LOYENS & LOEFF

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Quoted

Expedited proceedings in takeover processes

LOYENS & LOEFF

In this edition

1. Introduction

Complex acquisitions can lead to complex disputes. Such disputes often arise after the takeover process has been completed, for example, when it appears that certain warranties have been breached, an indemnity claim is not being honoured or a disagreement arises about (the amount of) leakage or an earn-out. In such cases, the parties can usually fall back on contractual agreements laying down dispute resolution mechanics.

However, disputes can also arise before the takeover process is completed. It is precisely in such cases that rapid action is often required to prevent irreversible consequences. The parties may then choose to obtain injunctive relief in (expedited) inquiry proceedings or in summary proceedings, which may intervene in the obligations of the parties or the governance of the company. In practice, (the threat of) such proceedings can also influence the dynamics of ongoing negotiations.

This edition of Quoted discusses the possibilities of initiating expedited proceedings in ongoing takeover processes. Options available to the parties in the context of the inquiry proceedings and summary proceedings will be discussed as well as certain differences between these proceedings. We will also look at some compelling recent precedents.

2. Inquiry proceedings and summary proceedings in a nutshell

2.1 Inquiry proceedings before the Enterprise Chamber

Inquiry proceedings are proceedings before the Enterprise Chamber of the Amsterdam Court of Appeal, a specialised forum consisting of three judges with extensive experience in corporate law and two expert members, mostly with a financial background (such as CFOs, bankers or accountants). The Enterprise Chamber deals with applications for an inquiry with the greatest urgency and, in sufficiently urgent cases, can often deal with such applications at short notice. The purpose of the inquiry proceedings is to find a solution to disputes concerning the governance of the company. The objectives of inquiry proceedings are reorganisation, restoration of healthy relations, disclosing the state of affairs and determining who is responsible for possible mismanagement of a legal entity.

Inquiry proceedings consist of two phases. In the first phase, an application is filed to order an investigation into the policy and affairs of a legal entity. The Enterprise Chamber will only grant such an application if there are well-founded reasons to doubt the correctness of the policy or course of affairs. Then, in a second phase, following the outcome of the investigation, an application can be filed to establish mismanagement and to take final action, including the suspension or annulment of resolutions, suspension or dismissal of directors and supervisory directors, or even the dissolution of the legal entity.

At any time during these proceedings, injunctive relief by means of immediate measures may be requested for the duration of the proceedings. Examples of such measures are the appointment of temporary directors or supervisory directors, a suspension of resolutions and a temporary transfer of shares by way of administration to an independent manager. The Enterprise Chamber has a great deal of discretion in ordering immediate measures. It may, for example, deviate from contractual agreements between parties, the articles of association and the law. The Enterprise Chamber may also grant measures other than those requested by the parties if it considers this to be in the interests of the company. In deciding whether to grant immediate measures, the Enterprise Chamber will consider the interests of all parties involved, with the company's interest taking precedence. In practice, immediate measures often prove to be the key to resolving the dispute.

Dutch law stipulates which parties are entitled to file an application for an inquiry. The parties that are entitled to take part in the inquiry include shareholders and/or

depositary receipt holders who hold a sufficient interest,[1] the company itself and parties entitled to do so under the articles of association or by contract. In order to avoid the company being taken by surprise by the application for an inquiry, the applicants should notify the company in writing of their objections to the policy or course of affairs before the application is filed.[2] Usually, an 'objection letter' is sent for this purpose. The company should also be given a reasonable time to investigate the objections and take action.

In addition to the applicant(s), the legal entity which is the subject of the application for an inquiry will be involved in inquiry proceedings in any event. Furthermore, various interested parties may be summoned or appear of their own accord. Examples of such interested parties are the shareholders, the management board, the supervisory board and the works council, but even a (potential) bidder has been considered an interested party in the past. Such parties may file independent requests, including applications for immediate measures.

2.2 Summary proceedings before a summary judge

Summary proceedings are expedited proceedings before the summary judge of a District Court. In contrast to the three-judge composition of the Enterprise Chamber, summary proceedings take place before a single judge. In general, more experienced judges are appointed as summary judges, although the judge in question does not always need to have specific knowledge of corporate law. In summary proceedings, a hearing is generally scheduled within six weeks, after which a judgment is given, in principle, within two weeks. These time limits may be shortened if the urgency of the matter requires it. It is even possible for the summary judge to hear and rule on a case within a few days.

In summary proceedings, the summary judge gives a provisional judgment based on the expected outcome in proceedings on the merits. Because of this provisional nature, summary proceedings offer little room for fact-finding and are not always a suitable forum for complex disputes. Also, the judgment does not have binding force, which means that the legal relationship between the parties cannot be determined with binding effect.

The foregoing does not preclude rapid intervention in summary proceedings by way of provisional relief. This often includes an order to comply with an obligation, the delivery of certain documents or a prohibition to perform certain actions (such as transferring shares to a third party). In the context of corporate law disputes, one can also think of suspending voting rights on shares, suspending the execution of certain resolutions (such as the convening of a shareholders' meeting) and the temporary appointment of a managing director. When ordering provisional relief, the summary judge will consider the interests of the parties involved and ascertain whether there is a legal basis for the relief sought.

In principle, any party with a sufficiently urgent and relevant interest can initiate summary proceedings. To this end, the court is requested to set a date and time for a hearing, after which a writ of summons will be served on the defendant(s), subject to any additional requirements the court may impose. It is possible, in certain circumstances, for other parties to intervene in the summary proceedings or to join the claimant(s) or defendant(s), although this is relatively rare.

3. The choice between inquiry proceedings and summary proceedings

How does a party to a takeover process choose between inquiry proceedings and summary proceedings? Such decision may be based on various legal and strategic considerations. We outline a number of considerations below based on four questions.

1 Under Article 2:346(1) of the Dutch Civil Code, the following persons are authorised to submit an application for an inquiry (i) in the case of a private or public limited company with an issued share capital not exceeding €22.5 million: one or more holders of shares or depositary receipts who - alone or together - represent at least one-tenth of the issued share capital or are entitled to an amount of shares or depositary receipts up to a nominal value of €225,000 or such lower amount as stated in the articles of association; or (ii) in the case of a private or public limited company with an issued share capital exceeding €22.5 million: one or more holders of shares or depositary receipts who - alone or together - represent at least one-hundredth of the issued share capital or, if the shares or depositary receipts - in brief - are admitted on the stock exchange, represent a value of at least €20 million according to the closing price on the last trading day before the submission of the application, or such lower amount as stated in the articles of association.

2 This requirement does not apply, for example, if the application is filed by the company itself.

3.1 Admissibility and jurisdiction

An important preliminary question is which proceedings are available to the parties. In that regard, among other things, the applicable requirements for admissibility and jurisdiction of the court should be considered.

As mentioned above, Dutch law defines which parties are authorised to file an application to initiate inquiry proceedings. A party that is not involved in the company, or is not yet sufficiently involved, will typically not meet these requirements. In such cases, summary proceedings can offer a solution, which are in principle available to any party with a sufficiently urgent and relevant interest. In summary proceedings, the jurisdiction of the Dutch court can be an obstacle, for example, in the case of a foreign opposing party or if the parties have agreed on a choice of forum or arbitration (for example, in a letter of intent). The Enterprise Chamber has exclusive jurisdiction if inquiry proceedings are initiated which concern a Dutch legal entity,[3] regardless of any other choice of forum between the parties.

3.2 Nature and scope of the dispute and necessary remedies

Another relevant question is what exactly entails the dispute between the parties and what is needed to resolve it. Not all disputes can be resolved in inquiry proceedings or in summary proceedings. For example, purely commercial disputes will be rejected by the Enterprise Chamber. This includes disputes that do not affect the functioning of the corporate bodies, such as disputes about refusal to transfer shares or enforcing continuation of negotiations. In such cases, summary proceedings can offer a solution. In summary proceedings, a party may, for example, demand specific performance of an obligation to transfer shares, request an order to continue negotiations or request a prohibition on selling certain assets. Certain provisions - including the suspension of voting rights on shares or the suspension of the implementation of certain decisions - can be requested in both proceedings.

The nature and complexity of the dispute and the remedy sought are also relevant for the choice between summary proceedings or inquiry proceedings. For example, the Enterprise Chamber will, as a rule, be better placed to rule on complex corporate law disputes than the summary judge.

3.3 The position of the party concerned

In addition, a party considering proceedings will have to consider its own position. What does it have to gain and what is at stake? What risks is it prepared to take?

The Enterprise Chamber, to a further extent than the summary judge, tends to take a pragmatic view and look for solutions that are in the interest of the legal entity. This, together with the broad discretion and flexibility it has in ordering immediate measures, means that the Enterprise Chamber can take far-reaching actions, but sometimes also takes an unexpected position. Therefore, parties may gain the most in inquiry proceedings, but at the same time there is the risk of an unexpected outcome and/or loss of control over the company. In summary proceedings, the summary judge is more bound to the positions taken by the parties and will often adopt a more restraint approach. This usually leads to less far-reaching intervention, but also makes the litigation risk more manageable.

It should also be borne in mind that there are only limited options to challenge a judgment in inquiry proceedings. In case of a negative decision, the unsuccessful party can only appeal to the Supreme Court. However, such proceedings are usually time-consuming, while in the meantime the decision of the Enterprise Chamber remains in force. In addition, only complaints about the motivation and application of the law can be brought before the Supreme Court; parties cannot appeal against established facts. Partly because of the factual nature of many orders in inquiry proceedings, a Supreme Court appeal is not always a realistic option. An appeal against a judgment in summary proceedings is possible, as is a subsequent appeal before the Supreme Court. In appeal, the case may be heard again. In addition, in summary proceedings there is the possibility of an expedited appeal, in which a judgment can be obtained within a relatively short period of time, *i.e.*, a few months.

3 The relevant legal entities are listed in Article 2:344 of the Dutch Civil Code and are public limited companies (*NVs*), private companies with limited liability (*BVs*), cooperatives (*coöperaties*), mutual insurance associations (*onderlinge waarborgmaatschappijen*), foundations (*stichtingen*) and associations (*verenigingen*) with full legal capacity that maintain an enterprise for which a works council must be established by law.

4. Recent takeover disputes in expedited proceedings

In recent years, several high-profile takeover disputes have been dealt with in expedited proceedings. Some examples will be discussed below.

4.1 AkzoNobel (2017)

In early 2017, the chemical group AkzoNobel N.V. ("AkzoNobel") was approached by paint manufacturer PPG Industries, Inc. ("PPG"). PPG made several proposals for a takeover of AkzoNobel. These proposals were rejected by AkzoNobel. A number of shareholders then attempted to call AkzoNobel's leadership to account and for that reason requested that a shareholders' meeting would be convened and that a vote would be taken on the dismissal of the chairman of AkzoNobel's supervisory board.

AkzoNobel refused to comply with this request and these shareholders instituted inquiry proceedings in which they requested, by way of immediate measure, that AkzoNobel be ordered to convene the requested shareholders' meeting. The Enterprise Chamber ruled that AkzoNobel had acted diligently in rejecting PPG's takeover proposal. Moreover, negotiations with a bidder are part of the company's strategy and thus, in principle, a matter for the company's management. There were therefore no reasonable grounds for doubting the correctness of the policy or the course of affairs. Accordingly, there was also no ground for granting immediate measures. Afterwards, the shareholders also - unsuccessfully - initiated application proceedings to convene the envisaged shareholders' meeting.

4.2 Marqt (2019)

In May 2019, supermarket chain Marqt Holding B.V. ("Marqt") was put up for sale. In connection with the upcoming sale process, a new shareholders' agreement was concluded between all shareholders. Part of that shareholders' agreement was a 'drag-along provision'. After several bids, a number of major shareholders decided to sell Marqt to Udea Beheer B.V. ("Udea"), known for its supermarket chain Ekoplaza. Among others, the founders of Marqt, who still held a minority interest, did not approve of this takeover and refused to agree to it.

The selling shareholders then initiated summary proceedings against the reluctant shareholders to order them to sell and deliver their shares to Udea on the basis of the agreed 'drag-along provision'. The dispute essentially revolved around the interpretation of that drag-along. The claim of the selling shareholders was upheld by the summary judge, allowing the takeover to be completed. The refusing shareholders appealed, but that appeal seems to have been withdrawn.

Given the commercial nature of this dispute, it was up to the selling shareholders to initiate summary proceedings. Nevertheless, pending their appeal, the refusing shareholders also initiated inquiry proceedings. In the inquiry proceedings, several immediate measures were requested which - in short - would block the takeover. The Enterprise Chamber rejected these requests. In this respect, an important consideration was the fact that not the inquiry proceedings, but an (expedited) appeal against the judgment in first instance (instead of 'ordinary' appeal) was the appropriate way to oppose the takeover. In view of this, there would be room for immediate measures only if exceptional and serious circumstances justified it, which was found not to have been the case in this instance.

4.3 GrandVision (2020)

In 2019, retailer GrandVision N.V. ("GrandVision"), known in the Netherlands for, among others, the optics chains Eyewish and Pearle, announced that it would be acquired by eyewear manufacturer EssilorLuxottica S.A. ("EssilorLuxottica"). EssilorLuxottica would first take over the shares of major shareholder HAL Investments B.V. in a private block trade and then make a public offer for the outstanding listed shares.

This transaction has come under pressure in 2020, reportedly due to the COVID-19 pandemic and its impact on the retail sector. In that regard, EssilorLuxottica took the position that GrandVision was not fulfilling its obligations under the transaction documentation, possibly in an attempt to terminate the acquisition or renegotiate its terms. EssilorLuxottica claimed in summary proceedings that GrandVision should provide certain information. That claim was rejected both at first instance and in appeal.

Notably, these summary proceedings were not intended to settle the dispute on GrandVision's compliance with its contractual obligations. That discussion is now in arbitration. The purpose of EssilorLuxottica's summary proceedings was to obtain information which it could use to better substantiate its position in that arbitration. Summary proceedings are ideally suited to these types of information requests.

4.4 Mediaset (2020)

Mediaset S.p.A. (“Mediaset”) and Mediaset España Comunicación S.A. (“Mediaset Spain”) were involved in a proposed merger whereby both companies would merge into the Dutch company Mediaset Investment N.V. (“MFE”). Mediaset holds all shares in the capital of MFE. Finanziaria d’investimento Fininvest S.p.A. (“Fininvest”) is the majority shareholder and Vivendi S.A. (“Vivendi”) is a minority shareholder in Mediaset and Mediaset Spain.

This merger threatened to prejudice Vivendi’s position as a minority shareholder. This was related, among other things, to a loyalty share scheme that would be introduced within MFE and under which Fininvest would obtain disproportionate voting rights. As a result, Fininvest, with a beneficial interest of 35%, would effectively control the general meeting. Vivendi then initiated summary proceedings in an attempt to block the merger. Vivendi’s claim was rejected at first instance, but it was successful in appeal. The Amsterdam Court of Appeal ruled, among other things, that the loyalty scheme at issue was neither suitable nor necessary to achieve its objective of promoting a sustainable and committed shareholder base. Against this background, the Court of Appeal prohibited MFE from proceeding with the proposed merger if - among other things - the contested loyalty scheme would apply after the merger.

The Mediaset case illustrates how far-reaching provisional relief in summary proceedings can be. In this case, Vivendi was able to block an imminent merger. Presumably, Vivendi was not entitled to initiate inquiry proceedings as it did not yet have a (direct) interest in MFE

5. In conclusion

Dutch law offers various possibilities to intervene in ongoing takeover processes through the courts. Going to court can be an important measure to prevent the violation of legitimate interests. Both summary proceedings and inquiry proceedings offer a suitable forum for this. In addition to jurisdiction and admissibility, various legal and strategic considerations may play a role in the choice of the proceedings. Although a similar result can often be achieved in both proceedings through relief, they are essentially different in nature. The nature and scope of the dispute, the intended result and the position of the parties involved (and their risk appetite) play an important role in this respect. Does a party opt for the more limited procedural debate in summary proceedings? Or does that party prefer to rely on the expertise and decisiveness of the Enterprise Chamber in inquiry proceedings, with the risk of a longer process (as an inquiry is ordered) and less predictability? These are relevant considerations for a party faced with such a choice.

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