plausibility of the explanation are also considered. However, the Haviltex yardstick is always based on all the circumstances of the case.[27]

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[22] Court of Rotterdam 14 July 2021, ECLI:NL:RBROT:2021:7193.

[23] Supreme Court 13 March 1981, ECLI:NL:HR:1981:AG4158, *NJ 1981, 635* (Ermes/Haviltex). See explanation note 3 below.

[24] Supreme Court 5 April 2013, ECLI:NL:HR:2013:BY8101 (Lundiform/Mexx). See also Supreme Court 21 April 1995, ECLI:NL:HR:1995:ZC1706, *RvdW 1995/98* (Kakkenberg/Kakkenberg); Supreme Court 20 February 2004, ECLI:NL:HR:2004:AO1427, *NJ 2005/493* (DSM/Fox), also Supreme Court 22 September 2006, ECLI:NL:HR:2006:AX1571, *NJ 2006/521* (samenlevingscontract).

[25] Supreme Court 20 February 2004, ECLI:NL:HR:2004:AO1427, *NJ 2005/473* (DSM/Fox); Supreme Court 2 February 2007, ECLI:NL:HR:2007:AZ4410, *NJ 2008/104* (NBA/Stichting Meerhuysen), also Supreme Court 23 April 2010, ECLI:NL:HR:2010:BL5262 (Halliburton).

[26] In Supreme Court 5 April 2013, ECLI:NL:HR:2013:BY8101 (Lundiform/Mexx) it has been ruled that this clause - which does not contain an interpretation clause - has no special meaning under Dutch law and cannot automatically detract from the fact that, when interpreting the contract, statements and conduct prior to the conclusion of the contract are nevertheless taken into account.

[27] Supreme Court 5 April 2013, ECLI:NL:HR:2013:BY8101 (Lundiform/Mexx).

In the year 2021, the courts interpreted provisions in contracts according to the Haviltex standard in several cases.[28]

According to annotator Spanjaard, a judgment of the Amsterdam Court of Appeal of 9 February 2021 provides a good example of the application of the Haviltex standard in a commercial takeover contract. This judgment concerns the interpretation of a contractual takeover of a credit facility (pursuant to Section 6:159 of the DCC) with a bank guarantee in the context of a takeover of a company in dire straits. According to the Court of Appeal, the focus was on the documents exchanged between the parties before the contract was concluded and the actual intentions of the parties. This prevails over the general use of language.[29]

The Court of Appeal of Arnhem-Leeuwarden also applies the Haviltex standard in its judgment of 1 June 2021. The parties disputed the interpretation of a settlement clause in respect of assets in a purchase agreement for shares in a company.[30] The buyer was of the opinion that direct settlement with the purchase price was intended. However, the seller argued that settlement with the result (which indirectly influences the purchase price) was intended. The literal text assumed settlement with the purchase price, but the Court of Appeal nevertheless ruled in accordance with the seller's explanation (settlement with the result). The court of appeal ruled:

> *"The more unusual the result of a particular interpretation, the less likely it is to correspond to what the parties had in mind when they entered into the contract. The more unusual the result of a particular interpretation, the less likely it is to correspond to what the parties had in mind when they entered into the contract."*[31]

As the explanation of the buyer leads to double counting, this explanation is not very evident. The court therefore looked at the plausibility of the explanation. In addition, it also follows from statements and conduct that the parties had the intention to set off the result against the result. This explanation also corresponds to a declaration of intent drawn up before the purchase agreement. Although the relevant text of the agreement was drafted by the seller's advisor, both parties were assisted by experts and had equal input as equal parties.

In its judgment of last December, the Court of Appeal of 's-Hertogenbosch also applied the Haviltex standard in favor of the textual explanation when assessing the target company's commitment to the purchase price clause in the share purchase agreement between buyer and seller.[32] According to the Court of Appeal, the target company was bound by the agreements between the buyer and the seller. It deviated from the linguistic explanation as the company is not mentioned as one of the 'undersigned' in the agreements. However, the agreements did include obligations of the company and they were

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[28] See for illustration Court of Oost-Brabant 9 June 2021, ECLI:NL:RBOBR:2021:2616; Court of Noord-Holland 27 October 2021, ECLI:NL:RBNHO:2021:9601; Court of Midden-Nederland 1 December 2021, ECLI:NL:RBMNE:2021:5781; Court of Rotterdam 27 oktober 2021, ECLI:NL:RBROT:2021:10823.

[29] Court of Appeal Amsterdam 9 February 2021, ECLI:NL:GHAMS:2021:455 JOR 2021/277 with annotation J.H.M. Spanjaard.

[30] Court of Appeal Arnhem-Leeuwarden 1 June 2021, ECLI:NL:GHARL:2021:5646; NJF 2021/324; JONDR 2021/549.

[31] Court of Appeal Arnhem-Leeuwarden 1 June 2021, ECLI:NL:GHARL:2021:5646, consideration 5.4.

[32] Court of Appeal 's-Hertogenbosch 28 December 2021, ECLI:NL:GHSHE:2021:3863.

signed by directors of the company.[33] A great deal of significance in the interpretation is attached to the fact that the company cooperated in the execution of the agreements. Under these circumstances, the seller could reasonably assume that the agreements had the consent of the company and that the company was bound by them, even if the company was not involved in the agreements as a party. As far as we are concerned, the Court of Appeal rightly attached great value to the execution. According to established case law, the attitude of the parties after the formation of an agreement during its execution can play a decisive role in the interpretation.[34]

4. WARRANTY INTERPRETATION

In 2021, there were also several rulings on the interpretation of guarantee provisions and claims resulting from guarantee infringements.[35] A guarantee is not a definite legal concept, but is often a statement by the seller about the existence or absence of a fact, in the presence or absence of which the seller fails to fulfil the contract vis-à-vis the buyer.[36]

An important guarantee is the information guarantee to cover the seller's obligation to provide information and the buyer's obligation to investigate (in a due diligence report). This is always an interesting area of tension, where the bar is set high for a professional buyer with expert advisers, especially if he knows that something is amiss.[37] An information guarantee is in principle limited by what the buyer knows or should have known (through due diligence).[38]

On 21 September 2021, the Arnhem-Leeuwarden Court of Appeal ruled on, among other things, the breach of the information guarantee and the responsibility of a professional buyer in the event of uncertainty. The due diligence report showed that something was apparently going on that could possibly have an impact on the performance of an important employee. The court of appeal ruled as follows:

> *"It is then up to Lux Invest to find out what this would mean in concrete terms, should it have reason to do so. It is undisputed that at the time of the takeover [X] would still appeal and that the outcome was not yet known. In court, Lux Invest confirmed that it had not asked for more*

[33] Court of Appeal 's-Hertogenbosch 28 December 2021, ECLI:NL:GHSHE:2021:3863, consideration 5.19.

[34] From Supreme Court 20 May 1994, NJ 1994/574 (Gasunie/Gemeente Anloo). For a similar case Supreme Court 27 November 1992, NJ 1993/273 (Volvo/Braam). See also Supreme Court 20 May 1988, ECLI:NL:HR:1988:AD0323, NJ 1988/781 (Smeets c.s./Kuyper), Supreme Court 10 December 2004, ECLI:NL:HR:2004:AP2651, NJ 2005/239 (Diosynth/Groot) and Supreme Court 12 October 2012, ECLI:NL:HR:2012:BX5572 (Portier/Montessori Amsterdam). See for the right to take into account de facto action at Haviltex: Supreme Court 8 June 2012, ECLI:NL:HR:2012:BV9539 (Scholten/Pichel).

[35] Court of Appeal Amsterdam 7 December 2021, ECLI:NL:GHAMS:2021:3858; Court of Den Haag 28 September 2021, ECLI:NL:RBDHA:2021:10713; Court of Rotterdam 27 October 2021, ECLI:NL:RBROT:2021:10823., *RCR/9.*

[36] Prof. R.J. Tjittes, Commercieel Contractenrecht, p. 417. Zie Parl. Gesch. Boek , p. 262 en 264; M.M. van Rossum, Garanties in de rechtspraktijk, 2015, p. 15 e.v.

[37] Supreme Court 10 October 2003, ECLI:NL:HR:2003:AI0306 (VBU/ Interchem); *Ondernemingsrecht 2003/50.*

[38] Court of Appeal Arnhem-Leeuwarden 24 April 2018, ECLI:NL:GHARL:2018:3872.

information. This is for its own risk, as LuMa provided sufficiently clear information about the possible absence of [X]."[39]

This judgment is in line with literature and case law.[40]

Again, in the judgment of the District Court of Amsterdam of 10 November 2021, the central question was whether information had been presented correctly in the run-up to the SPA, i.e. the gross profit margin in the context of the figures presented.[41] This involved a real supermarket war in law about the proverbial cat in the bag. Because of the interesting dynamics in this case, we will discuss the factual background in a little more detail. On 21 June 2017, Jumbo and Coop wrote to Sligro with a non-binding offer for the Emté supermarkets of EUR 250 million on a cash-and-debt-free basis. At the presentation of its half-year figures in 2017, Sligro announced that it did not see a stand-alone future for Emté and that it was exploring two options: a strategic alliance and a sale of the supermarket activities. At the end of 2017, Sligro started a competitive bidding process for the 130 Emté supermarkets. Sligro had received three indicative bids for Emté as a whole and several bids for parts of it. After having made a Confirmatory Indicative Offer, - whereby Jumbo and Coop (J&C) offered EUR 360 million – , the two bidders received, among others, ., a financial Vendor Assistance Report (VAR) drafted by PWC and dated 19 January 2018 on 22 January 2018 as well as a first draft share purchase agreement, the SPA. Furthermore, both prospective buyers were given the opportunity to conduct a due diligence investigation in a digital data room set up by Sligro, to ask written questions (Q&A) and to discuss the outcome of the SPA. Various expert sessions were organized. In the VAR, figures were withheld that could provide insight into, in short, the business operations and performance of the unsold Foodservices business unit. The supplier conditions that had been negotiated were also regarded as confidential information that would not be shared. This was what Sligro told interested parties from the outset.J&C based its claim that there had been a breach of contract due to a breach of the guarantees given at the time of the share purchase on the fact that, shortly after the takeover, it had become apparent that the company was in fact loss-making, whereas the gross margins presented by Sligro in the run-up to the purchase suggested that the company was profitable.

The court first noted that the provisions of the SPA and the associated Schedule 9 referred to by J&C did not mention any concrete figures. The provisions quoted under 2.15 amount to a promise that the figures (Accounts), as presented in the run-up to the conclusion of the purchase agreement, were correct and gave a fair picture of the financial position and performance of Food Retail. The guarantee that the buyer would also be able to achieve a gross profit margin of 24% was not given. The issue in this case was therefore whether the figures provided by the seller in the run-up to the sale give a correct picture. This was also the focus of the debate.

J&C pointed out that it was impossible for it to achieve the gross profit margins as presented in the VAR and the VAR Trading Update, with reference to supporting accountancy reports. The question

[39] Court of Appeal Arnhem-Leeuwarden 21 September 2021, ECLI:NL:GHARL:2021:8898, consideration. 3.9.

[40] See note 39.

[41] Court of Amsterdam 10 November 2021, ECLI:NL:RBAMS:2021:6431.

was whether this circumstance was sufficient to assume that the gross profit margins referred to therein could not have been correct.

J&C claimed that the method followed by Sligro, as explained by the witnesses, was incorrect, but did not specify which standard had been breached. In short, its argument was that the allocation should have been different because it did not reflect economic reality. However, according to the court, it would have been up to the company to substantiate this with a concrete standard, for example by referring to the rules of the trade for reporting as they apply to auditors, or by clarifying the - in its opinion correct - way in which the allocation should have been made.

Next, the District Court considered it important that it was clear that Emté was not this week's best deal. Sligro's reason for selling Emté was that it was not satisfied with the performance of the supermarkets. In addition, there was the fact that Emté was the considerably weaker brand within the Sligro group. The District Court also considered it important that J&C had changed the presentation of the figures and profit margins after the transaction, so that the argument of lower profit margins carried little weight at all. Contrary to J&C's argument, the conclusion that the figures in question were not correct cannot be drawn from the fact that the supermarkets sold were apparently unable to achieve the gross profit margins as presented in the VAR and the VAR Trading Update.

This judgment illustrates how important it is for the buyer to include concrete standards in the purchase agreement in order to seek redress, especially if there is reason to doubt the financial performance of the target.

It is also worth mentioning that in January 2021, the Supreme Court ruled on the tax consequences of the breach of guarantees in respect of the revaluation reserve within the framework of a share transfer of a riding school and tax assessments in this connection.[42] Cornelisse's annotation and A-G Wattel's conclusion are worth reading, particularly for tax law practitioners..[43] Wattel emphasizes the problem of allocating damages in the event of a breach of guarantee if damage can be caused by multiple causes: separate double causality (both causes occur simultaneously and are each capable of causing the damage) or alternative double causality (both causes are each capable of causing the damage, but occur (shortly) after one another).[44]

5. SUSPENSIVE AND RESOLUTORY CONDITIONS

Suspensive and resolutory conditions can be found in almost every takeover contract. In a takeover contract, the resolutory conditions are often referred to as 'conditions precedent' or 'closing conditions'. A legal transaction can be performed under a condition.[45] is not the realization of the legal act (the acquisition contract) that is made dependent on a condition, but the legal consequences or effect

[42] Supreme Court 29 January 2021, ECLI:NL:HR:2021:143.

[43] Supreme Court 29 January 2021, ECLI:NL:HR:2021:143, with conclusion from A-G mr. P.J. Wattel, *RCR 2021/26*, m.nt. R.P.C. Cornelisse, *BNB 2021/57*.

[44] Supreme Court 29 January 2021, ECLI:NL:HR:2021:143, with conclusion from A-G mr. P.J. Wattel, *RvdW 2021/170*.

[45] See article 3:38 of the Dutch Civil Code (DCC)

thereof. The acquisition contract is already in place, but the obligations arising from the contract are not yet effective (in the case of suspensive conditions) or may become ineffective (in the case of resolutory conditions).[46]

5.1 *Suspensive conditions*

In the first pandemic year (2020), suspensive conditions were used by buyers in a number of judgments to maneuver themselves out of a deal.[47]

In 2021, the Amsterdam Court of Appeal ruled in the appeal concerning such a takeover dispute in summary proceedings, which symbolized the disruption to the travel industry caused by the COVID-19 crisis in 2020: request for fulfilment of the transaction by seller Corendon to Sunweb et al. due to the fulfilment of the conditions precedent. The delivery of the shares in group company Corendon Holding was made subject to four conditions precedent. On 7 December 2020, in preliminary relief proceedings, the Court ruled that Corendon had made it sufficiently plausible for the judge to conclude that the conditions precedent had been met. However, based on the interests of all parties involved, the court denied the claim in preliminary relief proceedings, since awarding the claim, this would have far-reaching and possibly irreversible consequences in light of the pandemic. On 3 August 2021, the Amsterdam Court of Appeal rendered a judgment on appeal and rejected Corendon Holiday's claim. [48] For the interpretation of the condition precedent, the Court of Appeal considers that:

> *"The meaning which the parties in the given circumstances could reasonably attribute to these provisions and what they could reasonably expect from each other in this respect is decisive. All circumstances of the case are of importance, including the question of how the provisions have come about.*[49]

The history of the realization of the contract indicates that the literal text of the conditions precedent cannot be ignored. The Court of Appeal reached this conclusion because it concerned a detailed and extensive agreement which had been drawn up by professional parties that had been assisted by competent legal advisers. After assessing the literal text of the agreement and what had been agreed between the parties, the Court of Appeal concluded that it was at least unclear whether the conditions precedent had been fulfilled. Therefore, Lundiform/Mexx was applied, meaning that this dispute was not suitable for summary proceedings.

Noteworthy in this case is that, while the District Court stated that it was plausible that the condition precedent had been met, but that the claim could not be awarded in view of a weighing of interests, the Court of Appeal concluded that this was not sufficiently plausible and therefore rejected the claim. The Court of Appeal does not consider an opinion on the weighing of interests or unforeseen circumstances. It will be interesting to see whether a court in proceedings on merits will conclude that

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[46] Mr. R.P. Schrooten and Mr. B.C. Elion, '(Potestatieve) voorwaarden in overnamecontracten: van theorie naar praktijk', *Contracteren*, Aflevering 2, 2020.

[47] 'Overnamegeschillen in tijden van (corona)crisis' zoals verschenen in Geschriften vanwege de Vereniging Corporate Litigation 2020-2021, p. 237.

[48] Court of Appeal Amsterdam 3 August 2021, ECLI:NL:GHAMS:2021:2225.

[49] Court of Appeal Amsterdam 3 August 2021, ECLI:NL:GHAMS:2021:2225, consideration 4.11.

Sunweb can successfully invoke termination of the SPA due to non-compliance with the conditions precedent.

In September 2021, the Arnhem-Leeuwarden Court of Appeal also ruled on whether or not conditions precedent had been fulfilled in an agreement concerning the acquisition of a software supplier for McDonald's branches[50] This suspensive condition related to the satisfaction of the results of the 'Financial, Tax, Legal, IT' due diligence , the basis on which the buyer could determine whether the software was commercially and technically suitable for the German market. The key question is whether the ETL Buyer's disappointment regarding significant deviation from sales data constituted a valid reason for not relying on the suspensive condition of a satisfactory outcome of the due diligence. Seller BPH relied on the fact that the condition precedent had been met. The Court of Appeal put first and foremost that the seller BPH had the burden of proof and assertion with respect to the fulfilment of the condition precedent on the basis of Article 150 of the DCCP. The Court of Appeal's conclusion is interesting:

> *“Finally, the Court of Appeal considers that ETL, also in view of the text of the LOI ("Durchführung einer Due Diligence mit zufriedenstellendem Ergebnis"), had some freedom to assess whether the results of the due diligence were acceptable to it. Naturally, disappointing turnover figures of the company in which the buyer has an interest form an important part of the consideration of whether to proceed. The discretion as to whether or not the condition has been met is limited by the reasonableness and fairness referred to in Section 6:23 of the DCC. In this case the reasonableness and fairness do not require that the condition precedent must be considered fulfilled."*[51]

There is also the discussion whether the buyer had used his right to invoke the suspensive condition by not immediately referring to the disappointing results as a problem and by negotiating the draft purchase agreement. The Court of Appeal ruled on this

> *"Nevertheless, the Court of Appeal ruled that ETL had not thereby forfeited its right to invoke the non-fulfilment of the condition precedent or created a legitimate expectation on the part of BPH that the condition precedent had been fulfilled. Firstly, it was also in BPH's interest that ETL did not rely on disappointing sales figures but investigated whether the transaction could not be saved after all. In general, it is good if the contracting party is open about this, but there may be reason to keep the hesitations internal in order to avoid a rapidly growing gap between the parties."*

The Court of Appeal determined that the parties were bound by the purchase agreement, but under the condition precedent of a satisfactory due diligence. In this case, the Court of Appeal had to weigh, on the one hand, the seller's argument that he could rely on the fulfilment of the condition precedent and, on the other hand, the buyer's argument that the disappointing turnover of the target was a valid reason for relying on the non-fulfilment of the condition precedent of the satisfactory outcome of the due

[50] Court of Appeal Arnhem-Leeuwarden 21 September 2021, ECLI:NL:GHARL:2021:8878.

[51] Court of Appeal Arnhem-Leeuwarden 21 September 2021, ECLI:NL:GHARL:2021:8878, consideration 2.12.

diligence. In the end, the Court of Appeal considered the provision of incorrect information by the seller to the buyer to be more serious than the buyer's delay. The Court of Appeal also reasoned that the purchaser could possibly be held liable for communicating his hesitations too late, by analogy with the case law concerning aborted negotiations with regard to an agreement that had yet to be concluded. However, as explained above, this test calls for restraint.[52]

5.2 *Resolutory conditions*

The Court of Appeal of 's-Hertogenbosch delivered an interesting judgment in preliminary relief proceedings invoking the resolutive condition that no financing had been obtained for the takeover of a hotel and catering business.[53] The financing reservation had expired unused. The Court of Appeal ruled that by concluding the purchase agreement, the buyer had assumed the obligation to pay the purchase price. Financing the purchase price was his responsibility. After the unused period within which the financing reservation could be invoked had expired, it was at his risk that he did not have financing. Non-payment is not qualified as force majeure or unforeseeable circumstance. This is at the Buyer's risk according to common sense.[54] Cancellation of the promised financing cannot justify that it is unacceptable according to the standards of reasonableness and fairness for the Seller to hold the Buyer to its obligations under the purchase agreement or that it is a case of force majeure. The measures taken due to the COVID-19 crisis did not cause change either. The appeal for dissolution was therefore rejected by the Court of Appeal. According to Hendrikx, this judgment confirms one of the foundations of contract law: the parties are in principle bound by the word they have given, in other words pacta sunt servanda. In view of its seriousness, nature and content, the COVID-19 crisis may form an exception to this, but the mere fact that the crisis has adverse consequences for the contracting parties and puts pressure on the contractual obligations is insufficient. A party that is adversely affected by the pandemic should make this sufficiently concrete. As an alternative, Dutch contract law still offers sufficient room to reach a suitable solution, for example by means of the unforeseen circumstances of Article 6:258 of the DCC.[55]

In May 2021, the Rotterdam District Court ruled on an application for dissolution because the conditions for closing set out in the contract - the closing actions - had not been met in time.[56] The case concerned the acquisition of shares in the German company Osmed GmbH, a manufacturer of mechanical fillers. One of the closing conditions was not fulfilled before the closing date. Therefore, the closing could not take place on the closing date of 29 September 2017. According to the sales contract, the Buyer was entitled to rescind the contract if a closing condition had not been met. The Seller objected to this. The court found that there was a legally valid dissolution of the contract because the closing conditions of the contract had not been met in time. According to the court, a fatal

[52] Supreme Court 12 August 2005 ECLI:NL:HR:2005:AT7337 (CBB/JPO).

[53] Court of Appeal 's-Hertogenbosch 16 March 2021, ECLI:NL:GHSHE:2021:759.

[54] 'Overnamegeschillen in tijden van (corona)crisis' zoals verschenen in Geschriften vanwege de Vereniging Corporate Litigation 2020-2021, p. 239. Zie ook R.P.J.L. Tjittes en J.V. Telepta, 'Lessen uit de eerste rechterlijke uitspraken over COVID-19-crisis en onvoorziene omstandigheden en overmacht bij commerciële contracteren', Contracteren 2020, nr. 3.

[55] Court of Appeal 's-Hertogenbosch 16 March 2021, ECLI:NL:GHSHE:2021:759, *RCR 2021/87.*

[56] Court of Rotterdam 12 May 2021, ECLI:NL:RBROT:2021:4763.

term had been agreed. The literal text of the contract states: "Terminate the entire agreement", which must be understood as dissolving the contract. No estoppel can be inferred from the circumstances and conduct after the closing date. According to the court, more is needed to assume the processing of the law:

> *"Certainly in a situation like the one in question where the parties have explicitly agreed on the circumstances under which the parties are entitled to dissolve the contract, these circumstances occur and the party that can rely on them does so relatively quickly after these circumstances occur. The fact that the interests of the plaintiffs were harmed does not alter this. Arteface was entitled to let its own interest prevail."*[57]

6. ORDINARY COURSE IN THE EYEWAER WAR

Shortly after the first lockdown in 2020, the question naturally arose as to what is the ordinary course of a company at a time of COVID-19.[58] This was also a legal question in the takeover dispute between the listed optical giants EssilorLuxottica S.A. ("EssiLux") and HAL Holding N.V. ("HAL", with takeover target GrandVision), the eyewear war in 2020, which continued into 2021. The parties had already signed the takeover documentation in 2019 and were awaiting approval by the European Commission as a condition precedent. During this period, the company had to continue as a going concern and approval was required for certain operations. Grand Vision was hit hard by the COVID-19 crisis, during which any shops were closed. In the summer of 2020, GrandVision announced that it had made a loss of EUR 212 million in the first half of the year. The parties had agreed that GrandVision would run the company in the period preceding the transfer "in the ordinary and usual course of business consistent with past practice". In view of the disturbing reports, EssiLux had strong doubts whether HAL and GrandVision had kept to these agreements.

On 30 July 2020, ICC arbitration proceedings were commenced pursuant to the arbitration clause in the Block Trade Agreement and Support Agreement for the acquisition by EssiLux.

Pending the arbitration, EssiLux claimed in interlocutory proceedings before the District Court of Amsterdam and the District Court of Rotterdam that certain documents should be surrendered pursuant to Section 843a of the DCCP in order to be able to establish whether GrandVision had violated the ordinary course provision.[59] The judge in preliminary relief proceedings deemed himself competent to take cognizance of the claim.

There has been a discussion in the literature whether the judge in preliminary relief proceedings was authorized to take cognizance of the exhibit in view of the agreed settlement of the dispute. Following the example of the courts of first instance[60], the Amsterdam Court of Appeal ruled on 6 April 2021,

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[57] Court of Rotterdam 12 May 2021, ECLI:NL:RBROT:2021:4763, see consideration 4.15.

[58] T. Rijkse, Ordinary Course in tijden van Corona, *Ondernemingsrecht 2020/110*.

[59] Court of Rotterdam/Amsterdam 24 August 2020, ECLI:NL:RBROT:2020:7383.

[60] See comments mr. P.J. Van der Korst with *Ondernemingsrecht 2021/30*.

based on the literal wording of the dispute settlement clause, that the court in preliminary relief proceedings had jurisdiction:

> *"In the interpretation of the provisions of article 14.2 of the Support Agreement, it is not only the wording of the provisions that is important, but also what the parties have mutually stated and what they could reasonably have deduced from each other's statements and behavior. Since these are professional parties, who have been assisted by legal professionals, the linguistic meaning is of great importance in the interpretation of the relevant provisions.*
>
> *From the wording of article 14.2.1 ("Without prejudice to the right of each Party to seek injunctive relief in summary proceedings") and article 14.2.6 ("However, this Clause 14.2 shall not prevent a Party from (i) Seeking injunctive relief in summary proceedings') cannot be construed otherwise than that, as also ruled by the judge in preliminary relief proceedings, the parties have created a self-standing basis to be able to address the provisional relief judge."* [61]

For the rest, the Court of Appeal upheld the first instance rulings. The Court of Appeal considers that, in view of the agreed limited disclosure in the arbitration agreement, it is insufficiently plausible that EssiLux has a legitimate interest in the broadly requested inspection of documents. Furthermore, it has not been shown that the procedural possibilities in arbitration to obtain the documents by means of an order have been exhausted and that HAL will not comply with such an order. For the time being, the Court of Appeal has left it open whether the legal relationship alleged by EssiLux, namely the violation of the ordinary course obligation, is sufficiently plausible within the framework of a claim under Article 843a of the DCCP.

According to a EssiLux press release [62] the ICC ruled in an award made in June 2021 that HAL had violated the ordinary course provision. EssiLux had the option to abandon the deal. The reasons for this award are unfortunately not public. Subsequently, EssiLux proceeded with the acquisition as evidenced by a press release issued at the end of June 2021. It acquired the shares in GrandVision as of 1 July 2021 for the original acquisition price.[63]

Another interesting development concerning the ordinary course provision is the judgment of the General Court of the EU of September 2021.[64] According to Nijs, this judgment provides indications regarding permissible (and non-permissible) 'conduct of business' agreements in the context of a takeover from the point of view of competition law.[65] In this case, Altice Europe N.V. ("Altice"), an international telecommunications and cable company, acquired PT Portugal SGPS SA ("PT

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[61] Court of Appeal Amsterdam 6 April 2021, ECLI:NL:GHAMS:2021:941, *TVA 2021/62, NTHR 2021*, afl. 3, p. 132.

[62] https://www.essilorluxottica.com/essilorluxottica-welcomes-favorable-outcome-arbitration-confirming-material-breaches-grandvision-0

[63] https://investors.grandvision.com/static-files/ee32ed08-dc85-48c8-a9ae-dfcd94e3783c; 'Brillenoorlog EssilorLuxottica en GrandVision loopt met sisser af', *Financial Dagblad*, 29 juni 2021.

[64] European General Court 22 September 2021, zaak T-425/18, Altice vs Europese Commissie ('Altice-arrest') and B.A. Nijs, 'Gerecht zet schijnwerper op het schemergebied tussen signing en closing van een transactie in Altice-zaak', *Tijdschrift Mededingingsrecht in de Praktijk 2021/5-6.*

[65] B.A. Nijs, 'Gerecht zet schijnwerper op het schemergebied tussen signing en closing van een transactie in Altice-zaak', *Tijdschrift Mededingingsrecht in de Praktijk 2021/5-6, p. 8.*

Portugal"), a Portuguese provider of telecommunications and multimedia services for both B2C and B2B, from OI SA ("OI"). The SPA between Altice and OI contains an extensive conduct of business clause, which stipulated that PT Portugal would, in the period between signing and closing, carry out its activities in such a way as to avoid the risk of a foreclosure. The court found that the buyer had to continue as usual ('in the ordinary course of business') and had to obtain the prior approval of the buyer for certain decisions. Nijs concludes that the court particularly relied on the buyer's own responsibility. It is up to the buyer to keep an eye on whether the seller interprets the ordinary course clause too generously. A wait-and-see attitude of the buyer is therefore not accepted by the court.

7. DUTY TO COMPLAIN (REGULATION) IN TAKEOVER SITUATIONS

In 2021, the obligation to complain in takeover contracts was also the focus of lower court judgments. The starting point is that commercial parties may contractually deviate from the complaint regulation of Section 7:23 (1) or 6:89 of the DCC. Large professional parties are free to determine the complaint period of Article 7:23 paragraph 1 of the DCC themselves. Especially in over-all contracts, it is customary to agree on their own complaints regime with an end date on which each claim for breach of the guarantees will have lapsed or expired. In takeover contracts, the warranty period is usually between one and three years.[66] Agreements are made about the time at which claims under the warranty must be reported under penalty of lapse or limitation of rights. In the case of a specifically agreed complaint period, failure to complain in time can lead to the lapse or limitation of rights. The fact that the seller is not at a disadvantage does not mean that the reliance on the expiry of such a period is unacceptable according to the standards of reasonableness and fairness. This is a strict criterion that requires restraint, certainly between professional parties assisted by lawyers. Boom has written an interesting overview article to arrive at a concise explanation of grievance clauses.[67] According to him, the Afvalzorg/Slotereind judgment is a guideline for the interpretation and application of complaint clause.[68] In the case of complaint clauses with precisely formulated periods, the text of the clause will lead to a clear result. There is little room for the restrictive effect of reasonableness and fairness. Relevant factors are the professionalism of the parties (with the assistance of advisors), disadvantage due to inertia, how long the creditor could have known about the defect, or circumstances that could have resulted in an earlier notification. In takeover contracts, therefore, Boom's axe in words actually applies to specific complaint periods. In the case of a vaguely formulated complaint term, there will be more room for the circumstances of the case, inspired by the viewpoints of Articles 6:89 and 7:23 of the DCC.

In June 2021, the Court of East Brabant ruled strictly on the failure of a buyer to complain in time about the incorrectness of the takeover balance sheet due to a vaguely formulated complaint period.[69]

[66] Meijer a.w., p. 104. R.J.P.S. Tjittes, *Commercieel Contractenrecht*, p. 452.

[67] H. Boom, Op weg naar een consistente uitleg en toepassing van klachtbedingen, *NTBR 2021/9*.

[68] Supreme Court 7 February 2014, NJ 2015/274 (Afvalzorg /Slotereind).

[69] Court of Oost-Brabant 2 June 2021, ECLI:NL:RBOBR:2021:2558.

In line with the article by Boom, the circumstances of the case and the viewpoints of Article 7:23 of the DCC were tested.[70] The conclusion is that reliance on the obligation to complain succeeds.

In October 2021, the Rotterdam District Court also ruled strictly on a complaint clause with a concrete complaint period.[71] It ruled that it is not unacceptable according to the standards of reasonableness and fairness that the seller relies on the complaint term, because the parties have consciously agreed on these provisions, including the included terms . When determining this, the legal counsel engaged by the buyer weighed the justified interests of the buyer and the seller. After all, the buyer has an interest in sensible guarantees being given and in being given sufficient time to investigate after the takeover whether there rea any infringements, so that these can be substantiated in the agreed manner.

8. POST CONTRACTUAL NON-COMPETE OBLIGATIONS

The violation of post-contractual non-competition obligations in takeover disputes (or unfair competition in the key sense of Art. 6:162 DCC) was the focus of several decisions in 2021. The purpose of a non-competition clause in a takeover agreement is to protect the value of the company after its transfer, and is therefore usually agreed in favor of the buyer. However, the possibilities with regard to non-competition clauses in a takeover agreement are limited by European and Dutch competition law. Under this law, non-competition clauses are only permitted under specific conditions. Among others, a non-competition clause must be limited in duration and scope.[72] The Kolkman/Cornelisse judgment provides interesting insights into the general non-competition obligations after a takeover:

> "*Such an agreement, whereby one person transfers a commercial undertaking to another, generally precludes conduct that would amount to the transferor competing with his legal successor by continuing to perform, in the immediate vicinity of the transferred undertaking, the same activities that he was already performing within the undertaking before the transfer. The local reputation of the transferor will also be decisive for the question of whether a behavior within the meaning of Article 81(1)(b) of the Treaty is acceptable within the boundaries referred to here. (...) Furthermore, not entering into a non-competition agreement is not a license to be in breach of the contract or of the rules laid down in Article 6:248 (1) of the DCC are requirements of reasonableness and fairness to compete with each other.*"[73]

By judgment on 22 February 2021, the North Holland District Court ruled whether the buyer of a company must tolerate competition from the seller in the event of a very brief purchase agreement without a non-solicitation or competition clause.[74] Whether the seller is allowed to start a similar business after the sale in order to compete with the buyer depends on whether the parties' agreement

[70] Court of Oost-Brabant 2 June 2021, ECLI:NL:RBOBR:2021:2558, consideration 4.6.

[71] Court of Rotterdam 27 October 2021, ECLI:NL:RBROT:2021:10823.

[72] L.E. Haanraadts, G. de Jong, 'Het non-concurrentiebeding in de ondernemingsrechtpraktijk: vergeet het mededingingsrecht niet!', *MvO 2019, afl. 3-4.*

[73] Supreme Court 1 July 1997, ECLI:NL:HR:1997:1569 (Kolkman/Cornelisse).

[74] Court of Noord-Holland 22 February 2021, ECLI:NL:RBNHO:2021:1271.

stipulates that the buyer not compete with the seller after the takeover.[75] According to the District Court, the question of how the relationship between the parties is regulated in a written contract, and whether this contract leaves a gap that must be filled, cannot be answered on the basis of a purely linguistic interpretation of the provisions of that contract, but depends on the meaning that the parties in the given circumstances may reciprocally attribute to these provisions and on what they may reasonably expect from each other in this respect, following the Haviltex judgment. In its assessment, the court took the above Kolkman/Cornelisse starting point into consideration and therefore concluded that, in view of the nature and purport of the agreement at issue, the buyer could rely on the fact that no competition would be imposed on him by the seller.[76]

In a judgment dated 26 October 2021, the Arnhem-Leeuwarden Court of Appeal again applied the aforementioned judgment of the Supreme Court with regard to competition after the transition.[77] The Court of Appeal came to a different conclusion, however, particularly because no non-competition clause had been consciously agreed.

9. DAMAGE CAUSED BY BREACH OF WARRANTY

The discussion of damages resulting from breaches of warranties in takeover disputes is regularly complicated and often the subject of financial valuation/accountancy specialists. In principle, breach of a guarantee in a takeover contract results in an obligation for the seller to pay damages if the buyer has suffered loss as a result of this breach. In a takeover contract, this means that the purchaser must be put in the same position as he would have been as far as possible if the guarantee had been correct. In calculating the damages, a comparison must therefore be made between the purchaser's position in the situation that would have existed if the guarantee had been correct and the position in which the purchaser now finds himself.[78] This amounts to compensation for a positive interest; the injured party should be put in the situation that the guarantee was correct, and not only in the situation that there would have been no breach of the guarantee (negative interest). The assessment of damages depends on the circumstances of the case.[79] If it is established that during the negotiations with the seller the buyer made it clear how he valued the company and what changes in the financial situation of the company would affect his valuation, this should play a role in the damage assessment. According to

[75] Compare Court of Appeal 's-Hertogenbosch 31 October 2017, ECLI:NL:GHSHE:2017:4744, consideration 3.6

[76] Court of Noord-Holland 22 February 2021, ECLI:NL:RBNHO:2021:1271, consideration 5.4-5.5.

[77] Court of Appeal Arnhem-Leeuwarden 26 October 2021, ECLI:NL:GHARL:2021:10082, consideration 5.3.

[78] Mr. Drs, D.A.H.W. Strik, Aspecten van Schadevergoeding bij inbreuk op garanties in overnamecontracten, p. 407-408, Geschriften vanwege de Verenging Corporate Litigation 2007-2008 (VDHI nr. 97), Deventer; and see Supreme Court 26 March 2010, ECLI:NL:HR:2010:BL0539, r.o. 3.5 and recently: Supreme Court 28 June 2019, ECLI:NL:HR:2019:1042.

[79] See also Supreme Court 30 August 2019, ECLI:NL:HR:2019:1291.

the literature, there is a tendency for the damages for breach of warranty to be linked to the way in which the purchase price was calculated.[80]

In its ruling of April 2021, the District Court of Rotterdam ruled that the damage resulting from the breach of a guarantee regarding the financial data must be calculated by a specialist to be appointed in the Statement of Claims procedure, based on the principles of the District Court.[81] This includes how the valuation of the purchase price was previously established. The agreement in question does not provide any regulation leading to an unclear outcome.

It is also worth mentioning that Stephenson and Schennink, in their article in TOP of June 2021, wanted to provide further explanation of the concepts of damages in takeover practice.[82] They conclude that it is advisable to define the concepts of damages included in the SPA as accurately and exhaustively as possible in order to avoid the risk of future ambiguities and discussions. [83]

10. MISCELLANEOUS: DISPUTES

The retention of key personnel with a phased share transfer is regularly agreed in takeovers in order to maintain the value of the acquired company. This construction also led to disputes in 2021. At the beginning of 2021, the court of appeal in 's-Hertogenbosch ruled in a takeover dispute about the qualification of Bad or Good leaver of important key persons (as well as selling shareholders in case of phased share transfer with phased purchase price determination and payment).[84]

Phased payment of the purchase price with subsequent payment by means of earn-out upon good performance of the target also regularly leads to disputes. It is interesting in this context that in a judgment of 4 May 2021, the North Holland District Court ruled in an acquisition dispute concerning earn-out/remaining purchase price on a defense of inadmissibility concerning non-compliance with the mediation clause. The court considered the mere circumstance that the parties waited for each other (and therefore did not agree on the mediator) sufficient to rule that the claimant's claim before the court was admissible, despite the mediation clause.

With regard to internal approval and infringement of (takeover) transactions of private equity parties, the article by Sinninghe Damsté and Van Holthe tot Echten is also relevant. It concerns the broader concept of conflicting interests that now seems to have come to maturity in case law at the Commercial Chamber. This concept is broader than the statutory concept (Section 2:129/239 subsection 6 BW), as already became clear from the Linders/Hofstee rules. A purely personal element is not required by definition. What is required is that the 'other' interest does not run parallel to the

[80] See R.P.J.L. Tjittes, Remedies bij inbreuken op garanties in overna- mecontracten, Contracteren 2016, afl. 4, p. 106-114; M. Uijen, Schade- berekening bij overnames, Contracteren 2004, afl. 4, p. 103; R.G.J. de Haan in his note (under 4) with Court of 's-Hertogenbosch 28 May 2008, ECLI:NL:RBSHE:2008:BD2879, JOR 2008/224 (Souverein/Lam-mers).

[81] Court of Rotterdam 14 April 2021, ECLI:NL:RBROT:2021:3289.

[82] Mr. S.V. Stephenson, mr. A. Schennink, 'Uitleg van schadebegrippen in de overnamepraktijk', *TOP nr4*, juni 2021.

[83] Court of Rotterdam 14 April 2021, ECLI:NL:RBROT:2021:3289, *RCR 2022/9.*

[84] Court of Appeal 's-Hertogenbosch 23 February 2021, ECLI:NL:GHSHE:2021:534.

corporate interest. If there is a conflicting interest, an increased standard of care applies. Directors and commissioners who have (substantial) financial interests in a transaction, not uncommon in private equity practice because they usually co-invest with the private equity fund, would be wise to always take this increased standard of care into account in their actions.[85]

Eikelboom also points to the rules for related party transactions of listed companies.[86]

11. LASTLY

In 2021, the Courts of Appeal certainly did not stand still in M&A disputes. There have been some interesting legal developments in the full breadth of takeover disputes for large and small takeovers. In larger transactions, the textual explanation is more often rightly followed, in accordance with Lundiform/Mexx, but the Haviltex standard naturally continues to prevail, especially in court rulings. In addition, in larger transactions the professional buyer is treated more critically with respect to his own responsibility for the investigation and contractual risk allocation. This is also expressed in the fatal character of possible claims by the buyer in the event that specific complaint periods in the purchase agreement are exceeded.

[85] M.H.C. Sinninghe Damsté, A.M.J. Van Holthe tot Echten 'Linders/Hofsstee, PCM en Estro – De ontwikkelingen op het gebied van tegenstrijdig belang in de context van de private equity-praktijk, *Top nr. 3*, mei 20221.

[86] F. Eikelboom, Nieuwe regels voor related party transactions: papieren tijger, of olifant in porceleinkast, *Ondernemingsrecht 2021/107.*