# Directors' Liability Memo

## Introduction

- In principle, directors and officers of limited liability companies are not personally liable for the legal acts and duties performed on behalf of the company.
- However, in specific circumstances, directors can be sued for damages by the company, third parties and/or the bankruptcy administrator ('piercing the corporate veil') with great financial impact.
- Hereafter we provide a brief summary of key variants of director's liability under Dutch Law.

## External vs internal liability

- Mismanagement, maladministration and improper conduct can be grounds for liability of directors vis-à-vis the company (internal liability) on the basis of Article 2:9 of the Dutch Civil Code (hereafter: 'DCC')
- Article 6:162 DCC, the main tort-law provision in Dutch private law, governs the liability of directors towards third parties (external liability). Specific torts, such as duties of care towards creditors of the company, have developed in case law.

## Internal liability

- Directors ('bestuurders') are members of the executive and thus have a distinct, statutory relationship with the company.
- Not fulfilling key duties and obligations that belong to this special relationship is the legal basis for liability of directors towards the company and can result in damage claims (Article 2:9 DCC).
- There is a high threshold for the liability of directors; recourse on personal assets of directors is only possible in case of seriously culpable conduct (ernstig verwijtbaar handelen).
- Whether conduct is sufficiently culpable will depend on the circumstances of the case. Relevant circumstances include but are not limited to:
  - the nature of activities performed by the legal entity and the inherent risks;
  - the division of tasks among board members; and
  - the information that the board possessed or should have possessed when events transpired (to mitigate hindsight bias).
- If directors take (sufficient) measures to avert the negative implications of their conduct, they are generally not liable.
- A company may discharge directors for their duties towards the legal entity. However, under exceptional circumstances a director may be liable towards the company even if full discharge has previously been granted by the shareholders.
- In addition to the distinct relationship that originates from corporate law, directors also have a contractual relationship with the company.
- Maladministration and mismanagement may also qualify as non-performance of contractual obligations and thus provide a basis for liability towards the company based on a breach of contract.

## External liability

- If a company acts negligently towards third parties, directors may be liable for damages under Article 6:162 DCC.
- Case law prescribes the requirement of serious culpable conduct (codified in Article 2:9 DCC) to apply mutatis mutandis to liability towards third parties on the basis of Article 6:162 DCC.
- It is possible to define the following three broad categories of conduct that may serve as reasons for liability of directors towards third parties:
  - committing the company to an obligation with a third party while the director knows or should know that the company is unable to fulfill the obligation and does not provide sufficient recourse for damages;
  - Intentionally defaulting on pre-existing obligations towards a third party (fraudulent conveyance of assets falls under this category); and
  - conduct that disrupts the paritas creditorum (i.a. preferential payments).

## Directors' liability in the event of bankruptcy

- In the event of bankruptcy, directors can be liable towards the estate under Articles 2:248 DCC (for private limited companies) or 2:138 DCC (for public limited companies).
- Pursuant to these articles, the board of directors collectively, or individual directors, may be sued by the bankruptcy administrator for the estate's shortfall (debts that remain unpaid after liquidation) if:
  - duties and/or obligations have been conducted in a manifestly improper manner; and
  - it is plausible that manifestly improper conduct is a key cause of the bankruptcy (it is not necessary for such conduct to be the sole cause of bankruptcy).
- The bankruptcy administrator principally carries the burden of proof. However, in case of non-compliance with the obligations under Article 2:10 DCC (the obligation to keep records) or Article 2:394 DCC (the obligation to publish the annual accounts), the burden of proof shifts to the directors. If there is a legal presumption that this improper conduct has been a key cause of bankruptcy, this presumption can be refuted by the directors.
- A director that can prove that he is not at fault for improper conduct by the board and that he has not been negligent in taking measures to avert the consequences thereof is not liable.

## Get in touch

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