Shareholder activism in the Belgian court room

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Shareholding structure of listed companies in Belgium

- Typically one "reference shareholder" (often family shareholder) and many small minority shareholders

- "Reference shareholder" does not necessarily have a legal majority of shares/voting rights, but usually exercises "de facto" control (sometimes through voting agreements with related shareholders)

- Conflicts with "activist shareholders" most often relate to alleged abuse by the "reference shareholder" of his position to the detriment of the company/minority shareholders or related governance issues ("type II agency conflict)

  - Special procedure relating to "intragroup" conflicts of interest (art. 7:97 CCA – Code of Companies and Associations)

Shareholder activism in Belgium on the rise ?

- Where it all begun…: De Benedetti / Generale Maatschappij (Société Générale) - led to important changes in legislation
- Still more "active shareholders" than "activist shareholders"
- A limited number of cases regarding listed companies resulted in litigation: e.g. KBC-merger (cooperative shareholders Cera), Barco, Fortis, KBC Ancora, Arco, Nyrstar, Sibelco…
- [Many court litigations concern non-listed companies > often resolved by forced exit shareholder (judicial exclusion/withdrawal)]

Competent court for shareholder disputes

- No single specialised court for this kind of procedures
  (↔ Enterprise Chamber in the Netherlands)
- 9 enterprise courts with 29 divisions – summary proceedings usually concentrated in one division per court
- competent court determined by legal seat of the company (> most often before the Brussels courts, but with exceptions)

Possible court actions 

1. Appointment of a provisional administrator / receiver / sequestrator
2. Nullity of resolutions
3. Appointment of a court expert
4. Director's liability – derivative action
5. [5. Forced purchase or sale of shares]
6. [6. Judicial liquidation]

1. Appointment of a provisional administrator

- Appointed by the court to take over management of the company (or more limited assignment, e.g. approval of certain acts) – far reaching measure, limited in time

- Grounds:
  (i) (Objective) inability of company bodies to function normally (deadlock/characterised disagreement)
  (ii) Mismanagement - violation of corporate interest - abuse of majority
  (iii) Poor financial condition of the company

- Damaging for the reputation of the company

- Alternatives (e.g. to avoid the obligation to publish the mandate):
  - Appointment of an ad hoc agent with limited assignment, e.g. to convene/chair the AGM or Board, possibly with the right of veto, etc.
  - Appointment of an expert
  - Appointment of a receiver: take custody of specific items that must be clearly described (share register, documents, etc.)

2. Nullity of resolutions

- Relates to any decision of a corporate body
- Grounds for invalidity:
  (i) Formal irregularities: requires influence on decision or fraud/willful misconduct
  (ii) Exceeding of competence / misuse of power
  (iii) In case of suspended votes if this affects the applicable quora
  (iv) Absence of required special report
- Requires that claimant has an interest in adherence to violated rule and has not voted in favour of decision
- Specific regulation for invalid votes: court decision can replace votes of the minority shareholder(s) in case of abuse
- Nullity action to be directed against the company and to pronounced by the court – suspension possible in summary proceedings
- Short limitation period of 6 months!

3. Appointment of a court expert

- Usually in preparation of derivative action by minority shareholder: purpose is to gather information/proof for the purpose of introducing a claim regarding director's liability

- Treshold: identical to derivative action: shareholders representing min. 1% voting rights or min. 1,25 mln. euros of share capital (public company: NV-SA) – 10% shares (private company: BV/CV)

- Requires "indications" (not proof) that the interest of the company is seriously threatened or risks to be seriously threatened

- Equivalent of succesful Dutch "enqueteprocedure" – but rather rarely used (compare to success of forced sale or purchase of shares in non-listed companies) – recently some applications

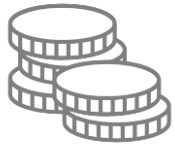
4. Director's liability – corporate action ("actio mandati")

- To be decided by AGM with simple majority of votes
- Not possible anymore if discharge has been granted (unless proven invalid)
- Since CCA 2019 rules on director's liability also apply to "de facto directors" and "shadow directors"
- Since CCA 2019 legal cap on liability depending on the size of the company (combination of turnover and balance sheet total – limitation from 125.000 euros to 12 million euros), but limited to occasional light errors
- Shareholders cannot claim for their own account (Supreme Court 23-02-2012 and 11-12-2020) unless they can prove individual damage (Supreme Court 25-01-2017), e.g. in case of misrepresentation

4. Director's liability – derivative action ("minderheidsvordering – action minoritaire")

- Shareholders acting in their own name but for the account of the company (legal fees reimbursed in case of succesful action)
- Treshold of min. 1% voting rights/1,25 mln. euros of share capital (public company: NV-SA) – 10% shares (private company: BV/CV)
- On the day of AGM voting on discharge
- Claimants may not have voted for discharge (unless proven invalid)
- Rarely used but recently more applications
- No longer possible after liquidation of the company (questionable):
  - Court of Appeal Antwerp 29-11-2018: derivative action pursued after liquidation is unfounded (no subjective right anymore)
  - Court of Appel Brussels 17-12-2018: derivative action introduced after liquidation is inadmissible

5. Forced sale and purchase of shares



- Shareholder conflict resolved by forced removal of one or more shareholders ("corporate divorce")
- Most "popular" corporate legal action – but not applicable in listed companies
- Alternative to more drastic judicial dissolution
- Forced sale of shares ("exclusion"): claimant holds min. 30% of voting rights or min. 30% of legal capital/profit rights
- Forced purchase of shares ("withdrawal) – no threshold
- Just and proper grounds ("gegronde reden") required
- Procedure before president enterprise court "as in summary proceedings"

6. Judicial winding-up

- Winding up for legal grounds: e.g. abuse of majority/minority, serious breach of contract, serious and lasting disagreement...
- Subsidiary nature: "ultimum remedium" (ultimate solution)
- Bring action against the company + possibly the shareholders who are responsible for the legal grounds
- Since the Belgian Company and Associates Code ("WVV"), always before the President of the Commercial Court acting such as in summary proceedings
- In principle judicial liquidator(s) are appointed

Case study 1: Fortis

- During the worldwide economic and financial crisis, the Fortis financial group was dismantled and the Belgian bank, Fortis Banque Belgique, was acquired by the Belgian state and sold to BNP Paribas.

- Several minority shareholders of the Fortis group brought summary court proceedings in order to suspend the decision of the board of directors to transfer assets to Belgium and the Netherlands and to BNP Paribas.

- The court of appeal of Brussels, acting as summary judge in appeal, ruled on 12 December 2008 that the board of directors had violated the articles of association and the Fortis Governance Statement by not involving the general assembly, although required by the Governance Statement. In addition, the Court of Appeal took into account the fact that several directors felt subjected to unacceptable pressure from the government to reach a decision despite their objections. It was also questioned whether the decisions were taken in the corporate interest.

- The shareholders obtained the right to hold a general shareholders' meeting to enable shareholders to voice their concerns about the proposed restructuring of the group, and to vote on the restructuring. This resulted in a modified restructuring proposal being put forward, which was accepted by the shareholders.

Case study 1: Fortis

- Deminor sought the appointment of a provisional administrator for Fortis Bank NV with broad powers, including a right of veto.

- Deminor's claim has been rejected by the court based on the following reasoning ("lack of legitimate interest"):

  "Deminor itself has created the conditions for acting belatedly; that, to that extent, Deminor's interest in bringing an action is of a purely speculative nature; that, in fact, nothing obliged Deminor to acquire Fortis shares after the disputed acts, and more specifically after October 3, 2008; that, consequently, it is with full knowledge of the facts that it has acted with the sole intention of participating in the proceedings: (...) that the mission of the courts is in no way to settle disputes that have been artificially created".

Case study 2: KBC Ancora

- KBC Ancora (reference shareholder of KBC Groep) and its parent company Cera bought additional shares of KBC Groep in 2007 (a.o. to pass the treshold of 30% before this implied a mandatory takeover bid), financed (a.o.) by KBC Bank
- Share price dropped dramatically due to the financial crisis – KBC Bank paid no longer dividends which led to financial difficulties
- Portus et al. (minority shareholders) started a derivative action against the director of KBC Ancora and against Cera as its alleged "de facto director"
- Leuven court of first instance (24-10-2012) and Brussels court of appeal (9-04-2019) ruled that purchase of shares was justified in view of the "anchorage objective" of KBC Ancora and was at the time welcomed by stock analists
- No violation of legal rules (in particular procedure on intragroup conflict of interest) or articles of incorporation
- As claim was declared unfounded, no verdict on admissibility of derivative action against alleged de facto director

Case study 3: Nyrstar

- Nyrstar (in distress) was restructured and its assets were transferred to a newco controlled by its reference shareholder Trafigura
- Investigation by the FMSA on disclosure of information to the market
- Quanteus et al. (group of minority shareholders) launched several legal actions against the outcome of this restructuring, which resulted a.o. in:
  - Order Pres. Antwerp enterprise court 7-01-2020: rejected claim for annulment of decisions general meeting + appointment provisional director
  - Order Pres. Antwerp enterprise court 26-06-2020: temporary prohibition to decide on liquidation of the company
  - Order Pres. Antwerp enterprise court 30-10-2020: appointment of expert panel to investigate a.o. transactions Nyrstar-Trafigura + liquidity crisis which led to restructuring
    - New order 9-11-2021: appointment of expert panel revoked on request of Trafigura (third party application)
    - An appeal is currently pending before the Antwerp court of appeal
  - Derivative action against Nyrstar directors and Trafigura as alleged de facto director (Antwerp enterprise court, div. Turnhout - pending)

Case study 3: Nyrstar – some legal issues

- No specific urgency is required for the appointment of an expert in summary proceedings – legal requirement that the company interests are seriously threatened suffices
- Expert investigation is not necessarily limited to future threats, but can also relate to historic facts
- The court can order that the company should provision the expert, to ensure that a derivative action does not remain a purely theoretical option for minority shareholders
- The fact that a shareholder who meets the legal threshold for an expert investigation, has bought additional shares:
  - does in itself not affect his legitimate interest in asking a court expert…
  - … but may play a role in the assessment of the "serious threats" to the interest of the company, justifying an expert investigation
- The appointment of an expert is not exclusively aimed at preparing a derivative liability action; but if such action is the only realistic remedy at hand, it should be demonstrated that claimants also meet the legal threshold for such action

Some closing remarks

- Courts are open to shareholder's claims, but the bar for director's liability in Belgium, in particular trough a derivative action, is quite high

- Scope of a derivative action remains unclear: quid liability claim vs. de facto directors, other measures aiming at restoring damage, derivative action after liquidation…

- "Activist shareholder" has often negative connotation
  ↔ active shareholder trying to enforce his rights

- Buying extra shares pending procedure is perceived as negative ("speculators")
  ↔ normal consequence of stock market capitalism ?

Thank you
Any questions?

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