DVDW

“Going Dutch?”

Legal insights for doing business in the Netherlands



Experts in the
laws of business

Preface

Going Dutch?

“Going Dutch” is a well-known and widely used expression for splitting the bill, and one that even occurs in business settings. It is not the only famous expression or idiom involving the Dutch: English also refers to a Dutch agreement or Dutch courage, both of which involve quantities of alcohol. Other expressions include a Dutch auction, double Dutch, a Dutch treat, a Dutch defence and Dutch gold. Clearly, none of these sayings are very flattering towards the Dutch. What they have in common, however, is that they have become part of the English language as a result of the Netherlands’ long history of global trade and international involvement.

While thankfully the idioms themselves are largely outdated, international business in the Netherlands is booming. Besides tax incentives, the country also offers unique opportunities for business. The Netherlands has a proven track record as a stable, internationally-oriented country with an open economy, a competitive business climate and excellent infrastructure, strategically located at the gateway to Europe and leading the way in technology and innovation.

The Dutch judiciary has a reputation for being among the most efficient, most reliable and most transparent worldwide. This makes the country a good choice for doing business. You or your clients might therefore be considering establishing a presence in the Netherlands or doing business with a Dutch company. With so many international groups holding companies in the Netherlands, you might also become involved in a legal dispute with a Dutch party.

Whatever the case, DVDW is centrally placed to assist you, with offices in both the seat of government, The Hague, and the mainport of Rotterdam, in close proximity to Schiphol and Rotterdam-The Hague Airport, and Amsterdam.

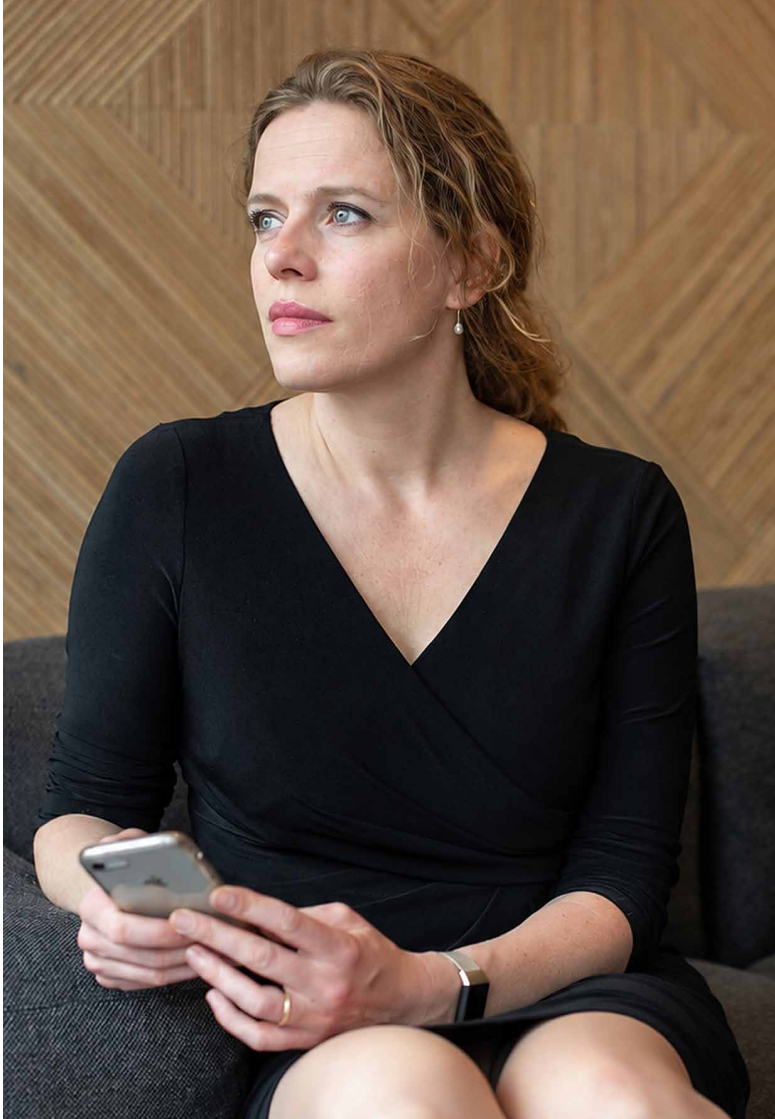
This legal guide provides an overview of practical legal aspects of doing business in the Netherlands, bringing together information on some of the core issues that our international corporate clients and business relations have encountered in the recent past. It contains contributions on employment law,

renting in the Netherlands, insolvency procedures and the Dutch creditor scheme ‘WHOA’, voting agreements in private equity and what to expect when facing the possibility of a shareholder dispute. The guide also explains the main issues of Dutch law with respect to loan and security documentation, what to expect in connection with reasonable contract interpretation in the Netherlands and the differences between Dutch and US/English Mergers & Acquisitions. It provides a brief introduction to Dutch legal aspects for you to browse through if you or your clients are involved in or are considering entering into business in the Netherlands.

Please feel free to reach out to me, any of the authors in this guide or anyone else at DVDW to discuss aspects of doing business in the Netherlands that are relevant to you or your clients. We hope that you enjoy this guide and find it of practical use.

All the best,

Marjon Lok
Co-managing partner DVDW / Partner Corporate Dispute Resolution & Litigation



DVDW's areas of expertise

Have a look at our website (www.dvdw.nl/en) to discover more about our areas of expertise. We understand business, and we understand that what you want from your Dutch attorney is advice that is to-the-point. We make it our priority to be clear. Whatever your next move is, we are your sparring partner.

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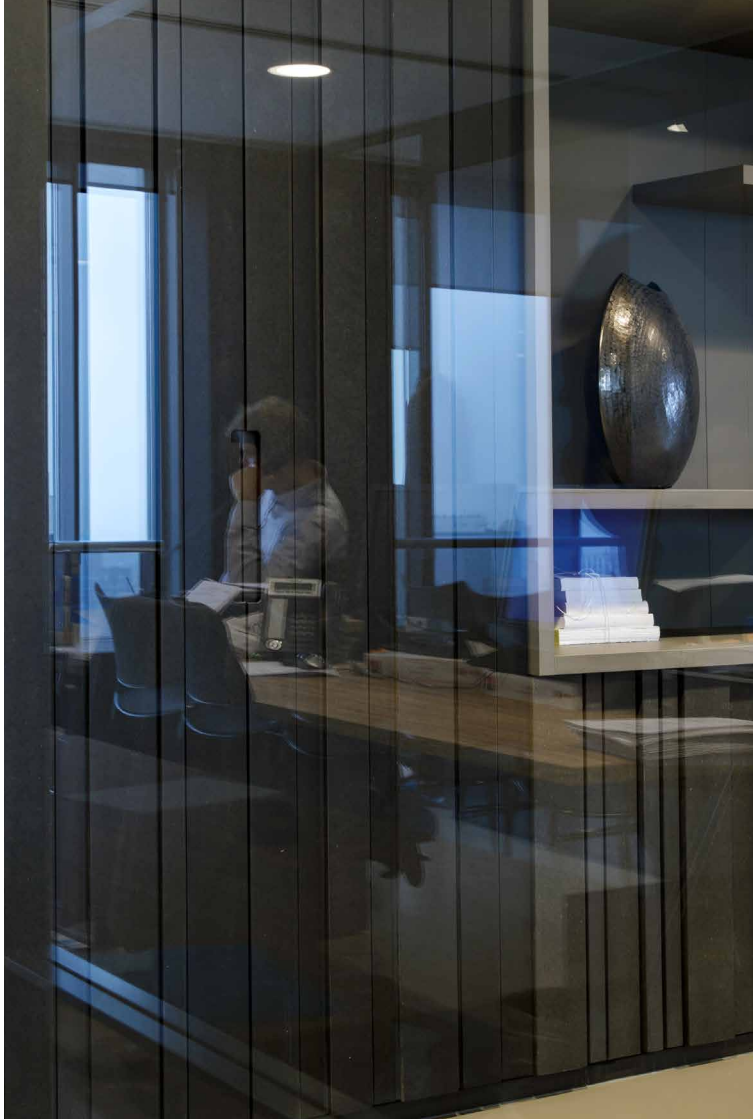
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Marjon Lok

Shareholder disputes in the Netherlands: “Even if a monkey wears a golden ring, it is and remains an ugly thing.”[1]

Marjon Lok

1 “Putting something attractive or expensive on something does not change its true nature”: an investment alone is not enough to make an enterprise successful.

Below you will find a bird’s eye view of some of the instruments available to shareholders in a Dutch entity in the event of corporate disputes. Each section comes with a Dutch idiom, translated (very) literally. The Dutch say things very directly, and the idioms show it.

1. Now the monkey comes out of the sleeve *(now the truth comes out)*

The Netherlands is often chosen as the jurisdiction for holding companies in international structures. Reasons include its central location for business in Europe, operational activities in the Netherlands, tax considerations or because it is a neutral jurisdiction. The Dutch judiciary is ranked among the most efficient, reliable and transparent worldwide.

When parties choose a Dutch legal entity, Dutch corporate law will apply not only to the entity, but its corporate bodies, including the shareholders’ meeting. International and domestic disputes between shareholders, disputes within a group structure and disputes between shareholders and the board of directors may all be governed (in part) by Dutch corporate law. Whatever the financial interest at stake, shareholder disputes often contain similar facets and history almost always repeats itself. The Dutch would say that *a donkey does not bump into*

the same stone twice. Shareholders, it turns out, regularly do.

One major difference from many other, mainly common law, jurisdictions is that the Netherlands has a stakeholder model rather than a shareholder model. The board of directors and the supervisory directors are legally obliged to act in the corporate interest of the company and its affiliated enterprise. Note that this also applies to trust directors. In determining that interest, they must duly take into account the interests of the stakeholders involved, including shareholders, employees, creditors, suppliers and other relevant stakeholders. A current topic of debate is the extent to which public interests can be considered part of the corporate interest. The corporate interest can change in different circumstances, such as financial distress, in which case the interests of the creditors become increasingly important. The corporate interest of a company is therefore not necessarily equal to the interests of its shareholders or even the group to which it belongs. The company's interest is usually determined primarily by what is considered necessary for the continued success of its enterprise.

Within a group, the group strategy may weigh heavily in determining the company's interest and may, depending on the circumstances, justify decisions that primarily serve the group as a whole. Where a group is involved, group policy may be essential to that success. A board will not readily be permitted to pursue a policy that is wholly incompatible with the group's corporate strategy and may, in some circumstances, have to accept that the company's interest is subordinated to the interest of the group as a whole. The board of the individual company, however, retains its own responsibility and cannot simply disregard that legal entity's interests. Group management is likewise not free always to subordinate the interests of a group company to what it sees as the interests of the group. Although the articles of a Dutch private limited company may grant shareholders a right to give instructions to the board, the board can never be obliged to act contrary to the company's interest. Equally, we often see shareholders' agreements stating that shareholders can appoint one or more supervisory directors and that such supervisory directors must act in the interest of the appointing shareholders. The second part of that clause has little to no meaning in the Netherlands. Both the directors and the supervisory directors will still be legally obliged to act and make assessments independently of the shareholders and in the interest of the company.

And that's not all. Dutch law states that a legal entity and all those involved in its organisation, such as shareholders and directors, must behave towards each other in accordance with what is required by standards of reasonableness and fairness. Any rule applicable between them has no effect as far as this would be unacceptable in the given circumstances to standards of reasonableness and fairness. This article plays a major role in almost all corporate governance-related litigation and should therefore be top of mind even when only the shadow of a potential dispute arises or when trying to settle the dispute. It also entails that although shareholders of a Dutch entity can act in their own best interests when exercising their voting rights, they will, to a certain extent, have to take into account the company's 'own' interests and even take into account a duty of care towards other individual shareholders.

That duty of care has become noticeably more concrete in recent years. Under Article 2:8 of the Dutch Civil Code (DCC), the company must exercise due care with respect to the interests of all its shareholders, and where minority shareholders face a majority shareholder there is more reason to guard against an impermissible mixing of interests or abuse of power.

The Supreme Court's starting point was that individual shareholders have no right to information outside the general meeting, except in relation to items on the meeting's agenda. The Enterprise Chamber has subsequently developed case law in which the duty of care under Article 2:8 DCC may, depending on the circumstances, require additional information to be provided outside the general meeting. In practice, a shareholder who is not represented on the board, especially in a family or joint venture company, may be entitled to answers outside the meeting, and the board may even have to inform that shareholder on its own initiative. Whether a shareholders' agreement can narrow these duties of care, for example by limiting information to the general meeting, is still a debated matter.

However aligned parties may seem at the start, interests can diverge at any given time. The future looks different from what was expected, or individuals or parties do not perform as expected. Cultural differences may be emphasised. The trust and confidence that once seemed essential may have eroded. Deadlocks may arise and decision-making may be impaired. Governance disputes, investment disputes, post-acquisition or partnership disputes may arise. Where did that golden investment go?

Now ‘the monkey comes out of the sleeve’. The need to intervene arises. Enter the lawyer.

2. Good arrangements make good friends *(goede afspraken maken goede vrienden): the need for speed vs. proper drafting*

The first step to preventing disputes is proper drafting. So many misunderstandings regarding the reasons why parties do business with each other could be prevented with good agreements and articles of association. I can already hear the reader sighing: obviously. But this is not so much about creating a legally strong position, although that obviously also plays a role. Especially in international relationships, where boilerplate language from one country may have a completely different effect in the Netherlands, and where the same words may already have acquired a different meaning through case law, for example the term ‘good faith’. But perhaps more than creating a strong legal position, it is equally about clarifying what parties expect and want from each other. A Dutch court will always pay attention to what parties intended, not only within the context of an agreement, but within the context of the workings of the Dutch legal entity itself. For example, in the case of a joint venture company, the company’s interest is determined by the nature and content of the cooperation agreed upon between the shareholders. Determining the parties’ intentions is therefore of great importance if litigation takes place in the Netherlands. Aside from the above, clarifying expectations and wants plays a huge role in avoiding litigation altogether, because parties are more aware of what they can and cannot expect.

This means looking beyond the sometimes urgent need or desire to get the deal done. Parties who trust each other - and do not want to give the impression that this is not the case - are inclined to skip this part or to do it with a minimum of documentation. Like a couple engaged to be married, parties may not want to stipulate conditions that could imply that the relationship going pear-shaped is even a serious consideration: why would you already assume things will go wrong? Sometimes a shareholder thinks he can sort things out the moment a problem arises. This is unfortunately often a misconception. Shareholders need to speak with each other and with the board about business principles, starting points and expectations. The concern that this might come across as distrustful is misplaced. A professional and businesslike approach fits in with making a business investment and generally only inspires confidence. It may be one of the greatest frustrations of lawyers: to see that a dispute costing

parties so much time, money and sleep could have been avoided relatively easily.

A side note: the quickest and cheapest route to a forced break-up of shareholders is often the enforcement of contractual obligations, for instance to offer shares in clearly specified circumstances, or shoot-out provisions. Since 2025 this side note has gained weight. The number of statutory exit proceedings has risen sharply, and a bespoke scheme in the articles or an agreement may take precedence over the statutory scheme. It will do so only if it is well drafted.

In a 2026 case, a clause in a shareholders' agreement stating that no member could be expelled from the company had no effect because the parties had not agreed a bespoke dispute resolution scheme. A bespoke scheme that makes the transfer of shares impossible or extremely onerous cannot be relied on to that extent (Article 2:337(1) DCC). A mere offering obligation without a corresponding purchase obligation may also fall short. In June 2026 the Enterprise Chamber granted an expulsion request despite reliance on such an arrangement, but applied the contractual bad-leaver provision when setting the price. Valuation clauses deserve the same care. Experts must take agreed valuation provisions into account, but the court will disregard them to the extent they would lead to a manifestly unreasonable price. Good-leaver and bad-leaver definitions, a clear valuation standard and a reference date are therefore worth their weight in gold.

When reviewing dispute resolution clauses keep in mind that shareholder disputes often take place when action is urgent, for example when additional financing is urgently required. A good dispute resolution clause allows for swift action where the circumstances require it.

3. Adding water to the wine *(water bij de wijn doen): negotiating*

Sometimes a dispute simply cannot be prevented. No matter how well the agreements have been drafted. In that case, it is important to make the most efficient use of the instruments that are available to the shareholder in those agreements, potential internal regulations and articles of association and possibly also sector specific codes and the law. At the same time, it is important to keep an eye on building a sufficient paper trail in the context of risk management. Shareholders should consider which long-term goals are achievable and desirable and, on that basis, arrive at the desired strategy. Don't just go for the short-term goals thinking that the rest will be taken

care of later. “The rest” can turn out to be a major obstacle in settlement efforts and litigation.

Good negotiations can ensure that shareholders are not faced with protracted and costly litigation, while achieving the desired solution. It is not about horse-trading or playing games. It is about understanding the conditions under which the other party gains an interest in reaching a certain agreement. This may be because you are in a stronger position legally speaking, but also because there are commercial interests at stake. What is important for one shareholder is not necessarily important for the other person and vice versa. If the other party is aggressive or litigious, it is important to anticipate its steps and to take the necessary measures, including pre-emptive action where appropriate. Of course, often some water will have to be added to the wine when finally settling. Not every wish can be granted, no matter how much a shareholder is willing to invest in litigation. The new statutory scheme has, by the way, made the shadow of the law much more significant. A credible threat of an expulsion or exit request before the Enterprise Chamber, with one fact-finding instance and no appeal on the facts, has become a strong negotiating tool. Many proceedings now end in a settlement reached at the hearing.

Incidentally, all this does not mean that negotiating has to be a long process. Sometimes it can be done very quickly. Sometimes there can be a quick route to a certain end, provided you can assess the other party financially and psychologically well. Think, for example, of the Texas and Mexican shoot-out, the fairest bid and Russian Roulette in the context of share transfers or deadlocks. Of course, more nuanced negotiation methods can also be appropriate. Whether it is a matter of breaking impasses, increasing control, enabling decision-making or investment financing opportunities, restoring relations, reaching an agreement on compensation or a definitive separation by means of an exit, demerger or a transfer of shares. Like in any jurisdiction, a well-thought-out strategy and realistic end objectives can take you a long way in negotiations. The fact that Dutch lawyers are generally more than happy to “fall with the door into the house” (*met de deur in huis vallen:* get straight to the point) can, at appropriate times, be very effective in getting things moving.

4. Bend or break *(buigen of barsten)*: enforcing the law

If there is no room or time to negotiate, or if a purely legal question is at stake, it may be time to start legal proceedings. Here, there are numerous routes and options for shareholders,



both as a corporate body and as individual majority or minority shareholders. For example, enforcing obligations to offer shares, seeking expulsion of shareholders, requesting an exit, enforcing, blocking or setting aside decision-making, denouncing mismanagement, enforcing necessary financing and dilution, forcing a demerger or simply holding shareholders liable. We also see a considerable number of disputes regarding the scope of information rights of the individual (minority) shareholder, especially when other shareholders also have a board position or for whatever reason may possess more or other information.

There are also various routes to realise those possibilities, including the Enterprise Chamber, the ordinary court, arbitration and the Netherlands Commercial Court. Since 1 January 2025, however, the statutory dispute resolution scheme (forced expulsion and exit) can only be brought before the Enterprise Chamber or, if properly agreed, before an arbitral tribunal or a binding adviser. Before initiating any proceedings, it is a good idea to consider what best suits you and your situation and which steps should be taken to best prepare the ground for such litigation.

5. Two captains on one ship *(twee kapiteins op één schip)*: the new statutory dispute resolution scheme (forced expulsion or exit)

The biggest change in recent times is the act that entered into force on 1 January 2025. Before 2025, the dispute resolution scheme was rather unpopular, with approximately 145 cases in 36 years. The reform appears to have been a success. In 2025 alone, 79 requests were filed with the Enterprise Chamber under the new scheme, and by mid-May 2026 the total had reached 119. Across all its case types, the Enterprise Chamber issued 125 decisions in the first seven months of 2026.

The statutory dispute resolution scheme applies to the BV and the NV, unless their shares or depositary receipts are admitted to trading on a regulated market or multilateral trading facility. It is now a one-stop shop. The procedure is no longer a writ procedure with two fact-finding instances. It is now a petition procedure in which the Enterprise Chamber is the first and only fact-finding instance. Only cassation to the Supreme Court remains. Parties can no longer designate another state court. Arbitration and binding advice, however, remain possible.

Holders of at least one third of the issued capital can request that a shareholder is ordered to transfer its shares. The essential requirement is that the shareholder whose shares are to be transferred has, through its conduct, *whether or not in its capacity as shareholder,* harmed the company's interest to such an extent that its continued shareholding cannot reasonably be tolerated (Article 2:336a(1) DCC). For example, conduct as a director, as a director of another (competing) company, or in a private capacity now also counts. The Enterprise Chamber applies a balancing test between the company's interest in ending the shareholding and the shareholder's interest in remaining a shareholder. From service of the petition until the decision is final, the respondent cannot transfer or pledge its shares, or create a usufruct on them, without consent.

A practical aspect is that connected claims between the same parties, or between a party and the company, can be brought before the Enterprise Chamber at the same time by petition. These could, for example, include claims for damages (Article 2:336a(6) DCC). The Enterprise Chamber may split the case if those claims are not suitable for joint handling in a single fact-finding instance (Article 2:336a(7) DCC). Note the trade-off: whatever the Enterprise Chamber decides on a connected claim cannot be appealed on the facts; only cassation to the Supreme Court will be available.

An expulsion or exit request under the statutory dispute resolution scheme can be combined with a request for an inquiry and immediate measures. In practice, this takes place quite often, either as a subsidiary measure (if an exit or withdrawal request is rejected) or because the inquiry is likely to provide information essential for establishing the price of the shares.

The Enterprise Chamber can grant provisional measures that last until the shares are transferred. It handles such requests with the utmost urgency (Article 2:338(3) DCC). It does not consider itself strictly bound by the requested measure. In one case, both shareholder-directors were prohibited from entering into new legal acts or making payments on behalf of the company, even though only the suspension of one of the directors had been requested.

If the request for an expulsion or exit is granted, the Enterprise Chamber may appoint one or more experts to report on the price, and their appointment cannot be appealed against (Article 2:339(1) DCC). Experts work under the Guideline for experts in the dispute resolution scheme (Leidraad



deskundigen geschillenregeling, as updated in summer 2026), which includes a standard plan of approach. At the outset, the expert prepares a plan of approach including a timetable and a cost estimate. The Enterprise Chamber then fixes the advance on costs. The usual reference date is the date of the Enterprise Chamber's decision granting the request.

A shareholder can harm a company without casting a single vote. A shareholder who also serves as a director and diverts customers to a competing business is an obvious example. The legislative history confirms that unfair competition and managerial misconduct by a shareholder-director can fall within the expulsion regime (Kamerstukken II 2023/24, 36 469, no. 3). Expulsion nevertheless requires conduct that harms or has harmed the company's interests to such an extent that continued shareholding cannot reasonably be tolerated, taking the interests involved into account. The 2025 and 2026 cases illustrate the distinction. In a family company dispute, an entrenched deadlock to which both shareholders had contributed led the Enterprise Chamber to order an inquiry, find expulsion justified and order a valuation of the shares, while reserving further decisions in the expulsion proceedings. By contrast, allegations of misconduct involving a shareholder's role as COO prompted an inquiry and suspension of that

shareholder in that capacity, with expulsion deferred because the relevant facts remained insufficiently clear. The inquiry also extended to the handling of the allegations and the conduct of other participants; it was not a finding that the alleged COO misconduct had been established *(MedEnvoy)*.

For a shareholder seeking an exit, the focus shifts to harm to their own rights or interests that makes continued shareholding unreasonable (Article 2:343(1) DCC). As the literature published in 2025 and 2026 explains, drawing also on earlier case law, prejudicial dilution, failure to provide necessary information and an unjustified dividend freeze combined with increased remuneration for the majority shareholder-directors may, depending on the circumstances and their cumulative effect, satisfy that test. None is an automatic ground for exit. An equitable increase in the transfer price is available only on request and does not automatically amount to an award of full compensation. It must be plausible that the relevant conduct reduced the value of the shares and that this reduction should not fairly fall entirely on the departing shareholder. The purpose is to achieve a reasonable transfer price.

Litigation can also create room for agreement. In 2025, the combined handling of inquiry and expulsion requests led parties to agree on a departure, withdraw those requests and jointly ask the Enterprise Chamber to determine the transfer price, with the assistance of an independent valuation expert. Where parties agree on a transfer against simultaneous payment of a price still to be determined, and agree to submit price determination to the Enterprise Chamber, that route is available. If they disagree on instructions concerning the valuation method, valuation date or other valuation circumstances, the Enterprise Chamber resolves those matters on an equitable basis.

6. Burning your fingers *(je vingers branden)*: Immediate governance intervention, forced share transfer and denunciation of mismanagement

Use of the Enterprise Chamber in international shareholder disputes is common. The Enterprise Chamber is particularly well suited to governance disputes. Its judges are highly experienced in corporate practice and corporate law, as well as related areas of law. The company's interests are leading for inquiry proceedings before the Enterprise Chamber, whereas the procedural interests of the parties are paramount in other proceedings. Inquiry proceedings (enquêteprocedure) may serve several purposes: investigating the company's policy and affairs, establishing responsibility for possible mismanagement

and, importantly in practice, restoring workable governance and corporate relations through immediate measures. Once achieved, an investigation into mismanagement may no longer be required. The Enterprise Chamber has a very wide range of immediate measures. The Enterprise Chamber can intervene extensively, quickly, practically and effectively.

Shareholders of a BV or NV with an issued capital of up to € 22.5 million need at least one-tenth of the capital, or shares with a nominal value of € 225,000, to request an inquiry. For larger companies the threshold is one-hundredth of the capital (Article 2:346 DCC). For companies whose shares or depositary receipts are admitted to trading on a regulated market or MTF, the threshold is one-hundredth of the capital or a market value of € 20 million, regardless of the size of the issued capital. In each case the articles may set a lower threshold. One consideration, perhaps, is that the proceedings may also work against you: if you are insufficiently prepared, you may burn your fingers.

Although the Enterprise Chamber cannot, in inquiry proceedings, directly oblige a shareholder to transfer his or her shares to another party, it can do exactly that under the statutory dispute resolution scheme discussed above. The Enterprise Chamber can also be quite creative in this respect within inquiry proceedings. The immediate provisions granted by the court may ultimately result in the definitive transfer of shares. For example, an independent director may be appointed with the authority to commence a bidding process or a forced demerger. Alternatively, emergency financing can result in a significant dilution of a shareholder, even in spite of contractual anti-dilution clauses. The legislator in fact expected that inquiry requests driven by deadlocks, about a quarter of all inquiry requests, would shift to the new dispute resolution scheme, because that scheme allows the court to order the transfer of shares. Where only a definitive separation is needed, the dispute resolution scheme is now usually the more natural route. Where both an investigation and a separation are needed, combining the two is possible. Ask yourself, though, whether achieving one goal makes the other redundant.

7. Patience is a beautiful thing *(geduld is een schone zaak)*: commercial (national and international) disputes and compensation claims

The ordinary court is ideally suited to more commercial disputes, investment disputes or post-takeover disputes. Damages are typically claimed in the ordinary court. Since

2025, however, damages claims that are connected to an expulsion or exit request can also be brought before the Enterprise Chamber, as discussed above. The court can also be used to seize assets such as shares, bank accounts or evidence. Swift action is possible via summary proceedings. A judgment can generally be obtained in a matter of weeks, depending on the true urgency of the matter, and can be far-reaching: we have seen some examples of orders to enforce contractual offering obligations in summary proceedings. Statutory expulsion and exit, however, now belong exclusively to the Enterprise Chamber (or arbitration). Where cases are not suitable for summary proceedings, for example where a declaratory judgment is sought, ordinary proceedings will have to be commenced. Ordinary proceedings can take years, especially when followed by appeal and cassation. Those willing to commence litigation - in cases not suitable for summary proceedings - may need to be in it for the long haul.
If an international dispute is involved and all parties prefer to litigate in English, the Netherlands Commercial Court (NCC) can also be chosen. The NCC also aims for faster handling of business disputes. An advantage is that at the NCC, the parties can also make procedural arrangements, there are clear English procedural rules and there is somewhat closer alignment with international practices. However, all parties must agree to accept the NCC as the forum of choice. Note that the NCC cannot be designated for the statutory dispute resolution scheme, because no state court other than the Enterprise Chamber can hear those cases.

8. Not all that glitters is gold *(het is niet alles goud wat er blinkt)*: Confidentiality and full cost recovery (arbitration)

International investors often opt for arbitration. Sometimes more out of habit than as a deliberate choice for a specific company. A major advantage of arbitration, if successful, is that a full costs award can be made, depending on the applicable rules and the tribunal's decision, which is not the case in corporate law court proceedings. Another advantage is that the appointed arbitrators are often experts in the relevant field of law. For investors, another significant advantage is that arbitration proceedings are generally confidential. That confidentiality is, however, relative because the names and the dispute may yet come to light if a party tries to annul the arbitral award in court. Although the grounds for this are limited, the case law is public.

A further disadvantage is that arbitration has its limitations. Annulment of corporate resolutions remains outside the reach

of arbitration. Following the Supreme Court's Groenselect judgment, the nullification of a resolution is not at the free disposal of the parties and requires the intervention of the state courts, given its *erga omnes* effect (Articles 2:15 and 2:16 DCC and Article 1020(3) DCCP). Several authors argue for a change of course, but for now an arbitral tribunal can at most address the consequences of a resolution, for instance by ordering a party to act or abstain, or by awarding damages.

An arbitration clause also does not prevent proceedings before the Enterprise Chamber, which has exclusive jurisdiction for certain corporate matters. It is now settled case law that the Enterprise Chamber assumes jurisdiction in inquiry proceedings even where the shareholders and the company have agreed to arbitration, although that line is criticised in the literature. For the statutory dispute resolution scheme, the articles or an agreement can provide for arbitration (Article 2:337(2) DCC), but the clause must say so explicitly.

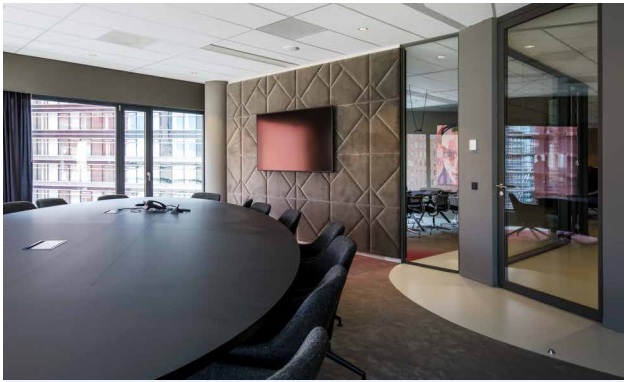
In CO2 Textile/Dyecoo (Amsterdam District Court, under the former regime), a choice of NAI arbitration for disputes 'relating to' the shareholders' agreement did not deprive the state court of jurisdiction over an exit claim, because the NAI had not been expressly designated for the specific disputes. The same reasoning is applied under the new regime. It is advisable to state in your agreement that connected claims fall within the arbitration clause. Think carefully, too, about whether you really want to give up the speed, specialist expertise and one-stop shop of the Enterprise Chamber. Also, the degree of professionalism and the costs at the various arbitration institutes may vary. An unthinking choice for arbitration may prove unsuitable.

If you do choose arbitration, then the Netherlands Arbitration Institute (NAI) may well be a good choice. The NAI is professional, has a relatively extensive list of experienced arbitrators and is significantly less expensive than, for example, ICC arbitration, and is therefore a relatively safe choice in almost all cases. It also allows for expedited summary proceedings. A sufficiently detailed arbitration clause is essential to avoid unnecessary costs and uncertainty about jurisdiction.

9. The end of the song *(het eind van het liedje)*: conclusion

If a dispute arises or threatens to arise within the context of a Dutch legal entity, the shareholder is not left empty-handed. The shareholder has numerous instruments at his or her

disposal, both judicial and extrajudicial. With the new statutory dispute resolution scheme, which designates one specialist court as a single-instance forum for expulsion, exit, connected claims and inquiry, that toolbox has become considerably sharper. It cuts both ways, so you should know where you stand before the other side does. However experienced the shareholder may be, dealing with a dispute in the most efficient and effective manner requires specialist and local knowledge. We are happy to share that knowledge with you. With a Dutch idiom or two, if desired.



Should you have any questions on corporate litigation, the role, position or information rights of the shareholders' meeting and the individual shareholder in the Netherlands, please feel free to contact:

Marjon Lok (lok@dvdw.nl)

Or visit our website for more information about the Corporate Litigation & Dispute Resolution team at DVDW.

Buyer beware: differences between Dutch, British and US mergers & acquisitions

Luitzen van der Sluis & Bas Augustijn

Introduction

As the focus of international investments has slowly shifted towards sustainable development through synergy (of acquired assets) and continued involvement of the investor, extensive M&A contracting has become even more crucial (and prevalent). As a result, international investors now more than ever have to deal with differences between jurisdictions during the process of closing their deals.

The Netherlands has long been a fan favourite of American and British investors (with the US bringing in the big bucks, as the country with the largest yearly monetary involvement in the Netherlands[1]). Therefore, differences between the laws of the Netherlands, England, and the US (mostly Delaware) are highly relevant to large numbers of investors seeking to acquire companies and assets in the Netherlands. This article sets out some of the differences between these jurisdictions that are especially relevant during M&A transactions. The article guides the prospective foreign investor through the usual deal timeline, and touches on all the differences that

[1] *https://longreads.cbs.nl/nederland-handelsland-2021/buitenlandse-investeringen-en-multinationals/*

might be considered of consequence. The article is not in any way intended as an extensive list of cautionary tips, but the lawyers at DVDW are always willing to help foreign-based companies with their questions relating to Dutch M&A practices.

The pre-contract phase

Precontractual liability

Most western jurisdictions, if not all, allow an enormous amount of freedom when it comes to negotiations and contracting. It is the widely held belief in most western countries, that each individual is entitled to as much freedom as possible, in so far as that freedom does not diminish the freedom of others. This means that, if the parties so decide, they may stipulate highly unconventional provisions within a contract, which each party may then enforce. A general principle relating to this “freedom to negotiate/contract” is that parties are also free to break off the negotiations and say “no”. However, in some jurisdictions parties might face consequences if they choose to do so.



Luitzen van der Sluis

UK/US doctrine

In the United Kingdom, under English (common) law, there is no general doctrine of good faith.[2] Therefore, logically, parties are under no obligation during their negotiations to act in good faith.

There are certain exceptions to this principle (such as if a good-faith clause is expressly imposed by the wording of the contract), but such exceptions generally only come into play if and when the parties have actually entered into an agreement. During the negotiations, either party is (at least usually) free to pull the plug without any liability towards the other party.

In the US, the position on good faith depends on the applicable state law; there is no single nationwide doctrine of precontractual liability. In Delaware, a binding preliminary agreement may require parties to negotiate outstanding terms in good faith within an agreed framework, even without requiring them to conclude the transaction.

Certain decisions of US courts illustrate that breach of such an obligation can give rise to damages, potentially even if the transaction is not concluded. This should not be confused with a general duty to negotiate every proposed transaction in good faith.

Dutch doctrine

Dutch law recognises potential liability arising from broken-off negotiations. However, Dutch case law has developed in such a way that liability of either of the parties (and in particular the exiting party) has become more and more difficult to prove.

Precontractual liability, that is to say the precontractual doctrine, was first introduced in the Netherlands in 1957 *(Baris/ Riezenkamp)*, in a court case between a seller and buyer of machinery designed to create motor vehicle parts. It was concluded that the precontractual phase should be conducted with due observance of standards of reasonableness and fairness (see section 4.). In this case, the judge ruled that (in accordance with those standards) the plaintiff and the defendant should have considered each other's interests (and specifically their business interests) during the negotiations. This represented the first instance of a court finding so, and it became the basis for subsequent case law.

[2] See: A. Calvert, J. Bond, M. Houlihan, "Good Faith in English Contract Law", Bracewell LLP Update.

In 1982 the courts ruled on a new case *(Plas/Valburg)*, which revolved around a contract for a swimming pool project granted by the former municipality of Valburg. In this case, the court ruled that the precontractual phase should be subdivided into three separate phases, with the first phase being the start of the negotiations (when the parties have the greatest freedom) and the final phase being the phase when the parties may rightfully assume that an agreement will be reached (based on mutual trust), in which phase liability becomes more likely. The court ruled that both parties need to be under the assumption that a deal will actually be reached before they become liable towards each other if the negotiations are broken off.

In 1987 the court abandoned *Plas/Valburg* in a new case between two parties negotiating a joint venture *(VSH/Shell)*. The court ruled that, to prove liability, it was enough for one party to be under the justified impression that an agreement would be formed. This principle of a "justified assumption of reaching an agreement" *(gerechtvaardigd totstandkomings-vertrouwen)* meant that parties need to be more careful towards the end of the negotiating process (emphasizing the conditional nature of their talks), in case they might be held accountable for the other party's loss or damage.

In later case law, the courts refined its stance on what constitutes a justified assumption of reaching an agreement, and the possibility to bring claims under precontractual liability became more and more limited. For example, it must be possible to subjectively and objectively determine such an assumption *(Vogelaar/Skil)*. Eventually, the measure under which liability can be proven was defined as follows *(CBB/JPO):*

As a benchmark for assessing the obligation to pay compensation in the event of broken-off negotiations, each of the negotiating parties – whose conduct must be determined in part by the other's justified interests – is free to break off the negotiations, unless this would be unacceptable on the basis of the other party's justified confidence that an agreement will be concluded or in connection with the other circumstances of the case.

Such a judgement would then need to be taken using a *"strict and restrained standard"*.

This means that, under Dutch law (in accordance with the development of precedent under Dutch case law), it has become exceedingly difficult to claim damages as a result of broken-off negotiations. However, liability remains possible, and the applicable Dutch standard should be assessed separately from the position under English law or the law of an individual US state. Caution is advised, especially in the later stages of negotiations, or when drafting the letter of intent, non-binding offer or other documents in the pre-contractual phase.

The choice of pricing mechanism

Prevalence of the completion account payment mechanism in the US

Once the parties enter into full-fledged negotiations for their M&A deal, they will have to decide what pricing mechanism they wish to use under the contract (meaning that they need to decide how they want to establish the price of the assets/company) in order to effectuate the deal. The most common types of pricing mechanisms are the "Locked Box" (where the company is bought as it was at a specific moment in time, with limited items being considered "leakage", which may then affect the purchase price) and "Completion Accounts" (where the final purchase price is adjusted by reference to the target's financial position at closing, typically its cash, debt and working capital, using agreed definitions and accounting policies).

Completion Accounts Mechanisms ("**CAM**") remain familiar in US domestic transactions, whereas Locked Box Mechanisms ("**LBM**") are well established in UK and European practice. This is a difference in market practice rather than a consequence of the common-law or civil-law systems themselves. Relevant considerations include:

I. US domestic M&A practice has traditionally favoured completion accounts, potentially as a result of the desire to limit exposure in volatile and demanding markets. Market familiarity and established transaction processes can influence the choice, although LBM is also available to US investors and should be assessed on its merits.

II. The common-law system in the US means that any form of contracting that is not used as often as other methods is riskier. As precedent (through case law) has had less time and fewer cases to develop, the risks related to the use of the LBM are less clearly defined. The risk described above (i.e. of litigation) can, of course, be greatly diminished by including a clause in the sale and purchase agreement (the

"SPA") that provides for mediation or dispute resolution (or otherwise), although it should be noted that the LBM generally does lower the likelihood of disputes arising from purchase price determination (which in turn lowers the odds of litigation);

III. Another reason why the LBM is less prevalent in America is the increase in the proportion of carve-out deals (i.e. deals where part of the company is not acquired). The LBM is less compatible with these types of deals: it complicates the process of determining leakage (money that should have stayed in the company), as the company might share its current accounts and other accounts with a part of the business that is not being sold, and so the company might be able to deplete its funds (or working capital) using those parts of the company (therefore making it more complicated to establish the leakage items).

In the Netherlands, the LBM is far more common than in the US, and many sellers ask for this mechanism to be used.

Advantages of the LBM

The main reason for sellers to ask for the LBM to be used is that the LBM provides greater price certainty. The price is fixed by reference to the locked box accounts, without a conventional completion-accounts true-up. The SPA must nevertheless address prohibited and permitted leakage and any separately agreed payment components; leakage protection is not limited to amounts received personally by the seller. As the price is pretty much set, the odds of disputes arising in connection with the purchase price are slimmer, meaning that the seller does not have to deal with (or at least prepare for) much litigation.

As no post-account amendment to the purchase price takes place, the LBM produces far less complicated SPAs. The mechanism itself is far less complicated (leakage items are much easier to establish than completion accounts). The LBM therefore allows for more cost-effective negotiations (about a less complicated agreement). It also often saves time after signing, compared with the time that is usually required to establish the closing accounts if the CAM is used.

Disadvantages of the LBM

A fairly substantial disadvantage of the LBM is that buyers will need to deal with a degree of uncertainty when opting for the LBM. The LBM creates uncertainty about the period between the "Locked Box Date" (the reference point for the sale) and the closing date. If the operations yield a profit during this period,

this works to the buyer's advantage. However, if the operations produce a loss, it is a disadvantage. The transaction process in and of itself can sometimes put pressure on operating profitability, especially in smaller transactions. Sometimes sellers will also request interest compensation, if they foresee a profit.

Letters of intent

Once the parties have agreed on a pricing mechanism and a base purchase price, the parties will often want to sign a letter of intent (also called "heads of terms" or "memorandum of understanding") or non-binding offer, in token of being formally committed to actually reaching an agreement, and because parties sometimes believe that signing a letter of intent makes an exiting party liable for loss or damage (or because they believe that the terms are binding).

A letter of intent may be non-binding, partially binding or binding, depending on its wording and the applicable law. It should expressly identify which provisions are intended to bind the parties, such as confidentiality and exclusivity, and whether the proposed transaction remains subject to a definitive agreement.



Bas Augustijn

Under English law, merely including an obligation to negotiate in good faith does not ensure that it is enforceable. Its contractual context and sufficiently certain content matter; a bare agreement to negotiate should not be treated as equivalent to a binding exclusivity undertaking.

Caution is required when drafting the letter of intent (especially for foreign investors): generally, Dutch letters of intent contain conditionality clauses (stating that the agreement is contingent on, for example, the due diligence investigation or satisfactory negotiations). Those clauses are included in the letter of intent to ensure that there is still room for negotiation, and that the parties signing the letter of intent are not liable (or at least not immediately) if they exit while the negotiations are ongoing (as the clauses create a viable defence for the leaving party if litigation ensues).

The parties should assess Dutch and EU merger-control requirements early in the transaction process and reflect applicable notification and suspension requirements in the timetable. Dutch concentrations meeting the applicable thresholds are subject to mandatory notification. UK merger notification remains voluntary, although authorities may investigate transactions on their own initiative. Separate investment-screening regimes must also be considered. The consequences of non-compliance depend on the particular regime and do not always automatically invalidate every transaction.

Contractual terms

The parties' intentions in the construal of contracts

Once the parties have survived the pre-contract phase, have drawn up (and signed) a letter of intent and made it past whatever anti-trust filings were required, the parties will usually start to negotiate the contractual terms of the SPA and initiate due diligence proceedings.

In Dutch contracts, the preamble (that is to say the recitals or "whereas clause") is more important than it is in the UK, and potentially more important than in the US (or at least certain states). This has to do with how Dutch contracts are construed in the event of a dispute. Under English law, contractual interpretation is objective and considers the wording, the contract as a whole and the relevant background reasonably available to the parties. The parties' undisclosed subjective intentions are not the test. The position under US law depends on the applicable state law.

In the Netherlands, the courts (and the law) have a much broader interpretation of contracts, in which not only the literal text (word for word) is important but also the meaning that the parties have given to the contract. This concept is known as the Haviltex principle. Even if a particular statement is not explicitly included in the contract, if a court considers that an obligation falls within the reasonable interpretation (or scope) of the contract (taking into account what the parties expected of each other), then that obligation might nevertheless exist (that is to say a court could enforce the term).

It is precisely this principle governing how contracts are construed that makes the preamble more important in the Netherlands. The recitals describe the parties' intentions, and those intentions in turn colour the rest of the agreement. It is therefore also advisable to draft the contract in such a way that, when it comes to provisions that could be interpreted in multiple different ways, those provisions are carefully constructed to include wording that sets out the parties' intentions.

Warranties and representations

Most SPAs (whether drafted using the CAM or the LBM) contain warranties and representations by the sellers, which might give the buyer the right to claim compensation for loss or damage if those warranties later prove to be untrue. In the US and the Netherlands, these statements are generally referred to as "representations and warranties", whereas lawyers and dealmakers in the UK will often resist referring to them as such (since defining them as such will potentially widen the scope of legal recourse available to the buyer against the seller beyond the contractual recourse that the buyer already has). As explained above, the literal wording of the contract (and contractual recourse) is paramount in the UK, where representations and warranties are extensive and detailed. The use of Dutch law is not a reason to draft warranties less precisely: their scope, disclosure qualifications, knowledge qualifiers and remedies should be expressly addressed. However, Dutch law does provide for remedies and recourse even if a warranty is vague or not present, as the courts may argue that a warranty is implied as a result of the "reasonableness and fairness" governing Dutch contractual relations.

Reasonableness and fairness

Involvement of employees

The Netherlands (as many European countries) has long attached great importance to protecting the employee. As such, for example (and in certain cases), before a

company enters into an M&A agreement it must first consult its employees (that is to say, an employee representation committee or works council). These committees/councils have mandatory rights of information and consultation. Therefore, employee engagement should be factored into any M&A process in the Netherlands. Furthermore, strict employment regulation protections are in place (within the entire EU) that may complicate the purchase, especially as employees of the target company will automatically transfer to the buyer (which is not always the case in the US).

Reasonableness and fairness

The protections under Dutch law, for smaller contracting parties in particular (such as consumers), extend further than merely considering the parties' intentions when interpreting a contract (and its implications). The interpretation of a provision, its enforceability in a particular case and its validity are distinct questions; they should not be reduced to a general assertion that an "unreasonable and unfair" provision is null and void. This has an enormous impact on the freedom of contract described in the first section of this article, and there is not always any possibility for contractually circumventing this principle (i.e. the parties may not explicitly stipulate that they will not or cannot argue the unreasonableness of provisions in legal proceedings).

This general principle (which is widely accepted and applied in the Netherlands) limits the contracting powers of some (often large) parties. What foreign investors often find frustrating about this principle is that it makes contracting a risky business that carries numerous unknowns (although any agreement comes with its own risks, even under the UK's system, where all the obligations must be specified expressly in the wording). Litigation becomes less straightforward, as do negotiations. However, the principle in fact often simplifies the negotiating process, because the parties are assured that, even if the contract does not contain every single term necessary to cement their positions, they will still have some degree of protection under Dutch law. As the discussion of the precontractual phase illustrates, reasonableness and fairness should be considered throughout the transaction process, not only in disputes about contractual wording after closing.

Protection against claims through disclosed information

Once a deal is finalised, it is possible that disputes will ensue. Such disputes are often related to the representations and warranties given by the seller (or sellers). US and European

(and by extension Dutch) parties to transactions are moving closer to each other in terms of their views on the influence of due diligence and disclosed information on transactions. In the Netherlands, it is common practice to include all the information that is disclosed during due diligence under the heading “disclosed information”. The SPA should specify which disclosed information qualifies which warranties, the required standard of disclosure, and whether actual or constructive buyer knowledge restricts a claim. Disclosure should not be described as automatically excluding every claim.

Unlike Dutch parties, US parties are familiar with a practice in which it is often still possible to bring claims based on information that was already known to buyers. To this end, “pro-sandbagging” clauses are included in sale and purchase agreements. These clauses have the effect that buyers can be indemnified for a breach of the agreement, even if they were already aware of the breach in question before closing. The position depends on the applicable state law and the wording of the SPA.

These clauses are rarely encountered in the Netherlands. Where they do occur, they mainly relate to fundamental warranties. If the buyer detects a breach (or a potential breach) before closing, this is usually also dealt with before closing. This can be given shape by including an indemnity or by incorporating the financial risk into the purchase price. Pro-sandbagging clauses will therefore be difficult to negotiate when dealing with a Dutch party.

Instead, Dutch M&A contracts usually contain clauses that explicitly rule out pro-sandbagging. Rather than assuming that a pro-sandbagging provision is invalid, the parties should expressly address the effect of buyer knowledge, disclosure and any specific indemnities in the SPA.

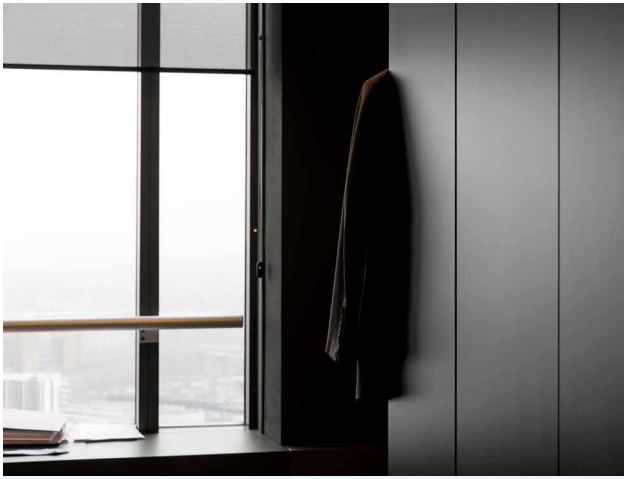
It has become increasingly important to specify the extent of protections under the warranties. Phrases such as “to the seller’s best knowledge” or “other than has been fairly disclosed” are becoming more and more commonplace.

Summary

Dutch M&A practices differ from those in the US and the UK. To comment on each aspect and difference in every step of the process would take a lifetime to write down, and would take the reader weeks to read, if not years.

Therefore, this article contains a number of relevant examples

that highlight the issues that might come up during the M&A process in the Netherlands. We take this opportunity to note that the lawyers at DVDW are experts who can guide any party through the complexities of a Dutch M&A deal, and can assist foreign investors who wish to learn more about (and benefit from) the differences between the relevant laws in the Netherlands and other jurisdictions. Caution is advised for any investor wishing to enter the Dutch market by means of M&A, but we possess the expertise to help you benefit from the differences. This article is then more than a cautionary tale alone: it also points out many opportunities.



If you have any questions about this topic, please contact:

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You can also visit our website to find out more about the Mergers & Acquisitions team at DVDW.

Loan and security documentation in the Netherlands

Eveline Kruisifikx & Pascal den Drijver

Dutch law does not impose specific requirements on loan documentation. It is important, however, to clearly set out the agreements in the contract, in order to avoid or limit any subsequent discussions. This also applies to the arrangements with regard to security, as lending money often goes hand in hand with negotiating collateral. Below is a brief overview of the different – and most commonly used – forms of security available in the Netherlands.

Collateral

Depending on the type of asset, the lender may demand mortgage rights *(hypotheekrechten)* and/or rights of pledge *(pandrechten)* over the borrower's assets. The creation of these security rights is subject to specific requirements:

- **Immovable property and registered ships and aircraft**
  A right of mortgage over land, buildings, registered ships and registered aircraft is created by a deed executed before a civil law notary, followed by registration in the public register of the Netherlands land registry. It is not possible to create a right of mortgage over future assets (i.e. assets that are not yet owned by the mortgager).

- **Movable property**
  Security over moveable assets, such as inventory and stock, is generally created as a non-possessory right of pledge (bezitloos pandrecht), whereby the pledgor remains entitled to use, consume and sell the goods in the ordinary course of business and – if future movable assets are included in the deed of pledge – a new right of pledge is created on each new good acquired by the pledgor. A non-possessory right of pledge is vested either by way of a privately executed deed followed by registration with

the tax authorities in the Netherlands, or a deed executed before a civil law notary. Registration with the tax authorities is, in contrast to the registration with the land registry, non-public and for stamp purposes only. Alternatively, a possessory right of pledge (vuistpand) may be created, in which case the pledgee takes possession of the goods.

- **Receivables**
  A distinction can be made between a disclosed *(openbaar pandrecht)* and undisclosed right of pledge *(stil pandrecht)*. Whereas a disclosed right of pledge is created by way of a privately executed deed followed by a notice to the debtor of the pledged receivable, the undisclosed right of pledge is created either by way of a privately executed deed followed by registration with the tax authorities, or a notarial deed. It should be noted that undisclosed rights of pledge can only be created over future receivables that directly derive from a legal relationship existing at the time of the execution of the deed of pledge. Professional lenders therefore register frequently, and on the basis of the powers of attorney issued by their borrowers, supplemental pledge instruments in which both the receivables to be pledged and the pledgors are described in a general way.



A draft legislative proposal *(Voorontwerp Wet modernisering pandrecht en cessie)* seeks to simplify this framework by abolishing the requirement that future receivables can only be pledged if they derive directly from an existing legal relationship. This would allow undisclosed pledges to be created over all present and future receivables, regardless of whether the underlying legal relationship already exists at the time of the execution of the pledge, eliminating the need for the burdensome practice of periodic supplemental pledges. Following the public consultation that closed in February 2026, the proposal is pending further legislative action.

The Act abolishing restrictions on pledging receivables *(Wet opheffing verpandingsverboden)*, which entered into force on 1 July 2025, renders contractual prohibitions and restrictions on the assignment and pledging of business receivables void, subject to a limited number of statutory exceptions. The exceptions include receivables arising from payment or savings accounts, credit or loan agreements involving multiple lenders (such as syndicated loans or crowdlending), specified clearing arrangements and payments into designated tax and social security accounts. When drafting security documentation,



Pascal den Drijver

lenders should therefore be mindful that contractual anti-pledge clauses are no longer effective for most business receivables, but may still be valid and relevant where a receivable falls within one of the statutory exceptions.

Pursuant to the General Banking Conditions (which are applied by all banks in the Netherlands), a right of pledge (first rank) will rest on (the credit balance in) a bank account with a Dutch bank, in favour of that bank. At the same time, Dutch banks are not keen on pledging (even with a lower rank) that balance to a third party. Many banks' general terms and conditions state that the balance in a bank account may not be pledged, except to that bank, with property law effect within the meaning of section 3:83(2) DCC and banks are usually hesitant to deviate from that. Receivables under payment or savings accounts are expressly excluded from the aforementioned statutory prohibition of contractual pledge restrictions.

- **Registered shares in a Dutch limited liability company**
  A right of pledge over registered shares (aandelen op naam) in a Dutch BV or NV includes dividend distributions and is created by the execution of a notarial deed. Usually, the company itself is also a party to that deed for the purpose of acknowledgement. It is common practice to agree that until an event of default occurs, the shareholder/pledgor remains entitled to dividend distributions and authorized to exercise the voting rights on the shares. It must be noted however that the company's articles of association may need to be amended (also by notarial deed) in advance if they prohibit or restrict pledging the company's shares.

- **Intellectual property rights**
  IP rights are pledged either by a privately executed deed followed by registration with the tax authorities, or a notarial deed. Although not required, it is highly recommended (i.e. in order to obtain third-party effect) to register a right of pledge with the offices (such as the Dutch Bureau for Industrial Property or the Benelux Trademark Register) in which that IP right is registered.

The pledgor's power of disposition ends upon its bankruptcy: no new rights of pledge can be created on assets acquired by the pledgor after the date of its bankruptcy.

Ranking

If an asset is pledged or mortgaged in favour of two or

more pledgees or mortgagees, the ranking of those rights is determined by the date and time of registration in the public land registry (mortgage) or by the date and time when the perfection formalities were fulfilled (pledge). It is possible for security holders with respect to the same asset (this applies to both mortgagees and pledgees) to change their respective rank.

Guarantees

Aside from the abovementioned rights of mortgage and pledge, a lender often requires a guarantee from the borrower's group companies and/or shareholders/directors. A guarantee is created by contract and there are no specific formalities.

Enforcement

If the borrower defaults in the performance of its secured payment obligations, the lender is entitled to sell the collateral and use the sale proceeds in satisfaction of those payment obligations. A court order is not required. Although in principle enforcement takes place by way of a public sale – and in case of a mortgage, before a civil law notary – a private sale is permitted (and often results in higher proceeds) with either the prior approval of the court (mortgage or pledge) or an agreement with the pledgor after the lender has become entitled to enforce its security (pledge). Appropriation of the collateral by the pledgee is not allowed. However, the pledgee may request the court to determine that the asset shall remain with the pledgee as purchaser for an amount to be determined by the court.

Although also pledged receivables can be sold by the pledgee, the pledgee usually enforces its rights by collecting those receivables. In case of an undisclosed right of pledge, the debtor of the pledged receivable should be notified first of the existence of that pledge before the pledgee may collect the receivable.

Enforcing a right of pledge over shares in a limited liability company is usually more complicated as i) shares are not well suited to be sold in a public sale, especially when not 100% of the shares are pledged; and ii) the statutory transfer restrictions *(blokkeringsregeling)*, if any, must be taken into account.

Bankruptcy, suspension of payments and Dutch Scheme ('WHOA')

Although mortgagees and pledgees remain entitled to enforce their rights when the debtor is declared bankrupt *(faillissement)* or when it is granted a suspension of payment

(surseance van betaling), the court may order (upon the request of the administrator) a so-called 'cooling-off period' of up to two months, which can be extended for additional period of up to two months. During such period a secured creditor is restricted from taking enforcement actions, unless it obtains judicial authorization to do so. A (general or partial) cooling-off period can also be issued by the court in a Dutch Scheme *(Wet Homologatie Onderhands Akkoord)*, if it is apparent that a) it is necessary for the debtor to continue its business during the preparation and negotiation of a scheme; and b) it is reasonable to assume that it serves the interests of the debtor's joint creditors and that the interests of third parties (such as security holders) will not be substantially prejudiced. However, the pledgee or mortgagee may request the court to authorize recovery of claims from the encumbered assets or to lift that cooling-off period by arguing that no grounds exist for imposing a cooling-off period or that a cooling-off period will materially harm its interests.

In conclusion

The above provides only a limited overview of the various Dutch security rights and the issues to be considered when enforcing those rights.



If you are planning to grant a loan to a Dutch party, if you already have collateral on Dutch assets and you wish to enforce it, or if you simply wish to receive more information on this subject, please contact:

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Or visit our website for more information about the Corporate Law team. We will be happy to assist.



Rien Visscher

The Reasonable Interpretation of Contracts under Dutch Law

Rien Visscher

Contract interpretation under Dutch law

When a contractual dispute arises, parties often start from the same assumption: the contract should mean what it says. That assumption is understandable. Commercial parties invest substantial time and resources in negotiating agreements because they seek certainty. Yet disputes about contract interpretation remain a recurring feature of commercial litigation.

For international businesses, Dutch contract law is sometimes perceived as less predictable than common law systems. Dutch courts do not confine themselves to the literal wording of an agreement but also consider the circumstances surrounding it. That observation is correct, but only up to a point. Dutch courts do not approach contracts as purely linguistic exercises, nor do they casually disregard carefully negotiated contractual language. Particularly in disputes between professional parties, the wording of an agreement often carries significant weight. The real question under Dutch law is therefore not whether text or context prevails, but how both interact.

The Haviltex doctrine

Any discussion of contract interpretation under Dutch law begins with one landmark decision: Haviltex. More than four decades later, the judgment remains the foundation of Dutch contract interpretation. The Dutch Supreme Court (Hoge Raad) recognised that contracts are concluded in a commercial and social reality and that their meaning cannot always be determined by examining the wording alone. According to the Supreme Court:

"The question of how the legal relationship between parties is regulated by a written contract, and whether that contract contains a gap which must be filled, cannot be answered solely on the basis of a purely linguistic interpretation of the

contract. The answer depends on the meaning which the parties could reasonably attribute to the relevant provisions in the circumstances of the case and on what they could reasonably expect from one another in that regard."

The significance of Haviltex is often misunderstood. The doctrine does not render contractual wording irrelevant, nor does it permit courts to rewrite agreements in pursuit of a more equitable outcome. Rather, courts must determine what the parties could reasonably have understood and expected when entering into the agreement. Relevant circumstances may include:

- the wording of the agreement;
- the commercial context in which it was concluded;
- negotiations preceding the contract;
- the nature and purpose of the transaction;
- the parties' expertise;
- the involvement of legal advisers;
- industry customs and practices; and
- the parties' conduct after the agreement was concluded.

The objective is not merely to establish what the words say, but what the parties reasonably meant and understood in the circumstances of the case.

Why contractual wording still matters

One of the misconceptions I encounter most frequently is that Dutch courts attach only limited importance to the wording of a contract. That is simply not how modern commercial litigation works. Judges read contracts carefully. In practice, disputes often arise precisely because parties attach great importance to particular wording once substantial commercial interests are at stake. Where sophisticated parties have negotiated extensively, received legal advice and entered into a professionally drafted agreement, courts are generally reluctant to ignore the language they deliberately chose. In such cases, the contractual text often becomes a powerful indication of the parties' intentions. This does not represent a departure from Haviltex. The same standard continues to apply. However, the circumstances of the case may justify attaching substantial weight to the wording of the agreement. Professional parties spend considerable time negotiating contractual provisions precisely because those provisions matter. For that reason, clear drafting remains one of the most effective risk management tools available to contracting parties.

Objective and subjective elements

From an international perspective, Dutch contract law is sometimes portrayed as highly subjective. In my view, that characterisation oversimplifies what Dutch courts actually do. The Haviltex doctrine does not focus on undisclosed intentions. A party cannot simply argue, after a dispute has arisen, that it secretly intended something different from what it communicated. Instead, the focus lies on what parties could reasonably derive from each other's statements, conduct and contractual arrangements. Dutch courts therefore examine both what the parties intended and what they were reasonably entitled to understand and expect. The inquiry is neither purely subjective nor purely objective, but contextual.

Contract interpretation, reasonableness and fairness

International businesses frequently associate Dutch contract law with the principle of reasonableness and fairness *(redelijkheid en billijkheid)*. While that principle occupies an important place in Dutch private law, it should not be confused with contract interpretation. Contract interpretation determines the content of the agreement. Once that content has been established, reasonableness and fairness may supplement the agreement or, in exceptional circumstances, prevent reliance on a contractual provision. Dutch courts exercise this corrective power with considerable restraint. The principle is not intended to rescue parties from unfavourable bargains or to redistribute contractual risks simply because the outcome proves disappointing.

Balancing legal certainty and commercial reality

Recent Supreme Court case law confirms that contract interpretation remains a holistic exercise in which all relevant circumstances may be considered. At the same time, the plausibility of the legal consequences resulting from a particular interpretation may also be relevant. In my view, one of the strengths of Dutch contract law is precisely that it attempts to balance two legitimate interests. Commercial parties require legal certainty, but contractual relationships do not operate in a vacuum. Agreements function within a commercial context that cannot always be ignored without producing artificial outcomes. The strength of Dutch contract law lies in its attempt to accommodate both considerations.

Practical implications for international businesses

For businesses negotiating agreements governed by Dutch law, a number of practical lessons emerge from both the case law and day-to-day litigation practice. First, drafting matters.

Clear and precise language remains the best way to increase predictability and reduce the risk of disputes. Second, the contractual text does not stand alone. Negotiations, correspondence and subsequent conduct may all become relevant if the meaning of the agreement is later disputed. Third, businesses should avoid two common misconceptions: that Dutch courts invariably prefer a literal interpretation, or that they readily disregard contractual wording in favour of fairness. Neither proposition accurately reflects modern Dutch law. Finally, the more sophisticated the parties and the more carefully negotiated the agreement, the more likely it is that significant weight will be attached to the contractual language itself.

Conclusion

Dutch contract law is sometimes portrayed as a choice between text and context. It is neither. Contractual wording matters, often enormously. Yet Dutch law does not stop at the text. Courts ultimately seek to determine what the parties were reasonably entitled to understand from the agreement and from each other's conduct in the circumstances of the case. That approach may occasionally provide less certainty than a strictly textual analysis. At the same time, it often produces outcomes that better reflect commercial reality and the legitimate expectations of the parties involved.

In my practice, disputes about contract interpretation almost never arise when a commercial relationship is functioning well. They arise when the relationship has deteriorated, substantial sums are at stake and parties start reading the same contractual provision in very different ways. At that point every word matters. Under Dutch law, however, the surrounding circumstances may matter as well. Understanding that interplay remains essential for anyone doing business in the Netherlands. For that reason, the best protection against future disputes is still the same today as it was forty years ago when Haviltex was decided: careful drafting, clear communication and consistency between what parties write and what they do.

For more information about Dutch contract law, (international) commercial agreements or commercial litigation in the Netherlands, including Dutch Supreme Court litigation, please contact:

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Tulips, bikes, and workers' rights: what you need to know about hiring in the Netherlands

Sanne Piekaar-Bouthoorn & Afra Dagistan

Considering hiring staff in the Netherlands? You are in good company. The Netherlands consistently ranks among Europe's most attractive destinations for international business, offering a stable legal system, a highly skilled and multilingual workforce, and an open, trade-oriented economy. Here is what every international employer should know before making that first hire in the Netherlands.

Fixed-term or indefinite? Choose wisely

Employers may hire staff on a fixed-term or an indefinite-term contract. Fixed-term contracts are straightforward: they expire automatically on the agreed end date, giving employers flexibility during periods of growth or project-based work.

There is, however, a statutory limit worth noting. Dutch law caps consecutive fixed-term contracts at three contracts within a 36-month period. If either of these limits is exceeded, the employment contract automatically converts into an indefinite-term contract. A break of more than six months between contracts is the only way to interrupt this so-called chain.

In other words, fixed-term contracts are a flexible and valuable tool for structuring a Dutch workforce, provided they are used with a clear understanding of the applicable limits.

Pay and benefits are more than just salary

Salary and benefits are another key consideration when hiring employees. Every employment contract must specify the gross salary and payment frequency. The salary must at least comply with the statutory minimum wage requirements in the Netherlands. Employees are also entitled to a statutory holiday allowance of at least 8% of their gross annual salary.



Sanne Piekaar-Bouthoorn

For employers entering the Dutch market, this is a standard element of remuneration practice that should be factored into employment costs from the outset.

Salary, of course, is not the only employment benefit to consider. Additional benefits may include a pension plan, travel reimbursements, bonus scheme, mobile phone, laptop, or company car. Such benefits are optional but common in the Netherlands and can help make your business an attractive place for talent to work. Whatever is agreed should be recorded in writing, as this provides clarity and reduces the risk of disputes.

The probationary period is a useful tool, if applied correctly

A probationary period can be a valuable way for both parties to assess the fit of the employment relationship. Importantly, the probationary period must be agreed in writing, with its maximum length depending on the type of contract. During this period, either party may end the relationship immediately, without notice or obligation to provide reasons. One firm rule applies throughout: the probationary period must be of equal length for both parties.



Afra Dagistan

Navigating the key entitlements to holidays and leave

Dutch law provides employees with a range of holiday and leave entitlements. Based on a 40-hour working week, employees are entitled to at least twenty paid holidays per year, and many employers offer more as part of a competitive benefits package. It is important to note that statutory holidays lapse on 1 July of the following year if not taken, while extra-statutory holidays remain available for up to five years.

Dutch law also provides for other forms of paid leave, including parental leave, emergency leave, and short-term care leave. These statutory entitlements should be referenced as a minimum standard in the employment contract and reflect the Netherlands' strong focus on work-life balance, an important aspect for international employers to consider when employing staff in the Netherlands.

Collective labour agreements are more relevant than you might expect

Another important feature of the Dutch employment landscape is the collective labour agreement. A cao ("collectieve arbeidsovereenkomst" or "collective labour agreement") sets minimum terms on wages, hours, and working conditions

within a given sector. Importantly, a cao may apply to an employer even if the employer has not signed one itself.

The Dutch Minister of Social Affairs and Employment can declare a sectoral cao generally binding, meaning it applies to every employer operating in that sector. Non-compliance can give rise to claims from employees, trade unions, or the labour inspectorate.

For businesses entering the Dutch market, it is important to establish at an early stage whether a cao applies. This provides clarity from the outset and helps prevent unexpected obligations later on.

Protecting business interests beyond employment with restrictive clauses

To protect business interests beyond the employment relationship, employers may include non-competition and non-solicitation clauses in the employment contract. These clauses must be agreed in writing. For indefinite-term contracts they are relatively straightforward to include, although courts may restrict or set them aside if they place an unreasonable burden on the employee.

For fixed-term contracts, stricter requirements apply. Each clause requires a specific, individually drafted, written justification explaining the substantial business interests that make the restriction necessary. It is important that this justification is carefully drafted, as courts retain the power to declare the clause void if the justification is insufficient.

Not all protective clauses are subject to those requirements. A confidentiality clause, for example, protects sensitive business information, survives the end of employment, and does not require separate justification in fixed-term contracts.

What employers need to know when an employee reports sick

This is an area where Dutch employment law is particularly distinctive, and where preparation pays off. Once an employee reports sick, the employer's obligations arise immediately and continue for a considerable period of time.

The employee must see the company doctor within the first six weeks of illness, as only the company doctor is authorised to determine whether an employee is unfit for work. Both employers and employees have active reintegration

obligations, including drawing up an action plan, monitoring progress, and exploring suitable alternative work.

Employee illness also results in financial obligations for the employer. The employer must continue paying at least 70% of the employee's salary for up to two years of illness. In practice, many cao's and individual employment contracts provide for continued payment of a higher percentage of the employee's salary, particularly during the first year.

Meeting these obligations diligently is essential: failure to do so can result in significant financial penalties, including an order to extend salary payments beyond the standard two-year period.

Dismissal? Choosing the right route

Dutch dismissal law operates as a closed system, meaning that the employer needs a valid and legally recognised ground for dismissal. Recognised grounds for dismissal include, amongst others, business-economic reasons, underperformance, and an irreparably disrupted employment relationship. Each ground must be supported by a well-documented file. In addition, employers generally cannot terminate an employment contract unilaterally. In most cases, prior permission from either the court or the UWV (the Dutch Employee Insurance Agency) is required.

Prior permission is not required in all circumstances. Exceptions include instant dismissal, expiry of a fixed-term contract, and termination during the probationary period. Parties may also agree to terminate the employment contract by mutual consent, without the need for prior approval from the court or the UWV.

Where termination is approved, the applicable notice period must be observed. The statutory notice period is one month for employees and between one and four months for employers, depending on the employee's length of service.

The transition payment is a cost to keep in mind

When the employer ends the employment relationship, the employee is generally entitled to a statutory transition payment ("transitievergoeding"). The calculation is straightforward: roughly one-third of a gross monthly salary per year of service, meaning three years of service equates to approximately one month's gross salary (including holiday allowance and variable remuneration).

There are limited exceptions to this entitlement. No payment is due where the employee is dismissed for serious culpable conduct or gross misconduct. In most other cases, however, the transition payment should be factored into the overall costs of terminating an employment relationship.

The employer's duty of care is an obligation not to overlook

Finally, Dutch law imposes a statutory duty of care on every employer, requiring employers to take all reasonable measures to ensure a safe working environment. This is a statutory obligation and cannot be excluded by contract. It is good practice to reference health and safety policies in the employment contract or in an employee handbook, reinforcing the Netherlands' strong standards of workplace protection. Those standards ultimately support a stable, motivated, and productive workforce.

Key takeaways

Dutch employment law is comprehensive and may initially appear complex to employers. Understanding its key principles can help employers navigate the framework and make informed decisions when building their workforce in the Netherlands. This is one of the many reasons the Netherlands remains an attractive location for international companies looking to establish or expand their presence in Europe. With the right preparation and guidance, hiring in the Netherlands is both manageable and rewarding.



Should you have any questions about Dutch employment law, feel free to contact:

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Director Liability in the Netherlands: More Familiar Than You May Think

And a few Dutch rules international directors should not overlook

Marlies Siegers

Foreign directors entering the Dutch market often ask how much personal risk actually comes with serving on the board of a Dutch company. If you are accustomed to doing business in the UK, Germany, France, Canada, Australia or the United States, many aspects of Dutch director liability law will feel familiar. The terminology and statutory provisions differ, of course, but the bottom line is very similar. That said, every jurisdiction has its quirks, and the Netherlands is no exception.

Director liability is rarely about the failure itself

Directors run a business and, with any luck, make it a great success. But, as in life, it is not always plain sailing. After all, if success were guaranteed, we would all be entrepreneurs. Directors are expected to make business decisions, and not all of those decisions will turn out well. A clever strategy is ultimately no more than a prediction of the future, perhaps well grounded, but still dependent on how clear the crystal ball is. What looks like a great opportunity can turn out to be a flop, an acquisition may be a bitter disappointment, financing may fall through or a major customer may collapse. These are all ordinary business risks, even if, in hindsight, the decisions behind them may well amount to an error of judgment or an outright mistake. Failure alone, however, is no basis for holding a director personally liable.

The US business judgment rule is perhaps the best-known example of judicial reluctance to second-guess informed business decisions made in good faith. German law has expressly codified a business judgment rule. Other jurisdictions, in turn, have different mechanisms to preserve legitimate managerial discretion.

That room for directors to exercise their own judgment exists



Marlies Siegers

under Dutch law as well. The Dutch Supreme Court has expressly recognised that directors should not be induced to let defensive considerations determine their actions to an undesirable extent. The Dutch legislature once put the same idea more appealingly: there must remain room for creativity, ingenuity and daring. That is why the threshold for director liability is high: it requires a serious degree of personal fault.

Dutch law thus reflects the same fundamental choice made in other jurisdictions: courts should distinguish between an unsuccessful business decision and conduct that no longer deserves the protection normally afforded to entrepreneurial decision-making.

Causes of action

Under Dutch law, director liability broadly rests on three grounds. They overlap to some extent, but are not inter-changeable. Nor is every ground available to every claimant.

Internal director liability

A director may face a claim from the company itself for improper performance of his or her duties (article 2:9 Dutch Civil Code (DCC)). After bankruptcy, the trustee can bring this claim too. This form of liability is generally referred to as internal director liability. The threshold is crossed only if the director has acted in a manner for which he or she can be seriously blamed. Whether that threshold is met depends on all the circumstances of the case, including the nature of the company's activities, the risks normally associated with them, the allocation of responsibilities within the board, the information available to the director at the time of the conduct complained of, and the insight and diligence that could reasonably be expected from a competent director.

Dutch law attaches particular significance to provisions in the articles of association that are intended to protect the company. The Dutch Supreme Court held that breach of such a provision is a weighty circumstance that, in principle, establishes director liability, although the director may rebut this by putting forward facts and circumstances showing that the breach does not amount to seriously blameworthy conduct.

Conflicts of interest deserve similar attention. Who participated in the decision? Was the conflict recognised? Dutch cases involving conflicts of interest and corporate opportunities illustrate how these issues can become part of a director liability claim.

External director liability

A director may also be sued personally by a third party, typically a creditor of the company. This is referred to as external director liability.

The starting point is that the company, not its director, is liable for the company's obligations. A director may nevertheless be personally liable where his or her own conduct towards the third party is sufficiently seriously blameworthy. This may be the case, for example, where a director causes the company to enter into an obligation while the director knew, or ought reasonably to have understood, that the company would be unable to perform the obligation and would offer no recourse for the resulting loss. The same applies where a director causes or permits the company not to perform an existing obligation, provided that, in the circumstances, the director's own conduct is sufficiently seriously blameworthy.

Liability in bankruptcy

The bankruptcy trustee may bring claims based on the internal or external director liability discussed above. But the trustee also has a specific claim that no one else can bring.

If the company is declared bankrupt, the trustee may seek to hold the management board of a Dutch NV or BV (public or private limited company) jointly and severally liable for the bankruptcy deficit if there has been manifestly improper management and that mismanagement was an important cause of the bankruptcy (articles 2:138 and 2:248 DCC). The Dutch Supreme Court has described manifestly improper management as conduct that no reasonable director would have engaged in under the same circumstances.

"That was the COO's responsibility"

Imagine a Dutch company with a three-person management board. There is a clear division of responsibilities. The CFO is responsible for finance. The COO runs operations, including the production sites. Another director has the commercial portfolio. Over several months, warning signs emerge at the company's main plant. Near-misses are reported. The Labour Inspectorate issues a formal warning. Key customers complain about quality problems. The COO remains optimistic and repeatedly assures the other directors that everything is under control. Eventually, the plant is shut down, fines are imposed and claims follow. Can the commercial director defend a subsequent liability claim by saying:

"I relied on the COO. Operations were not my responsibility"?



Possibly, but not easily. Dutch law allows the board to divide its duties. But it also starts from collective board responsibility: each director is responsible for the general conduct of the company's affairs. A division of duties cannot relieve a director of that responsibility. Each director remains responsible for how the board performs its duties and for the decisions it takes. Directors who are not in charge of day-to-day operations still take part in decisions about those operations and have to monitor their fellow directors.

That becomes particularly important in internal liability claims. If the company itself claims damages, a director escapes joint and several liability only if, also in view of the duties allocated to others, he or she cannot be seriously blamed and was not negligent in taking measures to avert the consequences. In bankruptcy, the director must prove that the manifestly improper management is not attributable to him or her, and that he or she was not negligent in taking measures to avert its consequences. In practice, the two routes tend to converge. In both cases, the relevant question may not be: "Whose responsibility was this?" but "What did you do when you realised, or should have realised, that something was going wrong?"

In a tort claim against a director personally, however, the focus is on the individual blame that can be attributed to that director: each director is assessed on his or her own conduct. The principle of collective responsibility still plays a part, because each director remains responsible for the general conduct of the company's affairs. That obligation rests on each director individually and is particularly relevant where a director can be blamed for failing to act.

Recent Dutch cases show, for example, that directors have been held personally liable for failing to intervene while another director withdrew funds from the company, failing to act on improper expense claims by a fellow board member, effectively giving up oversight and control of the company to a shareholder, or failing to act on improper conduct by another board member. So even directors who did not cause the problem can find themselves on the hook if they knew, or should have known, that something was wrong and failed to act.

Liability in company groups

Directors of a Dutch subsidiary have strict responsibilities in relation to the interests of the Dutch company they manage.
In a group, the practical governance of the business is often clear to everyone involved: approval from headquarters, reserved matters, reporting lines, policies, a shareholder agreement. That is not, however, the only framework that matters. Dutch law requires the directors of a Dutch subsidiary to exercise their own independent judgment. Regardless of whether the parent has a power under the articles of association to give instructions, the board of the subsidiary must assess those instructions against the interests of the Dutch company itself and may not follow them blindly. While the interest of a subsidiary is strongly shaped by the broader group context, it does not merge with it: a director who gives way to group pressure at the expense of the Dutch company's own interests, and in particular at the expense of its ability to meet its obligations, runs a serious risk of personal liability. Group approval and group interest are therefore relevant factors, but not a free pass.

When money becomes tight

Dutch law does not require directors to stop taking commercial risks the moment liquidity becomes tight. Nor is there a simple rule requiring a company in financial difficulty to treat all creditors equally. Paying one creditor while leaving another unpaid is not automatically unlawful. Businesses in difficulty still have to make choices and are allowed to do so. But the

reasons for those choices become increasingly important, particularly where payments are made to related parties or where the directors themselves have an interest in the payment to a particular creditor.

Unlike some other systems, Dutch law does not (yet) impose a duty to file for bankruptcy (that is going to change as a result of EU legislation). Nor does Dutch law have a separate 'wrongful trading' rule for continuing to trade once insolvency has become unavoidable. Continuing to trade can nevertheless give rise to liability under the general rules discussed in this contribution. The closer a company moves towards insolvency, the more weight is given to what the board knew when it made a particular decision, and what information was actually available at the time. Also relevant, for example, is whether there was a credible refinancing plan or a realistic prospect of improvement.

Financial distress therefore means, above all, that the factual basis for decisions, and the reasons behind them, matter more than ever. They may well determine whether the director personally runs the risk of ending up on the hook.

If the company goes bankrupt

The bankruptcy trustee can hold directors jointly and severally liable for the bankruptcy deficit (that is, the shortfall remaining after all assets have been liquidated). This claim succeeds if the management board has performed its duties in a manifestly improper manner and it is also plausible that this improper management was an important cause of the bankruptcy. The claim covers conduct during the three years preceding the bankruptcy. A discharge granted to the board before bankruptcy does not bar the trustee from bringing this claim.

Dutch law gives the trustee two important evidentiary advantages where the board has failed to comply with the statutory bookkeeping obligation or to publish annual accounts in time. If one of these failures can be established, it is conclusively presumed that the board has performed its duties improperly. That presumption cannot be rebutted. It also triggers a rebuttable presumption that the mismanagement was an important cause of the bankruptcy. If the trustee cannot rely on these presumptions, the trustee can still establish mismanagement on other grounds. All in all, the threshold for director liability remains a demanding one, even in bankruptcy.

You don't need the title of statutory director to be on the hook

Someone who has not formally been appointed as a statutory director of a Dutch company does not become one merely because his or her business card says "CEO" or "Managing Director". Formal appointment matters under Dutch corporate law. But the absence of a formal title does not necessarily eliminate liability risk.

Dutch law may treat a person who has effectively determined or co-determined the company's policy as if he or she were a director in the event of bankruptcy, which means that person can be held liable for the bankruptcy deficit as well.

The Dutch Supreme Court held that a person qualifies as a de facto policymaker if he or she has appropriated at least part of the board's management authority and actually determined policy in the manner of a director. What matters is the actual exercise of management authority beyond the powers conferred by law, the articles of association, corporate resolutions or contractual arrangements, including any power of attorney. Influence alone, even strong or decisive influence, is not enough.

The exercise of influence can be particularly relevant in an international group. There is nothing wrong with a parent company or shareholder having a strong view, but taking over the board's management role is where things enter the danger zone.

The natural persons behind the corporate veil

Dutch law contains a specific pass-through rule under which the liability of a corporate director also rests, jointly and severally, on each person who is its director at the time the liability arises (article 2:11 DCC). These are often referred to as indirect directors: the people behind the corporate veil. The indirect director may escape liability by showing that he or she cannot personally be seriously blamed.

The pass-through of liability can be interrupted by interposing a foreign entity. Dutch law determines whether the corporate director is liable. But the next step – from the foreign corporate director to its own directors – is governed by the law of the country in which the foreign entity is incorporated. The reach of Dutch law therefore stops at that point.

The best compliance tool costs almost nothing

Many years may pass between a board decision and the moment that decision is examined in litigation. By then, everybody knows how the story ended. With the benefit of hindsight, it is easy to say that a particular decision was reckless, even though it may well have made commercial sense at the time. The director then faces the difficult task of showing that it was a sound business decision when it was made.

You will rarely hear me, as a lawyer, say that the legal tests do not matter. But in practice, a director liability dispute often comes down to something rather mundane: the paper trail. The facts. Evidence that the decisions were sound, even if they did not work out as hoped. When a court, bankruptcy trustee or claimant examines a management decision, the questions tend to become very practical:

- What information was available?
- Which risks had been identified?
- Which questions were asked, and was additional information requested?
- Which alternatives were considered?
- Did you put your objections in writing?
- Were concerns raised by another director, the finance or legal department, or an external adviser?
- Was the necessary expertise available in-house and, if not, was outside advice obtained?
- Why did the board decide to take this particular course of action?
- And perhaps most importantly: can anybody still prove that?

A director who can reconstruct that process starts from a very different position from one whose defence essentially amounts to: *“I am sure we discussed it at the time.”*

The paper trail is therefore crucial. This requires more than minutes that merely record the resolution, but there is no need to document every step in detail as though litigation were already under way. Good minutes should answer the questions above and make it possible, years later, to understand the decision in the light of how things stood then. The board file should show, for example, why the acquisition price seemed justified or why the board expected the refinancing to come through. That gives the court more to work with than the outcome alone, and offers a safeguard against hindsight.

More familiar than different

Much of this will be familiar. A few Dutch points are worth keeping in mind:

- Dividing responsibilities within the board does not, by itself, protect a director from liability.
- Directors of a Dutch subsidiary must exercise their own judgment, even within a group.
- In bankruptcy, failing to keep proper books or to publish the annual accounts on time comes at a high price.
- Influence over a Dutch company can go too far, with a risk of personal liability for non-directors.

Directors are not expected to be perfect, and taking risks is part of the job. Just make sure that, five years later, somebody can still understand why the board thought it made sense back then.



Should you have questions about director liability in the Netherlands, Marlies Siegers will be glad to assist you.

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Please also visit our website for more information about the Corporate Dispute Resolution & Litigation team at DVDW.



Juliette van de Wiel

Insolvency in the Netherlands

Juliette van de Wiel & Ruben Berghuis

Current economic climate: a storm on the horizon for Dutch businesses?

For several years after the COVID-19 pandemic, a widely anticipated wave of Dutch insolvencies failed to materialise. Bankruptcy numbers rose from the record low of 2021 until 2024, but then eased: 3,226 businesses were declared bankrupt in 2025, compared with 3,782 in 2024. More recently, the trend has turned upwards again. In September 2026, 320 businesses were declared bankrupt, 16% more than a year earlier. This took the bankruptcy rate to its highest level since June 2025, although it remains well below the 2024 level. Relative to its size, the transport sector was the hardest hit.

The wider Dutch economy has proved resilient, but it is exposed to external shocks. The Netherlands Bureau for Economic Policy Analysis (CPB) projects GDP growth of 1.4%

in 2026 and 1.2% in 2027. It expects inflation of 3.3% and 2.7% respectively, driven largely by higher energy and fuel prices. It also expects the labour market to remain tight and negotiated wages to keep rising. The CPB names further rises in energy prices, new trade barriers and financial market turbulence as the main downside risks, against the backdrop of the war in the Middle East and US import tariffs. Internationally, the IMF projects global growth of 3.1% in 2026 and considers the risks to be skewed to the downside.

It remains uncertain whether these pressures will lead to a marked increase in Dutch insolvencies. Even so, higher costs, sustained wage growth and geopolitical uncertainty are good reasons for businesses with Dutch trading partners to know what to expect if a counterparty runs into financial difficulty. Below, we provide a brief overview of Dutch insolvency and restructuring proceedings and discuss the key questions that businesses with an insolvent Dutch debtor are likely to encounter.

Proceedings for insolvent legal entities

The Dutch Bankruptcy Act provides for three types of proceedings for businesses in financial distress: the court-approved private composition, suspension of payments and bankruptcy. For natural persons, there is also the debt restructuring scheme, which, after three years, provides a 'clean slate', or a discharge of all debts, if strict conditions are met.

In addition, Dutch company law provides legal entities with debts but without any assets the possibility to dissolve through so-called 'turbo liquidation'. Lastly, in the 2010s the practice of the 'pre-pack' was developed, in which the Dutch were one of the frontrunners. In a pre-pack, a going-concern sale of the company is prepared by the debtor under the supervision of the intended bankruptcy trustee in the weeks prior to the public bankruptcy proceedings. Following his formal appointment, the trustee can immediately conclude the prepared transaction. The aim is to achieve the best proceeds by avoiding a decrease in the value of the company simply because it is publicly known that the company is in bankruptcy proceedings. Dutch labour unions, however, see the pre-pack as a way to evade dismissal protection rules. Whereas, in bankruptcy, employees can be dismissed without cause, the possibility to dismiss employees outside bankruptcy is still fairly limited and expensive. Employees' rights and the pre-pack have therefore been a topic of heated discussion in the past years. This discussion raised uncertainty regarding the legal sustainability of the

pre-pack procedure and, consequently, the procedure has fallen into disuse in the Netherlands. Nevertheless, following developments in European legislation on the harmonisation of insolvency law, the pre-pack procedure is set to enjoy a revival in the upcoming years.

Dutch scheme of arrangements (WHOA)

The WHOA was added to the Dutch restructuring framework in 2021. 'WHOA' is the abbreviation of the act that introduced this procedure. It is a pre-insolvency procedure aimed at restructuring through a creditor composition, with features similar to the English 'scheme of arrangements'. Court involvement is in theory limited to approval of the composition. The procedure is widely viewed as a very welcome addition to the existing proceedings because of the many possibilities it offers. Most prominently, in case a qualified majority votes in favour of the offered composition, it enables the debtor to bind obstructing creditors to it. Throughout the procedure, the debtor remains in charge: it can choose to include all or only part of its creditors, including shareholders, secured and preferential creditors; it can request termination or adjustment of long-term contracts; and it can request a standstill period. Further details of the WHOA are discussed elsewhere in this magazine.

Suspension of payments

The suspension of payments procedure constitutes an immediate, temporary relief of payment obligations but is only binding for unsecured creditors. Secured creditors and creditors with preferential rights such as employees and the tax authorities must be paid in full, as well as all new obligations arising from the suspension date. The latter is one of the reasons that there are few suspension of payments proceedings. Another reason is that the route of suspension of payments is sometimes used by directors as an intermediate route to bankruptcy. The director does not need shareholders' approval to apply for suspension of payments, whereas such approval is required for a bankruptcy petition.

Only the debtor can apply for suspension of payments. The suspension is granted immediately on a provisional basis without a substantive assessment by the court. The court will appoint an administrator, whose cooperation is required for all legal acts the debtor wishes to undertake. Although the suspension of payments proceedings can be used to liquidate the company, it is generally aimed at continuation of the business through restructuring of the (unsecured) debts. The debtor can impose a composition upon all unsecured creditors if a simple majority of the creditors votes in favour and a

court rules that none of the statutory refusal grounds apply. The possibility to terminate or amend long-term contracts in a suspension of payments is, however, limited to lease agreements.

Bankruptcy

Out of all insolvency proceedings, bankruptcy is the most commonly used. Bankruptcy is aimed at liquidation of the assets by a trustee under the supervision of a supervisory judge. The bankruptcy constitutes a general attachment on all assets for the benefit of the bankruptee's joint creditors. Both the debtor and its creditors can apply for bankruptcy. As soon as the company has been declared bankrupt, the debtor loses the power to act on behalf of the company. This power is taken over by the court-appointed trustee, who will exercise it in the interests of the joint creditors. Within one or two days following his appointment, the trustee will generally dismiss all employees subject to a maximum notice period of six weeks. Wages are covered by the employee insurance agency. During this six-week period – and preferably sooner – the trustee will review the possibilities to sell the business *going concern*, as this usually generates higher proceeds than an execution sale of the individual assets. Proceeds are distributed amongst the joint creditors in accordance with their statutory ranks. Although liquidation of the company is the main goal of bankruptcy proceedings, a company can in theory restructure its debts through bankruptcy by offering a bankruptcy composition to its creditors. This possibility is rarely used.

Bankruptcy as an accepted means of debt collection

It may surprise foreign creditors how easy it is to apply for one's bankruptcy in the Netherlands. Bankruptcy proceedings will be opened if the creditor provides only summary evidence that he has a claim, that there is at least one other creditor and that at least one of the claims is currently due. Creditors often write to debt collection agencies and the Tax Authorities to ask whether they are willing to 'provide' the second claim. The procedure takes only two to three weeks. The debtor can appeal the bankruptcy order, but the bankruptcy has immediate effect nevertheless. This often has the effect that the bankruptcy becomes practically irreversible and makes it an effective means of pressure.

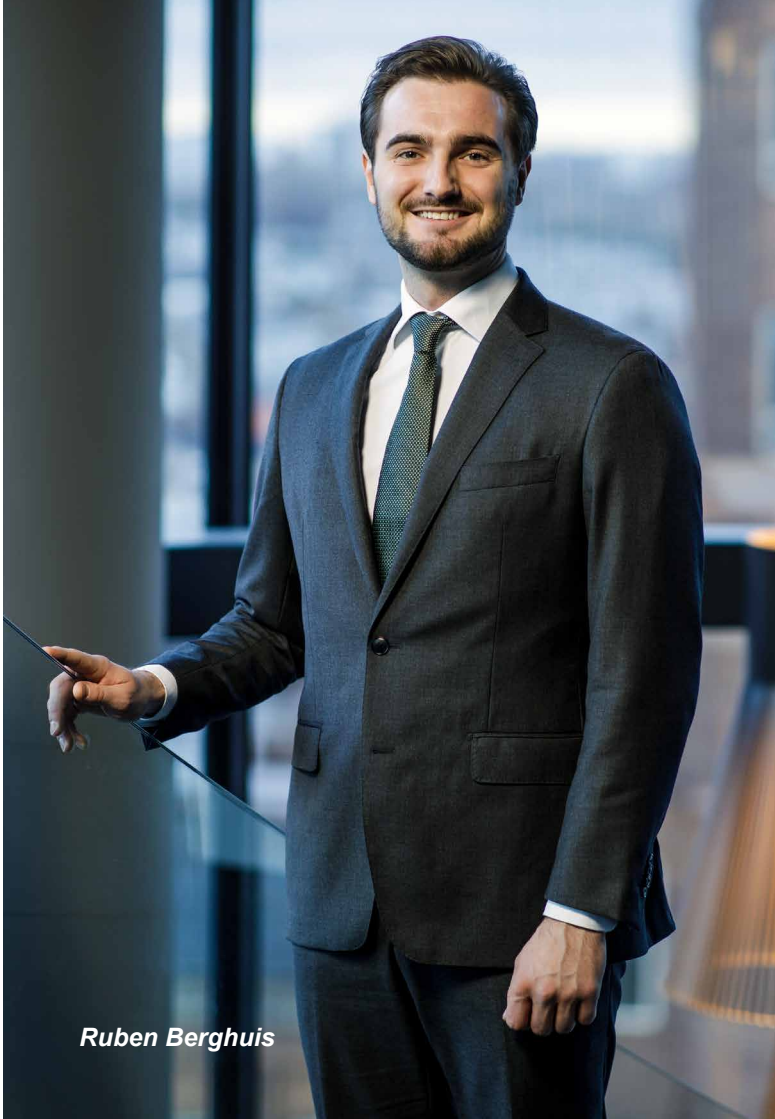
Petitioning for a debtor's bankruptcy is accepted as a means of debt collection. Particularly when the creditor's claim is not too complex, there is no need for the creditor to first try to collect the debt through summary proceedings. Creditors should be aware that any payments made to them under pressure of a

bankruptcy request can be claimed back by the bankruptcy trustee if bankruptcy nevertheless follows.

Recovery rate, duration and order of priority

Unfortunately, the recovery rate for trade creditors without securities or preferential rights is quite abysmal. In 75% of bankruptcies there are not even sufficient funds to pay estate creditors – to be paid before all other creditors – such as the trustee for his costs. The average recovery rate in bankruptcies is a mere 5%. Considering the average duration of a bankruptcy, creditors will have to await payment (if any) for one or sometimes several years. In terms of financial compensation, a bankruptcy is therefore very seldom in the interest of unsecured creditors.

The low recovery rate is at least partly the result of two developments. The number of claims that are accepted by the Supreme Court as estate claims has grown substantially over the past years. Examples of estate claims are the salary of the trustee and its financial advisers, costs of temporary continuation of the business, rental obligations for three months following the bankruptcy date and claims following environmental protection measures. Secondly, it has become more common for all of the company's assets to be pledged or



Ruben Berghuis

mortgaged to the financing bank. Creditors with security rights may execute their securities as if there were no bankruptcy. This regularly leaves little for the creditors with a statutory preference, such as the tax authorities, and even less for creditors who have no preferential rights – the majority.

Retention of title

A more effective means of recovery for suppliers of goods is a retention of title. Normally ownership will transfer upon delivery of the goods, regardless of whether the purchase price is paid. With a contractually agreed retention of title, however, the supplier retains ownership of its goods until full payment of the invoice. The bankruptcy trustee is obliged to respect a valid retention of title and must provide the supplier with the opportunity to recollect its products. This does not apply for the tax authorities. Under certain conditions, they have the authority to recover their claim towards the insolvent company by taking recourse on the supplier's goods that are located in the company's premises. This rather exceptional authority has been debated for many years, but so far no compromise has been reached. Suppliers should furthermore be aware of practical implications. For example, they can only recover their goods if they can point out (and prove) exactly which goods were delivered by them. This will probably not be a problem if it concerns a machine, but can be if the supplier is one of many who deliver a certain product to the company.

Director's liability and mandatory review into fraudulent acts

The general rule is that directors of a Dutch limited liability company are not liable for the debts of the company. The threshold for director's liability is high, in order to avoid defensive behaviour from directors. In addition to the grounds for director's liability based on general tort and company law, the bankruptcy trustee has two additional grounds on which he can invoke director's liability. He can hold all directors personally liable for the full bankruptcy deficit if they have manifestly mismanaged the company and this mismanagement is likely to be an important cause of the bankruptcy. Liability is assumed if the directors did not properly keep the records or did not file the annual report (in time). Additionally, the trustee can claim liability based on an act of tort towards the joint creditors. An individual creditor can still bring his own liability claim towards the director, but the court will first rule on the trustee's claim if the claims are pending simultaneously.

The trustee's statutory duties include a mandatory review into potential 'irregularities' and fraudulent acts in the period

preceding the bankruptcy. Should the trustee come across such prejudicial acts, he is expected to notify the criminal law authorities thereof. There is discussion as to whether it is fair and appropriate that the trustee's duty to serve this public interest is financed by the creditors (who get paid after the trustee) or by the trustee himself (in case there are insufficient estate funds).

Actio Pauliana

Creditors should also be aware of a bankruptcy trustee's power to nullify legal acts that were conducted prior to the bankruptcy. These are legal acts of which the creditor knew or should have known that they would be disadvantageous to the joint creditors. Such acts can be disadvantageous to the joint creditors for a number of reasons, but the most significant is the situation in which the act decreased the possibility of recovery on the estate – basically, a decrease in the value of total assets. One can think of the sale of goods at too much of a discount or at non-market conditions, or offsetting the purchase price against an already outstanding invoice. Typically it concerns legal acts that were conducted in the vicinity of insolvency. It is, however, not uncommon that acts conducted one year before the bankruptcy declaration are successfully nullified by the trustee. Because of the trustee's power to nullify legal acts, a creditor should have regard to the circumstances and conditions under which an agreement or transaction is concluded, particularly when the counterparty's financial difficulties are known.

Creditor's information and consultation rights

Bankruptcy proceedings in the Netherlands tend to last at least one year, on average. In more complex bankruptcies, it can take multiple years to liquidate the estate. During the course of bankruptcy proceedings, the trustee must file a public report regarding the progress of the proceedings and his management of the estate. The first report is filed after one month, and subsequent reports are filed every three months. These reports are accessible via the website of the Dutch judicial organisation. Towards individual creditors, the trustee is not required to inform them of the progress of the bankruptcy, nor is he required to consult them. In practice, the trustee will on occasion consult with (mainly larger) creditors regarding the progress of the bankruptcy or the initiation of certain actions, such as legal proceedings. Moreover, creditors can in theory request the appointment of a creditors committee, though this seldom happens. The committee has broader information rights than individual creditors and the trustee must consult the committee in specific situations. In addition to rights of

the creditors committee, non-estate creditors may request the supervisory judge to give instructions to the trustee, but this possibility is difficult to exercise, since the requirements are strict and it may not be used to enforce one's individual rights. Thus, the trustee can manage the estate at his discretion, without mandatory consultation of (individual) creditors.

Conclusion

The world economy has endured disruption over the past several years. Add current shocks and uncertainties to the equation, and it should not be surprising that businesses may face an increase in applications for insolvency and restructuring proceedings by their trade partners in the near future. In the Netherlands, a broad range of such proceedings exist. Bankruptcy is still the most common. It is intended to be creditor friendly, though in practice the recovery rate is low. In this light, a creditor should consider whether petitioning for a debtor's bankruptcy is the most effective means of recovery. Other means of recovery exist, yet these require more planning in advance. When it becomes apparent that a trade partner faces insolvency, a business is best advised to safeguard its own financial interests.



Should you have any questions about insolvency in the Netherlands, please feel free to contact:

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Gijs Wessels

The Dutch WHOA: the hottest restructuring tool in town?

Ruben Berghuis & Gijs Wessels

In 2021 the Dutch Scheme entered into force, as a new part of the Dutch Bankruptcy Act (DBA). It is referred to as 'WHOA', after its official name 'Wet homologatie onderhands akkoord'. The WHOA allows a debtor to reach a court-sanctioned plan with its creditors and shareholders aimed at either restructuring the undertaking or at a controlled wind-down, outside traditional formal insolvency proceedings. For international practitioners advising on cross-border restructurings, the WHOA has quickly become a reference point alongside the English Scheme of Arrangement and the US Chapter 11 procedure, from both of which it drew inspiration. This article sets out how the WHOA works, when it can be used, and what its cross-border implications are.

1. Background, objective and key features

1.1 Why the WHOA was needed

Before the WHOA, Dutch law offered no statutory mechanism for a binding creditor plan outside formal insolvency. A debtor in financial difficulty could only ask its creditors, informally, to agree to a deferral of payment or a partial debt write-off. Under general Dutch private law, creditors were in principle entitled to full payment of their claims, and could not be compelled to accept less unless an individual creditor's refusal amounted to an 'abuse of right' under article 3:13 of the Dutch Civil Code, a high threshold. A single holdout creditor could therefore frustrate an otherwise viable restructuring, which regularly tipped companies into bankruptcy, or forced other stakeholders to bear a disproportionate share of the restructuring burden.

Creditor plan procedures did already exist within suspension of payments *(surseance van betaling)* and bankruptcy proceedings, but preferential creditors (like the Dutch tax authorities) and secured creditors with a right of separate satisfaction (such as pledgees and mortgagees) could not be bound by them, which in practice made those procedures

unsuitable for most restructurings. Moreover, once a company is in suspension of payments or bankruptcy, value erosion is effectively unavoidable. The absence of a tool enabling early intervention, before value is destroyed, drove a number of Dutch companies abroad in the years before the WHOA, chiefly to the English Scheme of Arrangement (for example Van Gansewinkel Groep B.V., a major Dutch waste management company) or the US Chapter 11 procedure (for example Global Telesystems Europe B.V., a former major pan-European telecommunications and data service operator).

1.2 Objective

The WHOA is primarily aimed at businesses that face bankruptcy because of excessive debt but still have viable underlying operations; its purpose is to strengthen the reorganising capacity of such businesses. Notably, the instrument is not limited to rescue: it can equally be used to wind down a business that is no longer viable, where that produces a better outcome than liquidation in bankruptcy. The legislature intended the procedure to be accessible to both large corporates and SMEs, as well as to both Dutch and foreign legal entities.

1.3 Key features at a glance

In outline, the WHOA allows a debtor, or a restructuring expert *(herstructureringsdeskundige)* appointed for that purpose, to offer a plan to the debtor's creditors and shareholders, under which their rights can be amended. Those affected vote on the plan in classes. If the required statutory thresholds are met, the court then decides whether to sanction *(homologeren)* it, and under certain conditions may impose the plan even on classes that did not vote in favour, a mechanism known as a "cram-down".

2. Scope of application and the entry threshold

2.1 Who may use the WHOA

The WHOA applies to any debtor that carries on a business, irrespective of legal form, including associations and cooperatives. The only entities excluded are banks and insurers, which are subject to their own recovery and resolution framework. Importantly, employees' rights under their employment contracts (including claims of a pension fund) cannot be amended through a WHOA plan; a debtor seeking to amend employment terms must instead rely on ordinary Dutch employment law.

2.2 The entry criterion

Access to the WHOA hinges on a single statutory threshold (article 370(1) DBA): the debtor must be in a situation where it is reasonably plausible that it will be unable to continue paying its debts. This is a forward-looking test: it is sufficient that the debtor currently meets its obligations but foresees that insolvency cannot realistically be averted unless its debts are restructured. A bankruptcy that will only materialise in six months or a year, for example on the maturity of a loan the debtor will be unable to repay, is enough to trigger access to the procedure immediately. This early-intervention design is central to the policy objective of avoiding the value destruction associated with formal insolvency. A further structural feature is that the legislature clearly preferred consensual negotiation over court intervention. Accordingly, the procedural role of the court is kept deliberately limited and a number of procedural requirements relating to the plan, its content and the voting process must be satisfied before a sanctioning request can be filed.

3. The procedure in outline: debtor, court, creditors and shareholders

3.1 Who may take the initiative

The debtor itself may offer a plan directly to its creditors and shareholders, whilst it continues to operate its business on an ongoing basis. The WHOA is therefore a debtor-in-possession procedure. Creditors, shareholders, or the works council may however ask the court to appoint a restructuring expert to prepare and offer a plan. The debtor itself can also request such an appointment. Throughout the entire process, the debtor retains full management and disposition powers, even where a restructuring expert or an observer *(observator)* has been appointed – unlike, for example, a US Chapter 11 trustee model, the WHOA is a debtor-in-possession regime by default. Only one plan may be on the table at a time: once a restructuring expert has been appointed, the debtor cannot itself offer a competing plan for the duration of that appointment, although it may hand its own plan to the expert for submission to voting creditors and shareholders.

3.2 Two tracks: private and public procedure

The WHOA provides for two procedural tracks: a private out-of-court procedure *(besloten akkoordprocedure)* and a public out-of-court procedure *(openbare akkoordprocedure)*. In the *private* track, the debtor's intention to offer a plan is not made public, and all court applications are heard in chambers, keeping the process out of the public eye, although the affected creditors and shareholders are of course informed.

In the *public* track, by contrast, the debtor must ask the court to record the plan in the insolvency register and the government gazette, and the procedure must also be entered in the Trade Register, with court hearings taking place in public.

The choice between the two tracks must be made relatively early (generally before the first court application, such as a request to appoint a restructuring expert, a request for a cooling-off period or a sanctioning request), typically through a "start declaration" *(startverklaring)* filed with the court registry. A mid-course switch from private to public is only possible before any court involvement in the procedure, so the choice should be made deliberately, with cross-border recognition consequences firmly in mind.

3.3 Ancillary relief

The WHOA offers the debtor several ancillary tools to facilitate the negotiation process. Chief among these is the cooling-off period, which the court may order on request, limiting creditors' enforcement rights, lifting attachments, or suspending bankruptcy petitions, for an initial period of up to four months, extendable by a further period of up to four months. Unlike for example a Chapter 11 procedure, the filing of a start declaration under the WHOA does not lead to an automatic stay for the debtor. The debtor will need to proactively request the court for such a cooling-off period. The court will only grant the request where it is necessary to allow the business to continue operating while the plan is prepared and negotiated, and where the interests of the general body of creditors are served without materially prejudicing the creditor whose enforcement rights are curtailed.

4. Content, classes, voting and sanctioning of the plan

4.1 Flexible content of the plan

The content of a WHOA plan is, in principle, left to the debtor's discretion, both as to whom the plan is offered to and as to what is offered. A plan may be offered to only one class of creditors, since the court may sanction a plan as soon as at least one class has approved it, leaving other creditors outside the plan entirely. This allows a debtor to target precisely the liabilities that are problematic. Substantively, a plan may provide for payment of a percentage of the original claim, conversion of debt into equity, deferral of payment, or amendment of ongoing contracts such as a lease, although, as noted, employees' contractual rights are off-limits.



4.2 Classification into classes

Where a plan affects different groups of stakeholders, the plan must divide them into classes, grouping together those whose interests or rights are sufficiently comparable, and separating those whose positions diverge in case of a bankruptcy of the debtor. Two classification rules are mandatory. First, unsecured small and medium-sized enterprise (SME) creditors with claims for goods or services supplied, or claims in tort, must be grouped together if they are offered less than 20% of their claim. Second, creditors holding a right of pledge or mortgage must be placed in a separate class for the secured portion of their claim.

4.3 Voting

The plan must be made available to those entitled to vote at least eight days (as a bare minimum) before the vote takes place and cannot be amended thereafter, although in practice a voting term of two or three weeks is more usual. The WHOA does not prescribe a procedure for claim submission or voting, so the plan proponent has considerable freedom to design the process, and the vote can be organised physically or electronically. Nevertheless, in the more than five years of WHOA practice, the market has developed best practices in the organisation and timing of the voting procedure.

Only creditors and shareholders whose rights are amended by the plan are entitled to vote, and voting occurs per class. A class of creditors is deemed to have approved the plan if creditors representing at least two-thirds of the total value of claims voting within that class vote in favour. Where the required majority is achieved within a class, the dissenting minority within that class can be bound (“crammed down”). More strikingly, under strict conditions the court may also impose the plan on an entire class that voted against it – the so-called cross-class cram-down – provided at least one other, approving class consists of creditors who would expect a cash recovery in a bankruptcy scenario (an “in the money” class).

4.4 Sanctioning and the fairness tests

Once at least one “in the money” class has approved the plan (unless the plan concerns only creditors who would receive nothing in bankruptcy, in which case this requirement falls away), the debtor or the restructuring expert may request the court to sanction the plan. On receiving the sanctioning request, the court sets the hearing date. If not every class has approved the plan and no restructuring expert or observer is yet involved, the court will appoint an observer at that stage, whose task is to review the plan’s development with an eye to the collective interest of creditors and to report to the court.

The WHOA sets out a series of substantive conditions for sanctioning: the pre-insolvency threshold of article 370(1) DBA must be met; the plan must either avert an imminent bankruptcy of a business that is financially viable again after restructuring, or achieve a better outcome for a non-viable business than liquidation would; at least one class must have approved the plan; and the plan must be "fair". Fairness, in turn, comprises three elements: i) the so-called best interest test, requiring that no affected creditor or shareholder ends up materially worse off than in bankruptcy, ii) the absolute priority rule, requiring that reorganisation value be distributed in accordance with the statutory ranking of claims unless a dissenting class's objection is overcome by the required majorities, and iii) a cash-exit right for creditors who would receive a cash payout in bankruptcy and who voted against the plan with a majority of their class. A particular feature is the so-called "20% rule" in article 384(4)(a) DBA: where SME trade or tort creditors in a dissenting class are offered less than 20% of their claim, sanctioning must be refused unless there are compelling grounds to deviate.

The court distinguishes between general grounds for refusal, which it must examine of its own motion (such as the absence of the pre-insolvency condition, or non-compliance with procedural requirements on information, convening and classification), and additional grounds for refusal, which may only be invoked by creditors or shareholders who did not themselves vote in favour, and which they forfeit if they were aware of the ground but failed to raise it with the debtor in time.

4.5 Effects of sanctioning

Sanctioning closes the procedure and renders the plan binding on all affected creditors and shareholders, including those who voted against or abstained. The sanctioning judgment constitutes an enforceable title to the extent the plan grants creditors a monetary claim. If the debtor fails to perform the plan, it is liable for resulting damages, and the plan may, in principle, be rescinded *(ontbinding)*, unless rescission has been excluded in the plan itself, which is seen as market practice in Dutch plans. A sanctioned WHOA plan cannot, however, be annulled *(vernietigd)*, which lends the sanctioned outcome a measure of finality that is attractive to international stakeholders seeking certainty.

5. International aspects: jurisdiction and recognition

The choice between the private and public procedure (see paragraph 3.2) carries significant consequences for jurisdiction and cross-border recognition, and this is where the WHOA's international relevance is most pronounced.

For the *private* procedure, jurisdiction of the Dutch court is determined under article 3 of the Dutch Code of Civil Procedure, which looks at whether the applicant is domiciled or resident in the Netherlands, or whether the case otherwise has sufficient connection with the Dutch legal sphere. Recognition of a private-procedure outcome abroad is not automatic: it depends on the private international law of the state where recognition is sought or on applicable treaties between that state and the Netherlands. This is an important practical caveat for international undertakings: a private WHOA plan offers confidentiality, but recognition outside the Netherlands cannot be assumed and must be checked on a case-by-case basis under the relevant foreign conflict-of-laws rules. The *public* procedure, by contrast, is listed in Annex A to the EU Insolvency Regulation (Regulation (EU) 2015/848). This has two consequences. First, jurisdiction is determined by reference to the debtor's centre of main interests (COMI): where the COMI is located in an EU Member State (other than Denmark), the Insolvency Regulation determines whether the Dutch court has jurisdiction. Where the COMI lies outside the EU or in Denmark, jurisdiction instead follows from the Dutch Code of Civil Procedure. Second, and most significantly for cross-border practice, because the public procedure forms part of the Insolvency Regulation framework, decisions taken in that procedure are automatically recognised in other EU Member States (again excluding Denmark), pursuant to articles 19 and 20 of the EU Insolvency Regulation.

This asymmetry is the single most important international consideration when structuring a WHOA plan with foreign creditors or assets located in other EU jurisdictions. A debtor or restructuring expert anticipating recognition difficulties abroad, or wishing to rely on automatic EU-wide recognition, will generally have good reason to opt for the public procedure, accepting the attendant loss of confidentiality in exchange for recognition certainty across the EU. Conversely, where confidentiality is paramount and the restructuring's international footprint is limited (or where recognition can be secured through other means, such as bilateral treaty arrangements or local recognition procedures in the relevant jurisdiction), the private procedure may remain preferable. As the choice between the two tracks must be made at a relatively early stage and cannot be revisited once the court has become involved in the proceedings, this is a strategic decision that should be taken deliberately and, in any plan with an international dimension, as early as possible in the process – before any ancillary application, such as a request for a cooling-off period, is made to the Dutch court.

6. Conclusion

The WHOA fills a gap that Dutch insolvency law had left open for well over a century: a flexible, early-stage, binding restructuring tool that operates outside formal insolvency and that can, under defined conditions, bind dissenting creditors and shareholders across classes. Its design – a debtor-in-possession model, a free-form plan subject to statutory fairness tests, flexible class voting with a cross-class cram-down, and a choice between a confidential and a publicly recognised track – gives practitioners considerable room to tailor a restructuring to the specifics of a case. Whether it is, in fact, "the hottest restructuring tool in town" will necessarily depend on the facts: the nature of the creditor base, the location of assets and stakeholders, and, as set out above, the recognition profile required. For restructurings with any cross-border element within the EU, the choice between the private and public procedure, and its consequences for recognition under the EU Insolvency Regulation, deserves particular and early attention.



If you have any further questions about the use of the WHOA as a tool in (international) restructurings, feel free to contact:

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Leasing (Commercial) Real Estate in the Netherlands

Tim Verwey & Semmi Swolfs

Anyone investing in Dutch (commercial) real estate must look beyond the rent and the term of the lease. The statutory rules protecting tenants may affect the redevelopment of the property or its sale with vacant possession. The attractiveness of an investment also depends on the energy supply infrastructure and the technical condition of the property.

Which Lease Rules Apply in the Netherlands?

Residential Premises

Tenants of residential premises enjoy strong statutory tenant protection. Since 1 July 2024, leasing residential premises for a fixed term is no longer permitted, subject to exceptions. New temporary leases for terms of up to two years may only be entered into with specifically designated categories of tenants. There are also special forms of temporary lease to which separate conditions apply, and such temporary leases are only permitted if those conditions are met.

The level of rent also requires consideration. Since the introduction of the Affordable Rent Act (2024), the housing valuation system has been expanded and the maximum permitted rent is regulated for a larger proportion of rental homes. As a result, the agreed rent is not necessarily determinative. If the agreed rent contravenes the housing valuation system, the tenant may have it reduced to the permitted maximum, regardless of what was agreed. It is therefore important to have the proposed lease agreement thoroughly reviewed from a legal perspective before entering into it.

Shops, Hospitality Businesses and Hotels

Leases of these commercial premises generally have an initial term of five years, which is extended by operation of law by a further five years unless validly terminated. A notice

of termination served by the landlord does not terminate the lease if the tenant does not consent to termination. In that case, termination requires a court decision based on the statutory grounds for termination. The landlord has fewer grounds to terminate the lease within the first five years than after the initial ten-year period has expired.

A contractual end date therefore does not automatically mean that the property will become freely available at that time. Owners of real estate in the Netherlands should be aware of this.

Offices, Industrial Buildings and Logistics Real Estate

Of the categories discussed in this article, leases of these commercial premises are subject to the fewest mandatory rules of tenancy law. In this category, the parties have greater freedom to agree terms. However, after the expiry of the contractual term, the tenant may ask the court to extend the period allowed for vacating the property. That period may then be extended up to three times, each time for a maximum of one year. As a result, there may be a difference between the end date of the lease and the time at which the property actually becomes available. It is advisable to take this into account before committing the property to a new tenant.


Tim Verwey



Semmi Swolfs

Which Other Issues Are Important?

Energy Performance and Sustainability

Since 1 January 2023, office premises that are subject to the energy label requirement must have an energy label of C or higher. Several statutory exceptions to this obligation apply. In the event of non-compliance, the building may not be used as office premises.

There is no general energy label C requirement for industrial and logistics buildings. It is therefore important, before purchasing the property, to establish which measures are required and to document who will carry them out and pay for them. A general agreement to support each other's sustainability objectives does not always provide sufficient certainty in that regard.

Grid Congestion

Grid congestion may directly affect the lettability and value of commercial real estate. An existing connection does not automatically mean that sufficient electricity grid capacity is available for a new tenant. This is particularly important when real estate is developed or redeveloped. For example, completed properties sometimes remain vacant because they have not yet been connected to the grid. This can have significant financial consequences.

Avoid Unexpected Costs at the End of the Lease

Maintenance and handover at the end of the lease may give rise to significant costs, particularly for buildings with expensive installations. The technical condition of the property at the commencement of the lease should therefore be properly documented, and specific terms should be agreed regarding maintenance and the condition in which the property must be handed back at the end of the lease. Investors must also take into account the Dutch law principle of ‘a sale does not terminate a lease’. A buyer of let property automatically becomes the new landlord by operation of law and must honour the existing lease. The property cannot simply be delivered free of the tenancy as a result of the sale.

Careful due diligence before purchasing the property is therefore essential for foreign investors and other purchasers. The lease agreement, the technical condition of the property and the available electricity capacity all determine the return on investment and the options for letting the property in the future.



If you have any questions about real estate, please contact:

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You have my vote! The voting agreement for Private Equity

Anique Noordam

Introduction

Since the 1980s, private equity (hereafter PE) has been booming worldwide. Within the Netherlands, PE has often been in the news: positively, because of its unprecedented success stories, but also negatively, because of questionable practices that push the boundaries of Dutch corporate law. Although PE's reputation has suffered some dents in recent years, its popularity with large institutional investors continues to grow. The rate of return is often so high with PE that investments in PE currently pay off more than stock market investments. As a result, institutional investors are providing large amounts of capital to PE, increasing the amount of PE investments.

What does PE entail? PE is an umbrella term for investors who invest venture capital in unlisted companies. A PE investor is different from other shareholders because he almost always takes a majority stake in a target company and openly declares that he wants to sell his stake again within three to seven years (an "exit"). Because this exit should preferably be profitable, the PE investor wants to have a say in the company so that he can make the desired strategic investments and restructurings. This is often achieved by granting further powers to the PE party by agreement, in addition to the legal powers that belong to any (majority) shareholder. An example of this is the voting agreement on which this article will focus.

What is a voting agreement?

A voting agreement is an agreement that regulates how one or more parties will exercise their voting rights. This may concern the voting right on shares, but also the voting right of a board member in a board meeting or of a supervisory board member in a supervisory board meeting. A voting agreement between shareholders is in principle always permitted. A shareholder may exercise his voting right to serve his own interests. He may therefore also conclude agreements on the way in which he exercises that voting right. For directors (among themselves) and supervisory directors (among themselves) it is the other



Anique Noordam

way around. In principle, they may not conclude a voting agreement. There are two reasons for this. First of all, in the performance of their duties they must focus exclusively on the interests of the company and its business. Secondly, the duties of a management board or supervisory board member are tied to his person. A voting agreement whereby another person can determine how a board member or supervisory board member votes negatively affects this. Only in exceptional cases will a voting agreement between management board members or supervisory board members be deemed permissible. The situation must be specific, concrete and assessable, and the voting agreement must not jeopardize the independent performance of the duties by the management board or supervisory board member. This is still sometimes the case in joint ventures, for example, where management board members agree in advance that in the event of a tied vote they will appoint an expert. In this article I will confine myself to the voting agreement between shareholders.

What are the boundaries of a voting agreement?

In a voting agreement, three important quantities come into contact and sometimes into conflict: freedom of contract, the interest of the company and its business, and the shareholder's own interest.

In Dutch contract law freedom of contract is the starting point. This means that, in principle, everyone is free to make the agreements that he or she considers desirable. The exercise of that freedom may clash with the interests of the company and its business. In the case of a voting agreement, that interest imposes limits on the freedom of contract when it comes to exercising certain (corporate) rights.

The freedom that a shareholder enjoys to exercise his voting right in the manner he sees fit therefore also means that, in principle, he may always conclude a voting agreement. However, the Supreme Court has already determined in the old Wennex judgment of 1944 that concluding a voting agreement may not lead to "socially unacceptable consequences". This may be the case, for example, if votes are sold or if agreements are made that are contrary to the company's articles of association. The question of whether a voting agreement is permitted for an indefinite period of time also depends on the circumstances of the case. In addition, the reasonableness and fairness of Section 2:8 of the Dutch Civil Code, which apply to everyone involved in the company, also impose limits on a voting agreement. If compliance with a voting agreement will lead to unacceptable consequences, entering into this voting agreement is not permitted.

Examples of (permitted) voting agreements

In practice, we see various types of voting agreements. A first example is the voting agreement that creates an exception to the offering obligation in the event of a proposed or mandatory transfer of shares. It is certainly not unusual in family companies for shares to pass from generation to generation. Often the various branches of a family participate in the joint family company through their own holdings. To prevent a shift of shares in or behind the family branch's holdings from leading to an obligation to offer their shares in the family company, it is often agreed that the general meeting can decide to approve such a move. This often includes that the "approval will not reasonably be withheld" where the shares are transferred to a first-in-line descendant. Because PE often invests in family companies of origin, it also frequently encounters such a provision.

A specific type of voting agreement that often occurs in PE is the agreement that a minority shareholder has the right to appoint a director. In principle, the general meeting appoints the directors by simple majority, so the minority shareholder normally has little to say against this. Through a voting agreement the minority shareholder can be granted a right of appointment that would not normally accrue to him. In that case the minority shareholder is contractually assured of the power to appoint one of the directors, regardless of the size of its shareholding.

Another example that we often come across in practice is the use of the voting agreement to achieve so-called blocking. In situations where a majority shareholder is opposed to two or more minority shareholders, it is often agreed between the minority shareholders that they will vote as if they were one shareholder. Block formation agreements may also be desirable where there is no single majority shareholder, but several minority shareholders wish to form a single block in order to achieve the majority together. In the case of PE, this can be useful if two or more PE parties invest in the same target company and separately acquire a minority stake in it. Together, they will have a majority of the votes in the general meeting, so that a block formation agreement is an obvious choice.

Purpose and use of the voting agreement for PE

As mentioned, a PE investor is distinguished from a "normal" shareholder by, among other things, taking a (very) active role within the company, for example through participation in the management board or the supervisory board, in order to exert



influence. In its role as a shareholder, PE is bound by the legal and statutory powers and majority thresholds with respect to certain decisions. These include the statutory powers of the general meeting to appoint directors, the statutory power of the general meeting to adopt the financial statements, and powers of the general meeting as set out in Section 2:107a of the Dutch Civil Code. That article only applies to the NV. It stipulates that management decisions that lead to a major change in the identity or the character of the company or the business are subject to the approval of the general meeting, such as the transfer of the business or almost the entire business to a third party.

PE generally takes a majority stake in a company and will therefore usually not experience any problems with effectuating decision-making in the general meeting. The basic principle is that resolutions require a simple majority (half plus one of the votes cast), unless the law provides otherwise, which is usually the case where an enhanced majority is required. An example of this is depriving a nomination for a director to be appointed of its binding nature. A voting agreement in which the required majority of the parties agrees to the removal of the binding nature can offer a solution in that case.

In addition, a voting agreement can also be used to prevent deadlock within the general meeting. One example is a voting agreement in which the parties agree to the appointment of an expert if the meeting is in deadlock. In this way it is prevented that the business of a company suffers from deadlock, which could possibly lead to a decrease in value.

In summary, the voting agreement makes it possible to separate differences in rights and powers from share ownership. This avoids the need to issue different classes of shares, which facilitates a sale of the company in the event of an exit.

Deviation from the voting agreement and the enforceability

In view of the foregoing, the voting agreement can be a solution for achieving certain results that may not be realized on the basis of the shareholding. The disadvantage of a voting agreement, however, is that a shareholder can decide not to adhere to the voting arrangements.

Because a voting agreement is a contractual obligation, it is possible, in principle, to deviate from this and to vote in contravention of the voting agreement. This would constitute a breach of contract under the voting agreement, but it does not

affect the validity of the vote cast as such. Non-performance leads to the obligation to compensate the damage suffered. In practice, however, it is often difficult to prove that damage has actually been suffered as a result of an improperly cast vote, so that the other parties to the agreement are often left empty-handed. To avoid this problem of proof, the majority of voting agreements (and often shareholder agreements) contain a penalty clause. This is a clause on the basis of which a fixed amount (the penalty) is forfeited in the event of breach of contract. Only the court has a (limited) option to mitigate the penalty in that case. In principle, a voting agreement must always be complied with. The Supreme Court has ruled on this point that the mere fact that compliance with a voting agreement leads to a shareholder casting a vote that he would not have cast without that agreement does not in itself mean that the voting agreement is impermissible. In that respect, the principle of freedom of contract therefore prevails in the context of voting agreements.

Although breaching a voting agreement does not, in principle, affect the validity of the vote cast, that does not mean that breaching the voting agreement cannot affect the validity of the resolution passed. In addition, a judgment of the District Court of The Hague also shows that a voting agreement, for example in the form of a shareholders' agreement or an agreement in the articles of association, to which all shareholders (and the company) are parties, can lead to a voidable resolution if it turns out that a shareholder is voting contrary to the agreements made. The Amsterdam Court of Appeal has nuanced this principle to some extent, ruling that enforcement of the agreements contained in the shareholders' agreement is not permissible if this would unacceptably harm the interests of the company.

However, this will occur in exceptional cases, so that in principle there is a voidable resolution if a shareholder acts contrary to the agreement made. This problem is less likely to arise, however, if a voting agreement is used for block formation. In that case, the intended objective can be achieved by means of an irrevocable power of attorney.

Indeed, an irrevocable power of attorney means that one of the parties grants a power of attorney to the other party to exercise the voting rights on its equity interest. As the name suggests, it is not possible to revoke this proxy. This provides certainty that the vote will be cast as agreed. An irrevocable proxy can only be granted for cases in which the legal act will be in the interest of the proxy or a third party. In principle, this will be

the case, as the proxy holder will exercise the voting right in accordance with the agreement and therefore in his own interest. The disadvantage of a power of attorney, however, even an irrevocable one, is that the proxy holder remains authorized to exercise his rights at all times, so that the risk of acts contrary to the voting agreement remains.

A final option is to enforce the voting agreement through the courts by means of so-called real execution. This means that the counterparty of the party in default under the voting agreement asks the court for an authorization to cast the vote itself, or even to have the court order replace the vote. However, this will often not be the preferred option. Not only will this be a remedy that can only be applied in extreme cases, but its use will also strain relations within the company. It is therefore strongly recommended to make clear agreements on the purpose, performance and enforceability of the voting agreement.

More information?

Voting agreements come in many shapes and sizes and are generally contained in a shareholder agreement. The voting agreement can provide a solution in various cases to impasses or potential future points of contention. In addition, for private equity or another type of (large or minority) shareholder it can also offer a useful solution to realize certain corporate goals, such as effectuating an exit or appointing certain directors. Voting agreements are always customized and highly dependent on the circumstances of the case.

Do you have questions about the use of a voting agreement or do you want to know whether you are bound by a voting agreement? Anique Noordam will be happy to assist you.

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Please also visit our website for more information about the Mergers & Acquisitions team at DVDW.



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