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Instantie	Rechtbank Amsterdam
Datum uitspraak	29-04-2020
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Zaaknummer	NCC 20/014 (C/13/681900)
Rechtsgebieden	Civiel recht
Bijzondere kenmerken	NCC
Inhoudsindicatie	This case is about the two issues discussed below. 1. Whether or not the parties (domiciled in New York and Amsterdam) entered into a EUR 169 million transaction. Dutch law requires offer and acceptance 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. Here, the critical fact is that the defendant did not sign the "Transaction Agreement". The LOI's binary mechanism (either execute and deliver the paperwork for the Transaction Agreement by the agreed date, or pay a EUR 30 million fee) may not be an absolute formal requirement for contract formation, but it has significant evidentiary weight. In M&A practice, which the parties are thoroughly familiar with, this sets a high bar for there to be any agreement through other channels. The communications relied on by claimant do not clear that bar. There is not a sufficient factual basis to attribute the advisers' statements or conduct to the defendant, since there is nothing to suggest that the defendant itself said or did anything to communicate to the claimant that the advisers would be handling everything, including entering into the agreement. The Court finds that there is not a sufficient likelihood of success on the merits so as to justify an interim measure ordering the defendant to perform its obligations under the Transaction Agreement (payment of EUR 169 million and take the claimant's 50% stake in an equestrian show-jumping business). 2. Whether there any compelling reasons to modify or mitigate the fee. As to the alternative claim, the contract (LOI) is not in dispute. The issue is whether the Court should enforce the EUR 30 million fee against Tennor in the current COVID-19 circumstances, or whether the fee's effects should be modified, mitigated or reduced in some way, or whether the fee agreement should be dissolved. The claimant relies on three Articles: Articles 6:94, 6:248 and 6:258 of the Dutch Civil Code (DCC). Under all three Articles, the courts must exercise caution. Contracts must generally be enforced as agreed. The parties' autonomy is paramount. The courts' attitude is deferential. To express these concepts, all

three Articles use language stating, essentially, that interference by the courts in the contract's operation is allowed only to avoid an "unacceptable" impact, as assessed under standards of "reasonableness and fairness". There is no well-established case law on COVID-19. However, commentators have provided guidance that is very helpful to think through the issues. The "share the pain" approach advocated by Professor Tjittes focuses on preserving the parties' contractual equilibrium in the current circumstances. This is, in the Court's analysis, the right way to look at the agreement here.

There is no evidence in the record suggesting that the parties contemplated or discussed the full and exceptional impact of the COVID-19 crisis. The crisis may or may not be unprovided for. But there is no need to rule on this issue. Even if the crisis is unprovided for, there is no support in the record for the proposition that the crisis makes it unacceptable for the claimant to demand strict performance by the defendant. The reasons for this conclusion are straightforward. The fee allocates risk and expresses commitment. The fee caps the defendant's exposure. The harm to the business may be substantial and structural (as the defendant contends), or it may be short-term and minimal (as the claimant insists). Either way, the best "share the pain" solution, to preserve the contractual equilibrium in the agreement, is for the defendant to pay the fee as written. This allocates a defined risk to the defendant, but substantial actual or potential risks are borne by the claimant. If the fee were to be reduced in any business downturn, the fee's purpose – comfort and confidence to get the deal done – would not be accomplished. The fee would be eviscerated in precisely the circumstances in which the parties intended it to be robust. The Court therefore allows the alternative claim, and orders the defendant to pay the EUR 30 million fee.

(Summary in Dutch)
In deze zaak draait het om de vraag of er tussen partijen een Transaction Agreement (TA) tot stand gekomen is, en zo niet, of de fee van 30 miljoen euro die in dat geval verschuldigd is, moet worden gewijzigd of verminderd op de voet van artikelen 6:94, 248 of 258 BW vanwege de huidige coronacrisis. De voorzieningenrechter (CSP) van de Netherlands Commercial Court beantwoordt beide vragen ontkennend.
Vaststaat dat gedaagde de TA niet heeft ondertekend. Het vereiste van "execute and deliver" in de Letter of Intent (LOI) is onder Nederlands recht weliswaar geen vormvereiste, maar wel belangrijk als bewijsmiddel van het bestaan van een overeenkomst. In de M&A praktijk waarin partijen werkzaam zijn, betekent dit dat er een hoge drempel geldt voor het alsnog aannemen van een overeenkomst op basis van gedrag of uitlatingen van adviseurs van gedaagde. Wat eiseres in dit kader heeft aangedragen, is onvoldoende. Er is geen feitelijke grondslag aanwezig om dit gedrag en deze uitlatingen toe te rekenen aan gedaagde zelf. Daarom is het onvoldoende aannemelijk dat de bodemrechter zal oordelen dat gedaagde haar verplichtingen uit de Transaction Agreement (betalen van 169 miljoen euro en het afnemen van de aandelen) moet nakomen.
Tussen partijen is niet in geschil dat zij zijn overeengekomen om bij het niet tekenen van de TA een fee van 30 miljoen Euro te betalen. Gedaagde stelt echter dat de fee moet worden verminderd of gewijzigd vanwege de coronacrisis (zie hiervoor). De voorzieningenrechter volgt haar daar niet in. De coronacrisis is mogelijk een onvoorziene omstandigheid, maar niet van dien aard dat eiseres naar maatstaven van redelijkheid en billijkheid geen ongewijzigde instandhouding van de fee-verplichting mag verwachten. De bedoeling van de fee was om

partijen aan te sporen tot het aangaan van de transactie en om risico's tussen hen te verdelen. De fee beperkt de exposure van partijen. Dat doel zou worden doorkruist, als de fee zou kunnen worden verminderd bij een waardedaling van de target-onderneming. Dat zou het namelijk makkelijker maken om in zo'n geval de transactie niet te doen. Als de situatie van de doelmaatschappij zo slecht is als gedaagde stelt, dan is betaling van de fee een snelle uitweg uit de verplichting tot betaling van de koopprijs van 169 miljoen euro en uit de risico's die zijn verbonden aan het draaiend houden van de doelmaatschappij. Als de gevolgen van de coronacrisis blijken mee te vallen, lijkt de fee van 30 miljoen euro wellicht hoog, maar dat is wel wat partijen redelijk vonden toen zij afstand deden van hun recht om zich te beroepen op onredelijkheid van de fee. De subsidiaire vordering tot betaling van de fee van 30 miljoen euro wordt daarom toegewezen.

Vindplaatsen Rechtspraak.nl

Uitspraak

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judgment

AMSTERDAM DISTRICT COURT

Netherlands Commercial Court

NCC District Court – Court in Summary Proceedings Case reference number: NCC 20/014 (C/13/681900)

Judgment

29 April 2020

Claimant

[CLAIMANT]

"[Claimant]"

New York, New York, USA

lawyers: A.F.J.A. Leijten, O.J.W. Schotel and M.F. van Schendel, Amsterdam v.

Defendant

TENNOR HOLDING B.V.

"Tennor"

Amsterdam

lawyers: S.C.M. van Thiel, R.E.E. van Dekken and C.L. Kruse, Amsterdam

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4. Conclusion and order Signature pages

Reference is made to the Court's judgment on Tennor's motion (published on the Judgments List, ncc.gov.nl: ECLI:NL:RBAMS:2020:2277). That judgment set out the initial procedural history, background facts and [Claimant]'s main and alternative claims.

1 Summary

[Claimant]'s main claim seeks to compel the transfer of [Claimant]'s 50% stake in an equestrian show-jumping business to Tennor. In the Court's analysis, that is a bridge too far. There is not enough solid ground in the record,1 at this early stage and on a preliminary basis, to accept [Claimant]'s argument that the deal was done. In particular, there is nothing to show that Tennor itself said or did anything that a reasonable person in the same circumstances would have understood to mean that certain advisers were responsible for conveying final approval to [Claimant]. By contrast, [Claimant]'s alternative claim seeks payment of the expressly agreed fee due by Tennor as the party electing not to do the deal. Tennor contends that the fee should be modified or reduced given the current COVID-19 circumstances. The Court is not persuaded. In the Court's opinion at this early stage and on

a preliminary basis, the best course is to rely on the parties' judgement. They are experienced professionals, well guided and ably counselled by an array of experts. They set the fee and expressed their considered view that it was reasonable. They set their contractual equilibrium. The payment of the fee will preserve that equilibrium. Accordingly, the alternative claim is allowed, with interest.

2 Procedural history

All submissions were made in eNCC, by special order of the Court, given the current COVID-19 restrictions. Following the Judgment on the Motion, Tennor filed a statement of defence. Both parties submitted exhibits. Counsel submitted notes in eNCC in advance of the hearing. [Claimant] amended its claim. The matter was dealt with at a public videoconference hearing on 22 April 2020. The case was set for judgment today.

3 Discussion

3.1. The core facts in the case are straightforward and uncontested. It is worth reciting the main points here. They are:

[Claimant] and Tennor spent months in talks on a proposed transaction for Tennor to acquire [Claimant]'s 50% stake in an equestrian show-jumping business.2 They signed a Letter of Intent (LOI) in late December 2019. The LOI provides that either party may elect to back out of the deal at any time before the deadline, but the electing party must pay the non-electing party a EUR 30 million "fee". The deadline was 2 March 2020 (Tennor paying a EUR 1 million fee for a two-week extension to that date). [Claimant] executed the paperwork for the deal. Tennor's lawyers and other advisers made various statements on the deal (such as: "the drafts are final" and "Will revert with the signature pages in a few minutes").

Tennor's authorised officer did not sign the paperwork.

3.2. To set the stage for the analysis, it is useful to reiterate the parties' positions.

[Claimant] seeks an order for Tennor to take the stake and pay the price (EUR 169 million) (the main claim) or, in the alternative, an order for Tennor to pay the EUR 30 million fee (the alternative claim).

Tennor's defence has three prongs:

a. First, Tennor argues that there is no deal as its officer did not sign.

b. Next, Tennor relies on Articles 6:248, 6:258 and 6:260 of the DCC3 and contends that any deal must be dissolved, or its effects must be modified, in light of the current COVID-19 circumstances and their impact on the business.

c. Last, Tennor insists, on similar grounds plus Article 6:94 of the DCC,4 that the fee should be dissolved, modified or reduced to zero.

In response, in addition to its argument that the deal was done, [Claimant] contends that the business has retained its long-term value and that Tennor's change-of- circumstances arguments5 would effectively shift the COVID-19 burden entirely onto [Claimant]'s shoulders. Accordingly, [Claimant] argues there are no grounds to apply Articles 248, 258, 260 or 94 in these circumstances.

Preliminary matters

3.3. At the outset, the Court must determine the appropriate standard and the applicable law, and dispose of two preliminary matters.

3.4. The standard in summary proceedings has three prongs:6

a. Is there a sufficient likelihood of success on the merits?7

b. Is an immediate measure urgent and required in summary proceedings?

c. Is there a risk, on a balance of interests, of the unsuccessful party not being able to recover the funds, or undo the measure, if it is ultimately successful on the merits?

The courts must consider whether or not, on a balance of interests, the claimant's interests have enough weight to allow the claims. The courts should exercise caution in light of the recovery risk ((c) above). The likelihood of success on the merits ((a) above) is an important factor in the assessment of the recovery risk ((c) above). As for claims for money in summary proceedings, such as the alternative claim, the courts' judgment must provide more detailed reasoning to explain why the measure is or is not urgent. The courts' assessment in summary proceedings is at an early stage and on a preliminary basis; this means it is without prejudice to a subsequent action on the merits.

3.5. Next, the Court notes there is no dispute that Dutch law governs the parties' relationships at issue in the matter.

3.6. The first preliminary issue is whether [Claimant] has a sufficiently urgent interest so as to justify the Court's examination of its main claim in summary proceedings. The Court is persuaded that [Claimant] has the required interest. The context and purpose of the claim make this obvious: what is at stake is who will run the business pending dispute resolution on the merits. That in itself is sufficient. The parties need to know what their position is, and they need to know soon. But even the issue of the fee – the alternative claim – is sufficient to accept the requisite interest in this case. The mechanism of the LOI creates a clear and unambiguous rule: either you do the deal, or you pay the fee and walk away. And if you walk away, you pay the fee fast – within three business days. This means virtually immediately. The immediate payment concept is an essential part of the incentives the parties created with a view to comfort and confidence in each other's intentions to do the deal. And comfort and confidence were at the heart of the bargain in the LOI.8 If summary proceedings are not available to enforce the heart of the bargain, the bargain itself is an empty shell. As a result, speed is essential and [Claimant] has an urgent interest that justifies bringing its claim for money in summary proceedings.

3.7. The other preliminary issue is whether it is appropriate to deal with the matter in summary proceedings. The Court notes that the material facts are fundamentally clear and not in dispute. The legal issues present novel theories, but are not complicated. The issues are: Did the parties do the deal, and are there any compelling reasons to modify or mitigate the resulting obligations? Whether or not everything is clear enough at this stage to adjudicate the dispute in summary

proceedings is an issue to be addressed in the Court's analysis of the claims. This does not warrant the denial of all claims as a preliminary matter.

Whether the deal was done (the main claim)

3.8. The Court now turns to [Claimant]'s main claim. It is based on the position that the parties made a deal – an enforceable contract. The issue as to the main claim is whether or not the deal was done.

3.9. There is no doubt that general principles of contract formation apply here. 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.9

3.10. Applying these rules, the Court emphasises who the parties are and how they operate. The parties are experienced M&A specialist practitioners, guided by expert financial, legal and other advisers. Both sides have groups of companies operating in various jurisdictions.

3.11. In this context, at this early stage and on a preliminary basis, it is the Court's view that an authorised officer's signature has special significance and weight. It is not just a formality. It may not be the only way, but for these parties, as to this transaction and in these circumstances, it is universally acknowledged and accepted as the ordinary way to express final, binding agreement and to enter into the deal. A significant reason for this conclusion is Tennor's uncontested argument that its organisation has various people who are responsible for decision-making in different ways and at different steps in the process. For example, Tennor had numerous advisers, and it presented the deal to its board. There is no single person who has complete authority or responsibility. Tennor's structure and process suggest that the up-or-down decision in the executive suite at the end of the road is a crucial step. This step is ordinarily recorded by a signature. This is confirmed by Tennor's handling of the indicative bids and the LOI: they were entered into by Tennor's officer [Officer], not by any of its advisers. It is noteworthy that the proposed transaction was a major deal, given the purchase price, the target business, the parties' extensive talks and the documentation that was prepared. The proposed contract was very different – in nature, purpose and magnitude – from the straightforward and fairly obvious dispute resolution clause that the Court examined in the Judgment on the Motion.

3.12. It is acknowledged that Tennor did not sign the paperwork for the Transaction Agreement.

3.13. [[Claimant] insists that the circumstances in the run-up to the talks between the parties, as well as numerous statements and conduct by advisers, counsel and Tennor's chairman, must be considered. [Claimant]'s position, as far as it goes, has substantial merit. [Claimant]'s key points are:10

- [Claimant] views its relationship with its partner in the business as dysfunctional, and its partner as uncooperative, but the partner happens to be on friendly terms with Tennor's chairman, which positions Tennor as an attractive buyer
- this point poses major challenges to sell [Claimant]'s stake to anyone else
- Tennor reached out to [Claimant] to set up the talks
- in the talks, Tennor and its advisers expressed few or no doubts along the way about the deal being done
- Tennor communicated through its advisers, especially its M&A counsel

- [Claimant] was entitled to rely on statements and conduct by Tennor's advisers and others,11 including statements that nothing should be read into the accounting and regulatory issues (which were causing delays)

- Tennor represented to [Claimant] that it had adequate funding for the deal

- Tennor did not use the term "subject to contract" or similar language in the later stages of the talks

- Tennor presented the LOI as a structural solution to the "accounting issue" (causing delays) and put [Claimant] under pressure to accept it

- Tennor's advisers wrote that the Transaction Agreement was in final form and said that the LOI language on the Transaction Agreement being "non-binding" was only for the accountants' comfort

- Tennor presented the transaction to its board, expressing to [Claimant] it had no doubt the deal would be done

- a press release included statements by Tennor's chairman about cooperation in the business

- Tennor's M&A counsel wrote that there was no reason the deal could not be done and, later, that the deal was final and that he would revert with the signature pages

- counsel for [Claimant]'s partner in the target business delivered the executed paperwork.

3.14. But in the Court's preliminary analysis at this early stage, these points are not enough to overcome the fact that Tennor's signature is not on the paperwork.

3.15. The first point to discuss here is that the parties created a clear mechanism in the LOI: either execute and deliver the paperwork for the deal by the agreed date, or pay the fee. This was the uncontested binary option available to both parties. The plain language makes it clear the parties wanted certainty about how things would work. In the run-up to the LOI and the amendment, Tennor on numerous occasions raised last-minute issues ("accounting issues" or "acquiCo not ready to execute") preventing it from doing the deal and entering into the Transaction Agreement. By using the LOI to set a clear time and way for Tennor to make its choice ("execute and deliver" on 2 March 2020, 5 pm CET), there was no doubt about the parties' contractual relationship. Under Dutch law, the LOI's binary mechanism may not be an absolute formal requirement for contract formation, but it is a significant evidentiary rule (as [Claimant] argued). In M&A practice, which the parties are thoroughly familiar with, this sets a high bar for there to be any agreement through other channels. The above communications do not clear that bar.

3.16. More importantly, there is not enough evidence in the record showing a Tennor authorised officer in any way conveying to [Claimant] or its advisers that the

people saying, writing and doing these things were authorised to do the deal and enter into the final, binding agreement. In legal terms, there is not a sufficient factual basis to attribute the advisers' statements or conduct to Tennor. It is one thing for Tennor to instruct advisers to explore the territory, discuss terms and negotiate the deal. It is something very different for an adviser to have authority to say yes or no at the end of the day. This is something experienced M&A practitioners such as the parties and their advisers are familiar with. In this light, the statements and conduct at this stage suggest no more than everything was finalised and ready for presentation to Tennor executives – at which point Tennor executives would say yes or no (with yes being recorded in a signature).

Accordingly, there is no sufficiently clear and reliable communication in the record that a reasonable person in the same circumstances as [Claimant] would have understood to mean that Tennor wished to enter into the agreement (offer and acceptance).12 That means there was no deal. The background circumstances that [Claimant] relies on, as recited above, are not enough to overcome the basic fact that Tennor did not sign the paperwork.

3.17. The Court is acutely aware of the potential impact of this analysis. The analysis means that [Claimant] will end up running the business (at least in part or indirectly), facing unprecedented uncertainty and navigating the rocky shoals of the COVID-19 crisis for the foreseeable future, at least until there is a resolution of the dispute.

But to allow the main claim would be to compel Tennor to take [Claimant]'s stake in the business, pay EUR 169 million and face similar uncertainty and risks. At this early stage and on a preliminary basis, there is not enough solid ground in the record to support that solution.

3.18. Either way, whoever is responsible for the business, there is whitewater ahead. And there is no certainty as to who will prevail at the end of the day in the dispute resolution process. That process could easily spark further disputes – if one side runs the business for months or years, setting policy, and then a tribunal rules the other side should have been in control throughout the process. The Court strongly urges counsel to set up a prudent, responsible and expeditious dispute resolution process, in whatever forum is appropriate.

3.19. On the above grounds, at this early stage and on a preliminary basis, the Court finds that there is not a sufficient likelihood of success on the merits so as to justify an interim measure as sought by [Claimant] in its main claim. The main claim is therefore denied.

3.20. Accordingly, there is no need for the Court to consider the current COVID-19 circumstances and Tennor's Article 248, 258 and 260 arguments in relation to the main claim.

Whether Tennor must pay the fee now (the alternative claim)

3.21. The Court's focus now shifts to the alternative claim. Here, the contract itself – the LOI – is not in dispute. It was signed and is acknowledged by everyone in the case. The issue is whether the Court should enforce the fee against Tennor in the current

COVID-19 circumstances, or whether the fee's effects should be modified, mitigated or reduced in some way, or whether the LOI should be dissolved.

3.22. The Court will examine the legal principles first, before moving on to the fee's language and meaning and the analysis of the claim.

3.23. As the Court turns to the legal principles that guide the analysis, it may be helpful to review the main contours of Dutch thinking, and explore related systems. COVID-19 may present unprecedented challenges, but the past nevertheless helps to frame the issues.

3.24. Tennor relied on three Civil Code rules in support of its defence. These rules provide the framework for the Court's discussion:

- Article 6:248 (2) states that a contractual provision is unenforceable in certain circumstances13

- Article 6:258 authorises the courts to dissolve a contract or modify its effects in circumstances which were in the future when the contract was agreed and for which the contract makes no provision

- Article 6:94 authorises the courts to reduce or eliminate a penalty.

3.25. Under all three Articles, the courts must exercise caution. Contracts must generally be enforced as agreed. The parties' autonomy is paramount. The courts' attitude is deferential.14 To express these concepts, all three Articles use language stating, essentially, that interference by the courts in the contract's operation is allowed only to avoid an "unacceptable" impact, as assessed under standards of "reasonableness and fairness".15 Obviously, this does not mean the courts may substitute their own conceptions of what is reasonable or fair for the parties' judgement as expressed in the contract. Instead, the courts must examine whether the specific circumstances are such that there is a severe impact or egregious and transgressive conduct which warrants the courts' intervention. The courts should craft a solution that is as close as possible to what the parties bargained for in their initial deal and to the risk allocation that was inherent in that deal.16 A significant factor in the analysis is whether the current challenges are the same as, or similar to, the things that the parties dealt with in their agreement.

3.26. The legislative history on Article 258 provides guidance on how the courts should assess what the appropriate

solution may be:17

Few general rules can be stated as to how the court should intervene if it determines that the contract cannot be enforced in its current form. The court should state in concrete terms what good faith and fairness mean in the parties' specific relationship. One of the most significant factors in this analysis is that the parties entered into an agreement that has a certain substance. The court should consider the parties' intent and the contract's purpose as much as possible. This may mean, for example, that the disadvantaged party, where there is a severe disruption of the equilibrium of value between the parties' respective obligations, may seek an adjustment of its obligations, but may also have to bear a certain share of the risk; on the other hand, the court should consider particular value judgements made by the parties in the original agreement regarding their respective obligations, if inconsistent with fair market value at the time.

3.27. Along these lines, the legislative history also states three familiar types of circumstances that may warrant a court intervention:18

- where there is a severe disruption in the equilibrium of the parties' respective contractual obligations
- where the contract has lost its meaning because the parties' objective has been attained has become unattainable
- where performance is extremely onerous for one of the parties.

3.28. There is of course no well-established case law on COVID-19. However, commentators have provided guidance that is very helpful to think through the issues. Counsel discussed this guidance and used it to shape their change-of- circumstances arguments.

Professor Tjittes published an article on his firm's site.19It discusses contracts, M&A practice and Article 258. He argues that parties generally may not have taken the COVID-19 crisis, and its extraordinary impact, into account, so that there is an unprovided-for circumstance. Article 258, in his view, may impose a general duty to renegotiate in this light. He refers to the legislative history (cited above), the Principles of European Contract Law20 and the UNIDROIT Principles for International Commercial Contracts21 (as the general international standard on this topic). Absent consensus, he suggests the courts may intervene to adjust a contract such that the harm is borne by the parties in a 50/50 allocation. He notes that where one party, absent adjustments, would face major financial or operational problems as a result of COVID-19 circumstances, these circumstances are not an ordinary business risk to be borne by the disadvantaged party, and court-ordered adjustments are appropriate. However, he stresses that as the courts consider how to restore the contractual equilibrium in the novel circumstances, the parties' original intent and their contractual risk allocation must be respected and preserved: if a party entered into an advantageous or disadvantageous deal, that advantage or disadvantage should be reflected in a proportionate solution. These factors may warrant an allocation that is not 50/50, he suggests.22

This approach might be described as "share the pain", focusing on restoring or preserving the parties' contractual equilibrium (the Court's term).

The UNIDROIT commentary23 states that a

possibility would be for a court to adapt the contract with a view to restoring its equilibrium (paragraph (4)(b)). In so doing the court will seek to make a fair distribution of the losses between the parties. This may or may not, depending on the nature of the hardship, involve a price adaptation. However, if it does, the adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance.

Professor Tjittes and Ms Hogeterp also published an article that deals with material adverse change (MAC) clauses rules in the Netherlands, the US and the UK.24 The US and the UK are particularly relevant since M&A practice has been heavily influenced by them. The article notes that in England,25

in order to be material, any change must not merely be temporary. This is consistent with the approach which the courts have taken in relation to MAC clauses in company acquisition agreements […].

In other words, the courts must look at the long-term impact of a change. The article also points out that in England, the buyer's subjective perspective is not decisive; instead, the change must be assessed in objective terms. The article discusses a similar approach in the US,26 where a MAC clause

is best read as a backstop protecting the acquirer from the occurrence of *unknown events* that substantially threaten the overall earnings potential of the target in a durationally-significant manner.

and

The important consideration is therefore whether there has been an adverse change in the target's business that is consequential to the company's long-term earnings power over a commercially reasonable period, which one would expect to be measured in years rather than months.

Professor Schelhaas and Mr Spanjaard published an article in the 10 April 2020 edition of the NJB law journal.27 They focused on contracts such as agreements for the supply of goods or services, whether on a one-off basis or for a period of time. They suggested that the crisis may warrant a general duty to renegotiate contractual clauses in light of unprecedented and disruptive developments, especially where government measures have a disproportionate impact on one party. In their view, a failure to renegotiate might justify a denial of the other party's claim for performance, but only if there is disproportionate harm resulting from the crisis.

They acknowledged Professor Tjittes' 50/50 allocation concept as a helpful guideline.

3.29. The Court now comes to where the rubber hits the road. The above legal principles must be applied to the facts of the fee mechanism.

3.30. The discussion must start with the language that the parties used. The terms of the fee state in Sections 1 and 3 of the LOI:28

Should Tennor or any of its fully owned subsidiaries choose not to execute and deliver to all parties thereto the Transaction Agreement by 5pm CET on the 18th of February 2020, Tennor shall, within three business days, wire to [Claimant] €30,000,000 in cash in immediately available funds as a fee. Each of Tennor and [Claimant] confirms that the fee set out in this Section is reasonable and waives any and all rights to claim the contrary.

Sections 1 through 11 of this letter shall have a binding effect on the Parties; however, under this letter, neither Tennor nor [Claimant] shall be obliged to enter into the Transaction Agreement, and Tennor and [Claimant] are free to not execute the Transaction Agreement and instead choose to pay the fee pursuant to Section 1 or 2.

3.31. The first challenge before the Court is to determine what the fee means. This is no simple task. The parties presented sharply varying theories and arguments.

3.32. As the Court applies itself to this task at this early stage and on a preliminary basis, there is one cardinal point. It is that the fee allocates risk.29 That's the key concept. That is the fee's fundamental nature. It's not punishment. It's not about anyone doing anything wrong, or somehow violating their word, defaulting on their obligations or breaking the terms of the bargain. Instead, it's an incentive. It's an option. It expresses commitment. It reassures. It comforts. It engenders confidence. It restores trust. There had been delays on Tennor's side, resulting in a lack of trust, and this was a major reason for the LOI and its fee mechanism. As a

result, each side understood the other would walk away only in extraordinary circumstances – circumstances so significant that they outweigh an immediate EUR 30 million cash payment, in the other party's discretion. These circumstances could be a downside risk, such as a sudden change in the market causing a substantial decline in the business's value (making the transaction less attractive for the buyer). Or they could be an upside risk, such as another buyer offering a much higher price (which a seller could not accept without paying the fee). Or they could be something completely different, something unrelated to market conditions. In any event, the fee acts as an adhesive binding the parties to the bargain, unless something, in the electing party's discretion, outweighs EUR 30 million in cash.

3.33. But that's not all. The fee also caps exposure. This would seem to have tremendous value in the current circumstances, at least in Tennor's view. Tennor is free to walk away from what it views as a distressed business, escape its immediate EUR 169 million cash payment obligation, and avoid what it views as very substantial subsequent risks in business operations. Tennor's exposure to all of this risk is capped at EUR 30 million. That is how the fee mechanism operates.

3.34. Another way of looking at the fee is that [Claimant], as it accurately said, upheld its end of the bargain. Consider that the fee mechanism's structure is reciprocal: [Claimant] was authorised, in similar language in Section 2 of the LOI, to make the election, pay EUR 30 million and walk away. But [Claimant] did not walk away. It did not sell the business to anyone else. [Claimant] was available to deliver the shares to Tennor. In this sense, Tennor has already enjoyed the benefit of the built- in incentives in the fee mechanism. The adhesive binding [Claimant] to the bargain did not come unstuck.

3.35. These are the basics of how the fee mechanism operates and what it means. This is the most likely interpretation of the fee mechanism, at this early stage and on a preliminary basis. This is what a reasonable person in the same circumstances as the parties would have understood the plain language in Sections 1 and 3 to mean. It is noteworthy that the parties are experienced in M&A practice and were well advised by an array of experts.

3.36. Next, the Court must examine whether there is an unprovided-for circumstance within Article 258's ambit, and whether it is unacceptable for [Claimant] to demand strict performance of the fee agreement in the current circumstances.30

3.37. There is no evidence in the record suggesting that the parties contemplated or discussed the full impact of the COVID-19 crisis, especially in Europe and North America, even if they were aware of the initial outbreak in late December 2019 (LOI) or in mid-February 2020 (amendment extending the LOI). This suggests the crisis could be an unprovided-for circumstance.

3.38. However, the parties wrote in the LOI:

> Each of Tennor and [Claimant] confirms that the fee set out in this Section is reasonable and waives any and all rights to claim the contrary.

This points in the opposite direction. It suggests the parties intended to make a provision generally for anything that might happen and to accept the ensuing risks. But even so, the COVID-19 circumstances, at least in the short term, are so exceptional and disruptive that it may be hard to say they were provided for.

3.39. At this early stage and on a preliminary basis, the Court is convinced there is no need to decide which view is best. Even if the crisis is an unprovided-for circumstance, there is no support in the record for the proposition that this circumstance is such that it is unacceptable for [Claimant] to demand strict performance by Tennor. Accordingly, there is no compelling ground to apply Articles 248 or 258.

3.40.

This conclusion is based on the fee's operation and meaning, as set out above. The fee allocates risk and expresses commitment. The fee caps Tennor's exposure. At this early stage and on a preliminary basis, these points set the bar for reliance on Articles 248 and 258 at a high level. It makes sense for [Claimant] to demand strict performance in a scenario where this preserves the contractual risk allocation (the cardinal point noted above) and puts Tennor in an enviable position in a crisis: walking away with capped exposure, even at a high upfront price. This was the parties' equilibrium in the LOI.

3.41. Tennor's resistance to this line of reasoning is based on a fundamentally different perspective. Tennor's perspective focuses on the heavy burden it faces today. Tennor said that in the ordinary course of business (there being no COVID-19 crisis), it was planning to do the deal, and it was only because of the crisis, and the resulting distress in the business, that Tennor had no choice but to walk away. Tennor argued that the fee imposes harsh punishment for a choice that is hardly transgressive or offensive in the circumstances (and was in fact the only responsible thing to do). Another way to make the same point is to stress, as Tennor did, that by mid-February and early March, [Claimant] was unable to deliver the stake in the business in the same condition as contemplated in the LOI. The business was in distress, in Tennor's view, making the fee extremely onerous. Tennor also stressed that the fee was related to the price, and the price to the value of the business, concluding that it makes sense to adjust the fee downward as the value of the business declines – as the parties would have done if they had used lower value figures in the LOI. Along similar lines, Tennor's perspective is to emphasise its position now compared to its hypothetical position if the parties had known about the full COVID-19 impact at an earlier stage, such as December

2019. In that hypothetical position, Tennor obviously would not have signed the LOI. And it would have no harm whatsoever in relation to the business. As a result, Tennor's view is that the fee is extremely onerous and should be reduced, one way or another.

3.42. By contrast, [Claimant] emphasised a "share the pain" philosophy, relying on the Tjittes, Tjittes/Hogeterp and Schelhaas/Spanjaard articles referred to above. This philosophy focuses on the whole situation now, encompassing Tennor, [Claimant] and the target business. Its basic idea is that the parties are in it together and need to find a way out together. It stresses the parties' contractual equilibrium in the LOI and the need to restore or preserve that equilibrium in any court-ordered solution in the current circumstances.

3.43. The Court, at this early stage and on a preliminary basis, rejects Tennor's perspective and embraces [Claimant]'s philosophy. Articles 248 and 258 do not consider what either side would have bargained for or would have done if they had known about the unprovided-for circumstance much earlier.31 That is not the right question. Instead, what Articles 248 and 258 focus on, in relevant part, is whether or not it is unacceptable, under standards of reasonableness and fairness, for [Claimant] to demand strict performance of the fee obligation.32 Articles 248 and 258 consider the unprovided-for circumstance's impact after contract formation. Once the issue is framed this way, the answer is clear: the "share the pain" approach, focusing on the parties' contractual equilibrium, is the right way to look at the LOI in the specific circumstances in this case at this early stage.

3.44. In these summary proceedings, of course, there is no scope for fact-finding, expert enquiry or detailed analysis of facts and figures on one side or the other, or in the business. That is for another day. At this stage, the Court is persuaded there is no better "share the pain" solution than for Tennor to pay the EUR 30 million fee as written. Tennor might at a later stage be able to show that the fee is so onerous as to justify a court intervention, but that possibility seems unlikely if not remote at this stage. Any court-ordered solution would have to consider the parties' agreement, their value judgements, and their risk allocation – in short, the LOI's equilibrium. The components of this equilibrium – the parties' risks, advantages and disadvantages – are examined in greater detail below.

3.45. For now, [Claimant] "gets stuck with the business" (as was argued). [Claimant] is in the business for the duration, or at least for the foreseeable future, and in Tennor's view [Claimant] faces much harm and distress. In this scenario, this crisis may be much worse than anything the parties specifically intended to provide for,

but the harm will be inflicted mostly on [Claimant]. That is true even if only the harm and distress acknowledged by Tennor is considered.33 Tennor believes the business is "flatlining", suggesting the actual or imminent harm may be roughly equivalent to the full purchase price, or at least in that order of magnitude. If the business's value has declined, as Tennor contends, [Claimant] may face a need to invest substantial sums to keep the business afloat, with uncertain prospects of returns. The harm to Tennor – paying EUR 30 million as agreed – is outweighed by the harm [Claimant] faces (in Tennor's view). Viewed this way, the fee is a modest contribution by the electing party to help the non-electing party deal with the crisis.

If things are really as bad as Tennor contends, the fee is a quick-and-easy exit from a EUR 169 million upfront commitment and subsequent operational risks. Tennor will have no additional commitments or exposure.

3.46. On the other hand, if the long-term harm turns out to be minimal (as [Claimant] contends), the fee might look high, but it is still what the parties expressly said was "reasonable" in the LOI when they waived their rights to claim otherwise. And the parties knew exactly what they were doing. They knew things could change. They are experts, advised and counselled by experts. Tennor correctly notes that it is paying EUR 30 million and getting nothing, but that was going to happen anyway if Tennor made the election, for any reason or no reason. If there is little structural long-term harm, the situation is more or less what the parties thought it was when they signed the LOI. That suggests the fee is eminently reasonable, as the parties said it was at the time.

3.47. This weighing of advantages and disadvantages suggests, in the Court's analysis, that Tennor's payment of the EUR 30 million fee as written will preserve, in the current COVID-19 circumstances, the LOI's equilibrium along the lines of the parties' intent at the time the LOI was signed. Tennor bears the risk of the fee being due (if it elects to walk away), but the risk is capped at EUR 30 million, and very substantial actual or potential disadvantages are borne by [Claimant].

3.48. Tennor's "harsh punishment", "original proportions" and "unable to deliver" arguments are essentially similar to the arguments rejected above. In all of these arguments, the emphasis is on Tennor's current position, instead of the "share the pain" approach, as embraced by the Court.

As for Tennor's "harsh punishment" argument, the Court reiterates that the fee does not punish anyone. It expresses commitment, reassurance and comfort. The Court acknowledges the narrow straits Tennor was in – having to choose between a high fee and a lot of distress in the business. But that was part of the bargain. It is part of the reassurance and comfort. The parties knew what they were doing. Along these lines, the Court rejects Tennor's argument.

The Court notes Tennor's position on the fee-to-price and price-to-value relationships. At first glance, it would seem fair to maintain the same proportions as originally agreed. But ultimately this is unpersuasive. A post-LOI change in the value of the business, large or small, was part of the bargain when the parties agreed on the fee and the price. They did not include a fee adjustment mechanism, but they knew things could change. The point of the fee was to express reassurance and comfort and to engender confidence. The parties wanted to get the deal done. But this purpose would not be accomplished if the fee were to be reduced based on a decline in the value of the business. In that scenario, any downturn would make it that much easier to walk away. A severe downturn would make it easy and attractive to back out. Any downturn would undermine the parties' confidence in each other's intentions regarding the deal. That is exactly what the fee was engineered to avoid. Tennor's position would eviscerate the fee in precisely the circumstances in which the parties intended the fee to be robust. Accordingly, the

payment of the fee as written is the solution that will preserve the parties' LOI equilibrium.

For the above reasons, the Court rejects Tennor's point on [Claimant]'s ability to deliver the shares in the same condition as contemplated in the LOI.34

3.49. The Court notes and rejects several other positions advanced by Tennor.

The waiver is not void, as was suggested. It does not preclude the application of mandatory rules. Instead, in the Court's analysis, it simply says what the parties thought: the fee is "reasonable". It is tailored to their specific needs, circumstances and preferences. The waiver expresses their acceptance of the risks associated with the fee, as the legislative history notes they may do.35

Next, even if the parties only set the fee so high because they assumed they would never be in a situation where they would have to pay it, as the Court understands Tennor's argument, this does not alter the fundamentals in the case, as the analysis above shows. What matters is not what they thought, but what they said, and what a reasonable person in the same circumstances would have understood their words to mean. Section 1 leaves no doubt about the fee being owed in certain circumstances.

Tennor compared the fee to what it views as an ordinary break-up fee in M&A practice: 1-5% of the value of the business. But this ignores the plain language and context of the LOI. The fee was set so high because the parties wished to create a high level of trust, comfort and confidence. Tennor's argument that an ordinary break-up fee covers transaction-related costs is beside the point. And so is its argument that an ordinary break-up fee also expresses commitment. The parties evidently wished to express a lot more commitment here. If the fee is high compared to market standards, this is a particular circumstance – a departure from market conditions – which must be considered in applying Articles 248 and 258. As the legislative history emphasises, the original proportions, if inconsistent with market conditions at the time, must be preserved in any court-ordered solution.

That, again, is the LOI's equilibrium. In this sense, Articles 248 and 258 do not allow Tennor to escape from what it bargained for, and any solution would be subject to this rule.

Lastly, Tennor noted that it served a writ of summons initiating an action on the merits last week. Tennor argues this warrants awaiting the outcome of that action. This point has no merit, in the Court's view. The action on the merits, if progress to date is any guide, may be complex, hard fought and vigorously litigated. It will take time. The resolution will not be quick. But there is a sufficient likelihood that [Claimant] will be successful, as noted above. There is no need to await the outcome.

3.50. The Court rejects Tennor's Articles 248 and 258 arguments on the above grounds. It is not unacceptable, under standards of reasonableness and fairness, for [Claimant] to demand strict performance of the fee obligation in the current circumstances.

3.51. The Court must also examine Article 94, since Tennor relied on this rule. At this early stage and on a preliminary basis, the Court's opinion is that the fee is not a penalty within Article 94's ambit.36 This is because the fee is completely unrelated to a default or anything similar by the electing party. It is an incentive, but it is not a constraint forcing a party to do what it must do. Instead, it is a right and an option, to be exercised or not to be exercised, in the electing party's discretion. It is a risk allocation, as explained above. As a result, it is not a penalty as meant in Article 94, and this Article does not apply. But in any event, the enquiry under Article 94 is, in these circumstances, the same as the enquiry under Articles 248 and 258, so the analysis by the Court under Article 94 would produce the same outcome as set out above, for the same reasons. Accordingly, Article 94 adds nothing to the above discussion.

3.52. The Court's above analysis is confirmed by the balancing of the parties' interests in the circumstances, as required in summary proceedings. [Claimant]'s urgent interest, essentially, is to quickly collect the payment it is clearly owed under the LOI, so that it at least has custody of these funds as it faces the COVID-19 crisis – which it must do without Tennor under the above analysis. Tennor's interest is to escape the payment as it expects it will prevail at a later stage in proceedings on the merits. On a balance of these interests, in the Court's opinion, it is [Claimant]'s interests that have far greater weight. The simple fact is that the parties agreed for the fee to be paid *immediately* by the party electing not to close the transaction. That party is Tennor. This fact has great significance. It suggests the parties intended the non-electing party to have the funds pending dispute resolution. And [Claimant] bears the business risks. Nothing has been said to suggest

Tennor will have any extraordinary or unusual trouble in locating the funds to pay the fee. There is no specific or reliable information in the record to substantiate the alleged recovery risk; there is no cogent explanation as to why Tennor thinks there are concerns about [Claimant]'s ability to refund the fee if Tennor prevails at a later stage.37 Tennor has initiated an action in the Dutch courts. If that action moves forward, even though the Netherlands and the US do not have an enforcement-of- judgments convention, there are general principles of comity that may assist Tennor in making a recovery against assets in the US.38 As the discussion above illustrates, at this early stage there is a sufficient likelihood that [Claimant] will emerge as the successful party later on in respect of the fee. Based on the above analysis, there is no doubt that an interim measure as sought by [Claimant] in its alternative claim is urgent and required in these summary proceedings.

3.53. For these reasons, the Court will rely on the parties' judgement and enforce the fee as written. The alternative claim is allowed.

Interest and costs

3.54. The next point is [Claimant]'s claim for interest. It is essentially uncontested. It is based on the express and unambiguous terms of the LOI (Section 3):

The Party owed the fee shall be entitled to (in addition to the unpaid fee) […]

(y) interest on all unpaid amounts (calculated from and including the original due date until the date such amount is actually paid) at an annual rate equal to 6%.

Relevant objections by Tennor have been dealt with and rejected. The Court will award interest as claimed.

3.55. The Court finds that the interest started to accrue on 6 March 2020. That was three business days after 2 March 2020. Accordingly, 6 March 2020 was the time limit for Tennor to pay the fee. Tennor's default commenced on 6 March 2020, and the interest is owed as from that date.

3.56. Similarly, [Claimant]'s claim for full compensation of legal fees and expenses is firmly grounded in Section 3's clear and unambiguous language:

The Party owed the fee shall be entitled to (in addition to the unpaid fee) (x) any and all reasonable legal fees and expenses incurred by it in connection with the enforcement and collection of such payment obligation […].

However, this claim was withdrawn at the hearing because an itemised statement was unavailable at that time. There is no need to consider this point further at this time.

Enforceability and security

3.57. Lastly, there is the point of enforceability and security. Under Dutch procedure, the courts ordinarily issue a declaration of enforceability notwithstanding any remedy (such as appeal), except where there are special, compelling reasons opposing such a declaration. The reasoning behind this policy is that the successful party in first instance should be in a position to move forward rapidly and implement the court's decision. The successful party's interest in an expeditious resolution outweighs the unsuccessful party's interest in awaiting the outcome of an appeal or other remedies before complying with the decision. The enforcing party, of course, bears the risk of liability in the event the decision is annulled on appeal. The courts do not ordinarily impose the condition that the enforcing party provide security, but are authorised to do so, if warranted.

3.58. Tennor asked the Court not to issue the declaration, or to require security. Tennor argued that there is a recovery risk if it pays the fee now and prevails on the merits later. Tennor noted it plans to file for an expedited appeal against any adverse ruling here. [Claimant] insisted the declaration is appropriate, without security.

3.59. The Court rejects Tennor's argument. In these summary proceedings, it is [Claimant]'s urgent interest that has great weight, and the alleged recovery risk has not been substantiated, as noted above. A party's intentions as to an appeal do not change the analysis. Accordingly, the Court will issue the declaration of enforceability and will not require security.

Conclusion

3.60. The Court's conclusion is that the alternative claim must be allowed, with interest and a declaration of enforceability, as set out below. The other relief sought by [Claimant] must be denied.

3.61. Tennor is the unsuccessful party. It will be ordered to pay the costs. Given [Claimant]'s withdrawal of its claim for full compensation, as set out above, the cost order is based on the NCC CSP rates to assess lawyers' fees absent agreement (see Annex III to the NCC Rules):

motion: 2 x EUR 1,000

on the merits: 4 x EUR 3,000.39

The other items in the cost order are the NCC CSP court fee (EUR 7,688), the costs of service (EUR 85.52 for the summons and EUR 83.38 for the rectification; the rectification was caused by Tennor's initial counsel withdrawing from the case) and the fixed post-judgment costs (*nakosten*).

4 Conclusion and order

THE COURT IN SUMMARY PROCEEDINGS

4.1. The main claim is denied.

4.2. The alternative claim is allowed.

4.3. Tennor is ordered to pay to [Claimant] within 14 calendar days as from today:

a. EUR 30 million

b. contractual interest, accruing in respect of the amount under a. above, at an annual rate of 6% calculated as from 6 March 2020 to the date of payment

c. EUR 14,000

EUR 7,688

EUR 85.52

EUR 83.38

EUR 157 if the judgment is not served, or EUR 246 if the judgment is served

d. statutory interest (*wettelijke rente*, Article 6:119 DCC), accruing in respect of the amount under c. above, calculated as from the 15th day from today to the date of payment.

4.4. All other relief sought in these summary proceedings is denied.

4.5. This judgment is enforceable notwithstanding any remedy.

Done by L.S. Frakes, Judge, assisted by W.A. Visser, Clerk of the Court. Issued in public on 29 April 2020.

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SIGNATURE PAGE 1 OF 2

Judge

SIGNATURE PAGE 2 OF 2

Clerk of the Court

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1. The term "record" is used in this opinion, unless marked otherwise, to refer to the entire case file (all information imparted to the Court in the matter)

2 The term "business" is used in this opinion, unless marked otherwise, to refer to the equestrian show-jumping business, which was the target in the proposed transaction

3 Dutch Civil Code. These Articles are referred to as Articles 248, 258 and 260

4 Dutch Civil Code. This Article is referred to as Article 94

5 Articles 94, 248, 258 and 260

6 See Asser Procesrecht/Boonekamp 6 2020/223 (discussing claims for money, and noting that the rules apply to summary proceedings generally, except that more reasoning is required on urgency if the claim is for money), and Advocate-General Timmerman, para. 3.3, ECLI:NL:PHR:2019:261, HR 5 April 2019, ECLI:NL:HR:2019:508

7 The Dutch phrasing is "of het bestaan van een vordering voldoende aannemelijk is"; literally, whether the claim's "existence" is "sufficiently plausible"

8 The LOI's mechanism, the immediate payment concept and the incentives and their purpose (comfort and confidence) are uncontested

9 Article 3:35 DCC and the *Haviltex* case; as noted in the Judgment on the Motion, this is the best English rendering of the standard in the *Haviltex* case

10 See also the circumstances set out in the Judgment on the Motion

11 [Claimant] notes statements to the effect that an adviser is Tennor's investment banker, an adviser was hired to try to negotiate a buyout, advisers had been engaged to find a mutually acceptable solution, the other shareholder had engaged advisers, and advisers did the negotiation work for Tennor with [Claimant]

12 This means there is nothing solid enough in the record to support [Claimant]'s contention that it had legitimate expectations regarding the deal being done

13 See below on what circumstances these may be

14 Two prominent cases, as noted by Professor Tjittes in his article below, are HR 20 February 1998, NJ 1998/493, *Briljant Schreuders/ABP*, and HR 13 October 2017, ECLI:NL:HR:2017:2615, *Bronckhorst*

15 This language is in Article 248 (2), but Article 258 applies the same principles, stating that the court may intervene in unprovided-for circumstances "such that the creditor may not reasonably demand strict performance of the obligation"

16 Legislative history, Book 6, p. 970 and 974; "De mogelijkheid die artikel 6.5.3.11 biedt tot aantasting van de overeenkomst, is derhalve beperkt, en moet veeleer worden gezien als een middel tot aanpassing van de overeenkomst aan de gewijzigde omstandigheden, zoveel mogelijk in aansluiting op hetgeen partijen reeds aan rechtsgevolgen hebben geregeld of in de overeenkomst opgesloten lag. Men zie ook het tweede lid dat met het oog hierop is aangevuld met een verwijzing naar de aard van de overeenkomst. De rechter zal het artikel dan

ook met terughoudendheid moeten hanteren, zoals hij dat ook zal moeten met de bepalingen van artikel 6.1.1.2 lid 2 en artikel 6.5.3.1 lid 2; men zie hetgeen in deze memorie bij artikel 6.1.1.2 daarover is opgemerkt"

17 Legislative history, Book 6, p. 970 and 974: "Omtrent de vraag, welke beslissing de rechter moet geven, als hij eenmaal tot de overtuiging is gekomen dat de overeenkomst niet ongewijzigd in stand gehouden mag worden, zijn slechts weinig algemene regels te geven. De rechter moet concretiseren wat goede trouw en billijkheid van partijen in hun verhouding eisen. Een van de gewichtigste gegevens blijft daarbij, dat partijen een overeenkomst met bepaalde inhoud hebben gesloten. Met de bedoeling van partijen en de strekking van de overeenkomst moet zoveel mogelijk rekening worden gehouden. Hieruit kan bij voorbeeld voortvloeien dat in geval van ernstige verstoring van de waardeverhouding tussen de wederzijdse prestaties de benadeelde wel aanpassing van zijn verplichtingen kan eisen, doch ook zelf een zeker aandeel in het risico moet dragen; anderzijds moet ook rekening worden gehouden met van de marktwaarde der prestaties afwijkende waarderingen door partijen in de oorspronkelijke overeenkomst"

18 Legislative history, Book 6, p. 968: "Het in Conclusie 21A gebruikte criterium of "nakoming van een overeenkomst voor een der partijen uitermate bezwaarlijk wordt", is niet letterlijk overgenomen, omdat die formulering goed beschouwd slechts passend is voor de aan de overmacht grenzende categorie van gevallen, waarin de nakoming van een verbintenis uit de overeenkomst, zonder bepaald onmogelijk te worden, toch wel uitermate bezwaarlijk wordt. De bepaling moet ook kunnen worden toegepast, wanneer bij een wederkerige overeenkomst de waardeverhouding tussen de wederzijdse prestaties in ernstige mate is verstoord, of wanneer een overeenkomst haar zin verloren heeft doordat het doel dat partijen ermee hadden, is bereikt of onbereikbaar is geworden"

19 " Commerciële contracten en corona: uitgangspunt 50/50 verdeling nadeel" (www.barentskrans.nl).

In Dutch only

20 The Principles of European Contract Law 2002 (Parts I, II, and III), https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/portrait.pdf; Article 6:111 ("Change of Circumstances").

"If the parties fail to reach agreement within a reasonable period, the court may: (a) terminate the contract at a date and on terms to be determined by the court; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances"

21 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

2016, https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf; Article 6.2.3: ("Effects of hardship"): "If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium"

22 Referring to the legislative history (cited above) and Hof Arnhem-Leeuwarden 18 June 2013, ECLI:NL:GHARL:2013:4326 (para. 4.14): "Het gaat er uiteindelijk om dat de rechter het door de onvoorziene omstandigheid verstoorde contractuele evenwicht herstelt met inachtneming van de gewijzigde situatie. De rechter moet in zijn beslissing zoveel mogelijk aansluiten bij hetgeen partijen aanvankelijk hebben bedoeld en bij de risicoverdeling die aanvankelijk in de overeenkomst opgesloten lag (Parl. Gesch. Boek 6, p. 970 en 974). Ten behoeve van de praktijk geef ik een aantal gezichtspunten die naar mijn mening relevant zijn: […] 2. Als uitgangspunt kan worden aanvaard dat nu beide partijen geen blaam treft van de corona-crisis de tegenvaller gelijkelijk over beide partijen verdeeld moet worden. De Leidse hoogleraar Nieuwenhuis heeft hiervoor al in 1995 gepleit (WPNR 6165, p. 41). […] 3. Echter de tussen partijen aanvankelijk overeengekomen contractuele risicoverdeling moet wel gehandhaafd blijven. Een partij mag niet commercieel profiteren van de aanpassing van het contract. Wie een commercieel voordelig of onvoordelig contract heeft gesloten moet dat voordeel of nadeel bij wijziging of ontbinding proportioneel behouden. Dat is een reden van de 50/50 verdeling van het nadeel af te wijken. Zie Parl. Gesch. Boek 6, p. 970. Vgl. gerechtshof Arnhem-Leeuwarden 18 juni 2013, ECLI:NL:GHARL:2013:4326 (rov. 4.14). […]"

23 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, referred

to above

24 " De coronacrisis en MAC-clausules in M&A contracten", Ondernemingsrecht 2020/XIX. *In Dutch only*

25 Quoting Blair J in *Grupo Hotelero v Carey Value Added* [2013] EWHC 1039 (Comm), para. 363

26 Quoting the Delaware Court of Chancery in *IBP v Shareholders Litigation*, 789 A.2d 14, 111 (Del.Ch. 2001) and *Akorn v Fresius*, No. 2018-0300-JTL (Del.Ch. October 1, 2018)

27 " Contract en corona", NJB 2020, 881 (no. 14: https://www.njb.nl/media/3702/lr_njb14_2020.pdf).

In Dutch only

28 There is nothing in the record to suggest anything other than the LOI text expresses the parties' agreement

29 There was discussion of this term at the hearing, and there was some resistance, but risk allocation expresses fundamentally what counsel said at the hearing (they used terms such as "division", "option" and "incentive") and what the parties' plain language in Section 1 says. Tennor's counsel noted the question for Tennor was "Do I want to do this deal?" in light of the entire portfolio and its "key indicators", and Tennor was entirely free to make that call, but it was not dependent on market developments. The Court agrees the fee was not necessarily speculative, but that is not the point. At this early stage, it seems obvious that developments and risk generally would be a factor. That is the point of considering the entire portfolio. In any event, the Court is using the term "risk allocation" here to refer to questions like "Do I want to do this deal in light of my entire portfolio and my key indicators?". This is the way the term is used in the legislative history and in the Tjittes and Schelhaas articles cited in this judgment. Minor adverse risks/issues were allocated to Tennor, but it was free to walk away in the event of factors it decided were major in its discretion

30 The parties have not sought to rely on any force majeure, material adverse change or other change- of-circumstances clause

31 Article 258 considers only circumstances that were in the future when the parties made their bargain

32 Article 258 uses slightly different language: literally, whether or not [Claimant] can reasonably demand strict performance of the fee obligation, under standards of reasonableness and fairness. But the meaning is the same as the "unacceptable" language in Article 248 (2), as Professor Tjittes notes 33 [Claimant] stresses there is little prospect of a sale to someone else, plus ongoing friction with the other shareholder, without any recovery of substantial costs and time invested in negotiating the LOI and other documents in 2018-2020

34 If Tennor intended to argue that it can escape or postpone its obligations by doing nothing (not executing and delivering the paperwork, and not making an election), this is plainly wrong. A reasonable person in the same circumstances as the parties would have understood the Section 1 language to mean that Tennor makes an election by doing nothing (not executing and delivering), and therefore must pay the fee

35 Legislative history, Book 6 1981, p. 968 ff: "Parties may provide for the occurrence of a particular circumstance and, in this way, exclude any modification or termination based on this article in that circumstance"

36 The definition of a penalty is set out in Article 6:91 DCC

37 Tennor wrote that [Claimant] has holdings in the sports world, which is being hit hard by the crisis since large-scale events are prohibited, but this does not say anything specific about [Claimant]'s position

38 The 1956 Dutch-American Friendship Treaty reinforces general principles of friendship and comity, although it does not deal specifically with enforcement of judgments

39 The calculation is: summons (1), initial scheduling conference call (1), defence (motion) (1), videoconference hearing on the motion (1), and hearing in the action (2)