

CONFLICT OF INTERESTS

It is important in a possible conflict of interests, more than ever, that the statutory and – insofar as they exist – articles of association provisions on the subject are complied with and that any possible shareholders' resolution concerning the appointment of an authorised representative is recorded in writing.

On 9 July 2004, The Dutch Supreme Court issued a prominent ruling in which, among other things, the Supreme Court stipulated how a company director should act in the event of a conflict of interests.

Put briefly, there is a conflict of interests in the case of a legal transaction between the company and the director. In addition, there is a conflict of interests if the personal interests of a director are involved in a legal transaction of the company, without the director being directly involved as one of the parties. Finally, there is a conflict of interests if a director acts in a certain capacity as opposing party to the company, for example, as a director of a different company.

The law (Section 2:256 of the Netherlands Civil Code) stipulates that a company, in all cases in which it has a conflict of interests with a director, will be represented by supervisory directors, unless the articles of association provide for something different. In addition, the General Meeting of Shareholders is always authorised to appoint one or more other people to represent the company in the event of a conflict of interests. In deviation from these statutory regulations, the articles of association can provide that the director represents the company, even in the event of a conflict of interests.

In the ruling under discussion, there was a situation in which the articles of association provided that the company be represented by a person appointed by the General Meeting of Shareholders in the event of a conflict of interests. The only director, who was also the sole shareholder, represented the company himself – despite the fact that there was a conflict of interests and without having obtained an explicit shareholders' resolution to do so.

The Supreme Court subsequently ruled (in accordance with the position of the receiver of the company that had gone bankrupt in the meantime) that the director was not authorised to represent the company, because there was a conflict of interests and no written resolution from the General Meeting of Shareholders. It can be deduced from the ruling that the Supreme Court does not consider an implicit resolution for representation to be sufficient if there is a conflict of interests. The fact that the director was also the sole shareholder of the company and that, in his capacity as sole shareholder, he would appoint the only director (himself) as special representative, does not change things in this case.

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