

# CMS GUIDE TO SHAREHOLDER LITIGATION IN THE NETHERLANDS

## WHAT THE GUIDE IS

The CMS Guide to Shareholder Litigation (CMS Guide) aims to give an overview of the most important civil actions that shareholders can use to exercise their shareholder rights in The Netherlands. The civil actions in this CMS Guide only pertain to those actions for which the shareholder-ship is required to be admissible in court and all actions for which the shareholder by law or case law is considered an interested party.

## WHAT THE GUIDE IS NOT

This CMS Guide does not include all types of action that can be used by shareholders to ascertain the liability of any persons or bodies for economic damage to the shares as a result of - for example - any unlawful acts. Therefore, possible actions against executive and supervisory directors, trustees, creditors, debtors of the company, etc. are not described.

The CMS Guide makes no claims to completeness and does not constitute legal advice. The information it contains is no substitute for specific legal advice. If you have any queries regarding the issues raised about other legal topics, please get in touch with the authors of this publication:



Bart Bendel  
T: +31(0)30 21 21 530  
F: +31(0)30 21 21 172  
M: [bart.bendel@cms-dsb.com](mailto:bart.bendel@cms-dsb.com)



Wouter Vermaas  
T: +31(0)30 21 21 543  
F: +31(0)30 21 21 172  
M: [wouter.vermaas@cms-dsb.com](mailto:wouter.vermaas@cms-dsb.com)

## WHY USE THE GUIDE?

The user of this CMS Guide is offered a comprehensive insight into various types of actions to determine easily what civil action may be suited to address the problems with which a shareholder may be confronted.

## CONTENT OF THE GUIDE

The user will find a description of the objective of the civil action, the grounds to allow the legal claim, the requirements for admissibility, the legal basis, the competent court, the possibilities of appeal and—if any—the important specifics of the action.

## HOW TO USE THE GUIDE

Please use the CMS Shareholder Actions List below to find the information you are looking for by clicking:

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I. General actions for shareholders in The Netherlands public companies (“naamloze vennootschappen”) and private limited companies (“besloten vennootschappen met beperkte aansprakelijkheid”)

1. Annulment of corporate decisions

<a href="#">&lt;more info&gt;</a>	Reasonable interest	Art 2:15 subsection 3 DCC	District court → company residence	Yes <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

2. Winding up and asset distribution

2.1 Winding up of company pursuant to articles of association

An event which, pursuant to its articles of association, results in its winding up <a href="#">&lt;more info&gt;</a>	Interested party	Art 2:19 subsection 2 DCC	District court → company residence	Yes <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

2.2 Winding up of company due to defects

<a href="#">&lt;more info&gt;</a>	Interested party	Art 2:21 subsection 4 DCC	District court → company residence	Yes <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

2.3 Oppose distribution scheme of winding-up balance

If accounts rendered/distribution plan is incorrect	Creditor or entitled party	Art 2:23b subsection 5 DCC	District court → company residence	Yes <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

2.4 Reopening liquidation proceedings

<a href="#">&lt;more info&gt;</a>	Creditor or entitled party	Art 2:23c subsection 1 DCC	District court → company residence	Yes <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

## 2.5 Request for depositary of company records

If there is no depositary and the last liquidator is not prepared to become depositary	Interested party	Art 2:24 subsection 2 DCC	Subdistrict court → liquidated company residence	No	<a href="#">&lt;more info&gt;</a>

## 2.6 Request to access company records

If shareholder shows he/she has interest in inspection as former shareholder	Interested party	Art 2:24 subsection 4 DCC	Subdistrict court → liquidated company residence	Yes <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

## II. Specific actions for shareholders in The Netherlands public companies (“naamloze vennootschappen”)

### 3. Loss of shares

#### 3.1 Compensation for loss of shares in case of conversion company

No agreement regarding compensation between shareholder and company	<a href="#">&lt;more info&gt;</a>	Art 2:71 subsection 3 DCC	District court or interim provisions judge <a href="#">&lt;more info&gt;</a>	Yes <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

#### 3.2 Oppose provision of duplicate of lost shares

If the interested party proves that it possesses the lost share or a part of it	Interested party	Art 2:86d subsection 4 DCC	District court → company residence	Yes <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

### 3.3 Squeeze out minority shareholders

When the claimant or claimants satisfy(ies) the admissibility requirements	<a href="#">&lt;more info&gt;</a>	Art 2:92a DCC	Enterprises division of the court of appeal in Amsterdam	Yes <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

## 4. Convening general meeting

### 4.1 Convening a general meeting of shareholders

<a href="#">&lt;more info&gt;</a>	One or more shareholders who jointly represent(s) at least 10% of issued capital	Art 2:110/111 DCC	Interim provisions judge → company residence	No <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

### 4.2 Permission to convene general meeting if authorized persons fail to do so

Granted, unless court judges that general meeting has no purpose at all	Any shareholder	Art 2:112 DCC	Interim provisions judge → company residence	No <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

## III. Specific actions for shareholders in The Netherlands large public companies (“grote naamloze vennootschappen”)

### 5. Articles of association adopted by the court

If the general meeting does not resolve to amend the articles of association in time	A person entitled to place matters on the agenda pursuant to art 2:114a DCC	Art 2:154 subsections 5/6 DCC	Enterprises division of the court of appeal of Amsterdam	Yes <a href="#">&lt;more info&gt;</a>	<a href="#">&lt;more info&gt;</a>

IV. Specific actions for shareholders in The Netherlands private limited companies (“besloten vennootschappen met beperkte aansprakelijkheid”)

6. Loss of shares

6.1 Compensation for loss of shares in case of conversion company

No agreement regarding compensation between shareholder and company	< <a href="#">more info</a> >	Art 2:181 subsection 3 DCC	District court or interim provisions judge < <a href="#">more info</a> >	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

6.2 Squeeze out minority shareholders

When the claimant or claimants satisfy(ies) the admissibility requirements	< <a href="#">more info</a> >	Art 2:201a DCC	Enterprises division of the court of appeal in Amsterdam	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

7. Convening general meeting

7.1 Convening a general meeting of shareholders

< <a href="#">more info</a> >	One or more shareholders who jointly represent(s) at least 10% of issued capital	Art 2:220/221 DCC	Interim provisions judge → company residence	No < <a href="#">more info</a> >	< <a href="#">more info</a> >

7.2 Permission to convene general meeting if authorized persons fail to do so

Granted, unless court judges that general meeting has no purpose at all	Any shareholder	Art 2:222 DCC	Interim provisions judge → company residence	No < <a href="#">more info</a> >	< <a href="#">more info</a> >

V. Specific actions for shareholders in The Netherlands large private limited companies (“grote besloten vennootschappen met beperkte aansprakelijkheid”)

8. Articles of association adopted by the court

If the general meeting does not resolve to amend the articles of association in time	A person entitled to place matters on the agenda pursuant to art 2:224a DCC	Art 2:264 subsections 5/6 DCC	Enterprises division of the court of appeal of Amsterdam	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

VI. Other actions for shareholders in The Netherlands public companies (“naamloze vennootschappen”) and private limited companies (“besloten vennootschappen met beperkte aansprakelijkheid”)

9. Mergers and divisions

9.1 Annulment of legal merger of company

< <a href="#">more info</a> >	In its capacity as shareholder	Art 2:323 subsection 2 DCC	District court → transferee-legal person residence < <a href="#">more info</a> >	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

9.2 Compensation for loss of shares in case of merger

No agreement regarding compensation between shareholder and company	In its capacity as shareholder of the disappearing company	Art 2:333h subsections 1/2 DCC	Chairman of the enterprises division of court of appeal in Amsterdam	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

9.3 Annulment of legal division of company

< <a href="#">more info</a> >	In its capacity as shareholder	Art 2:334u subsections 2/3 DCC	District court < <a href="#">more info</a> >	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >



## 10. Regulation of disputes

### 10.1 Action to expel shareholders

Shareholding cannot reasonably be tolerated < <a href="#">more info</a> >	One or more shareholders who (jointly) contribute at least one-third of issued capital	Art 2:336 DCC	District court → company residence	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

### 10.2 Transfer voting rights against usufructuary or pledgee of a share

< <a href="#">more info</a> >	One or more shareholders who (jointly) contribute at least one-third of the issued capital	Art 2:342 DCC	District court → company residence	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

### 10.3 Action to demand that shares shall be acquired

Rights or interests are prejudiced by conduct of one or more shareholders < <a href="#">more info</a> >	Being shareholder of the company	Art 2:343 DCC	District court → company residence	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

## 11. Right of inquiry

### 11.1 Request for inquiry into policy and conduct of business of company

If there appear well founded reasons to doubt the correctness of the policy	< <a href="#">more info</a> >	Art 2:345/346 subsection b DCC	Enterprises division of the court of appeal in Amsterdam	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

## 11.2 Action to install interlocutory measures

If immediate remedy is required in connection with condition of company or in the interest of inquiry	Upon the application of the applicants referred to in art 2:345 DCC	Art 2:349a subsection 2 DCC	Enterprises division of the court of appeal in Amsterdam	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

## 11.3 Action for indefinite orders as result of inquiry

If misconduct is established by the report regarding the policy and conduct of company's business	< <a href="#">more info</a> >	Art 2:355 DCC	Enterprises division of the court of appeal in Amsterdam	Yes < <a href="#">more info</a> >	< <a href="#">more info</a> >

## 1. Annulment of corporate decisions

### Material grounds

In case it is contrary to (i) statutory provisions or provisions in the articles of association regulating the passing of resolutions, (ii) the principles of reasonableness and fairness required under article 2:8 DCC or (iii) any bylaws.

### Admissibility requirements

Reasonable interest.

### Legal basis

Art 2:15 subsection 3 DCC.

### Competent court

District court → in which the company resides.

### Appeal

Yes, court of appeal.

### Other elements

The right to demand annulment of the resolution shall lapse one year from the end of the day on which sufficient publicity of the resolution was given or on which the interested party became aware of the resolution or was notified thereof.

Proceedings commenced by a summons.

### Key case law

*Supreme Court, 31 May 1996, NJ 1996/694 (Videoworks)*

The supreme court considered that a shareholder does not always have reasonable interest due to the fact that he/she is shareholder. In case of rejection, a shareholder must demonstrate that he/she has his/her own reasonable interest in the due performance of the obligation which has not been performed.

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## 2. Winding up and asset distribution

### 2.1 Winding up of company pursuant to articles of association

#### **Material grounds**

On the occurrence of an event which, pursuant to its articles of association, results in its winding up and which does not constitute a resolution or an act, the object of which is the winding up.

#### **Admissibility requirements**

Interested party.

#### **Legal basis**

Art 2:19 subsection 2 DCC.

#### **Competent court**

District court → in which the company resides.

#### **Appeal**

Yes, court of appeal.

#### **Other elements**

The court shall declare whether the company has been wound up and the effective date of the winding up. The order shall be universally binding. A legal person shall continue to exist after its winding up to the extent required for the purpose of the liquidation of its property, rights and interests. In documents and announcements issued by it, the words *in liquidatie* shall be added to its name.

Proceedings commenced by an application.

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## 2.2 Winding up of company due to defects

### **Material grounds**

If (i) there are defects in its formation, (ii) its articles of association do not comply with the statutory requirements or (iii) it does not fall within the statutory description of its legal type.

### **Admissibility requirements**

Interested party.

### **Legal basis**

Art 2:21 subsection 4 DCC.

### **Competent court**

District court → in which the company resides.

### **Appeal**

Yes, court of appeal.

### **Other elements**

The court shall not order the winding up of the company, if it has allowed it a given period of time upon expiration of which the company which complies with the statutory requirements.

Proceedings commenced by an application.

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## 2.3 Oppose distribution scheme of winding-up balance

### **Material grounds**

If the court judges if the accounts rendered and/or the plan of distribution is incorrect.

### **Admissibility requirements**

Creditor or entitled party.

### **Legal basis**

Art 2:23b subsection 5 DCC.

### **Competent court**

District court → in which the company subject to the liquidation resided.

### **Appeal**

Yes, court of appeal.

### **Other elements**

The action to oppose the plan of distribution pertaining to the liquidation residue in case of a winding up has to be instituted within two months after lodging of the accounts rendered and the plan of distribution and after such lodging has been published and announced in accordance with art 2:23b subsection 4 DCC. Art 2:23b subsection 4 DCC stipulates that the liquidator must lodge the accounts rendered and the plan of distribution for entry at the registries where the legal person is registered and, in any event, at the office of the company, if there is one, or at any other place in the district where the legal person has its residence. The documents shall be available for public inspection for two months. The liquidator shall publish a notice in a newspaper stating where and until which date the same shall be available for inspection. The court can order publication in the *Nederlandse Staatscourant*.

Proceedings commenced by an application.

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## 2.4 Reopening liquidation proceedings

### **Material grounds**

If, after the company has ceased to exist, a further creditor or party entitled to the surplus comes forward or the existence of an asset is ascertained.

### **Admissibility requirements**

Creditor or entitled party.

### **Legal basis**

Art 2:23c subsection 1 DCC.

### **Competent court**

District court → in which the company subject to the liquidation resided.

### **Appeal**

Yes, court of appeal.

### **Other elements**

In case the court reopens the liquidation, it can appoint a liquidator. The company revives but exclusively for the purpose of the settlement of the reopened liquidation. During the period in which the company ceased to exist, there are grounds for extension as referred to in 3:320 DCC with regard to the prescription period for rights of action by or against the company.

Proceedings commenced by an application.

### **Key case law**

*Supreme Court, 2 October 1998, NJ 1999/194 (FNV/Ventaz)*

The Supreme Court considers that for granting the request for reopening, the applicant must demonstrate the claim and/or the existence of an asset sufficiently. The judge must verify with restraint whether or not this requirement has been fulfilled.

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## 2.5 Request for depositary of company records

### **Material grounds**

If there is no depositary and the last liquidator is not prepared to become depositary.

### **Admissibility requirements**

Interested party.

### **Legal basis**

Art 2:24 subsection 2 DCC.

### **Competent court**

The subdistrict court → in which the company resided before the winding up.

### **Appeal**

No appeal.

### **Other elements**

The books, records and other data carriers of the company which has been wound up shall be retained for seven years after it has ceased to exist. If there is no depositary and if the liquidator is not prepared to keep the same, a depositary, if possible from amongst the persons who were involved with the company, shall be appointed upon the application of any interested party. Within eight days after his/her custody obligation takes effect, the depositary must notify the registries of the company which has been wound up was registered of his/her name and address.

Proceedings commenced by an application.

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## 2.6 Request to access company records

### **Material grounds**

If the shareholder shows he/she has a reasonable interest in such inspection as a former shareholder.

### **Admissibility requirements**

Interested party.

### **Legal basis**

Art 2:24 subsection 4 DCC.

### **Competent court**

The subdistrict court → in which the company resided before the winding up.

### **Appeal**

Yes, court of appeal.

### **Other elements**

The subdistrict court may, upon application, give authorization for inspection of the books, records and other data carriers to any interested party.

Proceedings commenced by an application.

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### 3. Loss of shares

#### 3.1 Compensation loss of shares in case of conversion company

##### **Material grounds**

In the absence of agreement between the shareholder and the company regarding the compensation, the court will grant the application.

##### **Admissibility requirements**

Shareholder who has not consented to the resolution for conversion and therefore will lose his/her shares and will not become a member of the association, cooperative or mutual insurance society.

##### **Legal basis**

Art 2:71 subsection 3 DCC.

##### **Competent court**

The district court in the case of authorization for conversion or by the interim provisions judge of the court of first instance → in which the company resides.

##### **Appeal**

Yes, court of appeal.

##### **Other elements**

On the conversion of the company into an association, cooperative or mutual insurance society, each shareholder shall become a member unless he/she requested indemnification. The shareholder who has not consented to the resolution for conversion may request the company for indemnification against the loss of his/her shares. The request for indemnification must be made in writing to the company within one month after it has informed the shareholder that he/she requested such indemnification. In the absence of agreement, the shareholder can do the action as described above. The court will appoint one or more independent experts who will determine the indemnification.

Proceedings commenced by an application.

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### 3.2 Oppose provision of duplicate of lost shares

#### **Material grounds**

If the interested party proves that it possesses the lost share or a part of it.

#### **Admissibility requirements**

Interested party.

#### **Legal basis**

Art 2:86d subsection 4 DCC.

#### **Competent court**

District court → in which the company resides.

#### **Appeal**

Yes, court of appeal.

#### **Other elements**

The holder of a bearer share certificate may request the company to provide him/her with a duplicate of a lost share certificate. The holder must show *prima facie* that the share certificate was lost and give details, identifying the relevant share certificate. Any interested party may, within six weeks of the date of notification of the application, oppose to the provision of a duplicate by an application to the district court. Provisions in article 2:86d DCC does not apply insofar the articles of association of the company regulate the substitution of lost share certificates.

Proceedings commenced by an application.

#### **Key case law**

*Court of Appeal of Amsterdam, 6 October 2009, JOR 2010/88 (Bronwaterleiding Doorn/Engel)*

A person requests for duplicates of lost share certificates. The court considers that the share ownership has not been established by possessing talons including dividend coupons, because those are independently marketable.

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### 3.3 Squeeze out minority shareholders

#### **Material grounds**

When the claimant or claimants satisfy the admissibility requirements.

#### **Admissibility requirements**

(i) Shareholder who contributes at least 95% of the issued capital of the company or (ii) if two or more group companies jointly contribute such part and jointly institute proceedings for the transfer to one of them.

#### **Legal basis**

Art 2:92a DCC.

#### **Competent court**

The enterprises division of the court of appeal in Amsterdam.

#### **Appeal**

Yes, exclusively by way of cassation.

#### **Other elements**

The action must be instituted against the other shareholders jointly. If the court allows the claim, it may order one or three experts to report on the value of the shares to be transferred. The court shall determine the prices of the shares to be transferred as of a date to be set by it.

The court shall disallow the proceedings against all defendants if, notwithstanding compensation, a defendant would suffer serious tangible loss by such transfer, if a defendant is the holder of a share in which, under the articles, a special right of control of the company is vested or if a claimant has, as against a defendant, renounced his/her power to institute such proceedings.

Proceedings commenced by a summons.

#### **Key case law**

*Enterprises Division of the Court of Appeal in Amsterdam, 23 March 2000, JOR 2000/101 (Euromast)*

The shares have to be transferred at the value that they have on the day of the judgement or at a moment close to that day.

*Supreme Court, 14 September 2007, NJ 2007/610 (Versatel)*

The supreme court considers that the enterprises division of the court of appeal of Amsterdam can only reject a claim on the basis of the grounds for refusal mentioned above. The grounds for refusal must be interpreted strictly. The grounds do not give any space for weighing of interests by the judge.

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## 4. Convening a general meeting

### 4.1 Convening a general meeting of shareholders

#### **Material grounds**

After having heard or having summoned the company to appear, if the applicants have shown *prima facie* that the requirements have been satisfied and that they have a reasonable interest in holding the meeting.

#### **Admissibility requirements**

One or more shareholders who jointly represent at least 10% of the issued capital or such lesser amount as is provided by the articles of association.

#### **Legal basis**

Art 2:110/111 DCC.

#### **Competent court**

The interim provisions judge → in which the company resides.

#### **Appeal**

No appeal, except for cassation in the interest of the law.

#### **Other elements**

Denial of the application: if it does not appear to the judge that the applicants have previously requested the management or the supervisory board in writing, stating that the exact matters to be considered, to convene a general meeting and neither the management nor the supervisory board, which in this case have equal powers, has taken the necessary steps so that the general meeting could be held within six weeks after the request.

For the purpose of this article, the holders of depositary receipts issued for shares with the cooperation of the company have the same rights as shareholders.

Proceedings commenced by an application.

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## 4.2 Permission to convene general meeting if authorized persons fail to do so

### **Material grounds**

The court will grant the application, unless it judges that the general meeting has no purpose at all.

### **Admissibility requirements**

Any shareholder.

### **Legal basis**

Art 2:112 DCC.

### **Competent court**

The interim provisions judge → in which the company resides.

### **Appeal**

No appeal, except for cassation in the interest of the law.

### **Other elements**

If the persons, who, pursuant to art 2:109 DCC are authorized to convene a meeting, fail to hold a general meeting as described by art 2:108 or 2:108a DCC or the articles of association, any shareholder may be authorized by the interim provisions judge of the district court to proceed to do so himself.

A meeting as described in the art 2:108 and 2:108a DCC concerns the general meeting and the meeting within three months after the management has considered it plausible that the shareholders' equity of the company has decreased to an amount equal to or less than one half of the paid and called up part of the capital, in order to discuss the measure to be taken.

For the purpose of this art 2:112 DCC, the holders of depositary receipts issued for shares with the cooperation of the company have the same rights as shareholders.

Proceedings commenced by an application.

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## 5. Articles of association adopted by the court

### **Material grounds**

If the general meeting does not resolve to amend the articles of association in time, the court shall adopt the articles of association on application.

### **Admissibility requirements**

A person entitled to place matters on the agenda pursuant to article 2:114a DCC.

### **Legal basis**

Art 2:154 subsections 5 and 6 DCC.

### **Competent court**

The enterprises division of the court of appeal of Amsterdam.

### **Appeal**

Yes, appeal to the supreme court.

### **Other elements**

This action concerns the action to have the articles of association adopted by the court if the general meeting does not resolve to amend the articles of association in case the general meeting decided not to apply the dual-board regime voluntarily (partially or wholly) when the company does not fulfil the requirements of a dutch large public company anymore.

No later than 12 months after adoption of a resolution of the general meeting not to apply the dual-board regime voluntarily (partially or wholly), the management shall submit a proposal to the general meeting to amend the articles of association. If the general meeting does not resolve to amend the articles of association, the court shall adopt the articles of association on application.

A person entitled pursuant to article 2:114a DCC is one or more holders of shares, who, alone or jointly, represent no less than 1% of the issued capital or, if the shares have been admitted to a regulated market or a multilateral trading facility as referred in article 1:1 of the *Wet op het financieel toezicht* (Financial Supervision Act) or a system comparable to a regulated market or multilateral trading facility from a State which is not Member State, whose shares represent a value of € 50 million or more.

Proceedings commenced by an application.

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## **6. Loss of shares**

### **6.1 Compensation loss of shares in case of conversion company**

#### **Material grounds**

In the absence of agreement between the shareholder and the company regarding the compensation the court will grant the application.

#### **Admissibility requirements**

Shareholder who has not consented to the resolution for conversion and therefore will lose his shares and will not become a member of the association, cooperative or mutual insurance society.

#### **Legal basis**

Art 2:181 subsection 3 DCC.

#### **Competent court**

The district court in the case of authorization for conversion or by the interim provisions judge of the court of first instance → in which the company resides.

#### **Appeal**

Yes, court of appeal.

#### **Other elements**

On the conversion of the company into an association, cooperative or mutual insurance society, each shareholder shall become a member unless he requested indemnification. The shareholder who has not consented to the resolution for conversion may request the company for indemnification against the loss of his shares. The request for indemnification must be made in writing to the company within one month after it has informed the shareholder that he/she may request such indemnification. In the absence of agreement, the shareholder can do the action as described above. The court will appoint one or more independent experts who will determine the indemnification.

Proceedings commenced by an application.

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## 6.2 Squeeze out minority shareholders

### **Material grounds**

When the claimant or claimants satisfy the requirements as described above.

### **Admissibility requirements**

(i) Shareholder who contributes at least 95% of the issued capital of the company, or (ii) if two or more group companies jointly contribute such part and jointly institute proceedings for the transfer to one of them.

### **Legal basis**

Art 2:201a DCC.

### **Competent court**

The enterprises division of the court of appeal in Amsterdam.

### **Appeal**

Yes, appeal shall be exclusively by way of cassation.

### **Other elements**

The action must be instituted against the other shareholders jointly. If the court allows the claim, it may order one or three experts to report on the value of the shares to be transferred. The court shall determine the prices of the shares to be transferred as of a date to be set by it.

The court shall disallow the proceedings against all defendants if, notwithstanding compensation, a defendant would suffer serious tangible loss by such transfer, if a defendant is the holder of a share in which, under the articles of association, a special right of control of the company is vested of if a claimant has, as against a defendant, renounced his power to institute such proceedings.

Proceedings commenced by a summons.

### **Key case law**

*Enterprises Division of the Court of Appeal in Amsterdam, 23 maart 2000, JOR 2000/101 (Euromast)*

The shares must be transferred at the value that they had on the day of the judgement or at a moment close to that day.

*Supreme Court, 14 September 2007, NJ 2007/610 (Versatel)*

The supreme court considers that the enterprises division of the court of appeal of Amsterdam can only reject a claim on the basis of the grounds for refusal mentioned above. The grounds for refusal must be interpreted strictly. The grounds do not give any space for weighing of interests by the judge.

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## 7. Convening general meeting

### 7.1 Convening a general meeting of shareholders

#### **Material grounds**

After having heard or having summoned the company to appear, if the applicants have shown *prima facie* that the requirements have been satisfied and that they have a reasonable interest in holding the meeting.

#### **Admissibility requirements**

One or more shareholders who jointly represent at least 10% of the issued capital or such lesser amount as is provided by the articles of association.

#### **Legal basis**

Art 2:220/221 DCC.

#### **Competent court**

The interim provisions judge → in which the company resides.

#### **Appeal**

No appeal, except for cassation in the interest of the law.

#### **Other elements**

Denial of the application: if it does not appear to the judge that the applicants have previously requested the management or the supervisory board in writing, stating that the exact matters to be considered, to convene a general meeting and neither the management nor the supervisory board, which in this case have equal powers, have taken the necessary steps so that the general meeting could be held within six weeks after the request.

For the purpose of this article, the holders of depositary receipts issued for shares with the cooperation of the company have the same rights as shareholders.

Proceedings commenced by an application.

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## 7.2 Permission to convene general meeting if authorized persons fail to do so

### **Material grounds**

The court will grant the application, unless it judges that the general meeting has no purpose at all.

### **Admissibility requirements**

Any shareholder.

### **Legal basis**

Art 2:222 DCC.

### **Competent court**

The interim provisions judge → in which the company resides.

### **Appeal**

No appeal, except for cassation in the interest of the law.

### **Other elements**

If the persons, who, pursuant to art 2:219 DCC are authorized to convene a meeting, fail to hold a general meeting as described by art 2:218 DCC or the articles of association, any shareholder may be authorized by the interim provisions judge of the district court to proceed to do so himself.

A meeting as described in the art 2:218 DCC concerns the general meeting. For the purpose of this art 2:222 DCC, the holders of depositary receipts issued for shares with the cooperation of the company have the same rights as shareholders.

Proceedings commenced by an application.

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## **8. Articles of association adopted by the court**

### **Material grounds**

If the general meeting does not resolve to amend the articles of association in time, the court shall adopt the articles of association on application.

### **Admissibility requirements**

A person entitled to place matters on the agenda pursuant to art 2:224a DCC.

### **Legal basis**

Art 2:264 subsections 5 and 6 DCC.

### **Competent court**

The enterprises division of the court of appeal of Amsterdam.

### **Appeal**

Yes, appeal to the supreme court.

### **Other elements**

This action concerns the action to have the articles of association adopted by the court if the general meeting does not resolve to amend the articles of association in case the general meeting decided not to apply the dual-board regime voluntarily (partially or wholly) when the company does not fulfil the requirements of a dutch large private limited company anymore.

No later than 12 months after adoption of a resolution of the general meeting not to apply the dual-board regime voluntarily (partially or wholly), the management shall submit a proposal to the general meeting to amend the articles of association. If the general meeting does not resolve to amend the articles of association, the court shall adopt the articles of association on application.

A person entitled pursuant to art 2:224a DCC is one or more holders of shares, who, alone or jointly, represent no less than 1% of the issued capital. The articles may provide that the required part of the capital shall be lower.

Proceedings commenced by an application.

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## 9. Mergers and divisions

### 9.1 Annulment of legal merger of company

#### **Material grounds**

(i) If the deed of merger signed by the notary does not constitute an authentic document, (ii) on account of non-compliance with the art 2:310 subsections 5 and 6, article 316 subsection 4 or article 2:318 subsection 2, (iii) on account of nullity, invalidity, or grounds for avoidance of a resolution of the general meeting required for the merger, (iv) on account of non-compliance with art 2:317 subsection 5 DCC.

#### **Admissibility requirements**

In its capacity of shareholder.

#### **Legal basis**

Art 2:323 subsection 2 DCC.

#### **Competent court**

The district court → within whose jurisdiction the transferee-legal person has its principal place of business.

#### **Appeal**

Yes, court of appeal.

#### **Other elements**

The right to institute a claim for avoidance shall lapse by the curing of the default or on the expiry of six months after the lodging of the deed of merger at the public registries within the districts where the merged legal persons have their principal place of business.

The merger shall not be avoided (i) if the legal person has cured the default within a period to be set by the court, or (ii) if the consequences of a merger, which have already taken effect, can only be undone with difficulty.

The court may order the legal person to compensate any loss incurred by a party claiming avoidance of the merger on the grounds of a default which could have resulted in avoidance, if such court does not avoid the merger. The legal person shall have recourse therefore against the persons responsible for the default and, to the extent of the benefit enjoyed, against those who benefited from such default.

Proceedings commenced by a summons.

Key case law

*Court of Amsterdam, 6 February 2002, JOR 2002/61 (Leyinvest/Vendex KBB)*

If the six month term has expired, the shareholder cannot institute a claim for avoidance. This does not alter the fact that he can order the legal person to compensate any loss as described above. The expiry period of 6 months is not applicable therefore.

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## 9.2 Compensation for loss of shares in case of merger

### **Material grounds**

In the absence of agreement between the shareholder and the company regarding the compensation the court will grant the application.

### **Admissibility requirements**

In its capacity of shareholder of the disappearing company.

### **Legal basis**

Art 2:333h subsections 1 and 2 DCC.

### **Competent court**

The chairman of the enterprises division of the court of appeal in Amsterdam.

### **Appeal**

Yes, appeal to the supreme court.

### **Other elements**

If the transferee-company is a company under the law of another member state of the European Union or the European Economic Area, a shareholder of a company who voted against the merger resolution may file a claim for compensation with the company ceasing to exist within one month from the date of the resolution.

In the absence of agreement the compensation shall be determined by one or more independent experts appointed at the request of the party initiating such proceedings. For the purpose of this article shareholders shall be equated with holders of depositary receipts for shares as referred to in article 2:118a DCC.

Proceedings commenced by an application.

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### 9.3 Annulment of legal division of company

#### **Material grounds**

The court may avoid (annul) a merger if (i) the deed of merger signed by the notary does not constitute an authentic document, (ii) on account of non-compliance with the articles 2:334b subsections 5 or 6, article 334l subsection 3 or the first sentence of article 2:334n subsection 2, (iii) on account of nullity, invalidity, or grounds for avoidance of a resolution of the general meeting required for the division, (iv) on account of non-compliance with article 2:334m subsection 5 DCC.

#### **Admissibility requirements**

In its capacity of shareholder.

#### **Legal basis**

Art 2:334u subsections 2 and 3 DCC.

#### **Competent court**

The district court → within whose jurisdiction the transferee-legal person has its place of business.

#### **Appeal**

Yes, court of appeal.

#### **Other elements**

The right to institute a claim for avoidance shall lapse by the curing of the default or on the expiry of six months after the lodging of the deed of division at the public registries within the district where the transferee-legal persons and the divided legal person have their place of business.

A division shall not be avoided if the default is cured within a period set by the court or if the consequences of a division, which have already taken effect, can only be undone with difficulty.

Proceedings commenced by a summons.

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## 10. Regulation of disputes

### 10.1 Action to expel shareholders

#### **Material grounds**

If a shareholder who, by his conduct, prejudices the interest of the company to such an event that the continuation of his shareholding cannot be reasonably tolerated.

#### **Admissibility requirements**

One or more shareholders who, solely or jointly, contribute at least one-third of the issued capital.

#### **Legal basis**

Art 2:336 DCC.

#### **Competent court**

The district court → in which the company resides.

#### **Appeal**

Yes, the enterprises division of the court of appeal in Amsterdam.

#### **Other elements**

A shareholder, depositary receipts in respect of which are held by the company or a subsidiary, may institute proceedings only if and insofar as depositary receipts are held by others. A shareholder who holds shares as a nominee may institute proceedings only if and insofar as the holders of depositary receipts have agreed in advance thereto. Proceedings cannot be instituted by the company or a subsidiary of the company.

If judgment is given for the claimants, the court shall appoint one or three experts to report in writing on the price of the shares. The experts shall prepare their report in accordance with the provisions in respect of the valuation of the shares in the provisions on the restriction on transfer.

Proceedings commenced by a summons.

#### **Key case law**

*The Supreme Court, 8 December 1993, NJ 1994/273 (Van den Berg)*

If adopting resolutions are blocked or paralysed by two shareholders due to their conduct and these shareholders try to dismiss the director without any reason, the interest of the company is prejudiced to such an event that the continuation of his shareholding cannot reasonably be tolerated.

*The Supreme Court, January 21, 2005, NJ 2005/126 (Hoffmann)*

The court can decide not to appoint one or three experts in case the articles of association of the company contain transfer restrictions, that include such a criterion for value appraisal of shares, that the value of the shares can be unreservedly stipulated by the judge on the basis of that criterion.

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## 10.2 Transfer voting rights against usufructuary or pledgee of a share

### **Material grounds**

If the usufructuary or pledgee of a share by his conduct prejudices the interest of the company to such an event that the continuation of his exercise of the right to vote cannot reasonably be tolerated, demanding that the right to vote in respect of the share shall be transmitted to the holder of the share.

### **Admissibility requirements**

One or more shareholders who, solely or jointly, contribute at least one-third of the issued capital.

### **Legal basis**

Art 2:342 DCC.

### **Competent court**

The district court → in which the company resides.

### **Appeal**

Yes, the enterprises division of the court of appeal in Amsterdam.

### **Other elements**

A copy of the writ of summons must, without delay, be served by the claimants on the shareholder, who is not also a claimant. If judgement is given for the claimants in the proceedings demanding the transmission of the right to vote, the transmission shall take place by the judgment becoming final and binding.

Proceedings commenced by a summons.

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### 10.3 Action to demand that shares shall be acquired

#### **Material grounds**

If the shareholder whose rights or interests are prejudiced by the conduct of one or more co-shareholders to such an extent that the continuation of his shareholding can no longer reasonably be expected of him.

#### **Admissibility requirements**

Being shareholder of the company.

#### **Legal basis**

Art 2:343 DCC.

#### **Competent court**

The district court → in which the company resides.

#### **Appeal**

Yes, the enterprises division of the court of appeal in Amsterdam.

#### **Other elements**

Any shareholder against whom proceedings have been instituted may serve notice on another shareholder joining him as a party to the proceedings, if he is of the opinion that such proceedings should also have been instituted against such other shareholder.

Proceedings commenced by a summons.

If the claimant remains in default in transferring his shares, then the company shall transfer the shares on his behalf against simultaneous payment.

If judgment is given for the claimants, the court shall appoint one or three experts to report in writing on the price of the shares. The experts shall prepare their report in accordance with the provisions in respect of the valuation of the shares in the provisions on the restriction on transfer.

#### **Key case law**

*The Enterprises Division of the Court of Appeal in Amsterdam, 16 March 1995, JOR 1996/54 (Ramp/Lensen)*  
A shareholder competed with the company. The enterprises division of the court of appeal of Amsterdam considered that competing with the company is contrary to the principles of reasonableness and fairness. The other shareholder had been prejudiced by the conduct of the other shareholder who competed with the company to such an extent that the continuation of his shareholding can no longer reasonably be expected.

*Court of 's-Hertogenbosch, 10 May 1996, JOR 1998/26 (Hooymans)*

The continuation of his shareholding can no longer reasonably be expected, due to the fact that he had been dismissed as director, on the basis of which his rights or interests have been prejudiced.

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## 11. Right of inquiry

### 11.1 Request for inquiry into policy and conduct of business of the Company

#### **Material grounds**

If there appear to be well-founded reasons to doubt the correctness of the policy.

#### **Admissibility requirements**

One or more shareholders (or holders of depositary receipts), who solely or jointly, represent at least 10% of the issued capital or who are entitled to an amount in shares or depositary receipts issued therefore with a nominal value of € 225.000 or such lesser amount as provided by the articles of association.

## Legal basis

Art 2:345 and 2:346 subsection b DCC.

## Competent court

The enterprises division of the court of appeal in Amsterdam.

## Appeal

Yes, cassation appeal to the supreme court.

## Other elements

Relevant circumstances on the basis of the judge will possibly grant the application are: if there is a deadlock between shareholders, a conflict between the board and its shareholders, a conflict of interest or if no or incorrect information will be provided by the company. If the enterprises division dismisses the application and decides that, in its opinion, it was not made on reasonable grounds, the legal person may institute a suit for damages in the enterprises division against the applicant(s) for any loss suffered as a result of the application. If the application is granted, the enterprises division shall determine the maximum amount of costs of the inquiry.

Proceedings commenced by an application.

A selection of key case law:

*Supreme Court, 10 January 1990, 1990/466 (Ogem)*

The supreme court considers that the purpose of the inquiry is the reorganization and recovery of the relations by taking measures as regards reorganization within the company and to give full disclosure and to determine to whom the responsibility lies with regard to possible misconduct.

*Supreme Court, 4 June 1997, 1997/671 (Text Lite)*

The supreme court considers that the inquiry can extend to the performance of the persons who act for the company.

*Supreme Court, 13 May 2005, JOR 2005/147 (Zeelandia)*

The supreme court considers that only the legal entities, as mentioned in art 2:344 DCC, can be subject to the inquiry. However, the investigator can collect information regarding the policy and conduct of business of a legal person, that has relations with the legal entity, subject to inquiry, if the investigator considers it is useful for his inquiry.

*Supreme Court, 1 February 2002, NJ 2002/225 (De Vries Robbé)*

The company, subject to inquiry, nor the trustee of that company can request for an inquiry into the policy and conduct of business of that company. From this case it follows that these parties can not request for indefinite orders as a result of the inquiry either.

*Supreme Court, 18 November 2005, NJ 2006/173 (Unilever)*

The supreme court considers that when the dispute is only a dispute regarding property rights, as a result of which the purposes of the investigation proceedings can not be realised, an application for an inquiry into the policy and conduct of business of the legal entity can not be granted.

*Supreme Court, 30 March 2007, NJ 2007/93 (ATR Leasing)*

In the formation of its opinion regarding the judgement if there are well-founded reasons to doubt the correctness of the policy question, the enterprises division of the court of appeal of Amsterdam has to pay attention to the interests of the applicants and to the other company related (legal) entity as well. The interest of the company however comes first.

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## 11.2 Action to install interlocutory measures

### **Material grounds**

In the case an immediate remedy is required in connection with the condition of the Company or in the interest of the inquiry.

### **Admissibility requirements**

Upon the application of the applicants referred to in art 2:345 DCC (see 11.1)

### **Legal basis**

Art 2:349a subsection 2 DCC.

### **Competent court**

The enterprises division of the court of appeal in Amsterdam.

### **Appeal**

Yes, cassation appeal to the supreme court.

### **Other elements**

If the enterprises division will grant the application, it will order such remedy for the duration of the proceedings at most; this action is an action within the proceedings as mentioned under 25.

Proceedings commenced by an application.

A selection of key case law:

*Supreme Court, 19 October 2001, JOR 2002/5 (Skygate)*

The enterprises division of the court of appeal in Amsterdam can order immediate remedies that temporarily infringe the current legal relationship within the legal entity, subject to inquiry, and that can lead to irreversible consequences, on condition that the immediately remedies are preliminary and a reasonable weighing of interest has taken place.

*Supreme Court, 14 September 2007, JOR 2007/238 (Versatel)*

The enterprises division of the court of appeal in Amsterdam is authorized to order every immediate remedy, on condition that in view of the consequences of those remedies weighing of interest has taken place and the necessity of the remedies has been sufficiently shown. In this case among other things a supervisory board member was appointed with power, that differs from mandatory law.

*Supreme Court, 14 December 2007, JOR 2008/11 (DSM)*

The supreme court considers that the enterprises division of the court of appeal in Amsterdam can only order immediate remedies before the inquiry has been directed in case of substantial interest.

*Supreme Court, 13 July 2007, JOR 2007/178 (ABN AMRO)*

Also in view of interest of third parties the execution of a duly concluded agreement cannot be forbidden by means of an immediate remedy of the enterprises division of the court of appeal in Amsterdam.

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### 11.3 Action for indefinite orders as result of inquiry

#### **Material grounds**

If misconduct is established by the report regarding the policy and conduct of business of the company.

#### **Admissibility requirements**

Upon application of the original applicants (referred to in article 2:345; see 11.1) and if the report is available for inspection to them, upon application of others who meet the requirements laid down in art. 2:346 subsection b DCC (see 11.1).

#### **Legal basis**

Art 2:355 DCC.

#### **Competent court**

The enterprises division of the court of appeal in Amsterdam.

#### **Appeal**

Yes, cassation appeal to the supreme court.

#### **Other elements**

The application must be made within two months after the report has been lodged at the office of the clerk of the court. The orders measures are: (i) the suspension or avoidance of a resolution of the managing directors, the supervisory board members, the general meeting or any other constituent body of a legal person, (ii) the suspension or dismissal of one or more directors or supervisory board members, (iii) the temporary appointment of one or more directors or supervisory board members, (iv) the temporary derogation from such provisions in the articles of association as shall be specified by the enterprises division, (v) the temporary transfer of charges to a nominee and (vi) an order for winding up the legal person. This is a limitative list of orders.

Proceedings commenced by an application.

A selection of key case law:

*Supreme Court, 10 January 1990, NJ 1990/466 (Ogem)*

The supreme court considers that not every or incidental failure of policy can be qualified as misconduct as defined in art 2:355 DCC. The failure has to be substantial severe to be qualified as misconduct. Misconduct does not have to show a structural character. Even just one action can result in misconduct, especially if it leads to highly prejudicial consequences.

*Supreme Court, 27 September 2000, NJ 2000/653 (Gucci)*

In this case the supreme court decides that the enterprises division of the court of appeal in Amsterdam can not judge regarding misconduct and can not order remedies if no inquiry has taken place.

*Supreme Court, 18 April 2003, JOR 2003/110 (RNA)*

In this case the supreme court considers that the enterprises division of the court of appeal in Amsterdam uses a correct criterion for misconduct by judging that the conduct of the company was serious imputable and therefore misconduct was established. The supreme court considers as well that just one violation of the corporate standards is not enough to take misconduct for granted. There has to be a qualified "serious imputable" infringement of the concerned standards.

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