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Introduction

The central theme of this dissertation is the content and operation of the Dutch concept of reasonableness and fairness (redelijkheid en billijkheid) related to companies limited by shares, in particular with regard to the relationships between majority and minority shareholders, between the general shareholders' meeting and the board of directors, and between the directors themselves. Its operation and content are examined on the basis of reflections on the acts and decisions influencing these relationships.

In the Netherlands, no clear picture exists as yet of the operation of 'reasonableness and fairness' with regard to the relationships within companies. This study intends to contribute towards the development of clearer rules of reasonableness and fairness in these relationships within companies limited by shares. Dutch law and legal literature leave many questions unanswered on the operation and content of reasonableness and fairness in company law. In consequence, the author has paid much attention to comparative law. In her analysis of possible conflicts which may arise in companies limited by shares, she has included the laws of two other continental countries, Germany and France, as well as the law of England and Wales as an exponent of the Common Law tradition.

'Reasonableness and Fairness' from a Comparative Perspective

The author examines how and to what extent the principle of 'good faith' is applied in connection with companies limited by shares under Dutch and foreign law. For this purpose, a conscious choice has been made for a functional approach, in which problem analysis prevails. It may be concluded that in the foreign systems under study corresponding norms exist for assessing the acts of the parties involved, although their terminology, content and scope differ. English company law offers comparative material in the form of 'fiduciary duties'. Under English law, the 'fiduciary relationship' is essential. Furthermore, case law relating to s. 459 Companies Act 1985, governing the acts of (majority) shareholders, has further defined the concept of 'good faith'. Under German law, the 'Treupflicht' regulates the acts of shareholders and directors. Where under Dutch law the notion of abuse of law and abuse of (majority) power is
absorbed by reasonableness and fairness (see Chapter 1), in Germany, similarly, the doctrine of abuse of law is for the most part absorbed by the Treupflicht. In France, on the other hand, ‘good faith’ in company law is placed within the context of abuse of law, abuse of majority or minority power (‘abus de majorité’/‘abus de minorité’) and abuse of powers (‘abus de pouvoirs’). Furthermore, in recent case law the Cour de Cassation has held the duty of loyalty to be a separate and independent ground for testing the acts of directors.

The Relationship between Majority and Minority Shareholders

In Part I of the study, the author has attempted to make an inventory of the types of conflict which may arise in the relationship majority/minority shareholders. A distinction was made for this purpose between conflicts relating to the decision-making process at and around shareholders’ meetings and conflicts in relation to the content of resolutions to be passed. In Chapter 2 it is made clear that in all legal systems under study the powers of majority shareholders are not limitless. The way in which this idea has been given shape differs from system to system. In order to make a meaningful analysis, the author distinguishes between testing the decision-making process and testing the content of decisions.

In Chapter 3 the role of ‘reasonableness and fairness’ -and of comparable principles abroad- is examined in the various stages of the decision-making process. Notification, agenda setting and the course of affairs during the general shareholders’ meeting are studied. The core notion is “proper” decision making, especially from the perspective of the minority shareholder.

This theme is continued in Chapter 4, where attention is paid to the possible extent of leaving the decision making to others. In the author’s view, the requirement of ‘reasonableness and fairness’ does not only apply to the exercise of the rights to attend meetings and to vote at meetings, but also to the transfer of these rights through voting agreements or proxies (Chapter 4 at 1.1 and 2.3).

It is furthermore argued that the requirement of reasonableness and fairness gives direction to regulating the acts of those shareholders who through "vote clustering" can exercise more influence than warranted by the size of their participation. The importance of this issue is underscored by the impending regulation and facilitation of proxy soliciting in Dutch listed companies.
It is contended that the extent of obligations imposed on shareholders and their proxies by the requirement of reasonableness and fairness varies. The principal assumption is that the degree of influence a shareholder exercises should be commensurate with the degree of responsibility carried (cf. Chapter 4 at 1.2 and Chapter 12 at 6.2).

The relationship between shareholders and the difference in control between majority and minority shareholders are not only felt during the decision-making process, but in particular when a final decision is made as to the content of a resolution. Even where the procedure by which the resolution was taken was flawless, the resolution may still turn out to be contrary to the interests of the minority shareholders to the degree that interference is justified.

'Reasonableness and fairness', and similar concepts abroad, must therefore also have a control function with regard to the content of resolutions in order to protect the company and the (minority) shareholders. This, however, raises the question of the extent of such control. It should be particularly borne in mind that it is a major premise of decision making in a company limited by shares that resolutions are passed by majority vote. On the other hand, this is not a license for passing unreasonable and unfair resolutions (see before Chapter 1 at 9.2).

In Chapters 5 and 6 an attempt is made to specify and examine more thoroughly from the perspective of reasonableness and fairness conflicts which may arise as a result of types of resolutions, whose content may in particular affect minority shareholders. Examples of such resolutions are those to change the organisation of the company -and consequently to amend the articles of association- and resolutions directly involving the position of the shareholders, since they relate to (the reservation or distribution of) dividends.

With regard to changes to the organisation of the company and the articles of association, the study in Chapter 5 shows that the courts employ the criterion of whether and, if so, to what extent the company's interest has been prejudiced, rather than whether minority shareholders have been negatively affected.

In connection with dividend resolutions, Chapter 6 reveals that in all systems under investigation so-called "starving" of minority shareholders is pre-empted, but the way in which this is done and the result which may be achieved vary from country to country.
The Relationship between the General Shareholders’ Meeting and the Board of Directors

In Part II of the study attention is paid to the power and the legal relationships between the general shareholders’ meeting and the board of directors. Those relations are also coloured by the rule of reasonableness and fairness. By discussing such subjects as the right to give instructions, the appointment and removal of directors, as well as the problem of corporate opportunities, the author has made an attempt to show the power relationship and the power struggle between the general shareholders’ meeting and the directors. When assessing conflicts of interest, it should be borne in mind that directors must act in the interest of the company and its business when exercising their duties.

Chapter 7 deals with the distribution of powers between the general shareholders’ meeting and the directors. Worth noticing is that in German law, unlike English and French law, the Treupflicht may play a role in issues of distribution of powers between the general shareholders’ meeting and the directors. German case law shows that by virtue of unwritten law the shareholders meeting may possess powers other than statutory ones. In case law relating to the German Civil Code (see Chapter 7 at 2.1) there is an express assumption that if directors take decisions by which the rights of shareholders are seriously jeopardised, ‘reasonableness and fairness’ requires that the general shareholders’ meeting be consulted. The author contends that in the Netherlands ‘reasonableness and fairness’ also plays a role in the distribution of powers between the general shareholders’ meeting and the directors. This may result in the mandatory co-operation of the general shareholders’ meeting in decisions likely to seriously affect the shareholders (see Chapter 7 at 2.3).

In Chapter 8 the proposition is defended that, in spite of the fact that under Dutch law there are no rules governing directorship, the requirement of reasonableness and fairness entails that directors must be fit and capable to fulfil their duties. The continuity of the company and/or the company’s business is at stake here.

The power struggle between the general shareholders’ meeting and the directors manifests itself most clearly in procedures by which the general shareholders’ meeting removes or suspends directors. In Chapter 9 it is argued that the requirement of reasonableness and fairness also plays a role in decisions regarding suspension or removal. The author contends that there is not only room to test such decisions against procedural
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grounds, but also against substantive grounds. This represents a departure from the prevailing theory by which it is assumed, on the basis of Articles 134 and 244 Book 2 Dutch Civil Code that directors may be suspended or removed at all times.

A second issue, in which the conflict of interest between the general shareholders’ meeting and the directors arises, is the problem of corporate opportunities. In Chapter 10 the author submits that the requirement of reasonableness and fairness regulates the acts of those directors who use corporate opportunities to their personal advantage. The duty of loyalty, which in each of the systems under study is expected of directors, is not only owed, she argues, to the company, but also to the shareholders. In consequence, she considers the norm of Article 9 Book 2 Dutch Civil Code, deemed appropriate by most scholarly writers, as too limited a ground for testing issues of corporate opportunities.

The Relationship between Directors

In the Part III, the final part of the study, the relationship between directors is examined. This relationship is also governed in part by the requirement of reasonableness and fairness as specified in Article 8 Book 2 Dutch Civil Code.

The organisation and the decision making of company directors are the subject of Chapter 11. As regards the organisation of the board of directors, the author investigates whether and, if so, to what extent, delegation, mandate and instruction are allowed within the board of a company limited by shares. Where decision-making is concerned, she pays attention to the question of the extent to which there is a duty to consult and a duty to inform, or conversely, a right to be consulted and a right to be informed. Two instruments are discussed which could enhance the decision-making process and the functioning of the board of directors in the event of absenteeism of one or more directors, namely the possibility to confer a power of attorney and decision-making in writing.

The Reasonableness and Fairness-Test; Relevant Factors

An attempt has been made to analyze (potential) conflicts of interest from the perspective of reasonableness and fairness. The question of what determines the outcome of the analysis is dealt with in Chapter 12.
Reviewing the preceding chapters, the author distinguishes at least eight factors which play a role of sorts in determining 'reasonableness and fairness' in concrete cases:

1. the capacity of the person(s) involved in the conflict;
2. the influence the person(s) involved is/are capable of exercising;
3. the dual role/conflicting interests of the person(s) involved;
4. the nature and content of the decision;
5. the consequence of the decision or act for the person(s) involved;
6. the compensation for the person(s) involved as a result of the decision;
7. the character of the company;
8. the agreements between the parties involved.

The degree of importance of these factors and the ultimate resolution of a conflict depend on the court's assessment of all relevant circumstances. The assessment is also determined in part by the legal system which the court is bound to apply. For example, compared to their Dutch, German and English counterparts, French judges exercise more restraint with regard to substantive testing of decisions. Only in clear cases of abuse of law, abuse of (majority or minority) power, or abuse of powers will the judge impose such sanctions as annulment of the decision. This is somewhat compensated, however, by the range of preventative measures offered in French law to minority shareholders in particular, such as the possibility to request the court to appoint a 'mandataire de justice' (cf Chapter 2 at 5.2).

In Conclusion

Traditionally, 'reasonableness and fairness' has been a fascinating concept of Dutch contract law. With this book the author hopes to have demonstrated that this also holds true for company law. Furthermore, it is hoped that her observations have broadened the outlook on the meaning and operation of 'reasonableness and fairness' in company law. May they have contributed to a further analysis and development of legal views on this subject.

Translated by Louise Rayar