

## The Netherlands Commercial Court and business certainty in Dutch and English commercial contract law

by R.A. Dudok van Heel and R.P.J.L. Tjittes\*

### 1. Introduction<sup>1</sup>

As of 1 January 2019 the Dutch legal system offers a specialised venue for the adjudication of international commercial cases:<sup>2</sup> the Netherlands Commercial Court (“NCC”). Though it is a part of the Dutch judicial system, the NCC operates in English: proceedings at the NCC take place in English and its judgments are delivered in English as well. Technically, the NCC is not a separate court institution, but a chamber (“*kamer*”) of the Amsterdam District Court.<sup>3</sup> Its international jurisdiction follows from the ordinary jurisdictional rules and/or a choice of forum clause electing Amsterdam.<sup>4</sup> In order for the NCC to be able to deal with a case, the parties must expressly consent to the proceedings being conducted in English.

The judges at the NCC are selected for their proficiency in English and their expertise in international business law. Many of them have experience as in-house lawyers or as lawyers at international law firms and they are all well-versed in commercial matters and transaction practice. The proceedings at the NCC are governed by the Dutch Code of Civil Procedure (“DCCP”), which is supplemented by the NCC Rules.<sup>5</sup> The NCC Rules have been designed to allow the NCC to offer a modern and international form of proceedings which is practical, flexible and aligned with procedural practice in international arbitration.<sup>6</sup> For example, the NCC Rules allow proceedings to commence with a case management conference and put the actual hearing judges in control of the court calendar. To streamline hearings, the parties may be directed to circulate a summary of their core arguments two weeks in advance and

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<sup>1</sup> This article is an amended version in English of R.A. Dudok van Heel and R.P.J.L. Tjittes, *De Netherlands Commercial Court en ‘business certainty’ in het Nederlandse en Engelse commerciële contractenrecht*, *Geschriften van de Vereniging voor Corporate Litigation 2020/2021*, Serie vanwege het Van der Heijden Instituut, WoltersKluwer, Deventer, p. 287 et. seq., which in turn is based on chapter 1 of R.P.J.L. Tjittes, *Commercieel Contractenrecht, deel I: Totstandkoming en inhoud*, 2018. The authors thank Alex Burrough for his very valuable contributions to this article.

<sup>2</sup> The requirement that a case must be “international” (Article 30r DCCP) is a broad one. An English language contract between Dutch parties is already sufficient to qualify. See NCC Rules, p. 32, re. Art. 1.3.1(b) under b.

<sup>3</sup> There is also a Netherlands Commercial Court of Appeal, which operates as a civil chamber at the Amsterdam Court of Appeal.

<sup>4</sup> See *NL Parliamentary Papers I*, 2018-2019, 34 761, D, p. 7 (Further Memorandum of Reply) and *NL Parliamentary Papers II*, 2017-2018, 34761, no. 6, p. 2 (Note II)

<sup>5</sup> Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal), 2nd edition, December 2020.

<sup>6</sup> See E. Bauw, *Een Netherlands Commercial Court vanuit rechtsplegingsperspectief*, in: *De kansen voor een Netherlands Commercial Court*, p. 13-16, who refers to “London-like” elements. We see greater similarities with international arbitration practice.

the court may advise the parties of a list of topics that require specific debate at a hearing.<sup>7</sup> The NCC Rules also allow evidence to be given according to the “IBA rules on the taking of evidence in international arbitration”. Combined with the disclosure rules of Article 843a DCCP, this strikes an efficient and effective balance between common law and civil law requirements with respect to disclosure and production of documents. As a further augmentation of Dutch procedural law, the NCC Rules also allow for the cross-examination of witnesses or experts by the opposing party's lawyer, rather than the examination of the witness by the court itself as is usual under regular Dutch procedural law and practice.

The NCC is particularly well-positioned to resolve disputes about contracts drawn up in the English language as the result of negotiations that were conducted in English. This is not only a common practice in international business, but also in the Netherlands itself, an international business-focused nation where many multinational companies are headquartered and where business of substance is frequently conducted in English. In order to be able to bring these disputes to the NCC, the parties need to include an express clause in their contract.<sup>8</sup> This “NCC clause”, which is regulated by Article 30r DCCP, needs to designate the Amsterdam District Court as the applicable forum (if this is not already implied by the regular statutory rules on jurisdiction) and express the parties’ consent to English as the language of the proceedings. It is expected that the NCC case load will swell as time progresses, as it takes some time after such clauses are introduced for any subsequent conflicts and litigation to arise.

The NCC not only resolves disputes where the substantive law is Dutch law, but also, where appropriate, under foreign law. Several NCC judges can draw on international experience and on a general working knowledge and understanding of legal systems outside of the Netherlands, particularly English law of contract. Additionally, the judges may seek expert opinions on foreign law.<sup>9</sup> Moreover, though representation of record must be by a lawyer admitted to the Dutch bar, a party may instruct a lawyer from a foreign jurisdiction to present its case to the NCC. This is what happened in *Subsea Survey Solutions LLC v South Stream Transport BV*, where a Russia-based company and its Amsterdam counterparty disputed the interpretation of a settlement agreement in English that was governed by English law.<sup>10</sup> The NCC applied English law of contract, drawing both on the judges’ own knowledge of English law and on the opinions supplied by party experts. Additionally, South Stream and Subsea Survey were each assisted by English counsel at the hearing. In their review of this case, Professor McKendrick et al. commented:

*“The decision of the court in Subsea Survey Solutions LLC v. South Stream Transport BV demonstrates that the NCC can provide efficient proceedings in the English language for*

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<sup>7</sup> For a further overview of the procedural advantages, also see D.J. Oranje, De plussen van de Netherlands Commercial Court, in: *Geschriften vanwege de Vereniging Corporate Litigation 2018-2019*, 2019, p. 125-126. Also see P.E. Ernste and F.E. Vermeulen, The Netherlands Commercial Court – an attractive venue for international commercial disputes?, TCR 2016, p. 131-137.

<sup>8</sup> NCC proceedings can also be agreed by the parties in an existing dispute and/or pending proceedings before the regular Dutch courts. However, it is often difficult to procure such agreement when a dispute is already pending.

<sup>9</sup> Unlike in some other legal systems (such as the English system), the substance of foreign (private) law is not a fact to be proven, but constitutes law whose content must, if necessary, be determined by the Dutch court *ex officio* (Article 10:2 DCC).

<sup>10</sup> Amsterdam District Court (NCC) 4 March 2020, ECLI:NL:RBAMS:2020:1388 (*Subsea Survey Solutions LLP v South Stream Transport B.V.*).

*international commercial disputes, even when governed under laws other than Dutch law. The NCC, with the assistance of the party-appointed English law experts, clearly set out how Clause 7 of the Settlement Agreement should be interpreted according to English law and proved to be able to apply English law in a correct manner.”<sup>11</sup>*

Notwithstanding the NCC’s track record of resolving disputes governed by foreign law, parties are most likely to prefer the Dutch courts in general – and the NCC in particular – where Dutch law applies to their legal relationship. In many cases, the place of dispute resolution is inspired by the choice of substantive law. The same pattern is discernible in international arbitration, where an important reason to prefer a particular seat of arbitration is often its locus within the jurisdiction of the applicable substantive law.<sup>12</sup> The NCC proposition therefore not only rests on the expertise of its judges and the efficiency of its proceedings in English, but also on Dutch law being made the applicable law in international commercial agreements.<sup>13</sup>

The most popular choice of applicable law in international commercial contracts is currently English law.<sup>14</sup> One of the reasons for this lies in a general perception that English contract law emphasises freedom of contract and business certainty. Dutch law, by contrast, is sometimes purported to be dominated by the more nebulous concept of good faith (“reasonableness and fairness”) and hence to offer lesser certainty. We contend that these views, which in part originate from English legal establishment’s advocacy of its own legal system (and the contrasting absence of advocacy on the part

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<sup>11</sup> E. McKendrick, J.M. Luyckx and A.M.M. Hendriks, A NCC Case on Contract Interpretation from an English and Dutch Law Perspective, *European Review of Private Law* 1-2021, p. 88 (para. 37).

<sup>12</sup> Zie R.P.J.L. Tjittes, *Een Netherlands Commercial Court vereist reclame voor Nederlands recht*, *RM Themis* 2014, p. 261, E. Bauw, op.cit. AA 2016, p. 98, H.N. Schelhaas, *De markt op met de Nederlandse rechtsorde?*, *NTBR* 2017, p. 74, M. Neekilappillai, *Netherlands Commercial Court, Regelgevingsconcurrentie op de markt voor geschilbeslechting*, *NJB* 2017, p. 1600, J. Hoeben et al., *De Netherlands Commercial Court tot een -succes maken*, in: *De kansen voor een Netherlands Commercial Court*, 2018, p. 83 and T. Hartlief, *Koopliden in het recht*, *NJB* 26 June 2018. For an international perspective see G. Wagner, *Dispute resolution as a product: competition between civil justice systems*, in: H. Eidenmüller (ed.), *Regulatory competition in contract law and dispute resolution*, 2013, p. 399-400.

<sup>13</sup> See P. Kuipers, *Bedrijf, jurist en de Netherlands Commercial Court*, in: *De kansen voor een Netherlands Commercial Court*, 2018, p. 126, Hoeben et al. op.cit. (2018), p. 84-85, Ernste/Vermeulen, op.cit., p. 130, S.H.M.A. Dumoulin, *Het Netherlands Commercial Court vanuit de onderneming bezien*, in: *Geschriften vanwege de Vereniging Corporate Litigation 2015-2016*, 2016, p. 323, M. van Hooijdonk, *Internationale uitdagingen voor de Netherlands Commercial Court*, in: *Geschriften vanwege de Vereniging Corporate Litigation 2015-2016*, p. 337 and Tjittes, op.cit. (2014), p. 261. Once the NCC has picked up steam and English language judgments on Dutch law are circulated in international commerce, NCC case law may serve to create greater international access to substantive Dutch private law.

<sup>14</sup> An ICC survey (*ICC Dispute Resolution Bulletin* 2015/1) covering 2014 shows that the most popular legal systems in ICC arbitrations were English law (14.1%), 'American' law (10.2%), Swiss law (7.4%), German law (6.3%) and French law (6.2%). Another study (among 4427 international contracts in the period 2007-2012 that led to ICC arbitration) shows that English law (11.2) and Swiss law (9.91) dominate the market for the applicable law to international contracts, followed by 'American' law (3.56), French law (3.14) and German law (2.03). According to Queen Mary University of London, School of International Arbitration, *International Arbitration Survey: Corporate choices in International Arbitration – Industry perspectives, 2013*, the most frequently chosen law 'overall' is English law (40%), again followed by the law of the State of New York (17%), Swiss law (8%) and French law (6%). See also G. Cuniberti, *The international market for contracts: the most attractive contract laws*, 34 *Nw. J. Int'l L. & Bus.* 455 (2014), p. 472.

of the Dutch), are no more than caricatures. Though they depart from different principles, the outcomes provided by Dutch and English law of contract are comparable.

We will illustrate this by examining (i) good faith (reasonableness and fairness) in general, (ii) precontractual liability, and (iii) contract interpretation. We will show throughout that the sometimes substantial differences in basic principles prove to be of lesser consequence when one looks at the practical application of the law: both English and Dutch commercial contract law offer business actors flexibility and legal certainty. We conclude with some reflections on the value of business certainty in general and the positioning of the respective legal systems and the further benefits of Dutch contract law and Dutch dispute resolution.

## **2. Good faith, precontractual liability and the construction of contracts in English and Dutch law of contract**

### *2.1 Good faith*

Dutch law of contract is often said to be steeped in the principles of reasonableness and fairness (*redelijkheid en billijkheid*), i.e. the principle that is also known as “good faith”. In English law, by contrast, good faith is said not to exist as a generally applicable principle. These propositions deserve some qualification.

A good place to start is Lord Bingham’s remarks on this topic in *Interfoto Picture Library Ltd v Stiletto Visual Programmes*, which are often quoted in this context:<sup>15</sup>

*“In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table.’ It is in essence a principle of fair open dealing (...). English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.”*

A first observation here is that though English law may not have a general doctrine of good faith, it does offer specific approaches (“piecemeal solutions”) in response to problems of unfairness.<sup>16</sup> Insofar as English law is hostile to the doctrine of good faith, this hostility appears subject to attenuation or erosion. This is also discernible in, for example, *Yam Seng v International Trade Corporation* (2013)<sup>17</sup> There, following a review of the contract laws of England and other common law countries, Leggatt J concluded (para 153):

*“(...) I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.”*

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<sup>15</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes* [1989] QB 433 (CA) 439.

<sup>16</sup> See J. Cartwright, *Contract Law*, 3<sup>rd</sup> edition, 2016, pp. 82-86.

<sup>17</sup> *Yam Seng v International Trade Corporation* [2013] EWHC 111.

These examples point to the tentative development of a more general recognition of good faith in English contract law. However, the role of this doctrine has so far remained limited to a particular category of contracts, i.e. relational contracts (contracts that run for a period of time), and has also been applied to the performance of the contract only (and not to the negotiation, interpretation or post-contractual stages). Additionally, the concept of good faith has been applied in a very limited sense (i.e. with regard to honesty, fidelity and, occasionally, a duty of disclosure).<sup>18</sup> Nonetheless, while subsequent English court decisions have reiterated that English contract law does not contain a general principle of good faith and do not follow the decision in *Yam Seng* (by limiting their scope and outlining the distinction),<sup>19</sup> Leggatt J (now a member of the UK Supreme Court) further observed:

*“Although the observations that I made in the Yam Seng case about the scope for implying duties of good faith in English contract law have provoked divergent reactions, there appears to be growing recognition that such a duty may readily be implied in a relational contract.”*<sup>20</sup>

And more recently, Fraser J has given the following summary of the current state of affairs:

*“These cases, both appellate and first instance, all demonstrate in my judgment that there is no general duty of good faith in all commercial contracts, but that such a duty could be implied into some contracts [i.e. relational contracts, authors], where it was in accordance with the presumed intention of the parties. Whether any contract is relational is heavily dependent upon context, as well as the terms. The circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, is what decides whether a contract is relational or not.”*<sup>21</sup>

Even though English law does not have an overarching doctrine of good faith, it does however have specific doctrines that reflect what, under Dutch law, would be understood as an application of reasonableness and fairness.

Dutch law arrives at a similar outcome from the opposite direction. Under Dutch law, reasonableness and fairness are indeed the basic standard of all contract law. This standard is set out in Book 6 of the Dutch Civil Code (“DCC”), as a standard of conduct (Article 6:2(1) DCC), conferring upon reasonableness and fairness both the power to supplement a contractual agreement (Article 6:248(1) DCC) and to restrict the effect of a contractual agreement (Article (6:248(2) DCC). Moreover, throughout their relationship

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<sup>18</sup> See R.P.J.L. Tjittes, *Op de golven van de goede trouw naar Engels contractenrecht*, RM Themis 2015, p. 208 et seq. See also recently Leggatt J in *Sheikh Tahnoon Bin Saeed bin Shakhboot al Nehayan v Ioannis Kent* [2018] EWHC 333 (Comm), para. 167: “It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind (relational contracts, auteurs) are embodied in the normative standard of good faith.”

<sup>19</sup> See Tjittes, *op. cit.* (RM Themis 2015), pp. 209 et seq. See more recently *inter alia* *Ilkeler Otomotiv Sanayai ve Ticaret Anonim v Perkins Engines Co Ltd* [2017] EWCA Civ 183.

<sup>20</sup> Leggatt J in *Sheikh Tahnoon bin Saeed bin Shakhboot al Nehayan v Ioannis Kent* [2018] EWHC 333 (Comm), para 168.

<sup>21</sup> *Bates v Post Office Ltd* [2019] EWHC 606 (QB)(para 721).

parties have a duty to take each other's legitimate interests into account in negotiating and executing a contract, as the Netherlands Supreme Court stressed in e.g. *Baris v. Riezenkamp*.<sup>22</sup>

However, contrary to the first impressions one might have, none of this “normally obstructs the legitimate intentions of businessmen”. Particularly where it concerns a detailed contractual relationship between professional commercial parties, Dutch law offers very little room for any actual supplementary reasonableness and fairness. A good example may be found in the *Kotug Smit Towage v. Maersk Line* judgment of the Rotterdam District Court:

*“In the first place KST, as a professionally operating party, entered into a commercial agreement after conducting extensive negotiations with Maersk. In such a situation, the court must exercise great restraint with regard to supplementing or intervening in the agreements made between the parties.”*<sup>23</sup>

Accordingly, there is a very high threshold for any court to apply the supplementary effect of reasonableness and fairness conferred by Article 6:248(1) DCC in respect of a carefully drafted and detailed commercial contract. This makes legal and business sense: a carefully drafted commercial contract will normally not leave any gaps to be filled by good faith, and anything left open in the contract will usually have been left open deliberately.<sup>24</sup>

This is very similar to the situation in English law. There too it is assumed that a detailed and carefully drafted commercial contract will usually not contain any gaps, and that consequently there is no reason to assume implied terms.<sup>25</sup> As Lewinson LJ put it:

*“A term will not be implied into a detailed commercial contract unless it is necessary to give the contract business efficacy or it is so obvious that it goes without saying. It is not enough that it would have been a sensible thing to agree; or that, with hindsight, the terms actually agreed operate to the disadvantage of one of the parties to the contract.”*<sup>26</sup>

As concerns the restrictive effect of reasonableness and fairness (which is codified in Article 6:248(2) DCC), this – again – is subject to limits in Dutch law, particularly where it concerns a relationship between

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<sup>22</sup> NL SC 15 November 1957, NJ 1958, 67 (*Baris v Riezenkamp*) and NL SC 19 October 2007, NJ 2007, 565 (*Vodafone v ETC*). [“(…) by entering into negotiations on the conclusion of a contract, the parties enter into a special legal relationship governed by good faith, which means that their conduct must in part be guided by the legitimate interests of the other party;” ]

<sup>23</sup> Rotterdam District Court 9 October 2019, ECLI:NL:RBROT:2019:7871 (para. 4.24).

<sup>24</sup> M.H. Wissink, *Vertrouwen op tekstuele uitleg*, in: *Strikwerda's conclusies; opstellen aangeboden aan mr. L. Strikwerda ten opzichte van zijn afscheid als advocaat-generaal bij de Hoge Raad der Nederlanden* (Strikwerda volume), Deventer: Kluwer 2011, no. 25, and M.H. Wissink, *Wegcontracteren van de aanvullende werking van de redelijkheid en billijkheid*, in: *Contracteren (Special Willem Grosheide)*, The Hague: Boom Juridische uitgevers 2011, p. 24. See also H.N. Schelhaas, *Redelijkheid en Billijkheid*, Mon. BW A5, 2017, para. 19, and J.W.A. Dousi, *Representation and warranties: naar Nederlands en Anglo-Amerikaans recht*, *Contracteren* 2017/4. Also see p. 143. NL SC 2 February 2018, NJ2018/98 (*Goglio v SMQ*) (para. 3.7) and Arnhem-Leeuwarden Court of Appeal 15 September 2020, ECLI:NL:GHARL:2020:7227 (*ASR v Altera*) (para. 3.5).

<sup>25</sup> *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited & Anor* [2015] UKSC 72 (paras 19 and 21). Similarly *Hayfin Opal Luxco 3 SARL & Anor v Windermere VII CMBS plc & Ors* [2016] EWHC 782 (Ch), para. 68.

<sup>26</sup> Lewinson LJ (para 54) in *Kason Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132. See also *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481.

professional, commercial parties. Where a term is “unacceptable” according to standards of reasonableness and fairness, a party may not rely on it. However, the Netherlands Supreme Court has made quite clear, in accordance with the relevant statutory provisions on “unacceptableness” in Articles 6:2(2) and 6:248(2) DCC, that this restrictive effect of reasonableness and fairness is generally to be applied in a strict sense only and that the courts should exercise restraint in this context. Where the lower court ruled without being rigorous that reliance on a contract clause was “not reasonable” or where it failed to provide sufficient reasoning to support such a decision,<sup>27</sup> the Supreme Court has been swift to annul such judgments. Its position is unequivocal:

*“Not reasonable’ is a different standard than what is expressed in the words ‘unacceptable according to the standards of reasonableness and fairness’ in Art.6:248(2), which implies greater restraint.”*<sup>28</sup>

When it comes to clauses that exclude or limit liability, reliance on the restrictive effect of reasonableness and fairness has proven particularly fruitless where it concerns a commercial contract concluded between professional parties of equal rank in terms of power or expertise.<sup>29</sup> It follows from Netherlands Supreme Court case law that the restrained, cautious test that is already implied by the restrictive effect of reasonableness and fairness, should be applied with even greater restraint in respect of clauses that exclude or limit liability in commercial contracts concluded between professional parties. We refer to *Matatag v. De Schelde*<sup>30</sup> and *GTI v. Zürich*<sup>31</sup>, which show that contractual terms regarding the relationship between commercial parties should be reviewed with even greater restraint than usual.<sup>32</sup>

Here too, the similarities between Dutch law and English law are apparent. English law also does not readily allow a term in a commercial contract concluded between parties of comparable bargaining strength to be set aside as “unreasonable” within the meaning of the Unfair Contract Terms Act 1977. Chadwick LJ expressed this as follows in 2001:

*“Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view, be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement. They should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court should not assume that either is likely to commit his company to an agreement which he thinks is unfair, or which he thinks includes unreasonable terms. Unless satisfied that one party has, in effect, taken unfair advantage of the other – or*

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<sup>27</sup> See NL SC 9 January 1998, *NJ* 1998, 363 (*Apeldoorn v Duisterhof*), NL SC 14 December 2001, *NJ* 2002, 59 (*Bouwkamp v Van Dijke*), NL SC 8 February 2002, *NJ* 2002, 284 (*Poelstra v Bettman*), NL SC 20 December 2003, *NJ* 2003, 153 (*Bollemeijer v TPG*), NL SC 6 April 2012, *NJ* 2012, 234 (*X v Tennisvereniging De IJpelaar*) (para. 3.5) and NL SC 29 January 2021, ECLI:NL:HR:2021:153).

<sup>28</sup> NL SC 25 February 2000, *NJ* 2000, 471 (*Frans Maas v FNV*).

<sup>29</sup> See also Schelhaas, *op.cit.* (Mon. BW), para. 35.3.

<sup>30</sup> NL SC 31 December 1993, *NJ* 1995, 389 (*Matatag v De Schelde*).

<sup>31</sup> NL SC 15 October 2004, *NJ* 2005, 141 (*GTI v Zürich*).

<sup>32</sup> See also Asser/Hartkamp and Sieburgh 6-III (2014), no. 503, Schelhaas, NTBR 2008, p. 150 et seq., H.N. Schelhaas, *Algemene voorwaarden in handelstransacties*, Studiekring Offerhaus, Nieuwe Reeks, no. 13, 2011, p. 32, and Schelhaas, *op. cit.* (Mon. BW), no. 35.1 sub (iii) and 35.3.

*that a term is so unreasonable that it cannot properly have been understood or considered – the court should not interfere.*"<sup>33</sup>

And as Tuckey LJ commented in 2003:

*"The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms."*<sup>34</sup>

Accordingly, in the practical application of both Dutch and English law the courts are very reluctant to set aside an exclusion clause in a contract between commercial parties with similar bargaining strength.<sup>35</sup>

## 2.2 Precontractual liability

A particular application of good faith under Dutch law is the notion of precontractual liability where a party breaks off the negotiations. Under this doctrine, which the Netherlands Supreme Court introduced in *Plas v. Valburg* in 1982<sup>36</sup>, a party may be ordered to pay damages in the amount of the costs incurred by its counterparty or even the loss of profits where it has unlawfully broken off contract negotiations. This possibility to award compensation for *loss of profit* (expectation damages) due to breaking off negotiations and not only costs incurred (reliance damages) is fairly unique to Dutch law and is generally not accepted in any other jurisdiction.<sup>37</sup> However, in practice such an award has only been made in a handful of cases.<sup>38</sup> Moreover, from the 1987 *VSH v. Shell* judgment<sup>39</sup> onwards, the Netherlands Supreme Court has only further limited the scope of this doctrine of liability for breaking off negotiations. In doing so it has emphasised freedom of contract, restated that it is possible to terminate negotiations despite a legitimate expectation that a contract would be concluded, and reiterated that the threshold for precontractual liability is high (the "unacceptable" test). In the same vein, abundant case law from the lower courts shows that pre-contractual liability for breaking off negotiations is rarely accepted and that an award of damages in excess of the reliance interest (generally the costs incurred) is rarer still.

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<sup>33</sup> *Watford Electronics v Sanderson* [2001] EWCA Civ 317 (para. 55)

<sup>34</sup> *Granville Oil & Chemicals Limited v Davis Turner & Co Limited* [2003] 2 Lloyd's Rep 356 at 362. Followed by, among others, *Fraser J in Bates v Post Office Ltd* [2019] EWHC 606 (QB)(para. 1095).

<sup>35</sup> *Goodlife Foods v Hall Fire* [2018] EWCA Civ 1371.

<sup>36</sup> NL SC 18 June 1982, *NJ* 1983, 723 (*Plas v Valburg*).

<sup>37</sup> See M.W. Hesselink, *WPNR* 6248 (1996), p. 880-881. In French contract law compensation for lost profit in case of broken off negotiations is explicitly excluded by law (art. 1112 Cc).

<sup>38</sup> See M.R. Ruygvoorn, *Afbroken onderhandelingen en het gebruik van voorbehouden*, diss. Utrecht, 2009, para. 9.3.5 and L. Smeehuijzen and M. van Oosten, *Plas/Valburg: veel rechtsonzekerheid en ondermaats resultaat in de feitenrechtspraak*, AA 2015, p. 76. citing case law, to which should be added Amsterdam District Court 23 December 2009, *RCR* 2010/45 (*Leyduin v Gap*) (para. 4.5 and 4.6), Utrecht District Court 10 March 2010, *NJF* 2011/53, Utrecht District Court 10 November 2010, *NJF* 2011/52, The Hague Court of Appeal cited in NL SC 1 March 2013, *NJ* 2013, 142 (*Greenib Car v Van Dam*), Rotterdam District Court 2 November 2011, *RCR* 2012/19, Arnhem-Leeuwarden Court of Appeal 15 April 2014, *RCR* 2014/50, *NJF* 2014/257, Amsterdam Court of Appeal 19 December 2017, *ECLI:NL:GHAMS:2017:5293* (para. 3.11) and Amsterdam District Court 18 November 2020, *ECLI:NL:RBAMS:2020:7268* (para. 4.24).

<sup>39</sup> NL SC 23 October 1987, *NJ* 1988, 1017 (*VSH v Shell*)



Accordingly, freedom of contract itself also enjoys a firm foundation in Dutch law. In its 2005 landmark judgment on liability for breaking off negotiations, *CBB v. JPO*, the Netherlands Supreme Court began by stressing that:

*“... it must be stated first and foremost that the standard to be applied when assessing the obligation for damages in the event of broken off negotiations is that each of the negotiating parties (...) is free to break off the negotiations (...).”<sup>40</sup>*

Freedom of contract is paramount in Dutch contract law, in particular where commercial parties are involved. A party who believes it can get a better or cheaper deal from another party, may break off the negotiations and do business with that other party. The Netherlands Supreme Court continues in paragraph 3.6 of the *CBB v. JPO* judgment to give a summary of its case law on pre-contractual liability on account of breaking off negotiations:<sup>41</sup>

*“...The standard for assessing the obligation for damages includes the following elements:*

*- each of the negotiating parties has a duty to take the other’s legitimate interests into account as a guide for their conduct;*

*- each party is free to break off negotiations;*

*- the exception is where this would be unacceptable on the basis of the other party’s legitimate reliance that the agreement would be made or in view of the other circumstances of the case*

*- the relevant circumstances include, in any event:*

*\* the extent to which and the manner in which the terminating party has contributed to creating such reliance, as well as the legitimate interests of this party*

*\* whether unforeseen circumstances have arisen in the course of the negotiations.*

*If negotiations have been ongoing for a long period of time despite changed circumstances, the decisive analysis assesses reliance at the time the negotiations are broken off in the context of the entire course of the negotiations... [citations].”*

The Netherlands Supreme Court then expressly set out in paragraph 3.7 of this judgment that the standard it has given for assessing whether it is “unacceptable” to break off negotiations is “a strict standard that compels restraint”. The Netherlands Supreme Court thus aligns its approach with the test of the restrictive effect of reasonableness and fairness as codified in Article 6:2(2) DCC. The Netherlands Supreme Court has ruled many times in this regard that “unacceptable according to the standards of reasonableness and fairness” is a criterion to be applied with restraint.<sup>42</sup> Such restraint is all the more appropriate where the counterparty is a business. This final point seeks to lower the expectations of any party seeking damages (or another remedy) from its counterparty for breaking off negotiations and to discourage litigation on this issue.

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<sup>40</sup> NL SC 12 August 2005, NJ 2005, 467 (*CBB v JPO*).

<sup>41</sup> NL SC 12 August 2005, NJ 2005, 467 (*CBB v JPO*).

<sup>42</sup> See NL SC 9 January 1998, NJ 1998, 363 (*Apeldoorn v Duisterhof*), NL SC 25 February 2000, NJ 2000, 471 (*Frans Maas v FNV*), NL SC 14 December 2001, NJ 2002, 59 (*Bouwkamp v Van Dijke*), NL SC 8 February 2002, NJ 2002, 284 (*Poelstra v Bettman*) and NL SC 20 December 2003, NJ 2003, 153 (*Bollemeijer v TPG*).

Freedom to negotiate a contract has thus become more central in Dutch law and liability for terminated negotiations has faded into the far background.<sup>43</sup> This not only benefits the economic climate, it also creates greater alignment with the case law in neighbouring countries.<sup>44</sup>

Under English law, the ostensive starting point is that there is no obligation whatsoever to negotiate in good faith and no precontractual liability for breaking off negotiations. See in particular Lord Ackner in *Walford v Miles*:<sup>45</sup>

*“[...] the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. [...] A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.”*

However, the foregoing does not alter the fact that, although English law does not have a general doctrine of good faith (let alone in the negotiations phase), the previously mentioned piecemeal solutions are also available here to combat problems of unfairness.<sup>46</sup>

A first example is that a negotiating party may not make any false statements to the other party during the negotiations.<sup>47</sup> Misrepresentations in the precontractual stage may grant a right to damages or rescission of the contract.

Additionally, precontractual assurances relating to an interest in an immovable property (such as the purchase of a piece of land or the lease of a building), on which the addressee has relied and in consequence suffered a loss, may trigger proprietary estoppel. Such a proprietary estoppel may give rise to liability for damages (as a rule, for the “negative contract interest”, but in some cases the “positive interest” as well) or the obligation to accept that a contract has been formed.<sup>48</sup>

A further example can be drawn from English procurement law, where general principles of procurement law become applicable by means of an offer and acceptance construction. Whoever invites tenders as a contracting authority makes an implicit offer to act in accordance with general principles of procurement law.

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<sup>43</sup> So also A-G Van Peurse in his advisory opinion (no. 2.10) in advance of NL SC 3 April 2015, ECLI:NL:HR:2015:819 (art. 81 Wet RO) and Valk, op. cit. (SBR), para. 80a. A-G Timmerman, in his opinion (nos. 2.11 and 2.12) in advance of NL SC 3 February 2006, NJ 2006, 120 (*Budé v Geju*), qualifies this restraint in terms of a special contract law for businesses. See also H.N. Schelhaas, *Redelijkheid en billijkheid*, Mon. BW A5, 2017, para. 51.1. See also Arnhem-Leeuwarden Court of Appeal 17 November 2020, ECLI:NL:GHARL:2020:9442 (*Memory Events v Jaarbeurs*), para. 4.6.2,

<sup>44</sup> See H. Beale et al, *Cases, Materials and Text on Contract Law*, 2010, pp. 371 et seq.

<sup>45</sup> *Walford v Miles* [1992] 2 AC 128, 138, which judgment, despite criticism, still stands: *Petromec Inc v Petroleo Brasileiro SA* [2005] EWCA 891 and *Holloway v Chancery Mead* [2007] EWHC 2495, and for US law: A. Schwarz and R.E. Scott, *Precontractual liability and preliminary agreements*, *Harvard Law Review* 2007, pp. 668-676.

<sup>46</sup> See briefly: Cartwright, op. cit., pp. 82-86.

<sup>47</sup> See, for example, *Esso v Mardon* [1976] 2 All ER 5.

<sup>48</sup> See the principles explained in *Att.-Gen. Hong Kong v Humphreys Estate* [1987] 1 AC 114.

Anyone tendering accepts that offer and this creates a collateral contract, which means that these general principles of procurement law govern the legal relationship between the contracting authority and the tenderer.<sup>49</sup>

In practice, under both Dutch and English law, where it concerns larger commercial contracts (such as SPAs), parties will attempt to exclude any issues of precontractual liability by ensuring that the conclusion or operation of such contracts is made subject to certain conditions precedent.

Under Dutch law, a condition precedent (*opschortende voorwaarde*) in principle prevents the other party from having a legitimate reliance that a contract will be concluded as long as the condition has not yet been fulfilled. This precludes any pre-contractual liability for compensation of loss of profit from arising.<sup>50</sup> As long as the condition is not fulfilled, it is generally not possible for there to be any reasonable reliance that a contract will be concluded. An example of a usually effective practice – barring special circumstances – is the inclusion of a condition precedent specifying that there must be a validly signed contract in writing for an agreement to be legally binding. A reservation made in the precontractual phase may be ineffective if it, or the right to rely on it, has been waived (expressly or by implication), or it is otherwise unacceptable according to standards of reasonableness and fairness (or variations on this theme, as regulated in Article 6:23 of the DCC).<sup>51</sup>

Things are not that different under English law. A “subject to contract” clause will prevent a contract from being performed if that condition is not met.<sup>52</sup> However, in exceptional cases it is possible for a party to implicitly waive such a clause on the grounds of its conduct. The English Supreme Court has accepted such an implied waiver in a case where the parties had agreed on almost all the contractual terms and a significant degree of performance and payment had already taken place.<sup>53</sup>

In short, though the doctrines and principles relating to precontractual liability in Dutch and English law contain significant differences, their practical outcome in terms of business certainty is very much comparable. Moreover, the respective practice in regard to conditions precedent and implicit waivers is close to equivalent.

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<sup>49</sup> See *Blackpool Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195.

<sup>50</sup> NL SC 24 November 1995, *NJ* 1996, 162 (*Van Engen v Mirror Group*). See also NL SC December 20, 2013, *NJ* 2014, 144 (*State v G*) (para. 3.5.2). See also The Hague Court of Appeal 23 March 2010, ECLI:NL:GHSGR: 2010:BM1591 (*Moerkerk & Zandstra v Delek*) (para. 2.9) and Amsterdam District Court 27 June 2018, ECLI:NL:RBAMS:2018:4545 (para. 4.6)(regarding subject to board approval).

<sup>51</sup> See also A-G Rank-Berenschot in her advisory opinion (no. 2.6) in advance of NL SC 5 March 2010, *RvdW* 2010, 382 (*Fair Play Centers v Geveke*).

<sup>52</sup> See *Farrar et al v Rylatt et al* [2019] EWCA Civ 1864 (Coulson LJ, paras 65-68) and *Joanne Properties Ltd v Moneything Capital Ltd* [2020] EWCA Civ 1541.

<sup>53</sup> See *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14.

### 2.3 Interpretation of contracts

The classic standard for the construction of contracts under Dutch law is given in the *Ermes v. Haviltex* judgment,<sup>54</sup> where the Netherlands Supreme Court stated the standard in the following terms: the interpretation of a contract clause focuses on the meaning that the parties “should reasonably attribute” to the relevant provision in the given circumstances and on the meaning they “should reasonably expect” one another to give it. In *DSM v Fox* (paragraph 4.5) and subsequent judgments, the Netherlands Supreme Court added the following general rule on the interpretation of written contracts:

*"[...] the circumstances of the concrete case, as appraised according to the standards implied by reasonableness and fairness, are of decisive significance at each court."*<sup>55</sup>

It might appear to an outsider that contract construction under Dutch law is subject to some kind of nebulous and subjective reasonableness that would allow the court to tweak the contract on the basis of its personal opinion as to what this reasonableness entails. This, however, would be a misconception of Dutch contract law.

The Netherlands Supreme Court's reference in the *DSM v. Fox* judgment to the *appraisal* of all the circumstances according to reasonableness and fairness means that, when assessing how these facts and circumstances should be evaluated, reasonableness and fairness in the meaning of Articles 6:2 and 6:248 DCC operate within the context of Article 3:35 DCC (where they give substance to its objectifying element: "could reasonably attribute")<sup>56</sup>. This means that the court must assume that the parties acted as rational beings and that it is likely that they agreed on something that is objectively reasonable.<sup>57</sup> The role of objective reasonableness and fairness in the interpretation of a contract does not mean that the court (or arbitral tribunal) may interpret the contract according to its own (subjective) opinion of what is “fair” and “reasonable”. The key under Dutch law is what the parties objectively should, in relation to one another, reasonably expect the clause to mean in the given circumstances.

The language used in *DSM v Fox* and subsequent Supreme Court judgments is a clear pointer that a reasonable interpretation does not mean an interpretation according to the court's own (subjective) conception of what is reasonable, certainly when it concerns commercial contracts. It would, however, be welcome if the Netherlands Supreme Court were to clarify this more specifically. Any ambiguity about how the courts are to interpret (commercial) contracts under Dutch law creates uncertainty, especially among non-Dutch contracting parties and lawyers (including non-Dutch judges and arbitrators).

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<sup>54</sup> NL SC 13 March 1981, *NJ* 1981, 635 (*Haviltex*).

<sup>55</sup> NL SC 20 February 2004, *NJ* 2005, 493 (*DSM v Fox*). Likewise NL SC 25 November 2016, *NJ* 2017, 114 (*FNV v Condor*) (para. 3.6).

<sup>56</sup> “The absence of intention in a declaration cannot be invoked against a person who interpreted another's declaration or conduct in conformity with the sense which he could reasonably attribute to it in the circumstances as a declaration of a particular implication made to him by that other person.” (translation by Hans Warendorf).

<sup>57</sup> Cf. C-W Canaris and H.C. Grigoleit, *Interpretation of Contracts*, in: *Towards a European Civil Code* (A. Hartkamp et al (eds)), 2011, p. 590 and p. 592. Cf. Asser/Hartkamp & Sieburgh 6-III (2014), no. 36 and Hijma/Olthof, *Compendium van het Nederlands vermogensrecht*, 2016, no. 492 and J. Waelkens, *Interpretatie van overeenkomsten en eenzijdige rechtshandelingen*, 2016, para. 156.

The more that can be done to remove the misunderstanding that under Dutch law a court may interpret a contract as it deems reasonable, the better this will position Dutch law with respect to English law, where the highest court has made an explicit link between interpretation and business certainty.

A similar drive for certainty in Dutch law comes to the fore in the weight given to “linguistic” (i.e. text-based) interpretation in the practice of interpreting contracts and particularly with regard to carefully drafted commercial contracts.

Again, in *DSM v. Fox*, the Netherlands Supreme Court expressly reiterated the major practical importance of a “linguistic” interpretation:

*“In practical terms, the linguistic meaning that these words, read in the context of the document as a whole, normally have in (the relevant circle of) commerce, is often indeed of great importance to the interpretation of that document.”* (end of paragraph 4.5):

The Netherlands Supreme Court has cited this passage in subsequent judgments and reiterated the importance of text-based interpretation.<sup>58</sup> This is reflected in the practice of the lower courts: a 2018 survey of contract interpretation in 268 judgments found that in the vast majority of cases (96.7%), the court construed the contract in accordance with its text.<sup>59</sup>

Moreover, since *MeyerEurope v. PontMeyer* in 2007, the Netherlands Supreme Court has ruled that when interpreting a carefully drafted commercial contract (this, according to case law, is evidenced by the detail of a contract, the assistance of lawyers in its drafting and the presence of an entire agreement clause<sup>60</sup>), the court may ascribe considerable weight to the linguistic meaning of the contractual terms. Alternatively, the court may adopt the presumption that a contractual clause has the meaning it has according to its “linguistic” interpretation, subject to proof to the contrary. The Netherlands Supreme Court, qualifying it as a proper application of the “*Haviltex* standard”, upheld the following decision of the Court of Appeal in *MeyerEurope v PontMeyer*:

*“[...] for the answer to the question as to what meaning the parties should in the given circumstances reasonably have attributed to the disputed words in art. 8(b) SPA and what they should reasonably have expected from each other in this respect, in the circumstances [...], among which the nature of the transaction, the scope and detail of the contract, the manner of its formation and in particular the “entire agreement clause” in art. 17.5 SPA, the point of departure should be that decisive weight be given to the most obvious linguistic meaning of those words, read in the light of the other provisions in the SPA relevant to interpretation.”*<sup>61</sup>

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<sup>58</sup> See, *inter alia*, NL SC 17 September 2004, NJ2005, 169 (*Wessanen v Nutricia*) and NL SC 23 December 2005, NJ2010, 62 (*De Rooij v Van Olphen*).

<sup>59</sup> L. Smeehuijzen and J. de Haan, *Een empirisch onderzoek naar feitenrechtspraak over uitleg*, NJB 2020, p. 2569 et seq. (para. 6).

<sup>60</sup> Moreover, according to NL SC 13 December 2019, ECLI:NL:HR:2019:1940 (*Valerbosch*) (para. 3.2.3) the absence of any of these elements does not preclude the court from ascribing compelling weight to, or operating from the presumption of, the “linguistic” meaning of a contract clause.

<sup>61</sup> NL SC 19 January 2007, NJ 2007, 575 (*Meyer Europe v PontMeyer*), para. 3.4.3. (underscore added). The Netherlands Supreme Court has clarified and repeated this reasoning in, among others, NL SC 5 April 2013, NJ 2013, 214 (*Lundiform v Mexx*).

In short, though the theoretical principles of contract interpretation under Dutch law may appear at first glance to suggest a certain vagueness (“a reasonable interpretation in light of all circumstances of the case”), in practice, “linguistic” interpretation dominates (particularly where it concerns commercial contracts). A party arguing for an interpretation that deviates from the wording of the contract will have its work cut out for it: it will have to assert facts and circumstances that will undermine the presumption that the parties’ intention is not expressed correctly in the wording of the contract. Practice shows that this is extremely difficult.

In English law, textual interpretation was for a long time the prime point of departure when it came to the interpretation of written contracts.<sup>62</sup> However, there has been a perceivable shift in English case law since the 1970s, away from a purely textual interpretation towards a more contextual approach. Under this newer approach, it is not only the “linguistic” interpretation that matters, but also the meaning that reasonable persons in the same position as the parties ascribe to it, in respect of which the context of the contract (referred to by Lord Wilberforce and later others as *the “matrix of fact”*) is of relevance.<sup>63</sup>

In *Wood v Capita Insurance Services*, Lord Hodge emphasised that whether textual or contextual arguments predominate depends in part on the nature, degree of formality and quality of the drafting of a contract. These findings are reminiscent of the abovementioned Dutch *Meyer Europe v. Pontmeyer* judgment:

*“Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.”*<sup>64</sup>

A difference between contract interpretation under English law and Dutch practice is that English law generally does not take pre-contractual representations and the conduct of the parties after closing into

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<sup>62</sup> See, *inter alia*, *Inland Revenue Commissioner v Raphael* [1935] AC 96.

<sup>63</sup> *Reardon-Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989. See further *Investors Compensation Scheme (ICS) Ltd. v West Bromwich Building Society* 1 WLR 896, 912, *BCCI v Ali* [2001] 1 All ER 961 and *Rainy Sky SA & Ors v Kookmin Bank* [2011] UKSC 50, *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

<sup>64</sup> Lord Hodge (para. 13) in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

account. However, though under Dutch law such representations are relevant, they are rarely of decisive importance as they are not unambiguous. Where parties have understood each other's representations and statements in a manner other than their counterparty intended, the court will have to decide what the parties "may reasonably expect from each other". Similarly, under English law, where a contract is reasonably open to more than one interpretation, the – equally vague – notion of "business common sense" or "commercial common sense" comes into play.<sup>65</sup> See Lord Clarke in *Rainy Sky v. Kookmin*:

*"[...] where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense."*<sup>66</sup>

Lord Sumption, a former member of the English Supreme Court, quipped on "business common sense" that it is brought to the attention of judges:

*"[...] in virtually every case where Counsel contends for a result which is inconsistent with what his client appears to have agreed."*<sup>67</sup>

In his view, the courts are not well placed to determine what "business common sense" entails. He argues that judges suffer from hindsight bias and that their:

*"notions of common sense tend to be moulded by their idea of fairness. [...] It becomes a means of saving one party from what has turned out to be a bad bargain."*<sup>68</sup>

In *Arnold v. Britton*, Lord Neuberger emphasised that commercial common sense and the matrix of facts should not detract from the importance of the text of the contract.<sup>69</sup> He further cautioned that commercial common sense should not be applied with the benefit of hindsight to allow a party an escape from a commercially adverse transaction.<sup>70</sup> Lord Neuberger commented:

*"The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language."*<sup>71</sup>

As we hope to have shown in the above, notwithstanding the attention to "all circumstances of the case appraised in accordance with the standards of reasonableness and fairness", Dutch practice is less remote from this English approach than it might appear at first sight. "Linguistic", text-based, interpretation is key. Particularly where it concerns a detailed commercial contract drafted with care by professional parties with the benefit of legal assistance. In these circumstances it may be presumed that the text of the contractual provisions reflect the intention of the parties.

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<sup>65</sup> *Rainy Sky SA & Ors v Kookmin Bank* [2011] UKSC 50 (para. 21 et seq.) and Lord Hodge (para. 11) in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

<sup>66</sup> Lord Clarke (para. 30) in *Rainy Sky SA & Ors v Kookmin Bank* [2011] UKSC 50.

<sup>67</sup> Lord Sumption, *A Question of Taste: The Supreme Court and the Interpretation of Contracts*, Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017, p. 4. See [www.supremecourt.uk/docs/speech-170508.pdf](http://www.supremecourt.uk/docs/speech-170508.pdf).

<sup>68</sup> Lord Sumption, *op. cit.*, p. 10.

<sup>69</sup> See also *FCA v Arch Insurance et al* [2020] EWHC (Comm)(para 64).

<sup>70</sup> Lord Neuberger (para. 17-23) in *Arnold v Britton* [2015] UKSC 36. Similarly, Lewinson LJ in *Kasok Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132, para 17.

<sup>71</sup> Lord Neuberger (paras 19, 20, 77) in *Arnold v. Britton* [2015]KSC 36.

### 3. Further similarities and contrasts between Dutch and English law of contract

The caricature view places English contract law and Dutch contract law in opposition to one another. English contract law is said to be inspired by freedom of contract and legal certainty, while Dutch contract law is supposedly steeped in the notion of good faith and the weight ascribed to the particular circumstances of the case. The origin of these caricatures may perhaps be found in the extensive advocacy by, among others, the English Bar Association, the City of London and the English judiciary. Such advocacy tends to advance a number of arguments as to why English law is supposedly superior to civil law.<sup>72</sup> English law is said to be more transparent and predictable and offer greater legal certainty.<sup>73</sup> English law is also said to be more flexible and its system of precedents supposedly gives more precise rules. As Professor Cuniberti and others have pointed out, these arguments merit some qualification.<sup>74</sup>

Although English law does not contain a general doctrine of good faith, there are discernible developments towards the recognition of that doctrine (albeit limited for now to the performance phase of relational contracts). There is no duty to negotiate in good faith, but English law offers piecemeal solutions to counter unfairness in the pre-contractual phase. The interpretation of contracts is not only a matter of textual interpretation, but also of contextual interpretation in light of the matrix of facts. Clauses that exclude or limit liability are subject to a *reasonableness* test under the Unfair Contract Terms Act,<sup>75</sup> and penalty clauses are null and void if the penalty is disproportionate to the interest served by the penalty clause.<sup>76</sup> This balancing of the interests is dependent on the concrete circumstances of the case and accordingly its outcome cannot be predicted.

English contract law is laid down in numerous cases and it is not always clear what validity these cases have to other sets of facts. There are no statutory provisions on contract law in general nor are there statutory provisions on specific contracts (apart from incidental legislation such as the Sale of Goods Act).<sup>77</sup> In order to understand English contract law, it is therefore necessary to study many judicial decisions and subsequently determine their possible significance according to the doctrine of precedent. The Dutch system, with its codified general rules of contract law and specific rules for specific contracts (such as purchase, assignment, rent, surety, etc.) makes the law easier to find and thus promotes the

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<sup>72</sup> See e.g. Courts and Tribunals Judiciary, *The strength of English law and the UK jurisdiction* (see <http://www.judiciary.uk/wp-content/uploads/2017/08/legaluk-strength-of-english-law-draft-4-FINAL.pdf>.) “2. Substantive English common law is clear, fair and predictable, and based on precedent. The English common law respects the bargain struck by the parties. When planning a transaction or having to deal with the situation that has gone wrong, businesses know where they stand under English law and can predict outcomes with a higher degree of certainty. The English common law respects party autonomy as to the terms of the contract, and will not imply, or introduce, terms into the parties’ bargains unless stringent conditions have been met. [...]”

<sup>73</sup> See e.g. the House of Lords in *Golden Straight Corporation v. Nippon YKK (The Golden Victory)* [2007] UKHL 12 (para. 1). “The quality of certainty (...) is a traditional strength and major selling point of English commercial law (...)”

<sup>74</sup> With regard to an earlier version of the brochure cited in the previous note, Cuniberti (op. cit., p. 498) notes: “Clearly, the brochure is a marketing tool that does not aim at contributing to legal science.”

<sup>75</sup> See Anson's Law of Contract, J. Beatson et al, 2016, pp. 208 et seq.

<sup>76</sup> *Cavendish v Talal El Makdessi and Parking Eye v. Beavis* [2015] UKSC 67. A penalty clause is null and void under English law if (para. 32): “[...] the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.”

<sup>77</sup> Cartwright, op. cit., p. 58.



certainty and predictability of the law. Codification renders the law knowable at first sight and thus serves business certainty.<sup>78</sup> In short, as Professor Cuniberti has remarked:

*“The claim that the English common law is more precise than its civil law counterparts reveals, at best, ignorance of how civil law systems work and, at worst, a purposeful attempt to mislead business actors.”*<sup>79</sup>

The Dutch codified rules, supplemented and detailed by case law, are, in effect, likely more flexible and more precise than the English system of precedents. In civil law jurisdictions the courts ensure that the law is interpreted according to contemporary standards, is tested against objective reasonableness and fairness (as clarified in decades of case law) and, where merited, is tailored to special, individual cases. An English court must look at the *ratio decidendi* of a previous case, which is always linked to the particular facts of that specific case. If the facts are different, the rule developed in a previous case is irrelevant. This is different under Dutch case law. The general applicability of a legal rule given in a decision by the Netherlands Supreme Court does not depend on the facts of the case, but on the general wording the Supreme Court used to describe that rule. Additionally, under English law, where a precedent is no longer appropriate, it is very difficult to abandon. It is further worth noting that commercial contract law in civil law jurisdictions offers particular flexibility, in that almost all statutory provisions governing commercial contracts are non-mandatory and allow scope for party autonomy. Commercial parties are allowed to deviate from the general rules provided in the Civil Code.

While the English judiciary has been known to use its own judgments as a platform to promote the benefits of its own legal system to business,<sup>80</sup> the Netherlands Supreme Court has shown that it has a keen appreciation of the value that business ascribes to certainty and flexibility in more practical ways. Examples include its strong record in curtailing precontractual liability,<sup>81</sup> the weight its landmark judgments ascribe to linguistic meaning when constructing carefully drafted commercial contracts between professional parties,<sup>82</sup> and its insistence that the restrictive effect of reasonableness and fairness as set out in the DCC (Articles 6:2 and 248 (2)) is a very strict standard that is to be applied with restraint.<sup>83</sup> The Netherlands Supreme Court likewise requires a strict test with respect to the mitigation

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<sup>78</sup> See the then general counsel and lawyer of Akzo Nobel NV S.H.M.A. Dumoulin, Het Netherlands Commercial Court vanuit de onderneming bezien, in: *Geschriften vanwege de Vereniging Corporate Litigation 2015-2016*, 2016, p. 325 and P. Kuipers, Bedrijf, jurist en de Netherlands Commercial Court, in: *De kansen voor een Netherlands Commercial Court*, 2018, p. 126.

<sup>79</sup> Cuniberti, op. cit., p. 499 et seq.

<sup>80</sup> See e.g. *Golden Straight Corporation v. Nippon YKK (The Golden Victory)* [2007] UKHL 12 (para. 1). “*The quality of certainty [...] is a traditional strength and major selling point of English commercial law [...].*” And Lord Hodge (para. 15) in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24: “*The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation.*” And Lord Sumption in (para. 12, final) in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24. “[...] *the law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy.*”

<sup>81</sup> NL SC 12 August 2005, NJ 2005, 467 (*CBB v JPO*).

<sup>82</sup> NL SC 19 January 2007, JOR 2007, 166 (*Meyer Europe v PontMeyer*).

<sup>83</sup> NL SC 9 January 1998, NJ 1998, 363 (*Apeldoorn v Duisterhof*).

of penalty clauses.<sup>84</sup> Additionally, the Netherlands Supreme Court has extended this pragmatic approach in respect of facilitating innovations in finance, for example, approving collective deeds of pledge<sup>85</sup> and sale and lease back constructions.<sup>86</sup> The Netherlands Supreme Court has also further bolstered legal certainty by defining rules for “standard cases”, such as the rules on interpreting contractual prohibitions on assignment and pledges.<sup>87</sup>

All of this is far removed from the caricature of Dutch contract law that a misinformed bystander might infer from the mantra “all circumstances of the case appraised in accordance with the standards of reasonableness and fairness”. It does not mean that the Dutch courts have leeway to interpret a contract as they subjectively deem reasonable. It signifies a concern for legal precision, party autonomy and an objective test of fairness.

#### 4. Conclusion

We hope we have shown in the above analysis that Dutch contract law does not necessarily offer less legal certainty than English contract law, nor is it less precise or predictable. There is still much that can be done to unlock Dutch law to international parties, including English translations of landmark judgments and key legislation in Dutch contract law approved by the Dutch government and judiciary. This is an ongoing process. We hope that as the NCC breaks into its stride, the international business community will become increasingly aware of the strengths of Dutch law of contract and Dutch dispute resolution.

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<sup>84</sup> NL SC 27 April 2007, *NJ* 2007, 262 (*Intrahof v Bart Smit*), repeated in NL SC February 16, 2018, *NJ*2018, 100 (*Turan v Easystaff*).

<sup>85</sup> NL SC 3 February 2012, *NJ* 2012, 261 (*Dix q.q. v ING*).

<sup>86</sup> NL SC 19 May 1995, *NJ* 1996, 119 (*Sogelease*).

<sup>87</sup> NL SC March 21, 2014, *NJ* 2015, 167 (*Coface v Intergamma*).