

HOW TO FILE A CLAIM OF LIABILITY OF A DIRECTOR IN A LIMITED LIABILITY COMPANY IN BELGIUM

(A) What are the proceedings?

In the writ of summons, an introductory hearing is scheduled at which, unless the case is very obvious or is not disputed, fixed dates for the exchange of briefs between parties are set, as well as a date for the hearing at which the case will be pleaded according to the availability of the court. When parties do not agree on these fixed dates for exchanging briefs, the court can be asked to rule on this.

Evidence can be added by whichever party at any stage and at the latest on the last fixed date on which briefs have to be exchanged. However, a party can ask for a new term to file briefs when he takes notice of a new piece of evidence (albeit through the opposing party filing a piece of evidence) and wishes to discuss this in new briefs, insofar that he files a petition at least thirty days before the plea date.

(B) Procedural requirements majority

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(C) Competent Court & territorial jurisdiction

The competent court is the commercial court, although the court of first instance can also be competent because of their residual competence.

The claimant can choose to bring the case before the court where (one of the) defendants is resided or before the court where the seat of the company is situated (because of the fact that this is where the obligations arose or have to be executed).

(D) Who is legitimized to be the claimant?

Concerning **internal** director's liability: only the company is legitimated to file a claim against a director and this after a decision of the general assembly.

However, shareholders with a minimum of 10% of the shares can also launch a claim on behalf of the company, insofar as they have not ruled in favour of a discharge of the director.

Concerning external director's liability: any third party which can prove to have led extracontractual damages is legitimated to be a claimant. This includes shareholders insofar as they can prove that their damages are not limited to the diminishing of the value of their shares.

(E) Can the judgment be challenged?

Appeal before the Court of Appeal is possible in principle, but only when the amount of the claim is higher than 2.500,00 EUR.

Cassation is possible, but only after a judgment in last instance has been rendered.

PART II: LIQUIDATION

There are separate provisions in the Company and Associations Code concerning the liability of liquidators, so it is important to file the claim under these provisions. However, the principles of director's liability are the same in the case of liquidators: a decision of the general assembly is also required.

PART III: BANKRUPTCY CASES

When a company is declared bankrupt, the possibility to file a claim for internal director's liability rests with the bankruptcy administrator (or trustee). Of course the bankruptcy administrator does not need a decision of the general assembly in order to file the claim.

Moreover, Belgian bankruptcy law provides for certain specific grounds of director's liability:

- Grave errors by a director which led to the bankruptcy of the company;
- Liability for social security debts in case a director has been involved in two bankruptcies in the last five years prior to the new bankruptcy;
- Liability in case of 'wrongful trading' (keeping a virtually bankrupt company alive).

Another special ground of director's liability is the failure to comply with the so called 'alarm bell procedure'. When the net-assets of a company threaten to become negative (or have become negative), the director(s) have to call together the general assembly. Failure to do so will render grave liability of the director, as the damages led by third parties are deemed to stem from the failure to call together the general assembly (which could have decided to file for bankruptcy, go into liquidation or apply for a judicial reorganisation procedure for example).

Claims on the ground of these provisions can be filed by the bankruptcy administrator.

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