

HOW TO FILE A CLAIM OF LIABILITY OF THE DIRECTOR OF A LIMITED LIABILITY COMPANY IN THE NETHERLANDS.

a) What are the proceedings?

In the Netherlands, directors of a Limited Liability Company (*Besloten Vennootschap* (BV)) can be held liable under specific circumstances. The primary legal basis is found in the Dutch Civil Code (*Burgerlijk Wetboek*, BW).

Directors in the Netherlands can face various forms of liability under Dutch law, depending on the nature of their actions or failures.

Article 2:9 of the Dutch Civil Code (BW) addresses internal liability for improper management, also known as *wanbeleid*. Directors can be held liable if their actions are so negligent that no reasonably prudent director would have acted in the same way. For instance, if a director makes a detrimental decision without conducting proper due diligence, this could be considered improper management leading to potential liability.

Article 2:248 BW pertains to bankruptcy liability. Directors may be held liable for any deficit resulting from a company's bankruptcy if it is presumed that mismanagement contributed to the insolvency. In such cases, the burden of proof shifts to the director, particularly if statutory obligations such as timely filing annual accounts have not been met. An example of this could be the failure to maintain accurate financial records, which might lead to a bankruptcy situation where directors are held responsible.

Article 2:11 BW extends liability beyond just the legal entities to include the natural persons behind them who act as directors. This means that individuals who act as directors are personally liable in cases where their actions breach legal requirements or lead to significant issues for the company.

Additionally, Article 6:162 BW outlines tortious liability, allowing directors to be held accountable under general tort law for unlawful acts that cause damage to third parties. For example, if a director provides false information to creditors, which results in financial harm to those creditors, the director could be held liable under this provision.

b) Procedural requirements majority

When pursuing a director liability claim in the Netherlands, particularly under Article 2:9 BW (internal liability) or Article 2:248 BW (bankruptcy liability), certain procedural requirements must be met, including the need for majority approval in some cases.

Typically, a claim against a director for internal liability (mismanagement) is initiated by the company itself. This often requires a majority vote from the shareholders' meeting (*algemene vergadering van aandeelhouders*). The articles of association of the BV may stipulate specific voting thresholds, but generally, a simple majority (over 50%) is needed to approve the initiation of legal proceedings.

If the board itself is considering action against one of its members, a majority of the remaining directors typically must approve the decision to initiate legal proceedings.

When a company is bankrupt, the appointed trustee (curator) acts on behalf of the creditors and the company. The trustee has the authority to initiate a claim against the directors without needing shareholder approval. The trustee must demonstrate that the director's mismanagement significantly contributed to the bankruptcy.

Besides the company and trustee, individual shareholders or third parties may also have standing to file a claim under certain conditions, particularly under Article 6:162 BW (tortious liability). However, this usually doesn't require majority approval.

Conclusion

The procedural requirements for filing a director liability claim in the Netherlands often involve obtaining majority approval from shareholders or the board of directors, depending on the context.

c) Competent Court & territorial jurisdiction

Director liability claims in the Netherlands are generally filed in the District Court where the company is registered or where the director resides. The specific court and jurisdiction depend on the nature of the claim, the location of the parties involved, and any contractual stipulations.

Director liability cases are generally heard in the civil section of the District Court. These courts handle matters involving corporate law, including claims under Article 2:9 BW (internal liability) and Article 2:248 BW (bankruptcy liability). The primary rule is that the court in the district where the company's registered office is located has territorial jurisdiction. This applies to most cases, including those involving internal and bankruptcy liability. In cases where the claim is based on tort (Article 6:162 BW), and the director's residence differs from the company's location, the plaintiff may choose to file the claim in the court of the director's residence. If the company's articles of association or any agreements specify a particular jurisdiction for disputes, that court would typically have jurisdiction, provided it doesn't conflict with mandatory legal rules. For certain corporate disputes, including cases involving the mismanagement of a BV that significantly affects the company, the *Ondernemingskamer* (Enterprise Chamber) of the Amsterdam Court of Appeal may be competent. However, this is typically reserved for more complex or high-stakes disputes, rather than for personal liability of directors.

d) Who is legitimized to be the claimant?

The BV itself is the primary entity that can initiate a claim against its directors, particularly under Article 2:9 BW (internal liability). The company acts through its shareholders or board of directors. Shareholders may have the right to bring a claim on behalf of the company if the company itself fails to act. The board, excluding the director in question, may decide to file a claim if a director's actions are detrimental to the company.

If the company is bankrupt, the trustee (curator) appointed during the bankruptcy proceedings has the exclusive right to file claims against the directors under Article 2:248 BW (bankruptcy liability).

Creditors can bring claims against directors under Article 6:162 BW (tort law) if they can prove that the director's actions were unlawful and caused them direct harm. Third parties who have suffered damage due to the director's unlawful actions can file a claim under tort law (Article 6:162 BW).

Conclusion

Legitimacy to file a director liability claim in the Netherlands varies based on the nature of the claim and the affected parties. The company itself, shareholders, the bankruptcy trustee, creditors, third parties, and even the board of directors may all have the right to initiate a claim under different circumstances.

e) Can the judgment be challenged?

Yes, a judgment in a director liability case in the Netherlands can be challenged. The legal system provides several avenues for appeal and review, depending on the stage of the case and the grounds for challenging the judgement.

If a party disagrees with the District Court's judgment, they can appeal to the Court of Appeal. This must typically be done within three months of the judgment being issued. The Court of Appeal reviews both the facts and the application of law from the original case. New evidence can be introduced, and the court may re-examine witnesses.

After the Court of Appeal's decision, the judgment can be further challenged by filing for cassation with the Dutch Supreme Court (Hoge Raad). This must be done within three months of the appellate decision. The Hoge Raad only reviews points of law and legal procedure; it does not re-examine facts or evidence. The court checks if the lower courts correctly applied the law.

In rare cases, a judgment can be challenged through a procedure called *herroeping*, or reopening of the case. This is allowed under strict conditions, such as when new evidence emerges that could significantly alter the outcome, or if there was fraud or deceit in the original proceedings.

During an appeal, parties can request provisional measures from the court to suspend the enforcement of the judgment until the appeal is decided.

Conclusion

Judgments in director liability cases in the Netherlands can be challenged through appeals to higher courts, with the possibility of review by the Court of Appeal and the Supreme Court. In exceptional circumstances, cases may also be reopened if new evidence or fraud is discovered.

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