

THE DIRECTORS DISQUALIFICATION ACT FROM JULY 2016 TO JULY 2019

BY / LISETTE VAN DER GUN

In the three year period after the introduction of the Directors Disqualification Act (*Wet civielrechtelijk bestuursverbod*) five judgements were passed in which disqualification was imposed. Apparently, insolvency administrators and the Dutch Public Prosecutors do make use of this possibility, corporate litigator Lisette van der Gun observes.

On 1 July 2016, the Directors Disqualification Act (“DDA”) entered into force. Section 106a to 106e were added to the Dutch Bankruptcy Act (“DBA”). These sections make it possible for the court, at the request of the insolvency administrator or a Public Prosecutor, to prohibit a (former) director of a bankrupt legal entity from being a director or a supervisory director for a maximum period of five years. The purpose of the DDA is to fight bankruptcy fraud and irregularities in or around a bankruptcy more effectively. According to the explanatory memorandum (*Memorie van Toelichting*), this is an exceptional sanction for exceptional situations.ⁱ

GROUNDS FOR IMPOSING A DIRECTOR DISQUALIFICATION

The act contains five limitative grounds for imposing the disqualification on a director:ⁱⁱ

1. an irrevocable judgement whereby the (former) director is held liable for clear mismanagement that was an important cause of the bankruptcy (Section 2:138 or 2:248 Dutch Civil Code: “DCC”);
2. an irrevocable judgement which has determined there is intentionally fraudulent conveyance in anticipation of bankruptcy;
3. the director has seriously failed in his information and cooperation obligations towards the insolvency administrator;
4. the director has been involved in at least two other bankruptcies in which his conduct was culpable;
5. an irrevocable penalty has been imposed on the legal entity or director for acts constituting intentional misconduct or gross negligence in violation of the tax return rules.

CONSEQUENCES OF AN IMPOSED DIRECTOR DISQUALIFICATIONⁱⁱⁱ

A disqualification can be imposed for a maximum period of five years. An appointment as director or supervisory director in violation of a disqualification is void. But what about current directorships? A director on whom a disqualification has been imposed can no longer perform his duties as a director. He can no longer represent the legal entity. This applies not just to the bankrupt legal entity, but to almost all^{iv} legal entities of which he is a director. Section 106b DBA stipulates that the disqualification imposed on a director is an *impediment* to the performance of his duties as director or supervisory director with another legal entity. Is this director dismissed? Or is the effect of the disqualification a suspension for the duration of the disqualification? Kreileman and Bulten conclude it must be a dismissal: *‘In our opinion, the intention is not to (merely) suspend a director. In Section 106c (4) DBA, the Act provides for a separate possibility to suspend the director as a summary measure, pending the definitive imposition of the disqualification. Pursuant to the final sentence of Section 106c (5) DBA,*

*such suspension applies for a period not exceeding the duration of the proceedings. Terminating one suspension because the proceedings have ended and then using a disqualification to “activate” the next suspension does not seem to us to be a conclusive state of affairs.”^v This seems to me to a logical conclusion, which also follows from section Section 106c (3) DBA. That paragraph stipulates that the court may proceed to the temporary appointment of one or more directors or supervisory directors if the disqualification leads the legal entity being *without a director* or supervisory director. The court’s judgement puts an end to current terms in office. Whether the judgement will, just as in inquiry procedures (*enquêteprocedures*), replace the company’s decision to dismiss seems obvious, but is not certain.*

The answer to the question whether the court’s decision also encompasses termination under employment law, is also not certain. In the explanatory memorandum to the DBA^{vi}, the minister considered that the bill does not concern an employment law question, as this is a matter between the director and the legal entity. Kreileman and Bulten^{vii} are of the opinion that a disqualification means a definitive end to the current terms in office and thus a judicial dismissal. They make a comparison to the right of inquiry (*enquêterecht*). In an inquiry procedure, the Enterprise Chamber of the Amsterdam Court of Appeal may dismiss a director with definitive effect^{viii}. They argue: *‘The prevailing doctrine in the literature is that the employment contract can then also be dissolved. With the general jurisdiction to regulate all other consequences of the disqualification, as included in Section 106b (4) DBA, we therefore believe the court can – in addition to the preceding corporate law dismissal, also effect the employment law dismissal. It must determine all this explicitly.’^{ix}*

In the explanatory memorandum to Section 106b (4) DBA, the legislator refers to a comparable jurisdiction in the right of inquiry: *‘In the fourth paragraph, a fairly broad jurisdiction has been laid down for the court to provide for the other (legal) consequences of the disqualification. Comparable jurisdiction is included in the right of inquiry, section 2: 357 (2) DCC, and in the dismissal of foundation directors for, in summary, mismanagement, section 2: 298 (2) DCC. This jurisdiction gives the court, for example, the possibility to determine that a disqualification only takes effect after a certain period of time.’^x* I agree with Kreileman and Bulten that on this basis the court can also effect employment law dismissal. Ten Broeke and Zaal^{xi} conclude that the disqualification is a bankruptcy law measure that affects the (double) legal position of the director, but that insufficient consideration has been given to the corporate and employment law implications. They believe that the disqualification does not automatically lead to a termination of the employment contract, but that this must be terminated by a separate action.^{xii}

A disqualification can be imposed on a director, an indirect director, a former (indirect) director and a (former) de facto director^{xiii} of a bankrupt legal entity. A disqualification cannot be imposed on a supervisory director of a bankrupt legal entity, unless he or she acted as a de facto director. If a disqualification is imposed, this not only impedes acting as director, but also acting in the position as supervisory director. The person on whom the disqualification has been imposed is also not permitted to act as a de facto director during the period of disqualification.^{xiv} Despite the fact that a disqualification can also be imposed on a natural person who acts or has acted in the exercise of a profession or business^{xv}, it is permitted to be a shareholder of a company or a partner in a partnership or to have a sole proprietorship. The disqualification is not a business prohibition.

The judgement imposing a disqualification is not provisionally enforceable. At the request of the insolvency administrator or the Public Prosecutor, the court may suspend the director concerned for, for example, the period until the judgement on the disqualification has become final. The suspension can be declared provisionally enforceable.

As soon as the judgement on the disqualification is irrevocable, the clerk to the court offers the judgement to the Chamber of Commerce. This then proceeds to deregister the relevant director from the trade register. The Chamber of Commerce also keeps an overview of the imposed

disqualifications, which states the name of the natural person and the start and end date of the disqualification. This overview will be published by the Chamber of Commerce as soon as this is included in the amended Trade Register Decree. The expectation is that this change will come into effect in July 2020.

FROM JULY 2016 TO JULY 2019

As far as I can tell, a director disqualification has been imposed in five judgements so far. The first was a default judgement of the District court The Hague on 13 June 2018.^{xvi} The disqualification was imposed on two directors, a married couple, for a period of five years. They were accused of being guilty of bankruptcy fraud in healthcare and not cooperating with the insolvency administrator and not providing him with information. They had also previously been involved in bankruptcies as (de facto) directors. These disqualifications were published by the Chamber of Commerce on 20 September 2018, but have recently been removed from its website pending the amendment of the Trade Register Decree.

The second judgement is a contested judgment of the District court Rotterdam on 14 November 2018.^{xvii} In that case, a disqualification was imposed because the director violated information and cooperation obligations towards the insolvency administrator and did not deposit the financial statements in time. The disqualification was imposed for a period of two years.

The third judgement was issued by the District court Midden-Nederland on 19 December 2018.^{xviii} It is a default judgement. The director on whom a disqualification at the request of the Public Prosecutor was imposed, has in recent years been involved as a director and/or shareholder with 109 legal entities, of which a substantial number was dissolved or declared bankrupt. At the time of the judgement, the director was director of fifteen legal entities, four of which were declared bankrupt in 2017 and 2018. This director has also been suspended by the court as a director until the judgement has become irrevocable or has been set aside by another court judgement.

The fourth judgement was also issued at the request of the Public Prosecutor. This is a contested judgement of the District court Amsterdam of 24 January 2019.^{xix} The disqualification was imposed for a period of five years. The director was accused of having seriously failed in his information and cooperation obligations to the insolvency administrator.

At the request of the Public Prosecutor the most recent disqualification was imposed by the District court Overijssel^{xx} in its judgement of 20 June 2019. The disqualification was imposed for a period of five years. The director, who did not defend himself, has been involved in at least two other bankruptcies in which his conduct was culpable. He is also accused of mismanagement that was an important cause of the bankruptcy (Section 2:248 DCC) and of failing in his information and cooperation obligations towards the insolvency administrator.

FINAL REMARK

An insolvency administrator or the Public Prosecutor can only request the imposition of a disqualification based on the actions of a director after 1 July 2016. The procedure then takes some time. The DDA entered into force on 1 July 2016. Although people were sceptical about the introduction of the DDA, a disqualification was imposed five times since. Insolvency administrators and the Public Prosecutors apparently do make use of this option.

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ⁱ *Parliamentary Papers II* 2013/14, 34 011, no. 3, p. 3.

ⁱⁱ Section 106a DBA.

ⁱⁱⁱ Section 106b DBA.

^{iv} Exceptions are possible, for example, for your own pension or annuity BV or the local chess association.

^v N. Kreileman & C.D.J. Bulten, 'Het civielrechtelijk bestuursverbod', *Ondernemingsrecht* 2016/109.

^{vi} *Parliamentary Papers II* 2013/14, 34 011, no. 3, p. 25.

^{vii} N. Kreileman & C.D.J. Bulten, 'Het civielrechtelijk bestuursverbod', *Ondernemingsrecht* 2016/109.

^{viii} Section 2:356 (b) DCC.

^{ix} N. Kreileman & C.D.J. Bulten, 'Het civielrechtelijk bestuursverbod', *Ondernemingsrecht* 2016/109.

^x *Parliamentary Papers II* 2013/14, 34 011, no. 3, p. 31.

^{xi} M. ten Broeke en I. Zaal, Het civielrechtelijke bestuursverbod: gevolgen voor de bestuurder met een arbeidsovereenkomst, *ArbeidsRecht* 2015/41.

^{xii} Unless a corporate dismissal decision still needs to be taken on the grounds of the disqualification, because then the April 15 judgments will apply: Supreme Court 15 April 2005, *JOR* 2005/145 (*Unidek*); en Supreme Court 15 April 2005, *NJ* 2005, 483 (*Ciris/Bartelink*).

^{xiii} Section 106d DBA.

^{xiv} *Parliamentary Papers I* 2015-16, 34011, B, p.1.

^{xv} Section 106a (4) DBA.

^{xvi} District court The Hague 13 June 2018, ECLI:NL:RBDHA:2018:8801.

^{xvii} District court Rotterdam 14 November 2018, ECLI:NL:RBROT:2018:9777.

^{xviii} District court Midden-Nederland 19 December 2018, ECLI:NL:RBMNE:2018:6261.

^{xix} District court Amsterdam 24 January 2019, ECLI:NL:RBAMS:2019:466.

^{xx} District court Overijssel 20 June 2019, ECLI:NL:RBOVE:2019:2836