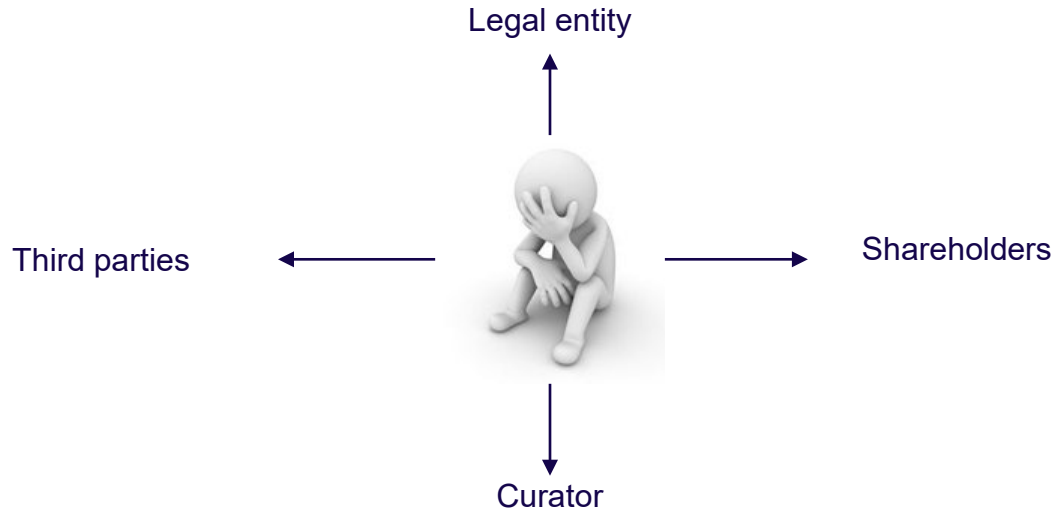

Liability, decision making and representation

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Liability risks



Liability risks

- Internal director's liability (art. 2:9 DCC);
- External director's liability (art. 6:162 DCC);
- External director's liability (art. 2:138/248 DCC);

- Other liability risks for director's:
 - Share buy backs (2:95/98a/98d/207a DCC);
 - For legal actions performed before registering the legal entity with the Chamber of Commerce (2:69/2:180(2) DCC);
 - For legal actions performed before incorporation (2:93/203(2) DCC);
 - Unduly paid dividends (art. 2:216(3) DCC) (Note: more or less the same applies to the NV based on case law);
 - Misleading annual accounts (art. 2:139/249 DCC);
 - Costs of inquiry proceedings (art. 2:354 DCC)
 - But also: duty to notifying the IRS (*belastingdienst*) in time in case of an inability to pay taxes (art. 36 Invorderingswet).

Liability risks

Legal entity
Art. 2:9 DCC



Internal Director's Liability

- Art. 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.

- Art. 2:9(2) BW:
 - 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

- Art. 2:9 BW lid 1:
 - Elke bestuurder is tegenover de rechtspersoon gehouden tot een **behoorlijke vervulling** van zijn **taak** (gedragsnorm).
 - Tot de taak van de bestuurder behoren alle bestuurstaken die niet bij of krachtens de wet of de statuten aan een of meer andere bestuurders zijn toebedeeld.

- Art. 2:9 BW lid 2:
 - Elke bestuurder draagt verantwoordelijkheid voor de **algemene gang van zaken**. Hij is voor het **geheel aansprakelijk** terzake van onbehoorlijk bestuur,
 - **tenzij** hem mede gelet op de aan anderen toebedeelde taken **geen ernstig verwijt** kan worden gemaakt **en hij niet nalatig is geweest** in het treffen van maatregelen om de gevolgen van onbehoorlijk bestuur af te wenden (toetsingsnorm).

Internal Director's Liability

- Proper management: objectified.
- An average director possesses the insight and diligence that may be expected of a director who is calculated for his task and performs it conscientiously (Dutch Supreme Court Staleman/Van der Ven).
- Standard: acting seriously reproachable.
- All the circumstances of the case:
 - The nature of the activities;
 - The resulting risks;
 - The division of tasks within the board;
 - The guidelines applicable to the board;
 - The information which the board had or should have had at its disposal.

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.
- Director may cite facts and circumstances on the basis that it can be assumed that the challenged act in violation of the provisions of the law or articles of association does not constitute a serious reproach.

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.

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, Intertrust'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.

Internal Director's Liability

- Collective liability: jointly and severally liable to the legal entity for damages. Paying director can take recourse against fellow directors ex art. 6:10 DCC.
- Disculpation:
 - Also considering the division of tasks (see articles of association, and 2:129a/239a DCC).
 - Also in the case of distribution based on decision or regulation?
 - No serious reproach.
 - Two-fold: shortcoming not attributable to him and not having been negligent.

Internal Director's Liability

- Discharge from liability (waiver).
- Extends to what is apparent from the financial statements and what has been made known to the general meeting of shareholders as a body (DSC Staleman/Van der Ven).
- In principle, this does not include knowledge of shareholders outside the meeting.
- Nor what shareholders could reasonably know.
- Exempt, indemnify, or limit scope? In violation of mandatory law ex art. 2:25 DCC.
- Possible: indemnification by third parties (mother) and advancing litigation costs.

Discharge

- **Court of Appeal of Amsterdam 22 oktober 2019, JOR 2020/27, m.nt. Kemp**
- Appeal for discharge succeeds.
- Information about the accusations against him concerning the Vicaris project had been sufficiently incorporated into the annual accounts and the annual report and discussed in the general meeting, after which discharge was granted without reservation.

Internal Director's Liability

- Also applies to the Supervisory Board (2:149/259 DCC), but supervision and advice.
- One-tier? (See the Fortis-case).
- Supervisory Board in principle only liable for improper supervision if improper management is established.
- However, established improper management does not imply improper supervision.
- For this purpose of importance:
 - efforts of SB to obtain necessary information;
 - overseeing policy preparation and implementation procedures; and
 - in what way did the SB try to intervene?

Liability risks

Third parties
Art. 6:162 DCC



External Director's Liability (6:162 BW)

- Primary liability legal entity.
- Individual liability (secondary).
- No "scared directors" (taking risks is ok, but not acting irresponsibly).
- Standard: acting personally seriously reproachable against the third party.
- Compensation for damages suffered, i.e., causal relationship between actions and damages.
- Two case types can be distinguished (DSC Ontvanger/Roelofsen).

External Director's Liability (6:162 BW)

- Case type 1: Beklamel-norm:
 - When the director **enters into an obligation** on behalf of the company;
 - while he **knows** or could reasonably have understood that the company **will not be able to comply**; and
 - Will **not provide redress** for the loss to be suffered as a result.
 - In other words, contracting lightly (example: DSC RCI).

External Director's Liability (6:162 BW)

- Case type 2:
 - Where the director **has caused** or **allowed**;
 - that the company **does not comply** with its legal or contractual obligation towards a third party,
 - as a result of which that third party suffers a loss.
- Director liability if there is a sufficiently **serious personal culpability**.
- Frustration of payment and recourse, unwillingness to pay, selective payment (only when favored by director/concern), appearance of creditworthiness).
- Other case type? **DSC Nilarco**.

Beklamel: knowledge director

- **ECLI:NL:GHAMS:2021:338**
- Administration is found to be out of order and is placed with another accountant.
- On January 12, 2018, a letter of intent to perform work is signed.
- On January 12, 2018, an invoice is sent for initial work.
- On January 12, 2018, the bank states that it is going to freeze the accounts. On January 15, 2018, due to the financial situation, the bank freezes the credit and states its intention to cancel the credit facility.
- On January 18, 2018, the invoice is paid.
- Knowledge criterion: although on the edge, "reasonable doubt" is insufficient.

Beklamel: knowledge director

- **ECLI:NL:GHARL:2021:248**
- Athleteshop is experiencing turbulent growth.
- Does not keep inventories and therefore cannot deliver on time.
- As a result, Athleteshop runs into problems: liquidity squeeze, cannot meet payment obligations to customers and prepares a proposal for payment arrangement with its creditors.
- Despite this, there was sufficient perspective on reference date.
- Sales figures (cash flows) were good, creditors (suppliers) wanted to agree payment schedules, serious investors, bank wanted to provide bridging loans.

Beklamel: knowledge director

- **ECLI:NL:GHARL:2020:8021**
- BV has payment difficulties and negotiates payment arrangement with creditor.
- BV has concrete view of sufficient financing.
- BV would provide bank guarantee to creditor, but this did not happen, because the directors did not want to provide counter-guarantee and did not inform the creditor about this.
- Court of Appeal:
- No liability, because it was not foreseeable that this would result in damages and the company would have no recourse.

Beklamel: knowledge creditor

- **ECLI:NL:GHAMS:2020:643**
- Landlord's knowledge of financial situation of tenant precludes directors' liability in tort.
- See in this context also: Supreme Court 5 November 1999, JOR 2000/10 (Verlinden v. Amstelland):
- *"Verlinden emphatically pointed out that he would not be able to pluck feathers from 'the bald frog Cunera'"*

Beklamel: knowledge creditor

- **ECLI:NL:GHAMS:2021:11395**
- MeerSaam teams up with Syntrus to buy property for seniors.
- After a joint viewing, MeerSaam enters into a purchase agreement with SVDT, without a financing condition (but with a 10% deposit and penalty clause).
- Payment of purchase price depends on financing by Syntrus.
- SVDT is aware of this and asks via MeerSaam for a commitment from Syntrus.
- If not, SVDT thought itself free to sell the property to someone else.
- MeerSaam: there is no commitment whatsoever from Syntrus.

Beklamel: knowledge creditor

- **ECLI:NL:GHAMS:2021:11395**
- Syntrus eventually forgoes financing.
- MeerSaam came up with CHP BV as a financier.
- This ultimately came to nothing, but CHP BV then bought the premises from SVDT itself.
- Court of Appeal: for Beklamel, it is insufficient that the director had to take into account the possibility that the company would not be able to fulfill its obligation, but it is required that the non-performance could reasonably be expected.
- Knowledge MeerSaam cannot be separated from knowledge SVDT.
- Beklamel = difference in knowledge. Director acts unlawfully by entering into the agreement on behalf of the company without sharing that information.

Beklamel: knowledge creditor

- **ECLI:NL:GHAMS:2021:11395**
- If the other party (professional) has about as much information about how the company with which it is dealing intends to finance its financial obligations from the agreement to be concluded?
- Is it apparent from that information that there is no reasonable expectation that the financing will succeed?
- Then the company's counterparty (to be judged by objective standards) can also expect that.
- There is then no question of creating the appearance of creditworthiness, or at least a legitimate expectation thereof.
- And so that director is then not acting unlawfully.

Beklamel: knowledge creditor

- **ECLI:NL:HR:2022:82**
- Hotel BV is licensed to operate for three years.
- Actifood BV supplies goods.
- Hotel BV keeps ordering, license is not renewed, BV goes bankrupt.
- Actifood holds director liable.
- Director: Actifood knew license was for three years.
- Beklamel: objection whether damage to creditors was or should have been foreseeable for the director.
- Director must consider whether obligations could reasonably be expected to be met.
- Knowledge creditor is a relevant circumstance.
- Actifood was entitled to rely on director's (reassuring) communications that the license would be renewed.

Beklamel: duty to inform?

- **ECLI:NL:GHARL:2021:7734**
- Doorwin Group receives refinancing from Fortis in 2009.
- Shareholders Semper Fortuna partially guarantees and agrees a counter-guarantee with fellow shareholder Viaverde.
- Just before that, Viaverde distributed all its cash as dividends.
- In 2015, Semper Fortuna must pay under the guarantee.
- Viaverde cannot pay under the counter-guarantee.
- Semper Fortuna: violation of Art. 2:8 DCC.
- Viaverde should have disclosed when agreeing the counter-guarantee that it no longer had liquid assets and was dependent on financing mother.
- Court of Appeal: no duty of disclosure for Viaverde and no liability.

Piercing the corporate veil

- DSC June 26, 2009, JOR 2009/221, (Eurocommerce).
- Brink was liable because the company Kloosterbrink, which he represented, should have concerned itself with Eurocommerce's cognizable interests "by informing it of the precise state of affairs."
- However, the duty to notify arose because it was established that Brink knew that Kloosterbrink **would not be able to perform and would have no recourse**, and it was also established that Eurocommerce itself would not have entered into its obligation had it known about it.

Piercing the corporate veil

- See also the “piercing the corporate veil” judgments.
- Parent company is held liable for subsidiary's debts.

- DSC 11 September 2009 (Comsys):
- duty of care for the controlling parent company to take measures arises at the moment that the subsidiary **can no longer meet its obligations** under its own power nor **offer any recourse** (in fact there is discontinuity).

Peircing the corporate veil

- DSC February 19, 1988 (Albada Jelgersma II):
 - Obligation to take measures only arises when mother Albada Jelgersma foresaw or should have foreseen that the other party, in continuing its extensive deliveries to the subsidiary, would be disadvantaged **by the lack of recourse** from the subsidiary.
- DSC 21 December 2001 (Sobi/Hurks II):
 - the mother's objective knowledge that her subsidiary was entering into obligations that the subsidiary **would not be able to meet** and for which the subsidiary **would have no recourse** created a duty to warn the mother.

Piercing the corporate veil

- DSC November 18, 1994 (NBM v. Securicor):
- Created confidence mother that the mother will pay:
- "For a creditor who has once based his actions on such a trust, it matters not whether he is warned in time that the subsidiary is unable to meet his obligations. From this trust he may derive the expectation that he will be paid by the mother."
- See also DSC March 24, 2017 (Hanzevast/G4 II).

Frustration redress

- **Dutch Supreme Court 8 december 2006, NJ 2006, 659 (*Ontvanger/Roelofsen*), category (ii):**
- In the event that the director "has caused or permitted the company to fail to comply with its legal or contractual obligations":
- if his act or omission as director is so negligent towards the creditor in the given circumstances that he personally may be seriously blamed for it.
- Such a serious accusation can in any case be made if it is established that the director **knew or reasonably should have understood** that the conduct of the company, brought about or permitted by him, would result in the company **failing to perform its obligations** and would not be able **to provide redress for the damage** occurring as a result.

Selective payments

- If a company is unable to pay all of its creditors in full, the director is, in principle, **free to determine** on the basis of his own consideration which creditors will be paid in the given circumstances (DSC ING/Zandvliet, JOR 2010/127).
- The freedom is more **limited** if the company has decided to **cease operations** and has insufficient funds to satisfy all of its creditors (DSC Coral/Stalt, JOR 1998/107):
- **Affiliated creditors** should not be paid with priority, except for a special justification.
- **Non-affiliated creditors** may not be paid in priority if the director has a personal interest in the payment, except for a special justification.
- If the director does so and there is no special justification, then there is manifestly improper management if the director should have taken serious account of the fact that the claim would remain unpaid as a result of his actions.

Selective payments

- **Dutch Supreme Court 17 januari 2020, JOR 2020/55, m.nt. Salemink**
- December 4, 2014: legal entity files for bankruptcy.
- December 22, 2014: unaffiliated creditor is paid;
- January 6, 2015: bankruptcy declared.
- Trustee (curator) claims damages from directors for unlawful selective payment on December 22, 2014.
- Court: director not liable.

Selective payments

- **Dutch Supreme Court 17 januari 2020, JOR 2020/55, m.nt. Salemink (vervolg)**
- Court:
- held that insufficient grounds existed to assume a personal interest and creditor was also not affiliated with director; and
- has established that the bankruptcy petition was intended as pressure on the majority shareholder in an attempt to reach a settlement to avert bankruptcy.
- No serious reproach here. Judgment of the court of appeal upheld.

Selective payments

- **ECLI:NL:GHSHE:2021:1527**
- Foundation enters bankruptcy on April 3, 2018.
- Old invoices from late 2016 and early 2017 from Support ME remain unpaid.
- Foundation did pay staff, fuel costs and rent until bankruptcy.
- Court of appeal:
- Payment Foundation involved ongoing, monthly costs of maintaining the business.
- Debt related to past expenses.
- Income: sufficient to pay current expenses, but not sufficient to additionally pay the debt to Support ME.
- Such balancing does not, in the court's view, exceed the limits of the Foundation Board's payment autonomy.

Selective payments

- **ECLI:NL:GHSHE:2022:3014**
- Company is ordered to pay ex-employee approximately EUR 50,000 in 2018.
- Company refuses to pay.
- Company declared bankruptcy on April 21, 2020.
- All creditors were paid, including affiliated creditors, except ex-employee (see DSC Van Waning/Van der Vliet).
- No justification, so director is liable.

Director's liability for future claims

- **ECLI:NL:GHARL:2020:3732**
- Execution of non-revocable judgment is unlawful if judgment is later overturned.
- DSC February 8, 2002, JOR 2002/62 (Beverwijk v. Maarssens Bouwbedrijf).
- Director collected amount immediately after judgment, has money deposited into private account with set-off of debt.
- After setting aside judgment, company offers no recourse.

Director's liability for future claims

- Elements for executor liability:
- The director should have **taken into account**, based on the circumstances known to him, the possibility that the judgment would be set aside.
- The director knew, or should have **taken serious account** of the possibility, that in the event the judgment was set aside the executor would not be able to refund the amount received.
- In the circumstances, the director can be blamed for nevertheless allowing a claim to be paid with neglect of the interests of the executor.
- What may be important here is that it is a payment of one's own claim.
- Directors must also consider latent liabilities.

Director's liability for future claims

- **ECLI:NL:GHARL:2020:2491**
- Court orders BV to pay damages to the State in 2005.
- BV makes no provision.
- Negative expert report for BV appears on appeal in 2009. In 2008 and 2009, BV makes large distributions to its shareholder.
- The directors cooperate and the supervisory board member didn't intervene.
- The Court of Appeal upheld the judgment and BV received a negative cassation opinion.
- BV was declared bankrupt at its own request.

Director's liability for future claims

- Directors liable under Art. 2:248 DCC because:
 - No provision enabling distribution under Art. 2:216(2) DCC (old) to be made
 - No warning to shareholder;
 - No use of advisory vote in AGM
 - Cooperation with dividend decisions
- Shareholder also liable ex Art. 6:162 DCC
- Had the same information as director/supervisory director
- DSC Nimox/Van den End q.q., NJ 1992/174

Director's liability for future claims

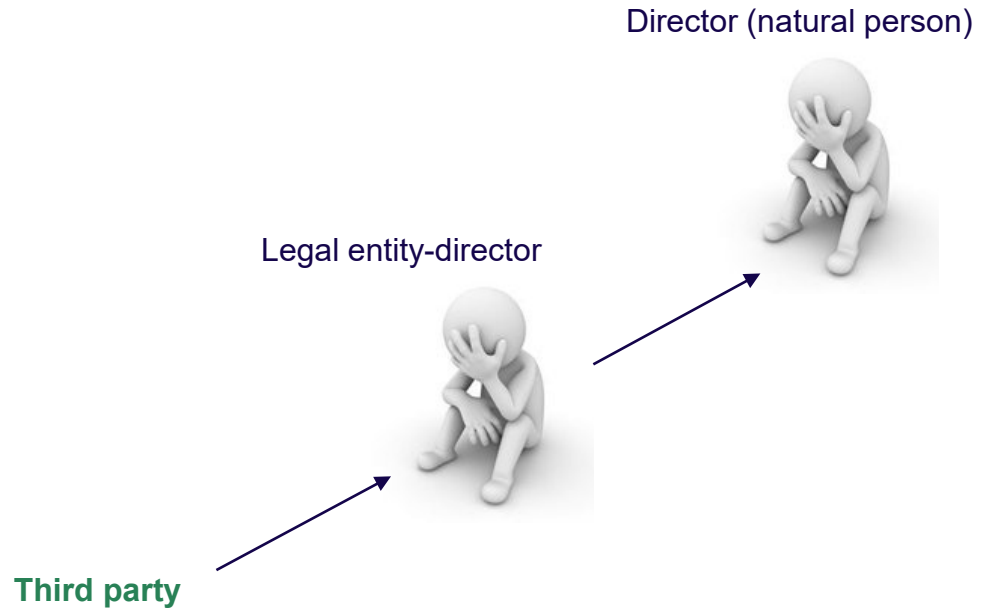
- **ECLI:NL:HR:2021:1916**
- Sanitech makes payment to joint venture partner (Montarlot) based on court judgment.
- On appeal, judgment is overturned.
- Montarlot can no longer repay.
- Sanitech holds directors liable.
- Court rejects: money was used to pay off creditors Montarlot.
- Creditors? Suddenly pay off current account of directors and related parties (necessity not proven).
- Court: directors did not have to **seriously** consider annulment of judgment.

Director's liability for future claims

- Court of appeal:
- Directors are liable now that:
- they should have **taken into account** the circumstance that the company might have to repay.
- They knew or should have **taken serious account** of the possibility that, in the event of the judgment being set aside, Montarlot would be unable to repay Sanitech the amount; and
- The directors can be blamed for having nevertheless withdrawn funds from Montarlot, neglecting Sanitech's interests.
- Perhaps different if the amount was to be spent on ordinary business operations instead of unobligated payments to directors/loyal parties.
- DSC: 81 RO.

Director's liability for future claims

- After execution of a judgment:
 - Based on the circumstances, **take into account** the possibility that the judgment will be set aside.
 - Know or **seriously take into account** that amount received after set aside judgement cannot be refunded (cannot perform and has no recourse). If that is the case, do not pay with neglect of interests of the creditor.
- In case of an uncertain claim: should you **seriously** consider the possibility of a claim against the company. Yes? Then obligation exists for the company.
- Then "ordinary" test Receiver/Roelofsen.
- In each case it is important why the company cannot perform and has no recourse: Inadmissible selective payment? Frustration of recourse?



Piercing ex art. 2:11 DCC

- Art. 2:11 DCC applies to all liability provisions in Book 2 of the Civil Code.
- Also applies to liability directors of a legal entity-*factual* director (DSC Lammers/Aerts q.q.).
- Does not apply to liability of a de facto director of a legal entity-facto director.
- Does NOT apply to a director of a foreign legal entity-director (!).
- Art. 2:11 DCC is also applicable to art. 6:162 DCC (DSC Le Roux Fruitexporters)
- Disculpation is also open to a second-degree director.
- Effect is thus "reversal" of the burden of proof compared to a director who is held directly liable on the basis of art. 6:162: then the burden of proof of "serious misconduct" rests in principle on the plaintiff.

Liability of indirect directors

- Operating company Brood pays management fees to indirect directors instead of to holding company.
- Indirect directors are held liable under art. 6:162 DCC and 2:11 DCC.
- Court of Appeal: indirect directors have disputed that the legal entity-director (Holding) is liable.
- Since it has not been established that Holding is liable, you do not get around to liability of indirect directors.
- Art. 2:11 DCC: not subsidiary, but derivative in nature.
- Legal entity-director liable, only then indirect director also liable.
- However, need not be established in separate proceedings.

Resolutions

- A resolution is a juridical act of the company.
- In general: 50% plus one vote.
- Sometimes: quorum or capital requirement.
- Resolution may be passed at a meeting (minutes).
- Resolution may be passed otherwise than at a meeting.
- NV: articles may provide that.. and unanimous vote (votes shall be cast in writing).
- BV: no such requirements (votes shall be cast in writing).

Null and void or annulment

- Resolutions can be **null and void** or may be **annulled**.
- Annulment may be requested by the legal person itself or by a person having a reasonable interest in the observance of the violated rule.
- The claim for annulment of a resolution should be brought **within one year** after it was given sufficient publicity or became known by or was communicated to the party concerned.

Null and void or annulment

- General rule:
 - A resolution of a constituent body of a legal person that is **contrary to the law or articles** shall be **null and void**, unless another consequence follows from the law.
- Exception:
 - A resolution is not null and void but may be annulled by the District Court if it is contrary:
 - a. to the principles of fairness and reasonableness;
 - b. to by-laws (reglementen); or
 - c. to statutory provisions or provisions in the articles regulating the establishing of resolutions.
- Exception to the exception:
 - A resolution is, however, null and void, due to a failure on its adoption to do some prior act required by law or the articles or to notify a person or body other than the constituent body which adopted the resolution.

Null and void (nietig)

- A resolution is null and void:
 1. if the **content** or **nature** of the resolution is contrary to the law or articles.
 2. if the resolution is adopted contrary to statutory provisions or provisions in the articles regulating the **authority** of the corporate bodies (is adopted by an unauthorized body).
 3. due to a failure on its adoption to do some **prior act** required by law or the articles or to **notify** a person or body other than the constituent body which adopted the resolution.
 4. if the resolution is adopted contrary to a **fundamental** requirement for establishing (**constituting**) the resolution (e.g. quorum requirements).

Annulment

- A resolution may be annulled if it is contrary:
 - a. to the principles of fairness and reasonableness;
 - b. to by-laws (reglementen); or
 - c. to statutory provisions or provisions in the articles regulating the passing of resolutions.
- So what is meant by “statutory provisions or provisions in the articles regulating the passing of resolutions”?
- Merely: provisions regulating the **procedural requirements** for adopting a resolution:
e.g. convocation of the GM, notice periods etc.

Representation

- Important: understand the difference between decision-making and representation.
- Decision-making: an organ of the company makes a decision. This is an internally directed legal act.
- Representation: an authorized representative acts on behalf of the legal entity with a third party.

Representation

- Representation: the power to perform a legal act in the name of another (legal) person.
- Principle in legal persons under private law: the board is authorized to act in the name of the legal person and to bind the legal person to a third party.
- Power of attorney (art. 3:60/66 DCC) (written or orally, explicit and implicit).



- The representative performs a legal act on behalf of the legal person.
- Purpose: agreement between legal person and Third Party.

Decision-making

- determines will of legal entity
- internal functioning

Representation

- Establishes legal relations externally (between legal entity and third party)
- external effect

Resolution with external effect

- Coincidence of legal moments
- Decision and representation
- Eg: appointment, remuneration and resignation.

Representation

- 2:130/240 DCC.
- The management **board** represents the company to the extent that the contrary does not follow from the law.
- Representation authority shall **also vest in every director**.
- The **articles** may provide that it shall vest only in one or more directors in addition to the management board or that a director may represent the company only with the cooperation of one or more other persons.
- So, the law stipulates that the articles could limited the representation authority in three ways:
 - A director is **independently authorized** to represent the company;
 - A director is **not independently authorized** to represent the company in any way;
 - A director is **only** authorized to represent the company if he acts **jointly** with one or more other persons.

Representation

- Only these provisions may be invoked against third parties by the company.
- The company may consider itself not bound by a transaction performed by a director in violation of such provision.
- The authority to represent the company is unrestricted and unconditional to the extent that the contrary does not follow from the law.
- Acting in violation of provisions in the articles restricting the authorization to represent the company: director's liability.
- Company is, however, bound by the transaction.

Representation

- Examples of restrictions or conditions?
- Art. 2:94/204(2) BW (specific legal acts).
- Art. 2:94c BW (acquisition of assets from founder) (NV only).
- Art. 2:96/206 BW (issue of shares).
- Art. 2:98 paragraph 4 BW (acquisition of own shares) (NV only).

- Strange ducks?
- Art. 2:107a paragraph 2 BW (NV only).
- Art. 2:164/274 paragraph 2 BW.
- "lack of approval does not affect the power of representation."

Representation

- Restrictions or conditions that do not follow from the law?
- Example: The statutory provision that a director may not represent the company in transactions exceeding a certain amount.
- Example: The statutory provision that directors are authorized to represent the company in the acquisition of registered property only after prior approval of the transaction by the SB.

Representation

- Is a restriction or condition NOT traceable to a statutory provision?
- Then Article 2:130/240 paragraph 3 of the Civil Code applies: the power of representation is unlimited and unconditional.
- EXTERNAL (i.e. towards the third party) the restriction or condition does not operate.
- The company is therefore bound by the agreement.
- The statutory limitation or condition does work INTERNAL.
- Violation can, for example, lead to dismissal of the director(s) by the AGM. Violation can also lead to liability of the director towards the company (ex 2:9 DCC) if the company has suffered damage as a result.

Representation

- Is a limitation or condition traceable to a statutory provision?
- Only the company can invoke a limitation or condition permitted or prescribed by law.
- Does the company invoke it? Then the company is NOT bound.
- However, it is required that the statutory limitation or condition is registered at the trade register.
- In this context, see Article 22(1)(a) of the Trade Register Decree (*Handelsregisterbesluit*).
- Restrictions or conditions included in the articles of association? Then also include them in the trade register.
- Not registered in the trade register? Then the company can NOT invoke the lack of power of representation against a third party who was unaware of it.
- See Article 2:6 paragraph 2 DCC and Article 25 Trade Register Act (*Handelsregisterwet*).

Representation

- Now what if unauthorized representation has been made, but the company does not (as yet) invoke the power of representation?
- The other party is then unilaterally bound.
- The other party can set the company a term for ratification (art. 3:69 paragraph 4 jo 3:78/79 DCC).
- If the company does not respond to the notice, the other party is in principle released.
- Does the company invoke the lack of power of representation? Then the company is not bound.
- The director who wrongfully represented the company is liable for the damage suffered by the other party as a result of the unauthorized representation (3:70 in conjunction with 3:78/79 DCC), provided that the third party was acting in good faith (DSC VOF/Van den Broek).

Representation

- Exception to the rule? DSC Bibolini.
- Company is bound. Other party acts in circumstances contrary to good faith (it is unacceptable by standards of reasonableness and fairness) by holding the company to the contract (requiring performance of the contract).
- For example: where the other party knew of the "only internally effective" restriction and nevertheless entered into the agreement; and the agreement was particularly detrimental to the company.
- Note: there must be more to it than mere awareness of the restriction.

Resolutions with external effect

- Coincidence of decision-making and representation.
- Indirect external: decision is required for the validity of the legal act (example: emission).
- Direct external: decision is legal act/offer addressed to an opposing party (examples: appointment, dismissal, discharge, distribution, remuneration).
- Void/destroyed resolution = also representation gone unless other party did not know and should not have known the defect (Art. 2:16 paragraph 2 DCC).
- Exception appointment of director/supervisory director: no protection, but compensation.

A blurred city street scene with modern buildings and a car in motion. The image is a wide-angle shot of a city street. In the foreground, a dark-colored car is blurred, moving from left to right. The street is paved with white dashed lines and a bicycle lane symbol. On the left side, there are modern buildings with large windows and a sign that says "PHARMACIE". There are trees and streetlights along the sidewalk. On the right side, there are more trees, a trash can, and a few people walking. The overall scene is a busy urban environment.

Questions?

Liability risks



↓
Curator (trustee)

External Director's liability

(2:248/138 DCC)

- Only in case of **bankruptcy**, instituted by the **trustee (curator)**.
- Liable to the estate for the **entire deficit**.
- **Manifestly improper performance** of duties by the board or a director.
- It is plausible that this performance of duties was a **major cause** of the bankruptcy.
- Thus: causal link between apparent improper performance of duties and bankruptcy.
- Also applies to the SB: Art. 2:259/149 DCC (and in some cases for foundations 2:50a, associations 2:300a).
- All circumstances in relation to each other and connected.

External Director's liability (2:248/138)

- Manifestly improper performance of duties?
 - Serious irresponsibility;
 - Culpable negligence;
 - Recklessness;
 - Blatant incompetence.
- Is clearly acting differently than would be expected of prudent executives in a similar situation (Panmo).

External Director's liability

(2:248/138)

- **Knowing** or **should have known** that creditors would be harmed (harm to creditors must have been objectively foreseeable to management).
- Only improper management **three years** prior to bankruptcy.
- Example: director cooperates in absolutely irresponsible dividend distribution (DSC Reinders).

External Director's liability (2:248/138)

- 2:138/248(2) DCC: **Double legal presumption.**
- Violation of the obligation to keep a **sound administration** (art. 2:10 DCC) or to **publish** the annual accounts (art. 2:394 DCC)?
- **Irrefutable** presumption of manifestly improper **management**;
- **Rebuttable** presumption that this is a **major cause** of the **bankruptcy**.
- The director can rebut the latter presumption by making it plausible that (also) other facts and circumstances than his improper actions have been an important cause of the bankruptcy.
- Trustee (curator) may argue that the director failed to prevent this other cause.
- Director must then make a plausible case that this other cause is not due to improper management (DSC Blue Tomato).

External Director's liability

(2:248/138)

- **Sound administration:** to maintain and preserve records in such a manner that the rights and obligations of the legal entity can at all times be known from them.
 - Nature of the business.
 - Reasonable understanding of capital position (debtors/creditors and liquidity) (DSC Kempers en Sarper. FSM Europe).
- **Publication requirement:** up to 12 months (scholarship: 6 months).
- SB must monitor compliance with publication/administration obligation (DSC Bodam Jachtservice).
- **Insignificant omission?**
- In the event of late filing: time and reason (burden of proof on the director; DSC Van Schilt).
- Absence of auditor's report is violation of art. 2:394 DCC, but may be an insignificant omission (DSC Van Schilt).

External Director's liability

(2:248/138)

- Again, possibility to **disculpate** (2:138/2483(3) DCC).
- Judge may mitigate collectively or individually (4).
- **Discharge does not preclude claim** (6).
- Also applies to a "de facto director" (who co-determined policy) as if he were directors (7).
- Trustee (curator) can also file a "2:9 claim" (8).
- When. Damage greater than deficit, more than 3 years ago (but note discharge).

External liability

- **ECLI:NL:GHARL:2020:9983**
- Breach of duty to publish, thus evidentiary presumption 2:248(2) BW.
- Violation in this case not an insignificant omission.
- Trustee: only external cause can negate.
- Two directors left and subsequently the license was terminated.
- Departure and cancellation of license can be considered a major cause of bankruptcy.
- Court: presumption is negated.

External liability

- **ECLI:NL:HR:2021:1099**
- Director transfers working capital to private and sends harmful email to all customers.
- It is established that transferring working capital was not a major cause of the bankruptcy.
- DSC: disproving presumption of proof also possible by referring to the acts or omissions of one or more directors provided that those acts, viewed in isolation, do not constitute improper performance of duties.

External liability

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External Director's liability

(2:138/248 BW)

- **Dutch Supreme Court 21 December 2018, JOR 2019/74, (Geocopter)**
- Board files for bankruptcy.
- Application for bankruptcy constitutes (alleged) manifestly improper management.
- Violation of art. 2:246 DCC (approval of GM) is primarily relevant for liability under art. 2:9 BW, because it serves to protect the interests of the company and the shareholder.
- If violation art. 2:246 DCC harms the interests of the joint creditors, it may also be relevant for liability ex art. 2:248 DCC.
- The court did not substantiate in what way the violation of art. 2:246 DCC by filing for bankruptcy harms the interests of the joint creditors, nor that the director knew or should have known that his actions would harm the joint creditors.

Supervision of co-director(s)

- **Dutch Supreme Court 30 maart 2018, (TMF)**
- TRUST is a director of foreign company together with Y.
- Company purpose: development of golf resort in the Dominican Republic.
- Foreign company is financed from the Netherlands by offering securities to investors.
- Securities are offered in violation of the Wte.
- Y is condemned. Investors address TRUST stating:
 - Collegial management, therefore also liable;
 - Violation of standards of financial law = liability; and
 - Inadequate supervision of fellow board member = liability.

Supervision of co-director(s)

- Supreme Court:
- No different rules apply to a trust-manager, but:
- in this case insufficiently stated which shows that TRUST knew or should reasonably have understood that Y was acting in violation of Wte.
- Relevant circumstances:
- Establishment TRUST in British Virgin Islands;
- Business operations: management and administrative services;
- No evidence that TRUST performed other services than administrative work.