CHRONICLE ON DUTCH M&A DISPUTES IN THE YEAR 2022

This chronicle provides an overview of relevant developments in M&A disputes in the year 2022, including published case law and literature. This chronicle provides a categorised overview of disputes concerning all aspects of the takeover process, such as breaking off negotiations, the interpretation of the agreement, warranties, purchase price, earn-out arrangements and post-contractual (penalty) clauses.

1 Introduction: general M&A market developments and disputes

After two stressful years marked by the Corona virus, the M&A market became active once again in 2022.[1] However, uncertain factors such as the war in Ukraine and rising inflation and interest rates, in addition to the aftermath of the Corona crisis, have had (and continue to have) a dampening effect on the M&A market. These factors are expected to materialise, among other things, in disputes in the areas of earn-out and (the back payment of the) purchase price in the coming years.[2] Of course, this is not yet directly reflected in this chronicle.

Deals in Europe in 2022 were characterised, among other things, by a sharp decrease in the use of Material Adverse Change clauses,[3] in contrast to the (Corona crisis) year 2021, where there was, on the contrary, a focus on such clauses.[4] In addition, we see that the use of earn-outs continues to increase.[5] This is an interesting fact for litigation practice, given that proceedings following an acquisition regularly revolve around the earn-out and its calculation.[6] Furthermore, Warranty & Indemnity (W&I) insurance (especially for larger transactions) is gaining in popularity.[7] This insurance will undoubtedly have a major impact on M&A disputes in the coming years, as it affects the traditional relationships between a purchaser and a seller. After all, the risk allocation changes once a transaction becomes W&I insured, which means the purchaser is more likely (or required) to seek recourse at the insurer. It will be interesting to see how these developments with regard to current transactions will affect the M&A disputes of the future.

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[1] This chronicle is a sequel to B.A. de Ruijter & B. Jakic, Overnamegeschillen in tijden van (corona)crisis, in: J. van Bekkum et al. (ed.), Geschriften vanwege de Vereniging Corporate Litigation 2020-2021 (VDHI no. 172), Deventer: Wolters Kluwer 2021, pp. 221-246 and B.A. de Ruijter & D. Glazener, Kroniek overnamegeschillen in coronajaar 2021, MvO, issue 5-6, pp. 125-136.

[2] See the M&A Disputes Report 2022 of the Berkeley Research Group, p. 6.

[3] CMS European M&A Study 2023.

[4] CMS European M&A Study 2022.

[5] This is particularly true for the Benelux and the Nordics, see CMS European M&A Study 2023, p. 16.

[6] See e.g., Gelderland District Court 7 December 2022, ECLI:NL:RBGEL:2022:6552, Midden-Nederland District Court 9 March 2022, ECLI:NL:RBMNE:2022:922 and 's-Hertogenbosch Court of Appeal 7 June 2022, ECLI:NL:GHSHE:2022:1793. For this, see also A.J. Rijsterborgh, Geschillen over earn-outs vanuit procesrechtelijk perspectief, MvV 2022, issue 11, pp. 369-376.

[7] CMS European M&A Study 2023; for a further explanation of the W&I insurance, see L.P. Keijzer, A.C. Wijdeveld & R. van 't Wout, W&I insurance, an established and evolving part of the M&A toolbox – some observations from practice, TOP 2022/324.

Now back to M&A disputes in the year 2022. Whereas in 2021 we saw many judgments across the board in M&A disputes covering all aspects of the takeover process, in 2022 we see a particular emphasis on disputes concerning the formation and interpretation of purchase agreements. Over a third of the published decisions concerned a discussion regarding the formation of the agreement. Changing market conditions are often a reason to get out from under a deal. We see that Supreme Court case law is always consistently applied in lower courts, resulting in a certain degree of convergence in those lower courts. That is good for legal certainty.

Table 1 shows that in 2022, there are twice as many decisions on M&A disputes in the Netherlands rendered by the district courts than by the courts of appeal. This seems to indicate that many disputes have been resolved after being heard at first instance. Research shows that worldwide, almost 75% of M&A disputes are even settled before proceedings have been initiated.[8] Furthermore, we see that the published judgments mainly concern relatively small M&A disputes. This is logical because in many larger takeovers, due to the desired confidentiality and enforceability in an international context, arbitration is opted for as a dispute resolution mechanism.

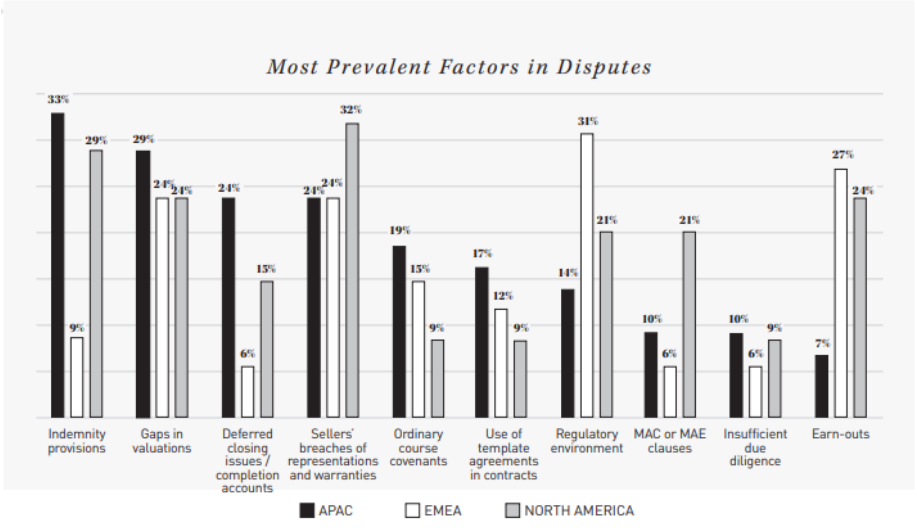
Table 1 An overview of published M&A disputes in 2022 in figures

Court of appeal judgments	13
District court judgments	24
Total:	**37**

Purchase price < 5 million	25
Purchase price 5 - 15 million	7
Purchase price > 15 million	5

Figure 1 shows that in the year 2022, earn-outs and warranty breaches played a major role in M&A disputes in the EMEA region (Europe, Middle East and Africa).[9] In particular, we already see warranty breaches recurring regularly as a subject of dispute in the Netherlands and, as mentioned, this is expected to happen for earn-outs as well.

Figure 1 An overview of the main causes of M&A disputes



[8] M&A Disputes Report 2022 of the Berkeley Research Group, p. 28.
[9] This figure originates from the M&A Disputes Report 2022 of the Berkeley Research Group, p. 23.

This chronicle will discuss all stages of the M&A process covered this year, with the aid of the following categories: the formation of the agreement and breaking off negotiations (Section 2), interpretation disputes in purchase agreements (Section 3), the earn-out (Section 4), warranty breaches and the limitation of liability (Section 5), error and deceit (Section 6), and post-contractual obligations and mitigation of the penalty clause (Section 7).

2 Formation of agreement and breaking off negotiations

Over a third of the published M&A case law dealt with the question of whether an agreement had already been formed, or the parties could still walk away from the negotiating table without any obligation towards the other party.

This preliminary phase is always governed by reasonableness and fairness. It follows from the Baris/Riezenkamp judgment that parties must mutually take into account each other's interests in the pre-contractual phase.[10] In some cases, this may mean that it is unlawful to break off negotiations. The leading judgment for answering the question of whether negotiations can be broken off without further obligations is CBB/JPO.[11] It follows that the additional effect of the principle of reasonableness and fairness may imply that the loss may consist of negotiation costs (negative contractual interest) and even lost profit or revenue (positive contractual interest). Here, the starting point is that a strict standard must be applied with restraint to assess whether breaking off negotiations is unacceptable. Compensation for the positive contractual interest requires that (a) the other party, due to the actions of the terminating party, has a legitimate expectation at the time of breaking off negotiations that an agreement will be reached, or (b) there are other circumstances that make breaking off unacceptable.[12]

In 2022, as in 2021, we see almost every judgment in the area of aborted negotiations correctly applying the CBB/JPO standard based on the facts and circumstances of the case. The relatively large number of judgments in this chronicle year on this issue, from both district courts and courts of appeal, underscores the principled nature and importance of parties being able to get out of the deal. The judgments handed down this year in this regard can roughly be divided into the following topics, which we will discuss below: reservations and expectation that an agreement will be concluded (Section 2.1), agreement on main points (Section 2.2) and the binding nature of the letter of intent (Section 2.3).

2.1 Reservations and expectation that an agreement will be concluded

The moment of signing is important in share purchase agreements, as it shows that there is final agreement from the parties' management. Under the freedom of contract, it is possible to stipulate that an agreement will only be concluded when the parties agree on all parts of the agreement ('subject to contract') and/or the written agreement has been signed ('subject to signature'). There is no definite meaning of this according to the Haviltex standard.[13] This reservation prevents reliance on the formation of a contract if such a condition is not fulfilled. Nevertheless, the question may arise whether pre-contractual liability arises for costs incurred. Indeed, liability for costs is not linked to the expectation that an agreement will be concluded, but is claimed with reference to the principle of reasonableness and fairness. However, the starting point here is that, unless otherwise agreed, parties negotiate at their own risk and expense.[14]

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[10] Supreme Court 15 November 1957, ECLI:NL:HR:1957:AG2023 (Baris/Riezenkamp).
[11] Supreme Court 12 August 2005, ECLI:NL:HR:2005:AT7337 (CBB/JPO).
[12] R.J. Tjittes, Commercieel contractenrecht, The Hague: Boom juridisch 2022, p. 62 et seq.
[13] Tjittes 2022, p. 138.
[14] See also GS Verbintenissenrecht (Blei Weissmann), art. 6:217-227 Dutch Civil Code, I.1, note 118; Tjittes 2022, p. 134.

The TMF judgment of the Amsterdam Court of Appeal of September 2022 focused on the possibility of breaking off lengthy negotiations and possible liability for loss (of profits or costs incurred) in the event of a 'subject to contract' reservation. TMF had included this reservation in its unilateral Indicative Offer. In this case, TMF broke off negotiations with the Exterus Group after a long trajectory with significant costs, without the reason for breaking off being with the Exterus Group. During this process, TMF also talked to a direct competitor of the Exterus Group. TMF was of the opinion that it was free to break off negotiations (without good reason) because it had clearly expressed a 'subject to contract' reservation in its Indicative Offer. The Exclusivity Letter had subsequently provided that parties were not bound to an offer until 'binding agreements are duly entered into'. Now that no purchase agreement was signed, it must be assumed - in view of that reservation - that no purchase agreement was entered into, even though this reservation was unilateral and not signed by the other party. The Court of Appeal allowed the reliance on the reservations. Thus, not entirely surprisingly as far as we are concerned,[15] the Court of Appeal came to the conclusion: no signature means no formation of the agreement.

Despite the recorded reservations, the Court of Appeal ruled strictly on the substantial negotiation costs incurred in view of the specific circumstances of the case (such as the protracted negotiations, breaking off without the reason being with the target itself and talking to a direct competitor of the target about possible other takeovers). The Court of Appeal ruled that these negotiation costs should indeed be reimbursed.

The TMF judgment makes it clear that including reservations is not sufficient to break off negotiations without consequences, which is aptly referred to by annotator Standhardt as being 'home free' when breaking-off. Standhardt believes that parties would be well advised to establish in the pre-contractual phase whether negotiation costs are to be reimbursed if negotiations are broken off.[16] We endorse this recommendation if parties want certainty in the unpredictable pre-contractual phase.

In its judgment of 13 December 2022, the Amsterdam Court of Appeal also confirmed that negotiating by the relevant terminating party with the reservation 'subject to signature' cannot lead to an expectation that an agreement will be concluded by the other party, McKinley.[17] The Court of Appeal explicitly refers to CBB/JPO.

Interestingly, McKinley invoked an unlawful act or more specifically an abuse of authority by a certain individual director by not signing the purchase agreement, even though a management decision to sign the agreement was already in place. According to the Court of Appeal, insufficient arguments had been put forward for a finding that a valid management decision had been made, as held by McKinley. But even if it is to be assumed that such a management decision had been made, it is a decision that concerns the internal legal order and, without further explanation, there was no unlawful act. According to the Court of Appeal, the parties are free to break off negotiations at any stage at their own discretion, but there may be an abuse of circumstances under exceptional circumstances. Not enough had been argued for this. In the circumstances, the director in question was entitled to ask justified questions about the transaction before signing.

2.2 Agreement on key points

[15] In this respect, we agree with G.J. Standhardt in her note to this judgment (para 10) with reference to Supreme Court 1 March 2013, ECLI:NL:HR:2013:BY6755 (Greenib).
[16] Amsterdam Court of Appeal 6 September 2022, ECLI:NL:GHAMS:2022:2622, JOR 2023/54 with commentary by G.J. Standhardt.
[17] Amsterdam Court of Appeal 13 December 2022, ECLI:NL:GHAMS:2022:3537, grounds 4.5-4.7.

According to the Haviltex standard, if no clear reservations were made in the negotiation phase, it depends on the mutual statements, conduct and the circumstances of the case whether there is an agreement.[18] There may also be an agreement on key points (essential points) or a framework agreement, depending on the parties' intentions. In determining the parties' intentions, according to the leading judgment Regiopolitie/Hovax,[19] relevant factors include:

1. the meaning of what is and is not arranged;
2. whether or not there is an intention to negotiate further; and
3. what must be assumed from the further circumstances of the case.

The nature and scope of the (intended) agreement should also be taken into account when assessing whether an agreement has been reached on essential elements. The general line in this year's case law is that the bar is high for assuming an agreement on key points between major professional parties, if it has not yet been signed.[20]

Noteworthy is the 10 May 2022 judgment of the 's-Hertogenbosch Court of Appeal. Therein, the Court of Appeal ruled on the question of whether a Share Purchase Agreement (SPA) had been formed, despite not being signed.[21] The Court of Appeal stated first and foremost that the question of whether an agreement was concluded at any time, as the sellers argue and the purchasers dispute, must be answered using the Haviltex standard.[22] In the Court of Appeal's view, no agreement was formed because the sellers had to understand that the outcome of the due diligence could affect the purchase price included in the draft agreement. The sellers had to reasonably understand that if the due diligence did not confirm the purchasers' view, this could affect whether or not the agreement would be concluded on the basis of the purchase price included in the draft agreement at that time.[23]

The question then arises as to whether, after the preliminary draft was sent, the purchasers were entitled to assume that their response to it had led to the formation of a purchase agreement. The purchasers made it known that the due diligence had not yet been completed. The sellers knew that the purchasers were still gathering information for the purpose of the due diligence up until a few days before sending the preliminary draft. On top of that, the purchasers had not provided any feedback on the due diligence prior to sending the preliminary draft. It is also significant that the top of the document states 'for discussion purposes only' and that the accompanying email states that there may still be adjustments as the preliminary draft had not yet been reviewed by the directors.[24] Based on the above, according to the Court of Appeal, the seller did not have the legitimate expectation that an agreement had been formed. This judgment is understandable given the usual practice in M&A transactions on this point.

The Hague Court of Appeal similarly ruled in early 2022 on the oral agreement in outline as regards a provisional purchase agreement.[25] In this case, the parties had entered into discussions on the terms of a possible purchase and sale of shares. As part of this process, the purchaser sent a preliminary purchase agreement to the accountant of the defendants. The preliminary purchase agreement stated

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[18] Supreme Court 13 March 1981, ECLI:NL:HR:1981:AG4158 (Ermes/Haviltex).
[19] Supreme Court 26 September 2003, ECLI:NL:HR:2003:AF9414, NJ 2004/460.
[20] Overijssel District Court 14 December 2022, ECLI:NL:RBOVE:2022:4026, ground 8.1. A similar consideration can be found in e.g., Amsterdam District Court 11 May 2022, ECLI:NL:RBAMS:2022:4838, grounds 5.9-5.11.
[21] 's-Hertogenbosch Court of Appeal 10 May 2022, ECLI:NL:GHSHE:2022:1467, RCR 2022/71.
[22] 's-Hertogenbosch Court of Appeal 10 May 2022, ECLI:NL:GHSHE:2022:1467, ground 3.24.
[23] 's-Hertogenbosch Court of Appeal 10 May 2022, ECLI:NL:GHSHE:2022:1467, ground 3.26.
[24] 's-Hertogenbosch Court of Appeal 10 May 2022, ECLI:NL:GHSHE:2022:1467, ground 3.28.
[25] The Hague Court of Appeal 22 February 2022, ECLI:NL:GHDHA:2022:301, RCR 2022/40, with notes by F. Lambert.

(among other things) that the parties had reached agreement in outline that "the seller will grant the purchaser a purchase option for all shares in the company" and that "the parties will enter into further consultations to elaborate the further conditions (...) of the aforementioned agreements as soon as possible". Shortly after receiving the preliminary purchase agreement, the seller communicated that the 'deal' was not going ahead.

In these proceedings, the seller invoked a circumstance, which was not mentioned during the negotiations, having to do with the mechanism of a purchase option as a reason for breaking off negotiations.

The Court of Appeal adopted a strict approach and, rightly, set the bar high for the expectation that an agreement was concluded before signing. The purchaser was not entitled to rely on the fact that during any of the negotiation talks, the seller wanted to commit to what it had discussed in outline with the purchaser, without further elaboration in a draft purchase agreement, which still needed further legal and tax review, comment and discussion. The mere fact that during the discussion between the purchaser and the seller there was agreement on the amount of the purchase price of the shares to be transferred is insufficient to assume that the seller had accepted a concrete offer by the purchaser to take over the shares. While the purchase price is one of the essential elements of a purchase agreement, it is not the only condition or essential condition for consensus: as long as there was no agreement on the other terms of the transaction, there was no complete purchase agreement.

In his notes, Lambert rightly comments that circumstances not mentioned in the negotiations can also be an essential point that can stand in the way of the expectation that an agreement will be concluded.[26] Of course, this does not necessarily mean that there is no obligation to pay compensation for the costs incurred.

2.3 The binding nature of a Letter of Intent

This chronicle year has also seen further case law on the proposition that a Letter of Intent (LOI) or Memorandum of Understanding was of such a binding nature that there was a legitimate expectation of formation of a purchase agreement. This is an uphill battle.

In a November 2022 judgment[27], the Limburg District Court made short work of the binding nature of the LOI in the situation where the seller sent a draft purchase agreement that deviated from the LOI. According to the District Court, the LOI did not qualify as a share purchase agreement. The parties agreed with each other in the LOI that they would only explore whether the transaction was desirable and feasible. Only following closing, which required final agreement between the parties on all transaction elements and conditions, would an agreement be formed. Although the parties had agreed on price and delivery principles in the LOI, that did not constitute a purchase agreement.

The Oost-Brabant District Court reached a similar judgment in preliminary relief proceedings on compliance with a sales memorandum regarding the sale of the Veldhoven Zoo.[28] In that case, the signed memorandum of sale included that the provisions of that agreement would serve as a basis for the agreement to be concluded. The fact that a certain basis was laid did not mean that no further elaboration was required. Moreover, it was expressly stated that the provisions provided the basis for the 'final purchase agreement'. This also showed that there was no 'final purchase agreement' in respect of the entire zoo and accessories at that time. By signing the preliminary agreement, the parties did

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[26] The Hague Court of Appeal 22 February 2022, ECLI:NL:GHDHA:2022:301, RCR 2022/40, with notes by F. Lambert.
[27] Limburg District Court 23 November 2022, ECLI:NL:RBLIM:2022:9424.
[28] Oost-Brabant District Court 20 July 2022, ECLI:NL:RBOBR:2022:2961, RVR 2022/74.

commit to each other, but in the opinion of the Court in preliminary relief proceedings this commitment did not go beyond an obligation to negotiate with each other in order to arrive at a purchase agreement that both parties had in mind according to the preliminary agreement.

3 Interpretation disputes in purchase agreements

In M&A disputes, the Haviltex standard is invariably key. Here, the parties' intentions in view of mutual statements and conduct play a major role. In principle, all circumstances are important for interpretation.[29] In M&A disputes, however, there is more emphasis on objective textual interpretation, as takeovers are almost always intensively negotiated by professional parties, assisted by expert advisers.[30] In a case of objective interpretation, (a) the text of the clause is read in (b) the context of the entire agreement, where (c) consideration is also given to the knowable purport of the relevant clause and (d) the plausibility of the interpretation.[31]

A judgment of the Amsterdam District Court of 2 March 2022, on an interpretation dispute regarding the breach of warranties regarding a takeover, is illustrative of the interpretation method according to the above-mentioned framework.[32] The District Court applied the 'Haviltex' standard,[33] but gave 'great weight to the wording of the agreement', because the parties involved were professionals who arranged their legal relationship in detail. Therefore the text of the provision was taken as the starting point. It was then interpreted in relation to other provisions, draft versions and the earlier letter of intent. It was then assessed in terms of its scope and, finally, the plausibility of the interpretation.

In an interpretation dispute before the Amsterdam Court of Appeal regarding a small takeover of a day-care centre, the Court of Appeal is clear: when a party argues that a certain contractual provision regarding the takeover of staff does not reflect the agreements between the parties, the text of the purchase agreement forms the starting point for interpretation and, in addition, the circumstances of the case can be used to see whether a different intention might be inferred.[34]

If there is an interpretation clause that says that the text of the purchase agreement prevails, then, according to the Arnhem-Leeuwarden Court of Appeal, there is reason to attribute even great significance to the text of the provision.[35] In those circumstances, according to the Court of Appeal, it can be assumed that the text of the contract carefully and correctly reflects the intention of the parties.[36] It follows from case law that if an agreement is not reasonably susceptible to more than one interpretation, the court may decide the case accordingly.[37]

The Amsterdam District Court, in an interpretation dispute involving an SPA about whether a certain brand name also belongs to a takeover when this is not literally stated in the SPA, also applied the Haviltex interpretation. The District Court emphasised that this was a commercial transaction, in which both parties were assisted by a lawyer.[38] In this case, the District Court took the textual

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[29] Supreme Court 13 March 1981, ECLI:NL:HR:1981:AG4158 (Ermes/Haviltex).
[30] The primacy of textual interpretation in the interpretation of commercial contracts (including, therefore, SPAs) is evidenced, inter alia, by Supreme Court 19 January 2007, ECLI:NL:HR:2007:AZ3178 (Meyer/Pont Meyer).
[31] Tjittes 2022, pp. 325 et seq.
[32] Amsterdam District Court 2 March 2022, ECLI:NL:RBAMS:2022:1495.
[33] Amsterdam District Court 2 March 2022, ECLI:NL:RBAMS:2022:1495, ground 4.7.
[34] Amsterdam Court of Appeal 5 July 2022, ECLI:NL:GHAMS:2022:1954, ground 3.6.
[35] Meanwhile, the Supreme Court has even ruled that the Haviltex standard may be contractually excluded (Supreme Court 25 August 2023, ECLI:NL:HR:2023:1131).
[36] Arnhem-Leeuwarden Court of Appeal 11 January 2022, ECLI:NL:GHARL:2022:162, RCR 2022/29.
[37] See e.g., Supreme Court 9 September 1994, ECLI:NL:HR:1994:ZC1436, NJ 1995/285 (Trouwborst/Tollenaar & Wegener).
[38] Amsterdam District Court 17 August 2022, ECLI:NL:RBAMS:2022:4801, ground 4.5.

interpretation as a starting point. It noted that the SPA mentions only the brand name 'ATC' and not the brand 'Air Trade Centre'.[39] However, the further circumstances were ultimately the deciding factor for the District Court to nevertheless award the claim. According to the District Court, it was hardly conceivable that the domain name containing the written-out name 'Air Trade Centre' would be transferred to the purchaser, while someone else possessed the *brand name* 'Air Trade Centre'. The District Court therefore concluded that the purchaser could reasonably assume that the brand name 'ATC' to be transferred included the brand name 'Air Trade Centre'. This is a good example where the facts and circumstances outweigh the textual interpretation, even though it is a commercial transaction involving professional parties and advisers.

3.1 Purchase price disputes

In 2022, we see several interpretation disputes regarding determination of the purchase price and the earn-out. According to a judgment of the Arnhem-Leeuwarden Court of Appeal[40] concerning a dispute about an agreed purchase price for shares, the party's intention pursuant to Haviltex remains leading, even if the notarial deed of transfer reflects a different, incorrect purchase price (due to an error by the adviser). In principle, a notarial deed has compulsory evidential force under Section 157(1) Dutch Code of Civil Procedure, but evidence to the contrary can be provided under Section 151(2) Dutch Code of Civil Procedure. The party in question succeeded in this, inter alia by demonstrating other facts, making known the intention of the parties and explaining the plausibility, but also by explaining how the acquisition was carried out.

Noteworthy in this context is a judgment of the Midden-Nederland District Court on the interpretation of a clause from the purchase agreement on the determination of the (final) purchase price for the shares.[41] The purchaser was to pay a purchase price based on the normalised EBITDA of the target on a cash and debt free basis as of 31 December 2018. Despite the fact that the text of the SPA contained an appendix with the calculation of EBITDA, with a limited number of normalisation items (textual), the District Court looked more broadly at the EBITDA based on the parties' intent and plausible interpretation in that regard. In doing so, the District Court considered the provisions in the SPA, the relevant correspondence by the parties and the provisions in the previously concluded Memorandum of Understanding.[42]

In the judgment of 30 May 2022, the same Midden-Nederland District Court expressly emphasised, when interpreting a settlement clause in a deed of transfer that was related to an earn-out payment in a purchase agreement, that the Haviltex standard applies in the case of a commercial agreement between professional parties who have obtained advice.[43] As regards the interpretation, the District Court first addressed the linguistic meaning, and then discussed subsequent statements and conduct evidencing the intention of the parties. The District Court concluded by assessing the plausibility of the interpretation advocated by the claimant as follows: "the more unusual the result of a particular interpretation is, or leads to an illogical or incongruous outcome, the less likely [it is] (...) that said interpretation corresponds to what the parties intended when entering into the agreement".[44]

4 Earn-out

[39] Amsterdam District Court 17 August 2022, ECLI:NL:RBAMS:2022:4801, ground 4.6.1.
[40] Arnhem-Leeuwarden Court of Appeal 3 May 2022, ECLI:NL:GHARL:2022:3527.
[41] Midden-Nederland District Court 6 July 2022, ECLI:NL:RBMNE:2022:2677.
[42] For the different purchase price mechanisms, see e.g., J.A.E.F. van Leeuwen Boomkamp, Koopprijsmechanismes in overnamecontracten: een vergelijkend overzicht, Ondernemingsrecht 2019/22.
[43] Midden-Nederland District Court 30 May 2022, ECLI:NL:RBMNE:2022:2197, ground 3.3 with reference to Supreme Court 5 April 2013, ECLI:NL:HR:2013:BY8101 (Lundiform/Mexx).
[44] Midden-Nederland District Court 30 May 2022, ECLI:NL:RBMNE:2022:2197, grounds 3.12-3.14.

As mentioned in the introduction, earn-out provisions are becoming ever more prevalent in M&A transactions. We therefore expect that this provision will increasingly be the subject of dispute.[45] This chronicle year, several judgments have been published regarding earn-out-related disputes.[46] For instance, we have already discussed a judgment that specifically focused on the interpretation of the wording of a settlement clause in a deed of transfer related to the earn-out payment.[47] Also, an interesting article was published in the chronicle year by Rijsterborgh on earn-out disputes from a litigation perspective.[48]

In practice, an 'earn-out' (it is not a well-defined civil law concept) refers to a contractual arrangement under which the purchaser of a company owes part of the purchase price only after one or more agreed results have been achieved on time. An earn-out provision allows parties, during their negotiations on a potential transaction, to bridge differences of opinion on the valuation of the target company. Here, uncertainties regarding future financial and non-financial events surrounding the target company are linked to a portion of the purchase price.[49] Thereby, the purpose of an earn-out is often to retain individuals whose commitment is an important factor for the success of the company.[50] If the earn-out results are not achieved, this means that the seller does not receive the linked payment (and the purchaser therefore does not have to pay it). In case of an earn-out, the interests of the parties are therefore not entirely parallel and therefore this can give rise to disputes. These disputes will mostly concern whether the earn-out results have been achieved, but also whether the purchaser has prevented the achievement of those results or has made sufficient efforts.[51] In this context, the seller has the obligation to provide facts and proof. Of course, this is a difficult task, especially if the best-efforts obligation is not specifically formulated on the basis of targets.

4.1 Best-efforts obligation earn-out

An example of this in the chronicle year is the judgment of the Midden-Nederland District Court of 9 March 2022. The dispute centred on the interpretation of a best-efforts obligation in the earn-out arrangement, according to which the purchaser was not allowed to partially cease certain sales activities, on pain of a penalty.[52] The District Court dismissed the seller's claims, using the Haviltex standard.[53] The best-efforts provision did not clearly state what "partial discontinuation" should entail. In the District Court's opinion, partial discontinuation existed if the purchaser reduced the efforts needed to sell or be able to sell the products to such an extent that the seller's interest in the highest possible earn-out is frustrated. In assessing this, the requirements of reasonableness and fairness come into play. Ultimately, the conclusion was that the purchaser had not reduced the efforts needed to sell the products in 2019 to such an extent that the seller's interest in the highest possible earn-out was frustrated. Consequentially, the purchaser had not partially discontinued operations, so the seller's claims were dismissed.

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[45] See also M&A Disputes Report 2022 of the Berkeley Research Group, p. 28.
[46] See 's-Hertogenbosch Court of Appeal 6 September 2022, ECLI:NL:GHSHE:2022:3089, Midden-Nederland District Court 9 March 2022, ECLI:NL:RBMNE:2022:922, Midden-Nederland District Court 30 May 2022, ECLI:NL:RBMNE:2022:2197 and Amsterdam District Court 2 February 2022, ECLI:NL:RBAMS:2022:717.
[47] Midden-Nederland District Court 30 May 2022, ECLI:NL:RBMNE:2022:2197.
[48] Rijsterborgh 2022.
[49] Rijsterborgh 2022, sections 1 and 2.
[50] R. Tarlavski & M. Feenstra, European M&A Study 2022 – lockdowns en locked boxes, Contracteren 2022, issue 4, section 5.1 with reference to M.W.E. Evers & G.J.P. Freijser, Aspecten van earn-outs, TOP 2009, issue 8, pp. 291-295.
[51] Rijsterborgh 2022, section 3.
[52] Midden-Nederland District Court 9 March 2022, ECLI:NL:RBMNE:2022:922.
[53] Midden-Nederland District Court 9 March 2022, ECLI:NL:RBMNE:2022:922, grounds 3.2-3.3. For the application of the Haviltex standard to an earn-out provision, see also Supreme Court 18 November 2011, ECLI:NL:HR:2011:BS1706, RvdW 2011/1422, ground 3.3.2.

4.2 Impact of Corona crisis on earn-out

Interestingly, judgment was also rendered this chronicle year by the Amsterdam District Court in a dispute between large professional parties concerning, among other things, the earn-out in light of the Corona crisis in a purchase agreement concerning a hotel.[54] The purchasers claimed that the consequences of the Corona crisis should be borne 50/50 because the Corona crisis materialised during the earn-out period and this was not foreseen when the agreement was formed. They claimed amendment of the purchase agreement on the grounds of unforeseen circumstances pursuant to Section 6:258 Dutch Civil Code. Indeed, strict compliance with the earn-out provision would lead to the unreasonable result that the consequences of the Corona crisis would have to be borne entirely by the purchasers. The District Court showed no mercy for this extreme situation. The parties, after extensive negotiations, with the assistance of lawyers, had agreed on a clear allocation of risk in the purchase agreement. They did not limit this in any way. Under these circumstances, according to standards of reasonableness and fairness, there are no grounds for amending the agreement or ordering the seller to renegotiate with the purchasers on payment of the earn-out.

5 Warranty breaches and limitation of liability

One of the most important parts of the SPA is the warranty schedule. The purpose of this set of warranties is to provide certainty about the conformity of the entity being acquired. Not surprisingly, the alleged breach of warranties is a subject of much litigation, so too in 2022.[55]

As stated in the introduction, it will be interesting to see how the increase in the use of W&I insurance will affect warranty breaches in M&A disputes. The W&I insurer effectively takes over the risks or part of the risks related to the breach of warranties in the SPA, usually to achieve a 'clean exit' for the seller.[56] This means that, in case of a warranty breach, a purchaser will in principle have to file a claim with the insurer and not with the seller. So, we will increasingly start to see that courts will refer a claimant to the next (or previous) party in the chain: the insurer.[57] It should be noted here that parties will probably often turn to the insurer in the first instance, before going to court to seek compensation for loss.[58]

5.1 Duty to disclose versus duty to investigate

When warranties are breached, a tension exists between the duty to disclose and the duty to investigate. The duty of disclosure is often secured by an information warranty or a contractual duty of disclosure. In the absence of a contractual deviation, the duty to disclose should in principle weigh more heavily, but in the case of professional purchasers assisted by expert advisers, the bar for the duty to investigate is high, especially if certain information provided should have prompted a red flag. Of course, this always depends on the way the agreement is structured.

In this context, the judgment of the Midden-Nederland District Court regarding the tension between the duty to disclose and the duty to investigate (in the context of a dispute about an incorrectly estimated item 'work in progress' on the takeover balance sheet) is interesting:

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[54] Amsterdam District Court 2 February 2022, ECLI:NL:RBAMS:2022:717.
[55] See, e.g., Gelderland District Court 20 April 2022, ECLI:NL:RBGEL:2022:1985; as mentioned in the introduction, this is also an issue in the international context (M&A Disputes Report 2022 of the Berkeley Research Group, p. 23).
[56] Keijzer, Wijdeveld & Van 't Wout 2022.
[57] We also see this e.g., in Midden-Nederland District Court 6 July 2022, ECLI:NL:RBMNE:2022:2633. This judgment is discussed later in the chronicle.
[58] That parties know how to find their way to the insurer is also evidenced by the Transactional Risk Global Claims Report 2022 of insurance intermediary Marsh: 'Claim notifications increased five-fold in the period 2017-2020, a consistent year-over-year increase in claim notifications from 2017 to 2020.'

> "The scope of the duty to disclose depends on the circumstances of the case. The existence of a duty to disclose presupposes (i) that the other party knew the correct state of affairs and (ii) it was knowable to it that the item in question was important to the other party, while (iii) it had to take into account that the other party did not know the fact and (iv) it ought to have informed the other party according to currently prevailing opinion."[59]

Invoking the breach of an information warranty in the context of a provided takeover balance sheet is often an uphill battle, especially in the absence of concrete agreements on the applicable accounting guidelines.[60]

5.2 Warranty reference date

An important point in the breach of a warranty is the reference date of the warranty. Warranties are usually linked to the moment of the signing of the purchase agreement. They are also frequently repeated at closing (time of transfer of shares). This means that a circumstance materialising after that reference date is at the purchaser's risk and expense. If there is evidence that the seller already knew that this circumstance would materialise before or on the reference date, there may be a breach of the information warranty.

The Hague Court of Appeal issued a judgment on this very issue in the summer of 2022.[61] After signing of the SPA, two demands for the payment of service charge had been received. A claim was made under a warranty and, in the alternative, the information warranty was invoked. The Court of Appeal considered that the warranties in the purchase agreement were issued at the time of formation of the purchase agreement and, in the absence of a clause to the contrary in the purchase agreement, they refer to the situation as it was at the time of concluding the purchase agreement. Thus, the question to be answered was whether the warranties issued were correct at the time of formation of the purchase agreement (the reference date). The Court of Appeal concluded that the warranties at issue in the dispute dated from after the purchase agreement was entered into and that it had not been stated or shown that the seller was aware of the corresponding invoices at the time the purchase agreement was entered into. This means that the seller did not have actual knowledge of the relevant invoices at the time the purchase agreement was entered into (which is necessary for reliance on this warranty).[62] An interesting observation in Ensink's notes is that the shares were transferred only after the date of the demand. Warranties are regularly 'repeated' at closing. This repetition of warrants might have provided relief to the purchaser. Another point touched upon in this note is the difficult position of proof a purchaser sometimes finds himself in. How are you going to prove that the seller did (secretly) know about such invoices? This issue comes up in several judgments.

The ’s-Hertogenbosch Court of Appeal delivered judgment in an M&A dispute in which the central issue was also whether warranties had been breached.[63] This judgment also shows how difficult a purchaser's evidentiary position can be. In essence, this case concerns the question of whether the seller breached warranties included in the purchase agreement by not sharing with the purchaser the knowledge he had prior to the conclusion of the purchase agreement about developments at two customers and the related decline in the deployment of traffic controllers. In these proceedings, the Court of Appeal could not establish with a sufficient degree of certainty the correctness of the

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[59] Midden-Nederland District Court 1 June 2022, ECLI:NL:RBMNE:2022:3250, grounds 4.10.
[60] Amsterdam Court of Appeal 17 May 2022, ECLI:NL:GHAMS:2022:1466.
[61] The Hague Court of Appeal19 July 2022, ECLI:NL:GHDHA:2022:1706, JIN 2022/165 with commentary by T. Ensink.
[62] The Hague Court of Appeal19 July 2022, ECLI:NL:GHDHA:2022:1706, ground 6.9.
[63] ’s-Hertogenbosch Court of Appeal 6 September 2022, ECLI:NL:GHSHE:2022:3089.

assertion that the seller had breached the warranties provided by not sharing the information known to him with the purchaser. This resulted in the evidentiary risk being borne by the purchaser.

5.3 The duty to complain and expiry clause

This year also saw further case law on the duty to complain or the expiry clause in the context of a warranty claim.[64]

The Arnhem-Leeuwarden Court of Appeal, in line with case law and literature[65], ruled strictly on the lack of proper written notice within the period agreed in the SPA. The Court of Appeal ruled that the right to compensation had lapsed.[66]

The Hague Court of Appeal also had to adjudicate whether the purchaser had reported the alleged breach of warranties within the expiry period of one month after he had or could have had knowledge thereof.[67] The Court of Appeal considered that the purchaser had himself stated at first instance that in January 2014 he accidentally found the seller's business email account, which contained numerous emails clearly showing systematic and large-scale tax evasion. The seller was notified of the alleged breach in April 2014. At that time, therefore, more than a month had already passed since the purchaser became aware of the alleged breach, so the notification was not made within the expiry period agreed in the purchase agreement and any claim for compensation under the purchase agreement on account of the alleged breach had lapsed. A classic case of the strict application of the time limit under an SPA for lodging a complaint.

5.4 Liability cap in case of intent and deliberate recklessness

There have also been some judgments on the liability cap or maximum liability for warranty breaches up to a certain amount, which often does not apply in cases of intent or deliberate recklessness. This year's case law shows several unsuccessful attempts to break through this cap by relying on intent.[68]

Illustrative is the judgment of the Amsterdam District Court of 2 November 2022 on the point of discussion about whether a warranty had been breached in the acquisition of a company (that sold and delivered skylights in 30 countries), because delivery vans were structurally loaded above the permitted quantity without this being disclosed at the time of the purchase. At issue here was whether the liability cap should be applied to the damage claim of more than EUR 5 million (the difference between what the purchaser paid for the shares and the amount the purchaser would have paid if the illegal overloading practice had been known to him at the time of the acqusition).[69] Structural overloading was not found to be disclosed. There was therefore a breach of warranty. The District Court did not accept that this structural overloading was deliberately concealed for the purpose of inducing the purchaser to buy (so that the liability cap would not apply). The seller knew about the structural overloading, but did not disclose it to the purchaser. However, this does not mean that he deliberately concealed this information with the aim of inducing the purchaser to buy the company. Thus, the 30% liability cap was applied. We think that the District Court could also have concluded here, especially given the amount of the related alleged loss (about half of the purchase price for the

[64] Arnhem-Leeuwarden Court of Appeal 11 January 2022, ECLI:NL:GHARL:2022:162, RCR 2022/29; Amsterdam District Court 2 November 2022, ECLI:NL:RBAMS:2022:7123; The Hague Court of Appeal 19 April 2022, ECLI:NL:GHDHA:2022:663.
[65] See De Ruijter & Glazener 2022 with reference to H. Boom, Op weg naar een consistente uitleg en toepassing van klachtbedingen, NTBR 2021/9; Supreme Court 7 February 2014, ECLI:NL:HR:2014:260, NJ 2015/274 (Afvalzorg/Slotereind).
[66] Arnhem-Leeuwarden Court of Appeal 11 January 2022, ECLI:NL:GHARL:2022:162, RCR 2022/29.
[67] The Hague Court of Appeal19 April 2022, ECLI:NL:GHDHA:2022:663.
[68] Noord-Nederland District Court 22 December 2022, ECLI:NL:RBNNE:2022:4879.
[69] Amsterdam District Court 2 November 2022, ECLI:NL:RBAMS:2022:7123.

shares; which was over EUR 10 million), that the purpose of the failure to disclose was to conceal an important obstacle and thus induce the purchaser to buy the company.

As the judgment discussed above also shows, it is clear that the District Court was reluctant to overrule an agreed cap on liability. This section further shows that, as a purchaser, you are often in a difficult evidentiary position, both in terms of proving a warranty breach and as regards the question of whether the liability cap should be upheld.

6 Error and deceit

Even if a seller guarantees that there is nothing wrong with the company to be taken over, it regularly happens that the purchaser considers that, even after an extensive due diligence, there appear to be skeletons in the closet after the acquisition. It happens that in such a case, the purchaser wants to annul the agreement by invoking error or deceit. However, annulment of an SPA (on these grounds) is often excluded in the agreement. This is to avoid the complex situation in which parties end up if, for example, a year after the transaction, the SPA is annulled and the transfer of the company has to be reversed (*you can't unscramble scrambled eggs*). Nevertheless, this does not always happen (especially in smaller takeovers) and both the Court of Appeal and the District Court ruled on this matter in 2022.

The Hague Court of Appeal ruled on 15 March 2022 on a dispute in which the key question was whether the seller had given incorrect information about the target's financial situation prior to the takeover or had withheld information relevant to the purchaser.[70] Shortly after the takeover, the subsidiary (and its operating company) of the purchased company was declared bankrupt, at the request of the purchaser. The purchaser invoked breach of the duty of disclosure by the seller with a primary reliance on error, in the alternative of deceit and in the further alternative of non-conformity or unlawful act. These claims were rejected. The Court of Appeal ruled that the seller had sufficiently disputed the fact that he had breached his duty of disclosure, inter alia because he had argued that all relevant information had been provided to the purchaser and that he was aware of the decline in sales. The Court of Appeal noted that the purchaser was aware of the (draft) financial statements prior to the formation of the SPA. All these (draft) financial statements always contained a continuity section, stating, among other things, that the operating company depends on a limited number of relations for a substantial part of its turnover. That purchaser was aware, or at least should be deemed to have been aware, of the contents of the relevant continuity sections was therefore not in dispute.[71] The purchaser, who was assisted by EY in the sale process, must have been aware of this risk, according to the Court of Appeal. Here, the bar is set high for a purchaser assisted by a professional adviser if certain information was provided. In this situation, it seems to us that this is also justified.

6.1 High threshold for assumption of deceit

On 6 July 2022, the Midden-Nederland District Court rendered judgment in a matter focusing on the question of whether an SPA was formed under the influence of deceit.[72] In principle, according to the District Court, there was no deceit, because the items mentioned in the financial statements were too limited in importance to derive deceit therefrom.[73] As for the other items, although they should have been normalised with hindsight, this did not give sufficient reason to believe that there was more than a mistake therein.

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[70] The Hague Court of Appeal 15 March 2022, ECLI:NL:GHDHA:2022:2698, NJF 2023/89.
[71] A continuity section is usually included in the financial statements by the auditor of a company when there is doubt about the continuity of the company in question.
[72] Midden-Nederland District Court 6 July 2022, ECLI:NL:RBMNE:2022:2633.
[73] Midden-Nederland District Court 6 July 2022, ECLI:NL:RBMNE:2022:2633, ground 4.39.

The question was then whether there were other circumstances that would nevertheless constitute deceit. Reference is made in this context to a CFO memo that was not shared, but which, according to the purchaser, contained essential information about the company's financial position. In this regard, the District Court ruled that the mere circumstance that the sellers did not share the internal CFO memo did not constitute deceit and showed understanding of the practicalities of an M&A process.[74]

Another interesting aspect of this ruling is that the purchaser brought alternative claims against the sellers based on warranty breaches. It was agreed in the SPA that the purchaser had to submit claims relating to breach of contract to the W&I insurer. Here, the purchaser argued that it could not file its claims with the W&I insurer because deceit on the part of the sellers was not an insured event. However, the District Court held that there was no deceit and thus concluded that the purchaser should apply to the W&I insurer.[75] This is a good example of the changes in the traditional relationship between the purchaser and the seller and to whom a party (often the purchaser) should turn with a claim in hand.

7 Post-contractual obligations and mitigation of penalty clause

Post-contractual obligations are regularly used in takeovers. Take, for example, the noncompetition clause. In such a clause, the seller and its associated persons, who will leave the company after the takeover, are prohibited from being active in the same field for a certain period of time. With noncompetition clauses, a penalty clause is usually also agreed upon, as the noncompetition clause would otherwise become much harder to enforce. The penalty clause then provides for a penalty if the noncompetition clause is breached. This penalty clause can be mitigated by the court (and this happens regularly).

The Midden-Nederland District Court issued a judgment in which the two aforementioned points were central.[76] First, the assessment of the alleged breach of the noncompetition clause. The District Court considered as follows:

> "(…) According to the wording of the clause, it concerns activities that "*may*" [italics BdR & PdK] adversely affect the activities of [company 1] or [company 2]. Contrary to [defendant 1] et al.'s argument, therefore, based on a (purely) linguistic interpretation, it is not the case that the noncompetition clause refers only to activities that (in retrospect) actually had an adverse effect on [company 1] or [company 2]."[77]

When the text of the agreement is read against the background of the formation history, but also against the literal textual provision of the clause ('may'), the District Court's logical conclusion is that the parties intended to enter into a noncompetition clause with a broad scope of application, or at least that the purchaser was justified in relying thereon.

The District Court found that there was a breach of the noncompetition clause, but then substantially mitigated the contractual penalty "because full application of the noncompetition clause leads to an excessive, and therefore unacceptable, result",[78] according to the District Court. Judicial mitigation was excluded in the purchase agreement, but such a provision is void under Section 6:94(3) Dutch Civil Code. The District Court weighed the following circumstances:[79]

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[74] Midden-Nederland District Court 6 July 2022, ECLI:NL:RBMNE:2022:2633, ground 4.44.
[75] Midden-Nederland District Court 6 July 2022, ECLI:NL:RBMNE:2022:2633, grounds 4.53-4.55.
[76] Midden-Nederland District Court 16 November 2022, ECLI:NL:RBMNE:2022:4529.
[77] Midden-Nederland District Court 16 November 2022, ECLI:NL:RBMNE:2022:4529, ground 3.5.
[78] Midden-Nederland District Court 16 November 2022, ECLI:NL:RBMNE:2022:4529, ground 3.14.
[79] With reference to the test framework in Attorney General Hartlief's opinion of 5 April 2019, ECLI:NL:PHR:2019:344, paras 3.3. et seq.

1. the nature and seriousness of the defendant's conduct;
2. the conduct of the parties and the circumstances under which the clause was invoked;
3. the nature of the agreement; and
4. the relationship between the amount of the contractual penalty and the amount of any loss suffered by the claimant.[80]

Using this framework, the District Court ultimately arrived at a mitigated penalty of EUR 10,000, while more than EUR 1 million was claimed in total. Given the purchase price of the shares (EUR 708,000), this mitigation is not surprising.

The Gelderland District Court handed down judgments focusing in particular on the mitigation of the contractual penalties from the purchase agreement.[81] As in the earlier discussed judgment of the Midden-Nederland District Court, the penalty is also strongly mitigated here.[82][83] The claimed penalty amount of EUR 218,000 was awarded in an amount of no more than EUR 1130. Here, the District Court mainly looked at the ratio between the claimed penalty amount and the loss actually suffered due to the late payment of the amounts in question.

7.1 Confidentiality obligations

Another post-contractual obligation that is regularly agreed upon is the confidentiality obligation. The Arnhem-Leeuwarden Court of Appeal rendered a judgment in that regard on 21 June 2022,[84] following the judgment discussed in the previous 'Chronicle takeover disputes'.[85] Where in 2021 the information warranty and the balance between the duty to disclose and the duty to investigate were central issues, the central consideration at issue here concerned whether there was a breach of confidentiality obligations by the seller in the settlement of a share purchase. At issue was a farewell card from a manager who had been suspended. The Court of Appeal held that the card did not entail a breach of the confidentiality obligation, as contained in the purchase agreement, because sending the card could not be construed as a "press release or publication", and because the card was limited to facts of common knowledge or facts that were already known to the public for other reasons.[86] A different opinion would not have been conceivable in our view either.

8 Finally

In 2022, we see the legal development in M&A disputes in lower courts becoming increasingly consistent within frameworks previously set out by the Supreme Court. Judgments such as CBB/JPO and Haviltex are consistently applied. The sophisticated framework of interpretation of takeover agreements is always systematically followed with the textual explanation as a starting point and, in larger takeovers, even as an anchor point.

The door of 'the intention of the parties' remains open especially in smaller takeovers and in situations that are not well arranged. In disputes, the purchaser is often the underlying party if no clear guidance is provided contractually and when potential so-called red flags have not been followed up in due diligence.

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[80] Midden-Nederland District Court 16 November 2022, ECLI:NL:RBMNE:2022:4529, grounds 3.15-3.19.
[81] Gelderland District Court 22 June 2022, ECLI:NL:RBGEL:2022:3161, NJF 2022/327.
[82] Midden-Nederland District Court 16 November 2022, ECLI:NL:RBMNE:2022:4529.
[83] Midden-Nederland District Court 16 November 2022, ECLI:NL:RBMNE:2022:4529.
[84] Arnhem-Leeuwarden Court of Appeal 21 June 2022, ECLI:NL:GHARL:2022:5181.
[85] Arnhem-Leeuwarden Court of Appeal 21 September 2021, ECLI:NL:GHARL:2021:8898, in: De Ruijter & Glazener 2022.
[86] Arnhem-Leeuwarden Court of Appeal 21 June 2022, ECLI:NL:GHARL:2022:5181, ground 3.16.

This chronicle year again shows that the M&A market is subject to continuous change. Consider the emergence of W&I insurance, but also the increasingly complex earn-out arrangements that parties are agreeing. As a result, the M&A disputes market will continue to evolve, leading to numerous compelling judgments in the coming years.