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Summary and conclusions

THE LEGAL POSITION OF A MANAGING DIRECTOR

Appointment, remuneration and dismissal of a managing director of a private or public company

The purpose of this research is to answer questions pertaining to the conflict between contract law, more in particular employment contract law, on the one hand and corporate law on the other hand when it concerns the legal position of a managing director.¹ The relationship between employee and employer is largely provided for in the law. The same is true for contractor and client, although protection does not prevail as much in this relationship. The director also has a legal relationship with the company, as well as other bodies within the company. This last-mentioned relationship mainly revolves around a well-balanced division of powers within the company, and the protection of corporate interests. Initially it seems that these different principles are not consistent with each other. It is often believed that the protective nature of employment law can be an obstacle for corporate relationships. The research focuses on a more detailed description of the relationship between corporate law and employment contract law or contract law in general. The main topics are the appointment, remuneration, and dismissal of the director. Based on this closer consideration a more nuanced answer is provided to the question whether the rules of Book 2 (corporate law) and Book 7 (employment contract law) of the Dutch Civil Code ('DCC') are conflicting, any problems resulting from this, and what a possible solution could be for this. Where necessary, the concurrence doctrine is used to answer questions. The last chapter summarizes the research and draws conclusions.

8.1 Introduction

The introductory first chapter explains that the director is part of a legal system, being the company, and that the director, in the words of Huizink, has a functional legal relationship with the company. His participation in the company is primarily governed by the law of legal entities. With the implementation of Book 2, DCC, the law of legal entities was detached from property law. Property law starts playing a role as

¹ In this research 'managing director' or 'director' refers to a managing director of a Dutch public company or private company with limited liability as appointed by the general meeting of shareholders (or the supervisory board as the case may be).

soon as property rights and obligations exist between director and company. Property law will then apply, unless Book 2, DCC, makes an exception. Property law can also apply through a *mutatis mutandis* provision. If parties also conclude an agreement, they deliberately intended to have the agreement govern the property rights and obligations. In the event of an employment agreement or contract for services, parties are dually bound with respect to at least three aspects: entering into the relationship, termination thereof, and remuneration.

The director, who performs work and receives compensation for this, often does this based on an employment contract. This could be different if parties entered into a contract for services, whether or not through a management company. The law determines for a listed company that the agreement between parties is not an employment contract. In that event there is a contract for services by operation of law.

The first chapter contains a description of the different theoretical movements that exist when it comes to the interpretation of the relationship between employment law and law of legal entities (the dual, mixed, colored, or dual linked legal relationship). The conclusion is that the Supreme Court finds that there is a dual legal relationship and that each relationship is governed by its own set of rules. The major disadvantage of all described movements is that nearly all used arguments are based on the situation of dismissal and the nature of the dismissal decision. It is questionable whether the theory of the dual legal relationship is sufficient to describe other aspects of the legal relationship of the director, such as appointment and remuneration. This aspect is explored further in the next chapters.

8.2 The opinion of the legislator

The opinion of the legislator on the legal position of the director has shifted in the second half of the last century, without this being based on explicit, fundamental, and detailed grounds. The legislative history does not show that it was the intention of the legislator that corporate law takes precedence over employment law.

Research of the legislative history of the legal position of the director (chapter II) led to the following findings and conclusions.

The legislator explicitly considered the legal position of the director when he drafted the Employment Agreement Act 1907 and the Commercial Code 1929. With the Employment Agreement Act this mostly took place in the context of the discussion about the scope of the new act; whether or not this should be a general regulation. The government, as well as the House of Representatives and the Senate, explicitly considered this essential choice and a substantive debate took place; also with regards to the position of the director. The conclusion was that a director who receives wages has an employment agreement. A decisive argument to place the director under the umbrella of employment law was that the director also has an interest to know where he stands; that he cannot be terminated without compensation and that he knows how he can resign. It is also important to know that the

legislator did not find decisive that the director also performs employer tasks. That is not important for the interpretation of his own relationship with the company. That corporate law could be inconvenienced by the protection under employment law was never discussed; there was no conflict with corporate law applicable at that time. It is also striking that the legislator assumes that employment law has preference in the event of a conflict between those stipulations and the stipulations of mandate that was applicable at the time to the director.

The legal position of the director was also explicitly considered when the Commercial Code 1929 was drafted, and the legislator concluded here again that there is an employment agreement. The legislator is of the opinion that employment law and corporate law apply equally and cannot be contradictory. The Commercial Code 1929 does give courts the power of mitigation with respect to determining compensation based on Article 1639r, DCC, that was applicable at the time (compensation in the event a notice period was not observed or premature termination of a contract for a definite period). But a principal difference with regular employees cannot be concluded based on this. Without the power of mitigation Article 1639r DCC can lead to unreasonable results for 'regular' employees as well. This power was '*sorely missed*'; Meijers writes in 1924 his commentary on the law.² When the government drafted the Commercial Code 1929 it announced that it would repair this flaw in the Employment Agreement Act, but that it had already taken care of this for the director. Since the amendment to the Employment Agreement Act was not realized until 1954, there was a long period during which there was a difference between legal positions, but this was not due to a principal choice. And yet this part of legislative history was the most important basis for the judgments of the *April 15* rulings³ (also see paragraph 8.6 of this chapter). This does not mean that the *April 15* rulings are incorrect or undesirable. However, a better basis or substantiation would have been desirable, also for the practice.

With later legislative amendments (employment and corporate laws) the legal position of the director is no longer discussed that explicitly and principally. The substantiation of the two biggest differences in protection under employment law between directors and regular employees (no approval necessary from Employee Insurance Agency for notice of termination and reinstatement of employment is not possible) is scant: a reference to 'existing law' with respect to reinstatement of employment, and a reference to the 'special position' of the director when it concerns the exemption of Article 6 Extraordinary Labor Relations Decree. Nothing from the legislative history of Title 10, Book 7 or Book 2 DCC and the amendments show that it was the intention of the legislator to have corporate law take precedence over employment law until the Tabaksblat Committee includes recommendations to that effect in the Corporate Governance Code 2003.

² Meijers 1924, p. 199.

³ Supreme Court April 15, 2005, NJ 2005, 484, JAR 2005/177, JOR 2005/145 (*Eggenhuizen/Unidek*) en NJ 2005, 838 with commentary from GHvV, JAR 2005/153, JOR 2005/144 en AA 2005/54 with commentary from Kortmann (*Bartelink/Ciris*).

The legislator relies heavily on these recommendations with respect to the legal position of the director and the stipulation that the director of a listed company no longer has an employment contract with his company. The decisive criterion seems to be 'the negotiation position of the director'. It is unclear why the same would not apply to all employees with a senior position, or who have a rare talent. Think for instance of senior managers or top soccer players. They also tend to perform work based on an employment agreement. According to the notes to the amendment Weekers/Van Vroonhoven-Kok⁴ this is to prevent severance payments that are too high. If that is the only reason, stipulating a maximum severance payment for directors of listed companies would have been sufficient; repealing employment law is too far-reaching. Paradoxically, the maximum severance payment of € 75,000 or an annual salary if that is higher than € 75,000 introduced with the Employment and Security Act does not apply to the director of a listed company, who, after all, does not have an employment agreement, but a contract for services.

The Employment and Security Act, yet again, contains a number of derogations for the director. And again, the notes contain little and no principal grounds. I refer, for instance, to excluding the director of the stipulations concerning the reflection period for the consent of the notice despite a prohibition of termination or when entering into a termination agreement. The argument that the reflection period does not relate to the market sensitiveness of the exit of a director is a bit of a stretch. That argument only applies to directors of listed public companies (who have no employment agreement by operation of law), but not for directors of regular public companies, private companies with limited liability, associations, mutual benefit associations, and cooperatives. Yet, that is the most important argument to exclude all those directors from the reflection period. Excluding directors from this protection when it concerns the consent with notice contrary to a prohibition of termination violates, in my opinion, jurisprudence concerning the nullity sanction (under employment law) with dismissal contrary to a prohibition of termination.⁵

It can be concluded that the clear line of the legislator in the years 1900-1929 was no longer followed during the postwar legislative history. When amending employment and corporate law, insufficient attention was paid to the principle side of the legal position of the director. The concept that the director is no different than other employees when it comes to protection under employment law was abandoned when employment dismissal laws abandoned the belief that it should be possible to discharge any employee at any time. However, I have not been able to find any indications to support the often argued precedence of Book 2 over Book 7 DCC; not even in recent legislative history.

Corporate law has seen a development with respect to remuneration in the last decade. Where the employment rules regarding remuneration practically only pertain to enforceability and seek to offer the employee protection against the

4 *Parliamentary documents II* 2009/10, 31 763 no. 10.

5 See paragraph 2.2.2.5 in chapter II.

employer who does not pay well, corporate law is used to meet social criticism on high-earners. Corporate law was not meant for this, in my opinion; corporate law is primarily meant to regulate the internal legal system within the company.

The legislator did not use those amendments (employment and corporate law) to explicitly discuss the position of the director and to give clear instructions for the way in which the employment contract law and corporate law might influence each other.

As an example I point to the Dutch Clawback Act, resulting in Article 135, paragraph 5 et seq., Book 2, DCC. With this law, the derogatory effect of reasonableness and fairness specifically for bonus agreements has been included again in the law. It is striking that the notes to this legislative proposal refer to Article 248, paragraph 2, Book 6, DCC. It would have been a logical course of action to connect to Article 8, paragraph 2, Book 2, DCC, the reasonableness and fairness under legal entities law, or to include considerations with respect to the relationship between employer and employee (for instance Article 611, Book 7, DCC). The legislator also does not discuss the situation in which there is a conflict between the remuneration decision and contractual agreements.

By not specifying or naming the concurrence that arises with the introduction of new rules the legislator has missed an opportunity to make a clear statement about the question how the relationship director-company should be specified. In my opinion this results in an unnecessary increase of the tension between corporate law and (employment) agreement law. This is a missed opportunity that leads to interpretation problems in practice. This is even more so since the legislator wants to prevent concurrence in general.⁶

8.3 The concurrence role

Concurrence has a limited role in the dual legal position of the director. Concurrence has no role in the appointment of the director. If it comes to the dismissal of the director, there is cumulation. The mixed agreement doctrine should be applicable with respect to remuneration. Concurrence of representative authority stipulations plays a role in all stages.

The third chapter, that is completely devoted to concurrence, as well as the chapters on appointment, remuneration, and dismissal, examine to what extent concurrence can play a role with the resolution of tension between corporate law and employment contract law.

The concurrence doctrine provides solution directions for interpretation problems if several rules of law apply (or could be applicable). There is no legal definition for concurrence. However, the concept of concurrence has been defined by several authors in the literature. This research joins the description of Boukema:

⁶ See *parliamentary documents II 2008/09*, 31 731 no. 1 and Bakels 2009a.

- Concurrence of law norms: one legal fact on which basis several law norms create a legal relationship between the same people;
- Concurrence of claims: claims that arise from several facts or between several people, but which all aim for the same goal;
- Consequential effect: one legal norm applies, but that norm is influenced by other legal norms.⁷

The basis for concurrence is cumulation. If cumulation is conflicting with the system or scope of the law, the person entitled has an option: alternative. Finally, it is possible that it follows or ensues unavoidably from a rule itself that the rule has exclusive effect and there is no option to choose at all.

There are several theories about the relationship between the director and the company: a mixed legal relationship, a dual legal relationship or a colored legal relationship.⁸ The concurrence doctrine or the mixed agreement doctrine can be useful with the solution of interpretation problems, depending on how the legal relationship between the director and the company is specified. If the relationship between the director and the company is interpreted as a mixed legal relationship, the mixed agreement doctrine should be used. If the relationship is seen as a dual legal relationship, then the concurrence doctrine could be used (according to the definition of Boukema).⁹ The so-called ‘interference doctrine under corporate law’ for civil disputes between shareholders and the company, developed by Kroeze, cannot be used for the relationship between the director and the company. After all, the director has a contractual relationship with the company from the very beginning, unlike the relationship shareholder-company.¹⁰ Moreover, that agreement (employment agreement or contract for services) is a special contract. The regulations for the contract for services as well as the employment agreement contain stipulations that differ from general contract law.

If the relationship between the director and the company is regarded as a dual legal relationship, there could be concurrence if several law norms apply to one legal fact or factual occurrence. The rules of law will then really have to influence each other. There is no concurrence in a situation in which the company holds the director liable based on Article 9, Book 2, DCC, while the company also reclaims the lease car based on the stipulations of the employment agreement, for instance in the event of long-term absence because of sickness. There is not one fact or legal fact, but there are two legal facts or facts: the improper performance for which the director is called to account and the long-term absence which creates a contractual obligation to return the lease car. There is perhaps an overlap of time and parties are the same, but there is no concurrence. Employment law should be applied to the claim to return the

7 Boukema 1966, p. 41 and 56. See chapter 3, paragraph 3.2.2.

8 See chapter 1, paragraph 1.4.

9 See chapter 3, paragraph 3.2.

10 I refer to the director who has an employment agreement or a contract for services. Chapter 1, paragraph 1.2.3 sets out that there is no contractual relationship at all in some cases. Those directors fall outside the scope of this research.

lease car, legal entities law should be applied to the claim due to improper performance and these rules do not overlap. There is concurrence when the body of facts is suitable for several actions or if a claim of the company or the director can be based on employment law as well as on corporate law. For instance, a liability claim under Article 9, Book 2, DCC, can go hand in hand with a liability claim under Article 661, Book 7, DCC. In that case there will be concurrence, unlike the other example.

If the legal relationship is seen as a mixed legal relationship the stipulations of Article 215, Book 6 and Article 610, Book 7, DCC, with respect to mixed agreements are relevant, even though these do not apply directly. After all, these articles give an indication of what the legislator had in mind. In that case the main rule is also cumulation. Only when both rules are not compatible or the scope of the stipulations prevent application in view of the nature of the agreement a choice needs to be made. If one of the agreements is an employment agreement, then the rules of employment law should have preference, in my opinion, based on Article 610, paragraph 2, Book 7, DCC. It is striking that literature and jurisprudence do not spend a lot of attention to this approach. If the mixed agreement doctrine is argued, then this is done without accepting that the consequence is precedence of employment law.

As discussed earlier, the Supreme Court, in my opinion, assumes that there is a dual legal relationship, at least when it concerns the termination of the employment agreement.¹¹ In that event there will be a certain degree of concurrence. The corporate dismissal decision as provided for in Book 2 DCC is one legal act. The relationship under corporate law as well as the employment agreement can be terminated with that legal act. Both set of rules apply and influence each other somewhat. The rules under corporate law for decision-making apply in full. Thus, with the annulment of a corporate dismissal decision, the entire legal act on which both legal effects are based ceases to exist. In that event the notice under employment law also ceases to exist (this means that the notice under employment law does have formal requirements in this case, while that is not the case if notice is given to a regular employee). The notice under employment law is then completely governed by employment law. The Supreme Court explicitly names the prohibitions of dismissal, but also the rules with respect to notice periods and manifestly unreasonable dismissal apply in full. In the *April 15* rulings it was therefore decided that the dismissal decision is one legal act on which basis the norms under employment law, as well as corporate law shape the legal relationship between company and director. This is in line with earlier rulings of the Supreme Court. The Supreme Court does nothing more than specifying that the intention of the company aimed at the dismissal (expressed to the director in the dismissal decision)¹² also sees on the termination of the employment agreement.

11 See chapter 1, paragraph 1.4 and chapter 4, paragraph 6.2.1.

12 This formulation is derived from the ruling of the Supreme Court of October 26, 1984, *NJ* 1985, 375 with commentary from Ma (*Sjardin/Sjartec*), legal ground 3.2, second sentence.

When entering into the relationship there is also a dual legal relationship, but the rules of employment law and the rules of corporate law do not influence each other. The corporate appointment decision and concluding the employment agreement are unrelated. There is not one legal fact with different consequences. The appointment decision, in my opinion, does not automatically create a contractual relationship.¹³ Entering into the employment agreement does not include an appointment under corporate law. If the appointment decision is seen as an offer to enter into a contractual relationship (which is not a logical assumption in my opinion, see paragraph 8.4), then there is one legal act on which basis, eventually, two legal relationships arise that in principle are governed by their own set of rules (similar to the settlement of the dismissal).

With respect to the remuneration I do assume that there is a dual legal relationship. Although remuneration and wages can be provided for separately (in a corporate remuneration decision and in the contract) and can also differ from each other, I am of the opinion that (with a few exceptions)¹⁴ the relationship between director and the company should be seen as a dual legal relationship when it concerns the consideration for his labor. The obligation for the company to do something in return for the management duties / work follows from the corporate remuneration decision as well as the contract. Even if there would not be a contract, the payment obligation (if there is a remuneration decision), in my opinion, is an obligation under property law.¹⁵ The contractual relationship should take precedence over the remuneration decision. The claim that arises when the company does not pay can, at the discretion of the director, be based on the remuneration decision or the agreement. See for this further paragraph 7.5 of this chapter.

These general findings about the role of concurrence are given further substance in the next chapters.

8.4 The appointment: towards a decision with indirect, external effect

A corporate appointment decision should have indirect external effect instead of direct external effect. It should not be possible for the company to enter into an agreement with a prospective director without a valid corporate appointment and remuneration decision.

The fourth chapter focuses on the commencement of the legal relationship between director and company. Concluding an employment agreement is a bilateral legal act. A relationship under corporate law is not created by entering into an employment agreement or including the job description 'director', regardless of the form. Appointment can only take place through the methods included in the exhaustive list in the law. The most common appointment method is a decision of the competent

13 See paragraph 7.4 of this chapter and – more detailed – chapter 1, paragraph 1.2.3 and chapter 4, paragraph 4.3.1.

14 See chapter 5, paragraph 5.2 and for instance District Court of Utrecht (Chairman) December 19, 2008, *JAR* 2009/49, *JOR* 2009/100.

15 See chapter 1, paragraph 1.2.2.

body (the general meeting of shareholders or the supervisory board). In the literature the appointment decision is specified as an external decision with direct effect of the competent body. Acceptance of the appointment is not constitutive for the validity of the appointment decision, but without the acceptance the appointment is not effected. In that event there is a valid appointment decision, but the director is not appointed. The appointment decision therefore does not have any other legal effect than the possibility of acceptance by the director. It is not clear how the appointment and entering into the contract relate to each other. Two versions are argued in the literature: (i) the entire legal relationship (contractual and under corporate law) commences with the appointment decision and the acceptance thereof or (ii) the appointment is the execution, the final stage of the contractual agreement entered into by parties. It cannot be clearly concluded from the system of the law which option is correct. What can be argued against the first option is that parties usually have reached agreement with respect to the conditions under which the director will take up his position. It is not clear whether the body authorized to appoint is also authorized to represent the company when entering into the employment agreement. Another body is often authorized to take a remuneration decision. It is difficult to see how the appointment decision can be considered to be an offer to enter into an employment agreement (which provides for the wages). The appointment decision can therefore hardly be seen as an offer to enter into an (employment) agreement. The disadvantage of the second option is that the external direct effect of the appointment decision is in conflict with the construction in which the appointment decision is merely seen as the execution. These interpretation problems could be prevented by not awarding the appointment decision direct external effect, but indirect external effect. In that event a further legal act would be needed (acceptance by the director and entering into the agreement) in order to realize the dual legal relationship.

Under current law it would be most logical in my opinion to consider the appointment and entering into an agreement as two separate legal acts with different legal effects. The problems that could arise when entering into the legal relationship are no classic problems of concurrence. These problems can be divided in three types:

- (1) The lack of a valid appointment decision while the director, on the basis of an employment agreement, has performed as such for years and believed that he was director. In that case the employee was never director and the regular rules under employment law apply to the termination. The company has the burden to prove that there was an appointment decision.
- (2) Contractual agreements are entered into initially, but this is -intentionally- not followed by an appointment. A valid employment agreement was concluded that is governed by the regular rules under employment law. If parties, when entering into the employment agreement, expressed the intention that the employee will become director, then the director can only very rarely enforce this. If the company wants to terminate the agreement, the normal rules under employment law need to be followed. This situation (where there was in fact an inaccurate formation of the will by the company; after all, one body promised appointment, but the authorized body does not want to) can be avoided by

including a suspensive condition in the employment agreement or by entering into an employment agreement for a definite period until the first shareholders' meeting. The prospective director will probably not accept this solution during negotiations, but employment law does offer that option.

- (3) There is an appointment decision, but an explicit employment agreement was never concluded. Based on the theory that the appointment decision is a consequence of an agreement between parties, there could be an (implied) employment agreement. The party who relies on that agreement has the burden of proof. If the director is going to perform his work it will have to be determined based on the intention of parties and the factual circumstances whether there is an employment agreement between parties for which the employee/director can use Article 610a, Book 7, DCC.

The last two problems described above could be prevented by qualifying the appointment decision as a decision with *indirect* external effect and to arrange that no other bodies have decision-making power than the bodies that are authorized with respect to the appointment and remuneration. In other words, the board of directors (or the supervisory board) should not be able to enter into an employment agreement with a prospective director without having a valid appointment decision and remuneration decision of the authorized body as a basis. The division of authority and decision-making within the company should be an internal matter that cannot be invoked against the prospective director unless he was not in good faith (for instance a current director that is re-appointed and knows that there is no decision). In view of the fact that nobody can be appointed against his will and because the appointment cannot be effected without acceptance, there is no reason at all why an appointment decision should have direct external effect. It is difficult to see what interest a director (or a third party) could have with the direct external effect of an appointment decision.

8.5 Remuneration: representative authority

The regulation for the remuneration of directors is too complicated and is wrongly used to curb directors' remunerations. The remuneration decision should have indirect external effect, just like the appointment decision. The body authorized to set the remuneration should also have exclusive authority to reach agreement on the employment conditions. Finally, the Enterprise Division of the Amsterdam Court of Appeal needs to have a reticent attitude when it comes to intervening in employment conditions of directors.

Chapter 5 further examines the remuneration of the director. Upon closer consideration of the legislative history of Article 135, Book 2, DCC, it can be concluded that the legislator did not intent to make a distinction between remuneration and remuneration policy. A broader definition of remuneration is desirable: everything that the company puts at the disposal of the director as consideration for work performed by the director is remuneration. Guarantees (including indemnifications) under Article 383e, Book 2, DCC, should not fall under that. There can only be a distinction between pay and remuneration in exceptional situations. The main rule is:

all to which the director is entitled as consideration for his work, is pay and remuneration. Even when a specific part of the remuneration is explicitly linked to the directorship, it should be treated as pay, and the statutory increase for instance is due in the event of late payment. However, these specific remuneration aspects are no longer due if the management task ends but the employment continues, whether or not after a transitional arrangement.

The remuneration of the director is (has become) complex, even without taking the contractual component into consideration. Different rules apply to different types of companies. Those rules pertain to disclosure and the decision-making process within the company. Governance codes that have rules about the amount of pay also often apply. The financial sector has rules of the regulator and the government that pertain to the amount of remunerations. Ever since the Dual-Board Company Structure Reform in 2004, Article 135, Book 2, DCC, has become subject of changes, all of which are intended to have a more balanced or curbed remuneration of directors. Whether it concerns the general meeting of shareholders or the works council, the legislator apparently had the idea that remuneration of directors can only be set with due care if all stakeholders have a say in it. However, by not attaching clear sanctions to the noncompliance with the regulations (or even no sanctions at all like with the works councils right to define its position in the general meeting of shareholders), the effectiveness of these measures are limited. The legislator assumes that the changes will lead to a culture in which a remuneration decision is taken in harmony with all stakeholders. In my opinion, the legislator paid insufficient attention to the legal technical details of the legislative changes. A good example is the lack of clarity with respect to the status of a remuneration decision that was taken in violation of the remuneration policy. Voidability is the best defensible sanction, in my opinion. Furthermore, the legislator insufficiently recognized that the supervisory board can frustrate the appointment authority of the general meeting by including a high severance package in the remuneration decision beforehand (see the *AHOLD* case).¹⁶ The *TNO* case¹⁷ also shows that the position of the general meeting as appointing body is not as strong if another body has the representative authority to set the remuneration.

It remains to be seen if it was very effective to disconnect the appointment authority and the remuneration authority from each other. This is not the case, in my opinion, from the point of view of representative authority. On the other side, it is hard to imagine that the general meeting, especially of listed companies, keeps it all to itself. Just like some other subjects concerning the director, it would be desirable to treat the director of a listed company different than the regular director. For a regular public company or private company with limited liability that is not listed, the stronger role for the general meeting will be easier to realize than for the listed

¹⁶ Amsterdam Court of Appeal (Enterprise Division) January 6, 2005, *JOR* 2005/6 with commentary from Josephus Jitta (*AHOLD*). See paragraph 4.3.2.1 of chapter 4 and in paragraph 5.6 of chapter 5.

¹⁷ District Court of The Hague (Chairman), December 30, 2008, *JAR* 2009/32 (*TNO/De Staat*); See paragraph 4.3.2.1 of chapter 4 and paragraph 5.3.3.2 of chapter 5.

public company. In order to avoid being put on the spot, the general meeting can also include in the remuneration policy how remuneration decisions should be dealt with prior to the appointment decision.

It was examined how the representative authority to set the remuneration decision relates to the representative authority to conclude an agreement (in an employment agreement) on wages on behalf of the company. Management is authorized to represent the company unless the law stipulates otherwise. Management is therefore also authorized to conclude an employment agreement or contract for services with a director. Management is never authorized to take a remuneration decision. The remuneration decision is a decision with direct external effect. The system of the law leads to the following conclusions:

- a) A remuneration decision is a decision with direct external effect;
- b) Article 245 (135), Book 2, DCC is a stipulation of representation;
- c) A remuneration decision taken by an unauthorized body is null and void;
- d) Pursuant to Article 16, paragraph 2, Book 2, DCC, a remuneration decision that is null and void can only be enforced against the director if he knew or should have known the deficiency.
- e) A remuneration decision that conflicts with the remuneration policy is legally valid and can only lead to internal sanctions against the supervisory board.
- f) The representative authority to enter into an (employment) agreement with a director is unrelated to the (representative) authority to take a remuneration decision.

Because of this two different bodies can have representative authority with respect to the same subject (remuneration of the director). That is undesirable. In my opinion there are two ways to solve this. One of the ways to solve this is by awarding the remuneration decision indirect external effect, similar to the appointment decision and concluding the employment agreement. In that event, the decision alone is insufficient for legal effect. An implementing act (such as concluding the agreement) is necessary. Conversely, the decision is necessary for the legally valid formation of the agreement. Another possibility is the analogous application of the judgment of the Supreme Court in the *April 15* rulings on Article 134, (244), Book 2, DCC. The Supreme Court found that that Article not just determines which body has representative authority to terminate the relationship under corporate law, but also to terminate the contractual relationship. Article 135 (245), Book 2, DCC is also a stipulation of representation. It can be argued that the representative authority of Article 135 (245), Book 2, DCC, is not limited to the representation through decision, but also to the representation through concluding agreements on compensation. Through that there would be a legal stipulation that prevails over the general representative authority of management.

Both solutions have disadvantages. Dogmatically, an extensive interpretation of the *April 15* rulings are somewhat problematic in my opinion, see for this paragraph 7.6. Viewed from the practice the decision with indirect external effect

seems an artificial solution; usually parties will negotiate the employment conditions and it is not practical to take a new remuneration decision prior to each negotiation round.

If neither one of these two solutions apply, a discrepancy between the remuneration decision and the agreed pay (i.e. there is no remuneration decision or the remuneration decision determines a lower compensation than the agreement) should be solved, in my opinion, based on representative rules under corporate law and regular representative rules, which can be applied alongside each other. If the director can rely on the representative authority of the signatory of the agreement, then he is able to enforce specific performance of that agreement, in my opinion. That follows from Article 61, paragraph 2, Book 3, DCC. Article 15, Book 2, DCC leads to the same conclusion: a remuneration decision taken by an unauthorized body is null and void. That nullity can be enforced against the director if he was or should have been aware of the deficiency. It is difficult to see why this should be different if there is no remuneration decision. This can also only be enforced against the director if he should have known the existence of such a decision is required.

If no pay was agreed, the director can at all times fall back on the stipulations regarding customary pay (Article 618 and 405, Book 7, DCC), as long it is certain that parties intended to have a compensated directorship (and it is unclear how high that compensation would be).

Two aspects of the directors' compensation are further considered: the unilateral change of the pay and the privacy of the director when it concerns his compensation. Where it concerns the unilateral change of the employment conditions, the one-sidedness of the remuneration decision seems to offer more possibilities to unilaterally changes than the employment agreement. I am of the opinion that this is not the case. The unilateral change of the agreed compensation should be treated through the contractual relationship. This mainly shows from the introduction of the paragraphs 6-8 in Article 135, Book 2, DCC. These powers of recovery and adjustment, introduced in Book 2 DCC, are fully based on the regulation under contract law with respect to undue payment (Article 203, et seq., Book 6 DCC) and the derogatory effect of the reasonableness and fairness (Article 248, Book 6, DCC). The legislative history also shows that the legislator assumes that contractual agreements prevail. It is doubtful if repeating the already existing powers will increase the room for the company to unilaterally change the compensation. The obligation for the company to be accountable for whether or not to use these authorities pursuant to Article 383c, paragraph 6, Book 2 DCC, could lead to quicker action within the company or at least to a situation in which the possibilities are considered more consciously.

It is interesting to see how paragraph 6 and 8 of Article 135, Book 2, DCC, would work out if the director of a public company would have an employment agreement with another group company. If the compensation, including bonus, was laid down in that employment agreement, we do not get around to the application of

Article 135, Book 2, DCC, in my opinion. The existing rules relating to the law of obligations and employment law apply to adjusting or reclaiming.

When it comes to disclosing his pay, the director has to put up with more concerning his privacy, compared to regular employees.

Finally, the last part of chapter 5 examines the role of the Enterprise Division of the Amsterdam Court of Appeal in directors' compensation. Awarding a certain compensation package to a director could be qualified as mismanagement in the sense of Book 2, title 8, section 10, DCC. The Enterprise Division of the Amsterdam Court of Appeal will sometimes intervene in director compensation. The Enterprise Division of the Amsterdam Court of Appeal, in my opinion, stretches its authority too much with this. After all, its authority to make arrangements and to provide for the consequences thereof is limited by not being able to nullify or terminate an agreement concluded by the company. With respect to directors' compensation, the Enterprise Division of the Amsterdam Court of Appeal does not seem to strictly adhere to this.

8.6 The dismissal of the director

The dismissal of the director can usually be handled sufficiently in practice. Through the so-called third exception, the April 15 rulings are wrongly used in order to give some directors more employment protection. The employment protection of directors is at the right level. If something should be changed, it would be to give the group director or the 'functional director' more protection. This can be achieved by giving him the full protection under employment law, or by obligating the company to better inform prospective directors on their legal position and to bear the costs of liability insurance.

The sixth chapter is the effect of the research on the dismissal of the director. The body authorized to appoint is authorized to unilaterally terminate the relationship under corporate law as well as the contractual relationship. This applies regardless of the termination method (giving notice or termination by the court). This follows from Article 134 (244), Book 2, DCC, in conjunction with the *April 15* rulings. Based on the current state of legislation and jurisprudence it cannot be said with certainty whether that body is *exclusively* authorized to terminate the contractual relationship. I am of the opinion that that power should rest with that authority. If it is accepted that other bodies are also authorized to terminate the contractual relationship with the director, then this would be an infringement of the dismissal authority of the general meeting (or the supervisory board, as the case may be). This could be different if ending the contractual relationship is only an implementing act. If there is a dismissal decision, then this will usually be the act of notice of termination. If the notice under employment law does not produce effect, ending the contractual relationship will only be the implementation of the intent of the authorized authority. In that event other bodies are, in my opinion, authorized to submit a request for termination at the court on behalf of the company. This is only different if the agreement between the director and the

company continues to exist, despite the dismissal decision, because parties agreed this (and the employment agreement therefore does not continue because of a prohibition of termination but because of another agreement made between the parties).

If there is no dismissal decision from an authorized body, the preliminary question to be answered is whether the contractual relationship can be terminated while maintaining the directorship. The *April 15* rulings do not see on that situation. It is hard to imagine a practical importance why one of the parties would want to terminate the contractual relationship while maintaining the position of directorship. It is a misunderstanding that there is no obligation to pay wages without a contractual relationship; after all, the remuneration decision also gives entitlement to receive payment of the remuneration. If one assumes that the contractual relationship can be terminated “independently”, then the body authorized with respect to the dismissal has the exclusive authority to effectuate that termination.

Based on an analysis of the *April 15* rulings it was examined how the legal relationship of the director ends. In the *April 15* rulings, the Supreme Court, just like in earlier rulings, continues to conclude first and foremost that the dismissal decision does not have to result in the termination of the employment. The consequences of the dismissal decision for the employment relationship between the director and the company depends on what is stipulated in the employment agreement and on the applicable legal provisions, unless Book 2, DCC, expressly sets these stipulations aside (legal ground) 3.4.2). Here, the Supreme Court does nothing more, in my opinion, then paraphrase the main rule for concurrence:

“The basis for concurrence of several applicable legal grounds for a claim stated by claimant is that these are applicable cumulatively, with the understanding that if those legal grounds lead to different legal consequences which cannot occur simultaneously, claimant can make a choice at its own discretion. The only exception to this is if there is an unavoidable prescription or requirement based on the law (see Supreme Court, November 15, 2001, no. C01/082, *NJ* 2003, 48).”¹⁸

Employment law (in the broad sense) is therefore applicable, unless corporate law has exclusive stipulations.

In the following legal ground the Supreme Court finds that the legislative history of Article 134 and 244, Book 2 DCC, also shows that those articles intend to effectuate that the employment relationship also ends. It is unclear whether the Supreme Court means that Article 134 and 244, Book 2, DCC, expressly set employment law aside. That is not the case, in my opinion, and both legal grounds are fairly independent from each other. After all, there is no stipulation under employment law that is being set aside. From employment law also ensues that a notice leads to the end of the employment agreement of the director. After all, for a director no prior permission is

¹⁸ Supreme Court June 15, 2007, *NJ* 2007, 621, with commentary from KFH (*Fernhout/Essent*). See chapter 3, paragraph 3.3.1.

needed from the Employee Insurance Agency. The Supreme Court does nothing more than to specify the dismissal decision as an act of notice of termination: it is one legal act with, in principle, two legal consequences: the end of the relationship under corporate law and the notice of termination of the employment agreement. Both aspects of the legal act are governed by their own set of legal rules.

The Supreme Court formulates two exceptions to this interpretation. The dismissal decision is not an act of notice of termination if there is a prohibition of termination or if parties agreed otherwise. There has hardly been a discussion in the literature about the question whether the notice periods under employment law apply and whether the notice can be followed by a manifestly unreasonable dismissal proceedings. Both questions are -justly- answered in the affirmative. It is logical that the *April 15* rulings do not include an exception for this; the dismissal decision remains an act of notice of termination that entails the end of the employment agreement and to which the rules of employment law, like notice periods or the manifestly unreasonable dismissal regulation, apply. After all, Book 2, DCC, makes no exception for this.

A further examination of the first exception (there is a prohibition of termination) has led to the following insights. With the Employment and Security Act entering into effect, a difference arises between directors and regular employees with respect to the reflection period for consent to a notice of termination while there is a prohibition of termination. The reflection period does not apply to directors with an employment agreement. That is, in my opinion, conflicting with the judgment of the Supreme Court in the *Levison/MAB* ruling,¹⁹ especially in view of the explanation in the legislative history. After all, it was decided in this ruling that the nullity sanctions for a notice of termination in violation with a prohibition of termination also apply to directors. It was furthermore ruled that violations of employment law (like the prohibition of the reinstatement of employment and the absence of a preventive review) should be interpreted restrictively. A number of prohibitions of termination was further examined (the prohibition of termination during illness, the prohibition of termination based on Article 108, paragraph 4 Pension Act and the prohibitions of termination because of discrimination). The *Van Kalmthout* doctrine²⁰ (a director who calls in sick after receipt of an invitation to be heard on his proposed dismissal cannot rely on the protection of the prohibition of termination) still stands, even after the Employment and Security Act entering into effect. The prohibition of termination of Article 108 Pension Act, should only apply, in my opinion, to employee members of pension fund directors and not for the director who is on the board on behalf of the employer. Finally it was concluded that directors who work based on a contract for services also enjoy the protection of the prohibitions of notice because of discrimination. This follows from the *Danosa* ruling,²¹ but also from the Equal Treatment Laws that have a broader reach than just the employment agreement.

19 Supreme Court November 13, 1992, *NJ* 1993, 265, with commentary from PAS (*Levison/MAB*).

20 Court of Appeal Den Bosch August, 22, 2000, *JAR* 2000/207 (*Van Kalmthout*).

21 Court of Justice of the European Union November 11, 2010, *JAR* 2011/24 (*Danosa/LKB*).

With respect to the general prohibition of termination (as laid down in Article 6 Extraordinary Labor Relations Decree and, after July 1, 2015, in Article 671, paragraph 1, Book 7, (new) DCC) it is relevant that the exception to the general prohibition of termination for directors will get a wider scope with the Employment and Security Act entering into effect. All directors of legal entities for whom Book 2 DCC stipulates that the reinstatement of their employment is not possible, fall under the exception of Article 671, paragraph 1 under e, (new) Book 7, DCC. The same applies to directors of foreign comparable legal entities. Last mentioned is a codification of the *Bennenbroek/Scia* ruling²² in which the codification was formulated slightly different than the ruling itself. After all, there it was determined that the exception (no permission necessary) also applies to directors of foreign companies, *unless* the position of the director substantially differs from the position of directors of Dutch companies. I cannot think of a situation in which the different formulations lead to a different outcome (a comparable legal entity in which the position of the director substantially differs from the position of a Dutch company – for instance because dismissal at all times is not the norm), but it would have been logical for the legislator to explain this difference. The enlargement of the scope of the exception to the general prohibition of termination is not extended to directors who are employed by another (group) company than the one they are director of. For them, termination of the employment agreement needs to take place in accordance with the general rules under employment law: permission from the Employee Insurance Agency is needed, the subdistrict court is competent and reinstatement of employment is possible.

A recurrent question is to what extent the director, who lost his directorship through a dismissal decision, but not his employment agreement (for instance because he is ill), falls under the exception to the general prohibition of termination. In other words: is notice of termination possible of the employment agreement of the director who has given notice of his recovery without permission from the Employee Insurance Agency? As long as parties have not given new substance to the employment agreement, the answer is that notice for termination can be given without this permission. This follows from the *Atlantic Nominees* ruling.²³ With the loss of the corporate position as director the question also rises if the former director, as a result, will be subject to a collective labor agreement or a decision for mandatory participation in an industry-wide pension fund, for which he was initially excluded based on his position. Based on the collective labor agreement laws the answer to this question is in the affirmative, but I am of the opinion that the methodology of the collective labor agreement law should give way to consistency when it comes to the position of the former director. After his dismissal as director (provided that no real substance has been given to the employment agreement that continues), he will be treated under employment law as if he was a director. There is no reason to make an exception for this when it comes to collective labor agreement law or pension law.

22 Supreme Court September, 15, 1995, NJ 1996, 234, JAR 1995/213 (*Bennenbroek/Scia*).

23 Supreme Court November, 17, 1995, NJ 1996, 142 (*Atlantic Nominees/Van den Elshout*).

The second exception was also discussed. Parties can agree that the dismissal decision under corporate law will not immediately terminate the employment agreement. This agreement can be reached prior to as well as with the dismissal decision.

The 'third exception' (the 'Timmerman exception'), discussed a lot in literature, is used regularly in the lower courts, in my opinion wrongly so, for a discussion about the protection level the director earns. Assuming the third exception in which the dismissal decision is not considered an act of notice of termination if the directorship does not play a real role with the performance, leads to the exclusive conclusion, in my opinion, that the dismissal decision should also not be seen as an act of notice of termination. The employer/company will still have to perform a separate act of notice of termination to terminate the contract. It is a misconception, in my opinion, permission is needed from the Employee Insurance Agency for that notice of termination. That only becomes relevant if parties have given real substance to the employment agreement after the corporate termination of the directorship. After all, the company/employer can simultaneously also, explicitly, give notice of termination of the employment agreement, in which case the exception to the general prohibition of termination will apply.

The underlying question is if one can successfully argue that the general prohibition of termination applies to the director for whom the directorship does not play a real role for the performance of his work. There is no indication for this in the notes to the decision to grant an exemption or in the legislative history of Article 671, paragraph 1, under e, Book 7, (new) DCC. I would like to argue not to make this distinction either. Book 2 only knows one type of director. In the framework of directors' and officers' liability 'not real' directors are also not treated any different than full directors. I do not see a reason to have the extent of protection under employment law depend on the facts and circumstances of the case. This would, in my opinion, lead to too much legal uncertainty about the termination of the employment agreement with a director. In order to strengthen their negotiating position most directors will argue with the approaching end of their relationship that they were no real directors after all. If there is a public need to treat certain directors fully as employees, the law will have to provide for this. I am of the opinion that the *April 15* rulings do not leave room for the third exception. In earlier cases the Supreme Court explicitly accepted the division between the termination under corporate law and the termination under employment law (*Atlantic Nominees* and *Mooij Verf/De Waard*).²⁴ The *Bartelink/Ciris* case was suitable in itself to give a decision about the situation in which the directorship was not so relevant for the performance of work. However, the Supreme Court did not mention the possibility of division at all.

24 Supreme Court November, 17, 1995, NJ 1996, 142 (*Atlantic Nominees/Van den Elshout*) and Supreme Court October, 8, 1993, NJ 1994, 211, with commentary from PAS, JAR 1993/244 (*Mooij Verf/De Waard*).

The scope of the *April 15* rulings (when do the rulings apply) was examined, in addition to the third exception. A common situation is one where the director is employed by another group company than the one where he is director. A dismissal decision will in that event not result in the termination of the employment agreement. This already ensues from the fact that the general meeting of the company is not authorized to represent the employer/company so that the dismissal decision cannot be seen as an act of notice of termination of the employer. This construction was furthermore explicitly discussed in the legislative debate on the Management and Supervision Act. The legislator explicitly explained that Article 132, paragraph 3, Book 2 DCC, does not apply to the director of a listed company who has an employment agreement with another company. The Supreme Court also concluded in the *Aeilkema/Omta* ruling that one should not pierce the constructions.

Another much-discussed borderline case is the question if the dismissal decision should also be seen as a termination of the contractual relationship if there is a contract for services. The opinions are split. It should be said first and foremost that it already follows from the *Bruins/Arrows* ruling that employment law does not apply if there is a contract for services. In line with this, it can be argued that the *April 15* rulings explicitly focus on the director who has an employment agreement, and legislative history (on which the rulings heavily lean) also assumes the employment agreement. However, the idea behind the *April 15* rulings apparently is that the company which dismisses, also no longer has a need for a contractual relationship. Shouldn't that also apply to the contract for services? Compare what I concluded above with respect to another judgment from the *April 15* rulings, namely that the general meeting is also the authorized body to end the contractual relationship and that Article 134 (244), Book 2, DCC, are stipulations of representation in that sense. The general meeting (or the supervisory board if that is the body authorized with respect to the dismissal) is also authorized with respect to the termination of the contract for services. It would be logical that the main rule from the *April 15* rulings also applies. There is no consensus yet on this in case law.

It is generally assumed that the dismissal of directors of other legal entities than private companies with limited liability or public companies do not fall under the *April 15* rulings. It is uncertain whether that assumption is still true in light of the changes introduced by the Employment and Security Act: associations, cooperatives, and mutual benefit associations, are considered to be equal on all aspects to private companies with limited liability or public companies with respect to the position of the director under employment law. It cannot be explained why a dismissal decision of an authorized body should not be specified the same way.

A dismissal by the Enterprise Division of the Amsterdam Court of Appeal or the expiration of a term of appointment does not immediately result in the end of the employment agreement. After all, there is no dismissal decision, so the *April 15* rulings do not apply.

The most important conclusion is that the importance of the *April 15* rulings should not be overrated. It was not ruled that corporate law always prevails. That stipulations from Book 2 DCC with an exclusive scope take precedence over stipulations under employment law, is completely in line with the main rule of concurrence. The dismissal decision is qualified as a legal act with two legal effects: end of the relationship under corporate law and the notice of termination under employment law. Nothing more and nothing less. The *April 15* rulings say nothing about the level of employment protection.

An examination of the review of the dismissal decision under corporate and employment law shows that both set of legal rules influence each other, but that there is no conflict. Nullification or voidness of the dismissal decision based on Book 2, DCC, will lead to the act of notice of termination ceasing to exist, and the employment agreement will be considered as not being terminated. If the employment agreement ends through a court decision, then the dismissal decision ceasing to exist will have no consequences for the terminated employment agreement. Every now and then this will lead to the court ruling on the termination taking into consideration the possibility of a nullification of the dismissal decision. If there are defects under employment law, the dismissal is not affected, but a liability for compensation arises for the company. This is only different if there are nullity sanctions under employment law. These will affect the notice of termination under employment law, but leaves the dismissal decision under corporate law intact. With the review under employment law the requirements under corporate law play a part when it comes to the assessment of the manifestly unreasonableness of the dismissal. With the assessment of the dismissal the position under corporate law provides the details of norms under employment law. This is shown from the review of the manifestly unreasonableness, the urgent cause and immediacy with dismissal with immediate effect, and with the termination of the employment agreement. According to expectations, this will not be different after the Employment and Security Act comes into effect.

As soon as the director and company make arrangements about the exit, similar representative issues come up as with the conclusion of the employment agreement and reaching agreement on the remuneration. It is most logical that the body authorized to set the remuneration is also authorized to make all arrangements with respect to the settlement of the relationship, except for the discharge. That is the exclusive authority of the general meeting of shareholders.

When it comes to the determination of the competent court the competency rules under corporate law apply nationally (when it concerns subject-matter jurisdiction as well as territorial jurisdiction). Internationally, the protective stipulations with respect to the competent court in employment disputes as laid down in European regulations could take precedence over competence rules under 'corporate law'. If parties agree on arbitration, the dual legal relationship clearly shows. The (dismissal) decision under corporate law cannot be disputed in arbitration; this judgment is reserved for the regular courts.

The divisibility of the position of the director clearly shows if a transfer of undertaking takes place. In case of a transfer of undertaking, the director will transfer to the acquirer as an employee and the directorship stays behind (and can be terminated through a dismissal decision of the company). In case of bankruptcy the position of the director is also divisible; a dismissal decision during bankruptcy does not end the employment agreement. Pursuant to Article 40 Bankruptcy Act, the authority during bankruptcy to give notice to terminate the employment agreements rests with the bankruptcy trustee. Book 2, DCC, does not expressly set aside Article 40 Bankruptcy Act.

8.7 Final conclusions

The most important rule under corporate law with respect to the legal position of the director is that the director can be dismissed at any time; the company cannot be faced with a director it does not want. This basis can also be found in Article 16, Book 2, DCC: even if the director could have relied on his appointment, this cannot be enforced against the company. Employment law (dismissal law) that hinders the dismissal of a director does not fit with this. That is the reason why reinstatement of employment is not possible for a director and why there is no preventive review (after all, the general prohibition of termination does not apply to the director). Each unreasonableness or irregularity of the dismissal is translated into compensation.²⁵ After all, the rule is not that it should be possible to dismiss the director at any time without compensation. That was also never the intention of the legislator. Only the nullity sanctions with prohibitions of termination seem to interfere with this. These also apply in part (for instance with prohibitions of termination because of discrimination) if there is a contract for services. Other prohibitions of termination, such as during illness, do not result in the continuance of the directorship, but in the continuance of the employment agreement. The company is then not faced with a director it does not want. After all, the dismissal decision *as a director* remains effective. However, the company/employer is faced with an ill employee who continues to get paid and the company will have to reintegrate him. This will not always be that easy in practice. The same can be said for some other situations in which the employee is unfit for work. This does not pose a problem under corporate law; from a business perspective it is a hassle, but nothing more than that.

When it comes to the system of the law and under corporate law, the current situation is satisfactory when it comes to dismissal protection, in my opinion. This can also be applied in practice. From an employment point of view or perspective one can argue against this. For instance, it is not always satisfactory for the sense of justice that the director does without 'full' employment protection. This is especially true for a director who -in short- has in fact no decision-making power. Think of the situation in which a director does not really report directly to the shareholder in a group (see the quote from the last paragraph), but to a manager somewhere else in the group. The assumption that directors can take care of themselves is too generic,

²⁵ This will not be different after the Employment and Security Act comes into effect.

in my opinion. After all, that does not apply to every director. On the other hand, there are plenty of 'regular' employees who are assertive, highly educated, have a high income, and a good position on the job market. In itself, there is nothing against employment law that is a little less protective for the 'top' of the job market (see also the research of Boot and Aerts described in chapter 1, paragraph 1.3.2). It is unclear why that has to stop with the director. The director is special because of his formal position within the company. That the director usually earns a higher than modal salary and belongs to the group of employees who are articulate, does not per definition sets him apart from other employees. Uniken Venema wrote in 1969: *'The position of a director of a 100% subsidiary is hardly any different than the position of a department head (...)'*²⁶. This is also true for the 'functional director' described by Van Uden²⁷. This can also be relevant for the flexible private company with limited liability (the so-called *Flex-BV*); after all the authority to issue instructions of the general meeting or special groups can be very wide. In that case the director is in fact nothing more than a senior manager or a branch manager. Still, he is burdened with the heavy liability of the directorship and the relatively light employment termination law. Determining based on the factual circumstances which director is 'real' and which director is not could perhaps lead to a satisfactory solution in some cases. On the other hand, it is not clear for parties beforehand how their legal relationship should be interpreted and how this can be terminated. This is undesirable, especially from the perspective of legal certainty.

It could be a solution to declare the entire employment law applicable to directors of private companies with limited liability in a group or of flexible private companies with limited liability. After all, the 'borderline cases' always concern that type of director. In that scenario, directors of listed companies will fall outside the employment law; directors of a group company or a flexible private company with limited liability will then fully fall under the employment law and all directors that are in-between will enjoy a lighter level of protection (no general prohibition of dismissal and no possibility of a reinstatement of employment). This solution leads to more fragmentation. A more unambiguous solution is that parties can choose themselves if employment law is applicable to their relationship. Directors of a group company already have that possibility; parties can choose whether the director of a group company will enjoy full protection under employment law by having him enter into employment with another group company than the one he is director of. Other directors do not have that possibility. A legislative change to effectuate this is simple; a paragraph could be added to Article 615, Book 7, DCC, which says that Title 10 of Book 7 is directory law for directors. Parties are then able to contract out of employment protection and other 'unnecessary' regulations.²⁸ Such a measure is not necessary, in my opinion. When it comes to employment protection the position of the director can be dealt with in practice. I also see no reasons dogmatically to exclude the director from employment protection, as stated above.

26 Uniken Venema 1969, p. 268/269.

27 Van Uden 2006 and chapter 6, paragraph 6.2.4.

28 See Verburg 2005.

However, an obligation for the company to provide information with the appointment of a director could be considered. Especially when there is a 'functional' director (think of the director who was employed as a regular employee for much longer) it should be clear that his appointment will have consequences for his legal position. The refusal to accept the directorship should then not be able to lead to the dismissal from the existing position. Such an obligation to provide information, linked to, for instance, a legal obligation for the company to reimburse the costs for a directors' and officers' liability insurance, should offer sufficient guarantees for the functional or 'not real' director.

Employment law also does not interfere with corporate law when it comes to appointment and remuneration. Quite the opposite, corporate law sometimes interferes with employment law, as is the case, for instance, with the privacy of the director versus the disclosure obligation of the company. One of the examples that was mentioned with the formation of the corporate governance code to argue that employment law interferes is the provisions on succession of fixed-term employment contracts. Employment law prevents that a director can have several employment agreements for four years (coinciding with the appointed term). This is strictly correct and a hindrance. However, practice also shows that parties rarely choose a contract for four years with the first appointed term.

The dual legal position of the director remains problematic. Dogmatically, corporate law and (employment) agreement law do not fit very well with each other. This is not so much because of the protection under employment law interfering with corporate law, but rather because there are several bodies within the company that have representative authority when it comes to appointment, remuneration, dismissal and concluding contracts with the director. Legislative history and case law show that there is little attention for, and sometimes even little insight in, the methodology of Book 2 and Book 7, DCC, and the relationship between corporate law and property law, more specifically the law of contracts. The conflicting representative authorities are hard to reconcile with each other. Concurrence rules can offer a solution in specific cases, but do not offer a balanced, dogmatic system. I am of the opinion that a more structured clarity is desirable, without disrupting the checks and balances between the different bodies of the company too much. The appointment decision, remuneration decision, and dismissal decision are decisions with direct external effect. A unilateral legal act with direct effect against third parties. This is less interesting with respect to the dismissal decision because the notice of termination (the most used method to dismiss a director) is also a unilateral legal act. When it comes to the appointment and remuneration there is indeed an interest conflict. After all, concluding an agreement and reaching an agreement on wages is a bilateral legal act. The appointment and remuneration decision should be a decision with indirect external effect; this could prevent a lot of uncertainty. Another option would be to provide for the entire legal relationship through Book 2, DCC, and to

accept that there is no contractual component. I am of the opinion that this solution would lead to dogmatic clarity, but is too far from the practice. After all, there will also be agreements with the director about the conditions of his appointment; this is a dual process that cannot be laid down in a unilateral decision.

There are different theories on the interpretation of the legal relationship between the company and the director. One speaks of a dual legal relationship, a mixed legal relationship, a colored legal relationship or a dual linked legal relationship.²⁹ Interpreting the relationship is not per definition a theoretical exercise. If the relationship between director and company is seen as a mixed legal relationship, the rules under employment law would always take precedence, pursuant to Article 610, paragraph 2, Book 7, DCC through the *mutatis mutandis clause* of Article 216, Book 6, DCC.³⁰ Most corporate law attorneys do not find this an acceptable consequence.³¹ In connection with the *April 15* rulings it has been argued that it clearly shows from that ruling that the Supreme Court puts corporate law first. I am of the opinion that there is a dual legal relationship with the commencement and termination. With respect to the remuneration I would say that there is a dual legal relationship in which the contractual rules take precedence.

29 See chapter 1, paragraph 1.4.

30 See chapter 1, paragraph 1.4.1 and chapter 3, paragraph 3.4 which extensively discusses how the rule of Article 610, paragraph 2, Book 7, DCC, that pertains to *mixed agreements*, can also be applied to mixed legal relationships, in my opinion.

31 See for instance Timmerman 1985, p. 6 and Timmerman 1991, p. 191.