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A NCC Case on Contract Interpretation from an English and Dutch Law Perspective*

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Abstract: This contribution discusses the first instance decision of the Netherlands Commercial Court between Subsea Survey Solutions LLC and South Stream Transport BV from an English and Dutch law perspective. The principal issue before the court concerned the interpretation of Clause 7 of the Settlement Agreement entered into between the parties and in particular whether or not this release and discharge clause provided South Stream with a defence to the claim which had been brought against it. This contribution discusses in a comparative way the principles of English and Dutch law which govern the interpretation of contracts. The conclusion is that the gap between the English and Dutch approach in relation to contract interpretation, although different in form, does not seem to be as broad as believed by many.

Résumé: Cet article discute le jugement de première instance de la 'Netherlands Commercial Court (NCC)' entre Subsea Survey Solutions LLC et South Stream Transport BV selon une perspective de droit anglais et néerlandais. La principale question dont le tribunal était saisi concernait l'interprétation de la Clause 7 de l'accord de règlement conclu entre les parties et en particulier la question si ou non cette clause fournissait à South Stream une défense contre la demande qui avait été intentée contre elle. Cette contribution examine de manière comparative les principes du droit anglais et néerlandais qui régissent l'interprétation des contrats. Il conclut que les différences entre les approches Anglaise et Néerlandaise en matière d'interprétation des contrats, bien que de forme différente, ne sont pas si grandes comme on le pense.

Zusammenfassung: In diesem Beitrag wird die erstinstanzliche Gerichtsurteil des Niederländischen Handelsgerichts zwischen Subsea Survey Solutions LLC und South Stream Transport BV aus englischer und niederländischer Rechtsperspective erörtert. Die Hauptfrage vor dem Gericht betraf die Auslegung von Klausel 7 der zwischen den Parteien geschlossenen Vergleichsvereinbarung und insbesondere, ob diese Klausel South Stream eine Verteidigung gegen die erhobene Forderung verschaffte oder nicht. In diesem Beitrag werden die Grundsätze des englischen und niederländischen Rechts, die die Auslegung von Verträgen regeln, vergleichend erörtert. Die Konklusion ist, dass die Unterschiede zwischen dem englischen und dem niederländischen Ansatz in Bezug

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auf die Vertragsauslegung, obwohl sie sich in ihrer Form unterscheidet, nicht so groß sind, wie viele glauben.

1. Introduction: The Facts

1. The Netherlands Commercial Court ('NCC') opened its doors on 1 January 2019. The intention of its creators was to provide a forum for the hearing in the English language of commercial cases, principally those cases which contain a significant level of complexity. The NCC is based in Amsterdam, the Netherlands. It is a specialized chamber of the Amsterdam District Court and of the Amsterdam Court of Appeal. A matter may only be submitted to the NCC where the following requirements are met (1) the Amsterdam District Court or Amsterdam Court of Appeal has jurisdiction, (2) the parties have expressly agreed in writing that proceedings will be in English before the NCC, (3) it involves a civil or commercial matter, which is not subject to the exclusive jurisdiction of any particular court and (4) the matter concerns an international dispute. A judgment from the NCC is automatically enforceable in all EU Member States pursuant to the Brussels I Regulation (recast), but may also be enforceable outside of the EU depending on the applicable international conventions or local recognition and enforcement rules.

2. A noteworthy first instance decision of the NCC is *Subsea Survey Solutions LLC* v. *South Stream Transport BV*.[1] The case concerned the construction of an offshore pipeline across the Black Sea as part of which South Stream Transport BV ('South Stream') entered into a contract with Subsea Survey Solutions LLC ('Subsea') under which Subsea agreed to perform a series of underwater surveys in order to collect data about the seabed corridor in which it was intended that the pipeline would be laid. The contract was entered into on 18 February 2014. A second contract was entered into between the parties on 28 July 2014 for the further collection of data. The first contract was referred to by the parties as 'the Geotechnical Contract' while the second was described as 'the UXO Contract'. The two contracts were amended on a number of occasions, including one occasion where one of the contracts was terminated and then later re-instated.

3. The present litigation did not, however, concern these two contracts. Rather, it concerned a Settlement Agreement entered into between the parties on 16 April 2018. The recitals set out the troubled history between Subsea, defined in the Settlement Agreement as the Contractor, and South Stream, defined as the Company, but the principal focus of the dispute was on Clause 7 of the Settlement Agreement which was in the following terms:

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1 Rechtbank Amsterdam (NCC) 4 March 2020, *Subsea Survey Solutions LLC/South Stream Transport BV*, ECLI:NL:RBAMS:2020:1388, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2020:1388 (accessed 4 January 2021).

> The Contractor, including its directors, employees, servants, agents, affiliates, subsidiaries, predecessors, successors and assigns, hereby releases and forever discharges the Company and its directors, employees, servants, agents, predecessors, successors, affiliates and assigns, from any and all manner of action and actions, causes or causes of actions, suits, debts, dues, sums of money, claims and demands whatsoever at law or in equity which it (or anyone claiming through it or in its name) ever had, now has or may hereafter have for any matters arising from or in relation to the Geotechnical Contract and UXO Contract and any and all contracts between the Parties related to those contracts.

4. Clause 18 provided that the Settlement Agreement was to be governed by, and construed in accordance with, the law of England and Wales. Clause 11 of the Settlement Agreement further provided

> Each Party hereby indemnifies, and shall keep indemnified, the other Party against all costs and damages (including the entre legal expenses of the Parties) incurred in all future actions, claims and proceedings in respect of any of the Geotechnical Contract and UXO Contact which it or its parent, subsidiaries, assigns, transferees, representatives, principals, agents, officers or directors ('Related Parties') of any of them may bring against the other Party or its Related Parties or any of them.

5. In the present proceedings Subsea sought to recover from South Stream the sum of EUR 22,470,765.08 in respect of what was described as 'non-contractual damages' said to be payable as a matter of Russian law by South Stream to Subsea following damage alleged to have been done to one of Subsea's vessels by the actions of South Stream. The principal issue before the court was whether or not Clause 7 of the Settlement Agreement provided South Stream with a defence to the claim which had been brought against it. As the court correctly observed, the answer to that question depended on the proper interpretation of Clause 7 and so it was necessary for the court to set out, and then apply to Clause 7, the principles of English law which govern the interpretation of contracts.

6. The approach of English courts to the interpretation of contracts has been a subject of considerable controversy in recent years. This difficult history was not referred to by the court in its judgment (and indeed in many ways it was not necessary for it to do so in order to resolve the point in dispute) but it did make particular reference to two recent decisions of the UK Supreme Court, namely *Arnold* v. *Britton*[2] and *Wood* v. *Capita Insurance*

2 UKSC 10 June 2015, *Arnold/Britton*, www.bailii.org/uk/cases/UKSC/2015/36.html (accessed 4 January 2021).

Services Ltd.[3] Reference was also made to the decision of the House of Lords in *Bank of Credit and Commerce International SA* v. *Ali.*[4] The citation of these cases is important. The significance of the first two cases lies in their articulation of the general principles applied by the courts to the interpretation of contracts, whereas the importance of *BCCI* v. *Ali* is to be found in the application of these principles in the particular context of settlement agreements. We shall examine these issues separately before turning to the court's application of these principles to the facts of the present case.

2. The Principles Applicable to the Interpretation of Contracts: The Development of English Law

7. Until relatively recently, the approach of the English courts to the interpretation of contracts attracted relatively little attention. The courts sought to interpret the words in the contract according to their ordinary grammatical meaning and were generally reluctant to admit into evidence materials beyond the documents in which the contract was to be found.[5] That approach began to alter in the early 1970s under the guiding hand of Lord Wilberforce.[6] Two particular features of this development are worthy of note. The first was the increase in the range of materials upon which the courts could draw when seeking to interpret the contract. While continuing to exclude pre-contractual negotiations and evidence of conduct subsequent to the making of the contract, English law became more willing to take account of 'the surrounding circumstances' or 'factual matrix' when seeking to interpret a contract. The second was a greater emphasis on the importance of 'context' or the 'commercial purpose' of the transaction when seeking to ascertain the meaning of its terms. This change in emphasis did not have the consequence that the courts no longer had regard to the natural and ordinary meaning of the words used by the parties. The natural meaning of the words used continued to be important, and would often be decisive, but it now had to be weighed in the scales together with a possible alternative meaning to be derived from the context in which the parties were operating or from the commercial purpose which the parties had in mind when entering into the contract. The court would thus have to balance these competing considerations when seeking to ascertain the true meaning of the term in dispute.

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3 UKSC 29 March 2017, *Wood/Capita Insurance Services Ltd*, www.bailii.org/uk/cases/UKSC/2017/24.html (accessed 4 January 2021).

4 UKHL 1 March 2001, *Bank of Credit and Commerce International SA/Ali*, www.bailii.org/uk/cases/UKHL/2001/8.html (accessed 4 January 2021).

5 See e.g., Lovell and Christmas Ltd v. Wall, [1911] 104 LT 85.

6 See in particular his judgments in *Prenn* v. *Simmonds,* [1971] 1 WLR 1381, 1383–1384 and *Reardon Smith Line Ltd* v. *Yngvar Hansen-Tangen,* [1976] 1 WLR 989, 995–997.

8. The most well-known articulation of this new approach can be found in the judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd* v. *West Bromwich Building Society*[7] when he sought to re-state 'the principles by which contractual documents are nowadays construed'.[8] A number of features of his re-statement can be noted. The first is the further increase in the range of materials on which the courts can draw to include 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man'.[9] The second was a shift in focus from the meaning of the words used by the parties (in the sense of their dictionary meaning) to the meaning which the document would convey to a reasonable man.[10] The third was a willingness to recognize that parties may make linguistic mistakes when drafting a contract and in such a case a court should not be obliged to 'attribute to the parties an intention which they plainly could not have had'.[11] In other words, it was possible for the courts to 'correct' an error in the drawing up of a contract as a matter of interpretation without having to invoke the doctrine of rectification, the more traditional approach of the courts to a case in which the document which the parties have drawn up fails to give effect to their common intention.

9. Although the approach of Lord Hoffmann was radical in the eyes of many English lawyers, it nevertheless appears restrained when compared to many other legal systems in the world. Thus, even under Lord Hoffmann's approach, English law continued to exclude from admissible evidence pre-contractual negotiations,[12] evidence of conduct subsequent to the making of the contract[13] and statements of

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7 UKHL 19 June 1997, *Investors Compensation Scheme/West Bromwich Building Society*, www.bailii.org/uk/cases/UKHL/1997/28.html (accessed 4 january 2021).

8 UKHL 19 June 1997, fn. 7.

9 Ibid., Lord Hoffmann subsequently qualified the width of this statement in UKHL 1 March 2001, *Bank of Credit and Commerce International SA/Ali*, www.bailii.org/uk/cases/UKHL/2001/8.html (accessed 4 January 2021), para. 39 when he stated that he 'meant anything which a reasonable man would have regarded as *relevant*' and that he was 'not encouraging a trawl through "background" which could not have made a reasonable person think that the parties must have departed from conventional usage' (emphasis in the original).

10 UKHL 19 June 1997, fn. 7.

11 UKHL 19 June 1997, fn. 7.

12 In *Investors Compensation Scheme* Lord Hoffmann acknowledged that the limits of this exclusion were in some respects unclear but subsequently in UKHL 1 July 2009, *Chartbrook Ltd/Persimmon Homes Ltd*, www.bailii.org/uk/cases/UKHL/2009/38.html (accessed 4 January 2021), the House of Lords affirmed the general exclusion of pre-contractual negotiations from evidence when seeking to interpret a contract. However, pre-contractual negotiations are admissible in evidence in an action for rectification or to support a plea of estoppel and these avenues to the admission of pre-contractual negotiations are frequently invoked by counsel.

13 This point was not expressly referred to by Lord Hoffmann in his judgment in *Investors Compensation Scheme* but it is clear law that such evidence is not admissible when seeking to interpret the terms of a written contract (see e.g., *Schuler AG* v. *Wickman Machine Tool Sales* [1974] AC 235).

subjective intent. Further, there was no hint in Lord Hoffmann's approach of any room for 'good faith' or 'reasonableness' as matters to be taken into account when seeking to interpret a contract.

10. In the years immediately following Lord Hoffmann's judgment in *Investors Compensation Scheme* his approach was very much in the ascendancy and his judgment was regularly cited to the courts and applied by them. However, this initial acceptance was not to last. A number of concerns began to surface. The first concern related to the diminution in the importance of the language which had been used by the parties and the apparent power that had been given to the courts to re-write the contract for the parties in order to produce what the court deemed to be a commercially reasonable outcome. The second, and related, concern was that Lord Hoffmann's approach had the potential to generate uncertainty in so far as it appeared to enable a party to a contract to submit that the meaning of the contract was not the meaning that would clearly be given to the terms as a matter of the natural and ordinary meaning of the words. The third was that the expansion of the scope of the 'factual matrix' had the consequence that the court was potentially deluged by evidence of very little value. The fourth was the confusion surrounding the relationship between interpretation and rectification. Interpretation, on one view, is the process by which the meaning of what the parties said in the document is identified, whereas rectification is concerned with what they meant to say but did not. The validity of these concerns has been a source of a vigorous debate in English law[14] and Lord Hoffmann himself has robustly defended his approach from his critics.[15] It is not necessary for us at this point to enter further into this debate. It suffices for us to note the existence of the controversy and, with this background, to turn to a consideration of two more recent Supreme Court cases, both which were considered by the NCC.

3. The Leading Modern Cases

11. The first case considered by the NCC was the decision of the Supreme Court in *Arnold* v. *Britton.*[16] Interestingly, the paragraph cited by the NCC was Lord Neuberger's identification of the range of materials on which a court can draw when seeking to identify the meaning of a disputed term in a contract, namely (1) the natural and ordinary meaning of the clause, (2) any other relevant provisions of the contract, (3) the overall purpose of the clause and of the contract, (4) the facts

14 The most vigorous debate has been an extra-judicial debate between Lord Sumption and Lord Hoffmann. See Lord Sumption, 'A Question of Taste: The UK Supreme Court and the Interpretation of Contracts', in D. Clarry (ed.), *The UK Supreme Court Yearbook 2016–2017, Volume 8* (UK: Appellate Press 2018) (a text of the speech can also be found at www.supremecourt.uk/docs/speech-170508.pdf (accessed 4 January 2021)) and the response by Lord Hoffmann: L. Hoffmann, 'Language and Lawyers', *LQR (Law Quarterly Review)* 2018, p 553.

15 L. Hoffmann, *LQR* 2018, fn. 14, para. 15.

16 UKSC 10 June 2015, fn. 2.

and circumstances known to or assumed by the parties at the time of entry into the contract and (5) commercial common sense, but (6) disregarding the subjective intentions of the parties. This paragraph helpfully sets out the factors to which an English court will have regard when seeking to interpret a contract. But, perhaps of greater significance, are the paragraphs immediately following that cited by the NCC in which the Supreme Court moved on to consider the weight to be attached to these factors. Of particular significance is the statement by Lord Neuberger that 'the reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed'.[17] Given the controversy which we have noted in relation to the development of English law in this area, the primary significance of *Arnold* lies in its attempt to put greater emphasis back on the language used by the parties and its warning against too great a readiness to depart from the ordinary meaning of words in order to give effect to what is thought to be a commercially sensible conclusion. Thus, while acknowledging that commercial common sense is 'a very important factor' in the interpretation of a contract, Lord Neuberger continued by stating that 'a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed'.[18]

12. The second case cited by the NCC is the decision of the Supreme Court in *Wood* v. *Capita Insurance Services*[19] where, in the passage cited by the Court, Lord Hodge drew a broad distinction between contracts drawn up with the benefit of professional assistance by lawyers and contracts which are concluded in a more informal context. In the case of professionally drawn agreements, Lord Hodge stated they should be interpreted 'principally' but not exclusively by textual analysis.[20] However, such textual analysis does not necessarily require that the words used by the parties be given their conventional meaning since, as Lord Hodge recognized, even professionally drawn agreements may not be entirely 'logical and coherent' and may 'lack clarity'.[21] However, the courts are likely to be slow to reach the latter conclusion given that the courts must be 'alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest'.[22] At the other end of the spectrum is the agreement that is marked by its 'informality, brevity or the absence of skilled professional assistance'[23] where greater weight may be given by the court to the matrix of fact or the background circumstances. It is important to

17 UKSC 10 June 2015, fn. 2, para. 17.
18 UKSC 10 June 2015, fn. 2, para. 20.
19 UKSC 29 March 2017, fn. 3.
20 UKSC 29 March 2017, fn. 3, para. 13.
21 UKSC 29 March 2017, fn. 3, para. 13.
22 UKSC 29 March 2017, fn. 3, para. 12.
23 UKSC 29 March 2017, fn. 3, para. 13.

note that the Supreme Court was not seeking to set up a stark contrast between agreements drawn up with the assistance of skilled professionals and informal concluded contracts. Rather, there is a spectrum or continuum on which contracts should be placed. The greater the role of professionals in the drafting of the contract, the greater the importance which the courts will attach to textual analysis when seeking to ascertain the meaning of the disputed term.

13. Before turning to the application of these principles to the facts of the present case, it is important to note one other decision cited by the NCC which is the leading English case concerned with the application of these principles to the interpretation of a settlement agreement. That case is the decision of the House of Lords in *Bank of Credit and Commerce International SA* v. *Ali*[24] where the House of Lords held, by a majority (Lord Hoffmann dissenting) that a settlement agreement did not, as a matter of construction, have the effect of preventing the applicant employee from pursuing a claim for what were referred to as 'stigma' damages. The settlement agreement in dispute was drawn in broad terms and provided:

> The applicant agrees to accept the terms set out in the documents attached in full and final settlement of all or any claims whether under statute, common law or equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the applicant has or may have or has made or could make on or to the industrial tribunal, except the applicant's rights under [the bank's] pension scheme.

14. Notwithstanding the breadth of the clause (including words such as 'all or any' (used twice), 'that exist or may exist', 'of whatsoever nature' and 'has or may have or has made or could make'), it was held that it did not encompass the applicant's claim for damages for the loss which he had suffered as a result of his association with a bank which for a number of years had been found to have carried on business in a corrupt and dishonest manner, the stigma of which association was said to have handicapped him in the labour market. The settlement agreement was signed in 1990 but the House of Lords did not recognize a claim for stigma damages until 1997 in *Mahmoud* v. *BCCI*.[25] So, at the time of entry into the settlement agreement, the claim for stigma damages was one which was unknown to English law and so the parties could not possibly have known of its existence. The majority of the House of Lords concluded that the wide words contained in the settlement agreement had to be confined by the context in which it was concluded. In particular, they held that the parties could not have intended to provide for the

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24 UKHL 1 March 2001, fn. 4.

25 UKHL 12 June 1997, *Malik/Bank of Credit and Commerce International, SA* [1998] AC 20.

release of rights and the surrender of claims which they could not possibly have contemplated at the time of entry into the release.

15. It is, however, important to see *BCCI* v. *Ali* in its context. It is not the case that settlement agreements are interpreted differently from other terms of the contract. On the contrary, the House of Lords held that the normal principles applicable to the interpretation of contracts also apply to settlement agreements.[26] Nor did the House of Lords conclude that it was not possible for parties to agree to settle claims that were unknown to them at the time of entry into the agreement. Parties who wish to achieve finality and to draw a line under all claims, whether known about or not, can do so provided that they use sufficiently clear language. The distinguishing feature of *BCCI* v. *Ali* was the fact that the claim that was being brought was one which did not exist in law at the time of entry into the settlement agreement.[27]

4. Application to the Facts

16. Turning now to the application of these principles to the facts of the case, it is important to note at the outset that there was no significant disagreement between the parties as to the principles of law applicable to the case. Their disagreement was one that related to the application of these principles to the facts of the case.[28] A similar phenomenon can be seen in the English cases where the parties are often in agreement as to the applicable principles but diverge on their application to the facts of the particular case.[29]

17. Two significant concessions were made by Subsea at the hearing before the court. The first was that its claim was based on facts which were known to it at the time of entry into the Settlement Agreement.[30] The second was that non-contractual claims fell within the scope of Clause 7.[31] This narrowed the issue before the court to the question whether Clause 7 only applied to contractual and non-contractual claims as a matter of English law (the position adopted by Subsea) or whether it applied to such claims brought under any law, including Russian law (the position adopted by South Stream). The principal submission advanced on

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26 UKHL 1 March 2001, fn. 4, para. 8.

27 EWCA Civ 11 July 2002, *Mostcash plc* v. *Fluor Ltd*, www.bailii.org/ew/cases/EWCA/Civ/2002/975.html, para. 59 (accessed 4 January 2021).

28 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.14.

29 See e.g., EWHC TCC 12 December 2017, *Systems Pipework Ltd/Rotary Building Services Ltd*, www.bailii.org/ew/cases/EWHC/TCC/2017/3235.html, para. 16 (accessed 4 January 2021); EWHC TCC 20 December 2017, *Ziggurat (Claremont Place) LLP/HCC International Insurance Company Plc*, www.bailii.org/ew/cases/EWHC/TCC/2017/3286.html, para. 22 (accessed 4 January 2021); EWHC Comm 12 May 2017, *Gard Shipping AS/Clearlake Shipping Pte Ltd*, www.bailii.org/ew/cases/EWHC/Comm/2017/1091.html, para. 14. (accessed 4 January 2021).

30 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.17.

31 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.17.

behalf of Subsea in this connection relied upon the inclusion of the words 'at law or in equity' in Clause 7 which were said to point unequivocally in the direction of English law given that it, unlike many other legal systems in the world, draws a distinction between claims at law and claims in equity. The NCC recognized that the inclusion of the words 'at law or in equity' was potentially significant on the ground that, had these words not been included in the contract, 'all current and future claims on whatever grounds under any law (of any jurisdiction) would fall within the scope of the release and discharge, given the clear and broad wording of this clause'.[32] However, their inclusion was not sufficient to persuade the court that the parties had intended to confine the scope of the clause to matters of English law. Indeed, in the judgment of the court, textual analysis of these words provided 'no insight' into what the parties intended by their inclusion, in particular whether there was any intention 'to limit or to expand the release and discharge'.[33]

18. Turning to the factual matrix, the NCC identified five factors which, taken together, supported the submission advanced on behalf of South Stream. The first was the breadth of the language used in Clause 7 to 'specify the claims covered by the release and discharge'. Attention was drawn to the words 'any and all' and 'any matters arising from or in relation to' the relevant contracts. As had been conceded by Subsea, the wording of Clause 7 covered not only contractual claims but also non-contractual claims, such as a claim in tort. This very broad wording was held to be an 'indication' that the parties 'intended to bar any existing and future claim of Subsea under whatever heading and on whatever ground against South Stream, including non-contractual claims under Russian law'.[34]

19. The second was that other relevant provisions in the Settlement Agreement and the Recitals showed that the parties intended the bar to encompass non-contractual claims brought as a matter of Russian law. In particular, attention was drawn to clause 11 which was said to confirm that the parties' intention extended beyond the settlement of claims arising as a matter of English law.[35]

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32 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.22.

33 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.22.

34 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.1.

35 Another issue in relation to Clause 11 of the Settlement Agreement concerned the counterclaim of South Stream to have its full legal costs awarded. In this respect, the NCC ruled that the reasonableness test, which is incorporated in Art. 6:96, para. 2b of the Dutch Civil Code and referred to in Art. 242, para. 1 of the Dutch Code of Civil Procedure ('DCCP'), is to be regarded as an overriding mandatory provision pursuant to Art. 9 of the Rome I Regulation. The reasonableness test under Art. 242 DCCP requires that (1) the legal costs must remain within a reasonable range and that (2) the costs were reasonably incurred in the given circumstances. The Rome I Regulation applies in situations involving a conflict of laws, to *contractual obligations* in civil and commercial matters (Art. 1, para. 1 Rome I Regulation). Without any further motivation of the court, it is somewhat surprising that the NCC applied Art. 9 of the Rome I Regulation to a rule of Dutch procedural law. However, the NCC referred to the exception in Art. 242, para. 2 DCCP, which

This inference was also drawn from Recital C to the Settlement Agreement which made express reference to non-contractual claims (such as intimidation, which is a tort, and a claim in unjust enrichment) and from the fact that the Recitals concluded by recording the intention of the parties 'to settle all their disputes and to enter into this Agreement'.[36]

20. The third factor was that the 'overall purpose' of the Settlement Agreement was held to be to terminate the contract between the parties and 'to settle all their disputes'[37] and not simply those disputes that had arisen between them as a matter of English law. Had the parties wished to restrict the scope of the settlement to disputes arising only under English law, they could easily have done so by inserting appropriate words of limitation. But they had not done so and as a result of their failure to do so 'a reasonable person could understand the broad wording used to intend to bar a non-contractual claim under Russian law as well'.[38]

21. The fourth factor was that Subsea admitted that the facts underlying its claim as a matter of Russian law were known to the parties at the time of entry into the Settlement Agreement.[39] Given that they had knowledge of these facts, it was for Subsea to insert words into the contract to preserve its entitlement to bring such a claim, particularly given that the directors and shareholders of Subsea were Russian. However, they had not taken such a step.

22. Finally, given that the stated purpose of the Agreement was to 'settle all disputes' and to 'penalise' a party from 'ever bringing any claim on whatever ground relating to the terminated contractual relationship' from a commercial perspective it was held not to make sense to limit the release to claims arising as a matter of English law and to leave open the prospect that the parties may bring claims under some other law, such as Russian law.[40]

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provides that the reasonableness test of Art. 242, para. 1 DCCP does not apply to agreements that serve to settle a dispute. Consequently, the court ruled it had no power to mitigate the cost allocation agreement incorporated in Clause 11 of the Settlement Agreement and awarded South Stream's counterclaim based on Clause 11 of the Settlement Agreement in full. See Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 5.8–5.12.

36 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.3. As the Commercial Court acknowledged (Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.9), English law does include the Recitals as part of the factual matrix (see EWCA Civ 12 April 2018, *Blackpool Football Club (Properties) Ltd/JSC Baltic International Bank*, www.bailii.org/ew/cases/EWCA/Civ/2018/732.html, para. 26 (accessed 4 January 2021)). The terms of the Recitals weigh less heavily in the scales than do the terms of the contract itself but, as in the present case, they can be used by the court to reinforce the conclusion it has reached as to the meaning of the term in dispute.

37 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.4.

38 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.4.

39 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.5.

40 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.6.

23. On this basis the court concluded that a reasonable person, having all the background knowledge which would have been available to the parties, would have 'clearly understood' that the intention of the parties was to release South Stream from 'any and all claims under any law'[41] with the consequence that Subsea was barred from bringing the present claims.

5. Interpretation of Contracts under Dutch Law

24. Had the case been decided under Dutch law, the outcome in all likelihood would have been the same. Before discussing the case from a Dutch law perspective, we will provide a brief overview of the main differences between the Dutch and English approach in relation to contract interpretation. Although the approaches differ in some aspects, both legal systems have alternative means that allow Dutch and English courts to come to a similar outcome.

25. The English approach primarily focuses on the meaning as it appears in the wording of the contract. That being said, one must take into account the factual matrix of the contract, especially if the natural meaning is unclear. The actual and subjective intentions of the parties are irrelevant. Instead, the approach is concerned with how a reasonable person would understand the parties' common intention from its objective manifestation. The Dutch approach, in contrast, firmly adheres to an interpretation according to the common intention of the parties, which in turn flows from the reliance doctrine. The Dutch Civil Code does not give specific rules of contract interpretation. They are to be found in the case law. The *Haviltex* case is one of the leading cases of the Dutch Supreme Court and it should be followed when interpreting a contract under Dutch law. In this landmark case, the Dutch Supreme Court introduced the so-called Haviltex Test for the interpretation of a contract: 'what matters is the sense which the parties could in the given circumstances reasonably reciprocally give to these provisions and what they could in that respect reasonably expect from each other'.[42] The Haviltex Test is an extension of the reliance doctrine of Articles 3:33 and 3:35 of the Dutch Civil Code; it all comes down to the meaning that the parties were reasonably entitled to attach to the contract and what they were reasonably entitled to expect under the given circumstances. In that context, the actual and subjective intention of the parties can be relevant as well. This Haviltex Test is applicable, irrespective of whether the wording appears ambiguous or not. In the Dutch approach, a court will not only consider the natural meaning of wording of the contract, but also all relevant facts and circumstances surrounding the contract, including, without limitation, the nature and purpose of the contract, the prior negotiations, the

41 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.24.

42 Hoge Raad 13 March 1981, *Ermes c.s./Haviltex*, ECLI:NL:HR:1981:AG4158, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:1981:AG4158 = *NJ* 1981/635, para. VI.2 (accessed 4 January 2021).

subsequent conduct of the parties, the structure of the contract, the nature and knowledge/experience of the parties to the contract and the assistance of (legal) experts. A Dutch court selects and weighs the facts and circumstances that it deems relevant when interpreting a contract. A court applying Dutch law cannot decide on the interpretation of the words used by the parties in the contract without assessing the facts and circumstances – as presented by the parties – which assist the court in deciding which of the possible meanings is closest to the intention of the parties. Depending on the circumstances of the case, the parties' actual obligations may be different from the natural meaning of the wording of the contract.

26. In line with the English approach, Dutch law recognizes the natural meaning of the words used by the parties as the most important factor to which a court will have regard when interpreting a contract. The natural meaning of the wording is always the starting point, but is by no means the only or final point as could be the case under English law. The amount of weight actually accorded to the natural meaning of the wording of the contract (even if such wording may appear unambiguous) depends on the facts and circumstances of the case as the Dutch Supreme Court held in the *Lundiform/Mexx* case.[43] In cases where none of the parties have identified any other relevant facts and circumstances for the court to consider, the natural meaning of the wording can be dispositive. However, whenever a party has identified facts and circumstances for the court to consider, a court can only determine whether the natural meaning of the wording in question is dispositive after having assessed all identified facts and circumstances and having weighed those deemed relevant in accordance with standards of reasonableness and fairness.

27. Dutch courts are free to decide how much weight they ascribe to each of the facts and circumstances, including the wording. The natural meaning of the words used in general will have more significant weight when it concerns the interpretation of a commercial contract concluded between professional commercial parties, as illustrated by the *Meyer Europe/PontMeyer* case. In that case, the Dutch Supreme Court recognized that when professional commercial parties have negotiated at arm's length with the assistance of (legal) experts, with a lengthy and detailed contract as a result, this could indicate that the parties have attached importance to the words used in the contract.[44] Such circumstances may demonstrate that the natural meaning of the wording accurately reflects the intention of the parties. If that is the case, Dutch courts in general will attribute significant

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43 Hoge Raad 5 April 2013, *Lundiform/Mexx*, ECLI:NL:HR:2013:BY8101, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2013:BY8101 = *NJ* 2013/214, para. 3.4.3 (accessed 4 January 2021); Hoge Raad 7 February 2014, *Afvalzorg/Slotereind*, ECLI:NL:HR:2014:260, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2014:260 = *NJ* 2015/274, para. 4.2.2 (accessed 4 January 2021).

44 Hoge Raad 19 January 2007, *Meyer Europe/PontMeyer*, ECLI:NL:HR:2007:AZ3178, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2007:AZ3178 = *NJ* 2007/575, para. 3.4.3 (accessed 4 January 2021).

weight to the natural meaning of the words.[45] The Dutch Supreme Court applied the same approach to the interpretation of a settlement agreement entered into between professional commercial parties in the *Derksen/Homburg* case.[46]

28. If the natural meaning of the words does not accurately express the parties' mutual intention, the other facts and circumstances of the case will become more important. At this point, there is a remarkable distinction between the Dutch and English approach. Under English law, evidence about the pre-contractual negotiations, the conduct subsequent to the conclusion of the contract and statements of subjective intent are excluded. Dutch law takes another approach: this kind of evidence does play a role and could demonstrate what the parties had actually agreed. For example, the email correspondence between the parties before the conclusion of the contract can indicate what the intention of the parties was at the time the contract was entered into[47] and the way in which the parties performed their contract in practice can illustrate how these parties understood the words used in the contract.[48] However, in practice it is quite a hurdle for parties to prove and persuade a Dutch court that the parties intended the words used to have another meaning than their natural one. So the final outcome would presumably be the same under English and Dutch law.

29. Another difference between the English and Dutch approach in relation to contract interpretation concerns the role of the standards of reasonableness and fairness. The standards of reasonableness and fairness are relevant in relation to contact interpretation under Dutch law. It will depend on the specific circumstances of the case what the effects of the standards of reasonableness and fairness

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45 In practice, courts can do so after weighing all facts and circumstances of the case in a final judgment. It may also after a first weighing of facts and circumstances and as a preliminary step decide to employ a rebuttable presumption that the natural meaning of the words used in the contract reflects the intention of the parties. If so, another weighing of the identified facts and circumstances remains possible so as to ensure that all the facts and circumstances are taken into account in the final judgment. This distinction is procedural and whether to take one or the other route to come to a final decision is at the discretion of the court and irrelevant for the substantive question whether all facts and circumstances have been properly weighed. See e.g., Hoge Raad 13 December 2019, *Monumentenmaatschappij Valerbosch B.*V./*X*, ECLI:NL:HR:2019:1940, dee plink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2019:1940, para. 3.2.3 (accessed 4 January 2021); Hoge Raad 5 April 2013, fn. 43, para. 3.4.4.

46 Hoge Raad 29 June 2007, *Derksen/Homburg*, ECLI:NL:HR:2007:BA4909, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2007:BA4909 = *NJ* 2007/576, para. 4.1.3 (accessed 4 January 2021).

47 See e.g.,: Rechtbank Amsterdam 6 May 2009, *Maxeda Nederland B.*V./*AT B.*V., ECLI:NL:RBAMS:2009:BI4276, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2009:BI4276, para. 4.8 (accessed 4 January 2021).

48 Hoge Raad 12 October 2012, ECLI:NL:HR:2012:BX5572, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2012:BX5572 = *NJ* 2012/589, para. 3.5 (accessed 4 January 2021); Hoge Raad 27 November 1992, *Volvo/Braam*, ECLI:NL:HR:1992:ZC0771, *NJ* 1993/273; Hoge Raad 20 May 1994, *Gasunie/Gemeente Anloo,* ECLI:NL:HR:1994:ZC1368, *NJ* 1994/574.

will be in the case at hand. To those unfamiliar with the Dutch legal system, it should be emphasized that as in the English system, a court cannot rewrite a contract in a way the relevant court deems reasonable and fair; the court's function is to interpret the contract. But a court can find that matters that have not been specifically provided for in writing are nonetheless part of the contract, on the basis of the parties' mutual intentions and what they were reasonably entitled to expect from each other.[49]

6. Comparative Analysis: The Interpretation of Clause 7 of the Settlement Agreement from a Dutch Law Perspective

30. Had the Settlement Agreement between Subsea and South Stream been governed by Dutch law, the Haviltex Test would have been applicable to its interpretation. This means that all facts and circumstances would have had to have been taken into account, according to standards of reasonableness and fairness when interpreting Clause 7 of the Settlement Agreement. In the case at hand, as we have noted, the NCC identified as part of the factual matrix five factors that were considered relevant for the interpretation of Clause 7. These factors, i.e., the wording of the relevant provision, other contractual provisions, the purpose of the contract, the nature of the parties, and the commercial perspective as well as the surrounding circumstances would also have played a role when interpreting Clause 7 according to Dutch law.

31. Also under Dutch law, a court would have taken the first factor, being the words used by the parties and their natural meaning, as a starting point for the interpretation of Clause 7 according to Dutch law.[50] The broad wording used in Clause 7 appears to indicate that the parties had the intention to settle all their disputes irrespective of the law under which the claims would be brought. However, under Dutch law the interpretation of Clause 7 should not only be made on the basis of the natural meaning of the words. A court should consider and weigh all facts and circumstances of the case at hand, assessed by the standards of reasonableness and fairness.

32. In relation to the second factor, the NCC paid attention to the role of the other contractual provisions and the Recitals.[51] Under Dutch law, the entire contract may be relevant when interpreting the contentious

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49 See for more information about the standards of reasonableness and fairness: J. Cartwright, 'Redelijkheid en billijkheid: a view from English law', in C.G. Breedveld-De Voogd et al. (eds), *Core Concepts in the Dutch Civil Code* (Deventer: Kluwer 2016), pp 39–60; M.H. Wissink, 'Legal certainty and the construction of contracts in Dutch law', in A.G. Castermans et al. (eds), *Foreseen and unforeseen circumstances* (Deventer: Kluwer 2012), pp 41–55.

50 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.1.

51 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.2–4.23.3.

clause.[52] For example, a court may pay attention to the headings used in the contract,[53] but it may also refer to other clauses to define a disputed term.[54] This means that also under Dutch law, the other terms of the contract and the Recitals would have been taken into account when interpreting Clause 7. As the Recitals often contain information about the intention of the parties when concluding the contract, these could be relevant for the interpretation of the operative part of the contract.[55] The information contained in the Recitals can prove that a word means something different in the given context and outweigh the natural meaning of such word. As the Haviltex Test compels the court to look beyond the wording of the contract, any documents concerning the negotiations of the Settlement Agreement could have been relevant when interpreting Clause 7 according to Dutch law. These kind of documents could not be submitted as evidence by the parties in the proceedings, which is understandable as English law is applicable to the case at hand which prohibits using prior negotiations as evidence. The Recitals, especially, would have been the only source of information of the intention of the parties.

33. The purpose of the contract is the third factor mentioned by the NCC when applying English law. This factor, together with the nature of the contract, may influence the interpretation under both English and Dutch law. The nature of a settlement agreement is often closely linked to its purpose, which is in this case ending or preventing any disputes (see Article 7:900 of the Dutch Civil Code). The mere fact that the parties concluded a settlement agreement demonstrates that the parties intended to settle their disputes and expected to reach finality. The nature and purpose of a settlement agreement, in combination with other circumstances like the assistance of experts, may give rise to a more textual interpretation.[56] This is in line with the English approach as applied by the NCC.[57] As the parties used no wording indicating that they intended to limit the scope of the settlement to claims

52 Hoge Raad 18 November 1983, *Kluft/B en W Supermarkten,* ECLI:NL:HR:1983:AG4691 = *NJ* 1984/272, para. 3.1.

53 Hoge Raad 13 December 2019, fn. 45, para. 2.4 with reference to para. 3.8.5 of the judgment of the Court of Appeal. A clause stating that headings should not have any effect on the interpretation of the contract may not have any special meaning or significance under Dutch law as these clauses tend to be boilerplate and have a specific Anglo-American background. Based on the judgment of the Dutch Supreme Court in relation to entire agreement clauses, this is just another clause that needs interpretation under the Haviltex test (see Hoge Raad 5 April 2013, fn. 43, para. 3.5.3).

54 Hoge Raad 31 May 2002, *De Heel/Huisman,* ECLI:NL:HR:2002:AE2376, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2002:AE2376 = *NJ* 2003/110, para. 3.6 (accessed 4 January 2021).

55 See e.g., Hof Arnhem-Leeuwarden 21 October 2014, ECLI:NL:GHARL:2014:8069, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2014:8069, para. 5.5 (accessed 4 January 2021); R.J. Tjittes, *Commercieel Contractenrecht* (Den Haag: Boom juridisch 2018), para. 5.3.5.

56 Dutch Supreme Court 29 June 2007, fn. 46, para. 4.1.3.

57 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.4.

under English law, the broad wording indicates that the parties had the mutual subjective intention to settle the non-contractual claims under Russian law as well. The NCC emphasized that a reasonable person would have interpreted the intentions of the parties, based on what they have written, in the same way.[58]

34. Like under English law, the fourth factor dealt with by the NCC, i.e., the nature of the parties, will be relevant under Dutch law. In the landmark *Haviltex* case, the Dutch Supreme Court already emphasized that 'it can also be material to which social circles the parties belong and what legal knowledge can be expected from such parties'.[59] The NCC qualified Subsea as a professional commercial party. Professional commercial parties are normally 'repeat-players' and are aware of the risks related to these kind of contracts.[60] These kind of parties do have specific knowledge in this field and in general need less protection than, for example, a consumer. If Subsea really intended to exclude the claims under Russian law from the settlement, it was up to Subsea to ensure that this was clearly laid down in the Settlement Agreement. By failing to do so, the NCC considered that such an omission should remain for the account of Subsea.[61] This is even reinforced by the background of the parties as the involved directors and Shareholders of Subsea are Russian.[62] A Dutch court applying Dutch law would have done the same. The nature of the parties and their (foreign) background are relevant circumstances to take into account when interpreting a contract under Dutch law.[63]

35. Finally, the NCC paid attention to the commercial perspective as a fifth factor and concluded that it would not make sense to limit the settlement to claims under English law only.[64] Dutch law does not recognize 'business common sense' as specifically as English law does, but the commercial perspective will be a relevant circumstance that may influence the interpretation of a contact. It is a circumstance looked at when considering the plausibility of the alternative interpretations,

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58 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.4.

59 Dutch Supreme Court 13 March 1981, fn. 42, para. VI.2.

60 M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', *L. & Soc. (Law and Society)* 1974, p 97; R.J. Tjittes, *Commercieel Contractenrecht,* p 27; H.N. Schelhaas, in H.N. Schelhaas & W.L. Valk, *Uitleg van rechtshandelingen. Preadviezen 2016 uitgebracht voor de Vereniging voor Burgerlijk Recht* (Zutphen: Uitgeverij Paris 2016), p 137.

61 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.5.

62 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.5.

63 Hoge Raad 20 September 2013, *Gemeente Rotterdam/Eneco c.s.,* ECLI:NL:HR:2013:CA0727, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2013:CA0727 = *NJ* 2014/522, para. 3.4.2 (accessed 4 January 2021); Hoge Raad 9 April 2010, *UPC/Land,* ECLI:NL:HR:2010:BK1610, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2010:BK1610 = *RvdW* 2010/511, para. 3.3 and para. 5.3 (accessed 4 January 2021); Hoge Raad 18 March 1983, *Shy Ying Cheung/Lam Tho Hing,* ECLI:NL:HR:1983:AG4694 = *NJ* 1984/345, para. 3.2.

64 Rechtbank Amsterdam (NCC) 4 March 2020, fn. 1, para. 4.23.6.

including whether such interpretations lead to an implausible outcome, and may influence the final weighing of the circumstances of the case.[65] A Dutch court would seek to assess whether the consequences of a specific interpretation reflect the reasonable intention and expectations of the parties. However, parties can agree something 'unreasonable'; there is freedom of contract. But if an interpretation of one of the parties leads to a clear implausible or imbalanced outcome this is a good reason to consider this and to investigate whether this is what the parties reasonably intended and what the parties were reasonably entitled to expect.

36. As follows from the above, unless evidence from the negotiations or the conduct of the parties following the Settlement Agreement clearly would have demonstrated differently, Clause 7 of the Settlement Agreement would have been interpreted in the same way had it been governed by Dutch law: it was the parties' intention to release South Stream from any and all claims under any law and the parties reasonably expected to achieve finality and to draw a line under all claims. The factors and surrounding circumstances that are relevant under the English factual matrix will also be taken into account when interpreting a contract under Dutch law. Even though there are still some important differences between the English and Dutch approach in relation to contract interpretation, a Dutch court, applying Dutch law, would presumably have reached the same conclusion as the NCC did under the applicable English law.

7. Conclusion

37. The NCC provides an interesting new alternative to resolving international commercial disputes. 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 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.

38. The case also demonstrates that the gap between the English and Dutch approach in relation to contract interpretation may not be as broad as many

65 Hoge Raad 1 November 2013, *VvE Prinsenwerf,* ECLI:NL:HR:2013:1078, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2013:1078 = *NJ* 2013/522, para. 3.5.2 (accessed 4 January 2021); Hoge Raad 14 February 2014, *Bakermans c.s./Mitros*, ECLI:NL:HR:2014:337, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2014:337 = *NJ* 2014/119, para. 3.4 (accessed 4 January 2021); Hoge Raad 25 November 2016, *FNV/Condor*, ECLI:NL:HR:2016:2687, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2016:2687 = *NJ* 2017/114, para. 3.4 (accessed 4 January 2021); Hoge Raad 4 May 2018, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2018:678 = *RvdW* 2018/591, para. 3.4.2 (accessed 4 January 2021); Hoge Raad 8 October 2010, ECLI:NL:HR:2010:BM9621, deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2010:BM9621 = *NJ* 2010/546, para. 3.6.2 (accessed 4 January 2021).

believe. In both legal systems, the issue boils down to the question of how much weight should be attached to the natural meaning of the words and to the other relevant factors when interpreting a contract. Under both laws, it is possible that the natural meaning of the words outweigh other factors, but it is also possible that other factors take precedence over the natural meaning of the words used by the parties. The latter is less likely to occur under English law than under Dutch law. Under English law, it is not permitted to search for the (subjective) intentions of the parties outside the document which is said to contain their contract. Therefore, it is less likely that a court will diverge from the natural meaning of the words when weighing the facts and circumstances of the case to give effect to the intention of the parties. Dutch law on contract interpretation has a broader approach and even accepts more subjective factors, like the prior negotiations and the subsequent conduct of the parties, when determining what the parties could reasonably have intended and could reasonably have expected at the time they concluded their contract. This, in combination with the influence of the standards of reasonableness and fairness, form the main differences between the English and Dutch approach in relation to contract interpretation. That being said, although the English and Dutch approaches differ in their form, the final outcome of the interpretation of the contract will in all likelihood often be the same as illustrated by the above analysis of the decision of the NCC in *Subsea Survey Solutions LLC* v. *South Stream Transport BV.*