LEGAL UPDATE

Attributing the knowledge of a director to the company

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All the acts of a company are carried out by natural persons. For example, a company can enter into an agreement by its director (or another authorised representative) signing it. And a company can commit an unlawful act by one of its directors and/or staff members committing an unlawful act.

In most cases, a company is represented by a director. The board represents the company unless the law or the company's articles of association provide otherwise.

If a director or another authorised representative is engaged in talks on the company's behalf, their statements are regarded as the statements of the company. On the other hand, if a party makes a statement to the directors of a company, i.e. the actual contracting party, such statement is regarded one which the company has taken note of. However, the knowledge of a director is not always equated with the knowledge of the company.

In a recent judgment, the Dutch Supreme Court reviewed whether the knowledge of directors (and a supervisory director) could be attributed to the company itself.

The case put to the Dutch Supreme Court was a dispute in which two former directors and a former supervisory director of an insurance company had, in 2007, transferred part of its credit portfolio to a party that (i) had in part been established by them; and (ii) in which they held a considerable stake, without informing the other officers and shareholders of this conflicting interest, for a purchase price of 1 AWG, i.e. EUR 0.47.

After the new managing board learned of this conflicting interest in 2013, the former officers and the buyer of the credit portfolio were held liable by the insurer. In the proceedings, the buyer raised the defence that the insurer's claim had become statute-barred. A limitation period starts to run on the day after the day on which an injured party learns of the damage and the liable party. Given that the officers involved, and therefore the insurer too, were aware of the conflict of interest at the time of the transaction, the limitation period started to run at that point, according to the buyer.

In its judgment the Dutch Supreme Court set out the doctrine of corporate attribution. In principle, the nature of the role of company director means that the latter's knowledge must be regarded as the knowledge of the company in commercial transactions. However, in special circumstances this may be different. The Dutch Supreme Court saw sufficient cause to conclude that these special circumstances were at play in this case. The reason was that the buyer of the credit portfolio, in which two of the officers themselves also held a position on the board, had collaborated in keeping the insurer in the dark about the conflicting interests and had made sure that the insurer would not take legal action against it. In such circumstances, the knowledge of the insurer's officers may not be attributed to the insurer. The buyer of the portfolio collaborated in and subsequently profited from the officers' mismanagement.

According to the Dutch Supreme Court, these circumstances meant that, in the relationship between the insurer and the buyer in the commercial transaction, the knowledge of the three officers concerned was not to be regarded as the knowledge of the insurer and the limitation period of the legal action against the buyer had consequently not started to run.

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