

## **The Companies and Business Court as a specialized court**

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### **1. Introduction**

The Netherlands and Delaware have some things in common. Not only is milk the national Dutch beverage as it is officially in Delaware according to Section 312 of the Delaware State Code; the Netherlands is also a small state in a federation of larger states.<sup>1</sup> Before the state company laws in the European Union were harmonized the Netherlands was sometimes characterized as the ‘Delaware of Europe’. Dutch company law was flexible, there were no capital requirements and the Netherlands was one of the very few states in Europe to adhere at a certain moment to the internal affairs doctrine.<sup>2</sup> One of the hidden objectives of the European company law harmonization program initiated in the 1960s, was to prevent competition between state company laws. Such competition was especially feared by the larger states in Europe. At this moment this competition is less feared in the European Union and even stimulated by recent case law of the European Court of Justice.<sup>3</sup> The idea that the competitiveness of Europe as a whole is not enhanced by harmonizing all company law rules, but by harmonizing some key rules and by stimulating flexibility and facilitating cross-border entrepreneurial activities has gained ground.

Another remarkable resemblance is that both Delaware and the Netherlands have a court that is specialized in company law issues. This feature of the Dutch and Delaware law system is unique in the world.<sup>4</sup> Both specialized business courts are – each on its own scale – successful and have made – and still make – important contributions to the development of corporate governance in their jurisdictions. The aim of this contribution is to find an explanation for the success of the Dutch specialized business court. In the first part of this contribution I will focus on specialized courts and the pros and cons of specialized courts on a more abstract level (Sections 2 to 4). In the second part I will address the question of how these pros en cons have worked out for the Dutch specialized business court (Sections 5 to 9).

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<sup>1</sup> § 312 State Code: ‘Milk shall be the official beverage of the State.’ (64 Del. Laws, c. 41, § 1).

<sup>2</sup> The internal affairs doctrine was officially adopted in 1959. At this moment the internal affairs doctrine is laid down in the *Wet conflictenrecht corporaties* (Corporations (Conflict of Laws) Act).

<sup>3</sup> HvJEG (European Court of Justice) 9 March 1999, *NJ* 2000, 48 (Centros); HvJEG (European Court of Justice) 5 November 2002, *NJ* 2003, 58 (Überseering); HvJEG (European Court of Justice) 30 September 2003, *NJ* 2004, 394 (Inspire Art Ltd).

<sup>4</sup> There are some specialized courts that have some resemblance with the Delaware Chancery Court and the Companies and Business Court. As of January 1, 1993, the State of New York established four specialized commercial departments to hear complex commercial and business cases. The State of Maryland created a Business and Technology Court in 2002. In Thailand the Thai Central Intellectual Property and International Trade Court was established at the end of 1997.

In the Dutch language the Dutch specialized business court is called 'De Ondernemingskamer'. In this contribution I will not use the literal translation 'Enterprise Chamber', but the functional translation 'Companies and Business Court'.<sup>5</sup>

## 2. What is a specialized court?

What is a specialized court? A specialized court can be described as a court with limited and usually exclusive jurisdiction in one or more specific fields of the law. Judges who serve in a specialized court are experts in the fields of law that fall within the court's jurisdiction.<sup>6</sup> A specialized court can either be set up as an independently functioning court or as an administratively created specialized division of an already existing general court.<sup>7</sup> The way a specialized court is organized is not essential as long as there are safeguards for its proper and independent functioning. Most jurisdictions in the world have specialized courts. Fields of law that are frequently assigned to specialized courts are juvenile cases and tax cases. But specialized courts for cases on bankruptcy law, labor law, patent law, commercial law and anti-corruption law are also not uncommon. There is a good deal of literature on the advantages and disadvantages of specialized courts.<sup>8</sup> I will give an overview of these advantages and disadvantages.

## 3. Advantages of specialized courts

There are strong arguments in favor of establishing specialized courts.

1. Specialized courts can resolve questions of law more efficiently and effectively. The judges in a specialized court are experts in their field with experience in handling matters in that field.<sup>9</sup>

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<sup>5</sup> See for a justification of this functional translation: Willems JHM, "The Companies and Business Court: Some Introductory Remarks" in *The Companies and Business Court from a comparative law perspective*, ed. Josephus Jitta MW (2004), pp. 182-183.

<sup>6</sup> Central European and Eurasian Law Initiative, *Specialized Courts: A Concept Paper*, (1996) p. 1.

<sup>7</sup> Jacobs JB, *The Critical Role of Company Courts in Fostering Good Corporate Governance*, (2003) Conference report Asian Business Dialogue on Corporate Governance, p. 10.

<sup>8</sup> For example: Dreyfuss RC, "Specialized Adjudication", (1990) *Brooklyn University Law Review*, pp. 377-441; Dreyfuss RC, "Forums of the Future: the Role of Specialized Courts in Resolving Business Disputes", (1995) *Brooklyn Law Review*, pp. 1-44; Central European and Eurasian Law Initiative, *Specialized Courts: A Concept Paper* (1996); Ad Hoc Committee on Business Courts, "Business Courts: Towards A More Efficient Judiciary", (1997) *The Business Lawyer*, pp. 947-964; Drabbe LWMM, "De specialisatie van de burgerlijke rechter", (1963) *Rechtsgeleerd Magazijn Themis*, pp. 113-138. Very useful for the preparation of section 3 was Jordan ER, "Specialized Courts: A Choice?", (1981) *Northwestern University Law Review*, at pp. 745-785.

<sup>9</sup> The result of establishing four specialized commercial departments in the State of New York to hear complex commercial and business cases was a 35 percent productivity increase in complex business cases in the first year.

2. Specialized courts give decisions with better quality leading to more predictability.
3. Specialized courts can devote more time to individual matters, without having to give priority to other cases, such as criminal cases.
4. Specialized courts tend to adopt an informal approach to procedural matters. They are therefore better equipped to adjust the procedure to individual aspects of a case.
5. Specialized courts have a significantly higher percentage of settlements.<sup>10</sup> The reason is probably because specialist judges can give better directions with more authority.
6. An argument that was especially raised in the U.S. is that general courts and other litigants can also benefit from transferring highly complex litigation to specialized courts, because the dockets of general courts are not drained by complex business cases.

These arguments are traditional arguments. They were already brought forward when competition was almost completely national. In today's world with a global economy and opportunities to invest in whichever country or economy, there has evolved a very important argument in favor of establishing a specialized court for commercial and business matters.

7. A business court can play an important role in the economic development of regions or countries. It can be used as a tool to attract companies, businesses, investors and investments to a given jurisdiction or to prevent them from leaving. A prerequisite is that the specialized court gives added value to companies and investors. The argument of competitive advantages from specialized courts is of special importance for courts that specialize in business law and fields of law that are related to business, such as patent law, bankruptcy law or labor law.

#### **4. Disadvantages of specialized courts**

Strong and valid objections have been raised against specialized courts. I will sum up the most important.

1. In 1951 the American Judge Rifkind expressed the view that in time the body of law that is addressed by a specialized court, secluded from the rest, 'develops a jargon of its own, thought-patterns that are unique, internal policies which it

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See: Haig RL, "Business Courts Can Improve State Judicial and Legal Systems", (January 9, 1998) *Legal Opinion Letter*.

<sup>10</sup>This was for example the case in the State of New York where a commercial division was established in 1993.

subverts and which are different from and sometimes at odds with the policies pursued by the general law'. Specialization 'intensifies the seclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system in law'. In a fundamental statement he asserts that '[t]he very essence of the judicial function' is not close familiarity, but 'a detachment from, a dispassionateness about the activity under scrutiny'.<sup>11</sup> To this day this well formulated argument is put forward against specialized courts.

2. An objection that is somewhat connected to the objection of Judge Rifkind is that forcing specialist advocates to argue before generalist judges ensures that the law will remain intelligible, at least to the average lawyer. Basic assumptions will not be taken for granted, and questions will be seen in a context broader than that of the specialist narrow concerns.<sup>12</sup> It is also argued that legal thought may benefit if legal issues are considered by different courts. A specialized court is often the only one of its kind.
3. Another serious concern that has been put forward in American legal literature – and that is probably connected to the electoral system of state judges in the United States – is that a specialized court is under greater pressure to be influenced by special interest groups than general courts are. This is because there are usually more general courts and it is not worthwhile for special interest groups to lobby if there are only a few cases in every single general court.<sup>13</sup>
4. An argument that was recently raised with success to oppose the institution of business courts in Pennsylvania and California is that a specialized court gives a higher quality judicial resource to certain categories of cases at the expense of other cases. No litigants should have 'better' justice than others.<sup>14</sup>

## 5. The Dutch Companies and Business Court

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<sup>11</sup> Rifkind S, "A Special Court for Patent Litigation? The Danger of a Specialized Judiciary", (1951) *American Bar Association Journal*, pp. 425-426. See also Jordan ER, "Specialized Courts: A Choice?", (1981) *Northwestern University Law Review*, p. 745.

<sup>12</sup> Jordan ER, "Specialized Courts: A Choice?", (1981) *Northwestern University Law Review*, p. 748.

<sup>13</sup> Central European and Eurasian Law Initiative, *Specialized Courts: A Concept Paper*, 1996, p. 15; France M, "Order in the business court", (1996) *Business Week* 3505, p. 138.

<sup>14</sup> Ad Hoc Committee on Business Courts, "Business Courts: Towards A More Efficient Judiciary", (1997) *The Business Lawyer*, p. 953; Central European and Eurasian Law Initiative, *Specialized Courts: A Concept Paper*, (1996), p. 1.

I will now turn to the Dutch Companies and Business Court. In this section I will explain some main features of the Court.<sup>15</sup> In the following sections I will examine whether the pros and cons of specialized courts also apply to the Companies and Business Court as a specialized business court.

The Dutch Companies and Business Court is a specialized and independent section of the general court of appeal in Amsterdam. The Court has exclusive jurisdiction in some fields of company law. This exclusive jurisdiction is attributed to the Court in specific statutes like the Dutch Civil Code, the Works Council Code and the Dutch Code of Civil Procedure. The Companies and Business Court is for example the competent court in disputes on reporting rules and in disputes between the company and the works council. The Court does not adjudicate all company law matters. Directors' liability cases are left to the civil or commercial divisions of general courts. As a generalization one could say that the Companies and Business Court has jurisdiction over conflicts within companies.

The Companies and Business Court acts as an appellate court in some procedures: for example in the expulsion and exit procedures that allow shareholders to sell other shareholders out or to be sold out by other shareholders. In most procedures the Companies and Business Court is the first and only factual instance. Parties are allowed to address the Supreme Court. But this is a cassation court that does not have the power to review facts (or at least to review facts openly). Its review is limited to questions of law and questions of reasoning.

The important role that the Companies and Business Court has in shaping corporate governance rules in Dutch company law, however, is connected with the so-called 'inquiry procedure'. Labor unions, the public prosecutor and – the most important category – shareholders with – alone or together - 10% of the shares or shares with a nominal value of 225,000 euros have a right to initiate the inquiry procedure by an application addressed to the Companies and Business Court. The Court may order an inquiry if there appear to be well-founded reasons to doubt the correctness of the policies or the conduct of a company. If there are well-founded reasons to doubt the correctness of the policies or the conduct of the company, the Court will appoint one or more investigators. These investigators are usually independent scholars, lawyers or auditors. The inquiry will lead to a report. This report brings the first part of the proceedings to an end. The objective of this first part is to disclose the policies and conduct of the company and – if relevant – to disclose who has been responsible

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<sup>15</sup> See in general: Josephus Jitta MW, "Procedural aspects of the right of inquiry" in *The Companies and Business Court from a comparative law perspective*, ed Josephus Jitta MW (2004), pp. 1-42.

for incorrectness of these policies and for misconduct of the company.<sup>16</sup> Sometimes parties are satisfied with this first part and everything ends there. This is the case when, for example, the company has gone bankrupt.

The second part of the proceedings is again initiated with an application. In this second stage the applicant asks the Companies and Business Court to establish whether there has been misconduct on the basis of the report, to establish who has been responsible for misconduct and if appropriate to order measures. The Companies and Business Court has broad authority in ordering measures: for example the annulment of resolutions, the suspension or dismissal of board members, the temporary appointment of board members, the temporary derogation of the articles of association, the temporary transfer of shares to a nominee and the dissolution of the company. The objective of this second part of the proceedings is to reorganize the company, to restore the company to a healthy state and to state who has been responsible for the misconduct of the company.<sup>17</sup>

I would like to emphasize that the Companies and Business Court does not address all company law issues. In fact, there are many company law issues that are assigned to general courts of first instance. The Companies and Business Court can establish the individual responsibility of board members for misconduct and this will damage their reputation. But it is not competent in liability cases and cannot award damages. A judgment by the Companies and Business Court on individual responsibility is not binding in liability proceedings, although it is not surprising that such a judgment will be of great help in such proceedings.<sup>18</sup>

Initially, the inquiry procedure was directed at companies, cooperative societies and mutual funds. When it proved successful it was extended to associations and foundations that run businesses. As of January 2006 there is a special provision that allows a representative body of the patients of a hospital with the legal form of an association or foundation to start inquiry proceedings.<sup>19</sup> What we see is an extension of the jurisdiction of the Companies and Business Court from the for-profit sector to the nonprofit sector. There is no experience yet with this new task.

What contribution did the Companies and Business Court make to the development of Dutch company law? I will give a brief outline of the importance of the Companies and

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<sup>16</sup> HR (Supreme Court) 10 January 1990, *NJ* 1990, 466 (Ogem II).

<sup>17</sup> HR (Supreme Court) 10 January 1990, *NJ* 1990, 466 (Ogem II).

<sup>18</sup> HR (Supreme Court) 8 April 2005, *JOR* 2005/49 (Laurus).

<sup>19</sup> According to Art. 6.2 of the Uitvoeringsbesluit WTZi (Care Institutions (Eligibility) Act Implementation Decree), a hospital has to include an article in the bylaws that authorizes a representative body of the patients to start inquiry proceedings.

Business Court. The Court has established standards for conflicts of interest, for the protection of minority shareholders, for takeover measures, for decision-making by the top level in groups of companies, for the disclosure of information by executive directors to supervisory board members, for the disclosure of information to shareholders, for the way directors should behave (active, loyal and with due care), for aspects of remuneration of directors (for example for poison pills) and for the way the company and its directors should operate vis-à-vis the works council. In the recent Versatel case the Companies and Business Court set new standards for conflict of interest situations in takeover and squeeze-out merger settings.<sup>20</sup> To illustrate the approach of the Companies and Business Court and the far-reaching provisional measures it can take and sometimes takes, I will cover the Versatel case in more detail.

The executive director and three out of four supervisory board members of Versatel were employees of the parent company Tele 2, which had made a successful take over bid. In a subsequent merger with another subsidiary of Tele 2 the minority shareholders would be squeezed out. Versatel wanted the general meeting of shareholders to vote on a change in its corporate governance policy. In future a supervisory board member could decide on a squeeze-out merger even if he had a conflict of interest. The Companies and Business Court decided that the interests of the outside minority shareholders were not in good hands with the non-independent board member and supervisory board members (who were all employees of the dominant shareholder Tele 2 which had just made a successful takeover bid), and in December 2005 – as a provisional measure – appointed three independent supervisory board members with exclusive authority to take all decisions and all actions regarding the squeeze-out merger. The appointment of the three independent supervisory board members can be seen as a procedural solution by the Companies and Business Court to the conflicts of interest problem.

In a remarkable decision of 24 March 2006 the Companies and Business Court intervened again in the Versatel squeeze-out merger case.<sup>21</sup> The subsidiary of Tele 2 and Versatel wanted to enter into the merger as soon as possible. The two merging companies would be valued after the merger (the interests of the minority shareholders would be protected by a complex tracking stock structure). The independent supervisory board members had agreed to the conditions of this merger. The minority shareholders of Versatel asked the Companies and Business Court to block the merger. The Companies and Business Court found that the subsidiary of Tele 2 and Versatel did not bring forward facts justifying

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<sup>20</sup> OK (Companies and Business Court) 14 December 2005, *JOR* 2006/7, *Ondernemingsrecht* 2006-3.

<sup>21</sup> OK (Companies and Business Court) 24 March 2006, *Ondernemingsrecht* 2006-8.

the necessity of the structure. It also held that the minority shareholders were entitled to a general overview of the facts and figures of the merger before the merger was completed. In these circumstances it was contrary to the requirements of reasonableness and fairness that the minority shareholders should be forced into a merger without specific information. The Companies and Business Court prohibited any decision-making by the shareholders' meeting on the merger. To a certain extent it overruled the independent supervisory board members it had appointed earlier. This decision goes beyond the procedural solution of appointing independent supervisory board members. It is based on a substantive review by the Companies and Business Court of the facts and the conflicts of interest problem. In my opinion the Companies and Business Court should in general rely on the judgement of the independent board members it appointed. Only exceptional circumstances could justify a departure from the business judgement of the court-appointed independent board members. I wonder if these exceptional circumstances were present in this case.

#### **6. The success of the Companies and Business Court**

Why is the Companies and Business Court so successful? As a general remark I would like to mention that there is one important event that boosted the popularity of the Companies and Business Court. Between 1971 and 1994 it had no authority to take provisional measures. In 1994 the company law statute was changed in such a way that the Companies and Business Court could take provisional measures.<sup>22</sup> One could say that this has led to a kind of renaissance for the Court. Disputes that require quick action were now brought before the Companies and Business Court and not before the judge in a general court in interlocutory proceedings. This is one important explanation for the success of the Companies and Business Court. I give another explanation for this success. This explanation is connected to the arguments in favor of specialized courts that I set out in Section 3. Let us see which arguments in favor of specialized courts apply to the Companies and Business Court.

##### 1st argument in favor

*Specialized courts can resolve questions of law more efficiently and effectively. The judges in a specialized court are experts in their field with experience in handling matters in that field.*

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<sup>22</sup> Section 349a of Book 2 of the Dutch Civil Code.



In urgent matters – where provisional measures are requested – a party can submit his application to the Companies and Business Court on Monday. The hearing will be held on Thursday. The defendant – that is the company – and other interested parties can submit their written defense and relevant documents in the period between the application and the hearing. If a party does not submit a written defense he is allowed to defend himself, or put forward his opinion on the case in question by oral pleading at the hearing. When necessary, the Companies and Business Court gives a reasoned oral judgment within half an hour after the closing of the hearing.<sup>23</sup> This illustrates the Section's efficiency and effectiveness.

The Companies and Business Court is one of the very few Dutch courts that includes lay people. The bench consists of five people, three of them professional specialized justices. The other two have financial experience as an auditor, a businessman or as a labor union official depending on the issues in the case in question. The main reason for establishing the Companies and Business Court in 1971 was that the Dutch financial statement procedure and the inquiry procedure demanded expert adjudication and an expert insight in the needs of companies and into the relationships within the business community.<sup>24</sup>

#### 2nd argument in favor

*Specialized courts give decisions with better quality leading to more predictability.*

Although general courts can give high-quality decisions, the overall quality of the decisions of the Companies and Business Court is in my opinion more consistent. The Companies and Business Court has set standards for important company-law issues. An important factor is that general courts tend to be conservative when a decision is needed. It seems as if they are sometimes afraid of the enormous economic consequences of their decisions. The consequence is that lawyers try to mold the facts of the case in such a way that the application for an inquiry procedure is justified. In that event the Companies and Business Court is competent to take provisional measures. The Companies and Business Court can take almost every measure it deems necessary. The president of the Companies and Business Court has stated that this authority comes close to the equitable jurisdiction of the courts of common law

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<sup>23</sup> In OK (Companies and Business Court) 13 March, *NJ* 2003, 298 the application was submitted on 11 March 2003, the hearing was on 12 March 2003, the written judgment was delivered on 13 March 2003: see Willems JHM, "The Companies and Business Court: Some Introductory Remarks" in *The Companies and Business Court from a comparative law perspective*, ed. Josephus Jitta MW (2004), p. 188.

<sup>24</sup> Maeijer JMM, "De ondernemingskamer (van het gerechtshof te A'dam) nu en in de toekomst" in *Rechtspleging*, ed. Aerts W (1973), p. 171. Report of the Verdam Committee 1965, p. 67.

countries.<sup>25</sup> When the postponement of the general meeting of Rodamco North America N.V. was requested – which was to decide a few days later on a 6 billion euro takeover – the postponement was given within 15 minutes of the hearings. In my opinion this request for postponement would have had little chance with a general court judge. (I am aware that the party which opposed the postponement would probably say that this is a strong argument in favor of a general court).

### 3rd argument in favor

*Specialized courts can devote more time to individual matters, without having to give priority to other cases, such as criminal cases.*

This also applies to the Companies and Business Court. Justice Jacobs mentions in his contribution in this book that the Chancery Court judges are able, when required, to take a particular case to the ‘head of the line’ if circumstances require. The same is true of the Companies and Business Court. Another aspect Justice Jacobs mentions is the culture or esprit de corps within the Chancery Court. The same is in my opinion true of the Companies and Business Court. Justice Willems, who is president of the Companies and Business Court, has brought together a small group of devoted professionals who will not leave the office if the work has not been done. There is a commonly held view in the Netherlands that the Companies and Business Court would not have been as successful – or maybe some would prefer to say influential – as it is now if Justice Willems were not the president of the Court. He is an active, hard-working and innovative justice, who has to a large degree created – by his decisions – his own competence.

### 4th argument in favor

*Specialized courts tend to adopt an informal approach to procedural matters. They are therefore better equipped to adjust the procedure to individual aspects of a case.*

Justice Willems likes to compare the approach of the Companies and Business Court to that of the Chancery Court in Delaware. He is not very interested in formal or procedural

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<sup>25</sup> Willems JHM, “The Companies and Business Court: Some Introductory Remarks” in *The Companies and Business Court from a comparative law perspective*, ed. Josephus Jitta MW (2004), p. 188.

technicalities and has a strong focus on the substantive issues.<sup>26</sup> In my opinion the most important issue for him is to solve the problem within the company. The Companies and Business Court has discretionary powers to take the provisional measures that it deems necessary, even when the parties did not request certain measures. The approach is – especially for a civil law system with strict procedural law – informal. The application procedure itself is informal. In major cases Justice Willems calls the lawyers to a meeting to agree on the most efficient procedure. Parties are allowed – if no one objects – to submit memorandums and exhibits in English. The Companies and Business Court has a broad interpretation of the scope of the inquiry procedure. The Court considered itself competent in the recent Unilever case, a dispute that was largely of a contractual nature but had some relationship with the internal policy of the company.<sup>27</sup> Contractual disputes are normally adjudicated by general courts. As I mentioned earlier, general courts are more conservative in ordering provisional measures in company law cases. One of the explanations for this phenomenon is that they have a more formal (and in general correct) approach to civil procedure. General courts will not award something that the plaintiff did not ask for. Parties determine the scope of the subject matter.

#### 5th argument in favor

*Specialized courts have a significantly higher percentage of settlements.*

The Companies and Business Court initiates settlements – especially when smaller business firms are involved – during the hearing. The Companies and Business Court can make these settlements binding on all parties by including them in the records of the hearing. There is some information on settlements that were reached at the hearing.<sup>28</sup> However, it is not possible to answer the question of whether the Companies and Business Court has a significantly higher percentage of settlements than general courts have. There are no reliable data to make a comparison. It would be necessary to have data on the overall settlement rate and not just on those reached at the hearing and in addition the settlement rate in general courts would have to be available. And even if data were available a comparison would

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<sup>26</sup> Willems JHM, “The Companies and Business Court: Some Introductory Remarks” in *The Companies and Business Court from a comparative law perspective*, ed Josephus Jitta MW (2004), pp. 187-188.

<sup>27</sup> OK (Companies and Business Court), 21 December 2004, *JOR* 2005/5 (Unilever); affirmed by the Supreme Court in HR (Supreme Court) 18 November 2005, *JOR* 2005/295.

<sup>28</sup> An annual report of the Companies and Business Court is published in the legal journal *Ondernemingsrecht* (see for example *Ondernemingsrecht* 2006-1, pp. 30-32). In 2001 a settlement was reached during the hearing in 11 cases, in 2002 in 3 cases, in 2003 in 4 cases and in 2004 in 3 cases.

inevitably have to be made between settlement rates in different kinds of proceedings. This would lead to an unreliable outcome.

#### 6th argument in favor

*General courts and other litigants can also benefit from transferring highly complex litigation to specialized courts, because the dockets of general courts are not drained by complex business cases.*

This advantage seems to me self-evident and needs no further comment.

#### 7th argument in favor

*A specialized business court can play an important role in the economic development of regions or countries. It can be used as a tool to attract companies, businesses, investors and investments to a given jurisdiction or to prevent them from leaving.*

Global competition between economies has recently been used as an argument in favor of business courts in the United States; for example for the establishment in 2002 of the Maryland Business and Technology Court.<sup>29</sup> It was also used in 2004 in favor of the Companies and Business Court by the Dutch Minister of Justice in a memorandum on the modernization of Dutch company law that was presented to Parliament.<sup>30</sup> The argument has also been used for developing economies. As an example I quote a paragraph of the OECD White Paper on Corporate Governance in Asia:

*“Court systems should further strengthen their expertise and capacity to adjudicate corporate-governance disputes efficiently and impartially, including through establishment of*

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<sup>29</sup> Ad Hoc Committee on Business Courts, “Business Courts: Towards A More Efficient Judiciary”, (1997) *The Business Lawyer*, pp. 947-964. Information technology is Maryland’s largest field of economic activity. It has one of the largest concentrations of bioscience and aerospace companies and the highest percentage of technological workers in the U.S. Maryland made a pragmatic and sensible choice by assigning fields of law to the specialized court that would have the largest impact on its economic position.

<sup>30</sup> Dutch Parliamentary documents (‘Kamerstukken’) 2003-2004, 29752, no. 2 ([www.overheid.nl](http://www.overheid.nl)). He expressly stated that the existence of the Business Court as a specialized court could enhance the attractiveness of the Netherlands as a place of business.

*specialized commercial courts and promotion of alternative dispute resolution. (...) Areas for active experimentation should include specialized company law courts (...).”<sup>31</sup>*

#### **8. The disadvantages of specialized courts and the Companies and Business Court**

One cannot get away with a one-sided impression. I will therefore make some remarks on the disadvantages of specialized courts I mentioned in section 4. There are ways to circumvent the dangers of seclusion from other courts, of immunization against refreshment by new ideas, the development of a jargon of its own, thought-patterns that are unique and internal policies that are different from and sometimes at odds with the policies pursued by the general law. It is striking to see that in practice these disadvantages are circumvented. I will sum up circumstances that counterbalance the specialization of the Companies and Business Court.

- a. The Dutch Companies and Business Court has established rules on the responsibility of directors. However, the Court has no authority in liability issues. The general courts decide liability cases. The Companies and Business Court is therefore not exclusively setting standards for the responsibilities of directors (although liability cases regarding directors of a non-bankrupt company are relatively rare because Dutch law does not know the concept of the derivative action and directors do not often (actually: never) sue their colleagues).
- b. The Companies and Business Court is competent in totally different company-law-related procedures. In particular the authority to decide codetermination law issues guarantees that the Companies and Business Court does not have exclusive competence in a very narrow part of the law.
- c. Two out of the three professional justices are assigned to the Companies and Business Court on a part-time base. They also function as justices in the appellate general court. In addition to this the Companies and Business Court has four deputy justices, who hear cases on a regular base. These deputy justices are no full-time justices. Three of them have a background as a law professor.
- d. The cassation court, which is a general court, has oversight and can set aside the decisions of the Companies and Business Court.

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<sup>31</sup> White Paper on Corporate Governance in Asia, fourth printing, 4 December 2003, § 41 and § 138.

I am not concerned that the Companies and Business Court as a specialized court is under greater pressure to be influenced by special interest groups than general courts would be. Judges in the Netherlands are not elected. They are appointed for life by Royal Decree (in the Dutch situation, for life means that they retire at the age of 70). The justices in the Companies and Business Court are likewise appointed for life. This is not the case for the lay experts who are also members of the Companies and Business Court (the bench consists of three justices and two lay experts). They are appointed by Royal Decree for a period of five years. The justification for this shorter period is that a lay expert is appointed on a personal title, but may lose his expertise (for example if he quits his job as an auditor, director or labor union official). An appointment for life could burden the Companies and Business Court with people who were experts in the past. In my opinion there is no risk in the Dutch situation of undue influence by special interest groups. That there is no indication that corruption has ever occurred in the Dutch judiciary is also relevant in the context of this conclusion.

The ethical argument against a specialized business court is that no litigants should have better justice than others. This argument is too absolute in my opinion. It neglects the fact that there may be valid reasons justifying some litigants getting better justice than others as long as the minimum standards are good enough. This is especially the case if a clear line can be drawn between business cases and other cases. Every potential litigant in an economy may benefit – as a citizen – from the economic development that may be derived from the establishment of a specialized business court.

## **9. Concluding remarks**

The aim of this contribution was to find an explanation for the success of the Dutch Companies and Business Court. The competence of the Companies and Business Court to take provisional measures is a prerequisite for this success. One could also argue that the lack of a derivative suit in Dutch law and hence the somewhat inadequate preventive role of behavioral standards set by director liability rules has contributed to the success of the inquiry procedure. Apart from these factors the Companies and Business Court functions with all the advantages that are normally attributed to specialized courts. The fact that these advantages of specialized courts are in reality advantages of the Companies and Business Court contributes in a very important way to its success. Specific features of the Dutch legal system as mentioned in Section 8 of this article form a counterbalancing force to some of the disadvantages attributed to specialized courts. Although some criticism is sometimes heard of the active role of the Companies and Business Court, it has no doubt made a very important

contribution to the development of Dutch company law and the establishment of rules of corporate behavior in the Netherlands. At a less abstract level – and last but not least – the Companies and Business Court has made a valuable contribution to the resolution of disputes in Dutch companies.