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Directors' and Officers' Liability in the Netherlands

I. General Part – Overview of the Corporate Law Framework

1. Nature of and distinction between various types of companies

Dutch law provides for the following **limitative list of legal forms** of a company: 1

Eenmanszaak (Sole Proprietorship)
Maatschap (Partnership) (art 7A:1655 Dutch Civil Code, DCC)
Vennootschap onder Firma (General Partnership) (art 16 Commercial Code (CC))
Commanditaire Vennootschap (Limited Partnership) (art 19 CC)
Vereniging (Association – Informal or Formal) (art 2:26 DCC)
Stichting (Foundation) (art 2:285 DCC)
Coöperatie (Cooperative) (art 2:53(1) DCC)
Onderlinge waarborgmaatschappij (Mutual Insurance Society) (art 2:53(2) DCC)
Besloten Vennootschap (equivalent of Private Limited Company, 'BV') (art 2:175 DCC)
Naamloze Vennootschap (equivalent of Public Limited Company, 'NV') (art 2:64 DCC)

The Formal Association, the Foundation, the Cooperative, the Mutual Insurance Company, the BV and the NV must be incorporated by a notarial deed.

Dutch law distinguishes between **NVs and BVs** ('Corporations'). The DCC includes separate chapters with rules for both legal entity forms. Although the BV was introduced in 1970 as a clone of the NV, since the modernization and flexibilisation of the BV legislation in October 2012 there are substantial and relevant differences in the rules that apply to NVs and BVs. Nowadays the BV is distinct from the NV. 2

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3 Dutch corporate law provides for **several types of NVs**. NV-shares can be either in registered form or in bearer form and combinations of various types of shares within an NV is possible. The shares of an NV can be publicly traded, but the NV may also be a private company as there is no obligation that the NV-shares have to be listed. Furthermore, the articles of association may provide for a restriction on the transfer of shares. The Board of Directors of an NV has the obligation to keep a shareholder register solely in the case of registered shares (art 2:85 DCC). Consequently, the NV does not necessarily know the identity of its shareholders.[1] Failure to comply with art 2:85 DCC constitutes a criminal act pursuant to art 1 (4) Economic Offences Act (*Wet op de Economische Delicten*, EOA).

4 The **BV** is mostly used as a closely held Corporation. Shares of a BV are registered and, in principle, not freely negotiable; they must first be offered to fellow shareholders if a shareholder wants to exit. A statutory deviation from this rule is possible, this creates an open BV, ie a BV with freely negotiable shares (art 2:195 DCC). Dutch corporate law does not include a prohibition on listing BV-shares and the Securities Custody and Transfer Act does not seem to provide for rules or regulations that prevent BV-shares from being included in the securities custody and transfer system.[2] As a result, BV-shares can be listed when the rules of the relevant stock exchange allow this. This is however not customary. The Board of Directors of the BV must keep a regularly updated register of its shareholders (art 2:194 DCC). Failure to comply with art 2:194 DCC constitutes a criminal act pursuant to art 1 (4) EOA.

5 Dutch corporate law does not make an explicit distinction between the **duties of directors** (Directors) in **public Corporations and non-public Corporations**. However, the Dutch Financial Supervision Act and ancillary legislation provides for specific rules for securities issuers. These fall outside the scope of this report. In addition, the Dutch Corporate Governance Code 2016 (DCGC 2016) is applicable to listed Corporations. Although the DCGC 2016 has become market practice, compliance cannot be demanded due to its soft law character. Still, its principles and practices are considered in legal proceedings where they offer

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1 On 11 April 2017, the Minister of Security and Justice issued a consultation regarding a proposal that further dematerialises shares in bearer form and makes it possible to identify all holders of shares in bearer form. With this proposal the Minister follows up on recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes and the Financial Task Force that aim to combat tax evasion, money laundering and financing of terrorism: <https://www.rijksoverheid.nl/actueel/nieuws/2017/04/11/blok-houders-van-aandelen-aan-toonder-niet-langer-anoniem>.

2 Kamerstukken II, 2006/2007, 31 058, no 3, 13 (MvT) and *MTA Lumeij-Dorenbos*, De Beurs-BV: kans of utopie? Tijdschrift voor Financieel Recht, 11 November 2012, 413–424.

guidance in light of the interpretation of the unwritten general legal opinion in the Netherlands (*de in Nederland heersende algemene rechtsovertuiging*), which in its turn gives substance to the requirements of corporate reasonableness and fairness which have to be taken into account by those who are involved with the Corporation and have to act accordingly (art 2:8 DCC) and the requirements of proper performance of the director's duties (art 2:9 DCC).[3] Other (large) Corporations that do not fall within the scope of the DCGC 2016, are also encouraged to adhere to its principles.

2. Legal personality and its consequences and the appointment, removal and accountability of the board

General description

In Dutch company law two main categories of legal forms exist: those with **legal personality** and those **without legal personality**. Those with legal personality can be divided into two groups: legal entity forms with share capital and those without. Each legal form is first examined as to its legal personality, property separation and liability. Second, the corporate bodies of each legal form are discussed. There is no legal definition of corporate bodies, but these may be defined as 'institutions' to which the law or the articles of association have granted the authority to take decisions that are to be recognized as decisions of the legal entity (Corporate Bodies). As a result a Corporate Body has decision-making authority regarding the affairs of the legal entity.[4] While each legal form has its own set of rules, some rules apply to all or a selected group of legal forms or to a specific group within the category of a legal form. Prior to exploring each legal form, important rules regarding the works council are briefly explained, the DCGC 2016 is addressed under question 1. 6

A **works council** must be established if an enterprise exists, regardless of the legal form, and at least 50 persons are working at this enterprise. The aim of the obligation to establish a works council is proper involvement (consultation and representation) of the workers within that enterprise.[5] 7

3 Hoge Raad (HR) 13.7.2007, European Case Law Identifier ECLI:NL:HR:2007:BA7970 (*ABN Amro*).

4 *Asser/Maeijer & Kroeze* 2-I* 2015/186. Arts 2:78a/189a DCC explicitly list certain corporate 'institutions' as Corporate Bodies as used in specific statutory provisions governing the NV and BV.

5 Art 2 Works Council Act.

8 Forms **without legal personality** are *Eenmanszaak* (Sole Proprietorship), *Maatschap* (Partnership), *Vennootschap onder Firma* (General Partnership), and *Commanditaire Vennootschap* (Limited Partnership).

9 **Eenmanszaak (Sole Proprietorship):** A Sole Proprietorship has **no legal personality** and is not directly governed by Dutch civil law although it is mentioned in art 5(b) Dutch Commercial Register Act 2007 (*Handelsregisterwet 2007*, DCRA 2007), on the basis of which the Sole Proprietorship has to be registered with the commercial register of the Chamber of Commerce ('Commercial Register'). The Sole Proprietorship has just one owner, this being a natural person. The **property** of the owner and the 'property' of the Sole Proprietorship (assets or means kept and used for the enterprise of the Sole Proprietorship) are not separated. The sole proprietor (entrepreneur) is personally **liable** for all debts and obligations of the Sole Proprietorship. A Sole Proprietorship has no mandatory **Corporate Bodies**. There are no specific rules that govern the internal organisation. Unambiguously, it should be mentioned that a Sole Proprietorship can employ workers. The entrepreneur is the contracting party as employer.

10 **Maatschap (Partnership):**[6] Article 7A:1655 DCC describes a partnership as an agreement under which two or more natural persons or legal entities have engaged themselves towards each other to bring together means (see below) to conduct certain activities with the purpose of sharing the benefits that may result therefrom ('Partnership'). The Partnership itself is thus merely an agreement and has **no legal personality**. The Partnership can be 'public' (*openbaar*) or 'silent' (*stil*), although this is not a distinction made in statutory law. A 'public Partnership' presents itself under a common name and participates in society under this name. Public Partnerships can only perform professional activities. However, these activities are not defined by law.[7] When non-professional business activities are performed under a common name, a General Partnership exists and different (liability) rules apply (see below). A 'silent Partnership' can perform both professional and non-professional activities. The Partnership starts as of the moment of the conclusion of the agreement if no other starting point has been specified in that agreement (art 7A:1661 DCC). Although a written agreement is desirable, the Partnership agreement can be concluded in any form, even implicitly.[8] When the Partnership has an enterprise as defined in the Dutch Commercial Register Resolution 2008 (*Handelsregisterbesluit* 2008, DCRR

6 Arts 7A:1655–1689 DCC.

7 The distinction between professional and non-professional activities is sometimes difficult to make.

8 HR 24 June 1932, Nederlandse Jurisprudentie (NJ) 1932/1587 and HR 2 September 2011, ECLI:NL:HR:2011:BQ3876 (*Astense dierenartsenpraktijk*).

2008),[9] the Partnership has to be registered with the Commercial Register.[10] Each partner is bound to provide the Partnership with capital, goods, use of goods or labour (art 7A:1662 DCC). Each partner acquires a share in the ownership of all the contributions, together this joint ownership forms the equity of the Partnership. All these assets may solely be appropriated for the purpose of the Partnership. Although it would be incorrect to describe the contributions of the partners as property of the Partnership as a stand-alone entity, the **assets committed to the Partnership** are insulated from claims by creditors of the individual partners. As a result, a private creditor of one of those partners cannot seize the partner's share in the property of the Partnership nor can it seize all or certain assets since partners do not have those assets freely at their disposal.[11] The right to seize Partnership property is exclusive to Partnership creditors as the community of property is shielded due to affirmative asset partitioning (*afgescheiden vermogen*).[12] Only when a Partnership has been dissolved and the individual claims on the assets (that remain after all creditors of the Partnership have been paid) have been transferred to each Partner, can the creditors of the individual partners assert their claims to those assets. These Partnership creditors also have the right to assert their claims against the Partners' private assets. When the obligation is divisible, a partner can only be held **liable** for an equal amount and an equal share of the debt, even when the share of one of these partners in the Partnership is less or smaller than that of the others (art 7A:1679 DCC). However, it is possible to deviate from this statutory liability rule when entering into an agreement with creditors, as a result of which for instance each of the Partners is personally liable towards the creditor in proportion to a Partner's real share in the Partnership or in full instead of in equal shares (art 7A:1680 DCC). Partners are not allowed to decide on an external liability arrangement without the consent of the third parties involved. When the obligation is non-divisible, such as an obligation to act, the partners are jointly and severally liable (art 6:6 (2) DCC). In 2013, the Supreme Court of the Netherlands (*Hoge Raad*, HR) confirmed its earlier judgment that the plaintiff in a case against a Partnership could assert his claim against both the Partnership and its partners personally.[13] These are two separate claims and third parties have a free choice as to which claim to assert and in which order. Since the Partnership

9 Art 2 in conjunction with art 8 sub b DCRR 2008.

10 Arts 5 and 6 DCRA 2007.

11 HR 17 December 1993, ECLI:NL:HR:1993:ZC1182 (*Van den Broeke/Van der Linden*).

12 HR 15 March 2013, ECLI:NL:HR:2013:BY7840 (*Biek Holdings*).

13 HR 5 November 1976, ECLI:NL:HR:1976:AB7103 (*Moret Gudde Brinkman*) and HR 15 March 2013, ECLI:NL:HR:2013:BY7840 (*Biek Holdings*).

itself is not a legal entity, one must litigate against the partners of that Partnership that are partners at the time of the issuance of the subpoena. It is sufficient to state the Partnership's name if its partners clearly carry on activities under that name. All Partners can then be ordered to appear at the proceedings.[14] Which partners can be held personally liable depends on the grounds used to hold the individual partners liable. If the legal basis of the claim is partner liability under partnership law (art 7A:1680 DCC), persons that were partners at the moment the Partnership's liability for the obligations (*schuld*) arose can be held liable. If the claim is based on the liability rules relating to the agreement of services between the third party and the Partnership, the claim must be asserted against the partners that were partners at the moment the Partnership entered into the agreement that resulted in damage (art 7:407(2) DCC). Under this rule, the partners involved are jointly and severally liable instead of having liability for equal shares. An exculpation possibility exists. When the assignment has been granted with a specific person in mind who together with the party to the agreement or as an employee of such a party, performs activities under the agreement, this person is also jointly and severally liable vis-à-vis the third party (art 7:404 DCC).[15] The liability rules relating to the agreement of services (arts 7:404 and 407 DCC) may be excluded by the Partnership in its general conditions. However, this does not deprive a third party of the right to hold partners personally liable on the basis of tort committed when performing their professional activities (art 6:162 DCC).[16]

11 The Partnership has no mandatory **Corporate Bodies**. The internal organisation of the Partnership is left to the discretion of the partners. A request can be filed to receive a court order for the dissolution of the Partnership. When specific requirements are met, the court may grant such an order as a result of which the partnership is dissolved and materially all partners are removed.

12 **Vennootschap onder Firma (General Partnership):**[17] The General Partnership is a species of the Partnership and similarly has **no legal personality**. All articles that apply to Partnerships also apply to the General Partnership unless specific rules for the General Partnership exist. The General Partnership can be defined as the Partnership established with the objective of performing non-professional business activities under a common name. The General Partnership has the capacity to sue and to be sued, art 51 Law of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, LCP), and has to be registered with

14 HR 5 November 1976, ECLI:NL:HR:1976:AB7103 (*Moret Gudde Brinkman*).

15 HR 15 March 2013, ECLI:NL:HR:2013:BY7840 (*Biek Holdings*).

16 HR 18 September 2015, ECLI:NL:HR:2015:2745.

17 Arts 7A:1655–1689 DCC, arts 16–18, 22–34 CC.

the Commercial Register.[18] A substantial difference between the Partnership and the General Partnership concerns the representation rules. In the case of a Partnership, the partners do not automatically have the right to represent the other partners. They need a proxy. In a General Partnership each partner, in principle, has the right of representation of the General Partnership and thereby the other partners, art 17(1) Commercial Code (*Wetboek van Koophandel*, CC). Limitations and exclusions may be agreed upon. The specific agreements relating to the representation authority only have external effect if these are clearly defined and registered with the Commercial Register. Partners that are not authorized to represent the General Partnership or act under their own name, in principle, do not bind the General Partnership (art 17(2) CC). An important distinction in the **liability** of partners is that partners of a General Partnership are each jointly and severally liable towards the General Partnership's creditors pursuant to art 18 CC. Partners that joined the General Partnership after its origination are also personally liable for obligations from before their involvement in the General Partnership.[19] The rules relating to the affirmative asset partitioning that apply to the Partnership also apply to the General Partnership, without prejudice to what is mentioned in the previous paragraph. The rules pertaining to **Corporate Bodies** of the General Partnership are equal to those of a *Maatschap* (Partnership; cf above no 10).

Commanditaire Vennootschap (Limited Partnership):[20] Another species of the Partnership is the Limited Partnership. All articles that apply to Partnerships also apply to the Limited Partnership unless specific rules for the Limited Partnership exist. The Limited Partnership distinguishes itself by having **two types of partners** (each either natural persons or legal entities), managing partners (*beherend vennoten*) and limited partners (*commanditaire vennoten*). The Limited Partnership should have at least one managing partner who can manage and represent the Limited Partnership and who is personally liable for the obligations of the Limited Partnership. If there are two or more managing partners they are jointly and severally liable to its creditors (art 18 CC). Articles 19–21 CC introduce the limited partner, referred to in Dutch as a 'silent' partner. This limited partner provides capital to the Limited Partnership. His **liability** is limited to the amount of his (capital) contribution. Due to the prohibition on management (*beheersverbod*) (art 20(2) CC), the limited partner is not allowed to engage in management, not even with a proxy. There are diverging views on whether (and if so to what extent) the prohibition also applies to internal influ- 13

18 Arts 5 and 6 DCRA 2007 in conjunction with arts 2 and 8 sub b DCRR 2008.

19 HR 13 March 2015, ECLI:NL:HR:2015:588 (*Carlande*).

20 Arts 7A:1655–1689 and art 19–21 CC.

ence of the limited partner on the management by the managing partner. The Supreme Court has not yet resolved this debate. In addition to the prohibition on management, the name of the limited partner may not be used in the name of the Limited Partnership (art 20(1) CC). Depending on the circumstances, a limited partner who violates the prohibition on management or the prohibition on the use of his name could become jointly and severally liable to all Limited Partnership creditors even for those liabilities that arose before the date on which the prohibition was infringed.[21] The rationale of this liability sanction is firstly the desire to avoid creating third party misperception of the capacity of the limited partner. It is undesirable that due to the activities of the limited partner or the name of the Limited Partnership, the third party should presuppose that the limited partner is a managing partner, thus giving rise to third party ancillary recourse opportunities. Secondly, the prohibition on management aims to prevent the limited partner acting in an irresponsible and risky manner on behalf of the Limited Partnership as he could take advantage of the fact that he is only internally liable up to the amount of his contribution. The Dutch Supreme Court (*Hoge Raad*) held that the liability sanction imposed upon a limited partner must be in line with this rationale and not be disproportionate to the nature and seriousness of the breach of the prohibition on management by the limited partner.[22] The sanction should be dispensed with if and to the extent that it is not justified or not fully justified by the actions of the limited partner. Relevant factors that have to be taken into account to determine if a sanction should be imposed and, if so, to what extent, are whether the third party was aware or should have been aware of the capacity of the limited partner and whether the limited partner can be blamed for the breach of the prohibition on management or use of name. One can expect a limited partner to be aware of the fact that he is not allowed to perform management activities. The rules pertaining to **Corporate Bodies** of the General Partnership are the same as those of a *Maatschap* (Partnership; cf above no 10).

14 Forms **with legal personality**, as found in art 2:3 DCC, are **private legal entities** – *Vereniging* (Association), *Coöperatie* (Cooperative), *Onderlinge waarborgmaatschappij* (Mutual Insurance Company), *Stichting* (Foundation) – and **Corporations with share capital.**

15 **Vereniging (Association)**:[23] An Association is a **legal entity** with members, pursuing a particular purpose, which is different from the purpose described in

21 Art 21 CC and HR 29 May 2015, ECLI:NL:HR:2015:1413 (*Lunchroom De Katterug*).

22 Art 21 CC and HR 29 May 2015, ECLI:NL:HR:2015:1413 (*Lunchroom De Katterug*).

23 Arts 2:26–52 DCC.

art 2:53(1) or (2) DCC.[24] The Association may not distribute profits among its members (art 2:26(3) DCC). There are two types of Associations; a formal and an informal Association. In the case of an informal Association no formalities exist as to the origination of the Association other than that it is constituted by a multilateral agreement (art 2:26(2) DCC). The Association should have an identity distinct from the members, and should participate in society as a unit with rights and obligations. It is not necessary that an expressive intention to form an association exists and/or formal registration in the Commercial Register has taken place.[25] The informal Association has legal personality but limited legal capacity, consequently it cannot acquire registered property nor be an heir. In order to establish a formal Association with full legal capacity (art 2:43(5) DCC) and limited liability (art 2:29(2) DCC), the Association must be incorporated by notarial deed with its articles of incorporation embodied in that deed as well as registration of the Association in the Commercial Register and deposit of a certified copy of the notarial deed of incorporation at the office of the Chamber of Commerce (arts 2:27 and 2:29(2) DCC). The formal Association has **assets, which are separate from that of its members**. In principle, none of these members or the Directors of the Association can be held **liable** for the formal Association's debt. However, every Director of a formal Association is severally and jointly liable together with the Association for the legal acts with which he binds the Association as long as the Association is not yet registered with the Commercial Register and no certified copy of the notarial deed of incorporation has yet been deposited at the office of the Chamber of Commerce. Under certain circumstances Directors can also be liable for mismanagement (art 2:9 DCC by the Association itself or 6:162 DCC by third parties). Directors' liability on the basis of these articles is discussed extensively under II and III (below nos 31ff and 113ff) in relation to Corporations. In the case of an Association, relevant circumstances that may be taken into account when determining whether the Director can be severely held to blame are inter alia the purpose of the Association, the financing and whether Directors receive remuneration. Articles 2:131/138/139/149/150 DCC shall apply accordingly in the event of the bankruptcy of an Association of which the articles of association are included in a

24 Art 2:26(1) DCC. Art 2:53(1) DCC: '...According to its articles of incorporation it must have the purpose (objective) to provide for certain material needs of its members on the basis of contracts, other than insurance agreements, concluded with those members in the course of its business, which it conducts or causes to be conducted for this reason for the benefit of its members.' Art 2:53(2) DCC: '...According to its articles of incorporation it must have the purpose (objective) to conclude insurance agreements with its members in the course of its insurance business, which it conducts for this reason for the benefit of its members.'

25 Hof Arnhem 14 April 2009, ECLI:NL:GHARN:2009:BJ2178.

notarial deed and which is subject to Company Tax (art 2:50a DCC). These articles are discussed throughout this contribution and, among other things, deal with liability in bankruptcy situations. The Directors of an informal Association are jointly and severally liable for debts arising from a juridical act of the informal Association that have become due and demandable during their period as Director. After their resignation they remain jointly and severally liable for these debts (art 2:30 DCC). The first **Corporate Body** of an Association is the general meeting, consisting of all members that are not suspended (art 2:38 DCC). The general meeting is conferred with all powers insofar as these powers are not granted to other Corporate Bodies of the Association by law or the articles of association (art 2:40 DCC). Among these, the general meeting appoints, suspends and dismisses Directors (art 2:37 DCC). Appointment may be restricted by a binding proposal of candidates, but the general meeting of members may vote against the proposed candidates with a $^2/_3$ majority of the votes (art 2:37(4) DCC). Both natural persons and legal entities can be appointed Director and these need not necessarily be members, depending on the articles of association.[26] The Board of Directors is exclusively entitled to manage the Association within the boundaries set by the purpose of the Association included in the articles of association (art 2:44(1) DCC). Divisions of duties may be included in the articles of association. They also may provide for limitations on the autonomy of the Board of Directors by requiring certain approvals of other Corporate Bodies before it can act.[27] There is no statutory rule on instructions. Some argue that an instruction right to give detailed instructions can be granted to the general meeting in the articles of association in combination with the possibility for the Board of Directors to ignore the instruction if it harms the interests of the legal entity and its affiliated organizations.[28] Others are of the opinion that some management authority can be vested in other Corporate Bodies; such a Corporate Body may then delegate the execution of this authority to the Board of Directors and in this context the other Corporate Body may instruct the Board of Directors how said execution should take place. However, these authors do not support the view that an instruction right to give detailed instructions can be included in the articles of association.[29] There are no statutory rules specifically

26 *GJC Rensen*, Tekst & Commentaar Burgerlijk Wetboek (T&C Burgerlijk Wetboek), commentaar op art 37 Boek 2 BW.

27 Some authors are of the opinion that these approval rights are limited to the extent that they should not result in a situation in which the Board of Directors is subservient to another Corporate Body: *CHC Overes/TJ van der Ploeg/WJM van Veen* (eds), Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij (2013) 188.

28 *Asser/Rensen* 2-III* 2012/127.

29 *Overes/van der Ploeg/van Veen* (fn 27) 323.

related to the (establishment of a) Supervisory Board. The Association may have a (facultative) provision in the articles of association with regard to the establishment and the functioning of a Supervisory Board. The articles of association include rules on the appointment, suspension and dismissal of supervisory directors ('Supervisory Directors'). As commonly accepted, members of the Supervisory Board are natural persons. There is a proposal for a Management and Supervision of Legal Entities Act (*Wet Bestuur en Toezicht Rechtspersonen*),[30] which provides for a statutory possibility to establish a Supervisory Board and gives this board the authority to supervise and advise the Directors, guided by the interests of the legal entity and its affiliated organisations. The proposal also gives the Supervisory Board the right to suspend Directors. The articles of association may grant other authorities to the Supervisory Board.[31] This proposal also includes a liability provision for Supervisory Directors similar to art 2:9 DCC. Although, the DCC does not provide for a one-tier board within an Association, such a structure does exist in practice.[32] Another Corporate Body of the Association can be a Department (art 37(5) DCC). A Department can be characterized as an organizational unity within the Association with a legal basis provided by or pursuant to the articles of association.

Coöperatie (Cooperative):[33] A Cooperative is a species of the Association with the important difference that it can distribute profits among its members. All articles that apply to Associations also apply to the Cooperative unless specific rules for the Cooperative exist. Formed by a multilateral judicial act embodied in a notarial deed (art 2:54 DCC), it must have the purpose, stated in its articles of association, of providing for certain material needs of its members on the basis of contracts, other than insurance agreements, concluded with those members in the course of its business, which it conducts or causes to be conducted for this reason for the benefit of its members (art 2:53(1) DCC). This makes the Cooperative a suitable legal form for business activities. As a **legal entity** and like the Association, the Cooperative has **separate property**. Depending on the type of **liability** chosen, the existing members and members that became ex-members within one year before dissolution or date of bankruptcy when relevant, are liable in equal parts for any deficit in case of dissolu- 16

30 Wijziging van het Burgerlijk Wetboek in verband met de uniformering en de verduidelijking van enkele bepalingen omtrent het bestuur en de raad van commissarissen van rechtspersonen (Wet bestuur en toezicht rechtspersonen), Kamerstukken 34 491.

31 Art 2:47 Voorontwerp Bestuur en Toezicht Rechtspersonen.

32 *MJ van Uchelen-Schipper*, Governance en toezicht, in: JJA Hamers/CA Schwarz/DFMM Zaman (eds), Handboek Stichting en Vereniging (2015) 250.

33 Art 2:53-63 DCC.

tion (art 2:55 DCC). The time period of one year regarding the former members may be extended in the articles of association. The articles of association may also deviate from a liability based on equal parts, for instance liability may be connected to the contributions of the members. Liability can also be excluded or limited to a maximum amount in the articles of association (art 2:56(1) DCC). The members may only invoke such exclusion or limitation if the legal entity has added to the end of its name the abbreviation 'UA' (exclusion of liability) or 'BA' (limited liability). A Cooperative that has not chosen a specific type of liability adds to the end of its name the abbreviation 'WA' (statutory liability). See for **Directors' liability** under *Vereniging* (Association).

17 The same **Corporate Bodies** of an Association are found in a Cooperative. In contrast to the Association, the rules that specifically apply to the Cooperative include a provision relating to the Supervisory Board (art 2:57 DCC). This states that the articles of association include the possibility of establishing a Supervisory Board, consisting of natural person(s). Members of the Supervisory Board are either appointed in the deed of incorporation or after the establishment of the Cooperative has taken place, by the general meeting. The Supervisory Board has the duty of supervising the Directors and providing them with advice. The Supervisory Directors are guided by the interests of the Cooperative and its affiliated enterprises. The Supervisory Board is authorized to suspend Directors, unless provided otherwise in the articles of association (art 57(3) DCC). The Supervisory Board also has a role in the case of conflicts of interest of one or more Directors (art 2:57(4) DCC). If a Cooperative meets the 'large' criteria as set out in art 2:63b DCC and fulfils other requirements such as (certain duration of) registration, it is obliged to institute a Supervisory Board. These three criteria are: (i) the legal entity's equity, according to the balance sheet with explanatory notes, amounts to at least € 16 million; (ii) the legal entity or a dependent company[34] is obliged, pursuant to law, to establish a works council, and; (iii) the legal entity and its dependent companies jointly employ on average at least one hundred employees in the Netherlands. Special rules apply to the appointment, suspension and dismissal of the Supervisory Directors of a 'large Cooperative', such as the requirement of at least 3 Supervisory Directors,

34 Art 2:63a DCC: In this Section (Section 2.3.2), a 'dependent company' means: (a) a legal entity to which the Cooperative (*coöperatie*) or Mutual Insurance Society (*onderlinge waarborgmaatschappij*) or one of its dependent companies has provided, for its own account, either solely or jointly, at least 50% of the issued capital. (b) a commercial partnership of which an enterprise is registered in the commercial register and in which the Cooperative or Mutual Insurance Society participates as a partner who is fully liable towards the creditors of that commercial partnership for all debts.

the right of the works council to recommend suitable candidates for the list of candidates to be proposed by the Supervisory Board, the right of the works council to oppose a proposed candidate, the right of the Enterprise Court (*Ondernemingskamer*) to dismiss a Supervisory Director, the exclusive right of the Supervisory Board itself to suspend a Supervisory Director etc (art 63f DCC). An important difference between a 'normal Cooperative' and a 'large Cooperative' is the approval right of the Supervisory Board relating to important activities or events relating to the Cooperative such as issuance of certain debt instruments (*schuldbrieven*), substantial investments, amendment of the articles of association, dissolution etc (art 2:63j DCC).

Onderlinge waarborgmaatschappij (Mutual Insurance Company):[35] The same articles that apply to the Cooperative (arts 2:53–63 DCC), also apply to the Mutual Insurance Company. The main reason that this form of Association has a different name is found in its purpose. As art 2:53(2) DCC states: *'According to its articles of association it must have the purpose to conclude insurance agreements with its members in the course of its insurance business, which it conducts for this reason for the benefit of its members.'* For Details on **Corporate Bodies** of the Mutual Insurance Company see *Coöperatie* (Cooperative). **18**

Stichting (Foundation):[36] A Foundation is a **legal entity** incorporated by means of a notarial deed (art 2:286(1) DCC) that has no members, and that intends to realize a purpose, mentioned in its articles of association, by using capital (property) which has been brought in for this purpose (art 2:285(1) DCC). That purpose may not include the making of distributions to its founders or those participating in Corporate Bodies of the Foundation. For charitable or social purposes, distributions are permitted (art 2:285(2) DCC). This said, the purpose of a Foundation may also include commercial activities. The Foundation is often used in the Netherlands as part of anti-takeover measures of an NV and used for a structure with depository receipts of shares (*certificaten van aandelen*) in the case of a BV. The Foundation has its own **property**. It can contract in its own name and sue or be sued. Every Director of a Foundation is severally and jointly **liable** together with the Foundation for the legal acts with which he binds the Foundation as long as the Association is not yet registered with the Commercial Register and a certified copy of the notarial deed of incorporation has not yet been deposited at the Chamber of Commerce (art 2:289(2) DCC). Under certain circumstances of mismanagement, Directors can be held liable (art 2:9 DCC by the Foundation itself or art 6:162 DCC by third parties). Articles 2:131/138/139/149/150 DCC shall apply accordingly in the event of the bank- **19**

35 Arts 2:53–63 DCC.

36 Arts 2:285–304 DCC.

ruptcy of a Foundation subject to Company Tax (art 2:300a DCC). These articles are discussed throughout this contribution and, among other things, deal with liability in bankruptcy situations. The **Corporate Bodies** of the Foundation are a Board of Directors that is charged with the representation (art 2:292(1) DCC), administration and management of the Foundation (art 2:291(1) DCC). There is a diverse set of options to fulfil a vacancy within the Board of Directors. The most common way of appointment is co-option. The Board of Directors appoints the new directors. However, the articles of association may provide that certain (legal) persons which are included in the articles of association have the authority to appoint the Directors. Another option would be a provision in the articles of association, which affords the right to bring forward a proposal of candidates. The articles of association will state the possibilities for deviating from this proposal by the Board of Directors.[37] If a Board of Directors is (partly) absent and the articles of association do not provide for a solution, the court may appoint (a) Director(s) (art 2:299 DCC). The articles of association should provide for a process of dismissal of Directors. Under certain circumstances the court also has the right to dismiss Directors at the request of the public prosecutor or any party that is involved. A Director that has been dismissed by the court is not allowed to become a Director of a Foundation for 5 years after the moment of dismissal (art 2:298 DCC). As with the Association, there are no statutory rules yet with regard to a possible Supervisory Board. What has been explained with regard to Associations in relation to a Supervisory Board also applies to the Foundation. With respect to 'large' Foundations there are certain restrictions as to who can become a Director of such a Foundation. See below under question 3.

20 BVs and NVs can be categorized as **Corporations with share capital**. They distinguish themselves from other legal forms through their (transferable) shares, limited liability and organizational structure. Both the BV and NV are able to adopt a one-tier board system instead of the two-tier board system. Corporations that meet certain requirements relating to their size, are governed by the so-called *structuurregeling*, an internationally unique system that structures the management of 'large' Corporations. Both the two-tier/one-tier board structures and the *structuurregeling* will be discussed separately.

21 **Besloten Vennootschap (equivalent of Private Limited Company, 'BV'):**[38] A BV is a **legal entity** with capital that is divided into one or more transferable shares (art 2:175 DCC). One or more persons establish(es) the Corporation by means of a notarial deed including the articles of incorporation. At least

37 *DFMM Zaman/GJH van der Sangen*, De oprichting van de stichting, in: JJA Hamers/CA Schwarz/DFMM Zaman (eds), Handboek Stichting en Vereniging (2015) 82.

38 Arts 2:175–276 DCC.

one share is held by a party other than, and not for the account of, the Corporation or its subsidiaries (art 2:175(1) DCC). No minimum capital requirements apply. **Shareholders** are not personally **liable** for the obligations of the Corporation and they are not obliged to contribute to the losses of the Corporation for more than what has been paid up on their shares or still has to be paid up. Even though shareholders in principle cannot be held liable by third parties or the Corporation for the Corporation's obligations, the articles of association can provide that shareholders can be held liable for certain obligations (art 2:192(1)(a) DCC). In addition, shareholders can be held liable on the basis of tort (art 6:162 DCC), though this happens only in exceptional circumstances. Liability of **Directors** is discussed extensively under II and III. A short summary is provided here. Until registration with the Commercial Register, Directors are jointly and severally liable for any juridical act performed during their directorship by which the Corporation is committed (art 2:180(2) DCC). After registration Directors can be held liable on the basis of mismanagement by the Corporation (art 2:9 DCC), on the basis of mismanagement causing bankruptcy by the liquidator (art 2:248 DCC) and on the basis of tort by third parties (art 6:162 DCC).

Naamloze Vennootschap (Public Limited Company, 'NV'):[39] The NV is a **legal entity** with an authorized capital (at least € 45,000, art 2:67(2) DCC) divided into transferable shares. The articles of incorporation specify the amount of the authorized share capital and the number and the amount of the shares in Euros (art 2:67(1) DCC). At least one share is held by a party other than, and not for the account of, the Corporation or its subsidiaries (art 2:64 DCC). One or more persons establish(es) the Corporation by means of a notarial deed including the articles of incorporation. **Shareholders** are not personally **liable** for the obligations of the Corporation and they are not obliged to contribute to the losses of the Corporation for more than what has been paid up on their shares or still has to be paid up. The NV is particularly suited for larger (listed) Corporations with large numbers of shareholders. **22**

The NV and the BV have a number of **mandatory Corporate Bodies**, including the Board of Directors and the general meeting of shareholders ('General Meeting'). The Board of Directors is charged with the management of the Corporation (arts 2:129/239 DCC) and representation of the Corporation (arts 2:130/240 DCC). Directors can be natural persons as well as legal entities (art 2:11 DCC).[40] Rights of appointment, suspension and dismissal may vary between NVs/BVs as a result of the applicability of the *structuurregime*, which is explained below. At the moment of establishment, Directors are appointed in **23**

39 Arts 2:64–166 DCC.

40 See also HR 17 February 2017, ECLI:NL:HR:2017:275.

the articles of incorporation and from that moment on (in a 'normal regime') by the General Meeting. In the case of a BV, the articles of association may provide that a meeting of holders of shares of a certain type (class) or indication subject to certain requirements appoints the Directors instead of the General Meeting (arts 2:132/242 DCC). The Corporate Body responsible for the appointment of Directors also has the authority to suspend and dismiss them (arts 2:134/244 DCC). With the BV, this authority can also be vested in another Corporate Body when permitted by the articles of association unless the *structuurregime* applies. In the case of a one-tier board, Directors may be suspended by the Board of Directors (arts 2:134/244 DCC). Within the limits set by law and the articles of association, any power not assigned to the Board of Directors or another Corporate Body belongs to the General Meeting (arts 2:107/217 DCC). Authorisation and instruction rights are discussed under questions 19 and 20 and connected case studies. Differences between rules applicable to the BV and NV may exist.

In deviation from what is market practice in many other countries, the Netherlands has a tradition of the **two-tier board structure** and has only recently (2013) introduced a legal basis for the one-tier system. First, the two-tier system is discussed. The NV and BV may have a Supervisory Board of one or more Supervisory Directors when this is provided for in the articles of association (arts 2:140/250 DCC). Only natural persons are eligible to become a Supervisory Director. Supervisory Directors are responsible for exercising supervision over the management and policy of the Board of Directors and over the general course of events within the Corporation. The Supervisory Board shall advise the Board of Directors by word and deed, also at its own initiative and even intervenes and takes corrective actions if necessary (within the confines set by the articles of association and law). To that effect, the Board of Directors provides the Supervisory Board in time with the necessary information to perform its duties (arts 2:141/251 DCC). In performing these duties the Supervisory Directors are guided by the interests of the Corporation and its affiliated enterprises. The articles of association may provide for additional authorities. The Supervisory Directors are appointed by the General Meeting (arts 2:142/252 DCC) or in the case of a BV this authority may be vested in a meeting of holders of shares of a certain type (class) or indication subject to certain requirements if this is provided in the articles of association (art 2:252 DCC). The Corporate Body that is responsible for the appointment also has the right to suspend and dismiss the Supervisory Board (art 2:254 DCC). The Supervisory Board is an independent body that cannot be instructed in any way.[41]

41 *JB Huizink*, GS Rechtspersonen, art 140 Boek 2 BW, aant 4c.

The **one-tier system** means that rather than having a Board of Directors and Supervisory Board or just a Board of Directors, there is, as specified in the articles of association, one, unified single Corporate Body, the one-tier board, consisting of executive Directors ('Executive Directors') and non-executive Directors ('Non-Executive Directors') (arts 2:129a/239a DCC). While they now form one corporate body and are collectively responsible and liable for the performance of their duties, some tasks remain separated. The duty to supervise the performance of duties by the Executive Directors must be performed by a Non-Executive Director. The chairmanship of the Board of Directors, the making of proposals for the appointment of a Director and the adoption of the decisions on remuneration of the Executive Directors may not be assigned to an Executive Director. The appointment of Non-Executive Directors is governed similarly to the appointment of Supervisory Directors of 'large' Corporations, which will be discussed below. Rules that apply to the Board of Directors (in a two-tier board) also apply to the one-tier board, the new system does not have its own set of rules (apart from what is explicitly stipulated in arts 2:129a/239a/164a/274a DCC). 24

The *structuurregeling* is a special set of rules for **'large' Corporations**. A Corporation that meets certain thresholds must within two months of the date on which its General Meeting has adopted the annual accounts (from which can be concluded that those thresholds are met), lodge a declaration with the Commercial Register in which is stated that the Corporation meets those requirements (arts 2:153/263 DCC). The requirements are that (i) the total sum of the issued capital and the reserves amounts to at least € 16 million; (ii) the Corporation is obliged by law to have a works council, and; (iii) the Corporation and its dependent Corporations jointly employ on average at least one hundred employees in the Netherlands (arts 2:153(2)/263(2) DCC). The consequence of meeting these thresholds for three continuous years (arts 2:154(1)/264(1) DCC) is that the *structuurregime* becomes applicable, which entails that the Corporation **must institute a Supervisory Board**. Certain exemptions exist on the basis of particular circumstances as a result of which a 'mitigated' *structuurregime* or the 'normal' regime applies. It is also possible to request dispensation from this obligation from the Minister of Security and Justice (arts 2:156/266 DCC). The Supervisory Board for a 'large' Corporation is afforded additional authority and balances the division of power, which is perceived as necessary given the size of these Corporations. The Supervisory Board, consisting of at least three natural persons, is appointed by the General Meeting on the basis of the nominations from the current Supervisory Board and, for one-third of the number of Supervisory Directors, the works council has the right to recommend persons for nomination (arts 2:158/268 DCC). One important power that is conferred on the Su-

pervisory Board for 'large' Corporations is that the Supervisory Board appoints Directors (arts 2:162/272 DCC). Furthermore, the Supervisory Board's approval for Board of Directors' resolutions is required for a number of issues including, but not limited to, the issuance of and acquisitions of shares, collaborations with other Corporations, large investments (arts 2:164/274 DCC). The absence of such approval however, does not affect the power of representation of the Board of Directors (arts 2:164(2)/274(2) DCC).

25 Since the codification of the one-tier system, it is also possible to **derogate** from arts 2:158/268 DCC (arts 2:164a/274a DCC) and institute a one-tier board rather than having a separate Supervisory Board. The Non-Executive Directors appoint Executive Directors and resolutions within the meaning of arts 2:164(1)/274(1) DCC require the approval of the majority of the Non-Executive Directors of the Corporation.

3. The qualifications of board members

26 The articles of association of the NV and BV may **limit the circle of persons** qualified to be appointed as Director by setting requirements which such Directors have to meet. The requirements may be set aside by a resolution of the General Meeting (arts 2:132/242 DCC). The DCGC 2016 requires that the Board of Directors and Supervisory Board need to be composed in such way that the requisite expertise, background, competences and – as regards the Supervisory Board – independence are present for them to carry out their duties properly (Principle 2.1). Every Director (Managing/Executive Director, Non-Executive Director and Supervisory Director) should have the specific expertise required for the fulfilment of his duties. In the explanatory notes to the DCGC 2016 it is stressed that it is important that sufficient expertise is available within the Board of Directors and the Supervisory Board to identify opportunities and risks that may be associated with innovations in business models and technologies in a timely manner.[42] Each Supervisory Director/Non-Executive Director should be capable of assessing the broad outline of the overall management. They should be able to operate independently and critically vis-à-vis one another, the Board of Directors, and any particular interests involved. Specific criteria apply to assess the extent of 'independence' and to the maximum number of Supervisory Directors/Non-Executive Directors who meet such criteria (Best Practices 2.1.7/2.1.8 and 5.1.1 DCGC 2016). Article 39 (1) of the European Statutory Audits

42 Explanatory notes to the code, under 2.1.4.

Directive (2014/56/EU) requires that at least one member of the audit committee should have competence in the preparation and auditing of the financial statements. This has been implemented in Dutch law.[43]

In addition to the 'large' Corporations with respect to the *structuurregime*, another definition of 'large' Corporations and Foundations (**Large Legal Entities**) is used in relation to the **limitation of board positions**. A Large Legal Entity under this definition is an NV, a BV or a Foundation that is obliged by law to draw up a financial statement which is equal or similar to annual accounts under Title 9 Book 2 DCC but does not meet at least two of the following criteria on two consecutive balance dates: (1) assets according to the balance sheet with explanatory notes using acquisition costs and production costs, with a value not exceeding € 17.5 million, (2) total of net turnover in the case of the NV or BV and either the total company revenues or total assets when these have to be included in the financial statement in the case of a Foundation do not exceed € 35 million, (3) the average number of employees is less than 250 during the financial year. The limitations of the board positions in Large Legal Entities are included in arts 2:132a/142a/242a/252a/297a/297b DCC. These articles specify which persons cannot become a Director on the Board of Directors: (i) persons who are a Supervisory Director or a Non-Executive Director with more than two Large Legal Entities, or; (ii) persons who are chairman of the Supervisory Board of a Large Legal Entity or of the Board of Directors of a Large Legal Entity if the tasks of the Directors are divided between Executive and Non-Executive Directors. For a Supervisory Director of Large Legal Entities the following limitations apply (arts 2:142a/252a DCC): a person who is a Supervisory Director or a Non-Executive Director with five or more Large Legal Entities cannot become a Supervisory Director. The chairmanship of the Supervisory Board and of the Board of Directors shall count twice if the tasks of the Directors are divided between Executive and Non-Executive Directors. Certain ways of calculating positions and exemptions apply, such as (but not limited to) the fact that the limitation does not apply to a Director who is temporarily appointed by the Enterprise Court. Management positions within one group of companies count as one posi- 27

43 Artikel III van het Besluit van 8 december 2016 tot wijziging van het Besluit toezicht accountantsorganisaties en enige andere besluiten ter implementatie van richtlijn nr. 2014/56/EU van het Europees Parlement en de Raad van de Europese Unie van 16 april 2014 tot wijziging van Richtlijn 2006/43/EG betreffende de wettelijke controles van jaarrekeningen en geconsolideerde jaarrekeningen (PbEU 2014, L 158) en ter implementatie van verordening (EU) nr. 537/2014 van het Europees Parlement en de Raad van 16 april 2014 betreffende specifieke eisen voor de wettelijke controles van financiële overzichten van organisaties van openbaar belang (PbEU 2014, L 158) (Implementatiebesluit wijzigingsrichtlijn en verordening wettelijke controles jaarrekeningen).

tion. While appointments that are in conflict with these rules are null and void, decision-making in which a wrongly appointed (Supervisory) Director has participated, remains valid (arts 2:132a(3)/242a(3) DCC and arts 2:142a(3)/252a(3) DCC).

28 With regard to Associations, Cooperatives and Mutual Insurance Companies, **no special qualities** are included in **statutory law**. Unless the articles of association state otherwise, Directors shall be members and appointed by the general meeting (art 2:37(1) DCC). **Articles of association** may dictate specific requirements provided that board vacancies can be filled despite these special requirements.[44]

29 With regard to **Financial institutions**, the Dutch legislator has imposed the so-called *geschiktheidstoets* or suitability test for persons responsible for the management of such institutions and supervision thereof, arts 3:8 and 4:9 Financial Supervision Act (*Wet op het Financieel Toezicht*, FSA).[45] These provisions also refer to Dutch civil law regarding the appointment of (Supervisory/Non-Executive) Directors as discussed above (cf no 23 ff).

In Dutch Boards of Directors and Supervisory Boards of 'large' NVs and BVs, as explained with regard to the limitations on board positions, at least 30% of the seats should be occupied by women and at least 30% by men, insofar as those seats are occupied by natural persons (**gender diversity:** arts 2:166 and 2:276 DCC).[46] If a Corporation to which these provisions apply does not meet these thresholds to create a fair balance between men and women, it must explain why it does not comply, what measures the Corporation has undertaken to achieve that balance, and how the Corporation envisions restoring this balance in the future (art 2:391(7) DCC). Smaller companies, ie those with assets smaller than € 17.5 million, a net turnover of less than € 35 million and less than 250 employees, must take the equal distribution of seats among men and women into consideration when seeking and appointing new Directors (arts 2:166/276 (2) DCC). The DCGC 2016 stresses that the Supervisory Board shall compose a diversity policy for the composition of the Board of Directors, the Supervisory Board and, if present, the executive committee, with regard to factors such as

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44 HR 19 March 1976, ECLI:NL:HR:1976:AC5713.

45 For the English translation of the FSA, see <http://www.rijksoverheid.nl/documenten-en-publicaties/brieven/2009/11/16/engelse-vertaling-van-de-wft.html>.

46 This rule has been reinstalled as from 13 April 2017 as it expired on 1 January 2016: Besluit van 16 maart 2017 tot vaststelling van het tijdstip van inwerkingtreding van de Wet van 10 februari 2017, houdende wijziging van boek 2 van het Burgerlijk Wetboek in verband met het voortzetten van het streefcijfer voor een evenwichtige verdeling van de zetels van het bestuur en de raad van commissarissen van grote naamloze en besloten vennootschappen (Stb 2017, 68). The content of the rules has not changed.

gender and **age** but also **social background, nationality and expertise** (see above no 26) in a way relevant for the Corporation (Best Practice 2.1.5). The corporate governance declaration should include the diversity policy and an explanation of the execution thereof. This includes an explanation of what specific objective is pursued with the diversity policy and the results of the former financial year.[47]

4. Investigations into directors' misconduct

30 With regard to NVs, BVs, Cooperatives, Mutual Insurance Companies and Foundations and formal Associations with an enterprise for which a works council has to be installed (see question 2), one possibility is to start **inquiry proceedings** (*enquêteprocedure*). The following parties may request inquiry proceedings: Certain (former[48]) members,[49] certain (former[50]) shareholders and certificate holders (holders of depositary receipts of shares[51]) (or in the case of bankruptcy their liquidators[52]), certain parties with an economic interest which is more or less on an equal footing with the interest of a (direct) shareholder,[53] the legal entity (or in the case of bankruptcy its liquidator[54]), parties which have been granted such a right in the articles of association or an agreement, certain associations of employees and the Advocate-General.[55] Prior to such request,

47 This is an implementation of Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts: Besluit van 22 december 2016 tot wijziging van het Besluit van 23 december 2004 tot vaststelling van nadere voorschriften omtrent de inhoud van het jaarverslag (Stb 2004, 747) ter uitvoering van richtlijn 2014/95/EU van het Europees Parlement en van de Raad van 22 oktober 2014 tot wijziging van richtlijn 2013/34/EU met betrekking tot de bekendmaking van niet-financiële informatie en informatie inzake diversiteit door bepaalde grote ondernemingen en groepen (PbEU 2014, L 330) (Besluit bekendmaking diversiteitsbeleid) and Best Practice 2.1.5/2.1.6 DCGC 2016.

48 Gerechtshof Amsterdam (OK) 3 March 2015, ECLI:NL:GHAMS:2015:809 (*DA*).

49 Art 2:346 (1) (a) DCC.

50 HR 4 November 2016, ECLI: NL:HR:2016:2456 (*SNS*).

51 Art 2:346 (1) (b) and (c) DCC and HR 11 April 2014, ECLI:NL:HR:2014:905 (*Slotervaart*).

52 HR 19 May 1999, ECLI:NL:HR:1999:AD3052, NJ 1999/670 (*De Haan Beheer*) and HR 29 April 2005, ECLI:NL:HR:2005:AT0144, NJ 2005/433 (*Polisol*).

53 HR 6 June 2003, ECLI:NL:HR:2003:AF9440 (*Scheipar*); HR 29 March 2013, ECLI:NL:HR:2013:BY7833 (*Chinese Workers*); HR 4 February 2005, ECLI:NL:HR:2005:AR8899 (*Landis*); HR 10 September 2010, ECLI:NL:HR:2010:BM6077 (*Butôt*) and HR 11 April 2014, ECLI:NL:HR:2014:905 (*Slotervaart*).

54 Art 2:346 (3) DCC.

55 Arts 2:345–347 DCC.

subject to the penalty of inadmissibility, any party must first inform the Board of Directors and/or Supervisory Board of its complaints against the Corporation's policy and the conduct of its business (art 2:349 DCC). As regards the inquiry proceedings, an eligible party can submit an application to the Enterprise Court, a specific judicial organ within the Amsterdam Court of Appeal, with the request to order an inquiry. Furthermore, the party that requested the inquiry may request preliminary injunctions for (at the longest) the duration of the proceedings. The Enterprise Chamber has, then, full discretion to order any preliminary remedy as it sees fit. As art 2:350 DCC states, the inquiry shall be ordered when there is a reasonable cause to doubt proper policy and conduct of business. If this is the case, the Enterprise Court appoints one or more experts who will inquire into the possible mismanagement. If these inquirers conclude that mismanagement has taken place, the original initiators of the inquiry proceedings or the Advocate-General on the basis of general interest may request the Enterprise Court to rule that the legal entity was mismanaged (*wanbeleid*) and to order one or more of the remedies mentioned in art 2:356 DCC, including but not limited to: the **suspension or discharge** of Directors, the **annulment of their decisions** and **dissolution of the legal entity**. Situations in which there are reasonable doubts as to whether the Corporation (or the Cooperative, Mutual Insurance Company, Foundation or formal Association with an enterprise for which a works council has to be installed (see question 2)) is properly managed include for instance, but are not limited to: the Corporation violates disclosure of accounting rules, a deadlock in the decision making process of the Corporation has occurred or there is an unfair dividend policy. The inquiry proceedings are focussed on what is best for the Corporation and not its stakeholders. This means that the Enterprise Court is not limited to ordering remedies that are requested by the parties to the proceedings, but may also order remedies that are in its view in the best interest of the Corporation. The inquiry proceedings cannot be limited in any way by the Corporation's articles of association or agreement.[56]

56 *F Veenstra,* GS Rechtspersonen, art 2:345 BW, aant A.

II. Liability for Damage Caused to the Company and to the Shareholders

A. General requirements – scope of duties and violation of duty of care of directors

5. Liability of the board and its members

Legal basis for liability. Directors can be liable for damage caused to the Corporation on the basis of rules of **company law** (art 2:9 DCC), **tort law** (art 6:162 DCC), **contract law** in the case of a services agreement (art 7:401 BW) and **labour law** in the case of an employment contract (art 7:661 BW). The legal relationship between the Director and the Corporation may vary as a result of different agreements and circumstances. Article 2:9 DCC is equally applicable to Supervisory Directors via arts 2:149/259 DCC. There is **no derivative suit** in the Netherlands. Shareholders can sue Directors and Supervisory Directors on their own behalf on the basis of tort. This is discussed in Part III (cf below no 113 ff) as this is an external liability. In the case of insolvency the liquidator can sue the Directors and Supervisory Directors on behalf of the Corporation. Directors of a BV can also be liable vis-à-vis the Corporation under certain circumstances for distributions (art 2:216 DCC). 31

Every Director is **obliged vis-à-vis the legal entity to perform his duties properly** (art 2:9 DCC). See the answer to question 6 for an explanation of the duties. Article 2:9(2) DCC states that all Directors are **jointly and severally liable** in the case of improper performance of the duties (*onbehoorlijke taakvervulling*). This is a result of the fact that the performance of Directors' duties is seen as a collective responsibility. An individual Director can exculpate himself from liability if he can prove that he (1) cannot be severely held to blame, taking into account the division of duties within the Board of Directors, and (2) that he has not been negligent in taking measures to avert the consequences of the improper performance of duties. In the case of a one-tier board these rules are also applicable. This means that even Non-Executive Directors are collectively responsible together with the Executive Directors for the management of the Corporation. Exculpation possibilities as mentioned under (1) and (2) also apply. 32

To establish liability under art 2:9 DCC, one needs to prove that the Director(s) **did not properly perform his (their) duties (mismanagement)**.[57] Liabil- 33

57 Please note that mismanagement as ruled on by the Enterprise Chamber in inquiry proceedings is not the same as mismanagement as meant in art 2:9 DCC.

ity due to mismanagement can only be established if the Director (or any individual member of the Board of Directors as they are jointly and severally liable) can be severely held to blame, taking into consideration all relevant circumstances.[58] Because the decision-making of the Board of Directors is always judged on an 'after fact' basis and the Directors, in taking on **entrepreneurial risk**, should have discretion in their decision-making, the additional criterion 'severe' is added to blame, raising the threshold for Director liability. The Supreme Court has held that this threshold is justified by the societal interest that Directors' acts should not be determined by defensive or risk adverse considerations to an undesirable degree.[59] Through case law, norms have developed to establish whether a Director can be severely held to blame for his mismanagement. The circumstances that are relevant for the determination of severely to blame are identified in the relevant case law, also known as the 'catalogue of circumstances'. These circumstances include, but are not limited to, the nature of the activities performed by the legal entity, the general risks resulting therefrom, the distribution of duties within the Board of Directors, possible corporate guidelines and the knowledge the Director had or should have had at the time of the alleged misconduct. In addition to these factors, case law dictates that liability must be established in the light of the insight and **diligence** that can be expected from a Director who is suited for his duties and fulfils these conscientiously.[60] A Director should perform his tasks in the way a reasonably capable and reasonably acting Director is supposed to perform his duties under the given circumstances.[61] This means that in case law **objective standards** are taken into account when determining the liability of Directors. When a Director acts in breach of statutory provisions or the articles of association, this presumably gives rise to improper management and severe blame. The Director should prove that his acts did not harm the interests of the Corporation and its affiliated enterprises in order to avoid liability.[62]

34 In addition to art 2:9 DCC, liability for damage caused to the Corporation by Directors and/or Supervisory Directors (or Executive and/or Non-Executive Directors) can also be based on art 6:162 DCC, which is the **general provision for tort**.[63] As a result the Corporation may use different legal grounds. In the ab-

58 HR 25 June 2010, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van der Ven*).

59 HR 20 June 2008, ECLI:NL:HR:2008:BC4959 (*NOM/Willemsen*) and HR 5 September 2014, ECLI:NL:HR:2014:2628 (*Tulip*).

60 HR 25 June 2010, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van der Ven*).

61 HR 8 April 2005, ECLI:NL:HR:2005:AS5010 (*Laurus*).

62 HR 29 November 2002, ECLI:NL:HR:2002:AE7011 (*Schwandt/Berghuizer Papierfabriek*).

63 Art 6:162 DCC: '(1) A person who commits a wrongful act vis-à-vis another person, which can be imputed to him, is obliged to repair the damage suffered by the other person as a conse-

sence of grounds for justification, the following acts are deemed to be **wrongful**: the infringement of a subjective right, an act or omission violating a statutory duty, or conduct contrary to the standard of conduct seemly in society. If the standard aims at protecting the interests of individuals against the damage and those individuals suffered damage as a result of the act(s), then one may conclude that the infringer committed a wrongful act vis-à-vis the harmed individuals. If the act is imputable to the infringer, then a claim in tort arises (art 6:163 DCC). Under Dutch law, the act is imputable if the person can be blamed for his tortious act or if the person is not to be blamed for the act but the act is imputable to him, either on a statutory basis or because the unwritten source of legal and moral opinion (*verkeersopvatting*) demands it. This does not mean, however, that in the case of imputing the act to a Director on the basis of blameworthiness, the **criterion of severe blame** can be circumvented. When the tort claim is based on mismanagement as meant in art 2:9 DCC, the Director must still be *severely* blamable.[64] This means that the standard deriving from corporate law and from tort law coincide. An exception to this strict rule is made in the case law for liability based on personal acts rather than acts performed as a Director.[65] In order for the tortious claim to be successful, there should be a causal connection between the act(s) of a Director and the damage incurred (art 6:98 DCC). One difference from the liability based on art 2:9 DCC is that liability for tort is a **personal liability** of the Director instead of a several and joint liability. The liability of Directors vis-à-vis the shareholder(s) based on art 6:162 DCC is an external liability, which will be dealt with in Part III (below no 113).

A Director can be held liable pursuant to art 7:661 DCC (causing damage to **35**
the Employer (the Corporation) or a third party to which the Employer is held liable), if there is an **employment contract** between the Director and the Corporation. An employee should behave as is expected from a good employee (art 7:611 DCC). Liability may arise if the damage is a result of **intent or conscious recklessness** of the employee. In labour law conscious recklessness exists when the employee is aware of the reckless character of his act(s) immedi-

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quence of the act. (2) In the absence of grounds for justification, the following acts are deemed to be wrongful: the infringement of a subjective right, an act or omission violating a statutory duty, or conduct contrary to the standard of conduct seemly in society. (3) A wrongful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion'.

64 HR 2 March 2007, ECLI:NL:HR:2007:AZ3535 (*Holding Nutsbedrijf Westland*).

65 HR 23 November 2012, ECLI:NL:HR:2012:BX5881 (*Spaanse villa*); HR 5 September 2014, ECLI:NL:HR:2014:2628 (*Tulip*). See also HR 18 September 2015, ECLI:NL:HR:2015:2745.

ately before the act(s) take(s) place.[66] There is debate about the relation between the requirement of 'intent or conscious recklessness' which applies in liability cases based on art 7:661 DCC with regard to a Director who is also an employee and 'severely to blame' which applies in liability cases based on arts 2:9 and 6:162 DCC. Some are of the opinion that the requirement of 'severely to blame' should not have a different content than intent and conscious recklessness.[67] Others hold the view that severely to blame does have a different content. Intent and conscious recklessness would be more subjective whereas severely to blame would be more objective and would lead to liability quicker than on the basis of labour law.[68] Listed NVs must comply with art 2:132(3) DCC, which entails that the legal relationship between the Director and the listed NV shall not be regarded as an employment contract. A Director that is a legal entity cannot enter into an employment contract with the Corporation, as only natural persons can be employees. Although the law does not provide for a qualification of the agreement between the Corporation and the Supervisory Director, it is commonly accepted that this is not on an employee basis. The agreement can be qualified as a services contract (*overeenkomst van opdracht*).[69] On the basis of arts 2:160/270 DCC, a Supervisory Director of a 'large' Corporation under the *structuurregime* cannot be an employee of the Corporation under an employment contract.

36 If the legal relationship between a Director and the Corporation is governed by a management contract, that relationship is considered to be a **services agreement** (art 7:400 DCC). The Director should behave as a 'good service provider' (*goede opdrachtnemer*) when performing his duties under the agreement. If the Director or Supervisory Director does not perform their duties as requested under the agreement, they can be held liable on the basis of **breach of contract** (art 6:74 DCC).

37 Article 2:216 DCC is applicable to the **BV** (not the NV) and deals with **distributions by the Corporation**. The General Meeting has the authority to decide on the allocation (appropriation) of the profits which have been determined by adoption of the annual accounts, and on the adoption of distributions, to the extent that the equity (total assets and liability) of the BV exceeds the reserves which have to be maintained by virtue of law or the articles of association. The

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66 HR 20 September 1996, ECLI:NL:HR:1996:ZC2142 (*Pollemans/Holding Hoondert*), HR 11 September 1998, ECLI:NL:HR:1998:ZC2702 (*Van der Wiel/Philips Lighting*) and HR 14 October 2005, ECLI:NL:HR:2005:AU2235 (*City Tax*).

67 *Asser/Maeijer/Van Solinge & Nieuwe Weme* 2-II* 2009/446 and *DAMHW Strik*, Grondslagen bestuurdersaansprakelijkheid: een maatpak voor de board room, Uitgave vanwege het Instituut voor Ondernemingsrecht deel 73 (2010) 22 f and 30.

68 *P van Schilfgaarde*, Van de BV en de NV (2013) 180.

69 Art 7:400 DCC.

articles of association may limit this authority or assign it to another Corporate Body of the BV. A resolution with regard to a distribution has no effect as long as the Board of Directors has not given its approval to it. The Board of Directors shall only deny its approval if it knows or reasonably ought to foresee that the BV, after the distribution, will no longer be **able to continue the payment of its due and collectable debts**. If the BV, after a distribution, is not able to continue the payment of its due and collectable debts, then the Directors who knew this would result at the moment of the distribution or who reasonably ought to have foreseen that result at that moment, are jointly and severally liable towards the BV for compensation of the deficit which has arisen on account of the distribution, raised by the statutory interest accruing as of the day of distribution.

6. General statutory and non-statutory duties of the board and its members

Subject to any restrictions under the articles of association, the Board of Directors is charged with the **management of the Corporation** (arts 2:129/239 DCC). The statute does not include an explicit explanation of the content of this duty of management (*bestuurstaak*). The Board of Directors is responsible for determining the strategies and policies of the Corporation, the Corporation's compliance with the law, representation of the Corporation, risk management, the financing of the enterprise and the execution of resolutions of Corporate Bodies when relevant. Other general duties include bookkeeping (art 2:10 DCC), publication of the annual report (art 2:394 DCC) and provision of requested information to the General Meeting unless a very important interest of the Corporation requires otherwise (arts 2:107(2)/217(2) DCC). In performing their duties Directors are guided by the **interests of the Corporation** and its affiliated enterprises (arts 2:129(5)/239(5) DCC) and the Board of Directors has **management autonomy** (*bestuursautonomie*), which means that within the framework of the law and the articles of association and the rules that are related thereto, the Board of Directors does not have to accept instructions with regard to the performance of their duties.[70] The acts of the Board of Directors are limited by the boundaries set by the objects clause included in the articles of association. **38**

The Board of Directors (whether in a two-tier structure or a one-tier structure) has a **collective responsibility** for the management of the Corporation. Each Director is responsible for the general affairs of the Corporation and **39**

70 HR 21 January 1955, ECLI:NL:HR:1955:AG2033; HR 13 July 2007, ECLI:NL:HR:2007:BA7970 (*ABN Amro*); HR 9 July 2010, ECLI:NL:HR:2010:BM0976 (*ASMI*).

should properly perform the tasks assigned to him (art 2:9 DCC). Other tasks can be assigned to individual Directors by or pursuant to the articles of association, as a result of which the assignment of duties can also take place through regulations of the Board of Directors and informal agreements when a statutory basis exists. All Directors' duties that have not been assigned to one or more Directors shall belong to the duties (tasks) of all Directors. In the one-tier board some tasks should be assigned to certain Directors. The duty to supervise the performance of duties by the Executive Directors must be performed by a Non-Executive Director. The chairmanship of the Board of Directors, the making of proposals for the appointment of a Director and the adoption of the remuneration of the Executive Directors may not be assigned to an Executive Director.

40 The **DCGC 2016** (only applicable to listed Corporations) stipulates that the Board of Directors is responsible for the continuity of the Corporation and its affiliated enterprises. The Board of Directors focuses on long term value creation of the Corporation and its affiliated enterprises, which includes considering the relevant interests of stakeholders.[71] To achieve this, the Board of Directors creates a vision and a strategy and should take care of balanced and effective decision making.[72] Attention will have to be paid to its risk profile and risk management.[73] Furthermore, the Board of Directors is responsible for creating a corporate culture that aims at long term value creation of the Corporation and its affiliated enterprises.[74] The Board of Directors shall provide the Supervisory Board in good time with all information necessary for the exercise of the duties of the Supervisory Board and shall report related developments to and shall discuss the internal risk management and control systems with the Supervisory Board and the audit committee.[75]

41 **Supervisory Directors** are responsible for the supervision of the policy of the Board of Directors and the general affairs of the Corporation and its affiliated enterprises and for providing the Board of Directors with advice. Supervisory Directors are also guided by the interests of the Corporation and its affiliated enterprises when performing their duties (art 2:140(2)/250(5) DCC). In executing their duties, the Supervisory Directors take into account the effectiveness of the internal risk and control systems and the integrity and quality of the financial reports.[76] The DCGC 2016 explicitly mentions that the Supervisory Di-

71 Principle 1.1 DCGC 2016.
72 Principles 1.1 and 2.4 DCGC 2016.
73 Principles 1.2–1.4 DCGC 2016.
74 Principle 2.5 DCGC 2016.
75 Principle 1.1, Best Practice 1.1.3 and Principle 1.4 DCGC 2016.
76 Principle 1.5 DCGC 2016.

rectors shall be consulted by the Board of Directors when formulating the strategy in order to create long-term value.[77]

7. Nature and scope of the duty to act in the best interests of the company

Articles 2:129/239 DCC require that Directors, while **performing their function**, should act in the interests of the Corporation and its affiliated enterprises. This implies that the duties **do not extend beyond their professional life**. Article 2:8 DCC stipulates that those involved with the Corporation must behave towards each other in accordance with what is required by standards of reasonableness and fairness and Directors specifically are responsible for a proper performance of the tasks conferred on them. 42

Debate exists as to what the **'interests of the Corporation and its affiliated enterprises'** entails. Legal commentators hold different views on how the interests of the Corporation are constructed. The 'resultant theory' holds that the interests of the Corporation equal the resultant of the consideration of interests (*belangenafweging*) of those that are involved with the Corporation. Which interests have to be taken into account and the weight that has to be given to these interests, depend on the circumstances.[78] The 'holistic theory' perceives the interests of the Corporation as a stand-alone set of interests with its own character. The Corporation has its own interests aimed at a healthy existence, development and continuation with the objective of the Corporation in mind.[79] The interests of the Corporation should be constructed independently from the interests of those involved with the Corporation. In the 'perspective theory', a combination of the two aforementioned theories, the starting point is a stand-alone set of interests which is coloured by the different circumstances of the Corporation, for instance the solvent Corporation and the insolvent Corporation.[80] 43

The Supreme Court has held that the content of the interests of the Corporation and its affiliated enterprises depends on the circumstances. In the event that an en- 44

77 Best Practice 1.1.3 DCGC 2016.

78 *EJJ Van der Heijden/WCL Van der Grinten* (PJ Dortmond, ed), Handboek voor de naamloze en de besloten vennootschap (2013) no 231; *Asser/Maeijer/Van Solinge & Nieuwe Weme* 2-II* 2009/395; *AF Verdam*, Het vennootschappelijk belang méér dan 'enlightened shareholder value', Tijdschrift voor Ondernemingsrecht 2013/18, 93–101 and *L Timmerman*, Grondslagen van geldend ondernemingsrecht, Ondernemingsrecht 2009/2, 4–13.

79 *JMM Maeijer*, Het belangenconflict in de naamloze vennootschap (inaugurele rede) (1964) 5; *Asser/Maeijer* 2-III, no 293 and *MM Mendel*, Het vennootschappelijk belang mede in concernverband beschouwd (oratie) (1989).

80 *WJ Slagter/BF Assink*, Compendium Ondernemingsrecht (2013) 945 ff.

terprise is connected to the Corporation, the interests of the Corporation are as a rule mainly determined by the advancement of the continual success (*bestendig succes*) of this enterprise. Directors, when managing the Corporation, should carefully take into account – also on the grounds of art 2:8 DCC – the interests of all those that are involved with the Corporation and its affiliated enterprises and make sure that these interests are not unnecessarily or disproportionately harmed.[81]

7.1. Case Study (safeguarding of interests)

45 Facts (a) and (c) seems to be personal acts of D's. Fact (b) appears to have taken place in his capacity as Director. There are no specific rules in Dutch company law that regulate the behaviour of Directors in private situations (facts (a) and (c)). It is not clear whether the other 'well-known companies' terminate their business relation with C-Corporation *only* because of these facts. It is also not clear under which conditions, for example a notice period, these companies end their agreements with C-Corporation. Therefore, it is not likely that C-Corporation can succeed in holding D liable on the grounds of art 6:162 DCC for the termination based on facts (a) and (c) as a result of (i) causation problems as set forth and (ii) absence of an obligation to pay compensation on the grounds of art 6:162 DCC when the violated standard of behaviour is not aimed at offering protection to the claimant against the damage as suffered by the injured person (art 6:163 DCC). For the same reasons it would be difficult for shareholders to hold the Director liable on the grounds of art 6:162 DCC, which would be an external liability (see under Part III, below no 113ff).

46 Article 2:9 DCC could be used by the Corporation as a basis for Director liability with regard to fact (b) (meeting with the Mafia while performing one's duty as Director), as it could constitute **mismanagement**. However, it is doubtful whether C-Corporation can successfully hold D liable on this ground due to problems with causality, although it could be argued that holding the meeting in itself constitutes mismanagement.

7.2. Case Study (fiduciary duty and conflict of duties)

47 A Director of a parent company is eligible to become a Supervisory Director of the subsidiary as long as the Supervisory Board can be sufficiently **inde-**

81 HR 4 April 2014, ECLI:NL:HR:2014:804 (*Inversiones cs/Cancun Holding I cs*).

pendent of all interests relating to the Corporation and its affiliated enterprises and involved persons and groups including the interests of the parent company as a shareholder.[82] This also applies to a subsidiary within the *structuurregime*.[83] It is doubtful whether this is still the situation in case study 7.2. It could be the case that at the moment Director D was appointed as Supervisory Director of A-Corporation, the confidentiality agreement was not in place yet and the Supervisory Board was sufficiently independent. If the parent company could be qualified as a third party under the agreement, Director D should not have agreed to enter into such confidentiality agreement. If Director D nevertheless entered into the confidentiality agreement, the question arises whether A-Corporation, which knows that D is also a Director of the parent company and as a result knows that D is not able to adhere to the secrecy obligation in relation to the parent company, can hold D liable under the agreement.

48 In answering this question it is assumed that C-Corporation is a 'third party', regardless of the fact that C-Corporation holds a 50% share in A-Corporation. The pecuniary loss is the result of C-Corporation not being informed by D of the economic situation of A-Corporation. As a Director of C-Corporation, D has the obligation to properly perform the tasks assigned to him with the interests of the Corporation and its affiliated enterprises in mind (art 2:9 and arts 2:129/239 DCC). The case stipulates that D is also under obligation not to disclose any information he acquires in his capacity as Supervisory Director of A-Corporation. Pursuant to arts 2:149/259 DCC, Supervisory Directors' liability is governed in the same way as Directors, keeping in mind that outcomes of the application may be different because the Supervisory Director has different tasks and responsibilities to a Director.[84]

49 It is not certain whether D, in his capacity as Director of C-Corporation, can successfully be held liable by C-Corporation on the basis of art 2:9 DCC. The case study does not provide enough information to conclude a solid answer. **Liability due to mismanagement** can only be established if the Board of Directors (or any individual member as they are jointly and severally liable) can be **severely** held to **blame**, taking into consideration all relevant circumstances.[85] A possible answer could be as follows. It is known that C-Corporation suffers pe-

82 Hof Amsterdam (OK) 2 February 1989, ECLI:NL:GHAMS:1989 (*Kodak*).

83 Bindend advies inzake de samenstelling van de raad van commissarissen van een dochter-structuurvennootschap, *WCL van der Grinten*, De Naamloze Vennootschap 55/5 (1977) 106–112.

84 *Asser/Maeijer/Van Solinge & Nieuwe Weme* 2-II* 2009/512.

85 HR 25 June 2010, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van der Ven*).

cuniary losses as a result of D's conduct. A-Corporation was already in economic difficulties. To avoid having C-Corporation affected by this situation and in the interest of C-Corporation, D should have informed C-Corporation of the information obtained in confidence as Supervisory Director of A-Corporation. Withholding that information, in other words: 'observing secrecy', was not in the interests of and was even disadvantageous to C-Corporation. **D should have informed C-Corporation, despite the risk of being held liable by A-Corporation in his capacity as Supervisory Director for not observing secrecy.** However, if D is the only Director of C-Corporation, it is not likely that the Board of Directors of C-Corporation will take the decision to hold D liable, as D himself would have to represent the Corporation, unless the authority of representation in liability cases such as these is granted to someone outside the Board of Directors. It is likely that only after D is dismissed as Director, will D be held liable by C-Corporation.

50 It is also not certain whether D, in his capacity as Supervisory Director of A-Corporation, can successfully be held liable by C-Corporation, based on **tort** (art 6:162 DCC). The question is whether D as a Supervisory Director of A-Corporation should have informed C-Corporation as major shareholder in A-Corporation, also taking into account the interests of A-Corporation, its other shareholder(s) and stakeholders.

8. The extent of the board's control and oversight

51 Dutch law contains **no specific obligations** to exercise control or oversight over employees. Such a duty is **included**, however, in the primary task of Directors, which is to **manage the Corporation** (arts 2:129/239 DCC). Part of this task is to manage the internal affairs of the Corporation.[86] Duties concerning control and oversight can be further distributed among the Directors by or pursuant to the articles of association (art 2:9 DCC).

9. Responsibility for compliance monitoring

52 See answer to questions 5 and 6.

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86 *Asser/Maeijer/Van Solinge & Nieuwe Weme* 2-II* 2009/390.

9.1. Case Study (liability of individual board members for disadvantageous transactions authorised by the majority in a board meeting)

With regard to the first part of the question, the Board of Directors has not performed its duties as is expected. Both D1 and D2 can be severely held to blame for their conduct. **D3** however, could assert that he **cannot be severely held to blame** because he sufficiently opposed the transaction by voting against it *and* taking measures (trying to convince other Directors not to vote in favour of this transaction) to avert the consequences of that improper performance of duties. The conditions for avoiding liability pursuant to art 2:9 (2) DCC correspondingly apply. If, however, he **did not try to persuade D1 and D2, he will not be able to exculpate himself**. He is then liable for the full consequences of an improper performance of duties, unless, also in respect of the tasks assigned to the other Directors, he is able to demonstrate on other grounds that he is not severely to blame for it and neither has he been negligent in taking measures to avert the consequences of that improper performance of duties. 53

10. Variation in duties and the standard of care expected of the board and its members under corporate, tort and contract law

See answers to questions 5 and 6. 54

10.1. Case Study (concretisation of the standard of duty; Business Judgment Rule)

Dutch (corporate) law **does not provide for specific measures or processes** in addition to the general duties (as explained in relation to previous questions) that would need to be implemented in such a scenario. Directors should make informed decisions while performing their tasks. They should have a fair freedom to take decisions that involve risks. The DCGC 2016 provides that the Board of Directors is responsible for managing risks associated with the corporate strategy and corporate activities and that an internal risk management system must be in place.[87] 55

87 Principle 1.2 DCGC 2016.

11. Factors influencing duties and the standard of care

56 See answers to questions 5 and 13.

11.1. Case Study (applicable standard of care)

57 Liability would depend, amongst other circumstances, on the nature of the activities performed by the legal entity, the general risks resulting therefrom, the distribution of duties within the Board of Directors, possible Corporation guidelines and the knowledge the Director had or should have had at the time of the alleged misconduct. Liability must be established in the light of the **insight and diligence that can be expected from a Director that is suited for his duties and fulfils these conscientiously**.[88] A Director should perform his tasks in a way a reasonably capable and reasonably acting Director is supposed to perform the duties under the given circumstances.[89] D, in his capacity as Director of B-Bank, is expected to be suited for his position as a manager of a bank and under these circumstances to be at least as skilled as an experienced professional manager.[90] By concluding this adverse transaction for B-Bank, D has not performed duties in accordance with how a reasonably skilled and reasonably acting Director would perform his duties.

12. The boards' and its members' duties and liability in the vicinity of insolvency

58 Dutch law **does not include specific duties or rules** relating to wrongful trading. When performing their duties, Directors have to act in line with the interests of the Corporation and its affiliated enterprises. Directors will take into account several interests such as shareholders' interests, creditor interests, employee interests etc. Dutch law does not provide for a formal change of attitude towards the consideration of the interests in case of insolvency. Some legal commentators argue that in the case that bankruptcy cannot be avoided anymore and positive future prospects are absent (*feitelijke insolventie*), the interests of the Corporation are determined by the interests of the creditors.[91] They

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88 HR 25 June 2010, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van der Ven*).

89 HR 8 April 2005, ECLI:NL:HR:2005:AS5010 (*Laurus*).

90 HR 10 January 1997, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van der Ven*).

91 *TT van Zanten/BF Assink*, Art 2:9 BW in faillissement: tijd voor herwaardering, Tijdschrift voor Insolventierecht (TvI) 2008, 25.

find an argument for this view in the new provision relating to (dividend) payments as discussed in the answer to questions 20, 26 and nos 95–96.

13. Impact of selection criteria on duties and the standard of care

59 Restrictions **do not affect the standard of duty of care applicable** to the Board of Directors or its individual Directors. In the performance of duties, the Director must direct attention to the interests of the Corporation and its affiliated enterprises and bears responsibility for the proper performance of such duties (art 2:9 and arts 2:129(5)/239(5) DCC). Additional requirements imposed by the Corporation do not alter this statutory duty of care.[92] The Supreme Court has held recently in a case relating to a joint venture-BV that every director has to be guided by the interests of the Corporation and its affiliated enterprises despite the fact that the Director has been appointed by or on proposal of the General Meeting of holders of shares of a certain type (class) or indication. This will not change when shareholders are closely involved with the Corporation or when the articles of association determine that the Board of Directors has to follow the instructions of another Corporate Body of the Corporation.[93] See Part I for restrictions on the eligibility of candidate Directors. When considering the duty of care of a Director in Dutch law, the **knowledge and skills of an 'average Director'** (*maatman-bestuurder*) given the circumstances has to be taken into account as the standard to assess the conduct of Directors in liability cases. These skills and knowledge form the objective lower boundary. If a Director has specific knowledge and skills, this circumstance could be taken into account when his conduct is being assessed.[94]

14. Compensation for damage to the corporation's property or to shareholders'/partners' property

60 As discussed above, misconduct on the part of a Director causes several and joint liability for all Directors if one or more can be severely held to blame, save

92 HR 25 June 2010, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van der Ven*).

93 HR 4 April 2014, ECLI:NL:HR:2014:804 (*Inversiones cs/Cancun Holding I cs*).

94 *WJ Slagter/BF Assink*, Compendium Ondernemingsrecht (2013) 1018 f and Hof Amsterdam 5 February 1998, Jurisprudentie Onderneming & Recht (JOR) 1999/54 (*Van Rossum/Grapperhaus qq*) and Hof Amsterdam 21 September 2010, JOR 2011/40 (*Lamvers/Stichting Freule Lauta van Aysma*).

for exculpation (art 2:9 DCC). Claims for damages can be made by the **Corporation itself or liquidators** (in the case of bankruptcy). Derivative suits are not possible under Dutch law.

61 In principle, derivative damage (*afgeleide schade*) to **share value will not be honored** by the Court unless the shareholder can demonstrate a violation of the relevant standard of care.[95] This is because loss or damage has adverse effects on the Corporation and its property, consequently, the Corporation (a legal entity that can sue and be sued) is the only party that can and should be able to claim compensation.[96] If a shareholder can demonstrate a violation of the relevant standard of care (art 2:9 DCC) or tort (art 6:162 DCC),[97] the claim for compensation may be successful. Derivative damage must not be confused with derivative suit.[98]

62 Lastly, art 2:343(4) DCC, the provision that governs the **forced takeover of shares in inquiry proceedings**, provides the Enterprise Court with the discretionary authority, if requested by the shareholder, to apply a fair (reasonable) increase of the price of the shares in connection with the conduct of the defendant or of others than the defendant, if it is plausible that this conduct has resulted in a decrease of the price of the shares which are to be transferred, and this decrease should not or not entirely remain for account of the plaintiff.

14.1. Case Study (compensation for damage to the corporation's property or to shareholders'/partners' property)

63 In the first situation **C-Corporation itself could claim damages** from D for his misconduct since it bears the cost of this damage (€ 100,000). C-Corporation would base such a claim on arts 2:9 and 2:239(5) DCC. S1 and S2 own the shares of C-Corporation but that property right is not violated by a decrease in the value of those shares due to the misconduct of D.[99] S1 and S2 in their capacity as shareholders have as such no legal basis to assert their claim, an exception to this is discussed below (cf no 64). S1 and S2 can use corporate procedures as provided for by Dutch corporate law, pressuring C-Corporation to initiate proceedings against D, for example through a General Meeting resolution.

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95 HR 2 December 1994, ECLI:NL:HR:1994:ZC1564 (*Poot/ABP*).

96 *BF Assink*, Vraagtekens rond afgeleide schade, in: *PJ van der Korst/R Abma/GTMJ Raaijmakers* (eds), Handboek Onderneming en Aandeelhouder (2012) 306.

97 *Van der Korst*, *Abma & Raaijmakers/Assink* (2012) (fn 96)307.

98 *Van der Korst*, *Abma & Raaijmakers/Assink* (2012) (fn 96) 339; *L Timmerman*, Pragmatisch denken over afgeleide schade, Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) 2013/6992, 115–118.

99 HR 2 December 1994, ECLI:NL:HR:1994:ZC1564 (*Poot/ABP*).

Shareholders that suffered a **decrease in their share value** as the result of misconduct of the Director of their Corporation can assert claims against that Director for compensation. In principle, the Court will not honour such claims for compensation of derivative damage, unless a specific statutory provision that protects the interest of the shareholder has been violated or the shareholder can demonstrate a **violation of the relevant standard of care vis-à-vis the shareholder in private** (eg via tort, art 6:162 DCC).[100] This is different from claiming compensation for direct damage (which also causes decreased share value), for example due to misleading information regarding the prospects of the enterprises affiliated with the Corporation, which has an influence on the market value of the shares. The Director has not violated a specific statutory rule. This case study does not lead to the conclusion that the Director has violated the relevant standard of care vis-à-vis S1 and S2. 64

14.2. Case Study (compensation for damage to the corporation's property or to shareholders'/partners' property due to delay in filing for insolvency)

The prerequisite for a (legal) person to open insolvency proceedings is found in art 1 Insolvency Act ('IA'): the debtor must have stopped paying his debts. **Directors** of a Corporation, which does not pay its debts, are **not obligated in any way to open insolvency proceedings or file for bankruptcy**. If the Directors want to file for bankruptcy, the Board of Directors needs to be assigned by the General Meeting to do so, unless the articles of association provide otherwise (arts 2:136/246 DCC). 65

See the answer to question 12. Although Directors are not obliged to file for bankruptcy, it could be argued that **continuing the business without paying debts**, hoping for better days, could in case of imminent insolvency lead to a **lack of proper management**. If D knows or should have known that bankruptcy would be **unavoidable**, it could be misconduct when he continues with conducting business activities. It could be argued that in such a case D should have filed for insolvency on 1 January, the **liquidator could then hold D liable** on the basis of art 2:9 DCC for the **increase of the debts or decrease of the assets**.[101] See the answer to question 5 for the requirements. However, the case study does not provide enough information about the business situation and opportunities in the period 1 January to 1 June to determine whether there was imminent insolvency. If doubt existed as to whether D could still turn around 66

100 HR 2 December 1994, ECLI:NL:HR:1994:ZC1564 (*Poot/ABP*).

101 HR 13 January 1995, ECLI:NL:HR:1995:ZC1605 (*Sobi/Hurks*).

the situation for the benefit of the Corporation, D would have to be granted some discretion in order to safeguard the Corporation.[102] The determination of the moment that imminent insolvency exists is not an easy task. The Supreme Court has held that with regard to the determination of the date of inevitability of the bankruptcy, the date should be set in favour of the Director.[103]

67 S1 and S2, in their capacity as **shareholders**, can assert a claim for damages, on the basis of **tort** (art 6:162 DCC). The likelihood of success however, is low. Shareholders are not required to provide capital larger than the value of their shares nor are they liable for the conduct of the Corporation (save for exceptions) (arts 2:64/175 DCC). The downside is that shareholders are last in line with regard to receiving payments in case of bankruptcy (arts 3:277/278 DCC). On 1 January, S1 and S2 would probably not have seen any payments, as a result of which their position on 1 June has not worsened or improved. In other words, the **misconduct of D affected the Corporation's creditors, not its shareholders**. Consequently, S1 and S2 will probably be unsuccessful in their claim.

15. Limitation periods

68 Like most claims, the claim against a Director must be asserted within **5 years after the damage** (regardless of when the damaging act actually occurred) **and the liable person have become known** to the injured party (the Corporation in this case) (art 3:310 DCC). In any case, the Corporation loses its claim **20 years** after the damage, even if the liable person/damage remains unknown. Both periods are **extended by 6 months** (arts 3:320 and 3:321(d) DCC) **after the resignation of an allegedly liable Director**.[104] This extended period was introduced to resolve the issue of Directors preventing possible claims against themselves.[105]

15.1. Case Study (suspension/interruption of the limitation period)

69 As stated in the answer to question 15, any claim asserted by a Corporation against one of its Directors can be made within 5 years after both the damage

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102 Rechtbank (Rb) Amsterdam 22 August 2001, ECLI:NL:RBAMS:2001:AG3872.

103 HR 21 December 2001, ECLI:NL:HR:2001:AD4499 (*Sobi/Hurks II*).

104 *Asser/Bartels & Van Mierlo* 3-IV 2013/558.

105 See further: *BM Katan*, 'Je wist toch dat ik je bedonderde?' De verjaring van de vordering van de rechtspersoon op zijn bestuurder, Maandblad voor Ondernemingsrecht 2017-3-4, 88–95.

and the person responsible for the damage have become known, with a maximum of 20 years after the misconduct and extended by a period of 6 months after the (former) Director's misconduct. Thus, the first situation does not change anything with respect to the limitation of C's liability. The knowledge of D is allocated to, or presumed to be known by, C-Corporation, due to the fact that D is a Director of C-Corporation. There is a debate going on relating to this issue.[106]

In the alternative, **D moved from the Board of Directors to the Supervisory Board**. By doing so, the **extended 6 month-period** went into effect. After these 6 months, claims against D can only be asserted if the 5 or 20 year limitation still applies. In the case of one-tier boards, the rules that apply to the Board of Directors in a two-tier structure also apply to the one-tier board. 70

B. Modification of the general conditions for liability

16. Adapting the scope and content of the board's and its members' duties

The general duties are described in the answer to question 6. The content and scope of Directors' duties **can be changed pursuant to the articles of association**. They may be limited (arts 2:129/139 DCC) or expanded (arts 2:107(1)/217(1) DCC). However, the right to change the scope of the duties of Directors is **not unlimited**, they must be able to perform their primary task, which is to manage the Corporation. In addition, deviation from provisions included in Book 2 of the DCC (legislation for legal entities) is only permitted if the law provides the possibility to deviate (art 2:25 DCC) or when there is a reasonable and objective justification for the deviation as a result of which the deviation is permitted on the basis of the principle of reasonableness and fairness (art 2:8 DCC).[107] The purpose clause in the articles of association defines the scope of the authorities of the Board of Directors. 71

The **division of duties** within the board may be altered by or pursuant to the **articles of association**. This means that the alteration can either be included in the articles of association in detail or they may provide for alternative ways to change the scope of duties, for example through **resolutions or contracts**.[108] With regard to the one-tier board, arts 2:129a(1)/239a(1) DCC list a number of duties that can only be assigned to Non-Executive Directors: supervision of Executive Directors, chairmanship of the Board of Directors, proposing new Directors and determining Executive Director remuneration. By or pursuant 72

106 *Katan*, Maandblad voor Ondernemingsrecht 2017-3-4, 88–95.

107 HR 31 December 1993, NJ 1994/436 (*Verenigde Bootlieden*).

108 *Huizink* (fn 41) art 9 Boek 2 BW, aant 12.1.

to the articles of association, it can be determined that decisions by a Director within their scope of duties has legal effect (arts 2:129a(3)/139a(3) DCC).

16.1. Case Study (distribution of competences)

73 As stated in art 2:9 par 2 DCC, Directors are **jointly and severally liable.** A director can exculpate himself when he can prove that he cannot be severely held to blame, in the light of tasks assigned to other Directors, and that he has not been negligent in taking measures to avert the consequences of the improper performance of duties. Assuming that the transaction entered into by D2 qualifies as improper management and given that D2 is solely responsible for foreign affairs and D1 is solely responsible for national matters, it is likely that D1 can **disprove severe blameworthiness** on his part. He has then to prove that he has not been negligent as regards taking measures to avert the consequences of the improper performance of duties by D2 (art 2:9 DCC). In answering this question it is presumed that each Director has the power of representation and that the representation is not limited in any way (art 2: 130/240 DCC).

74 **Alternative 1:** If such task allocation is provided for in the articles of association, D2 acts in violation of these. The situation that a Director has acted in **violation of a provision of the articles of association** that protect the Corporation constitutes a tantamount circumstance which, in principle, constitutes **mismanagement**.[109] D2 can thus be held liable on the basis of art 2:9 DCC. As all Directors are jointly and severally liable, D1 is liable in principle as well. However, given the fact that D2 secretly disregarded the task allocation, D1 is likely to disprove serious blameworthiness on his part. He has then to prove that he was not negligent as regards taking measures to avert the consequences of the improper performance of duties by D2.

75 **Alternative 2:** If the articles of association allow for this form of contractual task assignment, this constitutes a valid assignment of duties. However, the circumstance that Directors, by way of **separate agreement**, have agreed on a **specific division of tasks does not remove these tasks from their collective liability** pursuant to arts 2:9 and 2:129(5)/239(5) DCC. The tasks are not statutorily separated. Still, such an agreement can constitute an important **indication in disproving a Director's severe blameworthiness**.[110] D1 can disprove severe blameworthiness on his part, provided that D1 has not been negligent in taking measures to avert the consequences of that improper performance of duties (art 2:9 DCC).

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109 HR 29 November 2002, ECLI:NL:HR:2002:AE7011 (*Berghuizer/Parpierfabriek*).

110 Rb Midden-Nederland 19 June 2013, ECLI:NL:RBMNE:2013:CA3225 (*Landis*).

16.2. Case Study (authorisation of unlawful conduct)

Articles of association in violation of the law, *boni mores* (*goede zeden*) or the public order are **not binding** (art 3:40 DCC). The fact that the corporation authorised the illegal acts under (a)–(f) – whether this was expressively or not – does not change their illegality. **Directors** that act in violation of the law can be **held liable** on the basis of art 2:9 DCC (by the Corporation) or art 6:162 DCC (by the Shareholders, the Corporation, and third parties).[111] Rules of justification may apply. 76

Alternative: As mentioned, articles of association in violation of the law are not binding. D cannot be held liable in the alternative situation for not following the non-binding provisions of the articles of association. 77

17. Adapting the standard of care expected of the board and its members

As art 3:40 DCC states: '*A juridical act that violates a statutory provision of mandatory law is null and void*'. Article 2:9 DCC is **mandatory law** (art 2:25 DCC), and includes the **standard of severe blameworthiness**. Changing the standard of care would also undermine relevant case law. A-Corporation and its Directors cannot agree to the anticipatory exoneration or limitation of liability. 78

17.1. Case Study (reduction of due diligence standard)

See answer to question 17. 79

18. Other limitations or exclusion of liability

See answer to question 17. 80

18.1. Case Study (other limitation of liability)

See answer to question 17. 81

111 *DAMHW Strik*, Commentaar op Burgerlijk Wetboek Boek 2 art 9.

C. Authorisation and instructions by other organs of the company (in particular by the shareholders' meeting)

19. Powers and responsibilities in authorising and instructing the board

82 Resolutions of the Board of Directors may only be subject to authorization by **another Corporate Body if the articles of association provide for this** (arts 2:129(3)/239(3) DCC). Dutch law does not specify what Corporate Bodies can be afforded such power, it can be the General Meeting, the meeting of holders of shares of a certain type (class) or indication, the Supervisory Board or the joint meeting of the Board of Directors and Supervisory Board (arts 2:78a/189a DCC).

83 Regarding the **NV**, the **General Meeting is afforded power of authorization** in the field of certain **specific issues**, such as changes in the identity or character of the Corporation, (art 2:107a(1) DCC). Article 2:107a DCC provides a non-exhaustive list of decisions that are at least imperatively subject to the approval of the General Meeting. This list includes matters such as (a) the transfer of the enterprise or almost the entire enterprise to a third party; (b) entering into or exiting a collaboration of the Corporation or a subsidiary with another legal entity or Corporation when this would have a substantial impact on the Corporation; and (c) acquiring or disposing of a significant investment in another legal entity with a value of at least one-third of the value of the assets according to the (consolidated) balance sheet of the Corporation. However, the absence of the General Meeting's approval on a resolution, as referred to, does not affect the authority of representation of the Board of Directors or the Directors (art 2:107a(2) DCC). The act of filing for bankruptcy is also a decision that must be approved by the General Meeting of Shareholders (arts 2:136/246 DCC).

84 If a BV or NV, not meeting the criteria of a 'large' Corporation within the meaning of the *structuurregime* (arts 2:153/263 DCC), has a **Supervisory Board** in place, the Supervisory Board can be afforded additional duties and powers via the articles of association (arts 2:140/250 DCC). In the case of a 'large' Corporation within the meaning of the *structuurregime*, (arts 2:158/268 DCC), the Supervisory Board is mandatory and has statutory authorities of approval. Articles 2:164/274 DCC provide a list of resolutions that need the approval of the Supervisory Board. The absence of the Supervisory Board's approval on a resolution does not affect the authority of representation of the Board of Directors or the Directors (arts 2:164/274 (2) DCC).

85 The **one-tier system** is largely governed by the rules applicable to the Board of Directors. With regard to the list mentioned in arts 2:164/274 DCC, the authority of approval is vested in the Non-Executive Directors. Approval of the majority of the Non-Executive Directors is required (arts 2:164a/274a DCC).

19.1. Case Study (authorisation of an apparently disadvantageous transaction)

D, in his capacity as Director of C-Corporation and complying with the articles of association, concluded a valid transaction. Despite the authorization of the competent organ, D's conduct is not acceptable because it is **not in the interests of the Corporation** and its affiliated enterprises (arts 2:129(5)/239(5) DCC). Acting with the insight and diligence that can be reasonably expected from a Director that is suited to his duties and fulfils these conscientiously, D should not have concluded the disadvantageous transaction.[112] **Severe blameworthiness** can be established. Consequently, D can be held **liable** for this misconduct by the Corporation on the basis of art 2:9 DCC. The authorization may cause the members of the corporate organ to be liable for the damage that the disadvantageous transaction created.[113] 86

Alternative 1: For the liability of D see above. The situation that D has not disclosed the fact that the transaction would be disadvantageous to the corporate organ – although he was aware of this – strengthens the argument that D has **not properly performed his duty** as he should have properly and in good time informed the corporate organ. It would be difficult to hold the members of the corporate organ liable, as the organ was not informed about the disadvantageous character of the transaction nor would it have been aware of this character after a proper fulfilment of its duties. 87

Alternative 2: If the corporate organ has been negligent, the liability of its members depends on the type of corporate organ that is competent. If a Supervisory Board is the competent organ, its members may not have properly performed their duties (see question 6) and the same provisions that apply to the Board of Directors apply to the Supervisory Board. In this case, art 2:9 DCC is relevant. If the General Meeting is the competent organ, liability would rarely arise. For the liability of D, see above. 88

20. Instructions to the board or individual directors to implement certain management decisions

In principle, the Board of Directors is charged with the management of the Corporation. If the **articles of association** of a **BV** so provide, the **specified Corporate Body may instruct the Board of Directors**. The Corporate Body may be the General Meeting, the meeting of holders of shares of a certain type (class) or 89

112 HR 10 January 1997, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van der Ven*).

113 Rb Amsterdam 6.3.1911, W9133 and *Van der Heijden/Van der Grinten* (fn 78) no 231, 589.

indication, the Supervisory Board and the joint meeting of the Supervisory Board and Board of Directors (arts 2:189a in conjunction with 239(4) DCC). Differences of opinions exist regarding the question of whether the Supervisory Board would be a suitable Corporate Body to give instructions due to its task of supervision of the Board of Directors. This discussion is extended to the joint meeting of the Supervisory Board and the Board of Directors, because of the participation of the Board of Directors in this Corporate Body. Furthermore, there is debate as to the meeting of holders of shares without voting rights, because the right of instruction would give this group an important say in the management of the Corporation, which is not in line with shares without voting rights.[114] The Board of Directors is compelled to follow the instructions, unless these are in conflict with the interests of the Corporation and the affiliated enterprises (art 2:239(4) DCC).

90 If the articles of association of an **NV** so provide, the specified Corporate Body may give instructions relating to **general policy**, which is to be pursued in areas identified in the articles of association (art 2:129(4) DCC). If such instructions would not be in the interests of the Corporation, the Board of Directors can rely on art 2:129(5) DCC if it considers it inappropriate to execute the order. This seems to imply a substantial difference between the instructions when the Corporation is a BV (concrete instructions) and when it is an NV (general instructions). In practice, however, this does not seem to be an important difference as there have rarely been cases in which the type of instruction was the issue of debate. Normally, the debate is focused on the question of whether the Board of Directors materially should have followed the instructions in the case of a group of companies.[115]

91 Instructions **may not violate the law, *boni mores*** (*goede zeden*) or the **public order** (art 3:40 DCC) and have to be within the boundaries of reasonableness and fairness as included in art 2:8 DCC. Furthermore, the provisions in the articles of association limit the scope of the instructions. Instructions in violation of the articles of association are non-binding. This means that the division of powers as laid down in the statute and the articles of association have to be taken into account. Moreover, the purpose of the Corporation (which may be broader than the description in the articles of association) limits the right of instruction.

92 **Groups (of Corporations)** are not provided with special rules since group law in the Netherlands has not been codified. Without prejudice to the interests

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114 See for an overview of these discussions: *JA Terstegge*, Instructierecht en de Flex-BV, WPNR 2014/7011, 259–269.

115 Ibid.

of each parent/subsidiary and the responsibility that its Directors and Shareholders have towards their own Corporation and the Group, **parent Corporations can bindingly instruct their subsidiaries**. This can, for example, be provided for in the articles of incorporation. This is not just a right but also a responsibility of the parent Corporation; it must supervise and instruct the subsidiary and take action if the subsidiary does not meet its obligations or gets into financial distress. In addition to the *right* of instruction, the General Meeting also has the *power* of instruction as the General Meeting may discharge Directors, which gives them leverage and consequently influence over the Board of Directors.

20.1. Case Study (instructions regarding illegal/disadvantageous management decisions)

See the answer to question 17. D has **no obligation** to follow instructions of this kind. 93

20.2. Case Study (instructions regarding distribution of profits)

With regard to the **BV**, art 2:216 DCC is an internal liability provision relating to distributions, which was introduced in 2012. While the appropriation of profits is determined by the General Meeting, the **Board of Directors must approve** the resolution on the distributions according to art 2:216 DCC. The Board of Directors only should have rejected the decision if it knows or should have known that the distribution(s) would cause the Corporation's inability to pay its due debts. In the Parliamentary history, the time period that has to be taken into account is about one year, but the Board of Directors has to take into account all available relevant information.[116] A resolution with regard to a distribution has no effect as long as the Board of Directors has not given its approval to it. In the event that the Corporation is not able to pay its due debts after the distribution and the Directors knew or should have known this at the time of the distribution, they are **jointly and severally liable for the deficit** that is created as a result of the distribution (see also question 5). 94

There is debate regarding the question of the relation between the interests of the Corporation and its affiliated enterprises (which directors have to keep in 95

116 Kamerstukken I 20011/12, 31 058, no E, 15.

mind when performing their duties) and the requirement of 'foreseeable inability to pay its due debts', which refers to the creditors' interests. The interests of the Corporation are broader than only the creditors' interests, the interests of (minority) shareholders and for instance employees also have to be taken into account. In literature, some commentators support the opinion that also with regard to art 2:216 DCC, Directors should have these **broader interests of the Corporation** in mind. Reasonable arguments, eg investments in the Corporation, could be a reason to decide to reserve profits rather than distribute them to shareholders.[117] The fact that machinery would become obsolete would prevent the Directors from giving their approval to the resolution of the General Meeting because the capital would have to be used for the acquisition of new machinery. Others state that the decision about the approval should only be based on the explicit requirement of art 2:216 DCC. In this case they would argue that the Board of Directors would have to approve the distributions since as a result of the distributions only the profits are reduced and the Corporation would still be able to pay its due and collectable debts. Additionally, if shareholders received dividends while they knew or should have known about the Corporation's inability to pay its debts after distribution, they are obligated to return the payments (art 2:216(3) DCC).

96 As far as the articles of association do not provide otherwise, the **NV**'s profits are for the benefit of the shareholders. Profits are distributed (after the annual report is established) to the shareholders if the NV has sufficient equity (more equity than the paid-up share capital and legally and statutorily imposed reserves combined) (art 2:105(2) DCC). Shareholders aware of dividend payments contrary to art 2:105(2) DCC are obliged to return these payments to the NV (art 2:105(8) DCC). The payment qualifies as an undue payment (art 6:203 DCC). Unlike with the BV, unlawful dividend payments by the NV must be returned, regardless of whether the dividend payment affected the NV or not.[118] If, however, the Shareholders can demonstrate that they received the dividend payments in good faith, they are not obliged to return the payments (art 2:105(8) DCC).[119]

20.3. Case Study (instructions regarding covert return of contributions)

97 D, in his capacity as **Director** of C-Corporation, can be held liable for the transaction concluded by C-Corporation. His conduct constitutes **mismanagement**

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117 HR 12 July 2013, ECLI:NL:HR:2013:BZ9145, note by *B Bier* § 2.

118 *Huizink* (fn 41) art 2:105 BW, aant 5a.

119 Hof Amsterdam 10 June 1993, ECLI:NL:GHAMS:1993:AC1513.

(art 2:9 DCC). However, if D were to be sole Director of C-Corporation, he would probably not start legal proceedings on behalf of the Corporation against himself. If a new Board of Directors was appointed, it could take the initiative to sue D as former Director on behalf of C-Corporation. A claim of one or more of the **Shareholders** would probably not be successful, as each shareholder was aware of the situation and a valid resolution was adopted by the General Meeting.

98 In the case of an **NV**, a juridical act performed by the Corporation without approval of the General Meeting or without an audit report may be **nullified** on behalf of the Corporation when the juridical act implies the acquisition of assets that belonged to a founder one year before the establishment of the Corporation or afterwards belonged to a founder and has been performed within two years after registration in the Commercial Register. The audit report states that the value of the asset(s) to be received/purchased by the Corporation determined by generally accepted valuation methods equals at least the value of the counter performance by the Corporation. If the conditions in the case study were similar, this rule would be applicable.

99 **Alternative 1: D** can still be held **liable** (on the same grounds as mentioned above) by C-Corporation (not the shareholders); he should not have given in to the pressure of S1. Shareholders S2 and S3 cannot be held liable; the ultimate responsibility is with D. **S1** could be held liable on the basis of **tort** (art 6:162 DCC) by S2 and S3. However, it is doubtful whether this would be successful.

100 **Alternative 2:** C-Corporation can hold **D liable**, as stated above. The provisions for conflicts of interest include a 'decision-making rule' (art 2:129(5)/239(6) DCC). These provisions stipulate that a Director does not participate in the deliberations and decision-making if he has a direct or indirect personal interest therein that is contrary to the interests of the Corporation and its affiliated enterprises. If, as a result, no Board resolution can be passed, the Supervisory Board of C-Corporation can pass the resolution. In the absence of a Supervisory Board or if the Supervisory Board cannot pass a resolution due to conflicts of interest of the Supervisory Directors, the resolution shall be passed by the General Meeting, unless the articles of association provide otherwise. When the Board of Directors passes a resolution in violation of the conflict of interest rule, the resolution may be annulled on the basis of violation of the required statutory process (art 2:15(1)(a) DCC). However, this does not change the validity of the transaction when the Corporation has been validly represented. The value of S's shareholding is reduced as a consequence of this transaction. S could attempt to assert a claim on the basis of derivative damage (discussion of which is in question 14). If S can demonstrate a violation of the relevant standard of care, eg via tort (art 6:162 DCC), it may be successful in claiming compensation.

20.4. Case Study (instructions regarding covert return of contributions within a group of companies)

101 The **resolution of the General Meeting** of M-Corporation is an **instruction to the directors** of C-Corporation. If C-Corporation is a **BV**, the articles of association of the Corporation may state that the Directors must act according to the instructions of another Corporate Body (in this case the General Meeting of C-Corporation). Directors must follow the instructions, unless the instruction is contrary to the interests of the Corporation (art 2:239(4) DCC). C-Corporation is part of a group and therefore the Directors must also **take the interests of the group as a whole into account**, although the interests of the group may not be decisive.[120] If D grants A-Corporation a loan and the instruction is contrary to the interests of C-Corporation, which is likely in this case,[121] C-Corporation itself could bring a law suit against its Director D to claim damages (based on art 2:9 DCC). Alternative 1 does not change this assessment.

102 In order to hold M-Corporation liable in tort vis-à-vis C-Corporation, or the creditors of C-Corporation, the **inter-group relation** must be assessed, for example, to what extent has M-Corporation the power to control C-Corporation? Is there a duty of care of M-Corporation towards the creditors of C-Corporation and if so did M-Corporation breach this duty? At which particular moment in time is M-Corporation aware of the financial difficulty of C-Corporation?[122] M-Corporation holds all shares in C-Corporation, so it is likely that M-Corporation has the power to control C-Corporation. Actual **power of control generates a duty of care on the part of M-Corporation towards the creditors of C-Corporation**,[123] which is activated the moment M-Corporation should have foreseen that the creditors of C-Corporation are disadvantaged due to lack of assets.[124]

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120 HR 21 December 2001, ECLI:NL:HR:2001:AD4499 (*Sobi/Hurks II*) and HR 26 October 2001, NJ 2002, 94 (*Juno*).

121 In a case where a similar situation occurred, however in relation to granting a guarantee, the circumstances that led to such a conclusion were that the subsidiary that had been requested to provide a guarantee within the group already had a substantial amount of loans outstanding within the group without adequate security rights, the affiliated corporation that was supposed to receive the loan was in a financial situation that is comparable with suspension of payment (*surséance van betaling*) and had equity with a negative value. As a result, there were insufficient advantages as compared to the burden of the guarantee, the call in of the guarantee was not implausible and the continuity of the subsidiary was at risk: Rb's-Gravenhage (vzr) 7 August 2002, KG 02/947, JOR 2002/173 (*NEM/Babcock*).

122 HR 19 February 1988, ECLI:NL:HR:1988:AG5761 and HR 21 December 2001, ECLI:NL:HR:2001:AD4499 (*Sobi/Hurks II*).

123 HR 25 September 1981, NJ 2982, 443 (*Osby*).

124 HR 19 February 1988, NJ 1988 (*Albada Jelgersma II*).

This seems to be the case at the moment M-Corporation instructed Director D to grant A-Corporation an interest-free loan. Given the fact that thereby M-Corporation breached its duty of care, **M-Corporation becomes liable in damages**, based on tort (art 6:162 DCC).

Alternative 2: the facts presented in alternative 2 are relevant facts in establishing the liability of both D and M-Corporation, ie it is more likely that the court will hold D as well as M-Corporation liable on the grounds as set forth. **103**

Annulment of the loan, other than in bankruptcy, is not possible. In the case of **bankruptcy**, the appointed liquidator can **annul the transaction** if certain requirements are met, such as (i) the transaction is not compulsory, (ii) the transaction is disadvantageous and (iii) both parties knew or could have known that the transaction was disadvantageous (art 42 IL). Even compulsory transactions can be annulled if the other party at that moment knew bankruptcy was already filed or payment of a due debt was a result of consultation between both parties with the objective of favoring the recipient in relation to other creditors (art 47 IL). **104**

D. Waiver of and agreement regarding indemnity

21. Right and scope of waiver against board and its members

A waiver with which the Corporation in principle renounces its right to take recourse against Directors (*decharge/kwijting*) on the basis of mismanagement (art 2:9 DCC) is possible but is not included in statutory law. The waiver may also cover liability on the basis of art 2:216 DCC as regards distributions to shareholders. The scope of this waiver is limited as it **only** stretches to **information known to the Corporation and its shareholders**, although that knowledge is presumed to be more than just the annual report as it also includes information that has been provided by the Board of Directors to the General Meeting outside the annual meeting of Shareholders and with an exception relating to fraudulent acts that, as a result of manipulation of the report, are not part of the annual report but known to the Shareholder(s) as a result of his/their double role, ie being the Director(s) that performed the fraudulent acts.[125] In bankruptcy, the waiver also protects the Director against claims of the liquidator on the basis of art 2:9 DCC but not against claims on the basis of arts 2:138/248 DCC. The waiver **does not affect external liability** towards third parties, which cannot be limited. The waiver also concerns **other claims for liability, for example based on tort, which may no longer be** **105**

125 HR 25 June 2010 and JOR 2010/227 (*De Rouw/Dingemans qq*).

initiated against Directors by the Corporation. The General Meeting can declare waivers in the name of the Corporation; usually this is paired with the annual meeting of Shareholders and the presentation of the annual report.[126] When all Shareholders of a BV are also Directors of that BV, the signing of the annual report by all Directors and Supervisory Directors, subject to certain requirements and only when the articles of association do not exclude this effect, is regarded to be the adoption of the annual report which is also regarded as a waiver (*decharge/kwijting*).[127] In addition, the Corporation can enter into an agreement with a Director to grant a final waiver as part of an exit-agreement. As the Board of Directors is authorized to represent the Corporation, it will sign the agreement. The exiting Director with a personal interest cannot take part in the decision-making (arts 2:129(6)/239(6) DCC) as a direct personal conflict of interests exists. It has been argued that the General Meeting has to make a resolution regarding the waiver before the agreement is signed, but it is unclear whether the absence of such resolution affects the right of the exiting Director to rely on his rights under the exit agreement.[128] This waiver (*decharge/kwijting*) is an *ex post* instrument. It is not possible to exclude internal liability *ex ante* on the basis of art 2:9 DCC (*vrijwaring*).[129]

21.1. Case Study (waiver of right to pursue already incurred claims)

106 See answer to question 21. The knowledge of the General Meeting that the acts of the Board of Directors can be qualified as mismanagement (or that it is foreseeable that these acts may be qualified as mismanagement) (but the waiver has nevertheless been granted) does not influence whether the Director may rely on the waiver subject to the requirements included in the answer to question 21. This is also the case when the Director has intentionally caused damage to the Corporation.[130]

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126 HR 17 June 1921, NJ 1921, 737, (*Deen/Perlak*); HR 20 June 1924, NJ 1924, 1107 (*Truffino*); HR 10 January 1997, NJ 1997, 360 (*Staleman/van de Ven*); HR 20 October 1989, NJ 1990, 308 (*Ellem*) and HR 25 June 2010, JOR 2010/227 (*De Rouw/Dingemans qq*) and art 2:107/217 (1) DCC: *CDJ Bulten/N Kreileman*, De Dans ontspringen door decharge? in: G van Solinge et al (eds), Aansprakelijkheid van bestuurders en commissarissen: Nadere terreinverkenning in een uitdijend rechtsgebied, Serie vanwege het van der Heijden Instituut, deel 140 (2017) 417–443.

127 Art 2:210 (5) DCC.

128 *Bulten/Kreileman* (fn 126) 417–443.

129 *Asser/Maeijer & Kroeze* 2-I* 2015/204, *Asser/Maeijer/Van Solinge & Nieuwe Weme* 2-II* 2009/482 and *GH Potjewijd*, Vrijwaring voor bestuurders en commissarissen, Ondernemingsrecht 2003/16, 607–613.

130 HR 20 October 1989, NJ 1990, 308 (*Ellem*).

22. Indemnifying the board and its members from liability vis-à-vis third parties in the event of prosecution

It is **possible** for Corporations to agree upon indemnification in the event that Directors are sued by third parties for claims regarding their conduct in their capacity as Directors. The extent of indemnification may go as far as both parties wish (damages, judgments, settlements, costs of defence of legal actions, claims or proceedings and appeals therefrom) but will not include damage, payments or costs that are the result of intent or conscious recklessness nor can it impair art 2:9 DCC (acts that qualify as mismanagement for which the Director can be severely held to blame). Such an agreement would be in conflict with art 3:40 DCC.[131] Compensation in a case where the Director is sentenced to a term of imprisonment is thus unlikely as such criminal acts are likely to be a form of mismanagement. However, the Corporation may pay the legal defence costs of a Director, but these have to be paid back (with interest) when the Court has judged that the acts of the Director qualify as mismanagement.[132] **107**

There is no specific law that deals with indemnification. The indemnification may be included in the articles of association, which will be applicable to all Directors. The General Meeting is authorized to make amendments to the articles of association. In addition, it is possible to enter into an indemnification agreement. When indemnification is seen as an element of remuneration, the organ that is responsible for the determination of the Directors' remuneration would also be responsible for the decision-making regarding the indemnification. This will be the General Meeting, unless the articles of association vest this authority in another organ such as the Supervisory Board (arts 2:135(4)/245(1) DCC). The assessment of whether a Director may rely on the indemnification has to be executed by the Corporation. A Director with a personal interest cannot take part in the decision-making (arts 2:129(6)/239(6) DCC) as a direct personal conflict of interests exists. Other Directors will have an indirect personal conflict of interest.[133] In this way it is ensured that Directors cannot indemnify themselves. As no board resolution can be passed, the Supervisory Board shall pass the resolution. In the absence of a Supervisory Board, the General Meeting shall pass the resolution, unless the articles of association provide otherwise (see for conflict of interest rule the answer to case study 20.3). **108**

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131 Eg Court of Amsterdam 30 September 2015, ECLI:NL:RBAMS:2015:6932.

132 *GH Potjewijd/M van Olffen/A van Breda*, Exoneratie en vrijwaring voor bestuurders en commissarissen van vennootschappen, in: G van Solinge et al (eds), Aansprakelijkheid van bestuurders en commissarissen: Nadere terreinverkenning in een uitdijend rechtsgebied, Serie vanwege het Van der Heijden Instituut deel 140 (2017) 445–458.

133 *Potjewijd/van Olffen/van Breda* (fn 132) 445–458.

22.1. Case Study (limits of indemnity provisions)

109 (a) The answer to this question depends on whether D, while **driving home**, is considered to still be in his capacity as Director. Opinions on this matter are divided.[134]

110 (b) **Falsifications of the company's balance sheets** constitute mismanagement. See the answer to question 22.

111 (c) The acts performed by D (**false statements about a competitor**) are likely to have been made in the function of Director. See the answer to question 22 for a general explanation about indemnification. The question of whether C-Corporation is obligated to make payments by way of damages, judgments, and settlements, as well as costs of defence of legal actions, claims or proceedings and appeals therefrom depend on the question of whether the acts of D constitute mismanagement under art 2:9 DCC. See for an answer to that question our explanation in relation to question 5. If it can be qualified as mismanagement, C-Corporation is not obligated to indemnify the Director.

112 (d) The act of **sexual harassment** does not fall within the scope of his function as Director. If D's agreement with C-Corporation included a provision bringing such acts within the scope of his function (and reimburse him for liabilities arising from it), that provision would be in breach of morality and public order and therefore be void pursuant to art 3:40 DCC. D was not acting in his capacity as a Director when he sexually harassed a co-worker, therefore the claim (based on art 6:162 DCC) can be asserted against him directly. Neither does C-Corporation have to reimburse D for the costs incurred to defend himself.

III. Liability for Damage to Third Parties

23. Board's liability towards third parties

113 Director liability for damage caused to third parties is **generally** referred to as **external liability**. External liability can, in general, be established in various ways: (i) secondary liability: direct (and double) liability, (ii) liability in the case of bankruptcy of the Corporation, and (iii) liability prior to and at the moment of

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134 *Asser/Maeijer & Kroeze* 2-I*/97. *L Timmerman*, Beginselen van bestuurdersaansprakelijkheid. Hoedanigheid van bestuurder doet ertoe, in: G van Solinge et al (eds), Aansprakelijkheid van bestuurders en commissarissen: Nadere terreinverkenning in een uitdijend rechtsgebied, Serie vanwege het Van der Heijden Instituut deel 140 (2017) 25–40.

the incorporation of the Corporation. External liability can also be based on specific provisions in Dutch company law. We will refer to and discuss these provisions when answering the case studies in this section.

Secondary liability of a Director on the basis of **tort** (art 6:162 DCC) can exist when the Corporation is liable on the basis of non-fulfilment of contractual or statutory obligations or **tort** (art 6:162 DCC) for damage caused to a third party and the Director can also, due to his conduct as and in his capacity as Director, be held liable. To protect Directors from potential claims, the legislator has set a high threshold that must be met if a Director is to be found liable for his management in his capacity as Director. This is the threshold of **severe personal blameworthiness**. Rather than applying the regular conditions of art 6:162 DCC (discussed below), the standard or threshold of art 6:162 DCC is determined by art 2:9 DCC. Extensive case law has interpreted the application of art 6:162 DCC in conjunction with art 2:9 DCC and is discussed below. This higher degree of protection enjoyed by Directors has been acknowledged as justified by the Dutch Supreme Court[135] because otherwise, out of fear of liability, Directors may become more defensive in their decision-making and not take the entrepreneurial risk that drives the economy. **114**

The *Ontvanger/Roelofsen* case[136] is fundamental in asserting whether a Director can be **severely held to blame**. The Supreme Court has adopted stringent conditions. In the situation that a Director, acting in his capacity as Director of the Corporation, has (i) acted on behalf of the Corporation or (ii) has achieved or allowed that the Corporation can no longer meet its contractual and statutory obligations, severe blameworthiness is established when: (i) the Director, when concluding the obligation, knew or should reasonably have known that the Corporation could not meet that obligation and did not have sufficient means to remedy the damage of the third party deriving from the Corporation's default on that obligation[137] or (ii) the Director knew or reasonably should have known that his management had the consequence that existing obligations could no longer be met by the Corporation and the Corporation did not have sufficient means to remedy the damage of the third party deriving from the Corporation's default on that obligation. It depends on the circumstances whether the blameworthiness is sufficiently severe to hold him personally liable (on the basis that his conduct lacks carefulness to such an extent that he can be personally severely blamed).[138] **115**

135 HR 20 June 2008, ECLI:NL:HR:2008:BC4959 (*Willemsen/NOM*) and HR 5 September 2014, ECLI:NL:HR:2014:2628 (*Hezemans Air/Van der Meer*).

136 HR 8 December 2006, ECLI:NL:HR:2006:AZ0758 (*Ontvanger/Roelofsen*).

137 HR 6 October 1989, ECLI:NL:HR:1989:AB9521 (*Beklamel*).

138 HR 13 August 2001, ECLI:NL:HR:2000:AA4873 (*New Holland Belgium/Oosterhof*).

116 In the *Spaanse Villa* case[139] the Director's duty of care was defined by the way he presented himself to the third party, as a real estate expert, and not in his capacity as Director. This **conduct** of the Director, that caused damage to third parties, is then not attributed to him in his capacity as Director but attributed to him **in his own, personal capacity**. Despite the fact that the liability in this case concerns the conduct of the Director in his own, personal capacity, if that conduct could also be considered as conduct on behalf of the Corporation or attributed to the Corporation, the Corporation could also be held liable (double liability). Whether conduct is considered to be on behalf of or attributable to a Corporation depends on the circumstances of the case at hand and generally accepted practices.[140]

117 The **direct liability**, as established in the *Spaanse Villa* case, stirred quite some debate in the Netherlands as it seemed that the high degree of protection enjoyed by Directors – the threshold of severe personal blameworthiness – could suddenly be circumvented (under certain circumstances as mentioned above). This contradicts the notion that third parties enter into contracts with the Corporation, a legal form with its own legal personality, rather than its representative (the Director) because, under certain circumstances, the Director would be considered to be acting on his own behalf. In the *Tulip Air* case,[141] the Supreme Court explicitly gives a further explanation of its conclusions from the *Spaanse Villa* case and emphasizes that the possibility of direct liability only arises if the **Director acts in his capacity as a private person, on his own behalf instead of in his capacity as Director** of the Corporation. Consequently, not the standard of severe personal blameworthiness (determined by art 2:9 DCC) but the **regular standard for liability** has to be met (tort, art 6:162 DCC).[142] In the relationship between the Director and the third party, the Director has a **personal duty of care towards that third party**, which is determined depending on the situation. This is a different standard or duty of care than the standard or duty of care in his capacity as Director of a Corporation (art 2:9 DCC). If a Corporation is held liable pursuant to any form of civil liability and its Director is also sued, a claimant must still prove severe blameworthiness on the part of the Director.

118 **Liability for misleading information about the financial condition of the Corporation:** If the financial condition of the Corporation has been misrepresented in the annual accounts or in the interim figures as published by the

139 HR 23 November 2012, ECLI:NL:HR:2012:BX5881 (*Spaanse Villa*).

140 HR 6 April 1979, ECLI:NL:HR:1979:AH8595 (*Kleuterschool Babbel*).

141 HR 5 September 2014, ECLI:NL:HR:2014:2628 (*Tulip Air*).

142 See also HR 18 September 2015, ECLI:NL:HR:2015:2745.

Corporation or in the annual report, then the **Directors** are **jointly and severally liable** towards third persons for the damage which they have suffered as a result thereof. A Director who proves that such misrepresentation is not attributable to him is not liable (arts 2:139/249 DCC).

Liability in the case of bankruptcy of the Corporation: External liability 119
of Directors in the case of bankruptcy is described in arts 2:138/248 DCC. This is a form of **secondary liability**. Primarily the insolvent Corporation is liable towards its creditors for all outstanding debts. Claims against Directors of a bankrupt Corporation on the basis of arts 2:138/248 DCC can only be made by the liquidator. The liquidator represents all creditors of the Corporation. In order for his claim to be successful, the liquidator must prove that the Board of Directors (or any individual Director, as the liability is joint and several) has performed its duties manifestly improperly (**manifestly improper management**) and that it is probable that this manifestly improper management was an **important cause of the Corporation's bankruptcy** (arts 2:138(1)/248(1) DCC). As decided in the *Panmo* case, manifestly improper entails that 'no reasonable (Board of) Director(s) would have acted in the same way under similar circumstances'.[143] As is the case with internal liability (art 2:9 DCC), individual Directors can **exculpate** themselves from liability by showing that they cannot be blamed for the manifestly improper management and that they were not negligent in taking measures to avoid the negative consequences of manifestly improper management (arts 2:138(3)/248(3) DCC). Articles 2:138(2)/248(2) DCC provide the liquidator with a presumption. If the Board of Directors has not met its obligations under art 2:10 DCC (**accountancy**) and art 2:394 DCC (**publication of annual report**), then manifestly improper management is automatically established and it is assumed this was an important cause of the Corporation's bankruptcy. This assumption cannot be refuted.[144] An insignificant omission (default) is, however, not taken into account. Liability pursuant to arts 2:138/248 DCC is then established and the Board of Directors can only escape this outcome if it proves that the bankruptcy was caused by external factors or circumstances.[145] A legal action (claim) against one or more Directors can be filed only on the basis of arts 2:138/248 DCC on the ground of manifestly improper management, which took place in the period of **three years preceding the Corporation's bankruptcy**. The fact that a Director has been discharged from liability does not preclude the filing of a legal action (claim) as meant in the previous sentence.

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143 HR 26 July 2001, ECLI:NL:HR:2001:AB2053 (*Panmo*). Also: HR 12 February 2016, ECLI:NL:HR:2016:233.

144 *Asser/Maeijer/Van Solinge & Nieuwe Weme* 2-II* 2009/459.

145 See HR 12 February 2016, ECLI:NL:HR:2016:233.

A person, who has actually determined or co-determined the policy of the Corporation, as if he were a Director, is for liability reasons equally treated as a Director. Articles 2:138/248 DCC do not affect the possibilities of the liquidator in the bankruptcy of the Corporation to file a legal action (claim) against a Director on the basis of the agreement between the Corporation and the Director, on the basis of art 2:9 DCC or on the basis of art 6:162 DCC on behalf of the creditors.[146]

120 **Liability for tax debts, social insurance contributions and contributions to company pension funds**: Directors may be held liable for tax debts, social insurance contributions and contributions to company pension funds in two ways. First, an action based on **general tort law**, as described before. Second, and more common, an action based on art 36 **Tax Collection Act** (*Invorderingswet*, TCA). Article 36 TCA stipulates the liability of Directors of a Corporation with regard to certain tax debts such as wage withholding tax, VAT, and customs duties and also to unpaid tax debts incurred by other Corporations for which the Corporation was held liable. The same applies to social security premiums and compulsory contributions to the company pension fund (art 60 Social Security Finance Act (*Wet financiering sociale verzekeringen*) and art 23 Sectoral Pension Fund Obligatory Participation Act (*Wet verplichte deelneming in een bedrijfstakpensioenfonds 2000*)), hereinafter referred to as 'Taxes'. The liability under these provisions includes the liability of the former Director during whose term of management the due taxes occur and the liability of a legal entity as a Director of the Corporation. A person, who has actually determined or co-determined the policy of the Corporation as if he were a Director, is for liability reasons equally treated as a Director. The Corporation, and therefore its Directors, is obliged to inform the competent authorities immediately with a written notification in the event it is unable to pay Taxes; this is hereinafter referred to as '**Notification Duty**'. If the Corporation does not fulfil, or improperly fulfils, its Notification Duty, each Director of the Corporation is jointly and severally assumed liable for the payment of the due Taxes. This liability is already established if the Corporation fails to discharge its Notification Duty and not (only) if the Corporation is actually failing in the payment of the due Taxes. A Director can exculpate himself only by showing that it was not his fault that the Corporation did not comply with the Notification Duty or if he can prove that it was not due to manifestly improper management on his part that the taxes were not paid. In most cases this exculpation is near to impossible. Case law provides many cases in which Directors are held liable due to non-fulfilment of the Notification Duty. However, if the Corporation fulfils its Notification Duty, a Director

146 HR 14 January 1983, ECLI:NL:HR:1983:AG4521(*Peeters/Gatzen*) and HR 16 September 2005, ECLI:NL:HR:2005:AT7797 (*De Bont/Bannenberg*).

can only be held liable if the relevant authorities prove that the Taxes were not paid because of manifestly improper management on the part of the Director in the period of three years preceding the time of the notification. This is a heavy burden of proof. In most cases it concerns fraud, failing to properly keep the Corporation's accounts and records or failing to file proper tax returns. If the relevant authorities, in most cases the tax authorities, succeed in this burden of proof, an individual director can try to exculpate himself. He must prove that he is not to blame for the improper management. Improper management is defined in case law as if no reasonable director would have acted in the manner concerned in similar circumstances.[147] Such exculpation is difficult, but not impossible.

121 Special rules provide for **liability prior to and at the moment of the incorporation of the company**. Directors have the obligation to **register the NV or BV** in the Commercial Register and must deposit at the office of that register (Chamber of Commerce) an authentic extract of the notarial deed of incorporation and of the documents attached to it pursuant to art 2:204 DCC. The Directors are each, in addition to the BV, jointly and severally liable for any juridical act performed during their directorship through which the Corporation has been committed (bound) in the period prior to the moment at which the application for the initial registration in the Commercial Register was lodged, together with the extracts and copies to be deposited (art 2:180 DCC).

122 Directors are responsible for the **registration of the NV** in the Commercial Register, and must deposit at the office of that register (Chamber of Commerce) an authentic extract of the notarial deed of incorporation and of the documents attached to it pursuant to arts 2:93a, 2:94 and 2:94a DCC as well as a copy of the documents compiled pursuant to art 2:94a (4), last sentence DCC. They must, at the same time, report to the keeper of the Commercial Register for registration the total of the real and estimated costs incurred or to be incurred for account of the Corporation in connection with its formation (incorporation). The Directors are jointly and severally liable, in addition to the NV, for any juridical act performed during their directorship through which the Corporation has been committed (bound) in a period prior to the moment at which: (a) the application for the initial registration in the Commercial Register was lodged, together with the extracts and copies to be deposited; (b) the paid up share capital amounts to at least the minimum capital required for the formation (incorporation) of an NV, and; (c) at least one-quarter of the nominal value of the share capital issued at the formation (incorporation) has been paid up (art 2:69 DCC).

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147 HR 7 June 1996, ECLI:NL:HR:1996:ZC2096 (*Van Zoolingen*) and HR 8 June 2001, ECLI:NL:HR:2001:AB2053 (*Panmo*).

123 The persons who have performed a **juridical act in the name of a yet to be incorporated BV** are jointly and severally liable for that act until the Corporation has ratified it after its incorporation, unless the contrary has been stipulated explicitly in respect of that juridical act. If the Corporation has ratified the juridical act but fails to perform the obligations which arise from it, then the persons who have acted in the name of the yet to be incorporated BV are jointly and severally liable for the damage which a third person suffers as a result if they knew or reasonably could have known that the Corporation could not meet these obligations, all without prejudice to any possible liability of the Directors on account of a ratification. The knowledge that the Corporation could not meet its obligations is presumed when the Corporation is declared bankrupt within one year after its incorporation (art 2:203(2)(3) DCC).[148]

124 The same rules apply to the **NV** (art 2:93 DCC).

125 Article 6:162 DCC defines what, under Dutch civil law, is considered a **tortious act** and under what circumstances a (legal or natural) person is liable for damages to a third party. The following conditions must all be met for a claim based on tort to be successful. These conditions will be presumed to have been met in answering the case studies, unless stated otherwise. A tortious act is, save for justification, (i) a violation of someone else's right; or, (ii) an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct (art 6:162(2) DCC). This act must have caused (causality) damage (no claim without damage) to a third party. Furthermore, the tortious act must be attributable to a person (art 6:162(1) DCC). A tortious act can be attributed to a person committing the tortious act if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (art 6:162(3) DCC). Finally, there is no obligation to repair the damage on the ground of a tortious act if the violated standard of behavior is not intended to offer protection against damage as suffered by the injured person (art 6:163 DCC). If these conditions are met, a person is liable and must repair the damage suffered by the third party.

23.1. Case Study (board's instruction to provide inappropriate advice by sales representatives)

126 Unfortunately for P, C-Corporation has become insolvent and most likely will not be able to remedy the damage P suffered. Assuming C-Corporation is liable

148 HR 28 March 1997, NJ 1997, 582. See also: Court of Appeal Amsterdam 9 February 2016, ECLI:NL:GHAMS:2016:424.

towards P due to its default under the purchase agreement, this fulfils the prerequisite for **secondary liability** of D. P can now also assert its claim against D. As discussed in detail in the answer to question 23, the threshold of **severe blameworthiness** must be met if a Director is to be found liable for damages towards P. P must show that D, when concluding obligations on behalf of C-Corporation (or in this case instructing his employees to enter into agreements on behalf of C-Corporations with, for example, P), knew or should have reasonably known that C-Corporation could not meet its obligation under the agreement with P and C-Corporation did not have sufficient means to remedy the damage sustained by the third party deriving from the Corporation's default on that obligation.

C-Corporation's obligation due to its liability under the purchase agreement would be to reimburse P for the worthless product and to compensate P for the physical injury. It is likely that at the time of conclusion of the purchase agreement between C-Corporation and P, D knew or reasonably should have known that C-Corporation could not meet its obligations under the purchase agreement, given the fact that D instructs the employees to provide inappropriate information to possible purchasers, if necessary, and to give incomplete advice in order to sell as many products as possible. It is unclear whether D knew or reasonably should have known that C-Corporation did not have sufficient means to remedy the damage sustained by the third party deriving from the Corporation's default on that obligation. 127

If D **participated directly in the sales**, this would not change the legal assessment. D was still acting in his capacity as Director of C-Corporation. 128

23.2. Case Study (presenting false annual statements to third parties)

If the **financial condition** of the Corporation has been **misrepresented** in the annual accounts or in the interim figures as published by the Corporation or in the annual report, then the Directors are **jointly and severally liable** towards third parties for the damage which they have suffered as a result thereof. A Director who proves that such misrepresentation is not attributable to him is not liable (arts 2:139/249 DCC). 129

Regardless of any proceedings initiated by the liquidator (arts 2:138/248 DCC), P can assert its own claim against D or, alternatively, D1 and D2. For the outcome of the case it is irrelevant whether D **negligently or intentionally** presented false balance sheets and/or D1 persuaded D2 to present P with false balance sheets. 130

Unlike other forms of civil liability of Directors in their capacity as Director of a Corporation, **no severe blameworthiness** is required when applying 131

arts 2:139/249 DCC.[149] Liability is established if it is concluded that the financial condition of a Corporation has been misrepresented (and third parties that relied on that information suffered damage as a result thereof).

132 **Misrepresentation** of the financial condition of a Corporation entails that the quality and/or content does not meet the standards as accepted in general legal practice as found in art 2:362 DCC.[150] Though a claim on the basis of interim figures is possible, the (im)precision of such figures must be considered.[151] Articles 2:139/249 DCC can be seen as a *lex specialis* of tort (art 6:162 DCC), save for the fact that the provision already presumes that the misrepresentation is attributable to the Director(s) (though rebuttable, arts 2:139/249 (second sentence) DCC). The claimant must demonstrate that there is **a causal link** between the misrepresentation of the financial condition of the Corporation and his damage.[152] In that case, liability of the Director(s) may be established.

23.3. Case Study (publishing an incorrect prospectus)

133 Article 6 of the Prospectus Directive[153] stipulates that the issuer, offeror or person asking for the admission to trade on a regulated market or guarantor is responsible for the information given in a prospectus. However, civil liability cannot be based directly on this provision or on the Dutch Act on Financial Supervision.[154] Under Dutch civil law, **no specific prospectus liability** regime exists. Prospectus liability claims can be based on the **general tort law** provision of section 6:162 DCC ff. For a claim based on torts for an incorrect prospectus, two species of tort law are relevant. First, investors that qualify as **consumers** are protected by arts 6:193a-193j DCC in which the **Unfair Commercial Practices Directive**[155] has been implemented. Second, investors that do not

149 *ML Lennarts*, T&C Burgerlijk Wetboek, commentaar op artikel 139 Boek 2 BW.

150 *Huizink* (fn 41) art 139 Boek 2 BW, aant 3.

151 Ibid.

152 *Asser/Maeijer & Kroeze* 2-I* 2015/573.

153 Directive 2010/73/EU opf the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

154 Wet van 28 September 2006, houdende regels met betrekking tot de financiële markten en het toezicht daarop (Wet op het financieel toezicht).

155 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amend-

qualify as consumers are protected by the rules on **misleading advertisements**. The Misleading and Comparative Advertising Directive[156] has been implemented in arts 6:194–196 DCC.

134 A trader acts tortiously towards a consumer if he engages in a **commercial practice** that is **unfair**. A trader is any natural person or legal entity who, in commercial practices covered by arts 6:193a–j DCC, acts in the course of his professional practice or business and anyone acting in the name of or on behalf of such a trader. A consumer is a natural person who, in commercial practices covered by arts 6:193a–j DCC, does not act in the course of his professional practice or business. A commercial practice is any act, omission, course of conduct or representation, commercial communication, including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers. A commercial practice is **unfair** if a trader acts: (a) contrary to the requirements of professional diligence, and (b) the ability of the average consumer to make a decision on the basis of sufficient information is noticeably limited or may be noticeably limited, because of which the average consumer made or may have made a transactional decision which he otherwise would not have made (art 6:193b(2) DCC). In particular, commercial practices shall be unfair if a trader conducts: (a) a misleading commercial practice as meant in arts 6:193c up to and including 6:193g DCC, or (b) an aggressive commercial practice as meant in arts 6:193h and 6:193i DCC.

135 The person that makes public or causes to be made public misleading information regarding goods or services which he, or the person for whom he acts, offers in the conduct of a profession or a business can be held liable. For example, (i) publication of a misleading prospectus (this is for instance the case when certain important information is omitted); (ii) carrying out an unfair commercial practice; or (iii) publication of misleading advertisements.

136 Is D liable to P?[157] In the case study, an incorrect prospectus has been published and D has provided false information to the auditor who used this information for drafting the prospectus. As the act of providing incorrect information is an 'internal' act, D will not be qualified as a direct perpetrator under arts 6:193a–193j DCC and 6:194–196 DCC. It is more likely that D is liable to P on

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ing Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), in effect since 15 October 2008.

156 Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, in effect since 15 October 2008.

157 *JP Franx*, (Prospectus)aansprakelijkheid van bestuurders bij beursgang en emissie, in het bijzonder onder de Wet oneerlijke handelspraktijken, Ondernemingsrecht 2014/112, 571–579.

the basis of general tort (art 6:162 DCC) as a **secondary perpetrator** because the Corporation has published an incorrect prospectus, which qualifies as a misleading commercial practice and therefore results in a tortious act of the Corporation vis-à-vis the investors. D will then be jointly liable if he can be severely held to blame. In this case D negligently and intentionally provided incorrect information. As he therefore knew that the Corporation would act tortiously when providing this information to investors, it is most likely that D can be severely held to blame and will be liable towards P for the misleading or incorrect prospectus. We refer to the general outline of tort (art 6:162 DCC) under question 23 for further requirements.

23.4. Case Study (violation of cartel law)

137 Agreements, such as illegal price-fixing, that violate the cartel prohibitions of art 6(1) Competition Act or art 101(1) TFEU, are **null and void** on the basis of art 6(2) Competition Act or art 101(2) TFEU. Furthermore, art 3:40(2) DCC declares void legal acts contrary to mandatory rules. A **claim for damages** in the case of infringement of antitrust rules can be based on tort (art 6:162 DCC). D as **Director** of C-Corporation is jointly liable as a **secondary perpetrator** if he can be severely held to blame. In this case D participates in illegal price-fixing. It is likely that D is **liable** towards P for violation of cartel law. However, as far as we know no case law has been published on this issue. We refer to the general outline of tort (art 6:162 DCC) under question 23 for further requirements.[158]

23.5. Case Study (infringement of competition law)

138 If P is a competitor of C-Corporation and therefore is to be considered as acting in the course of a business, his claim can be based on the ground of **comparative misleading advertisement**, as a specific rule of tort law. Article 6:194a DCC defines comparative advertising as any advertising, which explicitly or by implication identifies a competitor or goods or services offered by a competitor. Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met: (a) it is not misleading; (b) it com-

158 *BJ Drijber*, Mededingingsrecht, in: BF Assink et al (eds), De vele gezichten van Maarten Kroeze's 'Bange Bestuurders', Uitgave vanwege het Instituut voor Ondernemingsrecht deel 104 (2017) 125–136.

pares goods or services meeting the same needs or intended for the same purpose; (c) it objectively compares one or more material, relevant, verifiable and representative feature of those goods and services, which may include price; (d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor; (e) it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor; (f) for products with designation of origin, it relates in each case to products with the same designation; (g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products; and (h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

Under art 6:194 DCC, a person who makes public or allows to be made public an announcement regarding goods or services which he, or the person on whose behalf he acts, presents in the course of a professional practice or business, acts tortiously towards another person who acts in the course of his business if this announcement is **misleading** in one or more of the following respects, for example as to: (a) the nature, composition, quantity, quality, characteristics or possibilities for use; (b) the origin, the way and the time of manufacturing; (c) the size or volume of the goods in stock; (d) the price or its method of calculation; (e) the grounds for or the purpose of the offer; (f) the awarded distinctions, certificates (references) or other assessments or declarations of third persons, or the used scientific or technical terms, the technical findings or the statistical data; (g) the conditions under which goods are supplied, services are rendered or payment is made; (h) the extent, content or duration of the warranty (guarantee); (i) the identity, qualities, capacity or competence and the person by whom, or under whose control or supervision or with whose cooperation, the goods are or will be manufactured or are presented or the services are or will be performed. **139**

If the advertisements qualify as misleading comparative advertisements under art 6:194/194a DCC, the Corporation has acted tortiously. D as director of C-Corporation is **jointly liable as a secondary perpetrator** if he can be **severely held to blame**. It is likely that D is liable towards P for misleading advertisements. We refer to the general outline of tort (art 6:162 DCC) under question 23 for further requirements.[159] **140**

159 *Asser/Maeijer/Van Solinge & Nieuwe Weme* 2-II* 2009, nos 269 and 471.

24. Company insolvency: liability of the board and its members towards the company's creditors

141 As discussed under question 23, individual Directors can be held liable in the case of insolvency by liquidators (arts 6:162 and 2:138/248 DCC) or individual creditors (art 6:162 DCC).

24.1. Case Study (delay in filing for insolvency)

142 P1, P2 and P3 are individual creditors of C-Corporation and thus each able to individually assert claims against C-Corporation for not meeting its contractual obligations and, in line with such claims, assert **claims against D** pursuant to art 6:162 DCC. For a claim against D to be successful, the threshold of **severe blameworthiness** must be met. We refer to the outline of secondary liability, as described under question 23.

143 D, acting in his capacity as Director of C-Corporation, has achieved or allowed that C-Corporation can no longer meet its contractual obligations. If D knew or reasonably **should have known** that his management had the consequence that existing obligations could no longer be met and the **Corporation did not have sufficient means to remedy the damage to the third party deriving from the Corporation's default** on those obligations,[160] then D is **liable** for the damage to that third party.

144 The case study could be pleaded as follows. As of 1 January 2014, shortly after entering into the loan agreement between C-Corporation and P1, D was in possession of such knowledge, yet he **did not undertake any action to avoid or limit the damage P1 would suffer** as a consequence of the direct financial situation of C-Corporation. It cannot be derived from the facts of the case what the cause of the insolvency was, thus only damage resulting from the difference between the 20% recovery rate of 1 January 2014 and the 15% recovery rate of 1 June 2014 can be confidently attributed to D's conduct. For that part, D failed to appreciate the interests of P1, and P1 would be able to demonstrate severe blameworthiness on the part of D, making D liable for P1's damages.

145 In the case of P2 and P3, when entering into the agreements D knew or should have reasonably known that C-Corporation could not meet its obligations under these agreements and did not have sufficient means to remedy the damage to P2 and P3 deriving from the Corporation's default on those agree-

160 HR 13 August 2001, ECLI:NL:HR:2000:AA4873 (*New Holland Belgium/Oosterhof*).

ments.[161] D **should never have entered into an agreement with either P2 or P3**, therefore all damage they suffered can be attributed to D's conduct. **Severe blameworthiness** can, again, be established. Consequently, D is also liable for the damage to P2 (to the amount of the outstanding loan) and P3 (to the amount of € 400).

25. General duties owed by the board and its members towards creditors and liability for breach

146 As explained in the answer to question 23, (individual) Directors can be **secondarily liable** with their Corporation if they can be **severely held to blame** for their conduct towards the third party (eg a creditor) (art 6:162 DCC).[162] A Director's liability towards creditors may be established in the case of the Corporation's insolvency (art 2:138/248 DCC). Dutch law and case law do not define or limit the type of duties that, if breached, result in Director's liability.

25.1. Case Study (personal liability for delay in filing financial statements)

147 Given the insolvency of C-Corporation and the liability for the non-fulfilment of its contractual obligations, P can assert a claim pursuant to art 6:162 DCC against D. P must prove that D, acting on behalf of C-Corporation, is **severely blameworthy** for the Corporation's inability to meet its contractual obligations towards P. This **secondary liability** is established if D, when entering into an agreement with P on behalf of C-Corporation, knew or reasonably **should have known that C-Corporation could not meet its obligations** under that agreement and did not have sufficient means to remedy the damage to P deriving from C-Corporation's default.[163] The burden of proof lies on P. The fact that D fails to publish the annual statement of C-Corporation in a timely manner and in the required form is one of the circumstances for establishing D's liability, but does not automatically lead to liability as such.

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161 HR 6 October 1989, ECLI:NL:HR:1989:AB9521 (*Beklamel*).

162 HR 23 November 2012, ECLI:NL:HR:2012:BX5881 (*Spaanse Villa*) and HR 5 September 2014, ECLI:NL:HR:2014:2628 (*Tulip*).

163 HR 6 October 1989, ECLI:NL:HR:1989:AB9521 (*Beklamel*) and HR 8 December 2006, ECLI:NL:HR:2006:AZ0758 (*Ontvanger/Roelofsen*).

26. Direct liability of the board and its members towards creditors

148 As explained in the answer to question 23, (individual) Directors can be secondarily liable if they can be severely held to blame for their conduct against a third party (eg a creditor or a third party) (art 6:162 DCC) if their Corporation is liable to that third party. Dutch law does not define or limit the type of duties that, if breached, result in Director's liability. The third party may also encounter difficulties in establishing causality between the conduct of a Director in his capacity as Director of a Corporation and the damage suffered. Even if causality is established, depending on the claim made, it **remains to be seen whether a Director's duty of care goes as far as having to take into account the interests of that third party**.

27. Limiting the liability of the board and its members towards third parties

149 As discussed in detail in the answer to questions 21 and 22, the Board of Directors and/or individual Directors **cannot limit their liability** towards third parties. We refer to Part II, under D (above no 105ff).

27.1. Case Study (limitation of liability)

150 As discussed in detail in the answer to questions 21 and 22, the Board of Directors and/or individual Directors **cannot limit their liability** towards the company and/or the shareholders, or to third parties. We refer to Part II, under D (above no 105ff).

IV. Procedural Law Aspects

28. Persons and corporate organs can be parties to a suit for damages

151 In the Netherlands only individual Directors (as defendants), individual Supervisory Directors (as defendants), individual shareholders (as plaintiffs), Directors de facto (as defendants) – anyone who has played a part in the Corporation's management as if he were a director, arts 2:138(7)/248(7) DCC and arts 2:151/261 DCC – and, of course, the Corporation itself (as plaintiff) – thus **not Corporate Bodies** – can be party to a lawsuit for damages due to the mis-

conduct of the Board of Directors or the Supervisory Board. If, for example, the Board of Directors consists of several Directors and the Corporation would like to claim damages due to misconduct of the Board of Directors, the Corporation must file the lawsuit against all individual Directors.

We interpreted this question as to whether Corporate Bodies or individual members of those bodies can be party to a lawsuit. In answering this question we opted for the case that the Corporation as plaintiff files a lawsuit against Directors as defendants due to misconduct. It should be noted that, for example, Directors could file lawsuits against each other to indemnify and hold harmless for wrongful acts of another Director. In practice many variations in these lawsuits are possible. 152

29. Standing and requirements to sue for damages against the board

Dutch law distinguishes between **decision-making** and the power to represent the Corporation. If the decision to file a lawsuit for damages against the Board of Directors and/or one or more of the Directors is on the agenda of a Board of Directors' meeting, it is likely that all present Directors have a conflict of interest. Articles 2:129(6)/239(6) DCC stipulate that a Director does not participate in the deliberations and decision-making if he has a direct or indirect personal interest therein that is contrary to the interests of the Corporation and the affiliated enterprises. The same applies for Supervisory Directors (arts 2:140(5)/250(5) DCC). If, as a result, no resolution can be passed, the resolution has to be passed by the General Meeting, unless the articles of association provide otherwise. 153

If the requirements of the decision-making as described are not met, this does not affect the **power to represent** the Corporation. This power remains with the Board of Directors. It is not likely that present Directors will file a lawsuit against themselves. Therefore it is advisable to remove the present Directors and to appoint one or more new members of the Board of Directors. Another solution would be that the General Meeting appoints a special representative to represent the Corporation in the lawsuit against its (present) Directors. In general, the attorney filing the lawsuit on behalf of the Corporation will (or should) check whether these requirements are met and whether the Corporation is duly represented in this lawsuit. 154

30. Legal representatives and conflicts of interests

It is possible for a lawyer who represented the Corporation and worked closely with its Board of Directors to represent the Corporation in a suit for damages against former Directors, since the lawyer represented the Corporation and not the (indi- 155

vidual) Director. However, due to the (close) relationship between the former Director and the lawyer, it is not likely that this will happen. In practice, another lawyer will be appointed by the Corporation to represent the Corporation in the lawsuit against its former Director. If a lawyer represented the Corporation in the past, he cannot represent the Directors or an individual (former) Director in the lawsuit against the Corporation. The rules of the Dutch Bar Association do not allow this.

31. Pursuing damages against the board and its members: procedural rules and competent court

156 There is **no special proceeding** for claims for damages against boards and/or their members. The general action (*dagvaardingsprocedure*) is applicable, which means, in principle, that the court of first instance (*Rechtbank*) of the defendant's residence is the competent court in these legal disputes.[164]

157 The Enterprise Court (*Ondernemingskamer*), a specific judicial organ within the Court of Amsterdam, endowed with competences in specific areas of corporate law, deviates from regular proceedings and deals with **inquiry proceedings**. As art 2:350 DCC states, the inquiry shall be allowed if there is a reasonable cause to doubt proper management. If this is the case, the Enterprise Court appoints one or more persons who will inquire into the possible mismanagement. If the(se) inquirer(s) conclude(s) that mismanagement has taken place, the original initiators of the inquiry proceedings or Advocate-General on the basis of general interest may request the Enterprise Court to apply one or more of the remedies mentioned in art 2:356 DCC, including but not limited to: the **suspension or discharge of Directors**, the **annulment of their decisions** and **dissolution of the legal entity**. The inquiry proceedings cannot be limited in any way by the company's articles of association or an agreement.[165]

V. Insurance Law Aspects

32. General statutory and non-statutory rules regulating D&O insurance

158 In the Netherlands D&O insurance policies are mostly connected to Directors, Supervisory Directors and shadow/de facto Directors. In this part we will dis-

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164 Art 99 LCP.

165 *Veenstra* (fn 56) art 2:345 BW, aant A.

cuss D&O insurances in this respect. There are **no general rules** stipulating that Directors, Supervisory Directors and/or the Corporation are obliged to take out a D&O insurance policy, nor is D&O insurance regulated in the DCGC. However, risk management is part of the DCGC 2016. **Risk management** of large multinational (listed) Corporations **includes D&O coverage**. D&O coverage is also increasingly on the agenda of small and medium enterprises ('SMEs'). Deductibles are becoming more common practice, allowing insurers to adjust their policies to individual Directors, Officers and Corporations. If a Director or Supervisory Director would like to take out extra insurance also covering the **deductible,** this will, in general, lead to a higher premium. It depends on the remuneration arrangement between the Director or Supervisory Director on the one hand and the Corporation on the other hand, who pays for that extra premium.

33. D&O policies: parties, corporate representatives and the treatment of premiums

Usually, the **Corporation** – as insurance **policyholder** – is party to the insurance agreement with the insurer. The Corporation – as insurance policyholder – is obliged to pay the insurance premiums relating to the D&O insurance. The costs of D&O insurances are borne by the Corporation. A D&O insurance policy – a Side A cover: covering the personal liability of Directors and Supervisory Directors as individuals – is **part of the remuneration** of Directors and Supervisory Directors of larger multinational (listed) Corporations, and – increasingly – also part of the remuneration of Directors and Supervisory Directors of SMEs. 159

Usually, a D&O insurance policy has a **Side A cover,** ie covering the personal liability of the D&O themselves, and a **Side B cover** or Corporation reimbursement cover, ie covering the reimbursement of the insured Corporation if it paid out the claim of a third party on behalf of its Director(s) and/or Supervisory Director(s). Listed Corporations can also obtain a Side C cover or securities entity cover, ie a cover for claims against the Corporation itself for a wrongful act in connection with the trading of its securities. The **Side C cover** has the effect that in the case of a claim against both the D&Os and the Corporation, the coverage under the insurance has to be shared by the D&Os and the Corporation. As a result, Corporations take on extra layers of insurance with regard to the Side A cover, which is called the A side only insurance. This insurance is activated when the maximum coverage under the 'normal' insurance has been paid.[166] See also the answer to question 37. 160

166 *H Londonck Sluijk*, Dekking onder D&O verzekeringen, in: G van Solinge et al (eds), Aansprakelijkheid van bestuurders en commissarissen: Nadere terreinverkenning in een

161 Dutch law distinguishes between decision-making and the **power to represent** the Corporation. If the decision to enter into a D&O insurance is on the agenda of the Corporation, it is likely that all Directors and Supervisory Directors have a conflict of interest, since a Side A cover is usually obtained for all Directors. Articles 2:129(6)/239(6) DCC stipulate that a Director shall not participate in the deliberations and decision-making if he has a direct or indirect personal interest therein that is contrary to the interests of the Corporation and its affiliated enterprises. The same applies to Supervisory Directors (arts 2:140(5)/250(5) DCC). If, as a result, no resolution can be passed, the resolution has to be passed by the General Meeting, unless the articles of association provide otherwise. However, the power to represent the Corporation remains with the Board of Directors or other persons who have been authorized to represent the Corporation. Nowadays, it is common that one of the Directors represents the Corporation in relation to the insurance, whereas this used to be an in-house counsel, the secretary of the Board of Directors or the Risk and Insurance manager.[167]

34. Insured persons

162 The Directors, Supervisory Directors or shadow Directors (*feitelijk beleidsbepalers*) who fall within the scope of the definition of D&O under the insurance agreement qualify as insured persons. Mostly, this means that statutory Directors qualify as insured persons as well as persons that have been involved in legal proceedings in which they have been alleged to be a shadow/de facto Director taking into account the judgement of the Court. This means that, if the claim is based on liability as a shadow Director, and the Court decides that the defendant is liable but not as a shadow/de facto Director, the costs of the defence will be covered but the damages to be paid by the defendant will not.[168] Usually, all **current, future and past Directors and Supervisory Directors** of a Corporation and its subsidiaries are covered under a D&O policy. The insured persons are generally natural persons. When a Director is a legal entity, this means that in legal proceedings in which both the legal entity as well as the natural person

uitdijend rechtsgebied, Serie vanwege het Van der Heijden Instituut deel 140 (2017) 459–471.

167 *Londonck Sluijk* (fn 166) 459–471.

168 *A Hendrikse*, De (niet statutair)bestuurder-werknemer en de bestuurdersaansprakelijkheidsverzekering, in: Y Borrius et al (eds), Geschriften vanwege de Vereniging Corporate Litigation 2016-2017, Serie vanwege het Van der Heijden Instituut deel 141 (2017) 325–336.

who is the indirect Director are defendants, the costs relating to the defence of the legal entity are not insured. The **Side A cover** insures the Directors and Supervisory Directors (or the larger group of persons, as mentioned above). It is thus possible to take out a group insurance. The **Side B cover** insures the Corporation. It is also possible to include members of the Executive Committee and senior employees or managers for payment of extra insurance premiums. It is, however, not common to include these persons.

35. Standing to claim under a D&O policy

The **insured person** has the right to claim for performance under a policy in a case where the insurance contingency has occurred. If provided for in a specific provision in the conditions of the D&O insurance policy, according to art 6:253 DCC and art 6:254 DCC, a third party can assert direct claims against the insurer.[169] In general, no such provisions are made. **163**

An exception to this is a so-called **direct action from third parties** against the insurer. This is only possible in the case of **damage due to injury or death**: '*If, in case of an insurance against liability, the insurer has been informed pursuant to Article 7:941 DCC of the materialisation of the risk, then the injured person may claim that, if an insurance benefit has to be paid by the insurer to the insured person, the amount of this benefit, which the insured person under the insurance agreement may claim from the insurer on the grounds of the death or injury of the injured person, is paid directly to him*' (art 7:954 DCC). **164**

35.1. Case Study (claims for performance by the company)

As we understand it, there is a **Side A cover** under the D&O insurance policy. Usually, compensation under this insurance is **payable to either the Directors, Supervisory Directors and/or de facto Directors themselves, or the Corporation itself** (as policyholder). In this case, it is established that D is liable towards C-Corporation. See the answer to question 35. D has the right to claim for performance under the insurance. If D goes into hiding or becomes bankrupt, this does not change the legal assessment. **165**

169 *Asser/Wansink/Van Tiggele & Salomons* 7-IX* 2012/389.

35.2. Case Study (claims for performance by third parties)

166 **P cannot assert his claim directly** against the insurer under the policy. Claims can only be asserted directly against the insurer if the damage suffered is due to injury or death. This answer does not change in the event that P has no contractual relationship with C-Corporation or if D becomes bankrupt.

36. Definition and occurrence of the insured event: D&O vs legal protection insurance

167 D&O insurance is an insurance which covers **personal liability of the insured persons** for damage caused to third parties – including their respective Corporations – inflicted by an incident, provided that the claims made conditions under the agreement are met.[170] Such an incident is commonly described as: 'an **act or omission that results in liability**'. Generally, D&O insurance is based on the claims made principle. This means that the claim has to be made within the duration of the insurance agreement. Depending on the conditions of the insurance policy, a claim can be made when it has been filed with the insurer or when it has been made against the insured person. A combination of those is also possible. Mostly, it is possible to buy additional insurance to extend the period within which a claim that is made falls under the insurance agreement (*uitloopregeling*).[171] An insured event, as such, does not occur when the Corporation receives a claim letter from a shareholder of a third party. However, the policyholder (ie the Corporation) is obliged to **notify** the insurer of the claim as an event that could lead to liability and that could lead to payment of compensation by the insurer. If the policyholder does not notify the insurer within the notification period stipulated in the policy, this – in general – leads to a breach of contract by the policyholder due to which the insurer is no longer obliged to pay compensation. Under certain insurance policies it is possible that coverage exists when the insurer has been notified of certain circumstances within the duration of the insurance that may lead to a claim that will be made after the insurance has been expired.

168 The core purpose of a D&O insurance policy is to provide financial protection for D&Os against the consequences of actual or alleged 'wrongful acts' when acting in the scope of their duties. Intentional illegal acts, however, are typically not

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170 *De Groot*, Bestuurdersaansprakelijkheid (2011) 303 ff.

171 *M de Kort-de Wolde/P Potjewijd*, Verzekering en vrijwaring, Ondernemingsrecht 2005/93, 278–283.

covered under D&O insurance policies. The D&O insurance policy will pay for defence costs (in civil litigation) and financial losses when this will serve the primary objective of the insurance, which is the protection of assets of the D&O against the claim made in relation to acts as D&O.[172] In addition, extensions to many D&O policies also cover costs for D&Os generated by administrative and criminal proceedings or in the course of investigations by regulators or criminal prosecutors. In other words: the D&O insurance policy has a **wider scope than legal protection insurance**. The latter only covers the costs for legal assistance.

36.1. Case Study (costs of defending a director against a claim by the company)

The answer to this question **depends on the conditions** of the D&O insurance policy. In general, the costs of the defence of D against claims asserted by C-Corporation (based on internal liability – art 2:9 DCC) are included in the coverage provided by a D&O insurance policy. **169**

37. Scope of D&O coverage and the insurer's obligations: D&O vs legal protection insurance

In the Netherlands a **Side A cover or Direct Coverage**, covering the personal liability of Directors, Supervisory Directors and shadow/de facto Directors (as explained in relation to question 34) as individuals, is part of the remuneration of Directors and Officers of larger multinational (listed) Corporations, and – increasingly – also part of the remuneration of Directors and Supervisory Directors of SMEs. Also a **Side B cover or Corporate Reimbursement**, ie the reimbursement of the insured Corporation if it paid out the claim of a third party on behalf of its Director(s) and/or Supervisory Director(s), is common in the Netherlands. Listed Corporations can also obtain a **Side C cover of Securities Entity Coverage,** ie a cover for claims against the Corporation itself for a wrongful act in connection with the trading of its securities. **170**

A D&O insurance policy provides financial protection for insured persons against the consequences of actual or alleged wrongful acts when acting within the scope of their duties. Its covers **damages, judgments, settlements, costs of defence of legal actions, claims or proceedings and appeals therefrom,** **171**

172 *Hendrikse* (fn 168) 325–336.

salvage costs, rehabilitation costs and other extra costs approved by the insurer. In addition, extensions to many D&O insurance policies also cover costs for insured persons generated by administrative and criminal proceedings or in the course of investigations by regulators or criminal prosecutors. Costs for legal defence, extra costs and salvage costs must be compensated **in advance** by the insurer if the costs are approved by him or incurred at his request. Regarding legal defence, insurers decide, **after consultation** with the insured person and the Corporation, on (i) acknowledgement of the liability, (ii) the assessment of the damages, (iii) the appointment of a lawyer and/or expert and the instructions given to them, and (iv) possible settlements.

172 According to art 4:67 Act on Financial Supervision (*Wet op het financieel toezicht*) ('FSA'), common legal protection insurers must ensure that the contract for legal assistance cover stipulates expressly that the insured person is **free to choose a lawyer** or another expert competent by law if:

- a lawyer or other expert competent by law is requested to defend, represent or promote the interests of the insured person in court or administrative proceedings;
- a conflict of interest arises.

173 In the Netherlands there is still an ongoing debate as to which extent common legal insurers must amend the conditions of their legal protection policy to act according to the **free choice of lawyer principle**.[173] In practice D&O liability cases are handled by specialist lawyers. The insurer and the insured persons agree upon who is the legal representative. It is in the interest of both insurer and the insured person to appoint a highly qualified lawyer for these matters. Another issue is avoiding **conflicts of interest** between the insured persons themselves and/or the Corporation (Side A and Side B cover).

37.1. Case Study (advance payments for legal defence)

174 If the D&O insurance policy provides for a **Side A (Direct Coverage)** and **Side B (Corporate Reimbursement),** this constitutes an **insured event** under the D&O insurance policy. Only if D acted as a Director of C-Corporation must the insurer **compensate (in advance)** the costs for legal defence, extra costs and salvage costs if these costs are approved by the insurer or incurred at his request. We refer to the answer to case study 37.1.

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173 Not only due to art 4:67 FSA, but also to the Judgment of the Court of Justice of the European Union (CJEU) 7.11.2013, C-442/12, *Sneller v DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV*, ECLI:EU:C:2013:717.

37.2. Case Study (reimbursement and compensation for fines and imprisonment)

D can probably not claim any payment under the D&O insurance policy for any of the offences mentioned in this case study. **Fines and damage due to imprisonment** are, in general, **excluded from coverage**. The degree of intention is, in general, irrelevant due to this exclusion. When the insurance involves a global coverage, punitive damages may be included under certain conditions.[174] Intentional acts will most likely be excluded. However, conditional intention – when the insured person has accepted the likely chance that the damage would occur – may fall within the scope of the insurance (see answer to question 39).[175] Costs of defence incurred in relation to the legal proceedings pertaining to the imprisonment may in principle be claimed by D.[176] 175

37.3. Case Study (pure economic loss/mass claims)

If the financial condition of the Corporation has been misrepresented in the annual accounts or in the interim figures as published by the Corporation or in the annual report, then the Directors are **jointly and severally liable towards third parties** for the damage which they have suffered as a result thereof. A Director, who proves that such misrepresentation is not attributable to him, is not liable (arts 2:139/249 DCC). 176

The investors can sue D, regardless of any negligence, for damages because when the annual accounts **misrepresent the condition of the Corporation,** Directors are liable towards third parties for losses suffered as a result thereof. D may, however, plead that the misrepresentation in the annual accounts is not attributable to him. It is not likely that D will succeed in this defence, because the financial affairs of the Corporation are the joint responsibility of the Directors. 177

If there is fault on the part of the Director, a D&O insurance policy would (depending on the terms and conditions of the insurance agreement) be able to 178

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174 *A Hendrikse/DAM van den Heuvel*, Bescherming tegen bestuurdersaansprakelijkheid in tijden van crisis, Tijdschrift voor de Ondernemingsrechtpraktijk 2009/4, 127–131.

175 *WCT Weterings*, Bestuurdersaansprakelijkheid, D&O verzekering en moreel risico: hanteren van eigen risico bij Side-A dekking is wenselijk, Ondernemingsrecht 2011/116, 571–580.

176 *MHC Sinninghe Damsté*, Biedt de bestuurdersaansprakelijkheidsverzekering afdoende bescherming tegen civielrechtelijke, strafrechtelijke en bestuursrechtelijke aansprakelijkheid? De stand van zaken anno 2015, in: M Holtzer et al (eds), Geschriften vanwege de Vereniging Corporate Litigation 2014-2015, Serie vanwege het Van der Heijden Instituut deel 128 (2015) 171–191.

cover negligence, gross negligence and even conscious disregard of duties, but not bad faith with the actual intent to do harm.

38. Duties of D&O policyholders and insurers' right to participate in the claims handling process

179 In general, but not limited to the following, the policyholder and the insured person have the following obligations:

- the policyholder must **pay the premiums**;
- the policyholder must give the insurer **notification of any alleged or asserted claim** as soon as reasonably practicable after it first becomes aware of such claim but no later than within a period set out in the conditions of the D&O insurance policy;
- the policyholder must provide the insurer with such **further information and documentation** as it may reasonably require;
- in the event of a claim, the insured party will at all times and at its own cost provide the insurer with all **information, evidence, documentation, assistance and co-operation** and will execute such documents, including signed statements and affidavits, which the insurer reasonably requests;
- the insured party will at all times and at its own costs use reasonable endeavours to do and concur in doing everything reasonably practicable to **avoid or diminish loss and to assist with the defence, investigation or settlement** of any claim;
- the insured party is obliged to **contest and defend any claim** made against him;
- to **inform the insurer** about: (i) major changes in the activities of the enterprise of the Corporation (mergers, acquisitions, (new) subsidiaries and participations, expansion, reduction, strike(s)); (ii) amendments of the articles of association; (iii) change of control; (iv) upcoming liquidity problems; and (v) the appointment of a receiver or trustee.

180 In general, the **insurer** is entitled to **associate and participate fully in the defence or settlement** of any claim. Usually, the insurer reserves its rights under the D&O insurance policy, including its right to agree or deny cover while it assesses a claim or participates in the defence of any claim. In general, the policyholder and the insured person(s) must not settle or offer to settle any claim, incur any costs of defence and/or other costs, charges, fees or expenses, or otherwise assume any contractual obligation or admit any liability in respect of any claim without the insurer's prior written consent, which shall not be unrea-

sonably delayed or withheld. For the appointment of a lawyer we refer to the answer to case study 37.1.

181 In the event that the policyholder and/or the insured person do(es) not fulfil one of the obligations as described and the insurer is harmed in its interest due to this non-fulfilment, the insurer is **no longer obliged to provide cover** under the D&O insurance policy or to pay compensations.

39. Typical exclusions from coverage in D&O policies

182 **Common exclusions** in D&O general policy conditions are: (i) any deliberately fraudulent or deliberately dishonest act or omission; (ii) any wilful violation of law or wilful breach of duty imposed by any law; (iii) illegal remuneration or personal profit; (iv) property damage and bodily harm; (v) legal action already taken when the policy begins; (vi) claims made under a previous policy; and (vii) claims covered by other insurance.

183 Furthermore, art 7:952 DCC stipulates that damage caused intentionally or due to recklessness will not be reimbursed by the insurer. Conditional intent and lower degrees of intent are, in general, still covered by the insurance.[177] As art 7:952 DCC contains regulatory law, parties can agree to exclude other damage from reimbursement, or include higher degrees of intent.[178] However, the Dutch Supreme Court decided that the **highest degree of intent (intention as purpose) cannot be insured,** as it would breach art 3:40 DCC. Finally, arts 7:925 in conjunction with 7:928 DCC exclude **circumstances already known** to the insurer at the commencing date of the insurance.

40. Claim for determining the insurance coverage

184 Any complaints or disputes that arise between the insurer on the one hand and the policyholder and/or the insured person on the other shall in first instance be **settled by 'Kifid'**[179] or any other organization for the settlement of complaints. More commonly, disputes are settled by the **court**. The **policyholder as well as the insured person may file a claim** against the insurer. Some D&O insurers have general conditions that stipulate that the transfer or cession of the right to

177 *De Groot* (fn 170) 3025 ff.

178 *Cieremans*, GS Bijzondere overeenkomsten, art 952 Boek 7 BW, aant 7.

179 An independent institution that mediates between consumers and banks, insurers and other financial services; <www.kifid.nl>.

claim is not possible or is invalid. Although it is possible to stipulate that on behalf of the insured person the Corporation can claim under the D&O insurance policy, it is not likely that such a provision will be agreed upon due to possible conflicts of interest that could occur under Side A and Side B cover.

41. Differences between the legal position of the board or director

41.1. Case Study (comparison of D&O insurance vs exclusion of liability)

185 **Side A coverage** under a D&O insurance policy as described in situation **(a)** is **valid** and protects D as Director of C-Corporation for claims if his liability is established.

186 An **exclusion of liability** as described under situation **(b)** is **invalid** as art 2:9 DCC is considered imperative law. Any provision in agreements or resolution of appointment that excludes liability on the basis of art 2:9 DCC is void due to violation of law (art 3:40 DCC).[180] We refer to the answer to case studies 17, 18, 18.1, 22 and 22.1. D is therefore not protected from claims of C-Corporation.

180 Eg Court of Amsterdam 30 September 2015, ECLI:NL:RBAMS:2015:6932.