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Application of the Dutch investigation procedure on two listed companies: the *Gucci* and *ABN AMRO* cases

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In recent years some decisions of the Dutch Enterprise Chamber of the Amsterdam Court of Appeal (and the Dutch Supreme Court) attracted attention in the international financial press. These judgments refer to takeovers of internationally well-known companies which were established according to Dutch company law. All these decisions were issued within the framework of the Dutch investigation procedure. Below I will explain some features of this investigation procedure (which has no equivalent in foreign jurisdictions, as far as I know), and clarify the position of the Enterprise Chamber in Dutch company law. Thereupon I will discuss the *Gucci* and the *ABN AMRO* cases which aroused worldwide interest from the financial world.

The investigation procedure was introduced in Dutch law in 1928.[1] Originally, it was a very simple provision. Minority shareholders were conferred the power to request a court to order an investigation into the matters of the company. The purpose of such an inquiry was to bring to light some facts that could otherwise be difficult for the shareholders to establish. It was up to the parties that asked for the inquiry to seek remedies in accordance with general civil and company law. This provision was not a great success. Only two inquiries in a period of forty years were requested. The unpopularity of the inquiry proceedings may have been caused by the fact that, even when the court ruled that there had been a case of misconduct, it was not capable of attaching any measures to its

[1] An excellent overview of the investigation procedure in English has been written by Marius Josephus Jitta, 'The procedural aspect of the right of inquiry' in *The Companies and Business Court from a Comparative Perspective* (Kluwer, 2004), 1–42. I used some of his formulations in this essay. See also L. Timmerman and A. Doorman, 'Rights of minority shareholders', in E. Perakis (ed.), *Rights of Minority Shareholders: XVIth Congress of the International Academy of Comparative Law (Brisbane)*, (Brussels: Bruylant, 2004), 484–609.

decision. In 1971 the investigation procedure was renewed and became an instrument which was extensively elaborated in the Dutch legislation. As from 1971, an investigation procedure consists of two phases. The purpose of the first phase is to get an order for an inquiry into the conduct and policies of the company. An investigation will be ordered if there appear to be well-founded reasons to doubt the correctness of the policies or the conduct of a company. The law grants the right to request an inquiry to *inter alia* shareholders who own 10% of the issued share capital or hold shares with a nominal value of €225,000. It is important to notice that this second threshold is very low, especially when it is applied to a listed company with millions of shareholders. The consequence of this low threshold is that listed companies are often the target of inquiry proceedings if there are problems within the company.[2] The second phase of the procedure aims at establishing whether there has been misconduct and, if so, whether *definitive* remedies should be ordered in order to correct the misconduct. These questions are discussed on the basis of the report of the investigators. Examples of remedies to be deployed are the dismissal of one or more directors and the temporary nomination of a director. When choosing a measure, the Enterprise Chamber is limited to a list which is to be found in the relevant legislation. In 1994, the Dutch legislator added an interim injunction procedure to the investigation procedure. This new provision enables the competent court to order *provisional,* immediate measures once an investigation procedure has been initiated before it. In recent years this interim injunction procedure has turned out to be of extreme importance. The reason hereof is *inter alia* that in company law a provisional measure is often *de facto* definitive because of the high speed at which businesses operate.

In 1971, the Enterprise Chamber of the Amsterdam Court of Appeals has been introduced in the Dutch judiciary as a specialized court for matters of company law for which the Chamber was designated by the legislator as competent court. One of these matters is the investigation procedure. In Dutch company law the Chamber plays a pivotal role. Since its establishment, its competence has been gradually increased by the legislator. It is interesting to note that the chamber is not entirely made up of lawyers. Two of the five judges are layman, usually accountants or former entrepreneurs. Since 1971 the enterprise Chamber has turned to be a court with the traits we normally associate with a

[2] Worldwide known companies such as Unilever, Ahold, Heineken, HBG, Rodamco, Corus and DSM were the subject of the investigation procedure.

specialized court.[3] One may expect that specialized courts are activist and not reluctant judges and tend to adopt a rather informal approach to procedural matters. These traits fully apply to the Dutch Enterprise Chamber. The Chamber is a very activist and very informal court and it has for a specialized court the natural tendency to interpret its tasks broadly with all the connected pros and cons. It tends to let substance override form. The Chamber is further helped with the active and informal performance of its tasks by the open structure of the way in which the right of inquiry has been legislated for. For instance, the Chamber can grant provisional immediate measures when these are required in connection with the condition of the company or in the interest of the inquiry. The Chamber is not limited to any specific set of measures, but it can order any provisional measure it deems appropriate. An example of a provisional measure is a prohibition on the directors to act on behalf of the company or to carry out a resolution. It should be noted that the Supreme Court has limited the competence of the Chamber to issue provisional measures to matters of great urgency.[4] Another example of the activist and informal approach is that the Chamber has the power to order an inquiry into broader subjects than that demanded by the plaintiffs. The consequence of all this is that the Chamber has considerable freedom of action. In addition to this, the possibilities of review of decisions taken by the Chamber are limited. The only possibility is to file an appeal in cassation with the Dutch Supreme Court. The Supreme Court only reviews decisions of the Chamber on limited grounds, i.e. whether the law has been correctly applied and whether the decision has been properly reasoned. The Supreme Court is not authorized to review the facts of the case. The Chamber is the only instance which deals with the establishment of the facts.

If one takes the number of decisions under the investigation procedure by the Chamber into consideration, the investigation procedure is a great hit. Since 1971, the Chamber has issued more than 1500 decisions connected with the investigation procedure in approximately 500 cases. The Supreme Court rendered about 100 decisions. A very attractive aspect of the way the Chamber operates is its speed. For instance, the Chamber is prepared to hear the request for an immediate measure within a week and can rule immediately after hearing the case. The popularity of the

[3] See on the traits of specialized courts: M. Kroeze, 'The companies and business court as a specialized court', *Ondernemingsrecht* (2007), 86–91.

[4] HR 14 December 2007, *Nederlandse Jurisprudentie* (2008), 105.

investigation proceedings is also caused by the fact that the proceedings contain a cost allocation rule that is beneficial for the plaintiff: the company has to pay the costs of the investigation, ordered by the Court which are sometimes high (a sum of €500,000 is not exceptional). For a plaintiff, the request for an investigation is a good gamble: it costs little and has a high nuisance value for the company that is the subject of the investigation. Another reason for the success of the investigation procedure is that the Chamber has the power to order a provisional measure before it takes a decision on the request for an investigation. The power to order a provisional measure within the framework of the investigation procedure has developed into more or less independent summary proceedings for corporate matters. These summary proceedings are of high importance, as the investigation procedure sometimes ends with a temporary measure, for instance because parties resign with the interim measures. Sometimes, the interim measures and suggestions of the Chamber stimulate the parties to reach a compromise.

A consequence of the practice of the investigation procedure is that judges of the Chamber sometimes interfere in the affairs of a company in an unprecedented manner. The Supreme Court quashed some decisions of the Chamber because these decisions left too little room for the management to pursue policies under its own responsibilities.[5] It is very difficult to assess the contribution the Chamber has delivered to the sound functioning of Dutch corporate life. Without any doubt, the Chamber has contributed to many settlements between the interested parties. Another important fact is that provisional and definitive remedies have often led to a dispute being solved in a certain direction. However, the question remains to what extent judicial interference can really terminate conflicts within companies. This question is legitimate, because the Dutch legislator had certainly an optimistic view on the abilities of the judge in this respect. It was the intention of the Dutch legislator to get a company back on track by restoring sound relations within a company through the investigation procedure. The legislator had in mind conflicts in a company which resulted in a deadlock of the management of the company. However, we know that the resources for all kinds of conflicts within a company are infinite. The investigation procedure has the intention to look forward, i.e. to look into the future

[5] HR 21 February 2003, *Nederlandse Jurisprudentie* (2003), 182 (HBG). See on this subject Vino Timmerman, 'Review of management decisions by the courts' in *The Companies and Business Court from a comparative law perspective* (Kluwer, 2004), 43–57.

of the company. I wonder whether this is not a somewhat idealistic trait of the investigation procedure taking into consideration that the business world tends to become more and more antagonistic. Sometimes, the investigation procedure is used by aggressive investors for tactical litigation and not for saving a company. The investigation procedure is in such a case used as one of the instruments to conquer the company. One thing is certain: the investigation procedure offers an interesting tool to Dutch corporate lawyers to further develop Dutch company law. It is a real lawyer's paradise. In the framework of the investigation procedure, litigation over nearly every aspect of company law and procedural aspects thereof has taken place. Against this background, I would like to make some comments on the *Gucci* and *ABN AMRO* cases.

Gucci is a world-famous group of companies specialized in the production and sale of Italian-designed luxury goods. For tax reasons, the listed top holding of the Gucci Group was situated in Amsterdam and established according to Dutch company law and had subsidiaries in Italy, France and several other countries. Gucci Group NV was a Dutch company to which the investigation procedure was applicable. In 1999 LVMH – a French competitor of Gucci, the V in LVMH stands for Vuiton – notified in a public statement that it had acquired an interest of 34.4% in the Gucci Group and that it did not intend to issue a public offer on the shares of the Gucci Group. The management of Gucci Group was not amused. It took countermeasures. Gucci Group issued shares to a newly established foundation 'Employees interests' under an employee stock option plan. The number of shares issued to the foundation was equal to the number which were held by LVMH. Gucci Group lent the foundation the sum it needed to pay up the shares. Some time later, the management of the Gucci Group made public that it had reached an agreement with the white knight PPR – another competitor of Gucci – on a strategic cooperation. Within the framework of this cooperation, Gucci Group issued shares to PPR equal to 40% of its capital without requesting the general meeting of shareholders' approval. Hereafter, LVMH announced a public offer. With the benefit of hindsight, we can conclude that this gentle gesture was too late.

When the management of a Dutch company gets into this kind of mischief, the Pavlov reaction of a shareholder who does not agree with the course of action by the management is to request an investigation into the affairs of the company and ask for immediate, provisional measures. LVMH did not resist this common urge. Immediately after the installation of the stock option plan, it requested an investigation

and several provisional measures. The Chamber issued a number of interim decisions. In one of its decrees, the Chamber ordered by way of a provisional measure that LVMH and the foundation were not allowed to vote on their shares. Some weeks later, the Chamber lifted the ban to cast a vote with regard to the shares held by LVMH, because in the meantime, PPR had acquired more than 40% of the capital of Gucci with the willing cooperation of the management of Gucci Group. The Chamber refused to nullify the issuance of shares to PPR because it would be too burdensome to reverse all the consequences of the transaction. On 27 April 1999, the Chamber published its final decision. In this decision, the Chamber denied the request to launch an inquiry into the policies of Gucci Group, it further declared that there was mismanagement on the part of Gucci Group, it quashed the decision by Gucci Group to establish the stock option by way of definitive measure and it ruled that the foundation could not exercise any rights in its capacity of shareholder in the Gucci Group. This decision seems on the face of it obvious. The foundation was a strange corporate creature, as all of its shares had been paid up with the financial help of the Gucci Group. However, this decision belongs to the most audacious decisions the Chamber took since its foundation in 1971. The statutory text clearly states that the Chamber is only authorized to conclude that there is a case of mismanagement and to issue definitive measures on the basis of a report prepared by the designated investigators. In its final Gucci decision, the Chamber determined mismanagement without a report, thereby skipping the inquiry part of the investigation procedure and ruled that a report could not bring to light any further relevant information and that a more detailed investigation would be superfluous and of no use. In this decision, the Chamber set aside a clear legislative text. An appeal in cassation was lodged. The Supreme Court is crystal-clear as well:

> The judgment of the Enterprise Chamber…bears witness to an incorrect interpretation of the law. First, the phrasing and the system of the law bear out that the Enterprise Chamber is not authorized to provide for relief… until 'misconduct has been borne out by the report'. Second it follows from the way in which the stipulations at hand have historically formed… that it was always the legislator's intention that the aforementioned relief could only be provided for once the first proceeding had been concluded with the report on the investigation, in so far as it had been borne out by the report that there had been question of misconduct on the part of the company. Third, it must furthermore be assumed on the basis of the

> purport of the law that the Enterprise Chamber has not been authorized independently to judge on the basis of such facts as it has established that it had been borne out that there had been a question of misconduct and provide for relief on the exclusive basis of its own judgment…In so far as there is no reason for launching an investigation…and there is a need for relief, the regular procedure before the civil court with the full complement of related guarantees is always available for this purpose.[6]

In this decision, the Supreme Court underlines the pivotal role of the investigation report in the investigation procedure and quashes the ruling of the Chamber in the *Gucci* case. The effect of the Supreme Court's decision is that the freedom of action of the Chamber has been somewhat diminished. However, I have the impression that the Chamber utilizes to a larger scale the instrument of the provisional measures since the *Gucci* decision of the Supreme Court. The requirement of a previous report does not apply to a provisional measure. By ordering provisional measures, the Chamber can sometimes achieve the same effect as with a definitive measure. The *Gucci* affair ended with a settlement under which PPR acquired all the shares in Gucci.

For Dutch corporate lawyers, the *ABN AMRO* affair is among the most painful that has ever happened. The roots of ABN AMRO go back to a bank that was founded in the beginning of the nineteenth century by our King William I. In the Netherlands, ABN AMRO was considered to be one of the most important companies. The end of the affair is that ABN AMRO has been cut into four pieces, some parts of which have been resold and that ABN AMRO *de facto* has ceased to exist. The reason for this dramatic course of affairs is that, for several years, ABN AMRO did not meet the expectations it had raised. Among shareholders, there was widespread dissatisfaction about the level of the profits ABN AMRO had generated during the last years. Early in 2007, ABN AMRO made public its intention to enter into a share-merger with Barclays Bank in response to this dissatisfaction. Immediately after the announcement, a consortium of three other banks (Fortis, Banco Santander and Royal Bank of Scotland), announced its intention to launch a public offer to ABN AMRO in cash. After several months, the offer of the consortium turned out to be successful, which led to the split-up of ABN AMRO. The *ABN AMRO* case landed with the Enterprise Chamber, because ABN AMRO announced that it had sold its US subsidiary, which represented approximately 25% of the value of ABN AMRO, to an American

[6] HR 27 September 2000, *Nederlandse Jurisprudentie* (2000), 653.

bank, while the bid of the consortium was imminent. A Dutch investors' association and some ABN AMRO shareholders requested an investigation by the Chamber and a provisional order to forbid ABN AMRO to sell its American activities. Hereupon, the Chamber deferred its decision on the investigation, but prohibited ABN AMRO bank to sell its American activities without the approval of the shareholders meeting for the duration of the proceedings. It should be noted that ABN AMRO had obtained legal advice that such an approval was not necessary under Dutch company law.

The question of the approval of the shareholders meeting for important transactions is regulated in section 107a of Book 2 of the Civil Code. Section 107a provides as follows:

> Resolutions of the management require approval of the general meeting when these relate to an important change in the identity or character of the company or the undertaking, including in any case…
>
> the acquisition or divestment by it or a subsidiary of a participating interest in the capital of a company having a value of at least one-third of its assets according to its balance sheet and explanatory notes or, if the company prepares a consolidated balance sheet, according to its consolidated balance sheet and explanatory notes in the last adopted annual accounts of the company.
>
> The absence of approval by the general meeting of a resolution …shall not affect the representative authority of the management or the directors.

One may conclude from this text that it is not evident that the approval of the general meeting is required for the sale of American ABN AMRO activities. The Chamber agrees with this conclusion, but solves this problem by interpreting the provision broadly:

> Taking matters into account the Chamber also considers that, in view of the particularities of the case at hand, it cannot be ignored that, even if it cannot directly be brought under the scope of application of section 2:107a Civil Code, it at least represents an occasion which touches on the cases foreseen by this provision (either generically or specifically) to such a degree that it can be virtually equivocated with it, and that the board and supervisory board of ABN AMRO Holding should have felt compelled to put the decision making concerning the sale of LaSalle (i.e. its American subsidiary, LT) before the general meeting. The Chamber points to the following circumstances in this, which should be considered in conjunction: 1. ABN AMRO Holding confirmed at 17 April 2007 to be talking to Barclays on a form of combination of activities; 2. previously – on

> 13 April 2007 – ABN AMRO Holding announced it would be carefully dealing with a letter from the Consortium, entailing an invitation to hold explanatory talks; 3. LaSalle represents a considerable part of the value of ABN AMRO…; 4. actors such as TCI (*author's note*: The Children's Investment Fund Management, i.e. an investment fund), VEB (*author's note*: Vereniging van Effectenbezitters, i.e. a Dutch investors' association) and the Consortium had let their wishes and plans concerning a possible merger or acquisition of ABN AMRO Holding and the associated sale of LaSalle be known in the period of time concerned; 5. Barclays made the sale of LaSalle…a condition for its intended offer to go ahead. This all means that the sale of LaSalle had become (or had been made) such an issue that the board and the supervisory board of ABN AMRO Holding was no longer at liberty to withhold this, in the circumstances, major and (as talks on the merger and the acquisition of ABN AMRO Holding revealed) critical transaction, from the consultation and the approval of the shareholders meeting.

This consideration is typical for the Chamber. It focuses on the circumstances of the case and does not regard the wording of a statutory provision as decisive. ABN AMRO did not acquiesce in the judgment and lodged an appeal in cassation.

The Supreme Court sings a different tune:[7]

> The circumstances cannot, unless the law or the articles of association so provide, result in a right of approval of the general meeting of shareholders of ABN AMRO holding with regard to the sale of LaSalle by ABN AMRO Bank…The Enterprise Chamber rightly assumed that the present case does not fall within the scope of this provision (i.e. section 107a, LT)… The first paragraph of Section 107a cannot, at variance with the findings of the Enterprise Chamber, be applied by analogy…now that the legal history – as set out in… Advocate General's advisory opinion…shows that the legislature, precisely for the sake of legal certainty, wished to deprive this provision from such a broad scope.

The language of the Supreme Court is again crystal-clear and does not need further comments. The Supreme Court quashes the judgment of the Enterprise Chamber. Some months later, the Chamber denied the requested investigation.

What can be learned from the *Gucci* and *ABN AMRO* sagas? I have tried to think deeply on this question, as I was involved in my capacity as Attorney-General to the Dutch Supreme Court. Foreign lawyers could

[7] HR 13 July 2007, *Nederlandse Jurisprudentie* (2007), 434.

conclude that the Dutch Supreme Court and the Enterprise Chamber disagree about fundamental questions of Dutch corporate law.[8] However, I have concluded something different. I think this is an example of a more general phenomenon of interaction between two courts of justice. If a certain legal court is deciding in an activist and informal way – and, as we have seen, this is the case of the Enterprise Chamber – the higher judicial body that has to review the lower court of justice will take a more distant and formal approach. I am of the opinion that this is an example of a natural interaction between two judicial bodies which will finally lead to a certain state of balance. I am convinced that if the Enterprise Chamber had taken a more distant and formal approach, this would have challenged the Supreme Court to a more active and informal attitude.

[8] See on the jurisprudence of the Dutch Supreme Court in matters of company law: L. Timmerman, 'Company law and the Dutch Supreme Court, some remarks on contextualism and traditionalism in company law', *Ondernemingsrecht* (2007), 91–5.