CHRONICLE ON DUTCH M&A DISPUTES IN THE YEAR 2023

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This chronicle provides an overview of relevant developments in takeover disputes in 2023, including published case law and literature. This chronicle categorizes and analyses disputes across various stages of the takeover process, including the initiation and breakdown of negotiations, interpretation of agreements, conditions for closing, earn-out arrangements, warranties, disputes over will and post-contractual clauses.

1 Introduction: general developments M&A market and disputes

The year 2023 was a global low in the M&A market in terms of deal value (down 17% at global level compared to 2022 and 28% down at European level compared to 2022), with fortunately a reasonable recovery in the last quarter with increase in strategic acquisitions.[1] Deals were delayed by a cumulation of macroeconomic factors, such as inflation and high interest rates following the COVID-19- pandemic, and increased geopolitical risks including the war in Ukraine. Financing was more difficult and valuation gaps between potential buyers and sellers increased, standing in the way of a deal.[2]

These deteriorating market conditions translate into more price adjustment disputes, such as earn-out and completion account disputes. According to the deals surveyed in 2023 in the CMS European M&A Study 2024, there is therefore more need for stable and predictable deal structures with a decrease in purchase price adjustment and earn-out mechanisms. The use of warranty & indemnity insurance to cover the risks of indemnities and warranties has remained stable compared to 2022.[3]

Our expectation in our earlier chronicles on Dutch M&A disputes was that market uncertainties, which were already unfolding in 2022, would result in more M&A disputes.[4] In 2023, we also see this trend continuing globally with a slight increase in M&A disputes. The more difficult economic conditions are leading to a search for alternative deal financing options (including vendor loans), resulting in more complex deal structures. According to research by the Berkeley Research Group, these more complex deal structures, particularly due to the involvement of private equity investors, lead to more disputes.[5] Figure 1 provides an overview of key contractual disputes in M&A disputes in 2023 at a global level.[6]

[1] *Global Mergers & Acquisitions Review* on 2023, London Stock Exchange Group (LSEG) and CMS European M&A Study 2024.

[2] CMS European M&A Outlook 2023.

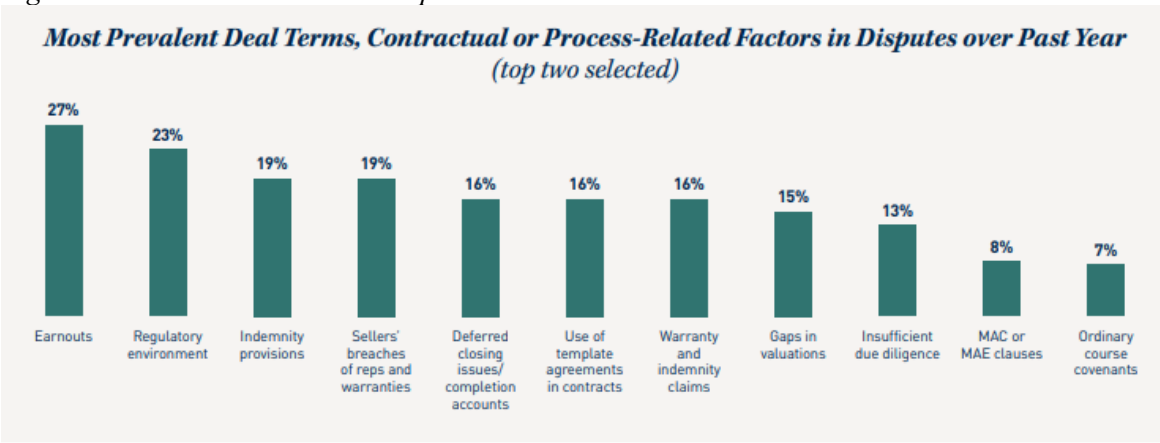
[3] CMS European M&A Study 2024.

[4] 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, B.A. de Ruijter & D.M.J. Glazener, 'Kroniek overnamegeschillen in coronajaar 2021', *MvO* 2022, paras 5-6, pp. 125-136 and B.A. de Ruijter & P.H.H. de Kanter, 'Kroniek overnamegeschillen 2022', *MvO* 2023, paras 8-9, pp. 193-203.

[5] Berkeley Research Group's *M&A Disputes Report 2024*, p. 5.

[6] Berkeley Research Group's *M&A Disputes Report 2024*, p. 6.

Figure 1 International M&A disputes in 2023



In 2023, the number of published judgments (38) is almost the same as in 2022 (37). After substantial growth in previous years, we can speak of a flattening of growth. In 2023, the Dutch Supreme Court ruled three times on M&A disputes. This is conducive to legal development in this area.

This year's published judgments again overwhelmingly concern smaller acquisitions.

Table 1 Deal value Dutch M&A disputes in 2022 and 2023

Purchase price (EUR)	Number 2023	Number 2022
< 5 mln.	25	25
5-15 mln.	7	7
> 15 mln.	4	5
unknown	2	/

As Table 1 shows, larger M&A disputes result in a published judgment only to a limited extent. This can also be explained by the fact that these are regularly settled amicably and that if they culminate in a dispute, arbitration is often chosen for reasons including confidentiality and enforceability in an international context. In any case, research shows an increase in arbitration clauses in M&A agreements in Europe.[7]

Published case law shows that most disputes occur in the area of formation of an M&A agreement and interpretation of such agreement. Furthermore, we see more earn-out disputes than in 2022 (see Table 2).

Table 2 Issues of (published) Dutch M&A disputes in 2023

Subject[8]	Number
Formation of agreement and breaking off negotiations	15
Interpretation of M&A agreement	16
Conditions precedent	2
Earn-out and purchase price adjustments	5
Warranty violations	3

[7] CMS European M&A Study 2024, p. 78. The Netherlands Arbitration Institute confirms an increase in 2023 M&A disputes brought to arbitration.

[8] Some statements from 2023 fall under multiple subjects.

Subject[8]	Number
Defects of will (error, threat, fraud or abuse of circumstances)	9
Post-contractual terms	2

Of interest is the book 'Bedrijfsovername' (*Business Acquisition*), published this year, which provides a practical description of the most relevant corporate law issues in the life cycle of a business acquisition, from the pre-contractual stage to remedies for non-performance.[9]

This chronicle will look at all the stages of the M&A process covered this year in a classified manner.

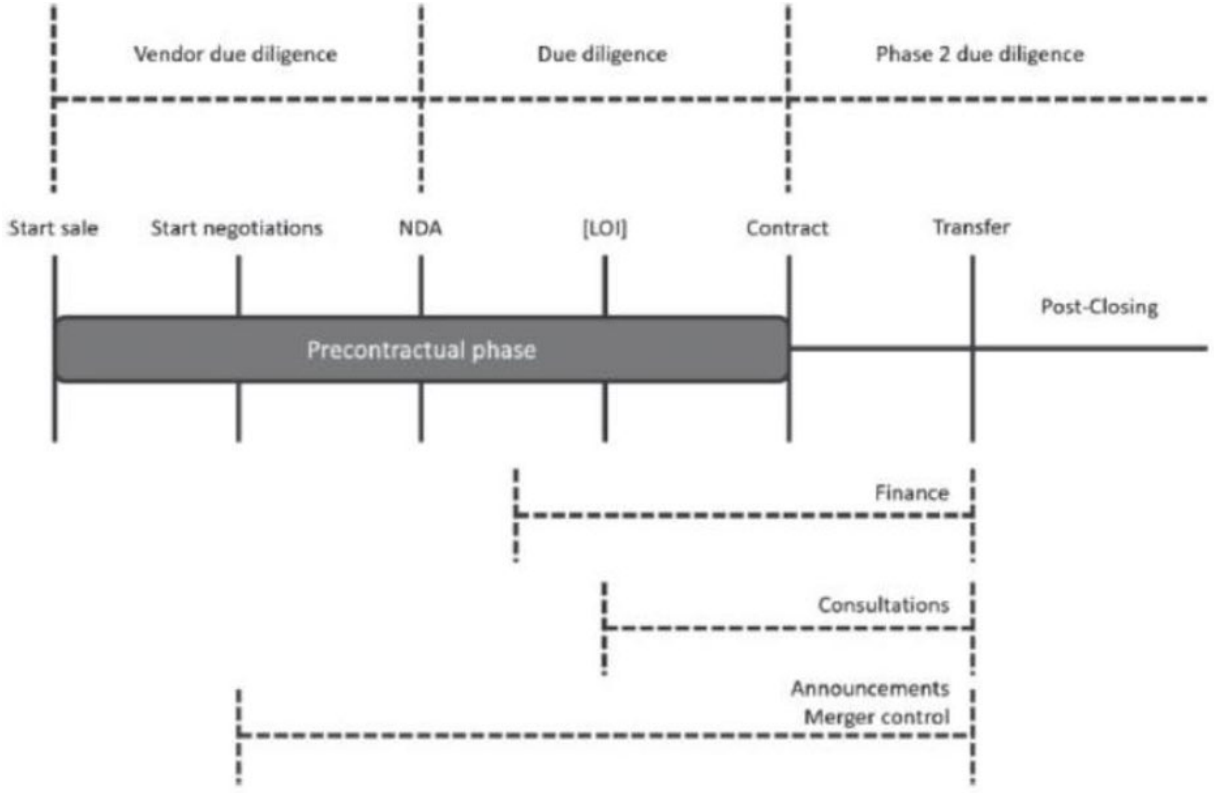
2 Formation of an M&A agreement and breaking off negotiations

2.1 General

In line with previous years, we note that over a third (as much as 40 per cent this year) of the rulings relate to formation of the M&A agreement and possible pre-contractual liability due to breaking off negotiations in that context.

From the kick-off of an acquisition process to the signing of an M&A agreement, there is the 'pre-contractual phase'. In this phase, pre-contractual documentation is agreed, such as a non-disclosure agreement and a letter of intent.[10] Due diligence is another key element of this pre-contractual phase. See Figure 2 for an overall schematic representation of the M&A process.[11]

Figure 2 The M&A process



[9] M.P.P. van Buuren & H. Koster, *Bedrijfsovername*, Deventer: Wolters Kluwer 2023.

[10] Van Buuren & Koster 2023, para 5.1.

[11] Van Buuren & Koster 2023, para 5.2.

The non-final nature of a letter of intent can be emphasised by including reservations such as: subject to contract, subject to final agreement, subject to written agreement and subject to negotiations. Such a clause does not affect the parties' consensus of will (intention) on the content of the letter of intent, but only the consensus of will on the content of the final agreement.[12]

If parties do not clearly establish (1) what is binding about the pre-contractual document and (2) when a particular agreement is binding, this will give rise to discussion and perhaps even a dispute regarding the (pre)contractual phase.[13] It will then come down to interpretation according to the Haviltex standard, as has been consistently applied in lower case law again this year.[14]

2.2 Formation of an M&A agreement

The answer to the question of whether an agreement was formed and with what content depends on what the parties mutually declared and inferred from each other's statements and conduct and were reasonably entitled to infer in the circumstances.[15]

In case law, we see that it is regularly argued by parties that before signing the M&A agreement (with all aspects of negotiated finalized), there is already an agreement on main points (essential points), or a framework agreement, from which performance can already be demanded. If parties do agree on the essential elements of the agreement, but one or more remaining (non-essential) elements still need to be negotiated, a framework agreement can be created. A framework agreement can also be a legally binding agreement. In 2023, District Courts and Courts of Appeal are reluctant to conclude that there is a framework agreement if essential elements have not yet been agreed,[16] especially if it is not set out in a signed contract.[17]

On this doctrine, a fairly consistent test is the leading judgment *Regiopolitie/Hovax*.[18] According to this judgment, in determining the intention of the parties, relevant factors include:

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

This year, the Arnhem-Leeuwarden Court of Appeal ruled along these lines when assessing whether negotiations in successive, non-consecutive term sheets (in which no reservations had been made) had resulted in an agreement or framework agreement when Reesink Staal was sold by the just delisted Royal Reesink.[19] In the absence of documentation in a final term sheet/purchase agreement, the buyer UTB sought to provide additional evidence of the existence of a purchase agreement through witness interviews. The court cited *Haviltex* and *Regional Police/Hovax*.

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[12] Van Buuren & Koster 2023, para 5.8.

[13] See District Court of Rotterdam 19 July 2023, ECLI:NL:RBROT:2023:6403, at 4.7-4.12 and District Court of Amsterdam 26 April 2023, ECLI:NL:RBAMS:2023:2697, at 5.6.

[14] See District Court of The Hague 6 September 2023, ECLI:NL:RBDHA:2023:13259, District Court of Oost-Brabant 31 January 2023, ECLI:NL:RBOBR:2023:419, *NJF* 2023/195 and District Court of Amsterdam 26 April 2023, ECLI:NL:RBAMS:2023:2697.

[15] Supreme Court 13 March 1981, ECLI:NL:HR:1981:AG4158 (*Ermes/Haviltex*).

[16] See Arnhem-Leeuwarden Court of Appeal 4 April 2023, ECLI:NL:GHARL:2023:2891, para 3.24, *RCR* 2023/44 and District Court of The Hague 6 September 2023, ECLI:NL:RBDHA:2023:13259, para 4.9.

[17] See also case law from last chronicle year in De Ruijter & De Kanter 2023.

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

[19] Arnhem-Leeuwarden Court of Appeal 4 April 2023, ECLI:NL:GHARL:2023:2891, *RCR* 2023/44.

The court explicitly considered that the burden of proof of the agreement or framework agreement lies with the buyer, as the party relying on its legal effects. The buyer failed in its burden of proof. According to the court, the buyer should have reasonably understood that a newly delisted company like Reesink, with a turnover of over EUR 700 million and a general counsel who was involved in the background, could not and would not agree so easily to what was discussed verbally. But that it still "in line with the premise [between the parties] needed to be recorded in a subsequent term sheet, which still had to be signed by both parties, after which the transaction documentation had to be negotiated and signed".[20]

Under certain circumstances, a contract is presumed to have been formed even though there is not yet a fully signed M&A agreement. In summary proceedings, the interim relief judge of the District Court of Rotterdam granted a claim for performance of an M&A agreement on the basis of offer and acceptance (Article 6:217 of the Dutch Civil Code) and the doctrine of good faith (Articles 3:33 and 3:35 of the Dutch Civil Code). The court in summary proceedings set the bar high for conclusion: there must be the required high degree of probability that it will be ruled in proceedings on the merits that an agreement has been concluded.[21] For this, the interim relief judge considered that the essentials of the agreement were clear on the basis of a signed transaction overview, the agreement via WhatsApp and subsequent e-mail correspondence. The essentials of the agreement included the purchase price, the vendor loan and the interest on the vendor loan. The circumstance that there was no agreement on the time of performance and how the purchase price would be paid does not alter this. It does not appear from correspondence between the parties that the terms on those points were so important that the sale could bounce off on them. Moreover, in the absence of those specific conditions, the statutory regime applies. If no time for performance has been stipulated, the obligation can be performed immediately and immediate performance can be claimed (Article 6:38 of the Dutch Civil Code). And if no arrangements have been made for payment in instalments, the purchase price must be paid all at once (Article 6:29 of the Dutch Civil Code).[22]

Illustrative of a case involving a pre-contractual document with a reservation is the acquisition of SnowWorld in proceedings before the The Hague Court of Appeal.[23] The parties disagreed on the interpretation of the MoU (*memorandum of understanding*) concluded, in particular on the question whether this MoU had the character of a fully-fledged, enforceable purchase agreement or merely an intention agreement that had expired due to the lapse of time. The Court of Appeal ruled that the MoU does not yet contain a final obligation to transfer the shares in SnowWorld. The buyer should have reasonably understood from the wording of the MoU that the potential seller had not yet committed itself (definitively) to the delivery of shares and options on shares. Indeed, the provision in the MoU that a purchase agreement had to be concluded by 20 January 2017 at the latest was subject to approval of the agreement yet to be drawn up by the parties' boards of management. This latest date for an 'irrevocable purchase agreement' is all the more indicative that there was no final ('irrevocable') commitment before that date.[24] Regarding the conclusion of an oral agreement following a discussion between the parties, the Court of Appeal finds that it does not follow from the transcript of this discussion that the parties had reached consensus on the essentials of the transaction, so that the buyer was entitled to understand that the potential seller was already (definitively) committed to the delivery of the shares at that time.[25]

In summary proceedings before the District Court of Amsterdam, the removal of a reservation of shareholder approval in a later final version of the LOI in light of the involvement of professional parties

[20] Arnhem-Leeuwarden Court of Appeal 4 April 2023, ECLI:NL:GHARL:2023:2891, paras 3.8-3.23, *RCR* 2023/44.

[21] District Court of Rotterdam 7 July 2023, ECLI:NL:RBROT:2023:6200, para 5.10.

[22] District Court of Rotterdam 7 July 2023, ECLI:NL:RBROT:2023:6200, para 5.11.

[23] District Court of The Hague 22 December 2021, ECLI:NL:RBDHA:2021:14248; The Hague Court of Appeal 22 August 2023, ECLI:NL:GHDHA:2023:2276.

[24] The Hague Court of Appeal 22 August 2023, ECLI:NL:GHDHA:2023:2276, paras 6.6-6.8.

[25] The Hague Court of Appeal 22 August 2023, ECLI:NL:GHDHA:2023:2276, paras 6.9-6.12.

leads to the ruling that the lack of shareholder approval can no longer be held against the performance of a deal.[26]

2.3 Pre-contractual liability

In proceedings on whether or not a contract has been formed, a plaintiff often alternatively invokes pre-contractual liability in case the court finds that no (framework) agreement has been formed.[27]

If no clear reservation has been made in the negotiations, then, in line with previous years, the legal framework from the *CBB/JPO* judgment applies as the starting point for possible liability for breaking off negotiations: freedom of contract is paramount and only in exceptional cases is breaking off negotiations impermissible by the standards of reasonableness and fairness on account of trust created by the party breaking off negotiations.[28] The extent to which and the manner in which the party breaking off negotiations contributed to the creation of that trust and its legitimate interests should be taken into account. Whether unforeseen circumstances have arisen in the course of the negotiations may also be relevant here, while in the event that negotiations are continued over a long period of time despite changed circumstances, the decisive factor as regards this trust is how it should be assessed at the final moment of breaking off negotiations against the background of the entire course of the negotiations.

The legitimate expectation may also arise from circumstances other than the negotiations themselves.[29] The Supreme Court has expressly held that the bar is high ('strict [standard] requiring restraint') to reach pre-contractual liability.[30] The burden of proof for the unless situation lies with the plaintiff.[31]

In this year, District Courts and Court of Appeal have again consistently applied the strict *CBB/JPO standard* in claims for damages for breaking off negotiations.[32] This shows once again that parties with clear pre-contractual agreements can save themselves complicated discussions. Indeed, clear reservations in the pre-contractual documentation mean that a legitimate expectation of completion under Article 3:35 of the Dutch Civil Code will not be assumed quickly. Therefore, there will then also be no cause for liability for negative contractual interest and/or positive contractual interest.

The The Hague Court of Appeal has confirmed that much significance is attached to the linguistic meaning of clear reservations in an LOI (in a situation between professional parties, assisted by legal advisers). This LOI states that a binding agreement only exists when the transaction documents are signed and, in the event the negotiations are terminated, no obligations to pay damages or costs ensue. According to the court, the foregoing (and the fact that the purchase agreement had not yet been drawn up) precludes the creation of a legitimate expectation of realisation. The verbal agreement that "it would soon come to a closing" cannot lead to a legitimate expectation of realisation either, as all (written) agreements were precisely intended to clearly mark that an interim (verbal) negotiation result could not be regarded as a binding agreement. This is all the more true as the said provisions were included in the LOI to avoid a situation like the present one (in which the question is whether there is legitimate expectation of realisation). Special circumstances may result in unilateral termination still being

[26] District Court of Amsterdam 13 April 2023, ECLI:NL:RBAMS:2023:2319, paras 4.4-4.5.

[27] See Arnhem-Leeuwarden Court of Appeal 4 April 2023, ECLI:NL:GHARL:2023:2891, *RCR* 2023/44, District Court of The Hague 6 September 2023, ECLI:NL:RBDHA:2023:13259 and District Court of Oost-Brabant 31 January 2023, ECLI:NL:RBOBR:2023:419, *NJF* 2023/195.

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

[29] Supreme Court 31 May 1991, ECLI:NL:HR:1991:ZC0255 (*Vogelaar/Skil*).

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

[31] The Hague Court of Appeal 21 March 2023, ECLI:NL:GHDHA:2023:421, para 6.2.

[32] See also District Court of Oost-Brabant 31 January 2023, ECLI:NL:RBOBR:2023:419, *NJF* 2023/195, District Court of The Hague 6 September 2023, ECLI:NL:RBDHA:2023:13259 and District Court of Amsterdam 26 April 2023, ECLI:NL:RBAMS:2023:2697.

unacceptable. The present circumstances that a party incurred costs in the negotiations or a director spent "several dozen hours" on those negotiations cannot qualify as a special circumstance.[33]

A good example of proceedings where the parties did not agree on the consequences of breaking off negotiations is the aforementioned proceedings on the acquisition of Reesink Staal before the Arnhem-Leeuwarden Court of Appeal.[34] After applying *CBB/JPO*[35], the claim for positive contract interest (being the situation where a purchase agreement would have been agreed) was dismissed. No legitimate expectation of realisation was created regarding the agreement, given the stage of the negotiations (see also above). In doing so, no damages were proven.

Of relevance to practice is that in 2024, the Supreme Court explicitly ruled on the three phases in negotiations relating to liability for damages. In *Plas/Valburg*, the Supreme Court identified three phases:

1. a phase where negotiations may be freely broken off;
2. a phase where a cost reimbursement is due (negative contract interest); and finally
3. a stage where breaking off is unacceptable and the other person's full damages must be compensated (positive contract interest).[36]

In *CBB/JPO*, the Supreme Court seemed to abandon the three-phase doctrine of *Plas/Valburg* because no explicit reference was made to it. In the judgment of 14 June 2024, the Supreme Court again explicitly refers to the second phase of *Plas/Valburg*, which has fallen into legal oblivion. In this phase, although breaking off negotiations is not unacceptable by the standards of reasonableness and fairness, circumstances may arise on the basis of which the party breaking off negotiations is obliged to reimburse the other party's costs.[37] In this judgment, the Supreme Court considers that this may be the case if the party breaking off negotiations has been unjustly enriched by work carried out by the other party.[38]

3 Interpretation disputes M&A agreements

Many M&A disputes revolve around interpretation of a contractual agreement (at the pre-contractual stage or after the conclusion of the M&A agreement) in the context of the takeover.

According to established case law, the Haviltex standard is always central to interpretation, which the Supreme Court confirmed again in an M&A dispute this year.[39] Here, the parties' intentions in view of mutual statements and conduct play a major role. In principle, all circumstances are relevant for interpretation.[40]

In *Meyer Europe v PontMeyer*, the Supreme Court held that when interpreting commercial contracts, the most obvious linguistic meaning of the wording of the contract should be given decisive weight as a starting point. Here, it took into account that the contract in question was an extensive, detailed agreement reached after intensive negotiations in which the parties were assisted by specialised lawyers.[41]

In 2013, the Supreme Court clarified its case law regarding this preliminary linguistic interpretation of a commercial contract carefully negotiated between professional parties. In *Lundiform/Mexx*, the

[33] The Hague Court of Appeal 21 March 2023, ECLI:NL:GHDHA:2023:421, paras 6.5-6.11.

[34] Arnhem-Leeuwarden Court of Appeal 4 April 2023, ECLI:NL:GHARL:2023:2891, *RCR* 2023/4.

[35] Arnhem-Leeuwarden Court of Appeal 4 April 2023, ECLI:NL:GHARL:2023:2891, paras 3.27-3.28, *RCR* 2023/4.

[36] Supreme Court 18 June 1982, ECLI:NL:HR:1982:AG4405, *NJ* 1983/723 (*Plas/Valburg*).

[37] Supreme Court 18 June 1982, ECLI:NL:HR:1982:AG4405, *NJ* 1983/723, cf. C.J.H. Brunner (*Plas/Valburg*).

[38] Supreme Court 14 June 2024, ECLI:NL:HR:2024:884, *JOR* 2024/214, cf. J. Verstoep.

[39] Supreme Court 15 December 2023, ECLI:NL:HR:2023:1754.

[40] Supreme Court 13 March 1981, ECLI:NL:HR:1981:AG4158 (*Ermes/Haviltex*).

[41] Supreme Court 19 January 2007, ECLI:NL:HR:2007:AZ3178, *NJ* 2007/575 (*Meyer Europe/PontMeyer*).

Supreme Court stated that even if, when interpreting a contract, great weight is attached to the linguistic meaning of the chosen wording, the other circumstances of the case may mean that a different (than linguistic) meaning must be attached to the provisions of the contract. After all, the decisive factor remains the meaning that the parties, in the given circumstances, could mutually reasonably attribute to those provisions and what they could reasonably expect from each other in that respect. The freedom to assign great weight as a starting point to the most obvious linguistic meaning of the disputed words of the contract enables the court, for the time being without a substantive assessment of the parties' contentions, to arrive at a provisional opinion on the interpretation of the contract. Subsequently, the court will still have to assess whether the party defending a different interpretation of the contract has argued sufficiently to be admitted as evidence or rebuttal evidence. If the latter is the case, the court is obliged to give this party the opportunity to produce this (counter)evidence.[42]

In 2023, the Amsterdam Court of Appeal listed many relevant factors for interpretation in the context of an M&A agreement in three judgments[43] :

a. what, in the given circumstances, the parties mutually could reasonably ascribe to this provision and what they could reasonably expect from each other in this respect;
b. to which social circles parties belong;
c. what legal knowledge can be expected from such parties;
d. the context of the relevant provision;
e. method of creation;
f. the plausibility of the legal consequences of one interpretation or the other;
g. the nature of the agreement; and
h. the conduct of the parties after the conclusion of the agreement.[44]

In addition, the Amsterdam Court of Appeal ruled[45] following *Lundiform/Mexx*:[46]

i. that in detailed negotiations with professional assistance (especially with the inclusion of an *entire agreement clause*), much or even decisive weight is given to the wording of the agreements.[47]

However, the decisive factor within the Haviltex standard ultimately always remains the intention of the parties in the light of all the circumstances of the case.[48]

In 2023, the Supreme Court once again confirmed that the Haviltex standard is central to the interpretation of an (M&A) agreement. This case concerned the discrepancy between the agreements in the purchase agreement of three operating companies and the notarial deed to transfer diesel pumps (which assumed different assets than in the purchase agreement).[49] The District Court considered that the question of what the parties had agreed in relation to assets to be transferred should be answered by

[42] Supreme Court 5 April 2013, ECLI:NL:HR:2013:BY8101, *NJ* 2013/214 (*Lundiform/Mexx*).

[43] Amsterdam Court of Appeal 16 May 2023, ECLI:NL:GHAMS:2023:1345; Amsterdam Court of Appeal 24 October 2023, ECLI:NL:GHAMS:2023:2837; Amsterdam Court of Appeal 12 December 2023, ECLI:NL:GHAMS:2023:3113.

[44] Amsterdam Court of Appeal 16 May 2023, ECLI:NL:GHAMS:2023:1345.

[45] See Amsterdam Court of Appeal 24 October 2023, ECLI:NL:GHAMS:2023:2837 and Amsterdam Court of Appeal 12 December 2023, ECLI:NL:GHAMS:2023:3113.

[46] R.P.J.L. Tjittes, *Commercieel Contracteren*, The Hague: Boom legal 2022, p. 325 ff.

[47] That textual interpretation takes precedence in the interpretation of commercial contracts (including, therefore, SPAs) is evident from, among others, Supreme Court 19 January 2007, ECLI:NL:HR:2007:AZ3178 (*Meyer Europe/PontMeyer*).

[48] See Amsterdam Court of Appeal 24 October 2023, ECLI:NL:GHAMS:2023:2837 and Amsterdam Court of Appeal 12 December 2023, ECLI:NL:GHAMS:2023:3113.

[49] Supreme Court 15 December 2023, ECLI:NL:HR:2023:1754.

interpreting the purchase agreement (and its annexes) using the Haviltex standard.[50] According to the Supreme Court, the court did not have to explicitly include the text of the purchase agreement in its judgment.[51] Attorney General Valk, on the other hand, argues that the District Court misapplied the Haviltex standard by not considering the text of the purchase agreement at all. The fact that the text was central to what the parties could and should reasonably have understood as the content of their agreement does not, in itself, exclude the possibility that the purchase agreement might turn out to have a different content after all. According to Valk, the Court of Appeal's substantiation does not show that the Court of Appeal weighed the circumstances that point in a different direction.[52] Valk did consider that weighing the weight of all circumstances for the interpretation of an agreement is the domain of the District Courts and Courts of Appeal and deserves the necessary leeway.[53] The Supreme Court does seem to concur with this and considers: ' Incomprehensible is this interpretation, *reserved to the Court of Appeal* [italics BdR, DG & PH], not.'

Acquisition documentation also regularly makes use of an interpretation clause, agreeing between the parties how an agreement should be interpreted. Case law and literature have accepted that parties can opt for a (primary) grammatical interpretation. It depends on the wording how an interpretation clause should be qualified (settlement agreement or evidence agreement).

This year, the Supreme Court delivered a much-discussed judgment on a contractual exclusion of the Haviltex measure.[54] The Supreme Court ruled that in the given circumstances, the Court of Appeal was not required to address the parties' intentions when interpreting the contractual interpretation measure. Debate soon arose in the legal literature as to whether the Supreme Court thereby allowed - in the light of contractual freedom - parties to contractually exclude Haviltex.[55]

As far as we are concerned, it follows from the judgment that such an interpretation clause can limit the effect of Haviltex, but it cannot be concluded that Haviltex can be excluded contractually altogether. In the first place, the Haviltex standard should be applied to the contractual interpretation clause itself to determine its purport.[56] And in concluding that the parties intended to stay as close as possible to a textual interpretation of the contract when interpreting it, Haviltex will always lurk in the background. After all, the parties cannot exclude reasonableness and fairness. If linguistic interpretation does not lead to a sensible result, the additional effect of reasonableness and fairness may still entail application of the Haviltex measure.

According to Schelhaas and Spanjaard, a contractual interpretation clause has the same function as an entire agreement clause. This gives great weight to the text of the agreement, as the parties have sought to regulate all their mutual rights and obligations in it.[57]

Applying the Haviltex standard, the Netherlands distinguishes itself from the more limited US interpretation of contracts by the system of common law, the parol evidence rule, the textual interpretation based on the plain meaning rule, the very limited role of reasonableness and fairness and

[50] Amsterdam Court of Appeal 2 August 2022, ECLI:NL:GHAMS:2022:3844, para 3.6.

[51] Supreme Court 15 December 2023, ECLI:NL:HR:2023:1754, para 3.2.2.

[52] Conclusion from Attorney General W.L. Valk 1 September 2023, ECLI:NL:PHR:2023:720, paras 3.7-3.8, by Supreme Court 15 December 2023, ECLI:NL:HR:2023:1754.

[53] Conclusion from Attorney General W.L. Valk 1 September 2023, ECLI:NL:PHR:2023:720, para 3.10, by Supreme Court 15 December 2023, ECLI:NL:HR:2023:1754.

[54] Supreme Court 25 August 2023, ECLI:NL:HR:2023:1131, *JOR* 2023/281, cf. R.J.Q. Klomp.

[55] See, inter alia, Supreme Court 25 August 2023, ECLI:NL:HR:2023:1131, *RFR* 2023/133, m.nt. S.A.K. d'Azevedo; *TBR* 2024/23, m.nt. P. Schotman, K.W.M. Baten, 'De val van Haviltex?', *MvV* 2024, vol. 2, p. 16 and F.J. de Vries, 'Uitleg en cassatie', *NTBR* 2023/46.

[56] Conclusion from Attorney General W.L. Valk 12 May 2023, ECLI:NL:PHR:2023:481, by Supreme Court 25 August 2023, ECLI:NL:HR:2023:1131.

[57] H.N. Schelhaas & J.H.M. Spanjaard, 'Uitsluitende of uitgesloten uitleg?', *Contracteren* 2023, vol. 4, pp. 131-138.

the absence of a duty of disclosure.[58] It is therefore also important under US law to define the legal relationship as fully and precisely as possible when drafting a commercial contract. However, the Haviltex standard does not mean that it is not necessary under Dutch law to draft comprehensive agreements. Even in the Netherlands, greater emphasis may be placed on the text of the contract in certain circumstances.

Anne Hendrikx received her PhD in Leiden on 20 June 2023 with the thesis 'Methoden van contractsuitleg. Een model voor de uitleg van een overeenkomst' (*Methods of contract interpretation. A model for contract interpretation)*. Central to the book is a model developed by Hendrikx, which she expects can be used by judges to determine the legal consequences of what has been agreed, using the correct method of interpretation.[59] The model will be able to clarify which method should be used to interpret an agreement in the light of existing regulations, case law and doctrine. Perhaps this model will recur in future chronicles.

4 Disputes in the twilight zone: conditions for closing

This year, disputes occurred about the terms and conditions in the period between the conclusion of the agreement (*signing*) and payment of the purchase price and transfer of the shares (*closing*).

This year, an overview article by Eijsvogel and De Planque appeared in 'Ondernemingsrecht' (*Business Law)* on the whole spectrum of the period between signing and closing of M&A agreements: negotiating, contracting and litigating.[60] In it, reference is made to the case law and legal developments that occurred during the corona crisis in the area of civil proceedings to get out from under a deal on the grounds of non-fulfilment of conditions, force majeure or unforeseen circumstances.[61]

The following types of conditions are identified:[62]

1. conditions precedent (e.g. approval of authorities, funding and necessary W&I insurance or non-violation of certain clauses such as 'material adverse change' and 'ordinary course of business');
   Upon fulfilment of the condition precedent, the effect of the commitment (the contract) commences. A condition precedent that may become more common is the condition that no report of wrongdoing has been made (or becomes known) within the meaning of the 'Wet bescherming klokkenluiders' (*Whistleblowers Protection Act*), which came into force on 18 February 2023, during a certain period.[63]
2. conditions precedent (same type of conditions as under 1);
   The fulfilment of a resolutive condition has no retroactive effect, but results in the return of what was received (the purchase price and shares) if closing has already taken place.
3. potestative conditions (e.g. the approval of the board or another body).
   These conditions depend on the will of one party.

A hot issue in contracting and litigating over conditions precedent is obtaining sufficient certainty that they will be fulfilled. More certainty can be obtained by imposing as concrete as possible best-efforts

[58] J.W.A. Dousi, 'Amerikaanse commerciële contracten', *Contracteren* 2023, vol. 2, pp. 53-62.

[59] A.M.M. Hendrikx, *Methoden van contractsuitleg. Een model voor de uitleg van een overeenkomst* (diss. Leiden), Deventer: Wolters Kluwer 2023 (promotor: prof. mr. H.J. Snijders). Prof. mr. Bakker discusses the thesis in P.S. Bakker, 'Methoden van contractsuitleg', *MvV* 2024, vol. 1, pp. 1-5.

[60] See also H. Eijsvogel & M. de Planque, 'Onderhandelen, contracteren en procederen over de periode tussen signing en closing van overnameovereenkomsten', O*ndernemingsrecht* 2023/79 and J.A.C. Veersen, 'De earn-out van bedrijfsovernames', *TOP* 2024/157.

[61] See also De Ruijter & Jakic 2021.

[62] Eijsvogel & De Planque 2023.

[63] J.A. Sombezki & E.S.C. van Schie, 'De invloed van de Wet bescherming klokkenluiders op de M&A-praktijk', *TOP* 2023/252.

and result obligations on the other party. It is advisable to indicate as precisely as possible what exactly the parties mean by the various best-efforts obligations. In doing so, it is advisable not to specify exhaustively the measures to be taken by the other party.

The case law of recent years on M&A disputes in the twilight zone shows that while it is difficult to enforce a closing with irreversible consequences in summary proceedings (with a view to proving that all conditions have been met), it is easier to enforce fulfilment of best-effort obligations in conditions in summary proceedings.[64]

Reliance on a conditions precedent to effect the closing or reliance on a resolutive condition to prevent or undo the closing lends itself better to proceedings on the merits. This is evident from the case law in this year.

In proceedings before the The Hague Court of Appeal, the question was whether the condition 'Closing shall take place on or before 29 September 2017' is a fatal term, after which a party may dissolve the agreement. The Court of Appeal considered that what was important here was that this was an agreement, which had been negotiated between professional parties and was intended to set out the mutual rights and obligations precisely, so that, in principle, great weight must be attached to its linguistic meaning. The circumstance that the vendors did not have the assistance of a lawyer in this respect does not alter this in the circumstances. The sellers knew exactly what the contract entailed.[65] Sellers rightly argued that also in such a case the other circumstances of the case may imply that a different (than linguistic) meaning should be attached to the provisions of the contract. The court held that it follows from the circumstances and conduct of the parties that the intention of the parties was to complete the transaction no later than *closing date*. Failure to do so would call the transaction into question. The closing date should be regarded as a deadline, or at least the buyer should have reasonably understood this provision as such.[66]

In that context, the Arnhem-Leeuwarden Court of Appeal ruled on the interpretation of conditions precedent to an option right, namely obtaining certification and putting a prototype into use, applying the Haviltex standard.[67] The wording of the conditions precedent in the deed of incorporation and those in the shareholders' agreement diverged. However, the Court of Appeal considered that it was established that the shareholders' agreement was drafted only one week after the articles of association and that there was no evidence anywhere that any divergent agreements had been made in the meantime. It is true that the conditions in the shareholders' agreement were worded slightly differently, but it does not follow from this that they wanted to deviate from the conditions in the articles of association.[68]

5 Earn-out

Research has shown a decline in earn-out clauses in M&A agreements in 2023 due to specific uncertain market conditions. This is the first time since the increase in the use of earn-outs in 2021 and 2022.[69]

Earn-out disputes will mostly concern whether (1) the earn-out results were achieved, but also whether (2) the buyer prevented the achievement of those results, or (3) made sufficient efforts to achieve the results. There is obviously a tension between the buyer and the seller, as they have partly (potentially) opposing interests in an earn-out.[70]

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[64] See also Eijsvogel & De Planque 2023 and De Ruijter & Jakic 2021.

[65] The Hague Court of Appeal 4 April 2023, ECLI:NL:GHDHA:2023:962, para 6.7.

[66] The Hague Court of Appeal 4 April 2023, ECLI:NL:GHDHA:2023:962, para 6.9.

[67] Arnhem-Leeuwarden Court of Appeal 29 August 2023, ECLI:NL:GHARL:2023:7297, paras 3.6-3.7, *OR Updates* 2023-0210.

[68] Arnhem-Leeuwarden Court of Appeal 29 August 2023, ECLI:NL:GHARL:2023:7297, para 3.3, *OR Updates* 2023-0210.

[69] CMS European M&A Study 2024, p. 26. Earlier, we noted that a significant proportion of international M&A disputes concerned earn-out provisions. This year, we see in the Netherlands that the number of published judgments on earn-out is about the same level as last year.

[70] See also Eijsvogel & De Planque 2023 and Veersen 2024.

The seller has the burden of proposition and proof in this context. This is often an uphill battle, especially if the earn-out and best-effort obligation in this context are not formulated clearly and specifically enough on the basis of targets. This is also evident this year.[71]

Illustrative is the judgment of the District Court of Noord-Holland of 21 June 2023 on the question of whether buyers have complied with their best-effort obligation regarding the earn-out.[72] This dispute established that in the first six months after acquisition, half of the minimum turnover stipulated in the purchase agreement was not achieved. According to sellers, this is due to buyers, as they did not fulfil their best-effort obligation. The court outlines the framework within which this dispute should be interpreted:[73]

> 'In a general sense, it applies that in an earn-out arrangement such as the one in question, the buyer is obliged in the purchase agreement to endeavour to achieve a turnover that does not fall below the agreed minimum turnover. This applies even if it has not explicitly undertaken to do so. Given the known interests of the seller in the earn-out arrangement, such a best-efforts obligation flows from the requirements of reasonableness and fairness (Article 6:248 paragraph 1 of the Dutch Civil Code). Its extent is determined by the circumstances of the concrete case, including the answer to the question of what the parties mutually declared during the negotiations and what they were entitled to expect from each other in respect thereof.'

The court considered that no concrete agreements were made in the purchase agreement or anywhere else about how buyers will run the business during the earn-out period or the content and extent of a buyers' best-efforts obligation. The seller bears the burden of proposing and, if necessary, proving the existence and content of the buyers' best-efforts obligation.[74]

6 M&A disputes over breach of warranties

In 2023, several M&A disputes again relate to a claim concerning a guarantee breach. These include the interpretation of guarantees, expiry periods of guarantee claims, damages resulting from a guarantee breach and directors' liability in connection with a guarantee breach.

This comes as no surprise. One of the most important parts of the M&A agreement is the warranty statement. This set of warranties colours the conformity of the target company. In the event of a breach of warranties, the buyer can in principle invoke all legal remedies, such as performance, termination and damages, unless these are excluded in whole or in part in the share purchase agreement (SPA) (as is usually the case with nullification and termination).[75] Generally, the parties agree that the buyer is only entitled to monetary damages. If the parties have agreed on an exclusive procedure to adjust the purchase price in case of breach of a warranty, that path should be followed, unless it is unacceptable according to standards of reasonableness and fairness.[76]

In M&A practice, a contractual complaint term is regularly agreed (in deviation from Art 7:23 or 6:89 of the Dutch Civil Code) for invoking claims, including warranty claims, under penalty of full or partial forfeiture of rights (such as prescription, compensation of the debtor or a limitation of the creditor's right

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[71] District Court of Amsterdam 24 May 2023, ECLI:NL:RBAMS:2023:3283; District Court of Noord-Holland 21 June 2023, ECLI:NL:RBNHO:2023:5746; District Court of Rotterdam 26 June 2023, ECLI:NL:RBROT:2023:5440; District Court of Zeeland-West Brabant 24 May 2023, ECLI:NL:RBZWB:2023:3737.

[72] District Court of Noord-Holland 21 June 2023, ECLI:NL:RBNHO:2023:5746.

[73] District Court of Noord-Holland 21 June 2023, ECLI:NL:RBNHO:2023:5746, para 4.2.

[74] District Court of Noord-Holland 21 June 2023, ECLI:NL:RBNHO:2023:5746, paras 4.3-4.4.

[75] Van Buuren & Koster 2023, para 18.1.

[76] See also Van Buuren & Koster 2023, para 5.8.

to compensation or repercussions for evidence).[77] If the consequences of violation of the complaint term are clearly defined, the creditor can definitively lose all his rights - and defences - that can be based on the fact of defective performance.[78]

A judgment of the District Court of Amsterdam dated 17 May 2023 ruled, inter alia, on an action for forfeiture of rights regarding late complaints about breach of a warranty.[79] The seller argued that the buyer had complained too late about the warranty, because the SPA states that the buyer must complain as soon as reasonably possible, but in any case within 10 days of the discovery of the circumstances giving rise to that breach of warranties. The court ignores this because lapses are not subject to any consequences in the relevant article. The general expiry period in the SPA of 18 months had not yet expired in this regard.[80] The incomplete wording of the consequences of the complaint clause is crucial in this matter.

Incidentally, this case also demonstrates well that the inclusion of nuances to warranties such as 'to the best of the Seller's knowledge' is an additional hurdle to prove that knowledge of breach of warranty on the part of the Seller prior to the time the warranty was issued.[81] According to the buyer, the warranty 'Each party with whom the Company has entered into an Agreement has, *to the best of the Seller's knowledge*, always materially performed its obligations under the relevant Agreement' has also been breached. Since this guarantee includes 'to the best of its knowledge', the guarantee was only breached if the Seller had or should have had knowledge during the closing. The District court ruled that there was no (knowledge of) breach before closing.[82]

Damage calculation in warranty breaches is often food for debate. When a guarantee is breached (which qualifies as breach of contract), damages are determined by comparing the current financial position of the creditor (buyer) with the hypothetical situation the creditor would have been in had the guaranteed fact been correct (the positive interest).[83] Since a certain degree of abstraction in the calculation is inevitable, the judge or arbitrator may need to estimate the damages (Article 6:97 of the Dutch Civil Code).

In practice, it is not always easy to prove what the damage is in the hypothetical situation in case of breach of warranty compared to the actual situation that the warranty correction has been fulfilled.

This is also endorsed by the Amsterdam Court of Appeal's judgment of 24 October 2023, in which violation of a financial guarantee (concerning the accuracy of the financial figures) was assumed regarding the target, technology start-up Tinker Investments, which went bankrupt shortly after the acquisition.[84] However, the claim for damages was dismissed because the buyer did not explain in the damage calculation, or explained insufficiently, what the consequence of the breach of the guarantee was on the valuation of the shares.[85] In its response to the sellers' report and conclusion, the buyer did dispute the sellers' views, but did not provide further substantiation of a possible causal link between the incorrect/incomplete disclosure assumed by the court and its alleged damages.[86]

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[77] It is relevant here that, pursuant to Article 3:322(3) of the Dutch Civil Code, the special two-year limitation period of Article 7:23(2) of the Dutch Civil Code after a complaint has been made cannot be contractually extended (to more than two years), but can be made shorter.

[78] H. Wammes, 'Schenden van de klachtplicht is een bevrijdend verweer met draconische gevolgen!', *ORP* 2023/166.

[79] District Court of Amsterdam 17 May 2023, ECLI:NL:RBAMS:2023:3217.

[80] District Court of Amsterdam 17 May 2023, ECLI:NL:RBAMS:2023:3217, para 4.2.

[81] District Court of Amsterdam 17 May 2023, ECLI:NL:RBAMS:2023:3217, para 4.9.

[82] District Court of Amsterdam 17 May 2023, ECLI:NL:RBAMS:2023:3217, para 4.9.

[83] Van Buuren & Koster 2023, para 18.4.2.

[84] Amsterdam Court of Appeal 24 October 2023, ECLI:NL:GHAMS:2023:3294.

[85] District Court of Amsterdam 3 October 2018, ECLI:NL:RBAMS:2018:10123, para 2.7.

[86] District Court of Amsterdam 3 October 2018, ECLI:NL:RBAMS:2018:10123, r.o. 2.9.

In proceedings before the District Court of Overijssel concerning a dispute over an issued guarantee as to the amount of EBITDA that forms the basis of the purchase price, the court initially ordered an expert opinion for calculating damages. Sellers argue that they have no financial assets for the advance payment of the costs for the expert opinion.[87] As a result, the District Court will no longer appoint an expert, but will rule on the (in)correctness of the EBITDA calculated by the sellers based on the documents already present.[88] The District Court will take as a starting point that the buyer cannot be disadvantaged in this assessment by the fact that the sellers did not comply with the District Court's order to bring further information into the proceedings for the intended expert's report. The sellers are at risk due to the failure of the expert investigation.[89]

7 M&A disputes over will

This year, we see a relatively high number of M&A disputes concerning absence of or defect in the legally required will (intention), including, in particular, error.[90] There is also a relevant opinion by Attorney General Lindenbergh on threat or abuse of circumstances in an M&A agreement in the context of a settlement, in a case the Supreme Court disposed of under Article 81 of the Judiciary Organisation Act.[91]

This is striking. In M&A agreements, we often see (almost always with professional parties) that reliance on defects of will, such as error, is excluded as far as legally possible. After all, an acquisition is by its nature often difficult to reverse and parties usually prefer damages or other compensation in money rather than annulment. A court will be reluctant to reverse a transaction, especially if other provisions can lead to an appropriate correction to the consequences of annulment.[92] In practice, however, it is also chosen (or perhaps overlooked) not to fully exclude reliance on certain wills.

A claim of error requires that the error is due to a communication or silence by the other party or that both parties assumed the same incorrect assumption/representation of facts.[93] The party claiming annulment has the burden of proposition and proof.

That it is often difficult to overcome this threshold is again evident this year.[94]

Even if there is a misrepresentation, that party must show that the extent of it is sufficient to establish the required causal link.[95] The causation requirement involves a subjective test: what would the acting party have done in the event of a correct representation of the facts? The answer of the District Court of Midden-Nederland: buyer would have entered into the purchase agreement even then.[96] Exclusive

[87] District Court of Overijssel 11 October 2023, ECLI:NL:RBOVE:2023:4115, r.o. 3.2.

[88] District Court of Overijssel 11 October 2023, ECLI:NL:RBOVE:2023:4115, para 3.7.

[89] District Court of Overijssel 11 October 2023, ECLI:NL:RBOVE:2023:4115, para 3.7.

[90] See Supreme Court 13 October 2023, ECLI:NL:HR:2023:1429, *JOR* 2024/52, cf. W.B. Meijer, with conclusion from Attorney General T. Hartlief 7 July 2023, ECLI:NL:PHR:2023:658, by Supreme Court 9 February 2024, ECLI:NL:HR:2024:208, Amsterdam Court of Appeal 18 April 2023, ECLI:NL:GHAMS:2023:925, *RCR* 2023/56, District Court of Oost-Brabant 28 April 2023, ECLI:NL:RBOBR:2023:2716, District Court of Midden-Nederland 19 July 2023, ECLI:NL:RBMNE:2023:3868, District Court of Midden-Nederland 16 August 2023, ECLI:NL:RBMNE:2023:4124, *NTHR* 2023/6, District Court of Rotterdam 27 September 2023, ECLI:NL:RBROT:2023:9020, rulings 4.10-4.11 and District Court of Overijssel 6 October 2023, ECLI:NL:RBOVE:2023:3863.

[91] Conclusion from Attorney General S.D. Lindenbergh 13 October 2023, ECLI:NL:PHR:2023:904, para 4.4, by Supreme Court 1 December 2023, ECLI:NL:HR:2023:1667.

[92] Conclusion from Attorney General T. Hartlief 7 July 2023, ECLI:NL:PHR:2023:658, by Supreme Court 9 February 2024, ECLI:NL:HR:2024:208.

[93] District Court of Midden-Nederland 16 August 2023, ECLI:NL:RBMNE:2023:4124, *NTHR* 2023/6.

[94] District Court of Overijssel 6 October 2023, ECLI:NL:RBOVE:2023:3863.

[95] District Court of Midden-Nederland 16 August 2023, ECLI:NL:RBMNE:2023:4124, rulings 3.14-3.33, *NTHR* 2023/6.

[96] District Court of Midden-Nederland 16 August 2023, ECLI:NL:RBMNE:2023:4124, rulings 3.34-3.40, *NTHR* 2023/6.

reliance on error usually fails,[97] exceptions aside. For example, the District Court of Rotterdam considered that although error can be contractually excluded, a reliance on that provision may be unacceptable by the standards of reasonableness and fairness on the basis of Article 6:248(2) of the Dutch Civil Code.[98] For such an argument, the party wishing to rely on error had not presented sufficiently concrete facts.

Whereas annulment for error is almost routinely excluded, this is not the case for amendment of the contract (Article 6:230(2) of the Dutch Civil Code). Amendment of the purchase price is often seen as less objectionable (as is payment of damages). The buyer then retains the shares, but receives monetary compensation.

Interestingly, in this year, the Supreme Court and Attorney General Hartlief, after two previous referrals back, again addressed the compulsory loss by amending the acquisition agreement to compensate for the compulsory loss under Article 6:230 of the Dutch Civil Code.[99]

Background to the dispute is a claim of error regarding the amount of EBIT on the basis of which (with a multiplier) the purchase price is determined. At the time of the purchase agreement, the buyer assumed, when determining the purchase price (EBIT for the financial year with a certain multiplier), that the EBIT would be sustainable (perpetual), but this turned out not to be the case due to a number of terminations of which the buyer was unaware. According to the buyer, sellers breached their duty of disclosure by only providing a list of unconditional terminations and not the pro forma terminations.[100]

In the judgment, the Supreme Court makes it clear that in order to remove the error disadvantage, the parameters of the purchase price mechanism can be adjusted to calculate the purchase price as it would have been agreed in the absence of the error situation. In particular, if fixed costs are involved, the court will not be able to estimate the error disadvantage based on the decrease in turnover due to the error if the purchase price depends on EBIT. This is because, in that case, the drop in EBIT does not automatically equal the drop in turnover.[101]

In proceedings before the Amsterdam Court of Appeal, the agreement excluded reliance on both annulment and modification for error. Under the agreement in this case, reliance on this is not possible if there is *fraud, gross negligence or willful misconduct*. The buyer believes that prior to the sale, the sellers overstated the EBITDA achieved and to be achieved.[102] The buyer argued that as a result, she entered into the purchase agreement under the influence of error and paid too much for the shares. It also argues that the sellers breached warranties under the purchase agreement due to the incorrect information. She believes that on this ground she can partially dissolve the purchase agreement and recover part of the purchase price.[103] The court ruled that it could hardly be otherwise than that there was intent or gross negligence on the part of the selling party when it came to taking milestones too early and not including foreseeable after-costs of 'near completion' projects. The court decides on an expert opinion.[104] The court then already makes a preliminary assessment that if, after the expert opinion, it will rule that the forecast was incorrect or misleading, the issue will be whether this was caused by intent or gross negligence. In principle, the burden of proof on this point rests on the buyer. If, after the expert opinion, it is established that the reliance on error succeeds, Article 6:230 (2) of the Dutch Civil Code must be applied. With the parties, the Court of Appeal assumes that to calculate that disadvantage, a

[97] District Court of Oost-Brabant 28 April 2023, ECLI:NL:RBOBR:2023:2716, rulings 4.6-4.7.

[98] District Court of Rotterdam 27 September 2023, ECLI:NL:RBROT:2023:9020, r.o. 4.10-4.11.

[99] Supreme Court 13 October 2023, ECLI:NL:HR:2023:1429, *JOR* 2024/52, cf. W.B. Meijer.

[100] Arnhem-Leeuwarden Court of Appeal 17 April 2018, ECLI:NL:GHARL:2018:3506, para 3.3.

[101] Supreme Court 13 October 2023, ECLI:NL:HR:2023:1429, para 3.2, *JOR* 2024/52, cf. W.B. Meijer.

[102] Amsterdam Court of Appeal 18 April 2023, ECLI:NL:GHAMS:2023:925, *RCR* 2023/56.

[103] Amsterdam Court of Appeal 18 April 2023, ECLI:NL:GHAMS:2023:925, para 1, *RCR* 2023/56.

[104] Amsterdam Court of Appeal 18 April 2023, ECLI:NL:GHAMS:2023:925, para 4.18, *RCR* 2023/56.

connection must be sought with the hypothetical contract that would have been concluded if the appellant had not erred.[105]

8 M&A disputes over post-contractual clauses

It is common to include a non-compete clause in an acquisition agreement, prohibiting the seller from competing directly with the buyer after the sale. A non-compete clause is allowed if it is directly related to and necessary for the transaction, a so-called ancillary restriction.[106] A condition is that the non-compete must be limited in terms of product, territory and duration. The European Commission has indicated in the Notice on ancillary restraints that a non-compete obligation is justified for a period of three years in the case of the transfer of goodwill and know-how and two years in the case of the transfer of goodwill only.[107]

Even if the parties do not agree on a non-compete clause, the requirements of reasonableness and fairness can, under circumstances, create a post-contractual obligation of non-compete.[108] In *Kalkman v Cornelisse*, the Supreme Court considered that[109]

> 'failure to enter into a non-compete clause does not yet constitute a licence to compete with one's counterparty in breach of a contract or the requirements of reasonableness and fairness referred to in Article 6:248(1) of the Dutch Civil Code'.

Such a judgment need not preclude the fact that it may constitute a de facto curtailment of a fundamental right of a former contracting party.[110]

The burden of proof for violation of the non-compete clause lies with the buyer. Careful wording of the clause is important as case law struggles to constrain freedom of competition.

Of interest is this year's ruling by the Amsterdam Court of Appeal (in summary proceedings) on the prohibition of competing by the seller after the three-year competition period. The interim relief judge of the Amsterdam Court of Appeal had earlier ruled - in line with *Kolkman v Cornelisse* - that the fact that the non-compete clause in the SPA had expired did not give the sellers a licence to unlawfully compete with the sold company, but that these interim relief proceedings did not lend themselves to a further fact-finding.[111]

The court is strict on the deadline and possibility of competition. The Amsterdam Court of Appeal considered in a judgment that the parties had agreed that the buyer would pay a substantial purchase price for the company including the goodwill and know-how contained therein. To protect this, the parties agreed on the non-compete clause and recruitment ban. These applied for a period of three years, and it had not been argued or shown that the sellers undertook to do so, or that the buyer, when buying the company, trusted or was entitled to trust that the sellers would refrain from competing with the buyer beyond the scope or period of the said non-compete clause. According to the court, after the expiry of these three years, the assessment of the legality of competition by sellers vis-à-vis the buyer is in principle not subject to different rules than the assessment of competition between unrelated companies in general.[112]

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[105] Amsterdam Court of Appeal 18 April 2023, ECLI:NL:GHAMS:2023:925, para 4.45, *RCR* 2023/56.

[106] Article 10 Competition Act.

[107] Commission Notice on restrictions directly related and necessary to the implementation of concentrations (2005/C 56/03).

[108] Supreme Court 1 July 1997, ECLI:NL:HR:1997:AG1569, *NJ* 1997/685 (*Kolkman/Cornelisse*).

[109] Supreme Court 1 July 1997, ECLI:NL:HR:1997:AG1569, *NJ* 1997/685 (*Kolkman/Cornelisse*).

[110] P.S. Bakker, 'Postcontractuele redelijkheid en billijkheid', *NTBR* 2023/47.

[111] District Court of Amsterdam 4 March 2022, ECLI:NL:RBAMS:2022:952, rulings 5.13-5.15 and 5.20.

[112] Amsterdam Court of Appeal 13 June 2023, ECLI:NL:GHAMS:2023:1372, para 4.2.3-4.2.8.

In a Rotterdam court judgment, the court held that a non-compete clause had not been violated, as the conduct did not qualify as competitive activity.[113] Although the seller visited a supplier and business relation of the buyer, the court considered that no relation clause had been agreed between the parties and that the seller was therefore free, subject to the limits of the non-compete clause, to visit the buyer's business relation.[114]

This year, Bakker has also examined the manifestation of reasonableness and fairness in relation to the post-contractual phase of contractual relationships in his article 'Postcontractuele redelijkheid en billijkheid'(*Post-contractual reasonableness and fairness*).[115]

Furthermore, the 2023 review article on post-contractual leaver provisions is also relevant to M&A practice and disputes arising from it.[116]

9 Concluding remarks

In terms of legal development of M&A disputes, 2023 was an interesting year with a number of landmark judgments by the Supreme Court and Courts of Appeal.

Internationally, there is an increase in M&A disputes due to (macro-)economic dynamics. In the Netherlands, the number of published judgments before civil courts has increased in recent years, but we see growth levelling off. More than 85% of these judgments relate to smaller acquisitions below EUR 15 million. At the same time, we see an increasing interest in arbitration clauses, regarding larger acquisitions.

In terms of the type of M&A disputes, we see disputes on the formation (40%), breach of the duty of disclosure (24%), purchase price adjustment in particular earn-out (13%), guarantees (7%), (suspensive/resolutive) conditions (5%) and post-contractual clauses (5%). In 40% of the cases an interpretation dispute also plays a role.

We draw the following general conclusions from the 2023 case law:

- On the negotiation phase, the courts have handed down interesting judgments, highlighting the importance of a clear reservation.[117]
- Regarding interpretation, the Supreme Court has confirmed that ultimately the Haviltex standard remains leading in an M&A agreement and not just the text is relevant.[118]
- Around this, the Amsterdam Court of Appeal has set a nice framework for relevant points of view for the interpretation of acquisition agreements between professional parties.[119]
- In doing so, the Supreme Court confirmed the admissibility of an interpretation clause to the exclusion of Haviltex (which, as far as we are concerned, limits the effect of Haviltex, but does not completely exclude it).[120]
- Furthermore, the doctrine on loss compensation for miscarriage of justice in M&As has been fleshed out a little further.[121]

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[113] District Court of Rotterdam 28 June 2023, ECLI:NL:RBROT:2023:5678.

[114] District Court of Rotterdam 28 June 2023, ECLI:NL:RBROT:2023:5678, paras 6.4-6.11.

[115] Baker 2023.

[116] B.A. de Ruijter & M. Feenstra, ' Geschillen over het vertrek van een aandeelhouder: the good-, the bad-(leaver) & Haviltex', *Bb* 2023/41.

[117] Arnhem-Leeuwarden Court of Appeal 4 April 2023, ECLI:NL:GHARL:2023:2891, *RCR* 2023/44; The Hague Court of Appeal 22 August 2023, ECLI:NL:GHDHA:2023:2276.

[118] Supreme Court 15 December 2023, ECLI:NL:HR:2023:1754.

[119] Amsterdam Court of Appeal 16 May 2023, ECLI:NL:GHAMS:2023:1345; Amsterdam Court of Appeal 24 October 2023, ECLI:NL:GHAMS:2023:2837; Amsterdam Court of Appeal 12 December 2023, ECLI:NL:GHAMS:2023:3113.

[120] Supreme Court 25 August 2023, ECLI:NL:HR:2023:1131, *JOR* 2023/281, cf. R.J.Q. Klomp.

[121] Supreme Court 13 October 2023, ECLI:NL:HR:2023:1429, *JOR* 2024/52, cf. W.B. Meijer.

Based on the case law, we conclude that many of the disputes in the pre-contractual phase can be avoided by including clear reservations (*subject to*) in the pre-contractual documentation with a cost allocation or *break-up fee* to avoid discussion about being bound by an agreement in the negotiation phase and possible liability.

In doing so, it is recommended that the M&A documentation also give careful consideration to contractual risk management of the other common dispute categories, using the *lessons learned* from the case law cited in this article. Look before you leap into an acquisition.