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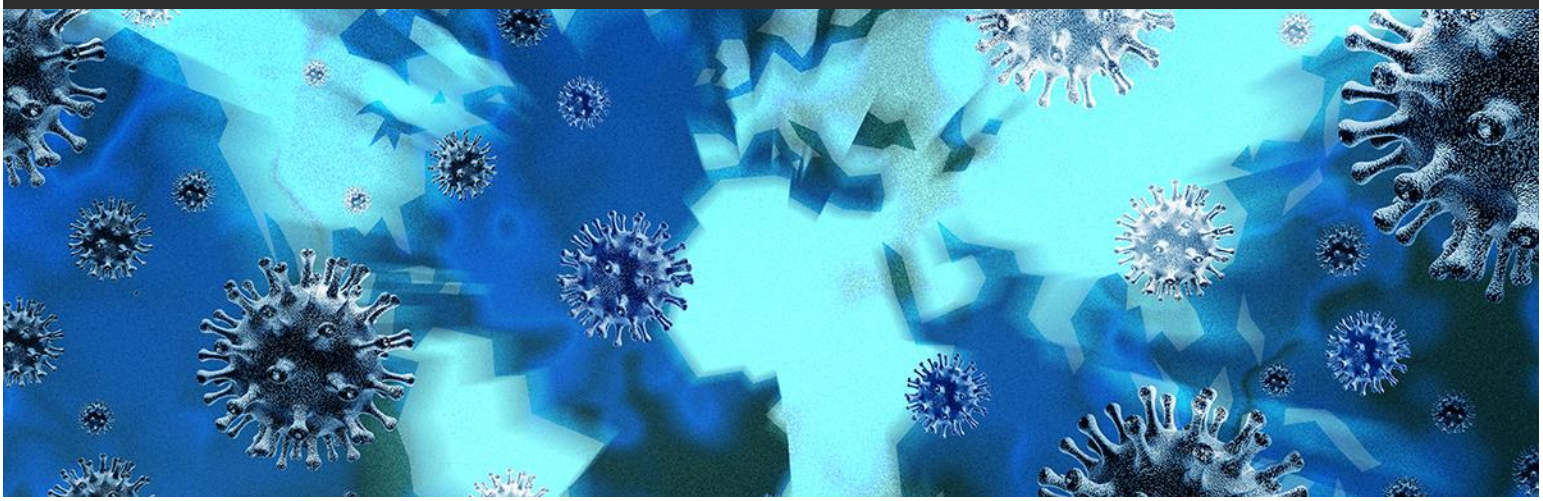
Alert | Health Emergency Preparedness Task Force: Coronavirus Disease 2019



June 2020

Dutch Court Decisions on Contractual Obligations During the COVID-19 Pandemic in an M&A Context

On 29 April 2020 the Netherlands Commercial Court (NCC) handed down a decision regarding a contractual break-up fee in an M&A transaction affected by the Coronavirus Disease 2019 (COVID-19) pandemic. Furthermore, on 14 May 2020 the preliminary relief judge of the District Court of Amsterdam also handed down a decision related to an M&A transaction affected by the pandemic. These decisions shed some light on the legal position of parties under Dutch law in these unprecedented times.

The NCC is a separate chamber of the District Court of Amsterdam, specialized in complex international commercial disputes. Proceedings before the NCC are conducted in English and the judgment is rendered in English.

The case before the NCC (ECLI:NL:RBAMS:2020:2406) revolves around the question of whether a Transaction Agreement (TA) was reached between the parties and, if this were not the case, whether the agreed break-up fee of € 30 million should be modified or mitigated based on Dutch law due to the current COVID-19 pandemic.

Parties in this case signed a letter of intent containing a break-up fee if a party elects to back out of the deal. Despite that all the paperwork was prepared and the defendant's lawyers and other advisors

indicated the agreements would be signed, the defendant did not sign the TA and refused to do so. In the proceedings before the NCC, the claimant (principally) claimed performance of the TA and argued an agreement was nonetheless reached despite the fact the TA was not signed. The NCC dismisses claimant's principal claim and found that no final agreement was reached because the defendant did not sign the TA and there was no other ground to conclude an agreement was reached. The court reasoned that there was not enough factual basis to attribute the advisers' statements or conduct to the defendant, since there was 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 TA.

The claimant alternatively claimed payment of the break-up fee. Not in dispute was that the parties agreed the defendant must pay a break-up fee of € 30 million if the TA was not signed. The defendant stated, however, that the break-up fee should be modified or reduced because of the COVID-19 pandemic, thereby relying on the Dutch law principles of unforeseen circumstances and reasonableness and fairness. These statutory provisions allow the court to interfere in contractual arrangements between parties if the outcome would otherwise be unacceptable, as assessed under the principle of reasonableness and fairness.

The NCC stated that the court must exercise caution when applying these provisions. Parties' autonomy is paramount, and contracts must generally be enforced as agreed. The NCC further stated that the COVID-19 pandemic might well be an unforeseen circumstance (meaning no contractual arrangements were made for this situation), but even if the crisis is an unforeseen 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 defendant.

An important legal consideration in this case is that the break-up fee was meant to allocate the risk between parties and limit their exposure if no agreement was signed. That purpose would be undermined if the break-up fee could be reduced based on a devaluation of the target company. The defendant was ordered to pay the break-up fee of € 30 million. In the case before the preliminary relief judge of the District Court of Amsterdam leading to the decision of 14 May 2020, parties agreed upon a signing protocol for a purchase agreement to be signed, subject only to the condition of the purchaser obtaining Warranty & Indemnity (W&I) insurance. The purchaser did not obtain W&I insurance and refused to do so due to the COVID-19 crisis. Dutch law dictates that, if a party who has an interest in not fulfilling a condition prevents the fulfillment of such a condition, the condition may be deemed fulfilled based on the principles of reasonableness and fairness. The court relied on this provision and ordered the purchaser to sign the SPA. The purchaser further claimed that the SPA cannot be entered unmodified based on the statutory provision of unforeseen circumstances. The court rejected this defense, stating that parties discussed the possible impact of COVID-19 - at a time when China was in lockdown and there were hundreds of infections in Europe already - and that they decided not to include specific contractual provisions (such as a material adverse change clause) covering this.

Conclusion

The decisions of the NCC and the preliminary relief judge of the District Court of Amsterdam are in line with other decisions of the Dutch courts, demonstrating that the Dutch law principles of unforeseen circumstances and reasonableness and fairness have a high bar to show that contractual arrangements should be modified. While it remains to be seen, Dutch courts may be reluctant to apply these principles based on the COVID-19 pandemic to interfere in contractual arrangements, at least in contracts in which parties have agreed on a specific risk allocation or parties - being aware of, and having discussed, the COVID-19 crisis - have chosen not to include a regulation for this in their contract.

** This GT Alert is limited to non-U.S. matters and law.*

For more information and updates on the developing COVID-19 situation, visit GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019.

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