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Update on relevant aspects of employment law for directors

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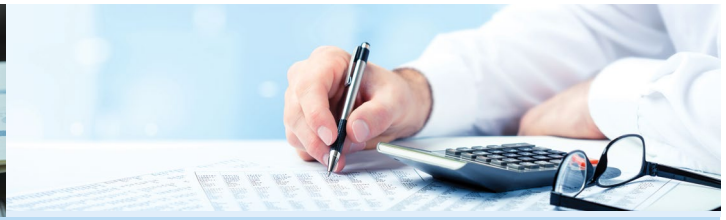

In this edition

Update on relevant aspects of employment law for directors

In 2019, the legal position of the director was set out in this newsletter.[1] The legal framework and points to consider at the time of the intended dismissal of a director were discussed in detail.

Since the overview provided in 2019, legislative changes were introduced and several interesting rulings have been rendered which focussed on the position of the director under employment law. In this edition, we elaborate on some of these rulings and other relevant developments on the basis of various themes that may come into play at the time of a director's dismissal. First, we briefly explain the special position a director occupies in employment law. We then discuss the requirements for a valid dismissal of the director and, in particular, the importance of a reasonable ground for dismissal and the possible financial (and other) consequences if these requirements are not met. Finally, we discuss a few legislative changes relating to the position of the director of a foundation and invoking the cooling-off period.

1. The special position of the director

The director has a dual legal status. On the one hand, a legal relationship under company law created upon appointment as a director and, on the other hand, a contractual obligation, usually in the form of an employment agreement.[2] This special dual legal status entails that at the time of dismissal, a different procedure applies for a director than for an 'ordinary' employee. The premise in this regard is that the relevant individual actually has the status of a director as a result of a valid appointment and acceptance of the position as director. The performance of typical directorial acts does not in itself produce a qualification as a director.

1.1 Appointment and acceptance

To qualify as a director, an appointment is required.[3] Except in the case of incorporation or appointment by the Enterprise Court in Amsterdam, the appointment requires a resolution of the body authorised to do so. Normally this will be the shareholders' meeting and, in companies that fall under the large company regime (*structuurregime*), the supervisory board. It is also possible to grant the power to appoint directors as part of the articles of association to shareholders of a certain class or designation.

1 By the term 'director' we mean each time director as referred to in Book 2 of the Dutch Civil Code (DCC), also frequently referred to in practice as the 'statutory director, which since the introduction of the Management and Supervision of Legal Entities Act (*Wet Bestuur en Toezicht Rechtspersonen*) also includes the director of a foundation.

2 For the sake of completeness, it is noted that the director can also decide to enter into a contract with the company on the basis of a services agreement. In this Quoted we will assume, unless stated otherwise, the situation that the individual is contracted on the basis of an employment agreement. Under Section 2:132(3) DCC the director of a listed company cannot work on the basis of an employment agreement.

3 Supreme Court 15 December 2000, *NJ* 2001/109 (*Van Ekelenburg/Squamish*). The articles that provide for the appointment of the director are mandatory (Section 2:25 DCC).

Unless the articles of association specify otherwise, an appointment resolution taken in a meeting is not bound by specific formalities. It does not follow from the law that documenting such appointment in writing is a constitutive requirement for appointment. That being said, documenting the appointment (in writing) is strongly advised to avoid any discussions in the future. If a written appointment resolution is not in place and a discussion arises about the qualification as a director, it is up to the employer to prove the directorship. Examples of such proof include minutes in which the appointment is unequivocally mentioned by the shareholders' meeting, the registration in the trade register of the Chamber of Commerce, the contents of the employment agreement or witness statements. No single circumstance has to be decisive, rather it must become sufficiently plausible on the basis of the various circumstances that an appointment actually took place at a certain moment. The attitude and conduct of the (alleged) director, is in itself insufficient for a qualification as director. An appointment resolution without holding a meeting, unlike an appointment resolution taken in a shareholders' meeting, does require a written document.

The appointment of a director may lead to discussions at the time of dismissal, as the lack of a valid appointment resolution in principle entails that the (alleged) director qualifies as an 'ordinary' employee. In that case, the full protection of employment law applies, which for example means that the individual concerned cannot be unilaterally dismissed by way of a shareholders' resolution.[4] Claiming that an appointment resolution is absent (i.e. contesting the status as director) is therefore a position that the (alleged) director can take in the context of an intended dismissal as a negotiation strategy. Such was the case in court proceedings where the parties were in dispute as to whether the (alleged) director was actually a director, and whether he could therefore be dismissed as such. The Supreme Court rejected the employer's appeal against the court's ruling, establishing thereby that the (alleged) director was not a director at the time of dismissal.[5] As a result, at the time of the dismissal, regular employment termination law for employees applied and the dismissal resolution taken by the general meeting was invalid. During the proceedings which focused on the status as director, the employer had in parallel conditionally requested the court to dissolve the employment agreement in case it involved an 'ordinary' employee. This request was granted, which limited the impact of the Supreme Court's ruling to a certain extent.

Besides the appointment, the director's acceptance of the appointment is a constitutive requirement to establish the status of director. Acceptance may be explicit or implicit. If proof of acceptance is lacking, it can also be made plausible on the basis of facts, conduct and circumstances that the appointment has been accepted. This could include, for example, the alleged director signing the Chamber of Commerce form, taking out liability insurance for directors, being physically present at the general meeting where the appointment took place or signing the financial statements.[6]

1.2 Dismissal

Besides the appointment and acceptance, the special position of the director also becomes apparent at the time of dismissal. In this regard, the director enjoys less protection against dismissal than an 'ordinary' employee. The director can be dismissed at any time by the body authorised to make the appointment, unless a prohibition on termination (*opzegverbod*) such as illness is the case or other agreements were made with

4 For a detailed explanation of the appointment of the director and the disputes that may arise in that respect, see Y. el Harchaoui and K. Wiersma (in Dutch): *Het benoemingsbesluit en de bestuurder: de stand van zaken*, TAP 2023/2 no. 49.

5 Supreme Court, 3 June 2022, ECLI:NL:HR:2022:817.

6 See also: K. Wiersma & Y. El Harchaoui (in Dutch): *Het benoemingsbesluit en de bestuurder: twee communicerende vaten*, TAP 2014/206.

the director,[7] without prior 'consent' from the court or the Employee Insurance Agency (UWV).[8] However, the fact that termination can take place unilaterally at any time does not mean that termination can take place without a reasonable ground for dismissal. In the absence of a reasonable ground for dismissal (or a serious culpable act by the employer), the court may award a fair compensation to the director (please refer to paragraph 3). Different from an 'ordinary' employee, when a dismissal resolution relating to a director is valid, the court cannot decide to reinstate the employment agreement.[9] If the dismissal resolution is legally valid, it will in principle automatically lead to the termination of the underlying employment agreement.[10] However, this is subject to the requirement that the directorship and the employment agreement coincide at the same company and, as mentioned above, no prohibition against termination applies and no other agreements are in place with the director.[11] The Court of Appeal in Den Bosch ruled in 2022 that if the parties have made other agreements in this respect, there must be (clear) consensus about the wish to maintain the employment agreement following a dismissal resolution.[12]

1.3 Right to be consulted

Under Article 30 of the Works Councils Act (*Wet op de ondernemingsraden* - **WOR**), the employer must give the works council the opportunity to issue its advice on a proposed resolution to appoint or (compulsorily) dismiss a director.[13] The advice must be requested before the appointment or dismissal resolution is taken, so that the works council still has time to exercise substantial influence on the proposed resolution. Prior to the advice, at least one consultation on the intended resolution must be held with the works council. If no advice under Article 30 of the Works Councils Act has been requested, but a resolution has been taken it may be questioned whether the company[14] can then be obliged to reverse its decision. There is not yet clear cut case law available in this respect, but the general consensus is that such obligation does not exist.

2. Reasonable ground

Reasonable grounds are required to dismiss an employee. The possible reasonable grounds are exhaustively listed under Dutch law (Section 7:669(3) DCC). The reasonable grounds can be divided into business economic reasons, such as an economic, technological or organisational reason (the a-ground) or long-term incapacity for work (the b-ground), and on the other hand, personal reasons such as the employee's underperformance (the d-ground) or other reasons, on the basis of which the employer cannot reasonably be expected to maintain the employment agreement (the h-ground). It is also possible to combine several personal grounds as the basis for dismissal (the i-ground). The requirement of a reasonable ground also applies to a director. It does not follow from the parliamentary history that less or more burdensome requirements apply when assessing reasonable grounds for dismissing a director.[15] Whether a reasonable ground for a director in a specific case exists should therefore in principle be assessed the same as when the dismissal of an 'ordinary' employee is contemplated.

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7 Section 2:134/244(1) DCC.
8 Section 7:671(1)(e) DCC.
9 Section 2:134/244(3) in conjunction with 7:682(3) DCC.
10 Supreme Court 15 April 2005, ECLI:NL:PHR:2005:AS2030.
11 It would seem to follow from the Floriade case that this requirement also applies to the management agreement. Case law on this topic is not crystallised. See District Court of Rotterdam 3 January 2022, ECLI:NL:RBROT:2022:1004.
12 Court of Appeal Den Bosch, 28 July 2022, ECLI:NL:GHSHE:2022:2654 with note K. Wiersma.
13 This applies only to directors who are also directors on the basis of the definition of the Works Councils Act (the director who exercises the highest control, either alone or jointly, in managing the work).
14 The Works Councils Act defines the company as '*de ondernemer* ' (i.e. the proprietor or economic operator).
15 District Court of Amsterdam 14 March 2019, *JAR* 2019/104 with note K. Wiersma.

Not only the presence of a reasonable ground, but also the timing thereof is important. In a recent ruling by the District Court of Zeeland-West-Brabant, more clarity was provided about the moment of the assessment regarding the presence of a reasonable ground when dismissing a director.[16] It is important to note that the director has the right to be heard regarding the proposed dismissal and also has an advisory vote (more on this later).[17] In principle, these powers are exercised during the shareholders' meeting at which the proposed dismissal is scheduled (or in a timely manner before the dismissal resolution is passed without holding a meeting). According to the court, the director must be familiar with the reason(s) for the proposed dismissal resolution in order to exercise these rights. The reason(s) for dismissal that have been communicated prior to the shareholders' meeting are also of importance. If no reasonable ground was present at the time the intention was communicated, this could potentially affect the discussion as to whether the employer acted in a seriously culpable manner (resulting in a fair compensation). After all, according to the court, the director cannot be confronted with an intention to dismiss him/her without a reasonable ground for such dismissal.

When a director is dismissed, the reasonable ground relating to underperformance (the d-ground) is generally less to be expected, primarily because of the requirement that an improvement plan has to have been completed. In case of a underperforming director, there is generally no willingness/time to complete an extensive improvement plan given the nature of the position.

Case law shows that where directors are dismissed the employer more often invokes 'other circumstances of such a nature that the employer cannot reasonably be required to continue the employment agreement' (the aforementioned h-ground). To clarify the scope of application of the h-ground, the legislator by way of example refers to the case of a manager with whom there is a difference of opinion about the policy/strategy to be pursued by the company.[18] Although partly due to this example there seems to be more room to dismiss a director on this ground, case law shows that the existence of this ground will not be readily assumed.[19] Reasons a request for dismissal would be unsuccessful include (i) the fact that there is no actual difference of opinion, (ii) there have been insufficient discussions with the director on the difference of opinion or (iii) the fact that, by its nature, dismissal under company law does not necessarily entail a sufficient (h-)ground for dismissal under employment law. Besides a difference of opinion, this ground for dismissal is also used when lack of trust in the director is the case. In view of the special nature of the relationship between a company and its director, without trust, a company cannot be expected to continue the employment agreement (as long as the breach of trust is sufficiently substantiated). For example, in a recent ruling it was deemed sufficient to assume a breach of trust when, despite a sharp decline in turnover, a director took insufficient action to boost the production and was unprepared when participating in important meetings.[20]

On 1 January 2020, an additional ground for dismissal was added to Section 7:669(3) DCC, the aforementioned cumulation ground (the i-ground). A combination of circumstances mentioned in two or more unsupported grounds for dismissal, more specific the grounds for dismissal related to personal reasons (grounds c-, d-, e-, g- or h-,

16 District Court of Zeeland-West-Brabant, 4 January 2024, ECLI:NL:RBZWB:2024:162.
17 Sections 2:8 and 2:227(7) DCC.
18 Parliamentary Papers II 2013/14, 33818, no. 7, p. 130.
19 A. Hoving &. B.M.C. Stenden (in Dutch): *Ontslag van de statutair bestuurder: meer kans op billijke vergoeding bij inbreuk op raadgevende stem en hoorplicht, minder kans op billijke vergoeding door cumulatiegrond, TRA* 2021/23.
20 District Court of Zeeland-West Brabant, 4 January 2024, ECLI:NL:RBZWB:2024:162.

as referred to in Section 7:669(3) DCC), which are of such severeness that the employer cannot reasonably be required to allow the employment agreement to continue, leads to an i-ground and consequently a reasonable ground for dismissal. If the court reaches a decision on the dismissal based on the i-ground, besides the general transition payment, the court can also award additional compensation amounting to half of the transition payment (the cumulative payment). An example of a cumulative ground (the i-ground) where an additional payment of 50% of the transition payment was awarded by a court concerned a combination of reasons that included underperformance (the d-ground), a disrupted employment relationship (the g-ground) and other circumstances that were so serious that the employer could not be required to continue the employment agreement (the h-ground). The director could not work well with the general manager, who no longer had faith in the director. In addition, the director caused uproar in the workplace and there were several disrupted relationships in the management team. The various person-related grounds (d, g and h) were individually insufficiently substantiated by the employer, but the circumstances taken together resulted in a sufficiently substantiated cumulative ground (the i-ground). In view of the inadequate the improvement plan that was offered to the director, the court awarded the director the maximum cumulative payment (1.5 x the transition payment).[21]

In a recent ruling by the Court of Appeal Arnhem-Leeuwarden, business economic circumstances (the a-ground) were invoked with the dismissal of a director.[22] The Court of Appeal emphasised that in principle it is up to the shareholders to decide to replace the director. However, this freedom does not go so far as to allow the dismissal of the director without having a reasonable ground for dismissal. Subsequently invoking business economic reasons for the dismissal while not discussing this with the director in this manner and being unable to objectively demonstrate this, does not provide a sufficient ground for dismissal. How a dismissal due to business economic reasons can be demonstrated objectively is laid down in the UWV's dismissal regulations and implementation rules. The rules of the UWV are also the guiding principle for the assessment by the court when the dismissal of the director is based on business economic reasons, according to the District Court of Gelderland.[23] In line with the judgement of the Court of Appeal Arnhem-Leeuwarden, the Court confirmed that a certain degree of freedom exists for the employer/shareholders to structure the organisation in such a way that the existence of the company is assured in the long term. However, this freedom is not of such degree that the employer is entitled to more freedom when dismissing a director than is the case with an 'ordinary' employee.[24] Also, in principle, when a director is dismissed, the employer has a duty to investigate whether the director can be redeployed within the employer's organisation to a different position.[25] However, in the case of a director, given his special position, redeployment will generally be less likely.

3. Fair compensation

In the absence of a reasonable ground but the existence of a valid dismissal resolution under company law, the dismissal will be upheld but the director will be eligible for a compensation (in addition to the statutory transition payment). This compensation is referred to as the 'fair compensation'. The right to a fair compensation already exists for a director due to the mere absence of a reasonable ground for dismissal. If there is a reasonable ground for dismissal, the director is only eligible for a fair compensation subject

21 District Court of Limburg, 22 November 2022, ECLI:NL:RBLIM:2022:9229.

22 Arnhem-Leeuwarden Court of Appeal, 29 January 2024, ECLI:NL:GHARL:2024:693.

23 District Court of Gelderland 4 January 2021, ECLI:NL:RBGEL:2021:52.

24 District Court of Amsterdam 26 January 2023, *JAR* 2023/60 with note K. Wiersma.

25 District Court of Amsterdam 26 January 2023, *JAR* 2023/60 with note K. Wiersma; Court of Appeal 8 Den Bosch July 2021, ECLI:NL:GHSHE:2021:2155 and Court of Appeal Amsterdam 20 August 2019, *JAR* 2019/233 (*Under Armour*).

to serious culpable acts by the employer (similar to an 'ordinary' employee). Unlike the transition payment, the law does not provide for a predetermined formula for calculating the amount of the fair compensation. In 2017, the Supreme Court listed (non-exhaustive) points of consideration that can play a role in determining the amount of the fair compensation. The degree of culpability of the employer, the income the employee would have received if the employment had continued until a reasonable ground for dismissal would exist, the (poor) state of the employer's finances and the amount of the transition payment can play a role when determining the amount of the fair compensation.[26] Although the Supreme Court's ruling relates to an 'ordinary' employee, it is assumed that these points of consideration also apply for the director.[27] This is also apparent from case law relating to the dismissal of the director.[28]

It follows from case law that the following points are most frequently taken into account by the court when determining the amount of fair compensation for a director:

- the expected remaining duration of the employment until a reasonable ground for dismissal were to arise;
- the expected duration of unemployment; and
- the degree of culpability of the employer.

In addition, the circumstance that the director has already found a similar position elsewhere is often an indication to adjust the fair compensation downwards. The fact that the fair compensation, depending on different circumstances, can result in a substantial amount is shown by several recent judgements. In one case, a substantial amount of fair compensation was awarded despite the fact that the director had the prospect of a new job (albeit with a considerably lower salary). Circumstances that played a role here were (i) 15 years of satisfactory service by the director, (ii) more than 12 years of which as CFO, (iii) the unexpectedness of the dismissal, (iv) the brief explanation as to the background of the dismissal, (v) the absence of the employer and the shareholder representing the company at the extraordinary meeting of shareholders at which the dismissal was scheduled (only lawyers were present) and (vi) an annual salary of EUR 540,000 gross. All this resulted in fair compensation for the director of EUR 750,000 gross.[29] The ruling shows that continuing the dismissal without having a reasonable ground can result in a substantial fair compensation for the director. In another recent ruling, the court awarded a fair compensation of EUR 670,000 gross. Circumstances considered relevant here included (i) the loss of income, (ii) the intention expressed to continue the employment for another five years (this had been laid down by means of an addendum to the employment agreement), (iii) a number of (high) bonuses awarded and (iv) loss of pension. Also relevant was the fact that the parties had made a written agreement that the severance payment in case of dismissal could not exceed the amount ofEUR 264,229.56 gross. As a transition payment of approximately EUR 165,665.40 gross had already been paid by the employer to the director, the fair compensation, according to the employer, could not exceed the difference between the contractually agreed severance payment and the transition payment (i.e. EUR 98,564.16 gross). However, the court did not agree with this reasoning, emphasising once again that contractually excluding or limiting the possible entitlement to a fair compensation will not be upheld in court proceedings.[30]

26 Supreme Court 30 June 2017, ECLI:NL:HR:2017:1187 (*New Hairstyle*).
27 Supreme Court 8 June 2018, ECLI:NL:HR:2018:878 (*Zinzia*).
28 See also: S.J. Sterk & D.J. Koenrades (in Dutch): *De billijke vergoeding van de statutair bestuurder sinds de Wwz: wind in de rug voor de bestuurder?* ArbeidsRecht 2021/16.
29 District Court of Amsterdam 26 January 2023, *JAR* 2023/60 with note K. Wiersma.
30 District Court of Zeeland-West Brabant, 13 March 2023, *JAR* 2023/123. This also follows from Section 7:682(8) DCC. At most, setoff against the contractual severance payment will be possible.

4. The ill director

As mentioned earlier, the dismissal as a director under company law does not also result in the end of the employment agreement, if a prohibition on termination (*opzegverbod*) exists. If the general meeting passes a dismissal resolution while prohibition is in place, the corporate management position ends, but the employment agreement remains intact. Such prohibition on termination exists, for example, if the director is ill at the time of his dismissal. In practice, the timing of the dismissal resolution and the moment of calling in sick in particular can lead to disputes. In 2000, the Court of Appeal Den Bosch ruled that the dismissal of a director who became unfit for work after he had received the invite to attend the shareholders' meeting at which his dismissal was to be decided on, was valid.[31] The scope of this so-called '*Van Kalmthout doctrine*' was brought up again in 2022 in one of the four Volksbank rulings. The director concerned had called in sick one day after receiving a draft settlement agreement (including a draft dismissal resolution). The director had received these drafts from the supervisory board, while the shareholders' meeting was the body authorised to dismiss him. The director was subsequently still dismissed by the shareholders' meeting. The question that came up was whether the receipt of the settlement agreement and the conversation with the supervisory board announcing his intended dismissal was sufficient for the decision on dismissal to be valid. The Court of Appeal Arnhem-Leeuwarden considered that the Van Kalmthout doctrine should be strictly applied.[32] According to the Court of Appeal, in this case the notice of dismissal was given in violation of the prohibition on termination in case of illness, as the illness predated the receipt of the invitation to the shareholders' meeting (which body was competent to dismiss the director). The fact that, through the supervisory board, the director was already aware of the intention to dismiss him when he called in sick does not affect this as the supervisory board was not the body that was competent to dismiss the director. The Court of Appeal ruled that the moment at which the director is invited by the body competent to dismiss the director, should be considered as the moment of reference for the question on whether a prohibition on termination exists.

5. A few other developments

5.1 The director of a foundation

On 1 July 2021, the Management and Supervision of Legal Entities Act (*Wet bestuur en toezicht rechtspersonen* - **WBTR**) entered into force. The Act aims to uniform the regulations regarding the management and supervision of legal entities and provide clarification on a number of points concerning the legal framework of the association, cooperative, the mutual insurance association and the foundation.[33] The main changes in the WBTR for the legal status of the director of a foundation are the right of the director of a foundation to have an advisory vote prior to his or her dismissal and it no longer being possible to reinstate the director of a foundation's employment agreement after dismissal.[34] These developments will be discussed briefly below.

Advisory vote

With the introduction of the WBTR, the director of a foundation, like the director of a private or public limited company, has an advisory vote before a valid resolution can be passed on his or her dismissal.[35] If the director is not given the opportunity to make use of his or her advisory vote, the dismissal can be annulled.[36] If the dismissal resolution is annulled,

31 Court of Appeal Den Bosch 22 August 2000, *JAR* 2000/207.

32 Court of Appeal Arnhem-Leeuwarden 30 May 2022, *JAR* 2022/154 with note K. Wiersma (*CFO Volksbank*).

33 Parliamentary Papers II 2015/16, 34491, 3, p. 1.

34 In February 2022, the 145th edition of *Genoteerd* discussed in detail the director of a foundation and the WBTR.

35 Section 2:44(8) DCC.

36 Section 2:15(1) (a) and (b) DCC.

this means that the employment agreement, if any, has also not been terminated. Failure to enable the director to make proper use of his or her advisory vote can also play a role in the question of whether the employer has acted in a seriously culpable manner and could therefore be relevant when determining the amount of a fair compensation, as explained in paragraph 3.[37]

Dismissal of the director of a foundation

Before the WBTR entered into force, the dismissal of a director of a foundation under company law did not immediately lead to the end of any existing employment agreement. If the foundation and the director failed to reach an agreement on the end of employment, the foundation had to either seek alternative consent from the UWV or ask the court to dissolve the employment agreement. With the introduction of the WBTR this preventative dismissal test came to an end and meant that in the case of a foundation, a valid dismissal of a director under company law with an employment agreement in principle results in the end of that employment agreement without the option of reinstatement by the court (2:298a DCC).

5.2 Cooling-off period for the director of a listed company

Alongside the WBTR, the Listed Companies (Legal Reflection Period) Act (*Wet wettelijke bedenktijd beursvennootschappen) was passed in 2021. Under this Act, the board of a listed company has the option to invoke a cooling-off period of up to 250 days in two cases*.[38] The Act aims to give the board of a listed company more time to identify and consider the interests of the company and its stakeholders in order to carefully determine its strategy in these cases.

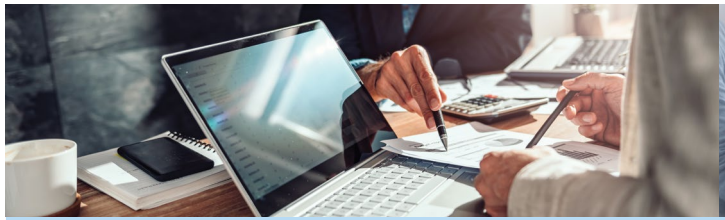
Besides the possibility of invoking this cooling-off period in the event of a 'hostile' takeover bid, the cooling-off period may also be invoked if one or more shareholders or depositary receipt holders submits a request, under the law or on the basis of a provision of the articles of association, which proposes the appointment, suspension or dismissal of one or more directors (or supervisory board members) during a general meeting of shareholders. If the board considers this request substantially contradictive to the interests of the company and its business, the board may invoke the cooling-off period. The decision must be substantiated and requires the approval of the supervisory board (if in place). If the resolution to invoke the cooling-off period is approved, this period suspends the power of the shareholders' meeting to appoint, suspend or dismiss directors (and supervisory board members). Shareholders can then, for example, still schedule the dismissal of a, but the shareholders' meeting cannot pass a resolution during the cooling-off period. After all, the only consequence of the cooling-off period is that certain resolutions temporarily cannot be passed. During the cooling-off period, the board gathers all the information necessary to carefully determine its strategy, after which a resolution can be passed. If the board needs less than 250 days, it can shorten the cooling-off period with the approval of the supervisory board. Shareholders and depositary receipt holders jointly representing at least three hundredths of the issued capital (or less if stipulated in the articles of association) may request the Enterprise Court in Amsterdam to end the cooling-off period. For example, the Enterprise Court may end the cooling-off period if its continuation can no longer reasonably contribute to a careful determination of policy.

37 A. Hoving &. B.M.C. Stenden (in Dutch): *Ontslag van de statutair bestuurder: meer kans op billijke vergoeding bij inbreuk op raadgevende stem en hoorplicht, minder kans op billijke vergoeding door cumulatiegrond, TRA* 2021/23.

38 The bill was discussed in detail in an earlier edition of *Genoteerd*.

6. Conclusion

The dual legal status of the director provides that both company and employment law elements need to be taken into account. This is the case at the time of appointing and dismissing the director. While a (qualifying) director can be dismissed unilaterally more easily than an ‘ordinary’ employee, it is not true that the director completely falls outside the protection of employment law. A reasonable ground for dismissal is also required to dismiss a director and, in principle, no less onerous requirements are imposed in this regard than is the case for an ‘ordinary’ employee. If no reasonable ground for dismissal exists, the director can claim a fair compensation. It is important that the employer/ shareholder is aware of this, also because recent rulings highlighted in this newsletter show that the amount of fair compensation awarded to a director can be substantial under certain circumstances. At the same time, since no predetermined formula for the calculation of the fair compensation exists, there is also no certainty in advance for the director as to the right to and the amount of any fair compensation. As a result unilateral dismissal followed by possible legal action also carries risks for the director. For these reasons, we expect that in most cases the director will in practice continue to be dismissed by means of a settlement agreement as this will offer the most certainty for both parties.



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