



Dispute Resolution on Mergers & Acquisitions by the Netherlands Commercial Court¹

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The Netherlands Commercial Court (www.ncc.gov.nl) is the International Commercial Chamber of the Amsterdam District Court, which has been in operation since 2019. The NCC is built on a solid foundation: the reputation of the Dutch judiciary, which is ranked among the most efficient, reliable and transparent worldwide (see the most recent [Rule of Law Index](#) of the World Justice Project, “Civil Justice” section). And the Netherlands – and Amsterdam in particular – is a prime location for business, and a gateway to Europe.

The reason for establishing the NCC is for the parties to conduct the entire proceedings in English before judges who are selected for their experience in dealing with complex international disputes. However, the NCC only has jurisdiction where the parties added [a NCC clause](#) to their contract. The contract must pertain to an international matter, but the parties need not have a connection to the Netherlands. The *forum non conveniens* doctrine does not apply.

Since 2019, the NCC has been attracting cases from parties all over the world. They seem to favour the Court’s efficient dealing with its caseload (within 6 weeks up to 12 months after initiation), which is a result of active case management and of deferring evidence gathering until after the interim judgment. This enables the Court and the parties to focus on examining those witnesses who can give evidence on facts that are in dispute and relevant for the Court’s decision.

A relatively large number of cases brought before the NCC since 2019 concern mergers and acquisitions (M&A). This may be explained by the experience the NCC judges have in this field from their practice prior to becoming a judge. In this paper, I will summarise the NCC’s key decisions in the area of M&A.

Formation of an M&A agreement

In principle, the formation of an M&A agreement is guided by the same principles as other agreements. Dutch law requires an offer and an acceptance of the offer for contract formation, and allows the parties broad leeway as to how they communicate what may or may not be construed as an offer or acceptance. The standard is not what the parties may have thought, or meant to say; it is what a reasonable person in the same circumstances would have understood their communications to mean ([Haviltex](#)).

In [McCourt I](#), the NCC gave a ruling as to how these requirements should be construed in the context of M&A practice. In this case, a letter of intent contained a right to walk away from the deal: the prospective purchaser was free at any time to not execute and deliver the transaction agreement, but would then owe a fee of USD 30 million. The prospective purchaser did not sign the transaction agreement, raising the question whether an agreement had nevertheless been concluded on the basis of various acts and expectations created between the parties. The NCC held that this was not the case. Although the requirement to “execute and deliver” does not constitute a formal validity requirement under Dutch law, it is important evidence for the existence of an agreement.

¹ This is a preview of the article “Kroniek Netherlands Commercial Court 2019-2025”, to be published in “Geschriften vanwege de Vereniging Corporate Litigation” (Wolters Kluwer Publishing).

It also means that a high threshold applies when assuming the existence of an agreement on the basis of conduct or statements by the parties' advisers. Two considerations played a role:

- the process on the purchaser's side had been structured in such a way that none of the advisers had full authority to decide on the transaction; the crucial step was board approval; and
- the board had never created the impression that the advisers did possess such authority, which is also uncommon in M&A practice.

The conduct and statements relied upon by the seller — including statements that the deal had been finalised and that signature pages would be provided, which ultimately did not occur — were considered insufficient.

Construction of an M&A agreement

As a general rule, contracts are interpreted on the basis of the *Haviltex* criterion: what a reasonable person in the same circumstances would have understood the contract to mean. In two M&A cases (*Welten* and *Triple Bells*), the NCC explicitly relied on the most obvious linguistic meaning of the agreement. These agreements had been concluded with professional legal assistance, were highly detailed, and contained an “entire agreement clause.” This approach is consistent with the Dutch Supreme Court's judgment in *Meyer/PontMeyer*.

Entire agreement clause

In *McCourt I* and *Lagerwey*, the significance of an “entire agreement clause” itself was at issue. As discussed above, such a clause may support a predominantly textual interpretation of the agreement. However, the existence of such a clause:

- is irrelevant as to the question whether there was agreement on an NCC clause, since the choice of the NCC must be assessed independently from the content of the other contractual provisions; and
- does not relieve the court of its duty to examine whether alleged agreements made prior to the conclusion of the agreement containing the “entire agreement clause” are binding between the parties.

The significance of such a clause depends on the circumstances of the case, including prior statements and conduct of the parties. In *Lagerwey*, the NCC Court of Appeal (NCCA) therefore first examined whether the parties had actually made the alleged “additional agreement” (and examined witnesses for that purpose) before considering the scope of the entire agreement clause.

Conditions precedent

In *Triple Bells*, the NCC addressed the interpretation of conditions precedent. According to the Court, such conditions are intended as “hard and fast rules.” Their purpose is to ensure that the obligation to complete the transaction only arises once the most fundamental obligations have been fulfilled, while also providing certainty that the obligation does arise once those conditions are satisfied. This is incompatible with an interpretation that would require extensive further investigation in order to determine whether the conditions precedent have been met.

Waiver

In the same case another issue of interpretation was raised: how to construe a clause waiving the right to rescind or annul the agreement. The relevant provision stated:

“Unless stated otherwise in this Agreement, the Parties waive their rights, if any, to in whole or in part annul (vernietigen), rescind (ontbinden) or partially rescind (gedeeltelijke ontbinding) this Agreement on the basis of article 6:228, article 6:258, article 6:265 or article

6:270 of the DCC. Furthermore, Parties waive their right to request a competent court to amend this Agreement on the basis of article 6:258 or article 6:230 of the DCC [Dutch Civil Code].”

According to the purchaser — who no longer wished to proceed with the transaction — the reference in the second sentence to the “competent court” meant that only judicial rescission had been waived, not extrajudicial rescission.

The NCC rejected this argument. The Dutch Civil Code (DCC²) provisions referred to did not concern a specific mode of rescission. Such a distinction would have required reference to Article 6:267 DCC, which distinguishes between judicial and extrajudicial rescission.

Disclosure

Another interpretative issue arose in *Welten*. In this case the purchaser relied on a contractual disclosure obligation requiring the seller: “*to disclose to the Seller or its representatives all information and documents relevant to the Claim*”.

The NCC rejected the purchaser’s argument that this provision should be interpreted narrowly. The seller was not required to describe with specificity the information or documents it sought to obtain. Nor was there — absent the abuse of rights or a contractual reasonableness test — any obligation to limit disclosure requests in order to avoid imposing an excessive burden on the purchaser.

This suggests that parties may contractually agree on disclosure obligations which are broader in scope than the statutory disclosure regime under Dutch procedural law. However, contractual disclosure obligations involving documents containing personal data must still comply with the proportionality test under the General Data Protection Regulation (GDPR). In this case, that requirement was satisfied because:

- the documents requested were business-related, so the persons involved had no reasonable expectation of privacy;
- the privacy of the persons concerned was protected through contractual confidentiality obligations; and
- there were no less intrusive means of obtaining the requested information, such as hearing witnesses.

Whether a disclosure request based on a contractual disclosure obligation succeeds depends on the wording of the clause. The clause discussed above was wide in scope: the only requirement was that the documents be relevant to a claim brought by the purchaser against the seller.

However, also in *Welten*, the seller brought a counterclaim alleging breaches by the purchaser of earn-out obligations. To substantiate that claim, the seller sought documents from the purchaser and relied on a more narrowly drafted disclosure provision: “*[provide] such information as reasonably requested by it and provide the relevant information relating to the preparation of the Earn Out Payment Calculation, in each case for the purpose of assisting the Seller in its review of the Earn Out Payment Calculation and the calculations contained therein*”.

The NCC held that this obligation was limited to documents relevant to reviewing the earn-out calculation prepared by the purchaser. It did not extend to establishing possible breaches of the agreement relating to the earn-out mechanism itself. A subsidiary claim based on Article 843a of the former Dutch Code of Civil Procedure (currently [Article 194 DCCP](#)) also failed because the seller had not made it sufficiently plausible that the alleged breaches had actually occurred.

² For the translation of the DCC see the book “The Civil Code of the Netherlands, Second Edition”, 2nd Revised Edition by Hans C.S. Warendorf et al.

Attribution of the target's conduct and knowledge to the seller

In *Welten*, the NCC concluded on the basis of the evidence submitted that the Chief Financial Officer of the target — the company sold by the selling parent company to the purchaser — had committed fraud within the meaning of Article 3:44(3) DCC. The fraud consisted of improperly approving the shifting of costs between two consecutive financial years and creating an incorrect provision for accrued holiday accruals.

The question was whether the conduct and knowledge of the CFO could be attributed to the selling parent company. The NCC answered in the affirmative. The applicable standard is whether, according to views prevalent in the community, the actions and knowledge of the individual acting or possessing the relevant knowledge can be regarded as actions or knowledge of the legal entity itself.

According to the NCC, this was the case. The CFO had a duty to communicate her actions and knowledge to the selling parent company because:

- she was aware of the ongoing acquisition process;
- she was responsible for decisions on financial matters within the target company, including accounting entries and accounting policies; and
- she had been tasked by the seller to provide information about the target company to the purchaser directly.

In addition, the selling company itself had a duty to actively inquire into the financial affairs of the target company, since it had provided warranties concerning these matters to the purchaser.

The fact that the M&A agreement contained provisions attributing the CFO's knowledge to the seller, but not specifically with regard to the warranties breached, did not help the seller's case. In addition to contractual attribution, attribution may also arise under general principles based on prevailing views in the community. The contractual attribution clause merely confirmed that the CFO's knowledge and conduct were attributable to the seller. According to the NCC, a different outcome would also be unworkable in M&A practice, as it would undermine the integrity of the M&A process.

After the interim judgment in *Welten* above, the seller challenged this ruling, including through its own expert evidence, but [unsuccessfully](#). The addition of the phrase “[fraud] on the part of the Seller” in several provisions of the M&A agreement was insufficient to conclude that the seller had excluded liability for fraud committed by employees of the target company. That wording had to be interpreted in light of the contractual allocation of risk between non-intentional and intentional breaches of warranties. The former were covered by W&I insurance, whereas the latter were not.

This also made the contents of the insurance policy itself relevant. The subrogation clause in that policy extended to fraud committed by the target company and its employees.

Reasonableness and Fairness

In the M&A cases brought before the NCC, parties occasionally invoked the principles of reasonableness and fairness, but unsuccessfully.

Waiver

In the *Triple Bells* decision already mentioned, the purchaser argued that reliance on the waiver to rescind the agreement was unacceptable according to standards of reasonableness and fairness because proceeding with the acquisition could seriously affect the gambling licences held by the purchaser in, among other places, the United States, and could potentially expose it to criminal liability.

The NCC accepted that such circumstances could in principle render reliance on the prohibition of rescission unacceptable. However, after extensive examination — including analysing legal opinions concerning gambling regulation — the Court concluded that the risks identified by the purchaser were unlikely to materialise.



Unforeseen circumstances

With respect to an acquisition taking place during the outbreak of the COVID-19 crisis (*McCourt I*), the NCC held that the crisis did not render reliance on a break-up fee (a fee payable for not signing the M&A agreement) unacceptable, nor did it justify relief on the basis of unforeseen circumstances under Article 6:258 DCC. The break-up fee was intended both to incentivise the parties to proceed with the transaction and to allocate risks between them. Although the COVID-19 crisis could in itself qualify as an unforeseen circumstance, this did not make it unacceptable to bind the prospective purchaser to the break-up fee because the very purpose of the fee was to preserve the purchaser's freedom to decide not to proceed with the transaction under any circumstances. The fee restored the contractual balance between the parties: while the prospective purchaser was required to pay the fee for walking away (EUR 30 million), it thereby limited its liability for the impact of the COVID-19 crisis on the target business, which remained with the seller.

Conclusion

The above illustrates that parties from all over the world entrust their M&A disputes to the Netherlands Commercial Court. As more and more NCC clauses find their way into M&A agreements, it is apparent that the NCC is on track of becoming the M&A hub in Europe.

Any questions?

If you have any questions about the NCC, please contact us at NCC@rechtspraak.nl. Or visit our website www.ncc.gov.nl. It contains [various documents](#) on the NCC. You may also follow us on [LinkedIn](#).