CHAPTER 10 – THE NETHERLANDS

I. General framework

Introduction to Dutch shareholders agreements

1. The purpose of shareholders' agreements ("**SHA**" or "**SHA's**" in plural) has been described elaborately in earlier chapters. Summarized, Dutch SHA's do not differ from their e.g. German or UK counterparts in purposes. Most Dutch SHA's nowadays are heavily influenced by their Anglo-Saxon cousins, from legal language to its 'skeleton' and lay-out. As an innominate contract (*onbenoemde overeenkomst*) SHA's do not have an individual statutory basis under Dutch law, but are governed by the Dutch Civil Code ("**DCC**"). In addition to the articles of association SHA's provide rules between shareholders and, in the Netherlands, regularly also for the target company if it is a party to the SHA. In this Chapter we will focus on SHA's which are drafted for shareholders of a private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid*) incorporated under Dutch law (referred to below as "**BV**" or "**BV's**" in plural) which is the most used legal person by companies and investors. For the sake of completeness, please note that in rare cases, shareholders of a public company with limited liability (*naamloze vennootschap met beperkte aansprakelijkheid*) could also enter into a SHA if the shares of the public company are not listed.

2. This Chapter aims to provide the reader – a legal professional – with an overview on Dutch law on SHA's and a practical guideline how to use and interpreted a Dutch SHA. In this context we provide a short introduction to the BV and its corporate bodies, provide an update on Dutch Private Company Law and describe the position a SHA currently has in relation to the articles of association of a BV. In the third paragraph we will focus on customary clauses which arise in Dutch SHA's. In the fourth paragraph we discuss the enforceability of Dutch SHA's and remedies in case a shareholder dispute occurs.

II. The SHA and Dutch Law

BV and its actors

3. Most BV's have at least two mandatory corporate bodies, being the Board of Directors ("**BoD**") and the General Meeting. Bigger companies with a full statutory two-tier board or companies with certain types of shareholders or investors (such as private equity investors) also have a Supervisory Board (*raad van commissarissen*) who supervises the policy of the BoD and the day-to-day business of the company. Per 1 January 2013 the Private Company Law Act also provides the possibility of a one-tier board which combines both executive and supervisory duties in one management corporate body with executive and non-executive members. A one tier board is stipulated in the articles of association. Other parties possibly

affected by provisions in the SHA's are the BV itself, management who hold an interest in the BV, a Working Council and subsidiaries of the BV.

Before and after the Flex BV Act

4. As a legal person, the BV is similar to a German GmbH (*Gesellschaft mit beschränkter Haftung*), an English or Irish Ltd. (*private limited company*) or a French SARL (*Societe a Responsabilite Limitee*). BV's are incorporated for one or more purposes e.g. tax purposes or to limit liability. Traditionally, the articles of association of the BV mainly provide rights and obligations regarding the governance of the BV. But since 1 October 2012, due to the Private Company Law (Simplification and Flexibilisation) Act (also known as the Flex BV Act), it is possible to organise the capital structure of BV's much more flexibly. The Flex BV Act provides to shareholders the possibility to include obligations and rules in the articles of association which were once the exclusive domain of SHA's. Summarized, the main amendments were:

   i) there is no longer a minimum capital requirement (previously EUR 18,000) to incorporate a BV;
   ii) share capital may be denominated in a currency other than the Euro;
   iii) non-voting shares and shares without the right on profit can be issued;
   iv) individual shareholders can be awarded voting rights on a much more customised basis in which some shares e.g. can carry more votes;
   v) direct appointment rights (for example with regard to directors and supervisory directors) attached to certain classes of shares;
   vi) qualitative requirements for shareholders (such as being a party to a SHA);
   vii) instruction right for shareholders (notwithstanding the duty of the BoD to act in the best interest of the company); and
   viii) the possibility to include a provision in the articles of association to the effect that, as a consequence of default under contractual obligations the rights of the defaulting shareholder such as voting and profit entitlement may be suspended.

   Other amendments provided the possibility to include provisions in the articles of association which previously were only included in SHA's, such as lock-up, tag and drag along and other obligations of a contractual nature. However, please note that '*incorporation by reference*', by which is meant a reference to a SHA included in the articles of association, is not allowed by Dutch law.[1] This rule prevents future shareholders from being automatically bound by rights and obligations which possibly could not have been known to them before acquiring the shares. Despite this rule, due to the flexibility in designing tailor-made articles of association, many legal experts expected that SHA's would become less used by shareholders. After all, it is now possible to shape the BV and all thereto related arrangements in a manner which addresses the requirements and rules preferred by parties from different jurisdictions. But more than five years later, we can draw the conclusion that

[1] There are some dissenting and nuanced opinions about this aspect in specialist literature, but the general accepted rule is that incorporation by reference is not allowed.

this is not the case. The average BV still uses a rather standard set of articles of association accompanied by a separate SHA applicable to the shareholders and – to an increasing degree – also the BV itself.

SHA or articles of association?

5. There are two main reasons why SHA's are still widely used in the Netherlands: i) confidentiality, and ii) amending SHA's is less time consuming and cheaper than amending articles of association. The articles of association are filed with the Chamber of Commerce and made publicly available by the Trade Register. Anyone could download a copy of the articles of association and e.g. find out which formula is used to calculate the value of shares. Unlike in the UK for example, shareholders of a BV are not obligated to file a copy of the SHA with the Trade Register of the Dutch Chamber of Commerce (similar to the Companies House under UK law) if it contains any relevant terms which are not contained in the articles of association. Furthermore, only the General Meeting of the BV (of shareholders or others entitled to attend the meeting such as certain holders of depository receipts on shares) can decide to amend the articles of association and the civil law notary has to notarize such a decision. Just like under German law, amending the articles often requires a General Meeting's resolution with 75% of the votes cast and/or a resolution of the General Meeting with a majority of at least 75% of the entire issued capital of the company present or represented in the passing of the resolution. Therefore even when certain common SHA clauses, such as lock-up provisions, could be included in the articles, these are still preferably included in the SHA's. Compared to amending a SHA, which simply needs consent of *all* parties to the agreement, amending the articles of association is quite cumbersome.

6. Other reasons to choose SHA's over articles of association are:

   i) Non-company related matters can also be included in the SHA;
   ii) Including arrangements which are, or may be in conflict with the statutory provisions or articles in association, which in some cases can even set aside mandatory law unless this is not acceptable according to the standards of reasonableness and fairness.[2]

7. However, there are some good reasons to choose articles of association over a SHA. The provisions included in the articles of association are binding on third parties (*goederenrechtelijke werking*), and acts in breach of the articles of association are void (for example a transfer of shares in violation with the articles of association) and in some cases voidable (if a party acts in violation with a decision making rule). It is self-evident that the articles of association are automatically binding for later acceding shareholders. SHA's are,

[2] Deviation from provisions in the law containing behavioral norms by contract is not possible; examples of these provisions may be the proper performance of tasks by the directors section 2:9 DCC and the obligation to act reasonably and fair section 2:8 DCC.

in principle[3], only binding on parties to the SHA and acting in violation with a provision under the SHA only leads to a breach and in some cases tort.[4] In such cases the injured party can demand performance under the SHA or is entitled to compensation. The protection under the articles of association goes further than protection under a SHA. This means that including shareholders' arrangements in the articles of association could especially provide more protection for *minority* shareholders than SHA's. By contrast, a majority shareholder may well be best of keeping the articles of association as light as possible, relying on its majority shareholder position where possible.

8. In practice, the SHA remains an important instrument in addition to the articles of association. In most cases the provisions in the SHA will be more tailored to the wishes of the parties than the articles of association, which are usually standard templates of civil law notaries. Before drafting the articles of association and/or a SHA, parties should ascertain if they wish to keep their arrangements private, if they wish to have their arrangements applicable to third parties and whether the statutory sanction regime is necessary to enforce the arrangements between parties (void and voidable vs. damages and action for performance). Whatever parties choose, in order to prevent interpretational issues between the SHA and the articles of association, we recommend to align the SHA with the articles of association as much as possible. In order to prevent conflicting provisions between articles of association and SHA's, it is standard practice for parties to include a provision in a SHA that it will prevail over the articles of association. An example of such a clause would be:

> "*The Parties agree that in the event of any conflict between the provisions of the Articles of Association of the Company and this Agreement, the provisions of this Agreement will prevail to the fullest extent possible. Without prejudice to the generality of the foregoing, the Shareholders acknowledge and agree that some of the arrangements included in the provisions of this Agreement are different from the transfer restriction Article in the Articles of Association of the Company. This deviation, however, is expressly agreed and accepted by the Shareholders in their mutual contractual relations as established through this Agreement. The Shareholders hereby agree to act in accordance with the provisions of this Agreement and to co-operate in the effectuation of any transaction in accordance with the provisions of this Agreement. In particular, each of the Shareholders agrees to waive any rights under the Articles of Association of the Company to the*

[3] There are some exceptions and nuances, for example when a BV is a joint venture company but not a party to the SHA (in that respect also known as a joint venture agreement). In that event the BoD of the company shall also be required to keep the purpose of the company in mind, which is laid down in the joint venture agreement, in order to serve the company's best interest. See also Supreme Court 4 April 2014, *NJ* 2014/286 (*Cancun*).

[4] According to the explanatory notes to the Flex BV Act, the statutory provisions do not prevent the articles of association from stipulating that the non-compliance with a SHA is sanctioned with the suspension of shareholders' rights. This means that non-performance under the SHA could lead to suspension of shareholders rights.

extent such waiver is necessary to procure that the provisions of this Agreement may be applied in such manner as is described herein."

Applicable regimes SHA's

9. A user of Dutch SHA's should be aware of the different statutory regimes applicable to articles of association and SHA's. The articles of association are governed by Book 2 DCC (*Company Law*), and SHA's are governed by Book 2, Book 3 (*Law of Property, Proprietary Rights and Interests*) and Book 6 DCC (*General Part of the Law of Obligations*). The importance of Book 2 DCC for SHA's is mainly limited to article 2:8 DCC, which introduces the principle of reasonableness and fairness in Dutch Company Law (see par. 12 hereafter). We will therefore first focus on Book 3 and Book 6 DCC.

10. SHA's governed by Dutch law are concluded by offer and acceptance in an oral or written form. Both during the pre-contractual phase[5] and after concluding a SHA, the parties must act towards each other in accordance with the requirements of good faith included in Dutch law in section 6:2 DCC (for obligations) and 6:248 DCC (for obligatory agreements), a Dutch legal doctrine also known as *contractual* 'reasonableness and fairness' (*redelijkheid en billijkheid*). This means that, although parties may primarily pursue their own interests, a party may not entirely disregard the justified interests of the other party. In general, all agreements under Dutch law might have, depending on the nature of the agreement, additional legal effects which are based on i) Dutch law itself (e.g. reasonableness and fairness and good faith which is 'coloured' by Dutch case law) and ii) customary practice. When explaining this doctrine to foreign clients or fellow lawyers, especially from the USA or the UK, a small moment of panic or disbelief appears to happen. How can you know for sure which rights and obligations exist under an agreement governed by Dutch law? Please note that the 'additional effects' are not common and most additional effects have been already dealt within the agreement itself. A Dutch SHA may be well concluded orally[6], but for obvious reasons we cannot recommend that. Just like in other jurisdictions, freedom of contract forms the basis of Dutch commercial law. Parties may even choose to draft the SHA in a foreign language other than Dutch or English, which we would not advise for practical reasons. It is even possible to declare foreign law applicable on a SHA related to a Dutch BV, although this is also not recommended.[7] However, there are some limitations to the validity of a SHA. Agreements that violate public morality or public policy or which violate Dutch mandatory law are null and void (section 3:40 DCC).[8] Furthermore, parties should also be aware of stipulations which restrict competition and infringe the cartel prohibition (European Competition Law and the Dutch Competition Act) on the penalty of being null and void.

---

5 Supreme Court 15 November 1957, *NJ* 1958/67 (*Baris/Riezenkamp*).

6 Please note that exceptions may apply for certain agreements, such as an arbitration agreement or clause which is required to be recorded in writing to be valid under Dutch law.

7 Parties should take article 9 Rome I into account which, in short, provides that Dutch mandatory rules may still be applicable on SHA's governed by another jurisdiction within the EU.

8 If the violated statutory provision is only meant as protection of one of the parties the contract is only voidable.

Interpretation of SHA's

11. In the Netherlands (commercial) agreements such as SHA's and their clauses are interpreted according to a set of criteria provided by the Supreme Court in 1981, in a landmark case named 'Haviltex'.[9] According to these criteria for the explanation and interpretation of a contract or its provisions. not only its wording is of relevance but also the parties' statements and conduct *before* the conclusion of the agreement, *even* if the circumstances[10] justify great significance being given to the contractual wording chosen by the parties. In summary: the meaning of the language in the agreement is not always determinative or decisive. The Supreme Court later confirmed, applied and nuanced the Haviltex-criteria several times.[11] Professional parties in the Netherlands have since tried to limit the scope of interpretation by e.g. including 'entire agreement' clauses, but in 2013 the Supreme Court decided such a clause would not automatically change or set aside the interpretation method according to the Haviltex-criteria.[12] The decisive factor remains what meaning the parties could reasonably attach to those provisions in the given circumstances and what they could reasonably expect from each other in that respect. Please note that in case of a detailed commercial contract that has been negotiated between professional parties assisted by lawyers, the linguistic meaning or grammatical interpretation of the wording of a contract still carries substantial weight. This common practice of Dutch courts, where they search for the most probable and reasonable interpretation, differs from e.g. UK courts which may strike out the contested clause completely if it finds that a contractual term is (too) unclear. In order to ascertain the meaning of a certain clause in a SHA, it is advisable to keep all mark-ups including comments and thereto related correspondence in file, which might help interpreting the respective clause.

Section 2:8 DCC – reasonableness and fairness in Dutch Company Law

12. In paragraphs 4 - 8, we already shortly pointed out that a SHA may even deviate from statutory law and articles of association to a certain extent.[13] Especially section 2:8 DCC is an important provision for Dutch SHA's, which is translated as follows[14]:

> "*Section 8 Book 2 DCC*
>
> *1. A legal person and the persons who by virtue of the law and its articles* [of association]*, are concerned with its organization must, in such capacity, conduct themselves in relation to each other in accordance with the dictates of reasonableness and fairness.*

---

9 Supreme Court 13 March 1981, *NJ* 1981/635 (*Haviltex*).

10 Such circumstances are e.g. but not limited to the nature, content, purpose and degree of detail of the agreement containing the clause, the manner in which the clause was discussed during the negotiations, the professionalism of either party and whether parties have received professional advice.

11 For example: Supreme Court 20 February 2004, *NJ* 2005/493 (*DSM/Fox*), Supreme Court 19 January 2007, *NJ* 2007/575 (*MeyerEurope/PontMeyer*) and Supreme Court 29 June 2007, *NJ* 2007/576 (*Derksen/Homburg*).

12 Supreme Court 5 April 2013, *JOR* 2013/198 (*Lundiform/Mexx*).

13 See footnote 2.

14 Translation by mr. M.W. Josephus Jitta (01-11-2016) in *"Warendorf Legislation Article 8 CC Bk 2"*.

2. *A rule which binds them by virtue of the law, custom, the articles, by-laws or a resolution shall be inapplicable to the extent that, in the circumstances, it is unacceptable according to standards of reasonableness and fairness."*

(Underlining added by the author)

Section 2:8 DCC is also referred to as the *company* ´reasonableness and fairness' rule, aside the aforementioned sections 6:2 and 6:248 DCC. Alongside statutory provisions and the articles of association, reasonableness and fairness shape the internal relations of a company. Section 2:8 DCC provides a starting point for that. Section 2:8 subsection 1 DCC provides for a general rule of behavioural conduct (additional effect of the principle of reasonableness and fairness, in Dutch: *'de aanvullende werking van de redelijkheid en billijkheid'*), whereas subsection 2 provides for a possibility to set aside a rule which binds 'them' by virtue of the law, custom, the articles, by-laws or a resolution if this rule is deemed unacceptable given the facts and circumstances (the restrictive effect of reasonableness and fairness, in Dutch: *'de beperkende werking van de redelijkheid en billijkheid'*). The criterium in subsection 2 is more stringent, since it requires a rule to be 'unacceptable'. Section 2:8 DCC does not provide specific points of reference which substantiate the company reasonableness and fairness and is mainly substantiated by case law. The starting point for applying the (company) reasonableness and fairness rule is section 3:12 DCC, which gives substance to what reasonableness and fairness require: one must take into account generally recognized legal principles, the legal beliefs in the Netherlands and the social and personal interests involved in the given case. Case law related to section 2:8 BW is therefore highly casuistic or self-justifying.

13. The section 2:8 DCC is important to Dutch SHA's, because it can limit the (contractual) freedom of shareholders and other parties to the SHA and may even set aside rules in the SHA (subsection 2). It is also called the cornerstone of the protection of minority shareholders rights.[15] For example, a shareholder is required to take all aspects and stakeholders into consideration before bringing out a vote to adopt a shareholders' resolution related to the distribution of profits. A majority shareholder could e.g. violate the justified interests of a minority shareholder by blocking distribution of dividends. If a shareholder does not take the reasonableness and fairness into account in such situations, a judge might decide to annul the shareholders resolution blocking the distribution of dividends ex section 2:15 subsection 1 sub b DCC. Furthermore, acting contrary to the principles of reasonableness and fairness may qualify as mismanagement (*wanbeleid*) as a result of which affected parties such as other shareholders or the BV could request the Enterprise Chamber of the Court of Appeal in Amsterdam (a specialized court for internal

[15] De Kluiver, "*The European Private Company? A Dutch Perspective, in: The European Private Company?*", De Kluiver, Van Gerven (eds.), Antwerp 1995, p. 122 ff.

corporate disputes) to initiate enquiry proceedings.[16] Also, it may affect the outcome of other forms of dispute resolution.[17]

14. A relatively recent development in Dutch case law (lower courts) is the 'corporate effect' (*vennootschappelijke doorwerking*) that a SHA might have on the corporate relations within a BV.[18] In case the corporate effect of a SHA is assumed, acting in violation with 2:8 DCC by one or more shareholders can lead to voidable (ex 2:15 subsection 1 sub b DCC) shareholders resolutions. Corporate effect is assumed when all shareholders are party to the SHA and one of the shareholders votes in violation of the SHA.[19] Each of the shareholders and the General Meeting (consisting only of the two shareholders) are required to respect the arrangements in the SHA, unless this is deemed unacceptable according to section 2:8 subsection 2 DCC and/or 6:248 subsection 2 DCC. In short, the current consensus in the Netherlands seems to be that corporate effect can only be assumed in so far as the corporate effect was intended (by shareholders). This intention could be derived from several circumstances. Although corporate effect is assumed when the BV is party to the SHA[20], some authors in Dutch specialist literature argue that a BV is not *required* to be a party at the SHA.[21] In conclusion, if a shareholder wants to enforce a SHA in court, it would be wise to take into account the fact that – depending on the facts and circumstances of the case – a court might decide i) to set the SHA aside due to the restrictive effect of the reasonableness and fairness, and ii) that the SHA has corporate effect and that the respective resolutions taken in violation with the SHA are void.

Joint venture agreements and 2:8 DCC

15. The diligent reader may already have concluded that joint venture agreements strongly resemble Dutch SHA's, but a joint venture can be incorporated in other (legal) persons as well, such as Dutch limited partnerships (*commanditaire vennootschap*) or a general partnership (*vennootschap onder firma*), whereas SHA's are only concluded regarding BV's or (rarely) NV's. Please note that if parties incorporate their joint venture in a general or a limited partnership, the Dutch Commercial Code is applicable which could materially influence tax, governance and liability aspects. For now, we will only discuss joint venture agreements related to BV's.

16. The interpretation of joint venture agreements is similar to that of SHA's (see par. 10 before). But beware that the character of a joint venture agreement might have some

---

16 See par. 33 and further hereafter.

17 Ibid.

18 The corporate effect rule is in contradiction with longstanding legal rules provided by the Supreme Court halfway the 20th century (see par. 21 and further). It would be interesting to see whether the Supreme Court would confirm its decision today.

19 Mr. J.M. Blanco Fernández, "*Vennootschappelijke werking van stemovereenkomsten*", OR 1999/6, p. 148 e.v.

20 District Court of The Hague 1 August 2012, *JOR* 2012/286 (*Vanka-Kawat*).

21 R.G.J. Nowak, "*Rechtsgeldigheid en doorwerking van buitenstatutaire governance-afspraken*", WPNR 7014/145, p. 342.

influence on the interpretation. Joint venture partners have a partnership in mind, do business together via the joint venture (the company) and this partnership is generally based on equality. Therefore, the partnership between the joint venture partners (shareholders) is somewhat different than normal. In a relatively recent judgment, the Supreme Court noted that the relationship between the meddling shareholders had been disrupted because one of the three shareholders had transferred its shares to its co-shareholder without informing the third shareholder.[22] As a result, the acquiring shareholder acquired a majority interest, while the joint venture was once set up on the basis of equality. Pursuant to the articles of association and the SHA, the shares were freely transferable so no article or clause was violated. However, the Supreme Court decided that the actions of the transferring shareholder and the acquiring shareholder were in violation with the (corporate) reasonableness and fairness ex section 2:8 DCC regarding the third shareholder. In summary: the Supreme Court explained that a joint venture agreement (a SHA[23]) in which the purpose of the joint venture company is included gives substance to the reasonableness and fairness shareholders have to observe in respect to each other. The reasonableness and fairness has to be observed which makes it necessary to pay attention to due process and transparency, despite the absence of provisions to that effect. The judgment also confirms that acting in conflict with the (purpose of) SHA might have corporate effect on the decision making within a company.

Applicable regime articles of association and interpretation

17. In the Netherlands Book 2 DCC (*Company law*) provides standard requirements for the articles of association which form the starting point for the template articles of association civil law notaries use. As mentioned earlier, its mandatory nature follows from section 2:25 DCC, which states that the provisions of Book 2 may only be deviated from to the extent allowed by the respective provision. Given their nature, the fact that their content is relevant not only to the company's founders but also to third parties, the articles of association would be most likely interpreted via the grammar or linguistic interpretation and not (primarily) according to the Haviltex-criteria. The objective criteria in the interpretation of the articles of association should in principle be leading since third parties outside the corporate relations also depend on the provided language in the articles of association. However, in a case where the articles of association concerns a cooperation between two legal persons that has been substantiated in the form of a company, while both founders were involved in establishing the company, including the articles of association, and in which the dispute regarding the interpretation is in fact also between these founders, it is likely that more emphasis is placed on the mutual intentions of parties and thus on the Haviltex-criteria.[24]

III. Contents of SHA's

[22] Supreme Court 4 April 2014, *NJ* 2014/286 (*Cancun*).
[23] The Supreme Court referred to the joint venture agreement in its consideration as a SHA.
[24] Court of Appeal Arnhem-Leeuwarden 20 March 2018, ECLI:NL:GHARL:2018:2640 (*Apotheek Eemnes*).

18. The contents of a SHA in respect of a BV depends on several circumstances, such as the identity of the shareholders, the relation between the shareholders and the objectives of their relationship as well as the business and the objectives of the BV governed by such SHA.

19. Common arrangements included in SHA's are:

    a. Business and objectives of the BV;
    b. Share capital, voting arrangements, dividend policy and respective shareholdings;
    c. Capitalization, (future) funding, anti-dilution and financing;
    d. Governance of the BV (including the composition of the board of directors and, if applicable, the supervisory board and arrangements regarding the decision making of the board of directors, the shareholders' meeting and, if applicable, the supervisory board);
    e. Reporting to the shareholders;
    f. Exit mechanisms (including mandatory offering, rights of first refusal, drag- and tag-along rights and if applicable, good- and bad leaver clauses);
    g. Transfer restrictions such as lock-up provisions and transfer requirements;
    h. Power of attorney (to act on behalf of offering shareholder);
    i. Minority protection (e.g. veto rights, anti-dilution, etc.);
    j. Deadlock mechanism;
    k. Restrictive covenants;
    l. Confidentiality;
    m. Termination;
    n. Non-competition and non-soliciting;
    o. Resolution of disputes; and
    p. Boiler plate clauses.

    Most of the above topics in a SHA have been mentioned in other Chapters. In this paragraph, we will focus on the following topics due to their special nature or place in Dutch law: i) voting arrangements or agreements, ii) governance and information rights, iii) dividend policy and iv) dispute resolution.

    Voting arrangements / agreements

20. Voting agreements serve several purposes, from avoiding a deadlock to creating a majority vote in the General Meeting e.g. against a majority shareholder. In general, voting agreements or arrangements between shareholders are included in SHA's, but they are also quite common as standalone agreements in mergers and acquisitions; with voting agreements shareholders can exert pressure on directors and supervisory directors or voting agreements are entered into with third parties who wish to influence the governance of the company, such as potential acquirers of the company.

21. In 1944 the Supreme Court of the Netherlands acknowledged for the first time the validity of the voting agreement.[25] Before the ruling of the Supreme Court in the Wennex-case, there was uncertainty in Dutch specialist literature about the admissibility of voting agreements. The Supreme Court ruled that although a voting agreement obliges the shareholder to exercise his vote in a prescribed manner, the SHA did not set aside the shareholder's statutory rights and its rights based on the articles of association. The shareholder was allowed to exercise his vote in conflict with the SHA it was party to. The ruling included two important points: i) a voting agreement is in principle valid under Dutch law, and ii) a voting agreement has *no corporate effect*. Meanwhile the latter point appears to have been superseded by several case law of lower courts (see par 14 and 24 hereafter).

22. In the case Melchers[26], the Supreme Court ruled on a case in which the majority of the shareholders had committed to vote in accordance with the result of a preliminary meeting to the General Meeting. The reason for this arrangement was to prevent one or more majority shareholders from cooperating with minority shareholders so as to change the character of the company. To that end, the voting agreement provided for, among other things, penalties, periodic penalty payments and a perpetual clause. The minority shareholders tried to impair the agreement and argued, inter alia, that the onerous clauses would make it impossible to vote at their own discretion if that information deviated from the outcome of the preliminary meeting. But the Supreme Court confirmed its previous opinion in Wennex and added that that Dutch law does not obligate shareholders to use their right to vote or to attend the general meeting of shareholders and that Dutch law allows them to appear and vote by a representative. This suggests that the Supreme Court does not attach much significance to the General Meeting as a place for consultation or deliberation. The following year the Supreme Court confirmed the Wennex-rule in the Aurora-case once again by deciding that parties are even allowed to vote according to instructions of a third party, and decided that the company benefitted from the shareholders who cast their votes in violation with the voting agreement.[27]

23. It is clear that voting agreements are allowed under Dutch law, but then the question arises to what extent is it allowed? In the following situations a voting agreement may not be valid: in case voting rights have been sold, a voting agreement in which the Board of Directors or Supervisory Board of the company imposes shareholders how to cast their vote, a voting agreement which is aimed at impairing or frustrating the statutory rules and articles of association regarding the decision making in the General Meeting (as stated in par. 22 above), a voting agreement aimed at establishing a decision which is in violation with public morals, public order, Dutch law or articles of association and voting agreements which are in violation with the reasonableness and fairness rule.

---

[25] Supreme Court 30 June 1944, *NJ* 1944/465 *(Wennex).*
[26] Supreme Court 13 November 1959, *NJ* 1960/472 (*Melchers*).
[27] Supreme Court 19 February 1960, *NJ* 1960/473 (*Aurora*).

24. In the cases Wennex, Melchers and Aurora the Supreme Court decided that shareholders are allowed to enter into a voting agreement, notwithstanding their right to cast their vote in violation with the voting agreement. The Supreme Court still has not deviated from its own Wennex-rule but, as stated in par. 14 above, nowadays it is assumed that in some cases voting agreements (most likely included in a SHA) have corporate effect, which means that votes cast in violation with a SHA might be – under certain circumstances – voidable and according to some authors perhaps even void.[28]

Governance and information rights

25. The governance of the company strongly depends on the articles of association and the content of the SHA. In that respect, the SHA contains usually more details on the governance of the company. The interplay of forces within the company depends on the independence of the company, the voting rights of the shareholders in the General Meeting and the extent to which shareholders are (or appointed) a board member in the BoD or the Supervisory Board. The BoD is responsible for all day-to-day affairs and is primarily obligated to serve the best interests of the company (stakeholders model as opposed to the shareholders model). If a Supervisory Board is installed, the SHA usually contains a list of board decisions for which the Supervisory Board must give its prior approval or advice. Approval and advice rights go hand in hand with information rights. In general, shareholders have less information rights regarding the day-to-day business than the Supervisory Board. The key is to include information rights and a list of 'reserved matters' for shareholders in the SHA, especially for minority shareholders, without burdening the BoD with too many obligations. Common practice is to take into account the following aspects of governance and information rights when drafting a SHA[29]:

i) Which powers are distributed to which corporate body, especially the relationship between the BoD and the General Meeting;
ii) The composition of the corporate bodies, especially the members of the BoD or the Supervisory Board;
iii) Clear rules on the appointment, suspension and dismissal of members of the BoD or the Supervisory Board;
iv) Rules on decision making, including requirements for meetings and recording, voting rights (see par. 20 - 24 above), majority thresholds on votes and quorums.

In order to *maintain* a balanced governance, we advise a review of the SHA every time a significant change in the corporate structure is proposed.

[28] District Court of The Hague 1 August 2012, *JOR* 2012/286 (*Vanka-Kawat*); District Court Amsterdam 16 January 2014, *JOR* 2014/157 (*Kekk/Delfino*) and Court of Appeal 13 January 2015, ECLI:NL:GHAMS:2015:55 (*Kekk/Delfino*).

[29] B.F. Assink | W.J. Slagter, "*Compendium Ondernemingsrecht (Deel 2)*", Deventer: Kluwer 2013, par. 116, p. 2296.

26. We have seen many shareholders disputes related to issues directly or indirectly caused by the absence of a balanced and fair distribution of rights and obligations regarding the governance. Information rights are especially important to minority shareholders. For example, a minority shareholder who is being squeezed out by a majority shareholder would typically require financial information of the company (provided by the BoD) in order to calculate the value of its shares in the company. If the majority shareholder also appointed two out of three board members of the BoD, the chances are that the required information will not freely provided by the BoD. The two board members might face dismissal by the majority shareholder if they act against the wishes of the majority shareholder by providing the requested information to the minority shareholder. From the perspective of a majority shareholder who appoints (a majority of) the BoD it could be desirable to leave out a list of reserved matters and blocking votes to keep the governance of the company in the hands of the BoD and as lean and mean as possible, and stipulate that only for transactions above a certain financial threshold the BoD requires the prior consent of the General Meeting.

Dividend policy

27. With the introduction of the Flex BV Act, a dividend distribution test was included in section 2:216 subsection 1 DCC partly inspired by case law of the Supreme Court and Courts of Appeal regarding the liability of directors. Many older articles of association and SHA's still refer to the 'old' provisions no longer in force, whereas the relatively new section 2:216 DCC is mandatory law. This means that older SHA's and articles of association might be non-compliant. In this paragraph we highlight the most important points regarding distribution of dividends under Dutch law. The General Meeting is (in principle)[30] exclusively authorised to resolve, to distribute or otherwise assign the profits that have been determined by the adoption of the annual accounts, as well as to resolve to other distributions of assets. The General Meeting is allowed to resolve and/or to make a distribution only when the company's equity exceeds the financial reserves required by law or the articles of association at the actual moment of distribution. This is called the "*balance sheet test*" (*balanstest*). Following a positive balance sheet test, the BoD has to approve the dividend distribution resolution in a separate resolution. The BoD is only allowed to refuse or approve a proposed distribution if it knows or should reasonably know that the company cannot pay its due and payable debts after making the proposed distribution. Again, the reference date of this dividend payment test (*uitkeringstoets*) is the actual moment of payment. In short, there are two consequences failing these tests (clawback): i) the BoD may be hold jointly and severally liable towards the company for the deficit caused by the respective payment, and ii) the shareholders may also be jointly and severally liable towards the company for the deficit caused by the respective payment, but for a maximum amount which the respective shareholder has received under the distribution. Since section 2:216 DCC is mandatory law, and actually protects both creditors and the company, so parties are not allowed to deviate from the statutory rules with a few exceptions. It is possible to deviate from the statutory

[30] Parties may deviate from this rule in the articles of association which can designate another corporate body to be authorized.

allocation by providing for a different allocation in the articles of association of the company. Deviation from the statutory allocation in a SHA is not allowed.

Dispute resolution

28. A dispute resolution clause is one of the most important arrangements in a SHA, in situations that the relationship between stakeholders of the company (not limited to shareholders only, for example if the company is also party to the SHA) are under pressure. Not every form of dispute resolution is recognized as such in the Netherlands, such as clauses which solve deadlock situations.[31] Classic forms of dispute resolution in the Netherlands, which are also most common, are: a) mediation, b) arbitration, c) a binding third party ruling (*bindend advies*), and d) judgment by the competent District Court. If parties wish to settle their dispute in aforementioned ways, the parties have to explicitly agree in a specific method of dispute resolution. If parties did not make any arrangements, the competent judge shall be authorized to decide on the matter, unless parties agree to an alternative dispute resolution at a later date. During negotiations dispute resolution clauses are often seen as boilerplate texts, which is a powerful reason why parties usually do not spend much time on these clauses. Although this behaviour is understandable, because in that phase of cooperation parties are usually still in the 'happy flow', it is advisable given the rule of thumb that a dispute between the parties to a SHA rises sooner or later, to spend some time thinking potential future conflicts through. In that context, choosing forms of dispute resolution depends a great deal on the character of the company (e.g. what is the purpose of the company?), its shareholders (professional investors or natural persons?) and what financial stakes are involved.

29. Mediation is fairly new in the Netherlands, but is evolving as a serious alternative to arbitration (par. 31) and binding third party advice (par. 32) given its relatively low costs structure and quick results. Parties usually agree to jointly appoint a mediator which is qualified and registered by the Dutch Mediation Institute ("**NMI**"). These mediators have completed a mediation training recognised by the NMI and are required to keep their knowledge and skills up to date, which is also verified by the NMI.[32] Should parties choose to include mediation as dispute resolution, it is advisable to (jointly) choose an experienced corporate law mediator who is also proficient in dealing with the 'soft' aspects of dispute resolution. This added value makes mediation especially interesting for parties who i) have less experience in dealing with corporate disputes, such as early-stage SME's, ii) are involved in a company driven by one or more members of the same family (family business), or iii) are involved in a company in which the financial stakes are limited and

[31] For example a 'Texas shout-out''-, 'Russian roulette'- or a 'fairest bid'-clause. A 'Texas shoot out'-clause e.g. is a clause in which shareholders oblige themselves i) to make a bid on the shares held by the other shareholder in a specific described event such as a deadlock and ii) the other shareholder accepts this bid or makes an higher offer on the shares held by the other shareholder (the first bidder). Parties repeat this process until a purchase price is accepted by one of the shareholders. Please note that each of the aforementioned shoot out clauses have their own advantages and disadvantages.

[32] For more information please visit: http://mediator.nl/mediation/nederlands-mediation-instituut-nmi-registermediator.html and http://www.nai-nl.org/en/info.asp?id=896.

mediation would be the most cost efficient way forward. In the Netherlands parties sometimes choose for a combination of mediation and a follow up dispute resolution (arbitration or court) in case the mediation was not (entirely) successful. Just like a third party binding advice procedure, a successful mediation ends in a settlement agreement (*vaststellingsovereenkomst*) which can be made enforceable by the competent court if necessary.

30. Dispute resolution by means of an arbitration is often chosen when international parties are involved in a Dutch SHA, because:

i) parties may choose the procedural language (usually in English);
ii) parties may choose arbitrators with the right expertise (not necessarily lawyers but also for example technical or IT specialists);
iii) of the benefit for non-European parties (especially parties based in the US) who might want to choose dispute resolution by arbitrators under the New York Convention arbitration due to the international enforceability of an arbitral award;
iv) the dispute can be dealt with on a confidential basis opposed to judgements by the Dutch judiciary which are – in principle – public;
v) arbitration results in an award by a tribunal that is enforceable at law as opposed to binding advice.

A further advantage can be (but not necessarily) the short duration of the procedure in contrast to Dutch legal proceedings on the merits which in some cases can take several years. Notwithstanding the potential benefits, arbitrations can be quite expensive in cases with a limited financial interest[33] and (therefore) are not always suitable for the parties such as referred to under par. 30 above. Moreover, specialised arbitration lawyers are often required to act on behalf of the parties involved[34], and usually there is no possibility to lodge an appeal against the arbitral award.[35] Furthermore, certain disputes such as the rescission or annulment of shareholders resolutions, fall outside the scope of jurisdiction of arbitrators and fall within the exclusive jurisdiction of the Dutch competent court. The Dutch Arbitration Act is incorporated in the Dutch Code of Civil Procedure ("**DCCP**"), but does not provide for separate rules for international arbitrations unlike for example its French counterpart. Parties can choose from different sets of arbitration rules which have their own procedural rules, but the most common sets of rules used in the Netherlands are the ICC's (International Chamber of Commerce) and NAI's (Netherlands Arbitration Institute) rules.[36] It is not a surprise that foreign parties tend to choose ICC or London arbitration rules,

[33] Please note that the Netherlands Arbitration Institute has a separate arbitral procedure for arbitral proceedings with smaller financial interests: http://www.nai-nl.org/en/info.asp?id=1009&name=Small_claims_arbitration

[34] Please note that engaging an arbitration specialist is not (always) mandatory.

[35] For some parties this aspect might actually be a benefit.

[36] As a quick reference a simple overview of the differences between the ICC, London Court of Arbitration, the UNCITRAL and the NAI rules can be found on the following page: http://www.acc.com/chapters/euro/upload/Vergelijking-ICC-LCIA-UNCITRAL-NAI.pdf

eventually unknown makes unloved, but in our experience the NAI rules provide independent, fast (the NAI also facilitates in summary proceedings) and (cost)effective arbitral proceedings. Parties are advised to explicitly include the possibility of arbitral summary proceedings in SHA's for cases which urgently require a decision, e.g. a decision on a financing obligation of a shareholder towards a company which is in financial distress.

31. Third party binding advice resolution is a procedure in which one or more by parties or a third party appointed advisor(s) determine what applies between the parties at law, in order to prevent any uncertainty or to end an existing or future dispute. Binding advice is based on a contract between parties, such as a SHA, in which they agree in advance to be bound by the decision given by one or more third parties (often experts) who have been appointed by the parties as binding advisers. Just like in a successful mediation procedure, a binding advice results in a decision which is usually laid down in a settlement agreement, which can also be made enforceable by the competent court if necessary. Parties are not bound by a set of rules, but it is advisable to make such an arrangement in advance of a potential conflict.

32. In the Netherlands District Courts have jurisdiction as the court of first instance over all civil and commercial matters. If parties choose a Dutch court for dispute resolution, they generally choose the District Court which is near the statutory seat of the company. The Courts of Appeal rule on appeals against decisions of District Courts (including decisions of the cantonal court) and appeals against Court of Appeal judgments may be lodged with the Supreme Court. On the global rule of law index 2017-2018 of the World Justice Project the Netherlands rank 5th behind the Scandinavian countries and 1st on Civil Justice matters.[37] Dutch courts are well known for their efficient, pragmatic and cost-effective procedural law and Dutch court judgments are amongst the most widely enforceable judgments worldwide. Although alternative dispute resolution such as arbitration appears to be faster, many parties still choose to go to court. The average duration of procedures on the merits (*bodemprocedures*) in commercial disputes is 60 weeks and for summary proceedings in which provisional measures are requested (*kort geding*) 4 weeks.[38] In the Netherlands legal proceedings are relatively cheap, e.g. the court costs of a procedure for claimant and defendant being non-natural persons (e.g. a foreign company), with a financial interest of more than EUR 100,000 (highest category), amounts EUR 3,946 each. With the exception of IP-disputes, the legal costs which the losing party is required to pay to the winning party are fixed at a (very) low rate and do not cover the real legal costs for a party. However, this provides a lower threshold for parties to submit a claim to the court and provides an incentive for the defendant to explore a settlement with claimant since its legal costs are not fully covered. The highest legal costs a party will incur are the fees of its lawyer, which are – generally – also relatively low compared to lawyer fees in the US, UK, Germany and France. A negative aspect of Dutch procedural law for foreign parties is that the procedural language

[37] http://data.worldjusticeproject.org/

[38] Statistics Netherlands (*Centraal Bureau voor de Statistiek*), "*Rechtspleging civiel bestuur 2012"*, Date: 2014.

is Dutch. But since 1 January 2016 parties may conduct civil proceedings in the area of maritime and transport law and the international sale of goods at the District Court of Rotterdam. Currently there is also a bill pending before the First Chamber of the Dutch parliament (Senate) named "The Netherlands Commercial Court Act" ("**NCCA**"). This act is expected to be passed by the First Chamber due 2018 and provides for the use of English as a language of proceedings besides Dutch and to allow the "international commercial chamber" of the Amsterdam District Court and Court of Appeal to deliver judgments in English. The NCCA also provides for other advantages normally reserved for arbitration, such as confidentiality[39] and applying other rules of evidence[40]. With the aforementioned amendments, tailor made for international trade and commercial disputes, the NCC will be a serious alternative for arbitration.

33. In addition to the aforementioned classic forms of dispute resolution, parties need to take into consideration that no matter what means of dispute resolution they have chosen, the company and its shareholders may always choose to address the Enterprise Chamber of the Court of Appeal in Amsterdam. This court is a specialised court and has exclusive jurisdiction in specific corporate proceedings such as "inquiry proceedings" (*enquêteprocedure*). The inquiry proceedings revolves around the question whether there are "good reasons to doubt that the company is being properly managed" *(gegronde redenen om aan het juiste beleid te twijfelen)*. The purpose of the investigation was once provided by the Supreme Court in the OGEM-case[41]: a) curing and reorganizing the company, b) finding evidence of possible mismanagement, c) allocating responsibility for proven mismanagement and d) the prevention of further mismanagement.[42] Summarized, the Enterprise Chamber decides what is in the best interest of the company involved and takes (provisional) measures accordingly. The company itself has the right of inquiry. The company's shareholders also have the right of inquiry if they meet certain criteria.[43] The Supreme Court has ruled that a foreign (indirect) shareholder also has the right of inquiry as long as it meets the criteria and is the (economic) beneficiary.[44] Other stakeholders, as the Supervisory Board, the administrator if the company is bankrupt and parties referred to as such in the articles of association or in the SHA also have the right of inquiry. The right of the Enterprise Chamber to order an inquiry is of a discretionary nature (with a wide margin of discretion) and implies a weighing-up of the interests of the parties involved. It is consistent case law that the Enterprise Chamber regards a deadlock – whether caused by a SHA or not – between shareholders as a good reason to assume mismanagement. Upon request of the requesting party the Enterprise Chamber can order immediate relief measures (*voorlopige*

[39] Section 8.4.2 NCCA.
[40] Section 8.3 NCCA.
[41] Supreme Court, 10 January 1990, *NJ* 1990/466 (*OGEM*).
[42] W.J.L. Calkoen,"*One-Tier Board*", IVOR nr. 85, 2012/4.6.3.
[43] A group of shareholders or a shareholder who holds at least 10% of the issued share capital in the B.V. or the holder(s) of shares or depositary receipts with a total nominal value of at least EUR 225,000.
[44] Supreme Court 29 March 2013, ECLI:NL:HR:2013:BY7833 (*Chinese Workers*).

maatregelen). Although the character of the measures are formally provisional, these measures can have irreversible effects.[45]

IV. Shareholders disputes

Breach of obligations under the SHA and remedies

34. Every SHA provides its own set of remedies in case a party to a SHA breaches its obligations under the contract. Remedies vary from SHA to SHA, but the most common remedies used (provided by the DCC or included in Dutch SHA's) are the rights to:

a. demand performance from the defaulting party;
b. claim (substitutional) damages;
c. claim a penalty fee;[46]
d. claim the shares held by the defaulting shareholder, whether or not in combination with a bad leaver clause (which provides for a lower valuation method to determine the purchase price for the shares) if both the mandatory offer clause and the bad leaver clause was included in the SHA;
e. use an irrevocable proxy provided by each party under the SHA in anticipation of a default event to perform the actions referred to under c) above on behalf of the defaulting party;
f. rescind (*ontbinden*) or annul (*vernietigen*) the SHA (and claim damages) but only if the right to rescind and / or annul were not excluded.[47]

Obviously there are many combinations of these and other remedies possible. As with dispute resolution clauses (see par. 28), parties do not always spend much time discussing or drafting the right remedies for the situation at hand. But without including the right remedies, a SHA is rendered useless against a defaulting shareholder. For example, shareholder resolutions adopted in violation with the SHA are not automatically void unless a court decides contrary to the long-standing case law of the Supreme Court (see par. 14 and 24). In these situations, where acting in breach of the SHA is rewarding for the opportunistic (defaulting) shareholder, the SHA therefore should contain a remedy which at least neutralizes the undesireable behaviour of the defaulting shareholder.

---

[45] The (temporarily) transfer of shares which may affect the governance of the company, the suspension of specific authorities of any corporate body of the company such as voting rights, the suspension of a director and the appointment of a director or supervisory director with special authorities.

[46] We think it is advisable to include the right to demand (additional) damages in case the breach causes more damage than the penalty covers. Please note that in the Netherlands judges have the right to limit penalty fees, this right cannot be exonerated.

[47] Excluding the right to rescind and annul is quite common in transaction documentation, and is even regarded as a boiler plate clause. However, in some cases the right to rescind or annul could prove useful. If the right to rescind and annul is not excluded, we think it is advisable to limit these rights to specified default events (material breach of contract).

Situations when the SHA is not enforceable

35. SHA's or SHA clauses which do not violate public morality or public policy or which violate Dutch mandatory law are in principle enforceable. The next limitation in enforceability is provided by section 2:8 DCC, as discussed in par. 12 and 13. In one of the important cases regarding SHA's in recent years, the Amsterdam Court of Appeal set aside a SHA-clause which deviated from the statutory appointment provision (section 2:244 subsection 2 DCC) which provides for the appointment procedure of directors.[48] Based on the special facts and circumstances of the case and the corporate reasonableness and fairness doctrine, the Court of Appeal ruled that performance of the respective SHA-clause was not in the best interest of the company. In that regard the court especially considered important the distorted relationship within the BoD and subsequently within the company. The SHA-clause was set aside in favour of the company.

Enforcing SHA's

36. A party may claim specific performance of a SHA at law in court, arbitration or a third party binding advice procedure. See par. 28 – 33 for a description of the characteristics of each forum. Each of these forums *may* also apply preliminary relief injunctions upon request[49]:

    a. A preliminary relief judge of the applicable district court;
    b. The Enterprise Chamber of the Amsterdam Court of Appeal in inquiry proceedings;
    c. The arbitral tribunal in summary arbitral proceedings.

Since parties can always jointly request a short-term mediation or a quick binding advice from a third party adviser, these options – which are based on mutual consent – will not be further discussed.

<u>Ad a. Characteristics and requirements preliminary relief injunctions regular proceedings</u>

Preliminary relief proceedings (also known as summary proceedings) are meant for urgent cases only to order a party i) to perform a certain action or ii) to refrain from a certain action, both often combined with a penalty order.[50] For example, the request to suspend a shareholder resolution to appoint a new director or to temporarily transfer the shares of another shareholder to an interim director, in order to resolve a deadlock between shareholders. The requesting party is required to demonstrate that, based on its interests, an immediate provisional measure is required (*spoedeisend belang*), such as the situation where a party to a SHA has reasons to suspect that another party to the SHA shall not perform its obligations. Our experience is that 'urgency' is quickly established by preliminary

[48] Court of Appeal 13 January 2015, ECLI:NL:GHAMS:2015:55 (*Kekk/Delfino*).

[49] Please note that the arbitration (or third party advice) clauses should explicitly provide in a preliminary relief procedure. If the arbitration agreement (clause) does not provide for summary arbitral proceedings, parties are free to agree to settle their dispute in summary arbitral proceedings afterwards.

[50] A penalty is automatically imposed in case the defendant does not apply with the judgment. Please note that a request to impose a penalty cannot be combined with monetary claims and that a judge may limit the requested penalty to his own discretion.

relief judges, but a judge will not award the requested measures if the case is too complex (facts or legal issues) to be dealt with in summary proceedings. A preliminary relief judgment is not a final decision on the merits of the case. Both parties are still allowed to address the respective court in proceedings on the merits and the outcome of both procedures may vary. The judgement in the proceedings on the merits overrules the judgment in the summary proceedings. Although preliminary relief injunctions are quite popular, the claimant must act cautiously in enforcing injunctions, due to the possibility that a decision may be reversed on appeal. If the injunctions are dismissed in appeal, the claimant who enforced the decision in first instance could be liable for damages on the basis of tort.

Ad b. Characteristics and requirements preliminary relief injunctions Enterprise Chamber

Besides addressing a regular district court, a shareholder may also request the Enterprise Chamber to order interim relief measures. The shareholder is obliged to ask the Enterprise Chamber for an inquiry, but the application for an inquiry may simultaneously contain the application for interim relief measures. The Enterprise Chamber first hears submissions from the parties and decides on the application for interim relief measures and then on the application for an inquiry. The requested measures are ordered if the Enterprise Chamber to its full discretion considers that i) it is able to order an inquiry and ii) it is likely that the criteria for an inquiry will be satisfied. Mindful of the facts of the case, the Enterprise Chamber may order any provisional measure it deems fit. The Enterprise Chamber decided in established case law that a shareholder who breaches a SHA may lead to the conclusion that there are "good reasons to doubt that the company is being properly managed" (see par. 33).[51] The ordered measures expire when the inquiry proceedings end, but it should be noted that these measures – just as the interim relief measures ordered by a regular court – may have an irreversible effect.

Ad c. Characteristics and requirements preliminary relief injunctions in arbitration

Section 1051 subsection 1 DCCP provides parties the possibility to authorize an arbitral tribunal or its chairman to award provisional measures just like in a regular summary proceedings. The applicable standard in summary arbitral proceedings equals the standard applicable in summary proceedings before the district court.[52] If either party brings its claims before a district court in violation with the arbitration clause (also known as the arbitration agreement), the relief judge of the respective district court may declare he is not authorized to decide on the claim and refer parties to the agreed arbitral tribunal. The procedure of the summary arbitration proceedings is defined by the procedural rules which the parties have chosen (ICC, NAI, etc.). Just like arbitral awards in a regular arbitration, awards issued in summary proceedings are immediately enforceable under Dutch law.

[51] Enterprise Chamber of the Amsterdam Court of Appeal 8 May 2002, JOR 2002/112 (*Broadnet*).

[52] See also: Nederlands Arbitrage Instituut (NAI) 3 April 2017, 4533 (arbitral award by Prof. Dr. F. De Ly).

Specific but common shareholder disputes: dismissal of a director also shareholder

37. It is not uncommon that shareholders are also executive or non-executive members of the BoD. In such cases, the SHA's often deviate from the statutory requirements for the dismissal of directors as stated in section 2:244 subsection 2 DCC. This section states that:

> […] *If the articles provide that a resolution to suspend or remove may only be passed by an increased majority in a general meeting at which a specific part of the capital is represented, such increased majority may not exceed two-thirds of the votes cast, representing more than one half of the issued capital.*[53] (Underlining added by the author.)

SHA's (and joint venture agreements) often deviate from this rule[54] and determine that members of the BoD are to be appointed and dismissed by unanimous decision of the shareholders. The first question is whether this contractual veto right is null because it is in conflict with section 2:244 subsection 2 DCC (see par. 12 – 14). In the important Kekk/Delfino case, where the shareholders included a similar clause in their SHA as referred to in par. 8 before, the district court decided that such a veto right was valid and had 'corporate effect', but the court of appeal decided on other grounds[55] that such a veto right has no effect, if giving effect to that right would be against the respective company's best interests based on the (corporate) reasonableness and fairness.[56] This rule applies regardless of whether the relevant provision is in conflict with statutory law or the articles of association. The court of appeal broke the deadlock and the director was dismissed, notwithstanding his claim for damages. Although the Supreme Court has not decided on the matter yet, for the present the conclusion seems to be that a director can always be dismissed if the company's best interests are at stake, with all necessary steps

38. Shareholders who wish to dismiss a director, also have to take into account potential employment law issues. The Supreme Court decided in an employment law landmark case that the dismissal of the director also leads to a direct termination of his employment agreement, except in case of i) a statutory prohibition of dismissal (for example when the director is ill) or when the employment agreement contractually determines otherwise.[57] The question is whether this rule also applies for management agreements with directors.[58] A

---

[53] Translation by mr. M.W. Josephus Jitta (01-11-2016) in *"Warendorf Legislation Article 8 CC Bk 2"*.

[54] Especially when the SHA determines that a shareholder has to offer his shares to the other shareholders when he seizes to be a member of the BoD.

[55] The court of appeal did not decide on the question whether the veto right had corporate effect.

[56] District Court Amsterdam 16 January 2014, JOR 2014/157 (*Kekk/Delfino*) and Court of Appeal 13 January 2015, ECLI:NL:GHAMS:2015:55 (*Kekk/Delfino*).

[57] Supreme Court 15 April 2005, *JOR* 2005/145 (*Unidek*).

[58] The answer to this question remains unclear. Some legal authors claim that the same criteria are applicable to the management agreement, but others claim that the management agreement is a different kind of legal relationship with the company so that the employment law criteria have no effect on management agreements. The Court of Appeal decided in its judgment of 16 September 2014 (*JOR* 2015/128) that the answer to this question depends on what parties have agreed to in the management agreement. The court of appeal decided, based on the aforementioned Haviltex-criterium, that dismissal of the director was

prior permission by a court or other authority for the dismissal is not required, but a reasonable notice period must be observed and – depending on the case – a severance package must be paid. The shareholders resolution to dismiss the director has to be valid, otherwise the director might successfully claim reinstatement. This means that for a successful dismissal, the shareholders should adhere to the articles of association and the SHA. If the director contests the dismissal, and the court decides that the dismissal was manifestly unreasonable, it can award the director a large compensation sum.

Dispute resolution: exit scheme procedure (uittredingsprocedure) and expulsion procedure (uitstotingsvordering)

39. If shareholders[59] have not made dispute resolution arrangements in advance, for example in a SHA, or after the emergence of the dispute, they could also rely on the statutory dispute resolution procedure (*wettelijke geschillenregeling*) or have the articles of association or SHA refer to this arrangement. This form of dispute resolution was thoroughly modified by the Flex BV Act to streamline the old existing (and unused) arrangement. Although the current arrangement is much better than the old, it is still not often used mainly because parties tend to rely on the articles of association of the company, a SHA or the inquiry proceedings at the Enterprise Chamber of the Amsterdam Court of Appeal. Due to the limited use of the statutory dispute resolution procedure, only a (very) limited description of this procedure is provided.

40. The statutory dispute resolution procedure provides two procedures: the exit scheme procedure and the expulsion procedure. The expulsion procedure ex section 2:336 subsection 1 DCC is basically the demanded removal of another shareholder. One or more holders of shares who, solely or jointly, contribute at least one-third of the issued capital may institute proceedings against any shareholder, who, by his conduct[60], prejudices or has prejudiced the interest of the company to such an extent that the continuation of his shareholding cannot reasonably be tolerated, demanding the transfer of his shares to the remaining shareholder(s). The exit scheme procedure ex section 2:343 subsection 1 DCC provides a 'trapped' shareholder whose rights or interests are prejudiced by the conduct of one or more co-shareholders to such an extent that he can no longer be reasonably expected to remain a shareholder, the right to institute a claim against his co-shareholders for his withdrawal, to the effect that his shares shall be taken over. The squeeze out procedure clearly has a higher threshold and demands a form of culpability of the squeezed out shareholder. In both procedures the district court appoints an expert or experts to establish the purchase price.

*****

connected to the termination of the management agreement due to the fact that the management agreement was part of an inseparable bond between the position of the director as a shareholder, a director and as a contractor.

59 Or, if certain conditions are met, also holders of depositary receipts.

60 His conduct in his capacity as a shareholder, not for example his conduct as a director of the company.