EXHIBIT 2.H

3.3 Disclosure or discovery

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Chapter 1 refers to the judgment in *Tripels v Masson*. [1] In that case, the President of the District Court of The Hague granted the claim for the disclosure of copies of Masson's bank and giro accounts, his security portfolios and overviews of his equity participations in various companies, as well as the disclosure of the accounting records of the companies based in Jersey and Liechtenstein from 1976 up to the date when the writ was issued. The Appellate Court took a different position. It found that, in that part of the claim, Masson had been requested to disclose accounts to Tripels relating to both his current and previous financial dealings. However, Tripels was not entitled to make that request because there was no statutory basis for it. The fact is that the law did not require such a disclosure from a debtor like Masson. Nor had the parties concluded a contract of that nature and, finally, Masson had not carried out any management activities. With regard to the claimed disclosure of accounting records, the Appellate Court found that the instances referred to in Sections 8 and 11 of Dutch Commercial Code (*Wetboek van Koophandel*) did not apply. It therefore denied the claim. The Dutch Supreme Court found that a debtor is obliged to provide a creditor who has a due and payable claim with information about his income and financial position and about property that is available for recourse.[2] The Supreme Court ruled, however, that it was not consistent with the legal system to attach practical effect to that obligation in such a way that a claim like the one in question could be granted. The fact is that there is only a limited group of parties that could require a debtor to disclose his accounting records. A claim for the disclosure of such a large number of records was reserved to the Trustee in bankruptcy.

Tripels' claim was too broad and it therefore exceeded the limits of Article 843a of the Dutch Code of Civil Procedure ("DCCP") or, as Advocate General Huydecoper argued in relation to another judgment: "*[It]… is considered objectionable (and I wholeheartedly agree with that) for preliminary measures of inquiry to be applied in such a way that the applicant is given the opportunity to gather any information as he sees fit (convenient to him) at the expense of his opponent. (We have a telling expression for this, which is 'fishing expedition', borrowed from the Anglo-Saxon practice of law). Why this should not be allowed can be explained as follows: it would not accord with the principle, accepted in Dutch law, that one cannot 'simply' demand access to all the information that another person possesses …*".[3] Tripels' claim was, however, in line with the English and American system of 'discovery'.[4]

The words discovery and disclosure are frequently used interchangeably, and not only in the Netherlands.[5] In what follows, I will take discovery to mean 'the discovery of the existence of a document' or 'the quest to determine whether or not a document exists', partly in view of the wording used by the Storme Commission (see Chapter 4). Disclosure then means revealing the contents of the discovered document.[6] In England, 'disclosure' is used predominantly. See *inter alia* the text of the Civil Procedure Rules, Part 31 of which devotes an entire chapter consisting of 23 articles to the 'disclosure and inspection of documents'. Under the heading 'Meaning of disclosure', para. 31.2 states: "A party discloses a document by stating that the document exists or has existed".

A search for ‘discovery’ and ‘disclosure’ in the United States Code yields a good number of hits for both words. One may tentatively infer from those hits that the existence of the document is not yet clear at the discovery stage, while the disclosure stage is about whether the content of a document, the existence of which is certain, should be disclosed.

In England and the United States, there is what is known as the ‘pre-trial discovery phase’. During this phase, a party may ask the other party to allow him to examine the content of the documents that are relevant to the proceedings.[7] There are few or no restrictions like the ones imposed by the terms ‘legitimate interest’ and ‘certain records’ used in Article 843a DCCP.[8] The absence of such restrictions can lead to an alarming increase in the scope of the proceedings, offering further opportunities to fish for documents. This would not be possible under Dutch law because the combination of the terms ‘legitimate interest’ and ‘certain records’ precludes such fishing for documents. In the parliamentary history of Article 21 DCCP, the Senate members of the VVD (People’s Party for Freedom and Democracy) asked whether that article was not a consequence of the Anglo-American system of disclosure, involving endless litigation about which documents should or should not be submitted. The Minister considered that Article 21 DCCP fitted in with a long-standing development on the continent that was not an offshoot of the Anglo-American system.[9] Kremer and Rehbock are also of the opinion that discovery, including the ‘pre-trial phase’, is not consistent with the Dutch system.[10] In short, they take the view, partly on the basis of Van den Reek's thesis, that discovery is not an isolated concept but rather it fulfills a specific function within a greater whole. Secondly, in their opinion, there seems to be little difference in practice because, even in the Netherlands, a party who is sufficiently certain that the other party is withholding information will still be able to gather the relevant information. Thirdly, parties who are not sufficiently sure what information the other party possesses are left empty-handed in both systems. Advocate General Spier does not seem to be in favor of ‘full disclosure’ either. In a very lengthy opinion he points out the disadvantages in detail, particularly the fishing opportunities that he believes should be avoided, and considers such a development unappealing.[11] Referring to The Principles of Transnational Civil Procedure (“PTCP”), Krans writes that disclosure in English and American law (to which those Principles seek to connect) provide wider possibilities for accessing information than are available under Dutch law. However, that gap is narrowed by the fact that the PTCP do not recognize unconditional disclosure either, and they describe discovery as limited. The principles of the PTCP (and, as I understand it, disclosure in England and America because the PTCP clearly sought a connection with the law of those countries) and those of Dutch law differ, but the outcomes need not be so far apart.[12]

Haazen mentions that even in America, which critics say is rife with fishing expeditions, one empirical study after another reveals that “*in many American civil cases, often approaching fifty percent, there is no discovery, and in most of the remainder of the cases there is remarkably little*.”[13]

Croiset van Uchelen compares the Dutch disclosure system with the common law system of discovery, perceiving the main difference to lie in the fact that, in the common law system it is easier to obtain evidence in advance, albeit often at considerable expense, whereas in the Dutch system of disclosure the case is first argued at length, thus leading to a more focused discovery. He does note, however, that in his view the Dutch system allows a request for disclosure on the basis of Article 843a DCCP to be made at an early stage and that it could be granted.[14]

Case law is not always a model of restraint. For instance, on October 3, 1996, the District Court of Rotterdam ordered Center Parcs and S&N to disclose the minutes of certain meetings of the boards of directors to former Center Parcs stockholders without imposing any limitation with regard to subject-matter, for example.[15]

With the world getting smaller and smaller, a Dutch defendant could find himself subject to the jurisdiction of the U.S. or English courts. He could then be required to produce documents under U.S. or English rules. If a Dutch court then receives a letter of request for documents from England, for example, that request would be based on the Hague Evidence Convention.[16] Such a request to a Dutch court may only be complied with in accordance with the declaration made by the Netherlands under Article 23 of that Convention. Article 23 of the Hague Evidence Convention provides that a Contracting State may declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries. The Netherlands did

issue that declaration and it is included in Dutch Treaty Series 1981, 70 (*Tractatenblad 1981, 70*). [17] According to the text of the declaration issued by the Netherlands and included in Dutch Treaty Series 1981, 70, the Dutch legislature wanted in any event to adhere to the principle that fishing for documents is not allowed in the Netherlands. It is not clear to me in this regard whether the then Dutch legislature was sufficiently aware of the limits of 'pre-trial discovery of documents' in Common Law countries or whether it simply had cold feet. The wording of the text of that declaration is clear and it therefore clearly expresses the intention of the legislature as well. So, in 1981 in any case, the legislature imposed a fishing ban in this regard. The obvious question is then whether that intention should still be taken into account when interpreting Article 843a DCCP in 2010. If we are to proceed from that intention or insight expressed in 1981, then the limits of the interpretation of terms such as 'legitimate interest' and 'certain records' would have to be in line with what the Treaty Series says is the government's declaration. It is my belief that that position is not tenable. The law in this regard has evolved so rapidly in recent years that what the legislature noted almost thirty years ago, which had not (yet) been subjected to a process of fact-finding, should no longer play an overly important role. Another important factor here is that the legislatures that drafted the various versions of Article 843a DCCP did not refer to that caveat included in Dutch Treaty Series 1981, 70, either in 1987-1988 or in 2001. So I think that the interpretation of Article 843a DCCP in 2010 should not rely too heavily on that caveat based on the Hague Evidence Convention.[18] It may even be time to scrap it.

For the sake of completeness, I also refer to the Dutch Supreme Court, March 11, 1994, NJ 1995, 3. In that judgment, the Dutch Supreme Court paraphrased the Netherlands' caveat as follows: "*With regard to the disclosure and submission of documents held by a party, the caveat made by the Netherlands on the basis of Article 23 of the Convention is also relevant. Put briefly, it means that the disclosure or submission of documents may not be requested for the purpose of commencing proceedings based on them*."[19]

Footnotes

[1]

Dutch Supreme Court, September 20, 1991, NJ 1992, 552, with commentary by J.B.M. Vranken.

[2]

The Dutch Supreme Court refers to Article 475g DCCP and the Memorandum of Reply to the Act implementing Books 3-6 of the New Dutch Civil Code, the first part containing amendments to the Dutch Code of Civil Procedure, the Judiciary (Organization) Act (*Wet op de rechterlijke organisatie*) and the Bankruptcy Act (*Failissementswet*), pp. 11-12. These state that a judgment debtor is obliged to cooperate with the enforcement and that this obligation is based on the judgment debtor's obligation to comply with the enforcement order itself. Having regard to Articles 6:2(1) and 3:45 of the Dutch Civil Code ("DCC") and Article 444 DCCP, this obligation entails additional obligations, including the requirement to refrain from removing property from lawful recourse. However, the Minister did not consider it desirable to include an explicit rule in this regard because, in his opinion, giving reasonable and practical effect to that rule would not be a simple matter. Having regard to this obligation formulated by the Dutch Supreme Court, the dismissal by the District Court of Amsterdam (September 7, 2006, AY7784) of a claim for the disclosure of certain financial documents because the plaintiff wanted information about the defendant's means for recovery, was incorrect. A better finding was the one given by the District Court of Dordrecht (January 5, 2006, SES 2006, 104): "... it is not ruled out in advance that Article 843a DCCP can also be used to obtain information in order to secure recourse...".

[3]

Dutch Supreme Court, December 24, 2004, *LJN* AR4980.

[4]

For fairly extensive explanations of this, see Van den Reek, diss., pp. 85-185 (chapter 3, 'Mededelingsplichten in het Engels burgerlijk procesrecht' (*Disclosure obligations in English civil procedure*)) and J. Ekelmans, 'U.S. disclosure and discovery of documents', TvPP 2009, pp. 179-187, and Ekelmans, diss. pp. 25-44. As regards the possibility of gathering evidence through the U.S.

courts for proceedings to be initiated in the Netherlands, see Tom Claassens, 'Discovery in de VS voor procedures in Nederland' (*Discovery in the U.S. for proceedings in the Netherlands*), Adv.bl. 2004, pp. 754-760 and S. Hoogeveen, 'Fishing expeditions versus exhibitieplicht' (*Fishing expeditions versus the duty of disclosure*), Adv.bl. 2005, pp. 678-681. See also C.G. van der Plas, 'De extraterritoriale reikwijdte van de exhibitieplicht bij banken' (*The extraterritorial scope of the disclosure obligation of banks*) (Offerhaus series), The Hague: Boom legal publishers 2014, C. 4, 'Grensoverschrijdende discovery in het Amerikaanse recht' (*Cross-border discovery in U.S. Law*) pp. 31-43.

[5]

For example, 'Een nieuwe balans' (*A new balance*) states on pp. 100-101, where English law is discussed, "Court intervention is now always required for the disclosure of documents (discovery)".

[6]

Van der Korst, p. 109, writes that disclosure means a litigant's statement that a document exists or has existed. On p. 121, he seems to think that discovery is a means of gathering evidence. K.J. Krzeminski writes, on p. 47 of 'U. S. discovery for use in Dutch civil proceedings' TCR 2008, pp.47-55: "Discovery can be defined as the pre-trial phase in a lawsuit in which litigant parties can obtain information from the opposing party."

[7]

See also pp. 26 et seq. van Haak and VerLoren van Themaat (editors).

[8]

See also Asser/Vranken Algemeen Deel** (*General Part***) 1995/19 et seq.

[9]

Parl. Gesch. Burgerlijk procesrecht 2002 (*Parliamentary History of Civil Procedure 2002*), pp. 152-153. According to the Dutch legislature, Article 21 DCCP cannot be considered as an offshoot of the Anglo-American disclosure system. Under that system, parties may be required to grant each other extensive access to all kinds of documents. According to p. 153 of the Parliamentary History of Civil Procedure 2002, that is entirely different from the (current) Dutch system of a clearly defined duty to tell the truth in court proceedings.

[10]

M. Kremer and E. Rehbock, 'Discovery en andere wegen der (ge)lijdelijkheid' (*Discovery and other forms of (im)passivity*), Ars Aequi 1998, pp. 448-457.

[11]

Advocate General Spier in his opinion to the Dutch Supreme Court, February 22, 2008, BB5626. Spier's extreme reticence in granting claims for the disclosure of documents is also evident from his opinion to the Dutch Supreme Court, October 26, 2012, BW9244 (whistleblower) in which he writes, among other things, that the Appellate Court's finding that the requested documents had not been sufficiently specified had hit the nail on the head: "The fact is that it is not entirely clear exactly which documents he (the whistleblower) is referring to. What is the phrase 'following on from his report of wrongdoing to the AFM' supposed to mean? What is meant by 'following on from'? And what 'abuses' is A concerned with, partly in light of the later limitation to the D-file? And what is meant by 'in any case'? What does D mean by 'as a result of the 'D file'? What reports and measures is A referring to? Does there have to be an inseparable connection with said file, or is it sufficient for there to be 'some connection' with it?" The Dutch Supreme Court then granted the claim with barely any further explanation.

[12]

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