



Warwick Legal Network

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

A PRACTICAL HANDBOOK

This practical guide provides a general overlook into the main legal and administrative aspects regarding summons in different countries worldwide.

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“HOW TO FILE A CLAIM OF LIABILITY OF A DIRECTOR IN A LIMITED LIABILITY COMPANY”

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CHAPTER 1

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.

Reference contact in Belgium:

Sebastiaan Meeuwens

Lawyer

at **Legalis Advocaten**

sebastiaan.meeuwens@legalis.be

+32 13 671201



CHAPTER 2

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

(F) What are the proceedings?

Most likely a claim of liability of the director of a LLC in Italy will follow the rules of the standard procedure of the Italian code of civil procedure.

In the writ of summons, the claimant sets out the factual and legal grounds and fixes the day of the first hearing.

If the defendant is resident in Italy, at least 120 days must pass between the notification and the first hearing; if the defendant is resident abroad, this term is increased to 150 days.

The defendant is due to file a statement of defence at least 70 days before the first hearing.

Before the first hearing the parties have also the possibility to file further 3 statements in order to contradict the opposing defence arguments and to request the admission of measures of evidence.

After the first hearing the Court will assume the admitted evidence and finally issue its judgment.

(G) Procedural requirements majority

Internal director's liability

Every quota holder can file a claim against a director; no minimum value of the participation in the LLC is required in order to file the claim.

External director's liability

Third parties may also take action against directors in order to obtain compensation for damages that were directly caused by their willful misconduct or negligence.

Creditors of the company may also file a claim against directors in case of failure to fulfil their obligations to preserve the integrity of the company's assets.

(H) Competent Court & territorial jurisdiction

Regardless of a few exceptions, the competent court is that of the registered office of the company. The case will be examined by a section of the court specialized in commercial law .

Arbitration is also possible.

(I) Who is legitimized to be the claimant?

Concerning internal director's liability: Every quotaholder independently from the value of his participation is legitimated to be a claimant. Even if it is not expressly provided by law for an LLC, some case law precedents admit a direct claim from the company itself against the directors.

Concerning external director's liability: Any third party is legitimated to act in order to obtain compensation for damages that were caused to him directly by willful misconduct or negligence of the directors. Creditors of the company are legitimated in case of failure to fulfil the obligations to preserve the integrity of the company's assets by the directors.

(J) Can the judgment be challenged?

Yes, the judgement can be challenged before the Court of Appeal.

The judgement of the Court of Appeal can be challenged in Cassation, but only on legal grounds.

PART II: LIQUIDATION

The Italian civil code expressly provides that the liability of liquidators is governed by the same rules that regulate the liability of directors.

PART III: BANKRUPTCY CASES

In case of bankruptcy of the company, the bankruptcy administrator may file a claim of liability against the directors. The bankruptcy administrator may act on his own initiative and does not need any resolution of the quota holders. However, in order to file a claim, an explicit authorization of the judge of the bankruptcy procedure is required.

Claims filed by the bankruptcy administrator could also be based on the failure of the directors to signal duly a financial crisis of the company and to undertake appropriate measures.

Reference contact in Italy:

Armin Haidacher

Lawyer

at **bureau Plattner**

armin.haidacher@bureauplattner.com

+39 0471 222500



CHAPTER 3

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.

Reference contact in the Netherlands:

Julie van Gerven

Lawyer

at **Keizers Advocaten**

j.vangerven@keizersadvocaten.nl

CHAPTER 4

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

a) What are the proceedings?

LAW 1/2000, OF 7 JANUARY, ON CIVIL PROCEDURE- Article 399 and following.

There are 3 main steps:

a) Allegations of both parts.

- claim
- statement of defense

b) previous hearing

- solve any procedural questions
- to fix the facts that must be proved
- proposal of the evidences to practice, and the judges agree or disagreed, admit or not.

c) The hearing: begins with the practice of the trials admitted and oral conclusions.

b) Procedural requirements majority

1. This actions can be both by the company pursuant to a general meeting decision which may be adopted at the requests of any shareholders even where not included on the agenda.

The by-laws may not require a qualified majority for the adoption of such decision.

2. When the company does not bring said action within a month of the date of the agreement or when the meeting decides against the claim for liability, any partner individually or jointly representing a share that permits them to request a general meeting, usually 5 %.

When the responsibility is based on the breach of the duty to loyalty, the partners may exercise the action for liability directly, without the need to submit the decision to the general meeting.

c) Competent Court & territorial jurisdiction

Commercial Court placed at the place where the company has its registered office.

d) Who is legitimized to be the claimant?

- The company:
- The shareholders when the company does not file the claim within a month or does not take the decision.
- The creditors of the company in certain circumstances when the activity of the director has caused and specific damage.

e) Can the judgment be challenged?

- Appeal: Yes
- Cassation appeal: Yes, although its admission is very restricted.

Reference contact in Spain:

Gloria Vinyals

Lawyer

at **Bufete Mañá-Krier-Elvira**

gv@bmk.es

+34 93 4878030

