Amsterdam 'Chancery Court' May Open Foreign Desk

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The judicial process before the Enterprise Division of the Amsterdam Court of Appeal that is termed 'the right of inquiry' is an unusual one. This is not so much because this process offers shareholders and employees a forum for referring their concerns about their enterprise's policies to the judiciary, but in particular because of the far-reaching measures that the Enterprise Division can impose in order to rectify the matter. Those measures might be provisional, or they can be final, if the inquiry commissioned by the Enterprise Division brings to light evidence of mismanagement. Examples of such measures include dismissing members of the board of directors and the supervisory board, reversing resolutions, deviating from the enterprise's articles of association, temporarily relieving shareholders of their voting rights, etc. In recent decades, this right of inquiry has also proved to be a feared weapon in disputes about hostile takeovers: remember Gucci and ABN-AMRO's high-profile takeover battles and the dramatic fall of Fortis. However, the bulk of the Enterprise Division's work concerns relatively small enterprises.

Being a product of the Dutch legislature, the right of inquiry can only be exercised in respect of Dutch legal entities, which in practice are primarily public and private limited liability companies. As such, only shareholders in Dutch companies may apply to the Enterprise Division for an inquiry. At least, that is what the law dictates, and that is how the matter was generally perceived until recently. However, the Dutch Supreme Court recently confirmed a judgment handed down by the Enterprise Division in which the shareholder in a Chinese company was declared to have standing in an application for an inquiry concerning its Dutch subsidiary.[2] The Supreme Court found that the shareholder in the Chinese holding company, having provided venture capital, had an economic interest that for those purposes could be equated with the interest of a shareholder participating directly in a Dutch company.

This judgment in *Chinese Workers* has major implications: the Supreme Court has opened the door to foreign investors whose investments in Dutch participations are only held indirectly. Similarly, in principle those investors might now also apply for an inquiry at their participations and – more importantly – request the Enterprise Division to impose immediately enforceable measures such as suspending board members, temporarily suspending voting rights or other powers or any other measure that is appropriate in order to resolve the emergency.

That judgment has since been the target of severe criticism in a number of publications of legal experts, who argue that the Supreme Court has granted the Dutch courts too much jurisdiction. They fear that it may lead to uncertainty in practice; what exactly entails 'an economic interest'? Said criticasters also maintain that anyone who structures an enterprise using foreign legal entities, which they often do purely for tax considerations, should be prepared to accept the consequences with all the benefits and burdens.

I do not agree with this criticism. Doing business and investing across borders is a fact of life in this day and age. One of the European Commission's key objectives is even to facilitate and stimulate that process. National legal systems – both the legislature and the judiciary – will increasingly need to adapt. No Member State of the EU can delude itself into believing that it is an economic island.

It is moreover highly doubtful whether withholding the right of inquiry from parties investing in the Netherlands by way of a foreign vehicle rather than a Dutch one is consistent with the European principle of free movement of capital. In addition, foreign investors are also faced with the far-reaching measures that the Enterprise Division sometimes imposes. In an earlier judgment, an interest held (indirectly) by a foreign investor in a Dutch company was effectively expropriated. Although for

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2 Dutch Supreme Court, 29 Mar. 2013, LJN: BY7833 (*Chinese Workers*).

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procedural reasons the Supreme Court did not review that judgment, even the Advocate General in that matter felt that expropriation to be contrary to Article 1 of Protocol 1 to the ECHR.[3] Considered in this light, I completely understand the Supreme Court's judgment in *Chinese Workers*. It is simply a matter of reciprocity.

3 See No. 3.42 of the AG's opinion concerning the Supreme Court's judgment of 23 Mar. 2012, JOR 2012/141 (*e-Traction*).