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Dutch Treat: Netherlands Judiciary Only Goes Halfway Towards Adopting Delaware Trilogy in Takeover Context

ABSTRACT

This Note examines Dutch takeover law in light of the current inter-EU competition to attract entities to individual Member States. The recent hostile takeover of the Dutch bank, ABN AMRO, provides an excellent example of the Netherlands' opportunity to use its judiciary to solidify its reputation as a competitive, business-friendly jurisdiction. The Dutch Enterprise Chamber can aid the Netherlands in becoming the preeminent EU country—a similar status to Delaware's Chancery Court in the United States. Although the Enterprise Chamber attempted to introduce Delaware law in ABN AMRO, *it unfortunately misapplied the law. As a result, the Dutch Supreme Court had to overrule its decision; however, the possibility of adopting Delaware takeover law remains. This Note proposes that the Dutch Enterprise Chamber adopt the Delaware takeover trilogy*—Revlon, Unocal, *and* Unitrin—*in order to provide certainty to Dutch takeover law and improve its corporate governance, which, in turn, should aid the Netherlands in attracting enterprises. Although it is too early to know, the Netherlands may become a "European Delaware."*

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I. INTRODUCTION

In October 2007, after a long and contentious battle between two of the world's largest banks, the Royal Bank of Scotland-led Consortium triumphed over Barclays and acquired the Dutch bank ABN AMRO in the largest deal in the banking industry to date.[1] The intense takeover battle began in early 2007 when the third largest bank in the world, UK-based Barclays, publicly announced its intent to purchase the largest Dutch bank, ABN AMRO.[2] Within a month, Barclays and ABN AMRO announced a €63.74 billion deal,[3] whereby Barclays would acquire ABN AMRO from its shareholders in a stock-for-stock transaction.[4] Shortly after, a Consortium led by the Royal Bank of Scotland (RBS), also a UK bank, entered the arena with an attractive €72.27 billion combination stock-for-cash and stock-for-stock offer[5]—in face value, nearly €10 billion more to ABN AMRO shareholders than Barclays.[6] The battle for ABN AMRO had begun.

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1. *The Royal Bank of Scotland Group PLC*, HOOVERS, Feb. 19, 2008, *available at* http://premium.hoovers.com/subscribe/co/overview.xhtml?ID=ffffsfyhhtrchryfxk. The Consortium was comprised of Royal Bank of Scotland, Fortis Bank of Belgium, and Banco Santander of Spain. *RBS-led Consortium Offers Reassurances in Bank Battle*, INT'L HERALD TRIB., May 14, 2007, *available at* http://www.iht.com/articles/2007/05/14/business/abn.php [hereinafter RBS-led Consortium].

2. Jill Treanor, *Talks on ABN AMRO Merger May Spark Bid for Barclays*, THE GUARDIAN (London), Mar. 20, 2007, at 28; *ABN AMRO Holding N.V.*, HOOVERS, Sept. 8, 2007, *available at* http://premium.hoovers.com/subscribe/co/factsheet.xhtml?ID=91361.

3. Carrick Mollencamp, *Barclays Touts Surety of ABN Takeover Bid*, WALL ST. J., May 24, 2007, at C8.

4. Frederick Lambert, *The ABN AMRO Ruling: Some Commentaries, 3. Commentary from a United States Lawyer and Law Professor's Perspective on the Decision of the Chamber of Business Affairs*, 4 EUR. COMPANY L. 168, 174 (2007). A stock-for-stock exchange occurs when the acquiring company [Barclays] trades its stock for target company [ABN AMRO] stock. *Id.* As a result, the former target shareholders no longer hold target stock, but instead hold the combined target/acquirer entity stock. *Id.* This is similar to a Delaware statutory merger, where two companies merge by exchanging former shares in each separate company for the same proportional interest in shares of the combined entity. *Id.* Typically, companies that intend to keep the target company whole offer stock-for-stock exchanges, whereas companies interested in breaking up the target offer cash-for-stock exchanges. These generalizations are consistent with the intents of the bidders–Barclays intended to keep ABN AMRO together and the RBS Consortium intended to spilt up the company. *See RBS-led Consortium*, *supra* note 1.

5. A stock-for-cash offer is similar to a stock-for-stock exchange, except instead of trading target stock for combined entity stock, the target shareholders exchange their target stock for cash. *See* Patricia A. Vlahakis, *Takeover Law and Practice 2007*, *in* 39TH ANNUAL INSTITUTE ON SECURITIES REGULATION, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 807, 842 n.20 (2006). A pure stock-for-cash offer effectively retires all former target stockholders (who accept the offer) by

Desiring to thwart the Consortium's hostile bid and to solidify the deal with Barclays, the ABN AMRO Board allegedly utilized a crown jewel defense by selling off its North American subsidiary, LaSalle Bank Corporation.[7] Bank of America contracted to purchase LaSalle for $21 billion.[8] ABN AMRO management explicitly assured Bank of America that shareholder approval was not required prior to the sale of LaSalle, confirming Bank of America's independent legal research.[9] Almost immediately after announcement of the deal, however, ABN AMRO shareholders expressed significant disapproval.[10] Viewing the sale of LaSalle as a defense by management to deter RBS and entrench themselves under management-friendly terms with Barclays,[11] ABN AMRO shareholders petitioned the Dutch Enterprise Chamber (also known as the Chamber of Business Affairs) to enjoin the deal pending shareholder approval.[12]

Although "hostile takeovers are the exception, not the rule,"[13] they are important within the corporate world for a number of reasons. First, they incentivize many bidders and targets to proceed on a friendly basis, since the risk that a friendly merger may turn hostile constantly underlies negotiations.[14] Both parties recognize the possibility that the bidder "may take its case directly to the

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paying them to relinquish their shares in the combined entity. RBS's offer was a combination, so each ABN AMRO shareholder received a combination of both cash and new combined RBS-ABN AMRO stock; thus, ABN AMRO control was not relinquished.

6. *Id.* Sources reported conflicting total value of the RBS deal ranging from €69.9 billion, *RBS-led Consortium*, *supra* note 1; to €71 billion, *The Royal Bank of Scotland Group PLC*, *supra* note 1; to €72.27, *Barclays Touts Surety of ABN Takeover Bid*, *supra* note 3. Hereinafter, this note assumes the latter was correct, and thus reports the RBS deal value equal to €72 billion.

7. *See* Eric Dash, *Bank of America Files Suit Over Deal to Buy LaSalle*, N.Y. TIMES, May 5, 2007, *available at* http://www.nytimes.com/2007/05/05/business/worldbusiness/05bank.html. A crown jewel defense is "the sale of an asset, which has the result of making a company less attractive to a tender offeror." 19 AM. JUR. 2D Corporations § 2230 (2008). A hostile bid is an unsolicited, unwanted bid for a company. *See* Meredith M. Brown, Paul S. Bird & William D. Regner, *Introduction to Hostile Takeovers*, *in* CONTEST FOR CORPORATE CONTROL 2007, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 309, 313–14 (2006).

8. Complaint ¶ 1, Bank of America Corp. v. ABN AMRO Bank N.V., No. 07 Civ. 3578, 2007 WL 1571950 (S.D.N.Y. May 4, 2007).

9. *See id.*

10. *ABN AMRO Shareholders Vow to Sue*, BOSTON GLOBE, Apr. 27, 2007, *available at* http://www.boston.com/business/globe/articles/2007/04/27/abn_amro_shareholders_vow_to_sue.

11. *Id.*

12. ABN AMRO Holding N.V./Bank of Am. Corp., 451/2007, Gerechtshof [Hof] [ordinary court of appeal], Amsterdam, 28 april 2007 (Neth.) [hereinafter *ABN AMRO Shareholder Litigation, Enterprise Chamber*]; *ABN AMRO Shareholders Vow to Sue*, *supra* note 10.

13. Brown et al., *supra* note 7, at 313.

14. *Id.* ("[T]he possibility that a bidder will be able to proceed on a hostile basis undoubtedly underlies many negotiated transactions.").

target's shareholders if the target's board 'just says no' [upon considering the unsolicited attempt]."[15] Second, many companies have used hostile takeovers as a tactic to accomplish strategically important acquisitions.[16] For instance, if a bidder, such as the RBS Consortium, sees two competitors merging—ABN AMRO and Barclays—the bidder may feel compelled to make a hostile bid "as a matter of strategic market positioning."[17] Third, a bidder may feel forced to use hostile means if the target refuses even to talk with the bidder.[18] Finally, hostile takeovers are especially relevant in the context of transnational transactions, such as the battle over ABN AMRO, because "hostile activity has been more active overseas than in the U.S." in recent years.[19]

ABN AMRO's sale of LaSalle raises an obvious question: Under what circumstances, if any, does Dutch law require prior shareholder approval of management's defensive decisions in a takeover context? Dutch law is not clear. A clear legal principle would greatly reduce transactions costs, not only for direct parties to the merger battle—such as ABN AMRO, Barclays, and RBS—but also for third parties, such as Bank of America.[20] Delaware's takeover law provides a much clearer framework for analysis than Dutch law.[21] Although the ultimate outcome of ABN AMRO's defensive strategy (i.e., ABN AMRO sold LaSalle to Bank of America) is consistent with Delaware takeover law, the Dutch principles should be clarified. The Netherlands should adopt the Delaware takeover trilogy—*Revlon,*

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15. *Id.* at 314.

16. *Id.* at 313.

17. *Id.* Essentially, the bidder adopts a "now or never" attitude. *See* Vlahakis, *supra* note 5, at 824 ("[S]trategic mergers are not immune from, and may actually attract, third-party attempts to acquire one of the prospective merger partners.").

18. Brown et al., *supra* note 7, at 313.

19. Vlahakis, *supra* note 5, at 823, 835. Overall takeover basics and mechanics are essentially the same between the U.S. and the Netherlands. *Id. See generally* HOLLY J. GREGORY & TOBERT T. SIMMELKJAER, II, COMPARATIVE STUDY OF CORPORATE GOVERNANCE CODES RELEVANT TO THE EUROPEAN UNION AND ITS MEMBER STATES 172–73 (2002) [hereinafter EU COMPARATIVE CORPORATE GOVERNANCE STUDY]; Scott V. Simpson et al., *The Future of Takeover Regulation in Europe, in* UNDERSTANDING COMPLEX FINANCIAL INSTITUTIONS 2006, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 725–926 (2006).

20. *See* Wilco Oostwouder, *Can You Trust the Dutch (Company Law System)?*, 4 EUR. COMPANY L. 211 (2007).

21. *See generally* Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 173 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 951 (Del. 1985); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995). The State of Delaware is the leading state of incorporation and leading source of corporate state law within the United States. Thomas J. Dougherty, *Takeovers: From Bear-Hug to Go-Shop, ALI-ABA Course of Study Materials, Securities Litigation: Planning and Strategies* 327, 338 (2007).

Unocal, and *Unitrin*.[22] The result will lead to more certainty and, in turn, more transactions in the market for corporate control,[23] which fosters a more attractive legal environment that should increase business to the Netherlands. Given the current EU landscape, the Netherlands could take the lead over the UK in the inter-European regulatory competition for businesses.[24] Through its judiciary, the Netherlands has the opportunity to become Europe's Delaware.

Part II of this Note discusses ABN AMRO's corollary sale of LaSalle to Bank of America, including the decisions of both the Dutch Enterprise Chamber and the Dutch Supreme Court. Next, it presents current takeover law in both the Netherlands and in Delaware. Part III analyzes the similarities between the Netherlands and Delaware in the context of the two Dutch court opinions regarding ABN AMRO, and then provides an alternative analysis of ABN AMRO's sale of LaSalle under Delaware law. Finally, Part IV proposes that Dutch courts should adopt a version of the Delaware takeover law analysis, specifically the *Revlon*, *Unocal*, and *Unitrin* doctrines. In order for this proposal to be successful, the Delaware laws must be tailored to fit the Netherlands' civil law system and stakeholder-centered view of corporate governance.[25]

II. BACKGROUND

After months of battling against Barclays and ABN AMRO's institutional shareholders, the RBS-led Consortium ultimately prevailed.[26] The resulting RBS-ABN AMRO acquisition was the largest banking deal to date, at €72 billion.[27] The events leading up to ABN AMRO's acquisition, however, are not only important in the context of banking, but also highlight significant aspects of the market for corporate control, particularly hostile takeovers.

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22. *See Revlon*, 506 A.2d 173; *Unocal*, 493 A.2d 946; *Unitrin*, 651 A.2d 1361; Dougherty, *supra* note 21, at 338 (noting that these cases are so well-known that they are referred to by these short-hand names).

23. *See* Bank of Am. Corp./ABN AMRO Holding N.V., Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 13 juli 2007, OK 135 (ann. MK) (Neth.), ¶ 3.1(viii) [hereinafter *ABN AMRO Shareholder Litigation, Supreme Court*]; Simpson et al., *supra* note 19, at 860.

24. *See generally* William Bratton, Joseph McCahery & Erik Vermeulen, *How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis* (Eur. Corporate Governance Inst., Working Paper No. 91, 2008); *infra* Part IV.

25. EU COMPARATIVE CORPORATE GOVERNANCE STUDY, *supra* note 19, at 172–73.

26. *The Royal Bank of Scotland Group PLC*, *supra* note 1.

27. *Id.*

In general, companies may become unified in a variety of ways[28] and for a number of reasons.[29] One particular method of unification is merging, which "consists of a combination in which one of the constituent companies remains in being, absorbing all the other constituent [companies]."[30] A merger is a form of takeover.[31] The decision to merge or unify two companies is almost always based on a business reason[32]—most commonly to increase the firm's profit,[33] or to obtain access to new markets, products, or technologies.[34] Since corporate statutes in both Delaware and the Netherlands grant broad powers to directors to manage the business and affairs of the corporation,[35] the judiciary's traditional response has been to defer to the board of directors.[36] Judicial review, however, may be sharpened in certain circumstances including defending against hostile takeover bids or engaging in a sale of control.[37] In Delaware, those circumstances evoke application of either the "*Revlon* test" or the "*Unocal* standard" supplemented by *Unitrin*.[38] Currently in the Netherlands, however, there is no clear test or analysis to apply to these situations.

This enhanced standard of review is justifiable in light of the directors' fiduciary duties of good faith,[39] care,[40] and loyalty[41] to both

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28. 19 AM. JUR. 2D *Corporations* § 2165 (2008) (stating that companies may become unified through four different arrangements: consolidation, merger, reorganization, and acquisition of assets).

29. 3A FLETCHER CYC. CORP. § 1041.30 (2007) (stating that acquirers may wish to unify a company to increase the firm's value and make profit).

30. 19 AM. JUR. 2D *Corporations* § 2165 (2008).

31. *See* 3A FLETCHER CYC. CORP. § 1041.30 (2007). A takeover occurs when one company (the target) is acquired by another company (the acquirer). *Id.* A takeover turns hostile when the target board opposes the bid by the would-be acquirer. *Id.*

32. Under Delaware State law, the board of directors has wide discretion to manage the business and affairs of a corporation. *See* DEL. CODE ANN. tit. 8, § 141(a) (2008).

33. 3A FLETCHER CYC. CORP. § 1041.30 (2007).

34. Lisa Blumensaadt, Comment, *Horizontal and Conglomerate Merger Conditions: An Interim Regulatory Approach for a Converged Environment*, 8 COMMLAW CONSPECTUS 291, 294–95 (2000) ("Mergers provide a way to quickly offer the latest technological advances.").

35. *See* DEL. CODE ANN. tit. 8 § 141(a); *ABN AMRO Shareholder Litigation, Supreme Court*, *supra* note 23, ¶ 4.4 (citing BW art. 9 (Neth.)).

36. Vlahakis, *supra* note 5, at 836 (describing Delaware's business judgment rule); Simpson et al., *supra* note 19, at 744–48 (describing Dutch business judgment rule). Under the Delaware business judgment rule, "directors' decisions are presumed to have been made on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Simpson et al., *supra* note 19, at 744–48 (citing Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341 (Del. 1987), and Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360–61 (Del. 1993)).

37. Vlahakis, *supra* note 5, at 836; 19 AM. JUR. 2D *Corporations* § 2196 (2008).

38. Vlahakis, *supra* note 5, at 836.

39. *Id.* The duty of good faith is derived from the business judgment rule. *Id.*

the company and its shareholders[42] because of the potential conflicting incentives between the director-manager's self-interest in keeping his job—"entrenchment"—and the shareholders' interest in maximizing their own profits.[43] A heightened standard of review subjects the directors' decisions to more exacting scrutiny to determine if the directors breached their duty of loyalty by engaging in "self-dealing" transactions, such as entrenchment.[44]

The most direct way for a director to entrench himself, and thus breach his fiduciary duties, is by abusing takeover defenses. Defenses against unsolicited hostile bids are not per se illegal.[45] On the contrary, defenses are specifically permitted, and even required in some circumstances under the directors' fiduciary duties.[46] For instance, the directors' fiduciary duties require opposition of a takeover attempt that management determines, in its best judgment, is detrimental to the company or its shareholders.[47] However, the power to defend is not absolute, and a corporation does not have "unbridled discretion to defeat any perceived threat" by any means available.[48] Hence, to protect against abuses, courts hold directors to the enhanced scrutiny tests under the *Revlon*, *Unocal*, and *Unitrin* trilogy for determining when takeover defenses are acceptable and what is the appropriate level of defense.[49]

Given this brief overview of the analytical framework employed by courts in the takeover context, it is time to turn to the events leading up to RBS's ultimate acquisition of ABN AMRO. First, the facts of the ABN AMRO acquisition are expanded, including

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40. *Id.* at 837. The duty of care "may be characterized as the directors' obligation to act on an informed basis after due consideration of the relevant materials and appropriate deliberation." *Id.*

41. *Id.* at 837–38. Traditionally courts have defined the duty of loyalty in "broad and unyielding terms," declining to establish a bright-line test. *Cede*, 634 A.2d at 363–64. In *Cede* the court "indicated that 'any' interest of a director in the transaction does not per se establish a breach of the duty of loyalty; rather, the director's self-interest must involve evidence of disloyalty." *Id.*

42. 19 AM. JUR. 2D *Corporations* § 2196 (2008).

43. *See* 3A FLETCHER CYC. CORP. § 1041.30 (2007); Vlahakis, *supra* note 5, at 837; *see also* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (explaining that directors are often confronted with an inherent conflict of interest during contests for corporate control "[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders").

44. Vlahakis, *supra* note 5, at 837–38.

45. *See* 19 AM. JUR. 2D *Corporations* § 2224 (2008); Simpson et al., *supra* note 19, at 868–70.

46. 19 AM. JUR. 2D *Corporations* § 2224 (2008).

47. *Id.*

48. *Unocal*, 493 A.2d at 955.

49. *Cf.* Robert A. Ragazzo, *Unifying the Law of Hostile Takeovers: The Impact of* QVC *and its Progeny*, 32 HOUS. L. REV. 945, 983 (1995) (stating that while *Revlon*, *Unitrin*, and *Unocal* each nominally apply an enhanced scrutiny standard, application of enhanced scrutiny in pre-sale and post-sale contexts differ).

summaries of both the Dutch Enterprise Chamber decision in favor of ABN AMRO's shareholders and the Dutch Supreme Court's reversal in favor of the ABN AMRO board. The following two subsections elaborate upon Dutch and Delaware takeover laws, as both the Dutch Enterprise Court and the Delaware Chancery Court specialize in the business law of their respective jurisdiction.[50]

A. *RBS-led Consortium's Acquisition of ABN AMRO*

ABN AMRO is a large banking group headquartered in the Netherlands.[51] The group's activities include retail banking in the Netherlands, the United States, Brazil, and Italy.[52] ABN AMRO entered the United States market in 1979 by acquiring LaSalle Bank Corporation.[53] ABN AMRO has approximately one hundred thousand employees worldwide.[54]

ABN AMRO's board of directors, in keeping with its fiduciary duties, frequently assessed the strategy and position of the company.[55] According to Professor Cornelis de Groot of Leiden University in the Netherlands, prior to any merger considerations, the ABN AMRO Board assessed four general options for the future growth and increased profits of the company: (1) going further alone (the "stand alone" scenario); (2) growth by acquiring smaller competitors; (3) entering into a merger with a bank of the same size or somewhat larger size; or (4) splitting up the company.[56] Initially, the Board did not seriously consider this last option "because selling some valuable parts, like LaSalle, might appear to be profitable but would leave the remainder of ABN AMRO too small to be spit [*sic*] up further profitably."[57] Instead, management adopted a combination of options two and three, gradually preferring option three.[58] Thus, by early 2007, the board had determined that "the most viable option for

50. Dougherty, *supra* note 21, at 338 (stating that in the United States, Delaware "remains the leading state of incorporation and leading source of corporate state law"); Lambert, *supra* note 4, at 176 (describing the Dutch Enterprise Chamber as having unique jurisdiction, specialized power of inquiry, and specialized business expertise).

51. Cornelis de Groot, *The ABN AMRO Ruling: Some Commentaries, 1. Outline of The Case*, 4 EUR. COMPANY L. 168, 168 (2007).

52. *Id.*

53. *Id.*

54. *ABN AMRO Holding N.V.*, *supra* note 2.

55. de Groot, *supra* note 51, at 168.

56. *Id.*

57. *Id.*

58. *Id.* It is interesting to note that ABN AMRO management's ultimate shift of endorsements from Barclays to the RBS-Consortium illustrates yet another shift in Board strategy (i.e., to the fourth option). *Id.* This presents no shareholder rights problem, however, because the RBS deal maximized shareholder profits.

ABN AMRO [was] to enter into a merger."[59] Consequently, ABN AMRO entered into preliminary friendly talks with Barclays, an established British bank.[60]

By the end of February, one of ABN AMRO's institutional shareholders, the Children's Investment Fund Management, attempted to maximize its profit by pressuring the board to end talks with Barclays and split up the corporation, dividing the proceeds among the shareholders.[61] Around the same time, the Bank of America Corporation expressed an interest in acquiring LaSalle.[62] Nonetheless, on March 20, 2007, ABN AMRO and Barclays announced a proposed merger.[63] On April 12, 2007, the three Consortium banks—Royal Bank of Scotland, Fortis, and Banco Santander—notified ABN AMRO of its intent to make a public takeover bid for LaSalle.[64] Shortly after this notification, another institutional shareholder, the Vereniging van Effectenbezitters (VEB),[65] sent the ABN AMRO board a letter expressing displeasure with the exclusive nature of the talks with Barclays, and suggested that ABN AMRO explore the RBS Consortium offer before committing to Barclays.[66] In addition, the VEB questioned the change in corporate strategy from stand-alone target to actively courting Barclays.[67]

In response, ABN AMRO appeared willing to talk with the Consortium following the exclusionary period that ended on April 20, 2007.[68] ABN AMRO, however, contracted to sell off its U.S. division, LaSalle, to Bank of America prior to expiration of this exclusionary period.[69] Although the board asserts that it acted in fairness and

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59. *Id.*

60. *Cf.* ABN AMRO Holding, N.V., Solicitation/Recommendation Statement Under Section 14(d)(4) of the Securities Exchange Act of 1934 (Schedule 14D-9/A), at 4 (Sept. 16, 2007) (stating that the board of directors made a decision to intensify friendly talks with potential merger partners in the first quarter of 2007, and that it soon became apparent that a merger with Barclays would meet strategic goals).

61. de Groot, *supra* note 51, at 168.

62. *Id.*

63. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 3.1(viii).

64. de Groot, *supra* note 51, at 168.

65. *Id.* Translated from Dutch to English, "Vereniging van Effectenbezitters" means "Dutch Investors' Association." *Id.* The VEB is a shareholder's organization in the Netherlands that plays an active role advocating shareholders' rights. VEB – Dutch Investors' Association, http://www.veb.net/overveb/code.php?codenr=91 (last visited Sept. 22, 2008).

66. de Groot, *supra* note 51, at 168.

67. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 3.1(vii), (xi); de Groot, *supra* note 51, at 168.

68. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 3.1(viii), (xi) (stating that ABN AMRO and Barclays preliminary negotiations included a thirty-day exclusivity period).

69. *Id.* ¶ 3.1(x), (xi), (xv).

good faith,[70] some shareholders, including VEB, believe this was an attempt to thwart the RBS Consortium from making a bid, favoring the Barclays deal as better for management.[71] Nonetheless, ABN AMRO management denied these allegations: "[T]he agreement with Bank of America was not the result of any request on the part of Barclays."[72]

Most likely, the sale of LaSalle to Bank of America was a crown jewel defense against the RBS-led Consortium's anticipated hostile bid.[73] ABN AMRO knew the Consortium would desire LaSalle.[74] Consequently, ABN AMRO hoped to deter RBS's bid by denuding it of a key business or asset.[75] It also prevented a bidding war over LaSalle that could have detracted from ABN AMRO's larger goal of merger.[76] Regardless of whether Dutch law required prior approval by the ABN AMRO shareholders, management did not have enough time to present the sale to a vote due to such short notice.[77] In order to significantly hinder the RBS Consortium, the ABN AMRO Board had no choice but to act in the manner it did.[78]

Notwithstanding the strong inference of "bad faith," or an entrenchment motive, from the alleged facts, the ABN AMRO Board did switch its endorsement from Barclays to the Consortium, albeit after Bank of America contracted to purchase LaSalle. This action

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70. *See id.* ¶ 3.1(xxiv), (xxvii).

71. *Id.* ¶ 3.1(xi); de Groot, *supra* note 51, at 169. The facts point to a crown jewel defense: ABN AMRO received notice from the RBS Consortium prior to selling LaSalle to Bank of America. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 3.1(xi); de Groot, *supra* note 51, at 169. In the Netherlands, a bidder must give a company seven days notice before making an official bid. Simpson et al., *supra* note 19, at 860 ("Bidder must notify target prior to making a hostile bid."). Hence the Board was presented with a perfect opportunity—the sale of LaSalle—to thwart an unwanted bidder. Even after receiving an official bid, the Board arguably could have sold LaSalle and avoided talks with the Consortium by relying on the 30-day exclusivity period in its agreement with Barclays. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 3.1(viii).

72. de Groot, *supra* note 51, at 169.

73. *See* Oostwouder, *supra* note 20, at 211; *ABN AMRO Shareholders Vow to Sue, supra* note 10; Dash, *supra* note 7 (defining the crown jewel defense).

74. de Groot, *supra* note 51, at 170. This proved to be true on May 14, 2007 when "RBS confirmed . . . its desire to take over LaSalle." *RBS-led Consortium, supra* note 1. Additionally, Fortis of Belgium announced its desire of ABN AMRO's Dutch operations and Santander of Spain announced its desire of the bank's Brazilian and Italian arms. *Id.*

75. *See RBS-led Consortium, supra* note 1; CORPORATE ACQUISITIONS, MERGERS AND DIVESTITURES § 10:89 (West 2008).

76. de Groot, *supra* note 51, at 168, 170.

77. *Id.*

78. *Id.*

lends some credibility to an assertion of fairness and good faith on the part of the board.[79]

The board initially appeared uninterested in the RBS Consortium.[80] Failure to present the sale of LaSalle for prior approval by the shareholders led to outrage, specifically due to the lack of board transparency in this hostile bid context.[81] In response, on April 27, 2007, the VEB sued the Board and asked the Enterprise Chamber of the Amsterdam Court of Appeals for an injunction of the LaSalle sale until it was put to a shareholder vote.[82] The Enterprise Chamber acquiesced and ordered an injunction and shareholder vote, reasoning that the sale of LaSalle functioned similarly to a "poison pill" for the larger proposed Barclays-ABN AMRO deal, and, thus, should have been put to the shareholders first.[83] ABN AMRO, Barclays, and the RBS-led Consortium appealed the judgment to the Dutch Supreme Court.[84] On July 13, 2007, the Supreme Court overturned the Enterprise Chamber's decision, allowing the sale of LaSalle to Bank of America to proceed without shareholder approval.[85] Ultimately, the RBS Consortium won the bidding war and acquired ABN AMRO (without LaSalle) in October 2007.[86]

1. The Dutch Enterprise Chamber Decision: An Attempt to Introduce Delaware Trilogy

The VEB's April 27, 2007 application on behalf of itself and other shareholders before the Dutch Enterprise Chamber was filed under the provisions on the "right of inquiry" in Book 2 of the Dutch Civil Code.[87] VEB requested that the court find "well-founded reasons to doubt good policy on the part of ABN AMRO" with regard to the sale

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79. *See ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 3.1(xxiv), (xxvii); Julia Kollewe, *ABN AMRO Drops its Support for Barclays Takeover Terms*, THE GUARDIAN (London), July 31, 2007, at 20.

80. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 3.1(xxvii).

81. *ABN AMRO Shareholders Vow to Sue, supra* note 10.

82. *ABN AMRO Shareholder Litigation, Enterprise Chamber, supra* note 12.

83. *Id.* A poison pill is a takeover defense which "enables the [target's] board of directors to prevent the acquisition of a majority of the company's stock through an inadequate or coercive tender offer, while giving the board leverage to negotiate with potential acquirers." 19 AM. JUR. 2D *Corporations* § 2186 (2008). Dutch law leaves "decision making on [the ownership of] shares" to the shareholders, thus arguably allowing shareholders a cote on takeover defenses in certain circumstances. *See* de Groot, *supra* note 51, at 170 (citing Stork, JOR 2007, 42, Chamber of Business Affairs 17 January 2007).

84. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23.

85. *Id.* ¶ 5.

86. Phillip Inman, *No Regrets, Says Barclays Boss over Failed ABN Bid*, THE GUARDIAN (London), Oct. 6, 2007, at 42.

87. de Groot, *supra* note 51, at 169.

of LaSalle to Bank of America.[88] Essentially, the complaint stated the VEB's view that ABN AMRO could not sell LaSalle without the prior approval of the general meeting of shareholders.[89] The VEB asserted that the agreement to sell LaSalle to Bank of America was made in bad faith "because it prevented the shareholders of ABN AMRO from seriously deciding between a public takeover bid by Barclays and a better bid by the Consortium of banks or any other party."[90] In other words, the VEB alleged that the board's decision to sell LaSalle to Bank of America constituted a crown jewel defense.[91]

The Enterprise Chamber decided in favor of the shareholders and prohibited the execution of the Purchase and Sale Agreement for LaSalle between ABN AMRO and Bank of America prior to approval of the general meeting of shareholders.[92] The Court's conclusion that prior approval was needed for this asset sale is based on the Court's earlier decision in *Stork*:

> [D]iscussions on the strategy of a corporation must be held within the framework of company law in the Netherlands as well as prevailing views on corporate governance, that boil down to the fact that strategy setting is in principle a function of the management board . . . and that the general meeting of shareholders can forward its opinion by exercising rights given to it by statutory law and by the articles of incorporation.[93]

The Enterprise Chamber distinguished between merely selling an asset and selling the shares of the corporation that owns the asset.[94] In the first situation, management has sole discretion to sell an asset, such as LaSalle.[95] However, "decision making on (the ownership of) shares and the rights attached to them is the exclusive right of the shareholder" prior to consummation, but not before the choice to defend.[96] Since ABN AMRO management connected the sale of LaSalle to the Barclays bid by conditioning the Barclays-ABN AMRO deal on the sale of LaSalle to Bank of America,[97] the sale of the asset to Bank of America was not analyzed in a vacuum. Instead, it was examined in the larger context of selling the shares of ABN

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88. *Id.* The Netherlands' concept of "good policy" is analogous to the United States' concept of "good faith." *Id.*

89. *Id.*

90. *Id.* at 169–70.

91. *See* 19 AM. JUR. 2D *Corporations* § 2176 (2008) (defining the crown jewel defense); *see also supra* text accompanying note 7 (for definition of crown jewel defense).

92. Oostwouder, *supra* note 20, at 211.

93. de Groot, *supra* note 51, at 170 (citing Stork, JOR 2007, 42, Chamber of Business Affairs 17 January 2007).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* (citing *ABN AMRO Shareholder Litigation, Enterprise Chamber, supra* note 12).

AMRO.[98] Thus, the Enterprise Chamber found the sale of LaSalle to be linked inextricably to the larger strategy of merging ABN AMRO with another company.[99] Nonetheless, the court concluded that ABN AMRO, Barclays, and Bank of America had not "engaged in a *coordinated effort* to frustrate the Consortium in its efforts. Rather than that, it may be assumed . . . that this represented a 'good opportunity' and a windfall, that they themselves connected to the public takeover bid by Barclays."[100]

The Enterprise Chamber also concluded that the Board's decision to change strategies from a "stand alone" approach to a merger plan meant that "the domain of issues that – within the framework of statutory law and corporate governance rules – [fell] within the competence of [management was] abandoned, and that the decision making about such a public takeover bid . . . [fell] within the competence of the shareholders."[101] In addition, the Enterprise Chamber concluded its opinion with language that once the corporation was "up for sale" the board's role was to maximize shareholder profit.[102]

2. The Dutch Supreme Court Decision: Apparent Rejection of Delaware Trilogy

The Dutch Supreme Court's July 13, 2007 ruling rendered a landmark decision with regard to shareholder rights and corporate governance in takeovers in the Netherlands, and potentially the entire European Union.[103] The Supreme Court rejected the Enterprise Chamber's reliance on Dutch case law, and instead relied solely on Dutch written law and the articles of association of the company.[104] In interpreting the Dutch Civil Code provisions, the Supreme Court turned to the Dutch Corporate Governance Code for guidance.[105] Principle II.1 of the Corporate Governance Code relates to the role and procedure of the management board.[106] It states that the "role of the management board is to manage the company, which means, among other things, that it is responsible for achieving the

98. *Id.*
99. Oostwouder, *supra* note 20, at 212–13.
100. de Groot, *supra* note 51, at 170 (emphasis added).
101. *Id.*
102. *Id.* at 170–71. "Up for sale" language most likely refers to Delaware's *Time* decision. *See* Part III.B.
103. Oostwouder, *supra* note 20, at 211.
104. *See ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 4.4.
105. *Id.*
106. TABAKSBLAT CODE [TC] art. II.1 (Neth.), *available at* http://corpgov.nl/page/downloads/CODE%20DEF%20ENGELS%20COMPLEET%20III.pdf. The Tabaksblat Code is the Dutch Corporate Governance Code.

company's aims, strategy and policy, and results."[107] When discharging this role, the management board "shall be guided by the interests of the company and its affiliated enterprise, taking into consideration the interests of the company's stakeholders."[108]

Principle II of the Corporate Governance Code adds substance to two pertinent sections of the Dutch Civil Code.[109] Section 2:8 of the Code requires managers and others involved with the company to act with "reasonableness and fairness" toward each other.[110] Section 2:9 states that every managing board member has, in essence, fiduciary duties to the company.[111] In particular, the requirements of both the Dutch Civil Code and the Corporate Governance Code do not require the managing board to ask, or even consult, the general meeting of shareholders for approval or opinion with regard to a transaction that falls within the authority of the managing board.[112] Accordingly, the Supreme Court overruled the Enterprise Chamber's decision to the contrary, concluding that the ABN AMRO board was not required to consult its shareholders.[113]

Principle IV of the Corporate Governance Code provides substance for Section 2:107(a) of the Dutch Civil Code.[114] Section 2:107(a) describes which decisions of the managing board (enumerated in Sections 2:8 and 2:9, *supra*) are subject to approval of the general meeting of shareholders.[115] During promulgation, the Dutch Parliament explicated the rule, stating that the general meeting of the shareholders does have a role to play in decisions that involve disposal of company assets, but only when "those decisions are so drastic that they change the nature of the shareholdership in the sense that the shareholder would, as it were, be providing capital to, and taking an interest in, a materially different enterprise."[116] Principle IV provides that "any decisions of the management board on a major change in the identity or character of the company or the enterprise shall be subject to the approval of the general meeting of shareholders."[117] The Supreme Court held that the mere sale of an asset, such as LaSalle, clearly is not "a significant change in the

107. *Id.*

108. *Id.*

109. *See ABN AMRO Shareholder Litigation, Supreme Court*, *supra* note 23, ¶ 4.4.

110. *See id.* (citing BW art. 8 (Neth.)).

111. *Id.* (citing BW art. 9 (Neth.)).

112. *Id.*

113. *Id.* ¶¶ 4.5, 6.

114. *See id.* ¶ 4.8.

115. *Id.* ¶ 4.7.

116. *Id.* (citing Explanatory Memorandum, Parliamentary Records II 2001-2002, 28:179, no. 3, at 18–19 (Neth.)).

117. TABAKSBLAT CODE [TC] art. IV.1 (Neth.), *available at* http://corpgov.nl/page/downloads/CODE%20DEF%20ENGELS%20COMPLEET%20III.pdf.

identity or the character of the company."[118] Thus, the ABN AMRO Board violated neither the Dutch Civil Code nor the Corporate Governance Code.

As additional justification, the Supreme Court pointed to the "legal certainty required in commerce" for refusing to extend the powers of the shareholders in this context.[119] This is premised on the legal principle, *pacta sunt servanda*,[120] which is especially important in international agreements.[121] The Enterprise Chamber's decision to require prior shareholder approval to sell an asset had to be overruled because it was inconsistent with Civil Code Section 2:107(a) and because the Dutch legislature declined to adopt a mandatory rule "precisely for the sake of legal certainty."[122] The Court also recognized the significant concern that third parties, such as Bank of America, must be able to rely on the ex ante legal opinions and research of the Dutch written law performed prior to entering into the agreement with ABN AMRO. If third parties cannot rely on written law, then the probability of completing a deal decreases while the transaction costs associated with the deal increase.[123]

B. *Dutch Law*

1. Takeover Code & EU Takeover Directive

For over fifteen years, the European Union (EU) has failed in its attempts to standardize company and takeover law across its Member States.[124] Finally, in 2004, the EU (of which the Netherlands is a Member) adopted the Directive on Takeover Bids, which is "aimed at creating a level playing field among EU companies and removing barriers to takeovers."[125] Article 9 of the Directive "prevents boards from adopting takeover defenses without first obtaining shareholder approval."[126] Specifically, "the target board may not take any 'frustrating action' that might cause the offer to fail, other than seeking alternative bids, without obtaining prior shareholder

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118. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 4.7 (quoting BW § 2:107(a)(1) (Neth.)).

119. *Id.* ¶ 4.4.

120. Oostwouder, *supra* note 20, at 211. *Pacta sunt servanda* literally means "agreements should be performed." *Id.*

121. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 321 cmt. a (1987) ("This section states the doctrine of pacta sunt servanda, which lies at the core of the law of international agreements and is perhaps the most important principle of international law.").

122. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 4.8.

123. *See* Oostwouder, *supra* note 20; *cf. ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 4.4.

124. Simpson et al., *supra* note 19, at 731.

125. *Id.*

126. *Id.* at 731–32.

approval."[127] Although the Takeover Directive appears to create a uniform code, in reality it is not very strong; the Portuguese Compromise significantly weakened the Directive by making "the adoption of rules limiting the use of takeover defen[s]e mechanisms optional."[128] The Netherlands was one of many Member States to opt out of Article 9.[129]

Prior to the EU Directive, the Netherlands did not have a takeover code.[130] Dutch company law, however, granted considerable rights to shareholders, such as the right to prior approval of a merger.[131] However, these rights are subject to limitation by the company's articles of association, and, unsurprisingly, shareholder rights are frequently limited.[132] In September 2004, the Dutch began to modernize its company law.[133] On May 24, 2007, the Netherlands adopted the EU Takeover Directive, albeit opting out of Article 9, in Section 2:359(b) of the Dutch Civil Code.[134] The Code specifically provides that companies may choose to give its shareholders rights of approval.[135] The legislature chose not to mandate this right of approval.[136] Thus, the legislature's choice

> confirms that the circumstance that a public bid has been issued or is to be expected on the shares of a listed company, does not necessarily entail that the managing board and the supervisory board – until the result of the bid having been honoured has been disclosed or the bid has lapsed – must only safeguard the interest of the shareholders and have it prevail, or must refrain from decisions that may influence whether the bid is or is not accepted by the shareholders.[137]

Prior to late 1990s, "hostile takeovers were rare in the Netherlands" and the business community "frowned on such

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127. *Id.* at 732.

128. *Id.*

129. *See id.* at 744; *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 4.6. The limited reach of Article 9 is just one example of the emerging competition among Member States. *See generally* Bratton et al., *supra* note 24. As discussed in Part IV, the Directive on Cross-Border Mergers and the recent European Court of Justice rulings have significantly increased this competition. *Id.* at 5.

130. Simpson et al., *supra* note 19, at 744.

131. *See* Michiel Huizingal & Martha Meinema, *The Netherlands*, *in* THE EUROPEAN COMPANY – ALL OVER EUROPE: A STATE-BY-STATE ACCOUNT OF THE INTRODUCTION OF THE EUROPEAN COMPANY 200, 205 (Krzysztof Oplustil & Christoph Teichmann eds., 2004) (stating that under Dutch law a general meeting of shareholders must approve a merger).

132. *See* EU COMPARATIVE CORPORATE GOVERNANCE STUDY, *supra* note 19, at 38–39, 38 tbl.O.

133. *See* Simpson et al., *supra* note 19, at 744. Note that company law is the European analogue to U.S. corporate law.

134. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 4.6.

135. BW § 2:359(b) (Neth.).

136. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 4.6.

137. *Id.*

conduct."[138] The environment changed, however, in 1999, when LVMH Moët Hennessy - Louis Vuitton S.A. attempted a hostile takeover of Gucci Group NV.[139] Beginning with the attempted takeover of Gucci, "the Enterprise Chamber of the Amsterdam Court of Appeals played a key role in determining the outcome of disputes among acquirers, target companies and other stakeholders and its decisions have begun to provide a judicial framework for takeovers in the Netherlands."[140] Nevertheless, the judicial framework can, and should, be improved.

2. Dutch Takeover Defenses

The Netherlands does not have a set rule regulating takeover defenses.[141] Though a civil law jurisdiction,[142] the Netherlands relies on "essential principles of good business judgment" as interpreted by Dutch courts.[143] The appropriate Dutch judicial standard of review is "good business judgment," which is similar to Delaware's business judgment rule—both standards require reasonableness and fairness.[144] In addition, Dutch courts have been relatively open to the use of takeover defenses if the company "could make a good faith argument that the takeover threat was against the best interest of the target and all its constituents."[145] In particular, the Dutch Supreme Court enumerated factors governing the validity of the defense: an anti-takeover device should have a temporary nature, be proportional, and not be irreversible.[146]

Dutch law permits hostile bids.[147] However, "the bidder is required to notify the target and to enter into talks with its board regarding the offer price and the reasons for the bid."[148] Thus, the element of surprise often accompanying hostile takeovers is lacking in the Netherlands. Regardless, a threat may exist to the company and the company may employ takeover defenses if the defense is in the interest of the company and the measures taken are proportional

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138. Simpson et al., *supra* note 19, at 745.
139. *Id.* at 745–46.
140. *Id.* at 745.
141. *Id.* at 746.
142. EU COMPARATIVE CORPORATE GOVERNANCE STUDY, *supra* note 19, at 32 tbl.L.
143. Simpson et al., *supra* note 19, at 746.
144. *See id.*; Vlahakis, *supra* note 5, at 836–38.
145. Simpson et al., *supra* note 19, at 746–47.
146. Oostwouder, *supra* note 20, at 213 (citing RNA, Hoge Raad der Nederland [HR] [Supreme Court of the Netherlands], 18 april 2000, NJ 2003 (286, m.n.t. Ma.) (Neth.)).
147. Simpson et al., *supra* note 19, at 852.
148. *Id.*

to the threat.[149] As a result of the proportionality limitation, crown jewel defenses are not common in the Netherlands.[150] Additionally, according to a 2007 Skadden Arps study, crown jewel defenses not only "appear less popular" but are also "potentially less effective if challenged in the courts" than other more common defenses.[151]

The rationale behind allowing companies to implement takeover defenses is two-fold. First, the business and financial markets have historically tolerated takeover defenses.[152] Second, Dutch boards not only owe duties to the company and its shareholders, but also to all of the company's stakeholders.[153] Note, however, that Dutch boards merely have a duty, and not a fiduciary duty, to the stakeholders; the board's fiduciary duty applies exclusively to the company.[154]

C. *Delaware Law*

1. Takeover Law

In the United States, Delaware "remains the leading state of incorporation and leading source of corporate state law."[155] Delaware law clearly defines directors' duties and provides a clear analytical framework for examining breaches of those duties in merger contexts.[156] Directors and officers of the corporation have fiduciary duties to the company's shareholders.[157] When examining the actions of a corporation in a takeover setting, Delaware courts use one of three standards of review: the traditional business judgment rule, enhanced scrutiny, or entire fairness.[158]

The first standard of review—wherein the court is very deferential to board decisions—is predicated on the Delaware General Corporation Law section 141(a), which provides that "[t]he business and affairs of every corporation . . . shall be managed by or under the

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149. *Id.* at 867; *cf.* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986) ("[D]irectors must analyze the nature of the takeover and its effect on the corporation in order to ensure balance – that the responsive action taken is reasonable in relation to the threat posed." (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985))).

150. Simpson et al., *supra* note 19, at 868.

151. *Id.* at 870.

152. *Id.* at 868.

153. *Id.* (including "employees, shareholders, and suppliers").

154. EU COMPARATIVE CORPORATE GOVERNANCE STUDY, *supra* note 19, at 172.

155. Dougherty, *supra* note 21, at 338.

156. *See generally* Vlahakis, *supra* note 5, § II.

157. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985); *see also* DEL. CODE ANN. tit. 8, § 141(a) (2008); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388 (Del. 1995).

158. Vlahakis, *supra* note 5, at 836.

direction of a board of directors."[159] This business judgment rule presumes that directors' decisions are made on "'an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'"[160] When this rule applies, decisions made by the directors are protected unless the "'party challenging the [board's] decision'" meets its burden "'to establish facts rebutting the presumption.'"[161] To rebut the presumption, the challenging party must show that the directors breached their fiduciary duty of loyalty or of care.[162] "If the business judgment rule is not rebutted, a 'court will not substitute its judgment for that of the board if the [board's] decision can be attributed to any rational business purpose.'"[163] This standard is typically very easy to meet.[164]

The second set of standards are intermediate ones, defined by common law and named for the cases in which they were pronounced.[165] The relevant standards for takeover law are *Revlon*, *Unocal*, and *Unitrin*.[166] Under *Revlon*, the directors have a duty to achieve the highest price reasonably available for the shareholders in a sale-of-control transaction.[167] The *Revlon* standard, as clarified by *Paramount Communications, Inc. v. QVC Network, Inc.*, is triggered by "a pending sale-of-control transaction, regardless of whether or not there is to be a break-up of the corporation."[168] A change of control occurs "when a majority of a corporation's voting shares are acquired by a single person or entity, or by a cohesive group acting together."[169] The Delaware courts will examine the board's conduct under the heightened *Revlon* standard only in the sale-of-control context.[170]

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159. DEL. CODE ANN. tit. 8, § 141(a).

160. *Unitrin*, 651 A.2d at 1373 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).

161. *Id.* (quoting *Aronson*, 473 A.2d at 812) (alteration in original).

162. Vlahakis, *supra* note 5, at 836–37 (citing *Aronson*, 473 A.2d at 812).

163. *Unitrin*, 651 A.2d at 1373 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)) (alteration in original).

164. *Cf.* Vlahakis, *supra* note 5, at 838 (explaining that directors' decisions receive "great deference" (quoting Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 46 n.17 (Del. 1994))).

165. Dougherty, *supra* note 21, at 338.

166. *Id.*

167. Vlahakis, *supra* note 5, at 840.

168. *QVC*, 637 A.2d at 46. "*Revlon* . . . does not hold that an inevitable dissolution or 'break-up' is necessary" for heightened scrutiny to apply. *Id.*

169. *Id.* at 42. In *QVC*, the aggregate public stockholders held the majority of Paramount's voting stock before the transaction and would only have held a minority voting position in the surviving corporation if the Paramount–Viacom transaction was consummated. *Id.* at 43. Thus, the proposed Paramount–Viacom transaction constituted a sale of control. *Id.*

170. Vlahakis, *supra* note 5, at 839.

The *Unocal* standard is triggered when directors "unilaterally adopt defensive measures in reaction to a perceived threat."[171] The *Unocal* test is two-pronged: first, the directors must show that they had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed"; second, they must show that the defensive measure chosen was "reasonable in relation to the threat posed."[172] The result of satisfying both prongs is the business judgment rule standard of review. However, if either prong is not satisfied, then the board's action receives an enhanced level of scrutiny under *Unitrin*.[173]

The *Unitrin* analysis adds an additional layer to the *Unocal* analysis. *Unitrin* "reaffirmed the power of directors to take reasonable steps to resist hostile bids."[174] In applying *Unocal*, the Delaware Supreme Court ruled that "a court should engage in a two step process: first, the court should determine whether the defensive steps were 'coercive or preclusive'; second, if the defensive steps were not 'coercive or preclusive,' then the court should determine whether the defensive conduct falls within a 'range of reasonableness.'"[175]

Under *Unitrin*, a defensive measure taken in response to a perceived threat is reasonable and proportionate when it is "non-coercive" and "non-preclusive."[176] A preclusive defense is one that prevents any future change-of-control transaction,[177] whereas a coercive defense is one that forces shareholders to agree with management.[178] Reasonable and proportionate defenses are deemed to satisfy the presumption of the business judgment rule; therefore, the court "will not substitute its judgment for that of the board if the [board's] decision can be 'attributed to any rational business purpose.'"[179] If, however, the court determines that the defense is "coercive" or "preclusive," then the burden of proof shifts from the party challenging the board's decision to the board, who must then

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171. *Id.*

172. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

173. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995).

174. Vlahakis, *supra* note 5, at 846.

175. *Id.* (quoting *Unitrin*, 651 A.2d at 1387–88, 1387 n.38).

176. Dougherty, *supra* note 21, at 338. These are terms of art "evoking fair disclosure, timing, [and] process." *Id.*

177. *See Unitrin*, 651 A.2d at 1387 ("[T]his Court concluded that the Time board's defensive response was reasonable and proportionate . . . because it did not preclude Paramount from making an offer for the combined Time-Warner company, *i.e.*, was not preclusive." (citing Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1154–55 (Del. 1990))).

178. *See id.* ("[T]his Court concluded that the Time board's defensive response was reasonable and proportionate since it was not aimed at 'cramming down' on its shareholders a management-sponsored alternative, *i.e.*, was not coercive . . . ." (citing *Time*, 571 A.2d at 1154–55)).

179. *Id.* at 1373 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (alteration in original).

show that its action had a "rational business purpose."[180] If the board meets its burden, then the board is entitled to the traditional business judgment rule[181] and "the burden shifts back to the plaintiffs who have the ultimate burden of persuasion to show a breach of the directors' fiduciary duties."[182]

Additional analysis is required when a third-party bid occurs. Friendly merger agreements often give rise to unsolicited bids.[183] In this situation, the third-party bid represents "a threatened change of control," and, thus, "a target's directors' actions with respect to that bid, including any changes to the original merger agreement, will be governed by the enhanced scrutiny of the *Unocal* standard."[184] Since a change of control question has been raised, should *Revlon* duties apply? The Delaware Supreme Court answered this question in the negative in *Time*: "[S]o long as the initial merger agreement does not itself involve a change-of-control transaction, the appearance of an unsolicited bid (whether cash or stock) does not in and of itself impose *Revlon* duties on the target [company]."[185] The court further noted that the determination of a threat is not for the court to make; the decision is reserved for the board of directors.[186]

Under the third standard of review, entire fairness, the court will determine whether a transaction is entirely fair, both in terms of price and process, to the shareholders.[187] Entire fairness applies when the presumption of the business judgment rule is rebutted, such as when an actual conflict of interest among a majority of directors exists.[188] This standard is the most exacting of the standards of review:[189] the board must show it acted with both "fair dealing" and "fair price."[190] Upon satisfying this burden, the burden of proving the unfairness of the transaction shifts back to the plaintiffs.[191] If the

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180. *See id.* at 1374 (citing Joseph Hinsey, IV, *Business Judgment and the American Law Institute's Corporate Governance Project: the Rule, the Doctrine, and the Reality*, 52 GEO. WASH. L. REV., 609, 611–13 (1984)).

181. *See id.* at 1390.

182. Moran v. Household Int'l, 500 A.2d 1346, 1356 (1985) (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958 (Del. 1985)).

183. Vlahakis, *supra* note 5, at 852.

184. *Id.*

185. *Id.* (summarizing the Delaware Supreme Court's holding in *Time*) (emphasis added).

186. *Id.* at 852–53 (citing Chesapeake Corp. v. Shore, 771 A.2d 293, 332 (Del. Ch. 2000)).

187. *Id.* at 840.

188. *Id.* (citing Weinberger v. UOP, Inc., 457 A.2d 701, 701 (Del. 1983)).

189. *Id.* (citing *Weinberger*, 457 A.2d at 701).

190. *Weinberger*, 457 A.2d at 711.

191. *See* Vlahakis, *supra* note 5, at 842; *cf.* Gesoff v. IIC Indus., 902 A.2d 1130 (Del. Ch. 2006) (reasoning that burden did not shift back to Plaintiff when Defendants failed to satisfy their burden of entire fairness).

plaintiffs are unable to meet their burden, the court will apply the deferential business judgment rule.[192]

2. Delaware Takeover Defenses

Section 141(a) of the Delaware General Corporation Law outlines the powers of the directors and officers of a corporation, including the implicit authority to utilize takeover defenses if in the best interest of the company and its shareholders.[193] Specifically, "the business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."[194] The specific powers of a Delaware corporation are enumerated in section 122. In particular, section 122(4) provides that every corporation shall have the power to "[p]urchase, receive . . . or otherwise acquire, own, hold . . . use and otherwise deal in and with real or personal property . . . and to sell, convey, lease, exchange, transfer or otherwise dispose of . . . all or any of its property and assets."[195] However, shareholders do get to vote upon a sale, lease, or exchange of "*all or substantially all* of [the corporation's] property and assets."[196]

Moreover, the American Jurisprudence on Corporations provides substance to takeover defenses, including crown jewels.[197] A crown jewel is defined as "the main attraction of the target company,"[198] and this *pièce de résistance* may be used in a defensive maneuver to "ward off the raider."[199] A crown jewel defense is "[t]he sale of an asset, which has the result of making a company less attractive to a tender offeror."[200]

Delaware takeover jurisprudence, as compared to Dutch law, is much clearer and more predictable. Clarity and predictability are desired outcomes within the law, especially in an increasingly global economy. International parties to a cross-border deal must be able to research and rely on the laws of each other's jurisdiction in order to lower transactions costs and encourage cross-border deals. Therefore, the gap of clarity in Dutch takeover law must be filled. Delaware

192. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)). The business judgment rule is the default standard of review if the plaintiff cannot carry his burden. *See id.*

193. *See* DEL. CODE ANN. tit. 8, § 141 (2008).

194. *Id.* § 141(a).

195. *Id.* § 122(4).

196. *Id.* § 271(a) (emphasis added).

197. *See* 19 AM. JUR. 2D *Corporations* § 2230 (2008).

198. *Id.* § 2176.

199. *Id.*

200. *Id.* § 2230.

takeover law provides an excellent model, as examined in the following sections.

III. ANALYSIS: COMPATIBILITY OF DUTCH AND DELAWARE TAKEOVER LAW FROM A COMPARATIVE PERSPECTIVE

"Historically, hostile takeovers were rare in the Netherlands . . . ."[201] In recent years, however, "the number of hostile bids has increased," and the Enterprise Chamber of the Amsterdam Court of Appeals has played a key role[202] in applying Dutch written law (Dutch Civil Code and the Dutch Corporate Governance Code) and creating some of its own.[203] Proponents of takeover defenses note that although the use of such devices has been criticized recently, the defenses have consistently been upheld in Dutch courts.[204] "The Enterprise Chamber has begun to provide a judicial framework for takeovers in the Netherlands, especially with respect to the use of anti-takeover devices."[205]

One unique aspect of the Netherlands as compared to the rest of the EU is that it is one of the only countries whose courts have played a significant role in many cross-border European takeover situations.[206] However, because there is currently no uniform code on takeovers in the EU, the courts have an opportunity to actively participate in interpreting the law of different European jurisdictions.[207] This presents a huge opportunity for the Dutch Enterprise Chamber to take the lead among EU jurisdictions to become the EU's special business court, analogous to the Delaware Chancery Court in the United States.[208]

Increasingly, the emerging Dutch judicial framework appears to mirror Delaware's common law doctrines on takeovers. This

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201. Simpson et al., *supra* note 19, at 852.

202. *Id.*

203. Maarten J. Kroeze, *The Dutch Companies and Business Court as a Specialized Court* 8 (Rotterdam Institute of Private Law, Working Paper No. 976277, 2006), *available at* http://ssrn.com/abstract=976277.

204. Simpson et al., *supra* note 19, at 747.

205. *Id.* at 853.

206. *See id.* at 750; *cf.* Huub Willems, *Other Aspects of the Companies and Business Court's Powers*, *in* THE COMPANIES AND BUSINESS COURT FROM A COMPARATIVE LAW PERSPECTIVE 193, 199 (Marius Josephus Jitta et al. eds., 2004) (explaining that many of the cases in the court involve non-Dutch parties).

207. *See* Willems, *supra* note 206, at 199–200.

208. Lambert, *supra* note 4, at 176 (comparing Delaware Chancery Court to Dutch Enterprise Chamber and stating that the "Chancery division . . . could be deemed to be the most similar entity in the United States with specialized business expertise"); Dougherty, *supra* note 21, at 338 (stating that Delaware "remains the leading state of incorporation and leading source of corporate state law" in the United States).

development is interesting for a number of reasons, including the fact that the Netherlands is a civil law country; whereas the United States is a common law country. In general, civil law countries follow the written law (i.e., the Codes) and do not put much weight on the unwritten law (i.e., judicial precedent).[209] The Dutch Enterprise Chamber, however, is more progressive and essentially has the same legal powers and discretion as its common law brother, the Delaware Chancery Court.[210] In particular, Justice Huub Willems, President of the Enterprise Chamber, believes that both jurisdictions have *principle-based* substantive law.[211] Justice Willems is "convinced that in the Netherlands developments [in business law] will proceed similarly [as in Delaware]."[212]

The Supreme Court's main issue with the Enterprise Chamber's decision, and its justification for reversal, fits squarely within the civil law model—the Enterprise Chamber's decision is not supported by Dutch written law.[213] Yet, the Supreme Court clearly could have affirmed the Enterprise Court by relying on an established judicial framework, as it has done numerous times before, if it had agreed with the lower court.[214] Instead, the Supreme Court reversed the lower court, implying that there was an additional, underlying factor weighing on the high court's decision.[215] It seems most likely that the Supreme Court simply disagreed with the Enterprise Chamber over the application of a Delaware-like judicial framework, but not the Delaware law itself. Commentators such as Anne van Nood, a Dutch lawyer, take this a step further by contending that the Supreme Court explicitly rejected a Delaware-like framework because of the differing views on corporate governance in the United States and the Netherlands.[216] The Netherlands prefers anti-takeover devices that

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209. *See generally* EU COMPARATIVE CORPORATE GOVERNANCE STUDY, *supra* note 19.

210. *See* Willems, *supra* note 206, at 197–98.

211. Huub Willems, *The Companies and Business Court: Some Introductory Remarks*, *in* THE COMPANIES AND BUSINESS COURT FROM A COMPARATIVE LAW PERSPECTIVE, *supra* note 206, at 181, 191 .

212. *See* Willems, *supra* note 206, at 198.

213. *See ABN AMRO Shareholder Litigation, Supreme Court*, *supra* note 23, ¶ 4.4. Specifically, the Supreme Court stated, "[t]here is not enough support for any other opinion in the law and the generally accepted legal conviction as expressed, inter alia, in the Dutch corporate governance code." *Id.* (citing TABAKSBLAT CODE [TC] (Neth.), *available at* http://corpgov.nl/page/downloads/CODE%20DEF%20ENGELS%20 COMPLEET%20III.pdf).

214. *Cf.* Simpson et al., *supra* note 19, at 852–53 (arguing that the Enterprise Chamber has provided "a judicial framework for takeover battles," such as those involving Gucci and Rodamco).

215. *ABN AMRO Shareholder Litigation, Supreme Court*, *supra* note 23, ¶ 6.

216. *See generally* Anne van Nood, *The ABN AMRO Ruling: Some Commentaries, 2. Commentary from a Dutch Lawyer's Perspective*, 4 EUR. COMPANY L. 168, 173 (2007).

protect all the stakeholders.[217] Particularly, van Nood criticizes the Enterprise Chamber's ruling as "aim[ed] at a more Anglo-Saxon interpretation of the boards of directors being profit maximization for the shareholders."[218]

Ultimately, the Dutch Supreme Court sided with critics such as van Nood and overruled the Enterprise Chamber.[219] However, the emerging Dutch judicial framework may have a very beneficial impact on the Netherlands. Many of the large, prominent cross-border hostile takeover battles of the past few years have occurred in the Netherlands.[220] The country's acceptance of hostile takeovers is important because many other EU Member States remain culturally and politically averse to cross-border hostile takeovers, often heavily influencing the outcome of the bids and preventing the emergence of a market for corporate control.[221]

As long as the Netherlands remains open to hostile bids, many corporate entities will gravitate to the country and relocate there through incorporation or reincorporation, thus increasing the number of cross-border deals.[222] To take advantage of this situation, the Netherlands first needs to increase legal certainty by solidifying its takeover framework in a vein similar to Delaware's takeover laws. The Netherlands should not, however, simply adopt the Delaware doctrines wholesale; instead, the Dutch must tailor their takeover law by expanding Delaware's shareholder rights view to the more expansive, European-friendly stakeholder-centered view. The Dutch Enterprise Chamber has the opportunity to become the European Union's Delaware. Not only will increased legal certainty encourage international deals but it will also increase domestic deals within the Netherlands, similar to the Chancery Court's effect in Delaware.

A. *Judicial Decisions: Dutch Supreme Court Leaves Opening Amid Apparent Rejection of Enterprise Chamber's Introduction of Delaware Trilogy*

Although recent Dutch Enterprise Chamber decisions have received praise both for their specific outcomes and for their evolutionary role in building a Dutch judicial framework, its ruling against the ABN AMRO Board in favor of shareholders was not as well received.[223] There are three reasons for the Dutch Supreme Court's reversal in the ABN AMRO case, each distinct from a

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217. *See* Simpson et al., *supra* note 19, at 853.
218. van Nood, *supra* note 216, at 173.
219. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 5.1.
220. Simpson et al., *supra* note 19, at 731.
221. *Id.*
222. *See generally* Bratton et al., *supra* note 24.
223. van Nood, *supra* note 216, at 171; Simpson et al., *supra* note 19, at 853.

wholesale rejection of a Delaware-like framework. First, certainty and reliability in commerce are very valuable commodities, and when ignored, trust in the law is lost. Second, the Enterprise Chamber appears to clearly overstep Parliament by expanding shareholder rights beyond the legislature's intent. And finally, the *ABN AMRO* facts were a poor base upon which to introduce Delaware-like laws into the Netherlands. Instead of adopting the Delaware trilogy amid poor facts, the Supreme Court left an opening for future adoption.

1. Underlying Policy: Promote Certainty and Reliability within Dutch Law

By overruling the Enterprise Chamber, the Dutch Supreme Court "restored the trust in the Dutch Company Law system."[224] Achieving legal certainty is a key theme throughout the Supreme Court's opinion.[225] The Dutch legislature made clear its policy of legal certainty when it enacted Article 2:107(a) of the Dutch Civil Code.[226] Article 2:107(a) states that "absence of approval by the general meeting [of shareholders] . . . shall not affect the representative authority of the management or the directors."[227] Not only did the Enterprise Chamber ignore this directive, but it even relied, in part, on this very same provision to grant the requested injunctive relief to the ABN AMRO shareholders.[228] The Supreme Court corrected this contradiction by upholding the legislature's explicit intent.[229] To prevent Bank of America, a third party, from fulfilling its contract would appear to "ignore the legislator's choice of third party protection for contracting parties."[230]

Pacta sunt servanda is an integral legal principle for building trust within a legal system.[231] It offers certainty to parties not familiar with local laws[232] and encourages businesses to choose one legal system over another.[233] International third parties such as Bank of America are precisely those entities the Dutch legislature hoped to protect when it declined to adopt a rule requiring prior shareholder approval.[234] Prior to the Netherlands' implementation of

224. Oostwouder, *supra* note 20.
225. *ABN AMRO Shareholder Litigation, Supreme Court*, *supra* note 23, ¶¶ 4.4, 4.7–.8, 4.10.
226. Oostwouder, *supra* note 20.
227. *Id.*
228. *Id.*
229. *ABN AMRO Shareholder Litigation, Supreme Court*, *supra* note 23, ¶ 5.1.
230. Oostwouder, *supra* note 20.
231. *Id.* at 211; RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 117.
232. *ABN AMRO Shareholder Litigation, Supreme Court*, *supra* note 23, ¶ 4.8.
233 *See id.* ¶ 4.4; *see also* Oostwouder, *supra* note 20.
234. *See ABN AMRO Shareholder Litigation, Supreme Court*, *supra* note 23, ¶ 4.4.

the EU Takeover Directive in late May 2007, Dutch law was unclear as to when prior shareholder approval was required with regard to a "transaction that [fell] within the authority of the managing board, based on the mere circumstance that it involves the interest of the shareholders in being able to sell their shares for the highest price possible."[235] The Dutch legislature's decision not to mandate shareholder rights of approval, but to allow companies the option of providing shareholders these rights[236] is indicative of the legislature's intent of enabling third parties to rely on ex ante legal opinions and research performed prior to entering into a contract under Dutch laws.[237] Additionally, the legislature limited the mandatory right of approval to "a board resolution . . . so drastic that it will change the identity or the character of the company or enterprise and the nature of the shareholdership" in a clear attempt to increase legal certainty.[238] Anything less would provide "unacceptable legal uncertainty."[239]

2. Unprecedented Expansion of Shareholder Rights

Legal certainty also underlies the Supreme Court's analysis of whether a right of prior approval of the general meeting of shareholders for the sale of an asset is supported by Dutch law.[240] In addition to the legislative intent undertones, the Court notes that requiring prior approval by the shareholders for a transaction that falls squarely within the board's authority will exponentially increase legal uncertainty, because it would include such inevitable complications such as differing opinions, coordinating the general shareholder's meeting, and determining the consequences if the board failed to fulfill its obligation.[241]

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235. *Id.*; *see also* van Nood, *supra* note 216, at 173. *See generally supra* Part II (discussing the EU Takeover Directive).

236. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 4.6 (citing BW § 2:359b (Neth.) (codifying the Dutch Parliament's implementation of the EU Takeover Directive)).

237. For example, third parties must be able to rely on the transactions performed by the managing board of a company in accordance with the provisions of the [Dutch] law and the [company's] articles of association being inviolable and to the extent they may be violated, that this possibility exists only on the basis of legal grounds with which third parties could have been familiar from the law or the articles of association.

See id. ¶ 4.4 (emphasis added).

238. *Id.* ¶ 4.7.

239. *Id.* ¶ 4.4.

240. *See* Oostwouder, *supra* note 20.

241. *ABN AMRO Shareholder Litigation, Supreme Court, supra* note 23, ¶ 4.4.

Additionally, a broader corporate governance tension underlies the Supreme Court's reversal. The Dutch Corporate Governance Code is based on the principle that a company is "a long-term form of collaboration between the various parties involved."[242] The Enterprise Chamber's obligation that a board focus solely on maximizing shareholder value "seem[ed] to be contrary to the fundamental principle of Dutch company law that the board of directors of a company must take into account the interests of all stakeholders of that company, including but not limited to the shareholders."[243] The Chamber's interpretation of the board's duties not only conflicted with a general Dutch principle and the Corporate Governance Code, but it also contradicted current Dutch regulations protecting all stakeholder interests.[244]

Prior to the Supreme Court's reversal, the Dutch legal community was also concerned with whether the Enterprise Chamber had changed the established Dutch principle "that the board of directors of a company must weigh the interests of all the stakeholders involved."[245] This approach appears to be very similar to Delaware's with regard to takeovers and the duties of the board.[246] However, the difference between Dutch law and Delaware law with respect to the ownership structure of a company poses a significant problem. The American view of corporate governance is shareholder-centered, whereas the Dutch view is stakeholder-centered.[247] This difference may result in different duties imposed on the board. An American board can be more focused, only looking out for the needs of its shareholders,[248] but a Dutch board must look beyond shareholders to its other stakeholders as well.[249] Therefore, perhaps the Supreme Court was unwilling to extend shareholders' rights to the detriment of other stakeholders.

A final example of the legal certainty rationale within the context of extending shareholders' rights can be found in the Supreme Court's refusal to analyze the sale of LaSalle under Dutch takeover defense doctrines.[250] Interestingly, in light of facts that appear to

242. TABAKSBLAT CODE [TC] pmbl. 3 (Neth.), *available at* http://corpgov.nl/page/downloads/CODE%20DEF%20ENGELS%20COMPLEET%20III.pdf.

243. van Nood, *supra* note 216, at 172–73.

244. *See id.* at 173. For example, the current regulation on public offers provides safeguards for stakeholder interests, specifically requiring the offer document to include a statement on how the rights of employees will be protected in a merger. *Id.*

245. Oostwouder, *supra* note 20; *see also* van Nood, *supra* note 216, at 172–73.

246. *See* Oostwouder, *supra* note 20.

247. EU COMPARATIVE CORPORATE GOVERNANCE STUDY, *supra* note 19, at 32.

248. *See id.*

249. *See id.*

250. Oostwouder, *supra* note 20, at 211–12.

signify a crown jewel defense,[251] the Supreme Court explicitly found that the sale of LaSalle did not involve a "co-ordinated manoeuvre aimed at frustrating the takeover intentions of the Consortium."[252] Rather than characterize the sale of LaSalle as a takeover defense, the Supreme Court termed it "a 'wonderful opportunity.'"[253] At first, this appears to be an absurd characterization, especially in light of the Dutch Court's recent acceptance of takeover defenses.[254] However, upon examination of Dutch takeover defenses, it becomes apparent how the court furthered legal certainty by avoiding a contradictory analysis.

Under Dutch law, a valid takeover defense should have a temporary nature, be proportional to the threat, and be reversible.[255] The sale of LaSalle likely would fail the takeover defense requirement because it was permanent (RBS could not later buy LaSalle from ABM AMRO) and it was irreversible (ABN AMRO could not get LaSalle back from Bank of America). In light of the ABN AMRO Board's express warranty that prior shareholder approval was not required, the consequence of holding the crown jewel defense invalid would be to block Bank of America's third party interest in performing the contract. Clearly, this would result in "unacceptable legal uncertainty."[256]

3. ABN AMRO Poor Facts: Nothing for *Revlon*- or *Unocal*-duties To Attach To

Although the Enterprise Chamber's attempt to adopt a Delaware-like framework was commendable, the Chamber may have avoided the Supreme Court's rejection if it had presented its arguments in a more persuasive way. The Chamber's ultimate analytical error appears to be that it choose poor facts and a recently clarified area of Dutch law to introduce a novel framework. Instead of adopting a Delaware-like framework, the Chamber's statement that "by displaying the bank for sale, the board of directors and the supervisory board of ABN AMRO Holding have committed themselves to create those circumstances for the sale process that are

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251. *See* de Groot, *supra* note 51; Lambert, *supra* note 4; Dash, *supra* note 7; *ABN AMRO Shareholders Vow to Sue*, *supra* note 10.

252. *ABN AMRO Shareholder Litigation, Supreme Court*, *supra* note 23, ¶ 4.2.

253. *Id.*

254. Simpson et al., *supra* note 19, at 746–47 (noting that Dutch courts have accepted takeover defenses upon a company's "good faith argument that the takeover threat was against the best interest of the target and all its constituents . . .").

255. Oostwouder, *supra* note 20, at 212 (citing RNA, Hoge Raad der Nederland [HR] [Supreme Court of the Netherlands], 18 april 2000, NJ 2003 (286, m.n.t. Ma.) (Neth.)).

256. *ABN AMRO Shareholder Litigation, Supreme Court*, *supra* note 23, ¶ 4.4.

most favorable for its shareholders"[257] evoked the heaviest criticism by those outside of the Judiciary.[258] The critique among lawyers such as van Nood conflated the adoption of a Delaware law with the possibility that the Chamber attempted to move the Netherlands away from a stakeholder view and towards a shareholder view of the company to the detriment of the stakeholders.[259]

Additionally, the outcome of the ABN AMRO case would most likely be the same under Delaware law as under Dutch law. It is also worth noting that few, if any, of the problems that the Dutch courts encountered are present under a Delaware-like regime. First, legal certainty is attainable within the Delaware-framework. Second, the difference in company structures—shareholder versus stakeholder—is not preclusive of Delaware law's applicability in Dutch law. Delaware's takeover framework adequately addresses shareholders' rights by imposing a heightened duty on the board to maximize shareholder interests.[260] The same result is achievable in the Netherlands through the establishment of analogous fiduciary duties; a further remedy is not needed. Third, the Delaware takeover defense analysis is less restrictive than the Dutch law; thus, the sale of LaSalle would probably be upheld as a takeover defense under *Unocal*—the defense must be reasonable and proportional to threat[261]–and *Unitrin*—the defense must not be coercive or preclusive.[262]

Although at least one commentator believes the Supreme Court rejected any future *Revlon*-like duty or adoption of a Delaware framework,[263] the Supreme Court probably left an opening for a *Revlon*-like doctrine.[264] It is more likely that the Supreme Court overruled the Enterprise Chamber because it saw what the Chamber missed—a *Revlon*-like doctrine was not applicable to the ABN AMRO facts due to *Time*—and, thus, was not ready to embrace *Revlon* on bad facts. When the facts are ripe, a *Revlon-Unocal-Unitrin*-like trilogy should be introduced to the Netherlands.

B. *Analysis of ABN AMRO Case Under Delaware Law*

Although the very bases underlying Delaware and Dutch corporate law appear to be different, it is significant that the outcome

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257. Oostwouder, *supra* note 214, at 172.
258. *See generally* van Nood, *supra* note 216; Oostwouder, *supra* note 20.
259. *See* van Nood, *supra* note 216, at 173.
260. *See supra* Part II.C.
261. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).
262. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995).
263. *See* Oostwouder, *supra* note 20, at 214.
264. *See supra* Part III.A.

of the ABN AMRO case would have been the same under Delaware law.[265]

Under Delaware law, *Revlon* duties are triggered by a sale of control transaction as defined in *QVC*, and arise "when a majority of a corporation's voting shares are acquired by a single person or entity, or by a cohesive group acting together."[266] The essential question dividing the line between *Revlon* analysis and *Unocal* analysis is whether a sale of control occurs.[267] The *Unocal* analysis consists of a two-pronged test.[268] First, did the directors have reasonable grounds for believing a threat to corporate policy existed?[269] Second, was the defensive measure chosen proportional to the threat?[270]

Although the Dutch Enterprise Chamber found that ABN AMRO was for sale,[271] a Delaware court would most likely conclude the opposite under *Time*.[272] The *Revlon* analysis is sufficient for situations where the target becomes "in play" as a result of either an initial unsolicited hostile bid or an initial friendly bid.[273] The analysis becomes complicated, however, when the initial bid is a friendly agreement and an unsolicited hostile bid attempts to interfere.[274] This scenario raises the issue of *when* the change of control question should be asked. The Delaware Supreme Court answered this question in *Time*: "As long as the initial merger agreement [ABN AMRO-Barclays] does not itself involve a change-of-control transaction, the appearance of an unsolicited bid [RBS Consortium] . . . does not in and of itself impose *Revlon* duties on the target [ABN AMRO] . . . ."[275] To determine if a change-of-control transaction occurs, the relevant comparison is between the control of

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265. M & A Law Prof Blog, *ABN Amro Wins One*, http://lawprofessors.typepad.com/mergers/2007/07/abn-amro-wins-o.html (July 13, 2007).

266. Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 173 (Del. 1986); Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42 (Del. 1994).

267. Vlahakis, *supra* note 5, at 842.

268. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

269. *Id.*

270. *Id.*

271. van Nood, *supra* note 216, at 172.

272. Vlahakis, *supra* note 5, at 852.

273. *Id.*

274. *Id.*

275. *Id.* In *Time*, the Delaware Chancery Court reasoned that no change-of-control transaction occurred because, both before and after the Time-Warner merger, control of Time "existed in a fluid aggregation of unaffiliated stockholders representing a voting majority – in other words, in the market." Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1990). It is worth noting that although the Delaware Supreme Court initially dismissed the Chancellor's reasoning, and affirmed *Time* on other grounds, the Delaware Supreme Court later adopted the Chancellor's reasoning from *Time* in *QVC*. *Id.*; Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 43 (Del. 1994) (citing *Time*, 571 A.2d at 1150 (Del. 1990)).

target before and after the merger.[276] No change-of-control transaction occurs if, both before and after the merger, control of the company "exist[s] in a fluid aggregation of unaffiliated stockholders" (i.e., the market).[277]

Although at first blush the threshold test appears to be *Revlon*, the *ABN AMRO* case must first be analyzed under *Time*. The initial merger agreement between ABN AMRO and Barclays does not involve a change-of-control transaction because control of both companies before the merger is widely diffused in the market, and the control of the merged company after the transaction is still within the market.[278] Since no sale of control would occur, *Revlon* duties do not apply. Therefore, the next step of the analysis is *Unocal*.

The ABN AMRO Board easily meets the *Unocal* test. As illustrated in *Time*, the decision regarding corporate strategy and culture lies almost exclusively with the board of directors; thus the board can easily meet its burden to prove that the RBS bid was a threat to ABN AMRO. Moreover, the ABN AMRO Board sold only one division of its numerous subsidiaries.[279] Although LaSalle was arguably one of ABN AMRO's most valuable assets, its sale was not "coercive or preclusive" of a future change-of-control transaction.[280] Thus, the board would easily meet the second *Unocal* prong.

Once out of the case law analysis, the Delaware court would turn to state statutes to confirm that no other requirement prevented application of the business judgment rule. The applicable Delaware General Corporation Law sections are 141(a) and 122.[281] When read together, these statutes empower the board of directors to sell assets of the corporation, except as otherwise provided in the articles of incorporation.[282] Delaware statutory law does not require prior approval of the shareholders unless the sale constitutes "all or substantially all of ABN AMRO's assets."[283] Thus, under Delaware law, ABN AMRO would not be required to obtain approval of the shareholders for the sale of LaSalle to Bank of America.

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276. *See QVC*, 637 A.2d at 46 (citing *Time*, 571 A.2d at 1150 (1990) (reaffirming the Court of Chancery's well-reasoned decision)).

277. *Time*, 571 A.2d at 1150.

278. Barclays does not have any control shareholders; control is widely diffused within the market.

279. ABN AMRO HOLDING N.V., 2007 ANNUAL REPORT 215–17 (2007), *available at* http://files.shareholder.com/downloads/ABN/407215467x0x183491/3cc1e1a6-3247-4e01-ba33-1ffba9d41fe9/ar2007en.pdf.

280. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995). In hindsight, the sale of LaSalle to Bank of America was clearly not coercive or preclusive because the ultimate winner of ABN AMRO was the RBS Consortium—not Barclays!

281. *See supra* Part II.C.2.

282. *See supra* Part II.C.2.

283. DEL. CODE ANN. tit. 8, § 271(a) (2008); M & A Law Prof Blog, *supra* note 265.

The Enterprise Chamber attempted to apply *Revlon* directly. However, under Delaware jurisprudence, this was incorrect. Either the Enterprise Chamber misunderstood the *Revlon/Unocal* analysis, or the Enterprise Chamber was not actually trying to apply Delaware law in the Netherlands. Although either analysis is plausible, it is more likely that the Enterprise Chamber was attempting to apply Delaware law. The great prominence of, and respect for, the Delaware Chancery Court, coupled with numerous commentaries and Justice Willem's reverence for Delaware law, suggests this was the case.[284] Unfortunately, its adoption failed due to poor facts and a misunderstanding of the intricacies of the *Revlon-Unocal-Unitrin* trilogy.

IV. PROPOSED SOLUTION: DUTCH JUDICIAL ADOPTION OF TAILORED DELAWARE TAKEOVER TRILOGY

The Dutch Enterprise Chamber picked a worthy model for its judicial framework when it chose Delaware. Most nations regard Delaware as the leading U.S. jurisdiction for business law.[285] Although the Enterprise Chamber incorrectly applied Delaware takeover law to the facts of *ABN AMRO* by overlooking the *Time* analysis and by over-extending shareholders' rights, its reliance on Delaware law was well-founded and appropriately timed. Due to the current EU landscape, now is an excellent time for the adoption of Delaware takeover law. Not only will Delaware's takeover trilogy provide certainty and predictability to the Dutch business court system, but it will also solidify the Netherlands' reputation as a competitive business-friendly jurisdiction within the European Union.[286] This adoption could enable the Netherlands to position itself to become Europe's Delaware.[287]

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284. *See generally* Willems, *supra* note 206.

285. *See* Karolina Carlsson, A Possible European Delaware: Can the European Private Company Prevent It? 13 (May 2006) (unpublished Master's thesis, Jönköping University) (on file with author) (stating that "Delaware does dominate the U.S. market for charters, with more than half of the larger enterprises incorporated in their system").

286. Bratton et al., *supra* note 24, at 7; *see also* Doughtery, *supra* note 21.

287. *See* Didier Martin & Forrest Alogna, New Delaware, WALL ST. J. EUR., Dec. 20, 2007 [hereinafter *New Delaware*]; *see also* Carlsson, *supra* note 285, at 12 (defining the European Delaware concept as "[the] one Member State comes to have the same advantage and leading status in the market as Delaware has in the U.S.").

A. *Characteristics of Delaware's Success*

Commentators attribute Delaware's domination of the U.S. corporate law market to three key characteristics.[288] First, Delaware's state laws are company-friendly. Due to Delaware's small size and dependence on corporate tax revenues, it had to draft attractive laws to keep firms within the state.[289] Second, Delaware's judiciary is extremely competent, knowledgeable, and specialized.[290] Not only does the Court have extensive business expertise, but it also is one of the most efficient courts within the U.S.[291] Finally, Delaware is persistent. Throughout the years, Delaware has experimented with company-friendly laws until it solidified its position as the U.S. leader.[292] Although it has cornered the market, Delaware must remain up-to-date to maintain its position. Delaware's key characteristics provide a useful model for the Netherlands to use to enhance its appeal to European businesses.

B. *The Current EU Landscape*

The idea that cross-border competition can benefit a Member State is relatively new to the European Union.[293] Founded upon treaties which promote a "non-competition" strategy, the European Union's goal has always been to maintain virtual national monopolies on corporate lawmaking.[294] As a result, competition among the Member States remained unattainable until recently. For example, the adoption of the Directive on Cross-Border Mergers, along with recent European Court of Justice rulings, allow corporations to merge and restructure or to relocate their principal place of business "based on the legal rules they prefer."[295] It is too early, however, "to

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288. Carlsson, *supra* note 285, at 13.

289. *Id.* (citing Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987)).

290. Carlsson, *supra* note 285, at 14.

291. *Id.* (citing Kenneth M. Ayotte & David A. Skeel, Jr., Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy 15–16 (Oct. 18, 2004) (unpublished manuscript, on file with author)).

292. *Id.* (citing Mark J. Roe, *Delaware's Competition* 2 (Harvard Law School, Discussion Paper No. 432, 2003)).

293. *See* Kroeze, *supra* note 203, at 1 ("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."). *See generally* Philippe Pellé, *Companies Crossing Borders Within Europe*, 4 UTRECHT L. REV. 6, 6 (2008); Bratton et al., *supra* note 24.

294. Bratton et al., *supra* note 24, at 8. Interestingly, a hidden objective of the Union's formation may have been to prevent the Netherlands from becoming a "European Delaware" in the late 1950s. Kroeze, *supra* note 203, at 1.

295. Bratton et al., *supra* note 24, at 5.

conclude . . . whether the Directive and the [ECJ cases] will lead to an increase in the reincorporation mobility and eventually more regulatory competition in Europe."[296] Nonetheless, the recent evolution of corporate mobility and corporate law points toward a potential "emergence of a Delaware-like 'European' State."[297]

The time is ripe for the Enterprise Court to enhance the Netherlands' attractiveness as a company-friendly jurisdiction. Recently, the Enterprise Chamber has seen an increase in takeover cases,[298] and it is unlikely that the legislature will be able to keep pace.[299] Indeed, in a 2004 presentation to Parliament, the Dutch Minister of Justice pointed to the Enterprise Chamber as a vehicle through which Dutch company law could be modernized.[300] It is logical, then, for the court to turn toward its own devices, even in a civil law country such as the Netherlands.[301] The Dutch have been very forward-looking and receptive of hostile bids—much more than its European counterparts.[302] As a result, companies may begin migrating to more attractive jurisdictions such as the Netherlands.[303]

C. *Dutch Judicial Adoption of Delaware Takeover Trilogy*

Adoption of Delaware's takeover law may solidify the Netherlands' strong position in the competitive regulatory landscape of the European Union. Indeed, the Netherlands must act to counter recent criticism for showing "little or no sign of high-quality legislative or case law reform."[304] Currently, most academics believe the UK has taken the lead in the race to become the "European Delaware," although the Netherlands is not far behind.[305]

The *ABN AMRO* decision provides the Netherlands with an opportunity to mirror two of Delaware's characteristics, thus

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296. *Id.*

297. *Id.* at 6.

298. Simpson et al., *supra* note 19, at 745.

299. *See id.*

300. Kroeze, *supra* note 203, at 16 (stating that the existence of the specialized business court (the Enterprise Chamber) may attract business to the Netherlands).

301. *Id.* The Enterprise Chamber actually has a good deal of discretion, in contrast to the U.S. where the plaintiff must first ask for a measure before the court will consider it. *Id.* at 14 (stating that the Enterprise Chamber "has discretionary powers to take the provisional measures that it deems necessary, even when the parties did not request certain measures").

302. *See* Simpson et al., *supra* note 19, at 745–46 (noting increased Dutch activity in takeovers).

303. *See generally* Pellé, *supra* note 293; Bratton et al., *supra* note 24; Carlsson, *supra* note 285. Generally, there are two types of corporate mobility: incorporation and re-incorporation.

304. Bratton et al., *supra* note 24, at 7.

305. John Armour, *Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition* 12 (ESRC Ctr. for Bus. Research, Univ. of Cambridge, Working Paper No. 307, 2005); *New Delaware*, *supra* note 287.

improving its competitive position within the European Union. The adoption of Delaware takeover law would promote company-friendly Dutch laws and will improve the efficiency and predictability of the Enterprise Chamber, thereby enhancing the Netherlands' appeal to businesses.

However, due to differences in the legal systems, implementation of the Delaware framework poses a few issues. Importantly, the framework must be tailored for the Netherlands. The Dutch must expand Delaware's notion of a shareholder to include all stakeholders to keep it aligned with longstanding principles of duties toward all stakeholders.[306] A line must be drawn, however, to delineate the appropriate level of stakeholder rights.[307] Fortunately, the Dutch Enterprise Chamber has discretionary power to take provisional measures *sua sponte*; thus, the Court may implement the Delaware adoption.[308] Justice Huub Willems, President of the Enterprise Chamber, believes the answer to incorporating comparative law into the Netherlands to be a "law-harmonizing interpretation method,"[309] such as the one presented here.

1. Benefits

The Netherlands will benefit from adopting Delaware's takeover law by attracting businesses in four distinct ways. First, it will attract businesses throughout Europe by establishing legal certainty.[310] For instance, Bank of America, a third party to the ABN AMRO deal, could have saved court costs and time if the Dutch law it had researched and relied upon ex ante had been upheld. Second, an increase in deals flowing into the Netherlands may lead to

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306. EU COMPARATIVE CORPORATE GOVERNANCE STUDY, *supra* note 19, at 28.

307. Very interesting questions arise regarding the correct level of shareholders' rights. *Compare* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005), and Bernard S. Black & John C. Coffee, Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation*, 92 MICH. L. REV. 1997 (1994), *with* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 618 (2006), *and* Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187 (1991). This is the "shareholder empowerment debate." This Note does not explore this issue, but at some point the Dutch judiciary should examine the appropriate level of shareholder protection. Professors Bebchuk and Bainbridge intensely debate what the correct level is.

308. Kroeze, *supra* note 203, at 14. "Sua sponte" is a Latin term that means the court may examine a question of law even if the parties have not raised it. It is rare for a civil law system to have this discretion. *See also* Willems, *supra* note 206, at 198–99.

309. Willems, *supra* note 206, at 199–200.

310. *See* Carlsson, *supra* note 285, at 13 (citing Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987)); *see also* Kroeze, *supra* note 203, at 8–9 (listing contributions that Enterprise Court may make, or has made, to Dutch company law).

increased revenues for the state.[311] Third, the Netherlands will benefit by enhancing its specialized business court.[312] Finally, a fourth benefit is an improved corporate governance code.[313] Often, the market for corporate control is seen as a way to align management's incentives with those of shareholders.[314] Attracting new entities to the Netherlands will also result in the additional benefits of job creation[315] and increased quality of professional services located within the country.[316]

2. Potential Drawbacks

Assuming that the Netherlands adopts the Delaware takeover trilogy, there is no guarantee that it will experience the same benefits as Delaware. Commentators currently disagree as to whether the required incentives for a "European Delaware" exist.[317] Nonetheless, it is too soon to know the outcome of the emerging inter-European competition or who will prevail as the European Delaware.[318]

V. CONCLUSION

The Dutch Enterprise Chamber's instinct to strengthen the Dutch business law in the takeover context was a prudent one. It chose an excellent model in the Delaware Courts, as Delaware corporate law is generally regarded as "the leading source of corporate state law" in the United States.[319] Unfortunately, its timing was misplaced and misjudged. *ABN AMRO*'s facts were not ideal for Delaware law because the same conclusion results under either Dutch or Delaware law. Under the facts of *ABN AMRO*,

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311. *See* Pellé, *supra* note 293, at 6 (one benefit of corporate mobility is economic growth). *But see* Bratton et al., *supra* note 24, at 4 ("[C]harter fees and franchise taxes are not available to incentivize European member states to modernize and optimize their corporate law regimes.").

312. *See* Carlsson, *supra* note 285, at 14 (citing Kenneth M. Ayotte & David A. Skeel, Jr., Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy 15–16 (Oct. 18, 2004) (unpublished manuscript, on file with author)).

313. Kroeze, *supra* note 203, at 2 ("[S]pecialized business courts . . . make . . . important contributions to the development of corporate governance in their jurisdictions.").

314. *See* Brown et al., *supra* note 7, at 313.

315. Pellé, *supra* note 293, at 6.

316. *See* Bratton et al., *supra* note 24, at 4.

317. *Compare New Delaware*, *supra* note 287 (monetary incentives exist), *with* Bratton et al., *supra* note 24, at 4 (charter and franchise taxes not available but incentives to appease the professional services industry exist).

318. *See* Bratton et al., *supra* note 24, at 7 ("It is too early to draw hasty conclusions about the emergence of a European Delaware.").

319. *See* Dougherty, *supra* note 21, at 338.

Delaware's *Time* precedent dictates that *Unocal,* and not *Revlon,* duties apply. Thus, the Dutch Supreme Court's ultimate result was correct. Notwithstanding this mistake, the Enterprise Chamber should adopt a tailored version of the Delaware trilogy for the Dutch system.

A judicial framework such as Delaware's provides certainty to both the legal and business markets. This certainty, in turn, encourages confidence and trust in the company law.[320] Coupled with the divergent, and often adverse, takeover laws throughout Europe, the Netherlands has a chance to lead change towards a freer market for corporate control and increased inter-European competition.[321] But the Netherlands first needs to prepare itself with an established judicial framework. The Dutch Enterprise Chamber can take the lead in the European Union and become Europe's Delaware. Not only will the Netherlands benefit from increased certainty, but it will also experience corollary benefits such as increased revenues and perhaps a stronger corporate governance regime.

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320. *See* Oostwouder, *supra* note 20, at 216.

321. *See generally* Bratton et al., *supra* note 24; Carlsson, *supra* note 285.

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