

Arbitration & ADR - Netherlands

Enterprise Court sets aside arbitration clause

Contributed by [Hogan Lovells International](#)

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If parties have agreed to arbitration, the court should in principle declare that it lacks jurisdiction. The Enterprise Division of the Amsterdam Court of Appeal ('Enterprise Court') has ruled once again that inquiry proceedings are not arbitrable.⁽¹⁾ The Enterprise Court held that inquiry proceedings, as well as the related possibility to impose interim measures, fall within its exclusive jurisdiction.

Facts

Kobalt had two shareholders, both of which held 50% of its share capital. Article 26 of Kobalt's articles of association provided for arbitration as a means of dispute resolution, to the exclusion of the courts.

In 2011 the shareholders fell out with one another. The general meeting of shareholders was intentionally blocked and the parties reached a deadlock.

Proceedings

One shareholder applied for an inquiry before the Enterprise Court in order to obtain insight into the company's affairs and redress certain issues.

Inquiry proceedings involve a court-approved investigation into the affairs of a company. An inquiry may be ordered by the Enterprise Court if there appear to be well-founded reasons to doubt the company's policies and conduct.

If the Enterprise Court concludes that the company has been subject to mismanagement, a shareholder may request the Enterprise Court to:

- suspend or prohibit resolutions of the managing directors, supervisory board, general meeting or any other constituent body of the company;
- suspend or dismiss directors or supervisory board members;
- appoint temporary directors or supervisory board members;
- order temporary derogation from specific provisions of the articles of association;
- order the temporary transfer of shares to a court-appointed trustee; and
- order the winding-up of the company.

The Enterprise Court cannot issue an order to pay damages. Claims for damages must be filed in separate proceedings.

During the course of the inquiry proceedings, the Enterprise Court may order interim measures if it deems them necessary in light of the conditions of the company or the interests of the inquiry. Interim measures include:

- suspension or dismissal of directors or supervisory board members;
- appointment of temporary directors or supervisory directors;
- temporary derogation from the articles of association; and
- temporary transfer of shares to a court-appointed trustee.

These interim measures will be ordered for the duration of the proceedings.

Decision

The other shareholder of Kobalt argued that the Enterprise Court should declare that it lacked jurisdiction, because the parties had agreed on arbitration as the dispute resolution mechanism. The

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Enterprise Court rejected this argument, ruling that its powers with regard to inquiry proceedings cannot be transferred to an arbitrator, as these powers can directly intervene in the "corporate order" (2) (eg, its ability to suspend or nullify decisions of the management board or general meeting of shareholders as interim measures, and to order the winding-up of the legal entity).

Comment

The Arbitration Act stipulates what is and is not arbitrable.(3) Generally speaking, matters of public policy are not arbitrable (eg, decisions that have *erga omnes* (towards all) effect). The legislature has left it to case law and literature to develop further what can and cannot be resolved through arbitration.

In this judgment, the Enterprise Court underscored once again that inquiry proceedings cannot be brought before an arbitral tribunal. However, legal scholars and practitioners have argued that inquiry proceedings should also be conducted in arbitration, as arbitration is more flexible. Another argument for inquiry proceedings in arbitration is that most interim measures do not have *erga omnes* effect and can therefore also be issued in arbitration. Other scholars and practitioners, however, have argued that allowing for inquiry proceedings in arbitration violates the nature of inquiry proceedings. On the basis of the law, a broader group of stakeholders has access (as interested parties) to inquiry proceedings before the Enterprise Court. Not all stakeholders will be party to the arbitration clause; this means that the jurisdiction of the Enterprise Court cannot be fully contracted out.

Shareholders should be aware that the Enterprise Court has once again highlighted that inquiry proceedings are not arbitrable, and that it has sole jurisdiction over these matters. An arbitration clause does not offer sufficient protection against the exclusive jurisdiction of the Enterprise Court.

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Endnotes

(1) Amsterdam Court of Appeal, September 4 2014, nr 200.148.623/01 OK, ECLI:NL:GHAMS:2014:3738. Although this subject has previously been addressed (for further details please see "[Right to enquiry into company's policy and affairs is not arbitrable](#)"), it is worth revisiting in light of this recent decision.

(2) The Enterprise Court reiterated its decision in *Habour Antibodies* (October 18 2012, JOR 2013/8) and *MPS28/Staat holding – Staat Creative Agency* (October 24 2013, JOR 2014/159).

(3) See Article 1020 of the Dutch Code of Civil Procedure.

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