

LIABILITY OF MEMBERS AND STEERING BOARD MEMBERS OF DUTCH ASSOCIATIONS

1 Introduction

ARTEMISIA, is an association under Dutch law. Like any other association it is a legal entity. A legal entity itself bears rights and duties and is responsible for its own debts with its own capital. In exceptional situations persons affiliated with the legal entity (like Steering Board members) can be held accountable. 'Normal' members of the association (not Steering Board members) can only be held liable for acts committed while pretending to act on behalf on the association. Other than this 'normal' members cannot be held liable. They can only 'lose' the contribution paid in case of a bankruptcy.

Hereinafter we will briefly discuss the professional duties of directors and the most important liability risks in connection therewith.

2 Steering Board

The Steering Board is composed of one or more natural or legal persons. Its members are collectively responsible for the management of the association. The Steering Board (the Presidium, the president together with the secretary or the treasurer, two vice-presidents acting together, or one or more members of the Steering Board, or another person who has received a power of attorney to represent the association) represent(s) the association towards third parties.

The daily management includes, *inter alia*, policy-making and implementation, coordination, financial management, registration of relevant data at the Trade Register and last but not least, the preparation and publication of the annual accounts.

In cases where there is a division of duties within the Steering Board, all important decisions falling under the management task must be taken jointly by the Steering Board as a whole. The association's financial policy is always the responsibility of the entire Steering Board.

Financial records and annual accounts

The Steering Board must keep such notes in respect of the financial position of the association as enable its rights and obligations to be ascertained at any time. The management shall keep the records for seven years.

Furthermore, the Steering Board is obliged to prepare the annual accounts yearly within five months from the end of the financial year of the association, unless this term has been expanded with a maximum of six months by the General Assembly because of special circumstances. The financial year of a association is equal to the calendar year, unless another financial year has been designated in the Articles. Within the same term as mentioned above, the Steering Board must produce an annual report. The accounts will be signed by all directors and adopted by the General Assembly. Is the signature of one of the directors missing, the reasons for this absence will be indicated (Article 49 book 2 Dutch Civil Code).

The association is required to publish the annual accounts within eight days after adoption or approval by the General Assembly. The Steering Board must deposit a copy with the Trade Register. When the annual accounts are not adopted and approved within the prescribed period, the Steering Board must publish the prepared accounts immediately. This publication must take place ultimately within thirteen months from the end of the financial year. (Article 48 and further book 2 Dutch Civil Code)

3 Liability of directors

The main risks for directors of Dutch associations to be held personally liable are the following.

Internal liability (liability vis-à-vis the association)

Each director is responsible to the association for the proper performance of the duties assigned to him. If a matter falls within the scope of responsibility of two or more directors, each of them shall be jointly and severally liable for any shortcoming, unless he proves that it is not attributable to him and that he has not been negligent in taking the measures required to prevent the consequences of the shortcoming (Article 9, Book 2, Dutch Civil Code: *When concerning a matter which belongs to the tasks of two or more directors, each one of them is entirely liable for that shortcoming, unless he or she cannot be blamed for this shortcoming and he or she has not neglected to take measures to avert the consequences of this shortcoming.*).

Mostly, the association will only be able to recover damages if the director has acted with intent or gross negligence. The director is only held liable if serious blame can be apportioned to him. Occasional errors do not immediately result in personal liability. If no other director acting reasonably, however, would have acted in the same way, personal liability may arise towards the association. The association may from time to time waive this internal liability. This can be effected by the annual General Assembly explicitly discharging (*decharge*) the conduct of the affairs of the Steering Board, upon adoption of the annual accounts or upon dismissal. The discharge of the Steering Board's conduct does however, only result in the internal liability being waived, not in external liability being waived.

External liability (liability vis-à-vis third parties)

A director can be held liable if his conduct as a director qualifies as tort. A person is liable for tort if he is to blame for the act committed or omitted, or if the act, or the omission of it, is attributable to a cause for which he is responsible either by law or in accordance with generally accepted standards. There is much case law on this subject. For instance, the director who commits the association to obligations of which he knows or should have known that the association will not be able to perform these obligations, may be held personally liable by the injured party (subject to sufficient proof of course).

(Unlawful acts are defined in Article 162 of Book 6 of the Dutch Civil Code. This article reads: *A person who commits an unlawful act toward another which can be imputed to him, must repair the damage which the other person suffers in consequence thereof. Except when there is a ground for justification, the following acts are deemed unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.*)

A director who knows that the association, by breaching the law or a contract, causes damage to third parties and who, despite this knowledge, is negligent in taking the necessary steps to prevent the damage, can be held personally liable for the damage, if the association has insufficient means to pay for this damage.

If a director has given instructions to commit an offence or if the offence was committed under his direction, he can be held liable under criminal law and criminal tax law for offences committed by the association. These offences include economic offences.

Furthermore, directors can be held jointly and severally liable:

- (jointly with the association) for each legal act binding on the association and performed during their management until: (a) the filing of the initial registration at the Trade Registry accompanied by copies of the documents required to be deposited; (b) the articles of association are embodied in a notarial deed (Article 29 and 30 book 2 Dutch Civil Code).
- if the association is declared bankrupt, the director(s) can be held liable by the administrator, for the amount of the liabilities that cannot be satisfied out of the liquidation of the assets of the association, if manifest improper management can be shown to have caused the bankruptcy. The failure to prepare and publish annual accounts on time or maintain accurate books and records is an indication of failure to perform satisfactorily one's duties as a member of the Steering Board. In such cases the manifest improper management is deemed to have caused the bankruptcy, unless the directors prove otherwise. This constitutes a reversal of the burden of proof.

Whether the Steering Board is guilty of improper management is determined in this respect on the basis of the three-year-period prior to bankruptcy. Each director who has been found guilty can be held liable for the full liquidation deficit. The director(s) who has (have) paid, may claim back a pro rata amount from the other director(s).

- if the annual accounts, interim figures or annual report, insofar as these were published, misrepresent the condition of the association, for any loss sustained by third parties, unless a director proves that the same is not attributable to him. This constitutes a reversal of the burden of proof.
- if a association is no longer able to pay its social security premiums, pension premiums, value added tax or wage taxes and if the director(s) can be shown to have acted improperly. If the inability to pay is not reported correctly within 14 days of the date on which the premiums and/or taxes are due, directors are assumed to have performed their task improperly, and the burden of proof is again reversed (Second anti-abuse act).

Possible steps to limit the liability risks

Hereinafter we propose the following actions to be taken in order to limit the possibility for directors to be held personally liable in relation with their professional duties. The list is of course not exhaustive.

- Take care of a sound and reliable administration, to enable that the rights and obligations of the association can be ascertained at any time;
- Keep all records available for inspection by the authorities during at least seven years (for certain VAT-purposes: nine years);
- Take care of the preparation of the annual accounts and deposit within thirteen months from the end of the financial year, even if the annual accounts have by then not been adopted and/or approved yet;
- Pay taxes and social premiums in time and in case of inability to pay, make notification hereof in time and in writing to the tax authorities, Industrial Insurance Board and Association Pension Fund;
- Do not commit the association to obligations which it can most probably not fulfill;
- Be well informed on the financial position of the association, on all important management matters and on all matters within the scope of your responsibility;
- Take all reasonable measures to prevent (further) damage to the association and/or to third parties which may result from any matter connected with the association and within the scope of its responsibility;
- Keep a record of important resolutions adopted by the Steering Board;
- Keep a record of resolutions adopted by the General Assembly; and
- Promote the discharge of the Steering Board and its members by the General assembly, for the management conducted by them, upon adoption of the annual accounts and in case of dismissal.