

Legal forms of business

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Overview

- Dutch legal persons: Legal structures with corporate (legal) personality.
 - Therefore not: Sole proprietor (eenmanszaak), Commercial partnership (VOF or Vennootschap onder Firma), Public partnership (Maatschap), Limited partnership (CV or Commanditaire Vennootschap).
- Management and Supervision of Legal Persons Act (Wbtr)
- Codification of directors' duties.
- Directors' liability.
- Conflict of interest (incl. approach of the EC).
- Dismissal of directors
- Obligation to offer?
- Attribution of knowledge
- Derivative suits/reflective loss
- Regulation of disputes (incl. squeeze-out))

Dutch legal persons

- Book 2 Dutch Civil Code
- Title 1: General provisions
- Title 2: Associations
- Title 3: Cooperatives and Mutual Insurance Societies
- Title 4: Public Limited Company (“naamloze vennootschap” or “NV”)
- Title 5: Private Limited Company (“besloten vennootschap” or “BV”)
- Title 6: Foundations
- Title 7: Mergers and divisions
- Title 8: Regulation of disputes and the right of inquiry (Enterprise Section of the Amsterdam Court of Appeal)
- Title 9: Annual accounts and annual reports

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 - Title 9: Annual accounts and annual reports
- **See: Warendorff Dutch Civil and Commercial Law Legislation**

General provisions

- Book 2 Dutch Civil Code
 - **No derogation** from the provisions of Book 2 except and to the extent that the law so permits.
 - The legal system comprises a **closed system**, so no other private law legal person than those mentioned as such in legislation can be created.
 - **Facilitating** and **regulating**.
 - Facilitating?
 - E.g. Incorporation (notarial deed), decision-making/representation, winding-up/dissolution, liquidation, conversion, mergers, division.
 - Regulating?
 - E.g. directors liability, claim for expelling, claim for withdrawal, right of inquiry.



Management and Supervisory of Legal Persons Act

(1 July 2021)

What has changed since July 1, 2021?

- Associations and foundations.
- One-tier board; 2:44a, 291a DCC (postponed until further notice)
- Supervisory board; 2:47 & 2:292a DCC
- Requirements appointment supervisory board members; 2:47a & 2:292a DCC
- Directors' duties: 2:44(2) & 2:291(2) DCC
- Restriction of multiple voting rights; 2:44(4) & 2:291(4) DCC
- Conflict of interest; 2:44(6) & 2:291(6) DCC
- Rewarding executive compensation; 2:44(7) & 2:291(7) DCC
- Advisory vote directors; 2:44(8) & 47(9) DCC

What has changed since July 1, 2021?

- Directors' liability; 2:50a & 2:300a DCC
- Mandatory inability to act provisions (belet- en ontstentenis); 2:44(5) & 2:291(5) DCC (partly postponed)
- Association: Binding nomination of directors; 2:37(4) DCC
- Foundation: appointment and dismissal directors; 2:286 DCC
- Foundation: dismissal at the request of an interested party; 2:298 DCC
- Foundation: no reinstatement of employment contract for directors; 2298a DCC

Directors' duties

- Codification of the duty of the management and supervisory board.
- In the performance of their duties, directors should be guided by the interests of the legal entity and its affiliated enterprise or organization.
- How does this relate to the statutory purpose of the legal entity?
- Dutch Supreme Court Cancun and Cordial:

Cordial: corporate interest

- What constitutes the corporate interest depends on the circumstances of the case
- If the legal entity is associated with a business, the interest of the legal entity is generally determined primarily by promoting the ongoing success of the business.
- In the case of a joint venture company, the interest of the legal entity is further determined by the nature and content of the cooperation agreed between the shareholders (may imply that (also) the interest of the legal entity benefits from the continuation of the existing relations between the shareholders).
- Moreover, the legal entity has an independent interest in ensuring that statutory standards and standards in the articles of association or standards that also arise from the reasonableness and fairness of article 2:7 CCC (2:8 DCC), including procedural standards that are necessary for proper decision-making, are or will be properly observed.

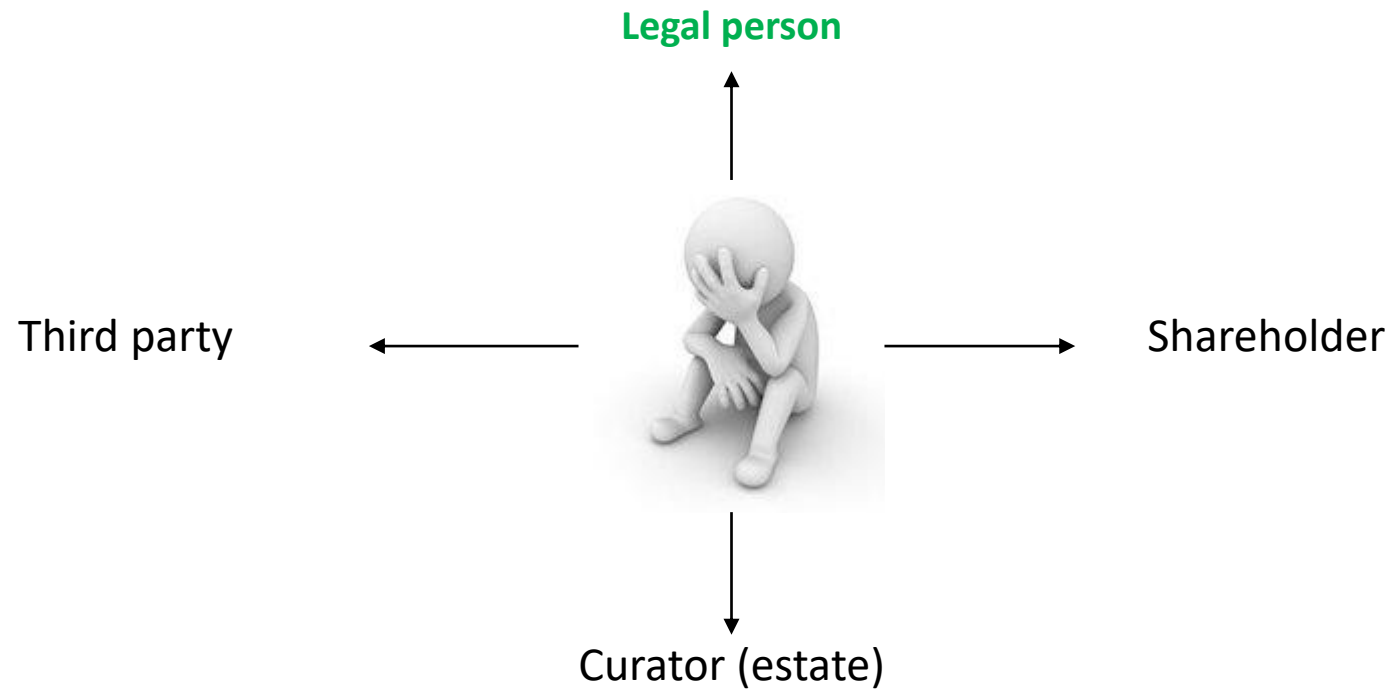
Cordial: corporate interest

- In these proceedings, the director's actions as a director are central.
- In answering the question of whether it is in the interest of the legal entity to make provisions in an inquiry proceeding, it should therefore also be taken into account in these proceedings that directors, in the performance of their duties, must exercise due care in relation to the interests of all those involved in the company and its business, and that this duty of care may imply that directors, in serving the interests of the company, must ensure that the interests of those involved are not unnecessarily or disproportionately prejudiced as a result.
- The obligation of directors of a joint venture company to exercise due care towards the shareholders may entail a special duty of care with respect to the position of a shareholder whose interest has been diluted or is (further) at risk of being diluted.
- The legal entity has an independent interest in ensuring that these standards arising in part from Section 2:7 CCC (2:8 DCC) are or are properly observed.

Cordial: corporate interest

- The court failed to recognize that the interest of Cordial and Turnham, also in view of the purposes and scope of the right of inquiry, should include the interests of Bab as a minority shareholder of Cordial and Turnham, and should include the independent interest of that Cordial and Turnham have in complying with the norms that apply in an issue of shares, in particular to a shareholder whose interest has been diluted or is in danger of being diluted.

Directors' Liability risks



Internal director's liability

➤ 2:9(1) DCC

- Each officer or director shall be responsible towards the legal person for the **proper performance** of his **duties**.
- All duties not allotted to one or more other directors by or pursuant to the law or the articles shall form part of the director's duties.

➤ 2:9(2) DCC:

- Each director shall be responsible for the **general course of affairs**.
- He shall be wholly liable for improper management, unless **no serious reproach** can be made against him, having regard to the duties attributed to others, **and** he was **not negligent** in acting to prevent the consequences of improper management.

Internal director's liability

- Proper performance: objectified.
- Test: acting like an average-director.
- Standard: **acting seriously reproachable/culpable**.
- All relevant circumstances of the case.
- **Jointly** and severally liable.
- Directors may try to exculpate themselves from liability:
 1. if the mismanagement did not concern activities belonging to their tasks;
and
 2. if they can prove that they have not been negligent in taking measures to prevent mismanagement.

Internal director's liability

- Discharge (decharge).
- Limited to the information annual accounts and other information provided to the general meeting of shareholders.
- Internal liability also applies to supervisory board members.
- Monitoring and advice.
- Liability of managing directors does not automatically mean liability of supervisory board members.

Internal Director's Liability

- Act in violation of a legal or statutory provision intended to protect the legal entity?
- Severe circumstance that in principle establishes liability (DSC Berghuizer Papierfabriek).
- Plaintiff claims (and proves if necessary) that the director acted in violation of that provision.
- The director may raise a disculpatory defense and provide rebuttal evidence.

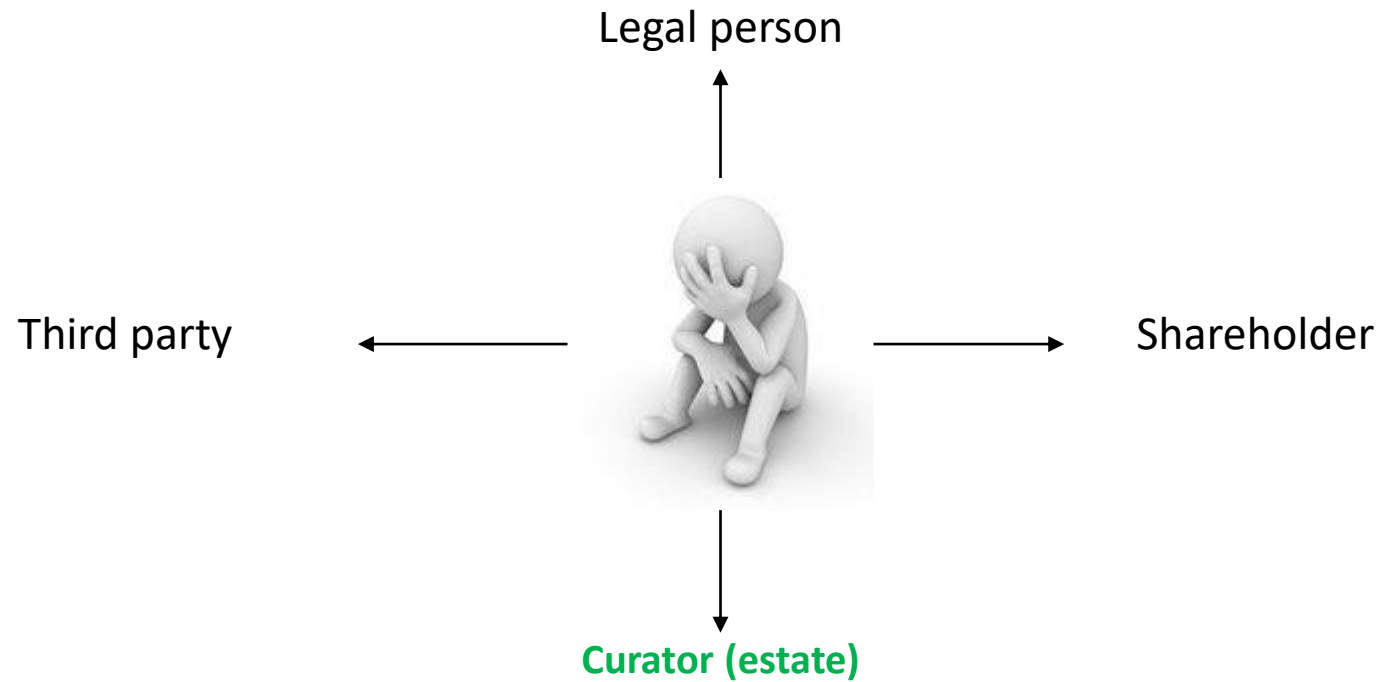
Internal Director's Liability

- **ECLI:NL:HR:2023:146**
- Stichting Studiefinanciering Curacao (SSC)
- Foundation whose objective is to provide study financing to residents of Curacao and to manage and collect student loans issued in that context.
- Director SSC enters into an agreement with Experientia on May 15, 2017.
- The decision to enter into the agreement required SB approval under the AoA.
- SB dismisses director and argues that SB did not approve the agreement.
- AoA allow SB decision-making outside meeting (provided written and all members agree to this method of decision-making).
- Director invokes e-mail vice chairman SB, with other SB member in cc.

Internal Director's Liability

- Budget etc. had been approved.
- Instruction government to build on preparation and guidance.
- To comply with this government instruction: extension of Experientia contract.
- Was in line with standing policy.
- No financial problems, sufficient cash flow to meet contract.
- DSC: These contentions cannot be said to detract from the judgment that director was seriously culpable for failing to comply with the statutes.

Directors' Liability risks



External liability (2:248/138 DCC)

- In the event of a **bankruptcy**.
- Directors are **jointly** and **severally** liable to the estate.
- For the **whole deficit** of the estate (amount of obligations not satisfied out of the liquidation of the assets).
- **Manifest improper performance** of his duties; and
- It may be assumed that this is an **important cause** of the bankruptcy.
- Is **prejudice** against creditors **foreseeable**?
- Know or should have known: objectified.
- All relevant circumstances of the case.
- Also applies to supervisory board members.
- Only improper performance during **three years preceding** the bankruptcy.
- **Discharge** granted **does not bar** an action against the directors.

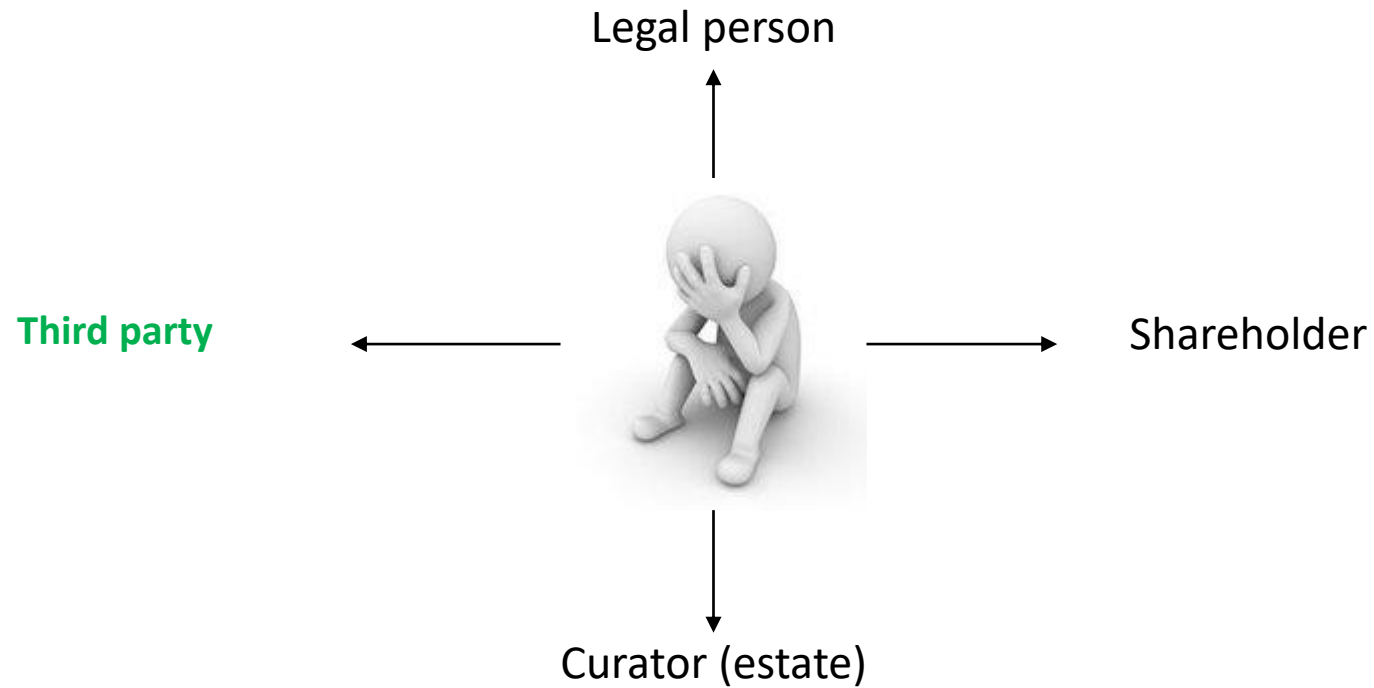
External liability (2:248(2)/138(2) DCC)

- If management has not complied with its obligations **under Articles 10 or 394**, it has **performed its duties improperly** and it shall be **presumed** that the improper performance of its duties **constitutes an important cause** of the bankruptcy.
- Article 10: sound administration.
- Article 394: publish its annual accounts (within 12 months).
- Any immaterial omission shall not taken into account.
- Irrefutable: improper performance.
- Refutable: an important cause of the bankruptcy.
- Director: **other facts and circumstances** important cause of the bankruptcy.
- Negligent in acting to prevent the consequences of these other facts and circumstances?
- Director: other facts and circumstances cannot be considered improper performance by the board.

External liability (2:248/138 DCC)

- Exculpation is possible (3):
- A director shall not be liable if he proves that the improper performance of the management's duties is not attributable to him and that he has not been negligent in taking measures to avert the consequences thereof.
- A court may reduce the amount for which the directors are liable if it considers the same excessive, having regard to:
 - a. the nature and seriousness of the improper performance of the management's duties,
 - b. the other causes of bankruptcy
 - c. the manner in which it is liquidated; and
 - d. The time during which such director was in office in the period during which the improper performance took place.
- Any person who has determined, or jointly determined, the policy of the business of a company as if he were a director shall be equated to a director.

Directors' Liability risks



External director's liability (6:162 DCC)

- Primarily liable against third parties: the legal person.
- Only **in exceptional circumstances**: individual liability of a director.
- Bar is set fairly high: no “fearful directors”.
- Standard: **personally acting seriously reproachable** against a third party.
- Causation between act and damages.
- When is a director acting personally seriously reproachable?
- At least **two types of conduct**;
 - In the event that a director **acted** in name of the company and **he was aware or could reasonably have been aware** that the company would be **unable to perform** its obligations and that there would be **no recourse**; and
 - In the event that a director has **ensured** or **permitted** that the company would **not fulfil its obligations** causing damages to the third party (e.g. unwillingness to pay).

Directors' liability (former law)

- What has changed re associations and foundations?
- Art. 6:162 DCC:
 - Directors and supervisory board members of all legal entities.
- Art. 2:9 DCC:
 - Directors (including non-executives) of all legal entities;
 - Supervisory board members of commercial (formal) association (VBP) incl. cooperative and ovm; and
 - Supervisory board members of commercial foundation (VPB).
- Art. 2:138 DCC (2:50a en 300a DCC):
 - Directors and supervisory board members of commercial (formal) association (VBP) incl. cooperative and ovm; and
 - Directors and supervisory board members of commercial foundation (VPB).

Directors' liability (since July 1)

- Art. 6:162 DCC:
 - Directors and supervisory board members of all legal entities.
- Art. 2:9 DCC:
 - Directors and **supervisory board members** of all legal entities.
- Art. 2:138, **1, 3 - 10** DCC (2:50a en 300a DCC):
 - Directors and **supervisory board members** of all legal entities.
- Art. 2:138, **2** DCC en 2:139/2:150 (2:50a en 300a DCC):
 - Directors and supervisory board members of commercial associations/foundations (VPB).
 - Directors and supervisory board members of an association/foundation that is required by law to prepare **financial statements** that are the same as or equivalent to financial statements as referred to in Part 9 of Book 2 of the Dutch Civil Code (read: **semi-public sector**).
 - Disclosure: documents must be kept available to any interested party.

Internal directors' liability (since July, 1)

- Art. 2:9 BW also for supervisory board members.
- Brings little news:
 - Effect of 2:9 BW in relation to claim pursuant to 6:162 BW (Rb. Oost-Brabant 26-2-2014 (Servatius)).
 - Specific semi-public legislation (Art. 31 (3) Housing Act for housing corporations).
- WODC-report (2012):
 - Art. 2:9 BW is not often used.
 - Reasons: settlement, costs/no possibility of recovery, already sufficiently punished.

Liability following bankruptcy

- More important:
- Joint and several liability of directors and supervisory directors in case of bankruptcy ex 2:138 BW for the entire estate deficit.
- Background:
 - Vestia, Amaranthis, InHolland, Rochdale, Meavita etc.
 - Halsema report: “Tighten civil liability where possible”

Liability following bankruptcy

- Minister:
 - Fraud or serious dereliction of duty also exists in non-commercial foundations and associations.
 - Trustee should have adequate means to recover damages.
- Criticism:
 - Why for all association and foundations?
 - Are Art. 6:162 DCC and Art. 2:9 DCC not enough?
 - Call to remove link between duty of disclosure/evidence of suspicion (not answered).

Liability following bankruptcy

- Nevertheless, pushed through, albeit in a somewhat slimmed-down form.
- **First proposal:** Art. 2:138 DCC applies to all legal entities.
- **Second proposal:** Art. 2:138 (2) DCC does not apply to unremunerated directors of non-commercial associations/foundations.
- **Third proposal:** Art. 2:138 (2) DCC does not apply to non-commercial associations/foundations, but does apply to the semi-public sector (because not always VPB, often exempt under conditions).
- Not the whole 'problem' solved: bankruptcy is required (but 2:9 DCC).
- Not so remarkable statement: size, character and activities are important. Directors small foundation, modest remuneration, do not have the same requirements.
- **Remarkable statement:** Accounting not in order? Not automatically a reason for liability.

Liability following bankruptcy

- **Somewhat notable statement:** General course of affairs?
 - Strategic policy, financial policy and risk policy.
- Director is not authorized to set off against a claim against the legal entity.
 - See HR 18-09-2009 (Bandel/Van der End q.q.).
- Claim cannot be made against:
 - An administrator appointed by the court
 - A director appointed by the Enterprise Chamber as referred to in Article 2:356(c) DCC.
 - Presumably also a temporary supervisory director.
- This does not affect: a claim pursuant to 2:9 DCC (or Art. 6:162 DCC).

ECLI:NL:HR:2022:691

- Import Cooperation Europe BV goes bankrupt (1 November 2016).
- Direct and indirect directors are liable based on 2:248 DCC.
- Directors appeal for moderation.
- 2:248(4): Court may mitigate amount for which **directors** are liable if it deems the amount excessive, given:
 - The nature and seriousness of the management's improper performance of its duties,
 - the other causes of the bankruptcy, as well as de aard en ernst van de onbehoorlijke taakvervulling door het bestuur,
 - The way this was handled.
- 2:248(4): Court may **further** moderate amount of an **individual director** if he deems such amount excessive, considering:
 - The time during which that director served as such during the period in which the improper performance of duties took place.

Liability

- Note: Material qualification of bodies.
 - General board/daily board:
 - Who is board (executive, non-executive)?
 - Who is supervisory board member?
 - Who is employee?
- Division of duties versus general course of affairs.
- Facts up to 3 years back (but note transitional law!).
- Conflict of interest rules!

Conflict of interest



Statutory provision

- BV/NV.
- Before 2013: it targeted the authority to represent the company.
- After 2013: decision-making.

Do not participate

- A director shall not participate in the **deliberation and adoption** of resolutions if he has a direct or indirect **personal** interest which is in conflict with the interest of the company and the enterprise connected with it.
- If, as a result, no management resolution can be adopted, the resolution shall be adopted by the supervisory board.

Escalation of authority

- Where there is no supervisory board, the resolution shall be adopted by the general meeting, unless the articles provide otherwise.

Conflict of interest

- Foundation until July 2021: no regulation.
- Foundation after July 2021 (Wbtr):
 - Directors: same as regulation NV/BV, but instead of GM: in the absence of a supervisory board, the decision is taken by the board with a **written record** of the **considerations** underlying the decision, unless the articles of association provide otherwise.
 - Supervisory directors: equal to directors.

Conflict of interest

- **Remarkable statement:** the absence of a written determination does not lead to the annulment of the decision.
- **Remarkable statement:** regulation on absence or inability to act can be used to "circumvent" the escalation regulation (also for NV/BV).

Supreme court: Bruil

- Eventually, it is the Court that decides whether or not there was a conflict of interest.
- When?
- In the event that the director has a **personal interest** or due to his **involvement in another interest** that is in conflict with the interest of the company.
- that **he can no longer be considered capable** to guard over the interest of the company in a way that may be expected of an honest and unbiased director.
- Not required: it will inevitably bring damages to the company.
- The two interests are **so incompatible** that there is room for **reasonable doubt** whether the director will act solely in the interest of the company.
- All relevant circumstances.
- Consequence? Resolution may be annulled (and in some cases it may be null and void).
- It **does not affect the representative authority** of the management directors.

Enterprise Court

- Conflict of interest? The special approach of the Enterprise Section of the Amsterdam Court of Appeal...
- Right of inquiry as a powerful weapon.
- The EC may appoint one or more persons **to undertake an investigation** into the policy and conduct of business of a legal person, either as a whole or in respect of a part thereof or in respect of a specific period.
- Only if there appear **well-founded reasons** to **doubt** the correctness of the **policy** or the correctness of the **course of affairs**.
- Where an **immediate remedy** is required in connection with the condition of the legal person or in the interest of the inquiry, the EC may at any stage of the proceedings, order such remedy for the duration of the proceedings at most.

Enterprise Court

- Phase one: **the inquiry**.
- Ends with the deposit of the inquiry report.
- Phase two: is **misconduct** (wanbeleid) established by the report?
- Yes? The EC may make one or more of the following orders (limited):
 - a. The suspension or nullification of a resolution of the managing directors, the supervisory board members, the general meeting or of any other constituent body of a legal person;
 - b. The suspension or dismissal of one or more directors or supervisory board members;
 - c. The temporary appointment of one or more directors or supervisory board members;
 - d. The temporary derogation from such provisions in the articles as shall be specified by the EC;
 - e. The temporary transfer of shares to a nominee; and
 - f. An order for winding up the legal person.

Reasonableness and fairness

- 2:8(1) DCC:
- A legal person and the persons who by virtue of the law and its articles are concerned with its organization must, in such capacity, conduct themselves in relation to each other in accordance with **the dictates of reasonableness and fairness**.
- Well-founded reasons to doubt the correctness of the policy or the correctness of the course of affairs? Judgement based on 2:8 DCC.

Conflict of interest & EC

- Conflict of interest according to the statutory provision differs from the approach of the EC.
- EC: a conflict of interest **AND** a conflict of duties (**scope is wider**).
- Depends on how you handled the conflict (clear separation of interest, transparency, advice independent expert)?
- In some cases: director should not participate in the **deliberation and adoption** of the resolution **AND** should not participate in the **execution** of the resolution.
- Consequences: no decision-making and no representation (**wider consequences**).

Conflict of interest & EC

Omines:

- Art. 2:8 BW: R&B
- Exercise care with regard to the interests of all its shareholders.
- In certain cases, the interests may be mixed: be attentive and exercise due care to prevent an impermissible entanglement of interests (cf. HR 1 March 2002, "JOR" 2002/79, cf. Van den Ingh (Zwagerman) and Section 3:46 (1) opening words and under 4 BW).

Conflict of interest & EC

Omines:

- If in a transaction real risk of entanglement of interests?
- A higher degree of care required in the preparation, decision-making and execution of that transaction and in the conclusion of the agreement.
- Accuracy: transaction takes place on reasonable and market terms and makes good business sense.
- Involvement of expert third parties may be desirable and is sometimes required.

Conflict of interest & EC

Omines:

- Is transaction subject to SB or GM approval?
- Provide in a timely manner all information necessary to assess whether transaction is reasonable and fair from the perspective of the company's interests and whether sufficient care is taken towards minority shareholders and other parties involved in the company and its business (cf. HR 4 April 2014, "JOR" 2014/290, cf. De Haan (Cancun), OK February 17, 2009, ECLI:NL:GHAMS:2009:BI4018 (Butôt), OK April 22, 2016, "JOR" 2016/193, cf. Olden (Leaderland)).

Conflict of interest & EC

Omines:

- Direct or indirect personal conflict of interest is a special form of entanglement of interests.
- A managing director has such incompatible interests that it is reasonable to doubt whether he has acted or will act solely in the interests of the company and its business.
- Articles 2:8, 2:9 and 2:239(6) DCC: a conflicted director must be as open as possible towards his fellow directors (and, as the case may be, the supervisory board) about (the nature of) the conflict of interest.
- Also in case of doubt!

Conflict of interest & EC

Omines:

- Irrespective of whether Art. 2:14-16 BW apply to the decision at hand: conflicted director does not participate in the deliberations and decision-making (Art. 2:8, Art. 2:9 and Art. 2:239 (6) BW and OK March 26, 2019, ECLI:NL:GHAMS:2021:878 (Eetcafé De Stip)).
- Depending on the circumstances: conflicted director is not involved in the preparation of the transaction in question, he has no or limited information about it, or he temporarily transfers (part of) his portfolio to a fellow director (cf. OK March 21, 2017, "JOR" 2017/229, cf. Sinninghe Damsté (TMG) and OK December 22, 2017, "JOR" 2018/210, cf. Bulten (Intergamma)).

Conflict of interest & EC

Ergo Buildings:

- In the transaction, Ergo Buildings - as the selling party - was represented by X, as (indirect) director of Ergo Buildings, while at the same time X acted both for himself in private and on behalf of Rosch (as shareholder and director of Rosch) as the buying party.
- Given the conflicting interests between the buyer and the seller, X was conflicted so that as an indirect director of Ergo Buildings he had to observe the heightened duty of care towards Ergo Buildings. X has not shown to be aware of this.
- Nor has it been shown how he ensured that the sale price for the apartments and the plots of land was in line with the market.
- That the transaction gave effect to agreements made between the parties has also not been concretely substantiated by Ergo Buildings and Rosch.
- With that, the sale of the land plots provides a legitimate reason to doubt Ergo Buildings' proper policy and conduct.

Conflict of interest & EC

- The Enterprise Chamber puts first that, according to established case law, a director is deemed to be conflicted within the meaning of Article 2:239(6) of the Dutch Civil Code if he is faced with such irreconcilable interests that it can be reasonably doubted whether he is guided in his actions solely by the interests of the company and its business.
- The question of whether this is the case must be answered on the basis of all the circumstances of the case.
- If a director is conflicted, he should refrain from participating in the deliberations and decision-making on the transaction in question.

Conflict of interest & EC

- Incidentally, a higher degree of care is also required in the preparation, decision-making and execution of the transaction.
- In doing so, the distinguishable interests must be kept separate in a careful manner and the greatest possible degree of openness must be observed.
- The increased care should in principle be aimed at ensuring that the transaction takes place under reasonable and market-conforming conditions so that it makes good business sense. To this end, the involvement of expert third parties may be desirable and, under circumstances, necessary.

Code word

Legal Entity

Art. 2:298 BW: the mini inquiry proceedings

- The court may investigate and, pending the investigation, may grant injunctive relief.
- Suspension and dismissal refers to directors and supervisors.
- Pay attention: material approach!
- See ECLI:NL:RBNHO:2022:2694:
"suspension by a judge is in principle reserved for the Enterprise Chamber of the Amsterdam Court of Appeal."
- Especially important for cases that cannot go to the Enterprise Chamber.

Dismissal directors foundation

- Director may be dismissed by the court upon request of an interested party or the public prosecutor (PP) .
- Previously:
 - Does something or fails to do something in violation of law or articles of association;
 - Is guilty of (financial) mismanagement;
 - Because of not or not properly complying with an order to provide information (and possibly books, documents and other data carriers) to the PP.

Dismissal director foundation

- As of July 1, 2021:
 - Neglect of his/her duties;
 - Due to other important reasons (mostly private circumstances);
 - Due to a drastic change in circumstances on the basis of which the continuation of his/her directorship cannot reasonably be tolerated (competitive business, scandal);
 - Due to failure to comply, or to comply properly, with an order to provide information (and possibly books, documents and other data carriers) to the PP.

ECLI:NL:RBZWB:2020:5239

- Dismissal by the court:
 - Doing or failing to do anything contrary to the provisions of the law or the articles of association; or
 - Being guilty of (financial) mismanagement.
- Casu: dismissal as a result of an act or omission in violation of the articles of association.
- Foundation for the realization of a soccer museum.
- Director acts contrary to the law and the articles of association:
 - Holding too few meetings;
 - No minutes kept;
 - Chamber of Commerce registration not up to date.
 - Failure to comply with statutory duty to dissolve the foundation
 - Neglect of duty (Wbtr) or act contrary to law and articles of association?

ECLI:NL:RBZWB:2020:6776

- Dismissal by court: guilty of mismanagement.
- Two STAK 's: Diependael Foundation (SD) and S&V.
- Mismanagement = financial mismanagement (and not mismanagement in general).
- Deficiencies with regard to managing the foundation's assets or ensuring that sufficient income is obtained.
- Lack of clarity about which of the two is entitled to vote on the shares.
- Director SD: refuses to cooperate or vote (until discharge is granted for period of governance as Director S&V).

ECLI:NL:RBZWB:2020:6776

- Court: SD board member must act in accordance with the interests of the foundation (see analogously 2:239 (5) BW, see also (codification) Wbtr).
- STAK fails to exercise shareholder rights = financial mismanagement.
- Shortcomings in the management of assets.
- Also, putting personal interests above foundation's interests = mismanagement?
- Or rather in conflict with the legal obligation: serving the interests of legal persons?
- Wbtr: dismissal for negligence of management task.

ECLI:NL:RBAMS:2022:4160

- Suspension and dismissal of Sywert van Lienden et al. as director of Stichting Hulptroepen Alliantie (SHA).
- Public prosecutor and interested parties apply for suspension and eventual dismissal under Art. 2:298 DCC.
- 28 April 2022: suspension directors.
- Dismissal directors and appointment new director?
- Court: directors act contrary to the statutes (i.e.: in the performance of their duties, the directors act in the interests of the Foundation and its affiliated organization). See also 2:291 (3) DCC.
- Court: even after July 1, 2021, dismissal is justified. The continuation of conflict of interest is deemed: "other substantial reasons" (and not job neglect).
- Core offense: conflict of interest, corporate opportunity.
- Circumvention of the profit distribution ban?

ECLI:NL:RBAMS:2022:4160

- Conflict of interest: in part because directors are conducting their own defense on behalf of Foundation.
- Relief Goods Alliance BV: uses office space, has benefited from name and goodwill of SHA (which organization was set up with effort of many volunteers).
- Distinctions to the outside world were not clear.
- Only emphasis placed on selfless commitment to, "for no consideration."
- Conflict of interest and acting contrary to the interest of the Foundation.
- In short: SHA has been misused for personal gain.
- Malicious intent is not explicitly part of this procedure.

No reinstatement employment contract

- No reinstatement of the employment contract of a director (or supervisory board member) of a foundation.
- Codification "15 April judgments"
- Art. 7:671 sub 1 sub e BW: written consent of UWV not required for termination if reinstatement of director's employment contract not possible.
- Thus, it is no longer possible to refuse dismissal in the absence of reasonable grounds (although this is possible in the case of dismissal prohibitions).
- Only entitlement to equitable remuneration (and transitional remuneration).
- Important point: how is the provision for dismissal in the articles of association structured?
- Why also apply to supervisory directors?

No reinstatement employment contract

- Does termination of employment contract also apply in case of dismissal by court at the request of an interested party pursuant to Art. 2:298 DCC?
- Discussion in literature: Hoffman Bedrijfsrecherche HR 28 June 2000, JOR 2000, 151.
- In my opinion, this is also the starting point for dismissal by the court.
- So: pay attention what you ask for.

ECLI:NL:RBAMS:2020:5911

- Claimant is one of three founding partners of an investment fund.
- Without previous clear signals plaintiff is told to be fired, respond to proposal within two days.
- No agreement on certain parts of shareholder agreement (in particular exit arrangement).
- Last draft: cooling down and mediation required for dismissal. Dismissal only by unanimity.
- Shareholders' agreement not signed, thus no unanimity required.
- However, Art. 2:8 paragraph 2 DCC: this manner of dismissal is unacceptable according to the standards of reasonableness and fairness.

ECLI:NL:RBAMS:2020:5911

- So not: director can be dismissed at any time.
- Also not: resolution voidable, but suspension of GM until arrangements are made.
- Statutory director must first be heard on the basis of Art. 2:8 BW.
- No efforts made to agree on financial consequences of dismissal claimant.

ECLI:NL:GHARL:2020:10269

- Is the director an employee or director under the articles of association of SterGo (the holding company) or of Groveko (subsidiary)?
- Court: employment contract with SterGo, but no director under the articles of association.
- SPC Van Ekelenburg/Squamish: cannot accept a person who, despite the absence of a resolution, has assumed, on the basis of statements or conduct of the company, that he has been appointed director, as a director.
- SterGo did not submit documents showing the decision on an GM.

ECLI:NL:GHARL:2020:10269

- Court of Appeal: Neither the law nor the articles of association impose formal requirements on a resolution to appoint by the GM.
- Based on facts and circumstances, the Court of Appeal considers it plausible that a resolution to appoint has taken place.
 - Letter of intent;
 - Implementation of letter of intent in shareholders' agreement;
 - Provisions in the employment contract (including severance pay in the event of dismissal as director under the articles of association).

ECLI:NL:RBGEL:2020:3263

- The board of Social Brands does not want to meet the demands for a new investment from (indirect) shareholders Semper (55% shares).
- The board applies for bankruptcy of the subsidiary, without (prior) approval of the GM of the holding company (despite small deficit).
- Semper claimed suspension of the two directors in preliminary relief proceedings.
- Court in preliminary relief proceedings tests against the standards of the EC ("mismanagement").

ECLI:NL:RBGEL:2020:3263

- Provisionally suspends directors "until the EC makes a provision".
- Must attach term to interim injunction.
- See City Assistant: suspension, but initiate inquiry proceedings within 3 months.
- City Assistant: deadlock in board and GM.
- Did Semper have no other options?
- Art. 2:220 BW: convene GM and suspend itself, for example?
- No impasse in the GM.

ECLI:NL:RBOBR:2021:294

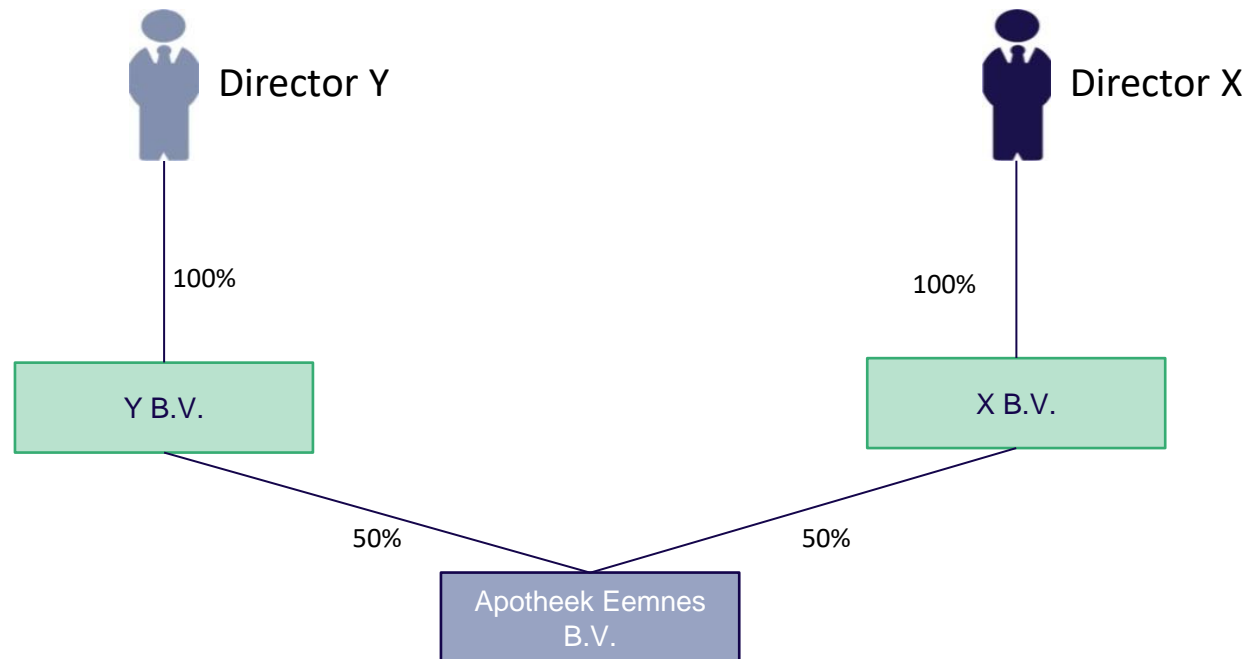
- Unit17, at the initiative of others, focuses on mouth masks instead of refurbished electronics.
- Both shareholders have 50%.
- The bank account is used for mouth masks out of sight of the director.
- Director finds out and intervenes.
- Plaintiff claims suspension of director and appointment of plaintiff as director.
- Interim relief judge sees no reason to proceed to suspension, because there is no question of "mismanagement".
- Needless to say: the claimant is not the right person to be appointed as temporary director because of an obvious conflict of interest.

Which judge?

- Art. 2:131 Civil Code applies mutatis mutandis.
- What claims?
 - Directors' liability
 - Supervisory director liability
 - Agreement between legal person and director
- Judge? Area within which the legal person is domiciled.
 - Proceedings "which generally involve an interest in which the aspects of the law of legal persons are more involved than in disputes between the legal person and an employee".

Obligation to offer?

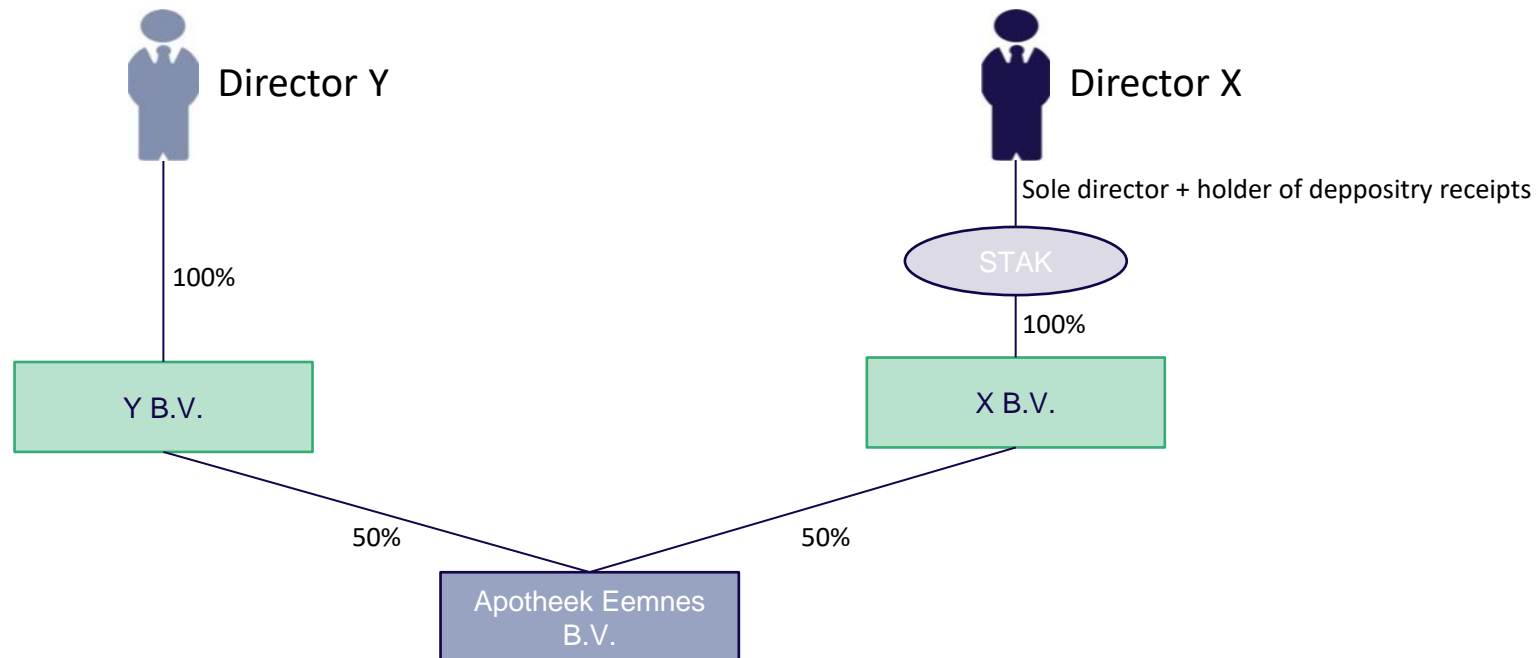
Up until July 18, 2013



ECLI:NL:HR:2019:1688

Obligation to offer?

Situation after July 18, 2013



ECLI:NL:HR:2019:1688

Obligation to offer?

- Director Y then (January 6, 2015) pointed out to Director X the obligation to offer regulation in the articles of association (art. 15).
- Art. 15(g) states:
 - "[In the event of] a change of the shareholders in a shareholder legal entity by the accession of other natural or legal persons as shareholders than those who were shareholders up to that time (...) his shares must be offered with due observance of the provisions of the following paragraphs of this article."
- If the shareholder remains in default, the company is irrevocably authorized to offer and deliver the shares for sale.
- The effect of the mandatory offer is further that the rights attached to the shares cannot be exercised (Article 15 paragraph 5).

Obligation to offer

- GM March 30, 2015: proposal to dismiss director X.
- Director Y states that the proposal has been accepted because rights suspended.
- Director X asserts equality of votes.
- On 27 May 2016, the STAK transferred the shares back to X BV after decertification.
- X BV claims a declaration of rights that in case of an internal change of shares, the offering rules do not apply (no material change), and therefore all subsequent acts do not proceed.
- Court rejects X BV's claims.

Obligation to offer

- Court: in principle objective interpretation (more than a grammatical explanation), but:

"in a case involving a cooperation between two companies cast in the form of a company, while both founders were involved in the design of the company, including its articles of association, and where the dispute is in fact also fought out between these founders, more emphasis may be placed on the mutual party intention."

Obligation to offer

- Nevertheless, the Court of Appeal ruled that the offering rules applied.
- It is not important that the depositary receipts remained in the company's own hands and that director X was always a director of STAK.
- The decertification and transfer back of the shares did not succeed either, because there was no retroactive effect.
- Appeal to 2:8 of the Dutch Civil Code also fails.
- In short, director X was dismissed and must transfer his shares.

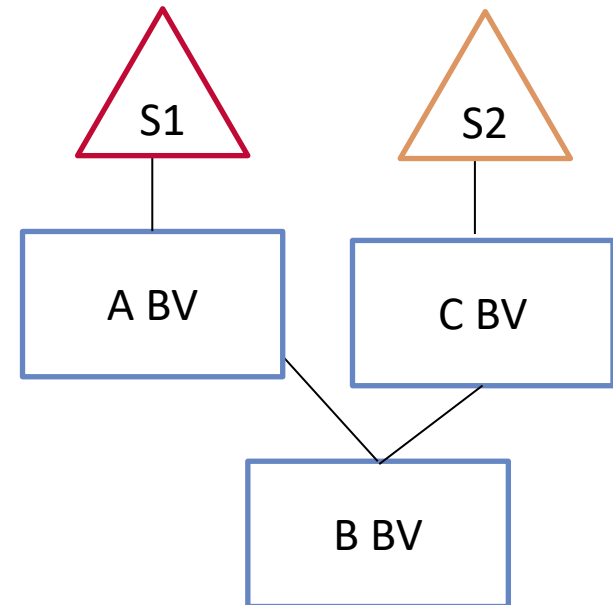
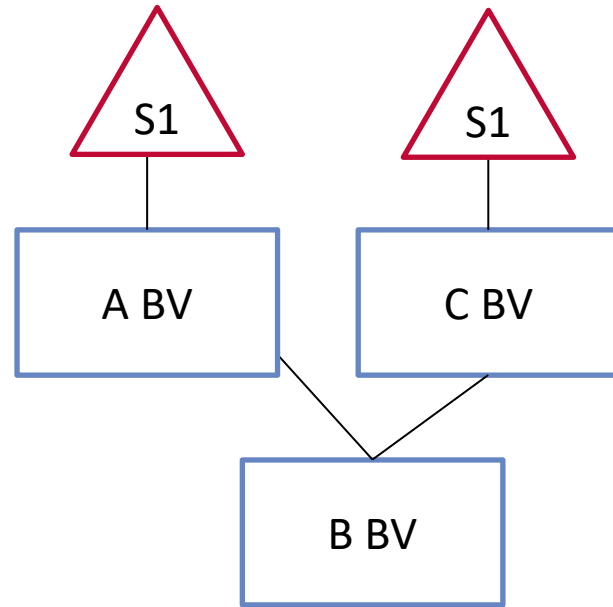
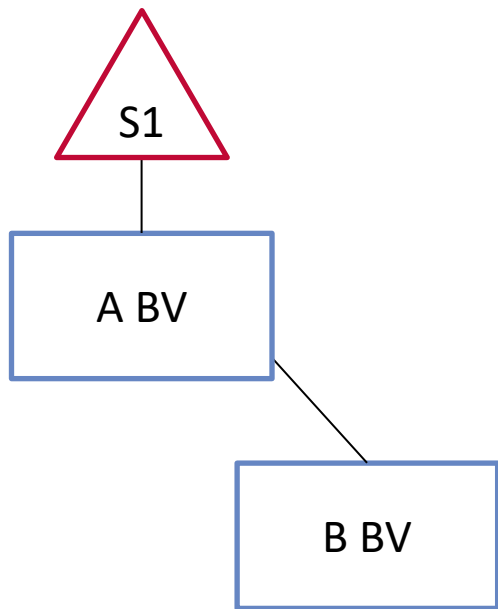
ECLI:NL:GHAMS:2020:3311

- Statutory provision and provision in the shareholders' agreement: transition of control shareholder-legal entity means mandatory offer.
- Transition of control: concept of "merger" in the SER Merger Rules 2000 (see also those from 2015), which also includes demerger.
- "Acquisition or transfer of control, directly or indirectly, of an enterprise or part thereof, as well as the formation of an aggregate of enterprises".
- Explanation: on the acquisition of an interest of more than 50%.

Obligation to offer?

- In this case, the shares in the operating company (B BV) were also held by A BV (the shareholder legal entity) and the shares in A BV were held by a Stak (STAK I).
- Quality requirement: in order to be a shareholder in B BV, the relevant (legal) person had to be a party to the shareholders' agreement.
- A BV is split up (A BV and C BV). STAK I becomes shareholder of C BV.

Obligation to offer?



Obligation to offer?

- C BV shares are then transferred to another Branch (STAK II). STAK II has the same board as STAK I.
- Has the offering arrangement been triggered?
- Has C become a party to the shareholder agreement as a result of the demerger?

Obligation to offer?

- "In interpreting that provision of the articles of association, no rights of third parties are at stake and the obligation to offer applies only to the shareholders who are parties to the shareholders' agreement, so that it is reasonable to apply the subjective Haviltex standard."
- The demerger proposal referred to B BV as a participation (*deelneming*) (and not merely to the shares).
- Therefore, not only the shareholding was split off, but also the legal relationships directly related to it.

Obligation to offer?

- Transfer to STAK II? There is a transfer of control.
- After all, it is a different legal entity. The composition of its board, and therefore its control, can change without a property transaction.

Attribution of knowledge

- ECLI:NL:HR:2020:1413
- ECLI:NL:RBROT:2020:7915
- ECLI:NL:HR:2020:1539

ECLI:NL:HR:2020:1413 (HDI/Treston)

- Two directors and a supervisory board member of HDI establish Treston (Aruban law) on December 5, 2007.
- On April 7, 2008, HDI transfers its Aruban portfolio to Treston at 1 Aruban florin.
- Treston becomes entitled to all premium payments.
- Treston reinsures the portfolio with HDI.
- The directors and the auditor will receive commission in this process.
- Directors, supervisory member and Treston act unlawfully.

ECLI:NL:HR:2020:1413 (HDI/Treston)

- Treston complains that the limitation period under 3:310 (1) of the Dutch Civil Code (5 years) started to run earlier than when it was dismissed in 2013.
- Does knowledge of a director count as knowledge of the legal person?
- See also Article 3:320 in conjunction with 3:321 (1) (d) of the Dutch Civil Code: 6-month ground for extension.
- Attribution of knowledge if the knowledge of the acting person can be considered as knowledge of the legal person in society.
- HR: in principle, the position of managing director means in society: knowledge of the managing director = knowledge of the legal person.
- Under special circumstances this may be different.

ECLI:NL:RBROT:2020:7915

- Foundation het Peuterhuis: from 2011 - 2017 only one director.
- November 2018: discharging decision taken (by only the director).
- Admittedly no conflict of interest regulation for foundations; but
- But decision voidable: contrary to R&B ex art. 2:8 BW.

ECLI:NL:RBROT:2020:7915

- Payments made without legal basis.
- Claim time-barred?
- Principle: those who present themselves as a single entity in society are responsible for the expectations thereby created in others.
- In this case: expectations not raised in others, because receiver and director were the same person.

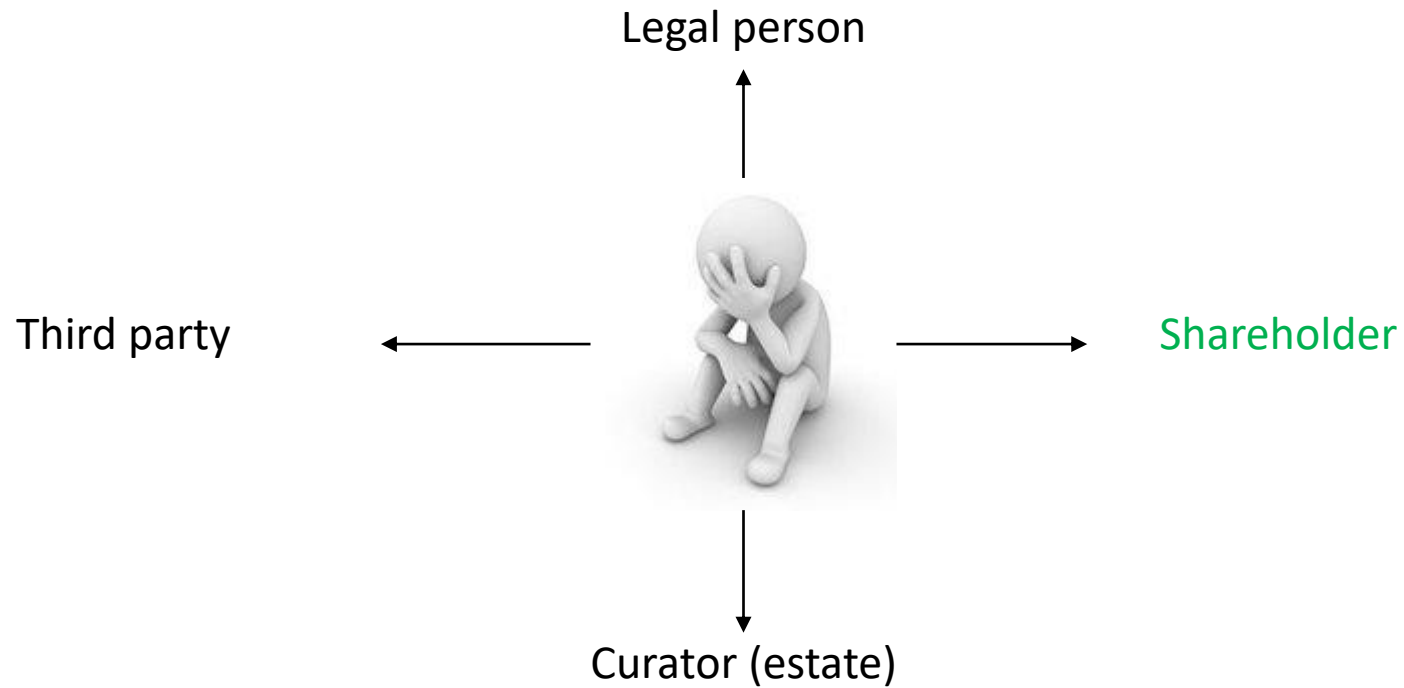
ECLI:NL:RBROT:2020:7915

- It is undisputed that no remuneration agreement had been made; and
- That the director was only authorized to represent himself by virtue of the articles of association with another director.
- Director therefore knew, even as recipient, that the payments were made without legal basis and unauthorized; and
- That a successor board would proceed with recovery.

ECLI:NL:HR:2020:1539

- Attribution of knowledge of directors to the company.
- Company buys shares of operating companies. Two of the buyer's three directors are involved with operating companies.
- The purchaser claims against the seller that the seller has breached its obligation to provide information.
- However, the purchaser itself possessed this information, as two of the directors were in possession of this information.

Directors' Liability risks

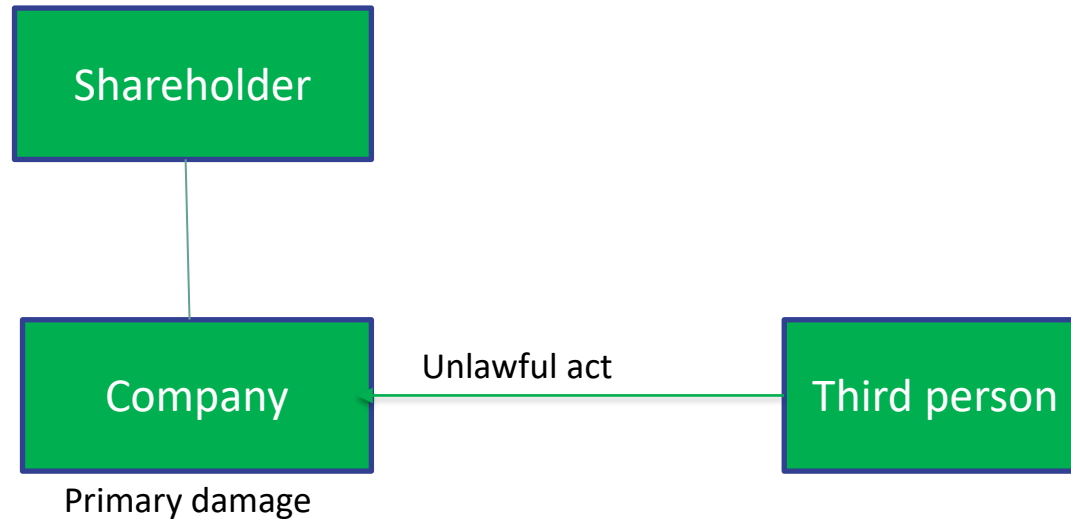


Derivative suit/reflective loss

- Dutch law **formally does not recognize** the possibility of a **derivative suit**.
- No possibility to recover **reflective loss** either.
- General rule:
- A shareholder cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a “loss” is merely a reflection of the loss suffered by the company.
- Why?
 - Multiple actions by shareholders and the company.
 - Advantage (priority) shareholder instead of other creditors of the company.
 - Double payments.
- There are, of course, exceptions.

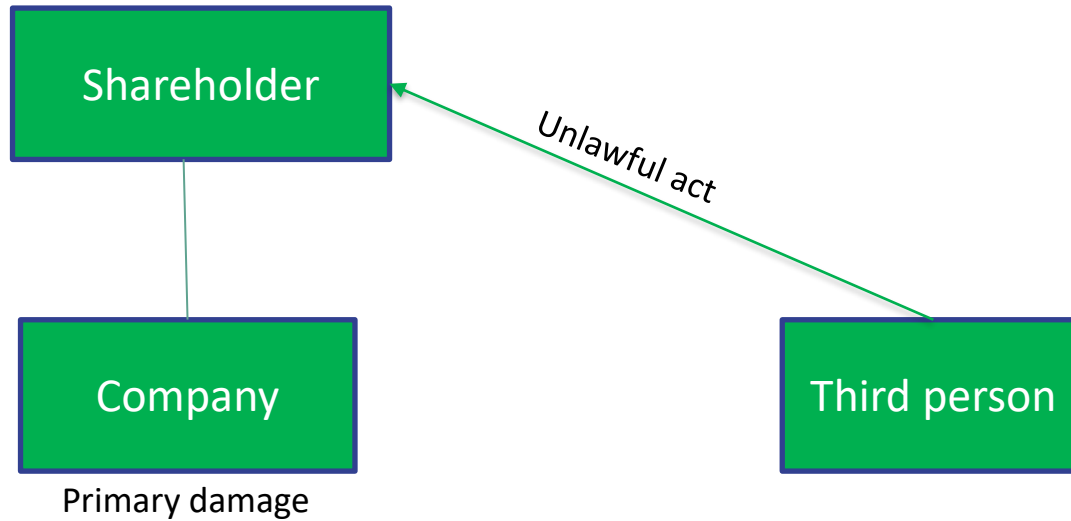
Situation: APB/Poot

Shares worth less due to damage subsidiary

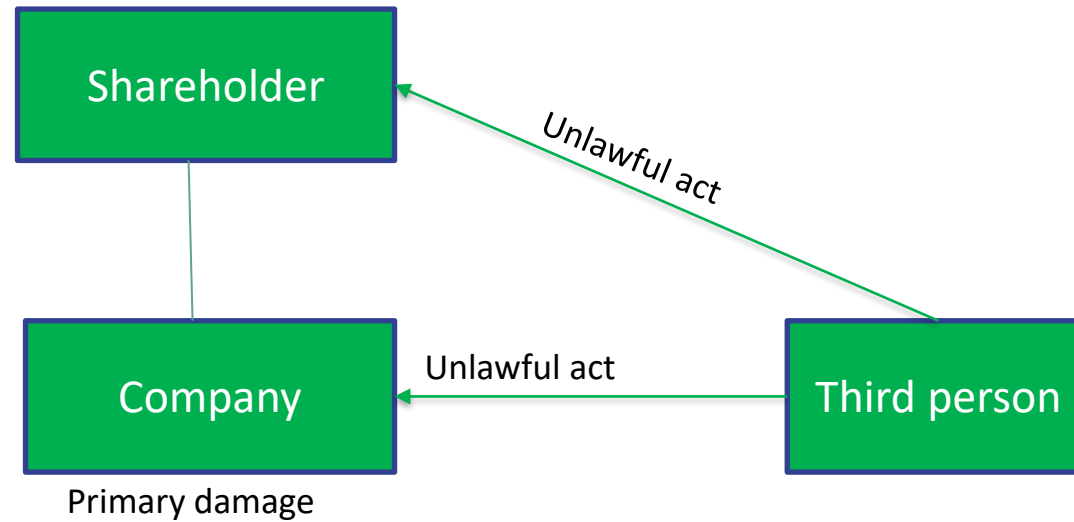


Situation: Gemeente Gilze en Rijen

Primary damage is being attributed



Situation: Cross options



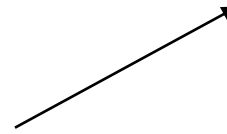
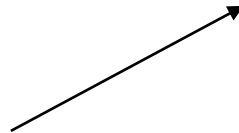
Director (natural person)



Director - Legal person

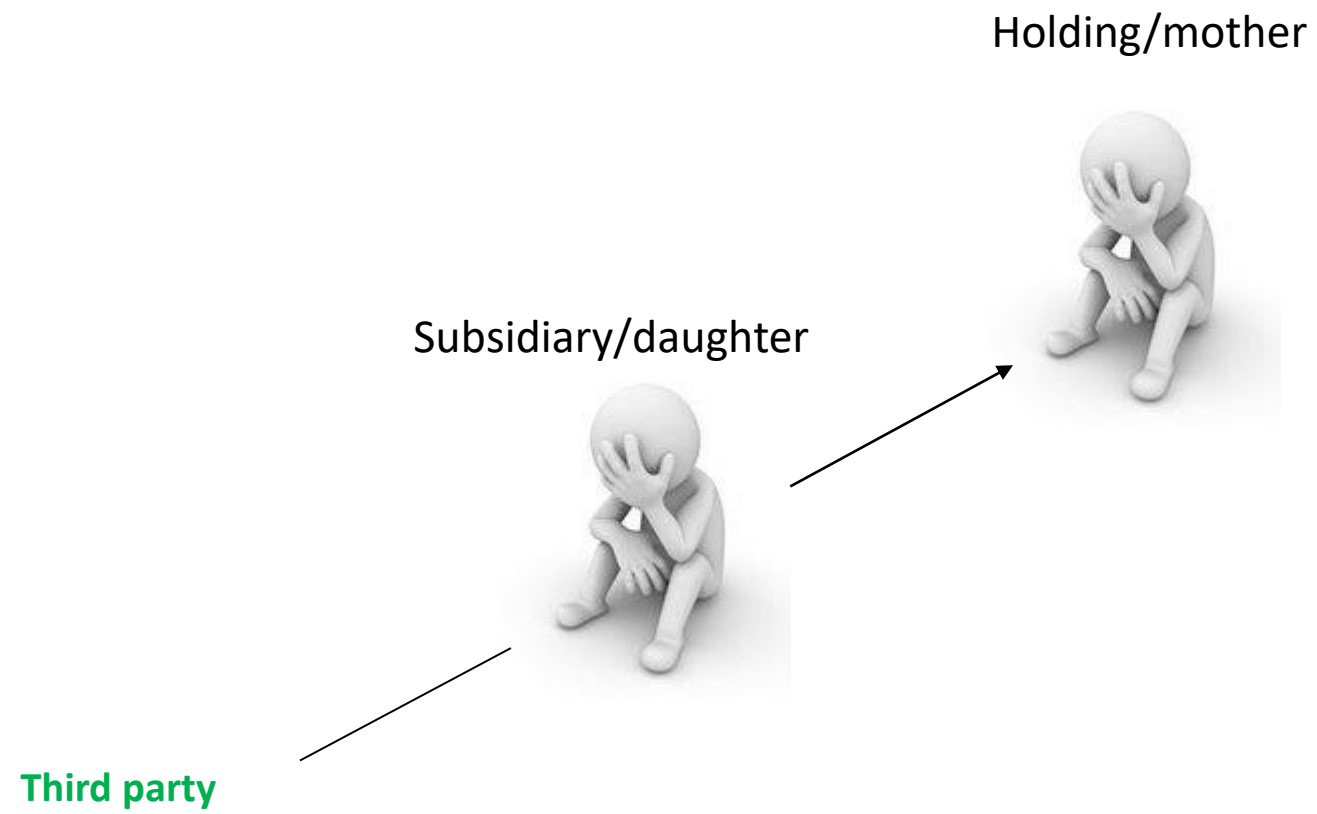


Third party



Piercing the veil ex 2:11 DCC

- The liability of a legal entity as director of another legal entity shall also rest jointly and severally on any person who is director of that legal entity at the time the liability of that legal entity arises.
- 2:11 DCC is applicable in the event of internal or external directors liability.
- Not applicable in the event that the director natural person is a director of a foreign legal person – director.
- Exculpation is possible.



Piercing the corporate veil

- Holding is liable for obligations subsidiary.
- In all cases it is known that the subsidiary cannot comply with the obligation re its creditors and will offer no recourse.
- Piercing the corporate veil:
 - An **exceptional duty of care** holding against creditors subsidiary; and
 - A **violation** of this duty of care.
- Wrongful act holding vs. creditors subsidiary.
- Examples:
 - Appearance of creditworthiness.
 - Hazardous group structure.
 - Intensive involvement, failing to act.

Regulation of disputes

➤ To expel:

One or more holders of shares who, solely or jointly, contribute **at least one-third** of the issued capital may institute proceedings against any shareholder, who, **by his conduct as a shareholder**, prejudices or has prejudiced **the interest of the company** to such extent that the continuation of his shareholding **cannot reasonably be tolerated**, demanding the transfer of his shares.

Regulation of disputes

➤ To withdrawal:

A shareholder whose rights or interest are prejudiced by the conduct of one or more co-shareholders to such extent that he can no longer be reasonably expected to remain a shareholder, may institute a claim against his co-shareholders for his withdrawal.

When determining the price for the shares, the court may, if so claimed, allow a fair increase to take account of the conduct of the respondent, or of persons other than the respondent, if it is plausible that such conduct should have led to a reduction of the value of the shares to be transferred and such reduction should not or not completely remain for the account of the claimant.

Squeeze-out proceedings

➤ To squeeze-out

A person who is a shareholder and for his own account contributes **at least 95%** of the **issued capital** of a company and who may exercise at least 95% of the **rights to vote** in a general meeting, may institute proceedings against the other shareholders jointly for the transfer of their shares to the claimant.

EC allows, by analogy, when determining the price for the shares a fair increase to take account of the conduct of the respondent, or of persons other than the respondent, if it is plausible that such conduct should have led to a reduction of the value of the shares to be transferred and such reduction should not or not completely remain for the account of the claimant.

Questions?