

8 | The Duty of Directors to be Guided by the Best Interests of the Company

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1 INTRODUCTORY REMARKS

The corporate form (referred to as the *company* or the *corporation*) is a core concept in corporate law that is recognized worldwide. In its basic appearance the corporate form is a legal person (as opposed to *e.g.* partnerships) with a capital that is divided into transferable shares, that is led by a corporate board, and in which neither the shareholders nor the corporate directors are personally liable for the obligations of the company. This contribution considers the nature of the company as a statutory core legal concept in the Netherlands. After some observations of a more general nature, the discussion of the company as a core legal concept will take place against the backdrop of another statutory core legal concept that is firmly rooted in corporate law in the Netherlands: the duty of corporate directors in the performance of their duties to be guided by the best interests of the company and the undertaking that is connected with it. Paragraph 2 is introductory and describes some elements of corporate law in the Netherlands. Paragraph 3 investigates the origins of the company in the Netherlands. Then attention shifts to the core legal concept that corporate directors must be guided by the best interests of the company and its undertaking. Paragraphs 4 and 5 discuss landmark cases of the Dutch Supreme Court on corporate law: historic case law (the Doetinchemse IJzergieterij and Forum-Bank cases in paragraph 4) and a more recent case (the ASMI-case in paragraph 5) that show how the core legal concept of acting in the best interests of the company and its undertaking has in Netherlands case law gradually shaped thinking about the company as such. Whereas the origins of the company are in contract law (as is also reflected in the historic case law), both the historic and the more recent case law show that the company has developed over time into an abstract organizational form in which (as would be expected in such an abstract organization) the authority of the board of directors is pre-eminent. The idea of the corporate form as an abstract organizational form in which the position of the corporate board is paramount is not

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exceptional, as is borne out by the discussion of the judgment of the Supreme Court of the State of Delaware (United States of America) in the Selectica case in paragraph 6. This judgment as well as the case law discussed from the Netherlands show that companies have similar characteristics, however different the jurisdictions are in which they appear. However, a recent judgment by the Dutch Supreme Court in 2014 in the Cancun case (discussed in paragraph 7) may prompt a re-evaluation of the thinking on the nature of the company. The Cancun case could be a watershed in the sense that the Dutch Supreme Court seems to indicate that – when interpreting the core legal concept that directors in performing their duties must be guided by the best interests of the company and the undertaking that is connected with it – the organizational characteristics of an individual company may play an important role in determining the duties of the corporate directors. Thus interpreted, a company should no longer be regarded just as an abstract organizational form but also as an organization whose specific organizational characteristics determine how corporate directors should perform their duties. Interestingly, this recent development in the case law of the Dutch Supreme Court occurred in a situation where the company that was the object of the legal proceedings was a joint venture company of a highly contractual nature.

2 A PRELIMINARY OBSERVATION ON THE CORPORATE FORM (IN THE NETHERLANDS)

In the Netherlands there are two types of companies, the public limited company (or company limited by shares, in Dutch the *naamloze vennootschap*, abbreviated *NV*) and the private limited company (or private company with limited liability, in Dutch the *besloten vennootschap met beperkte aansprakelijkheid*, usually referred to as the *besloten vennootschap* for short, abbreviated *BV*). Legislation on the public limited company dates back as far as 1838, in what was then the Commercial Code, and legislation on the private limited company dates back to 1971, also in what was then the Commercial Code. Today, public limited companies and private limited companies are regulated in the Dutch Civil Code.

Articles 2:64 and 175 DCC are the opening articles of Title 4 and Title 5 of the Second Book of the DCC respectively. These articles hold the definitions of the two types of companies. Under Article 2:64, par. 1 DCC a public limited company ‘is a legal person with an authorized capital divided into transferable shares’, and under Article 175, par. 1 DCC a private limited company ‘is a legal person with an authorized capital divided into one or more transferable shares’, to which in both provisions is added: ‘The shareholders shall not be personally liable for acts performed in the name of the company and shall not be liable to contribute to losses of the company in excess of the amount which must be paid up on their shares’. In accordance with Articles 2:64, par. 2

and 175, par. 2 DCC both a public limited company and a private limited company may be incorporated by either one (natural or legal) person or several (natural or legal) persons, and shall be established by a notarial deed of incorporation. In accordance with Articles 2:66, par. 2 and 177, par. 2 DCC the name of a public limited company and a private limited company shall begin or end with the words *Naamloze Vennootschap* (or the abbreviated form *NV*) or *Besloten Vennootschap met beperkte aansprakelijkheid* (or the abbreviated form *BV*) respectively. In comparison with the public limited company the private limited company is intended to be a 'light' company in the sense that the private limited company is more 'flexible' than the public limited company and is more 'simplified' as opposed to the public limited company.

There are several notable differences between public limited companies and private limited companies under Netherlands company law. To note but a few, *first*, both the issued share capital and the paid up part of the issued share capital of a public limited company shall be at least 45,000 euros (and shall be expressed in euros), whereas the issued share capital of a private limited company shall be at least one euro cent only and the paid up part of the issued share capital of a private limited company may be as little as zero (and need not be expressed in euros). *Second*, as a general rule the directors of a public limited company shall be appointed by the company's general meeting (in principle by a majority decision), whereas the directors of a private limited company may be appointed by either the company's general meeting (in principle by a majority decision) or by a meeting of holders of shares of a specific class or type (in principle by a majority decision) as opposed to the company's general meeting as a whole. *Third*, all shareholders of a public limited company shall have both voting rights and the right to distribution of profits, whereas a private limited company may have shareholders that have shares to which either no voting rights or the right to distribution of profits are attached (with the express provision that shares cannot be devoid of voting rights and the right to distribution of profits cumulatively). *Fourth*, the articles of a public limited company may provide that the company's board of directors must conduct itself in accordance with the directions of a corporate body (*e.g.* the general meeting) in respect of the general policy to be pursued in areas further specified in the articles, whereas the articles of a private limited company may simply provide that the company's board of directors must conduct itself in accordance with the directions of another corporate body (*e.g.* the general meeting), with no limitation to only the general policy to be pursued and without the need of specifying the relevant areas in the articles.

There are also some notable similarities between public limited companies and private limited companies under Netherlands company law. *First*, on the level of its board of directors both a public limited company and a private limited company may be organized as a one-tier board or a two-tier board. In a one-tier board (also: unitary board) the board of directors consists of both executive directors and non-executive directors, the non-executive directors

performing the internal supervisory function. In a two-tier board (also: dual board) next to the management board (comprised of managing directors) there is a supervisory board (comprised of supervisory directors), the supervisory directors performing the internal supervisory function. However, as a general rule Netherlands company law does not require that there is an internal supervisory function. This means that a public limited company and a private limited company may just have a board of directors comprised of only executive directors, or may just have a management board without having a supervisory board. *Second*, under Articles 2:129 par. 5 and 239 par. 5, and 140, par. 2 and 250, par. 2 DCC all corporate directors, whether executive directors and non-executive directors (if the latter have been appointed) in a one-tier board, or managing directors and supervisory directors (if the latter have been appointed) in a two-tier board, shall, in the performance of their duties, ‘be guided by the best interests of the legal person and the undertaking connected with it’. It is precisely this provision that has been regarded as underlining that public limited companies and private limited companies are an abstract organizational form. A widely held view on this provision holds that corporate directors should take into account and balance the interests of all stakeholders in the company and not just the interest of the company’s shareholders.¹

3 AN OBSERVATION ON THE ORIGINS OF THE CORPORATE FORM (IN THE NETHERLANDS)

The fading years of the sixteenth century witnessed a remarkable economic development in the Netherlands. These years saw the establishment of a number of companies devoted to far-reaching overseas trade. Next to sailing to the northern Baltic and Hanseatic regions, ships now also sailed in eastbound directions to the Indies (and later in westbound directions to the Americas as well as to Africa).² The first of these companies was the Company of Far (the *Compagnie van Verre*, an abbreviation of *Compagnie van Verre Reizen*: Company of Far Travels), established in the city of Amsterdam in 1594). As successive companies in other cities followed, competition between these companies grew. This prompted the Netherlands government to bring at least most of these companies under the aegis of one overarching organization, called the East India Company (the *Oost-Indische Compagnie*, usually referred to as the *Verenigde Oost-Indische Compagnie*: the United East India Company)

1 P.J. Dortmond (main author), *Handboek voor de naamloze en de besloten vennootschap*, Deventer: Kluwer 2013, no 231, J. Winter & J.B. Wezeman, *Van de BV en de NV*, Deventer: Kluwer 2013, pp. 27-29. *Cfr.* M. Olaerts, ‘De aandeelhouder en het vennootschappelijk verband: de kwalificatie van de vennootschap en de invloed op de vennootschappelijke belangenafweging’, *Tijdschrift voor Ondernemingsbestuur* 2015-2, pp. 51-64.

2 J. de Vries & A. van der Woude, *Nederland 1500-1815. De eerste ronde van economische groei*, Amsterdam: Uitgeverij Balans 1995, pp. 411-417, 450-462 and 462-469.

in 1602.³ The modern public limited company (with legislation dating back to 1838) and by extension the modern private limited company (with legislation dating back to 1971) are mostly regarded as descendants of the United East India Company. However, there are conflicting views about the way in which the public limited company (and the private limited company) build on the earlier United East India Company.⁴

As a starting point on the heritage of the public limited company, all views recognize that the United East India Company was a company whose shares were traded on a stock exchange (this being the Amsterdam stock exchange). *The first (majority) opinion* holds that the previously existing companies were in effect limited partnerships in which the most important partners, who also formed the board of directors of these companies, were as general partners jointly and severally liable for the debts of these companies, and in which the other less important partners as limited partners were not liable for the debts of these companies.⁵ Building on this analysis, this opinion suggests that the succeeding United East India Company was a company in which none of the partners (including the most important partners who formed the board of directors of the United East India Company) were liable any longer for the debts of the United East India Company. *The second (minority) opinion* argues that both the previously existing companies as well as the succeeding United East India Company were business partnerships in which all partners were liable for the debts of the company, although not jointly and severally, but only proportionally.⁶ In addition, this opinion argues that any partner in both the previously existing companies and the United East India Company could escape from this proportional liability by giving up his shares in the company. This would be the effect of the so-called *droit d'abandon* (the right to renounce) that allowed shareholders to give up their shares (this right being the consequence of the then common idea regarding the commercial law of the sea that 'no one can lose more to the sea than he has entrusted to it'). A strong point of *the first (majority) opinion* is that it regards the United East India Company and thereby the later public limited company as a logical follow-up to the concept of the limited partnership, by simply extending non-liability

3 H.M. Punt, *Het vennootschapsrecht van Holland. Het vennootschapsrecht van Holland, Zeeland en West-Friesland in de rechtspraak van de Hoge Raad van Holland, Zeeland en West-Friesland*, Deventer: Kluwer 2010, pp. 100-101.

4 P.J. Dortmond (main author), *Handboek voor de naamloze en de besloten vennootschap*, Deventer: Kluwer 2013, nos. 1-39.

5 Discussed by: H.M. Punt, *Het vennootschapsrecht van Holland. Het vennootschapsrecht van Holland, Zeeland en West-Friesland in de rechtspraak van de Hoge Raad van Holland, Zeeland en West-Friesland*, Deventer: Kluwer 2010, pp. 95-107. *Cfr.* On the United East India Company: L.O. Petram, *The world's first stock exchange. How the Amsterdam market for Dutch East India Company shares became a modern securities market, 1602-1700* (2011: published at <http://dare.uva.nl>).

6 Advanced by: W.M.F. Mansvelt, *Rechtsvorm en geldelijk beheer bij de Oost-Indische Compagnie*, Amsterdam: Swets & Zeitlinger 1922.

for the debts of the partnership to all members of the company. However, a weakness of this opinion is that it introduces non-liability of any and all members for the debts of the United East India Company into an era where the concept of legal personality had not been thought through. *The second (minority) opinion* has a strong point in that it logically connects the *droit d'abandon* in the United East India Company and its predecessors to the notion that none of the members of a public limited company needs to be liable for the debts of the company. A weak point of this opinion is that the idea that both the most important partners and the less important partners of the United East India Company were liable (albeit proportionally) for the debts of the company is difficult to reconcile with the United East India Company having shares that were traded on a stock exchange, making it difficult to retrieve the identity of the partners that were liable for the debts of the company as long as they did not invoke the *droit d'abandon*.

The legislation of 1838 clearly struggled with the proper way to regulate the public limited company. It decided to regulate the business partnership, the limited partnership and the public limited company on a par in the Commercial Code (next regulating the professional partnership in the DCC). The opening provision of the Title called 'On the partnership of trade' read:⁷ 'The law recognizes three partnerships of trade: the commercial partnership, the limited partnership or partnership *en commandite*, [and] the public limited company'.⁸ Interestingly, the public limited company was named (as it still is today) *naamloze vennootschap* (meaning *anonymous company*), derived from the French term *société anonyme*. In this respect (and also as an explanation of the phrase *naamloze vennootschap*), the opening article on the public limited company read: 'The public limited company shall not have a common name, nor shall it carry the name of one or several of its partners, but shall only be indicated by the object of its business enterprise'.⁹ This somewhat strange provision meant that the 1838 legislation tried to distinguish the public limited company (a novelty in terms of legislation at the time) from the commercial partnership and the limited partnership: unlike the commercial partnership and the limited partnership the public limited company could not carry a 'fantasy' company name or have the names of its partners as part of its company name (note the use of the phrase partners instead of shareholders), but could only be named *e.g.* Coal Trading Company or Grain Importing Company. This is all the more understandable as the legislation of 1838 did not require that the name of a public limited company should include the words *Naamloze*

7 'Van vennootschap van Koophandel'.

8 'De Wet erkent drie soorten van Vennootschappen van Koophandel: De vennootschap onder eene firma; De vennootschap bij wijze van geldschieting, anders compagnieschap *en commandite* genaamd; De naamlooze vennootschap'.

9 'De naamlooze vennootschap heeft geen firma, noch draagt den naam van een of meer der vennoten, maar zij ontleent hare benaming alleen, van het voorwerp harer handels-onderneming'.

Vennootschap or the abbreviated form *N.V.* The 1838 legislation further stated that ‘The partners or holders of the parts or shares shall not be liable beyond the full amount of those parts or shares’,¹⁰ and ‘The company shall be led by directors, appointed by the partners, who may or may not be partners themselves, and may or may not receive a salary, with or without supervision by supervisory directors’.¹¹ The 1838 legislation also stated that ‘The managing directors shall be responsible only for proper execution of the tasks they are commissioned with; as regards third parties they shall not be liable for the debts of the company’.¹² Under the present regulation of the public limited company and the private limited company in the DCC the fact that directors of a company are not responsible for the debts of the company in respect of third parties is something that is regarded as being so logical and obvious that there is not even a provision anymore that states this in so many words. Interestingly, nowhere did the legislation of 1838 refer to the public limited company as a ‘legal person’.

In 1928 a major overhaul took place of the legislation on the public limited company in the Commercial Code.¹³ Under the new legislation the public limited company was referred to as a ‘legal person’ and was required to have the indication *Naamloze Vennootschap* or the abbreviated form *N.V.* as part of its company name.¹⁴ Also, the ban on the use of a ‘fantasy’ company name or the use of the names of its shareholders as part of the company name was repealed.

4 HISTORIC CASE LAW (IN THE NETHERLANDS) OBSERVED

4.1 Introduction

This paragraph discusses two older judgments of the Dutch Supreme Court that were rendered when Netherlands corporate law was still nascent. These judgments give insight into the way in which the Dutch Supreme Court already at that time underlined the strong position that corporate boards have vis-à-vis both individual shareholders and the general meeting. These judg-

10 ‘De vennoten of houders dier actien of aandeelen zijn niet verder aansprakelijk, dan voor het volle beloop derzelve’.

11 ‘De vennootschap wordt beheerd door daartoe, door de vennoten, aangestelde bestuurders, deelgenooten of andere, al dan niet loontrekkende, met of zonder toezigt van commissarissen’.

12 ‘De bestuurders zijn niet verder verantwoordelijk, dan ter zake van de behoorlijke uitvoering van den aan hen opgedragen last; zij zijn uit kracht der verbindtenissen van de vennootschap, aan derden niet persoonlijk verbonden’.

13 *Stb.* 1928/216.

14 ‘De naamlooze vennootschap is rechtspersoon [...]’ and ‘De naam vangt aan of eindigt met de woorden Naamlooze Vennootschap, hetzij voluit geschreven, hetzij afgekort tot “N.V.”’.

ments form the basis of the later judgment in the ASMI case discussed in paragraph 5.

4.2 The Doetinchemse IJzergieterij case (1949)

In the *Doetinchemse IJzergieterij* case NV Uitgevers Maatschappij C. Misset (*Misset*) had been the majority shareholder of NV Doetinchemse IJzergieterij (*Doetinchemse IJzergieterij*) since 1933.¹⁵ Under the articles of Doetinchemse IJzergieterij the supervisory board had the power to issue new shares of the company. Two managing directors of Misset had been members of the supervisory board of Doetinchemse IJzergieterij but had died in 1945 and 1947 respectively, leaving Misset no longer represented in the supervisory board of Doetinchemse IJzergieterij. During the general meeting of Doetinchemse IJzergieterij that was held in August 1947 Misset became aware of the fact that the supervisory board had issued a large number of shares. As a consequence, Misset had lost its position as majority shareholder (it should be noted that Netherlands company law at that time did not give existing shareholders a right of first refusal when a public limited company issued new shares). Misset brought a lawsuit against Doetinchemse IJzergieterij asking the District Court to order provisional measures that would prohibit the new shareholders from exercising their rights on the shares they had acquired. The District Court did not award this request, but the Court of Appeal ruled in favour of Misset.

Doetinchemse IJzergieterij appealed to the Dutch Supreme Court. On its part, the Dutch Supreme Court annulled the Court of Appeal's decision and affirmed the decision of the District Court that had ruled in favour of Doetinchemse IJzergieterij. The main argument in the proceedings before the Dutch Supreme Court forwarded by Misset was phrased in quite plain terms. In the opinion of Misset 'supervisory directors could not take a decision that contravenes the interests and wishes of the majority shareholder'. The Dutch Supreme Court rejected Misset's argument in a very short consideration:

'Supervisory directors who exercise their powers as a corporate organ shall be guided by the interest of the company and shall give precedence to the interest of the company in case this clashes with the interests of whatever shareholder'.

4.3 The Forum-Bank case (1955)

In the *Forum-Bank* case two shareholders of NV Forum-Bank (*Forum-Bank*) had proposed that Forum-Bank buy back shares these shareholders held in the company and that the price to be paid by Forum-Bank be used mainly to

¹⁵ Dutch Supreme Court 1 April 1949, NJ 1949/465 (*Doetinchemse IJzergieterij*).

reduce the amount of debt these shareholders owed to the company.¹⁶ When this proposal was discussed by the general meeting both the management board and the supervisory board of Forum-Bank as well as five of the eight shareholders who attended the general meeting opposed the proposal. The management board and the supervisory board argued that accepting the proposal would not be in the interest of Forum-Bank itself and its shareholders, as it would undermine the liquidity of the bank, and that in accordance with the articles this was a matter not to be decided by the general meeting but by the management board. When it came to a vote, the voting power of the two shareholders who had made the proposal (296 and 110 shares), combined with the votes of the one shareholder who supported the proposal (5 shares), was enough to have the proposal accepted by a majority of 411 votes in favour of the proposal to 117 votes against the proposal. This prompted two opposing shareholders to bring the matter before the District Court, asking the District Court to declare that the decision by the general meeting was null and void as it was outside the realm of the general meeting's powers. The District Court ruled in favour of these claimants and the Court of Appeal, on the basis of the articles of Forum-Bank, confirmed this judgment.

One of the two shareholders who had originally proposed that Forum-Bank buy back the shares lodged an appeal to the Dutch Supreme Court. In this appeal, the main argument was phrased in equally plain terms as the argument in the *Doetinchemse IJzergieterij* case: even if it were to be accepted that the competence to decide on buying back Forum-Bank's shares fell within the powers of the management board, the decision made by the general meeting could not be null and void because:

'the general meeting of shareholders [...] has competence to order the management board to act in certain ways, to wit to decide to buy back shares as is debated in this case, for which reason that decision, in any case and as such and to that extent, was made in a competent way and is not null and void.'

The Dutch Supreme Court, however, did not accept this line of reasoning and dismissed the appeal. The Dutch Supreme Court first interpreted the appeal as arguing in essence that:

'it brings to the fore that the general meeting, in spite of the fact that buying back the company's shares [...] falls within the competence of the management board, has the power to instruct the management board to buy back shares of the company for a specified price from certain sellers because the managing directors are subordinate to the public limited company and the general meeting exercises the ultimate power in the public limited company.'

16 Dutch Supreme Court 21 January 1955, *NJ* 1959/43 (Forum-Bank).

Then the Dutch Supreme Court rebutted the appeal in – again – a very short consideration:

‘this argument, thus read, ignores that the general meeting too shall not transgress the powers given to it by statutory law or by the articles.’

4.4 A short comment

Interestingly, in one consideration in the *Doetinchemse IJzergieterij* case ([Incorrectly, the] Court of Appeal took as a starting point that the nature of the corporate contract entails as a fundamental right that shareholders have a right of first refusal when shares are issued’) the Dutch Supreme Court rendered a reference that the Court of Appeal had made to ‘the nature of the corporate contract’. Apparently, the Court of Appeal at the time still regarded the corporate form as a contractual relationship between its participants. On its part, the Dutch Supreme Court underlined the autonomous position of the ‘[s]upervisory directors who exercise their powers as a corporate organ’. Likewise, in the *Forum-Bank* case the Dutch Supreme Court underlined the autonomous position of the management board. Both cases indicate a line of thinking whereby the corporate form gradually developed into an abstract organizational form in which the role of the corporate directors is pre-eminent.

5 A MORE RECENT CASE (IN THE NETHERLANDS) OBSERVED

5.1 Introduction

In the *ASMI* case the Dutch Supreme Court had the opportunity to lay down what a modern twenty-first century company is: an abstract organizational form wherein the duty of the directors to be guided by the best interests of the company and the undertaking that is connected with it implies that both shareholders and the general meeting can exert very little leverage when it comes to influencing the company’s policies or asking directors to act in certain ways. In a two-tier board this applies to both (the members of) the management board and (the members of) the supervisory board.

5.2 The *ASMI* case (2010)

ASM International NV (ASMI) was a listed public limited company that had been established by A.H. del Prado in 1968. *ASMI* held 53% of the shares in *ASM Pacific Technology Ltd (ASMPT)* that was also a listed company (in Hong Kong). A.H. del Prado held approximately 21% of the shares of *ASMI*. He had been

the chief executive officer (CEO) of ASMI from its establishment in 1968 and remained so until 1 March 2008. On that day his son, C.D. del Prado, who had been on the management board of ASMI since 2006, became the new CEO of ASMI. Since 2005 a number of shareholders of ASMI had been raising concerns about the way ASMI was run. These shareholders were Fursa Master Global Event Driven Fund LP (*Fursa*), an investment fund that held approximately 6% of the shares of ASMI, and a number of investment funds that operated under the name of Hermes and together held approximately 15% of the shares of ASMI. Their concerns concentrated on two issues. They argued that the way in which the articles of ASMI provided for the appointment of the members of both the management board and the supervisory board of ASMI was not in conformity with what shareholders of a listed company would expect. In their opinion especially the fact that since 2006 both A.H. del Prado and C.D. del Prado had been on the management board of ASMI resulted in 'family ties' that raised 'doubts and concerns that there will not be enough distance between the members of the management board'. They also commented on the fact that the shares in ASMPT traded against approximately EUR 18 per share whereas the shares in ASMI traded against approximately EUR 12 per share only. In their opinion this could only mean (since ASMPT as a 53%-subsidiary company of ASMI was being favoured more by investors than ASMI) that the financial results of ASMI were negatively influenced by its own business that was not profitable enough. The differences of opinion between ASMI's management board and supervisory board on the one hand and Fursa and Hermes on the other hand resulted in extended talks between these parties and finally a lawsuit against ASMI under the provisions on Right of Inquiry in Title 8 of the Second Book of the Dutch Civil Code. In these proceedings the Enterprise Court of the Amsterdam Court of Appeal in 2009 came to the conclusion that there were well-founded reasons to doubt ASMI's policies.¹⁷ On appeal, however, this judgment was set aside by the Dutch Supreme Court.¹⁸ One reason for this was that the judgment of the Enterprise Court was, as the Dutch Supreme Court considered, flawed because 'it follows to a sufficient degree from the facts of the case that the management board did start a dialogue with the external shareholders, went into their arguments and dismissed these arguments on the basis of well-founded and defensible counter-arguments, taking into account the long-term interests of all those involved in the company.' What follows below are two considerations of the Dutch Supreme Court on general issues of company law:

17 Enterprise Court 5 August 2009, *JOR* 2009/254 (ASMI).

18 Dutch Supreme Court 9 July 2010, *JOR* 2010/228 (ASMI). M.M. Mendel & W.J. Oostwouder, 'Het vennootschappelijk belang na recente uitspraken van de Hoge Raad', *Nederlands Juristenblad* 2013, no. 1776.

‘The management board of a company, when fulfilling its obligations under statutory law or the articles, shall give precedence to the best interests of the company and the undertaking connected with it and shall in its decision-making take into account the interests of all stakeholders, among whom the shareholders are to be reckoned. Therefore, ASMI’s strategy is in principle a matter for the management board to decide on, and it shall be the management board, under the supervision of the supervisory board, which is to judge whether and to what extent it is desirable to discuss this with the ‘external’ shareholders. Although the management board is under an obligation to give account to the general meeting of shareholders it is, in the absence of arrangements under statutory law or the articles, not obliged to involve the general meeting of shareholders in advance in matters that fall within its competence.’

And:

‘The supervisory board shall supervise the management board’s policy as well as the general course of affairs in the company and the undertaking connected with it and shall advise the management board [...]. This function under statutory law does not entail an obligation for the supervisory board to intermediate in conflicts between the management board and shareholders. Neither is the supervisory board under an obligation to give account to the shareholders on this matter. [...] The supervisory board, when approached by shareholders requesting it to intermediate or to take other action, will have to act adequately on the basis of its own function. However, an obligation to intermediate actively would [...] contravene the margin of discretion that the supervisory board has in fulfilling its function.’

5.3 A short comment

The ASMI case represents the apex in the Netherlands of the line of thought that regards the corporate form as an abstract organizational form in which the authority of the corporate directors is pre-eminent. The Dutch Supreme Court decided that a management board is in principle ‘not obliged to involve the general meeting of shareholders in advance in matters that fall within its competence’ and that a supervisory board is not obliged to ‘intermediate in conflicts between the management board and shareholders’. Being the apex of that line of thought, the Dutch Supreme Court’s judgment is also questionable. The judgment puts extreme emphasis on the autonomous position of both the management board and the supervisory board of a company vis-à-vis the company’s shareholders. In doing so, the judgment shows little regard for the interests of the shareholders as investors in the company. After all, should a management board not be obliged to at least consult the company’s general meeting on major issues that are important to the shareholders? And likewise, what is the use of having a supervisory board that refrains from intermediating in conflicts between the management board and the company’s investors?

6 THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF DELAWARE IN THE SELECTICA CASE (2010)

6.1 Introduction

The judgment of the Supreme Court of the State of Delaware in the Selectica case shows that the general features of the corporate form are much alike across jurisdictions: as in the Netherlands the Delaware Supreme Court allows corporate boards a wide margin of appreciation that shareholders are unable to encroach upon.

6.2 The Selectica case

Selectica, Inc. (*Selectica*) was a listed corporation that provided enterprise software solutions. Selectica had become a listed corporation in 2000 and had since incurred substantial losses. The price of Selectica shares had fallen from \$ 30 per share at the time of the initial public offering to less than \$ 1 per share. The value of Selectica consisted mainly of cash reserves, intellectual property rights, goodwill and 'accumulated NOLs'. NOLs are 'net operating loss carryforwards' that under (U.S. federal) tax law a corporation that does not achieve a positive net income may use as a fiscal means 'to provide a refund of prior taxes paid or to reduce the amount of future income tax owed'. Therefore, NOLs are a valuable asset. Selectica's NOLs amounted to approximately \$ 160 million. A corporation may only make use of NOLs that it has generated itself and under (U.S. federal) tax law the use of NOLs is limited following an 'ownership change'. For the purposes of applying this limitation, an ownership change generally occurs when over a period of time of three years 50% of a corporation's shares change ownership; *however, in this calculation only shareholders who hold 5% or more of a corporations's shares are counted.*

Selectica had employed a 'shareholder rights plan' (a poison pill) as a protective measure against a possible hostile takeover since 2003. This shareholder rights plan would become active if a Selectica shareholder would acquire 15% (or more) of Selectica's shares. In 2008 the board of directors of Selectica amended this shareholder rights plan *as a means of protecting the value of its NOLs* to the effect that the plan would be triggered when a shareholder would acquire 4.99% (or more) of Selectica's shares.

In December 2008 Trilogy, Inc. (Trilogy), together with its subsidiary company Versata Enterprises, Inc. (Versata) intentionally surpassed the 5% threshold ('bought in excess of' the threshold) by then acquiring 6.7% in total of Selectica's (common) shares. Its reasons for doing so were to 'bring some clarity and urgency' to their relationship that had been troubled (also by lawsuits) for a number of years. Under these circumstances the board of

directors of Selectica in January 2009 decided to put the shareholder rights plan into action. This meant that the shareholder rights plan ‘doubled the number of shares of Selectica common stock owned by each shareholder of record, other than Trilogy or Versata, thereby reducing their beneficial holdings from 6.7% to 3.3%’. Preceding this, in December 2008, Selectica had filed suit in the Delaware Court of Chancery ‘seeking a declaration that the NOL Poison Pill was valid and enforceable’. On their part, Trilogy and Versata argued that the (use of the) shareholder rights plan was unlawful. The Court of Chancery ruled in favour of Selectica.¹⁹ Trilogy and Versata appealed to the Supreme Court of the State of Delaware, but in its judgment of 4 October 2010 the Supreme Court affirmed the judgment of the Court of Chancery.²⁰ The Supreme Court considered: ‘The Court of Chancery concluded that the protection of company NOLs may be an appropriate corporate policy that merits a defensive response when they are threatened. We agree’, because:

‘The Court of Chancery found the record “replete with evidence” that, based upon the expert advice it received, the Board was reasonable in concluding that Selectica’s NOLs were worth preserving and that Trilogy’s actions presented a serious threat of their impairment. [...] Those findings are not clearly erroneous. They are supported by the record and the result of a logical deductive reasoning process’,

and because the shareholder rights plan (that was also a protective measure) was not such that it had the effect of precluding a possible takeover of Selectica:

‘The Court of Chancery concluded that the NOL Poison Pill and Reloaded NOL Poison Pill were not preclusive.^[21] [...] The record supports the Court of Chancery’s factual determination and legal conclusion that Selectica’s NOL Poison Pill and Reloaded NOL Poison Pill do not meet that preclusivity standard.’

Furthermore, ‘The implementation of the Reloaded NOL Poison Pill was also a reasonable response’:

‘The record indicates that the Board was presented with expert advice that supported its ultimate findings that the NOLs were a corporate asset worth protecting, that the NOLs were at risk as a result of Trilogy’s actions, and that the steps that the Board ultimately took were reasonable in relation to that threat.’

19 Court of Chancery of the State of Delaware 26 February 2010, CA #4241-VCN (Selectica), at: <http://courts.delaware.gov>.

20 Supreme Court of the State of Delaware 4 October 2010, no. 193, 2010 (Selectica), footnotes deleted, at: <http://courts.delaware.gov>.

21 The Reloaded Poison Pill refers to the amendment of the shareholder rights plan to the effect that it would be triggered when a shareholder would acquire 4.99% (or more) of Selectica’s shares.

6.3 A short comment

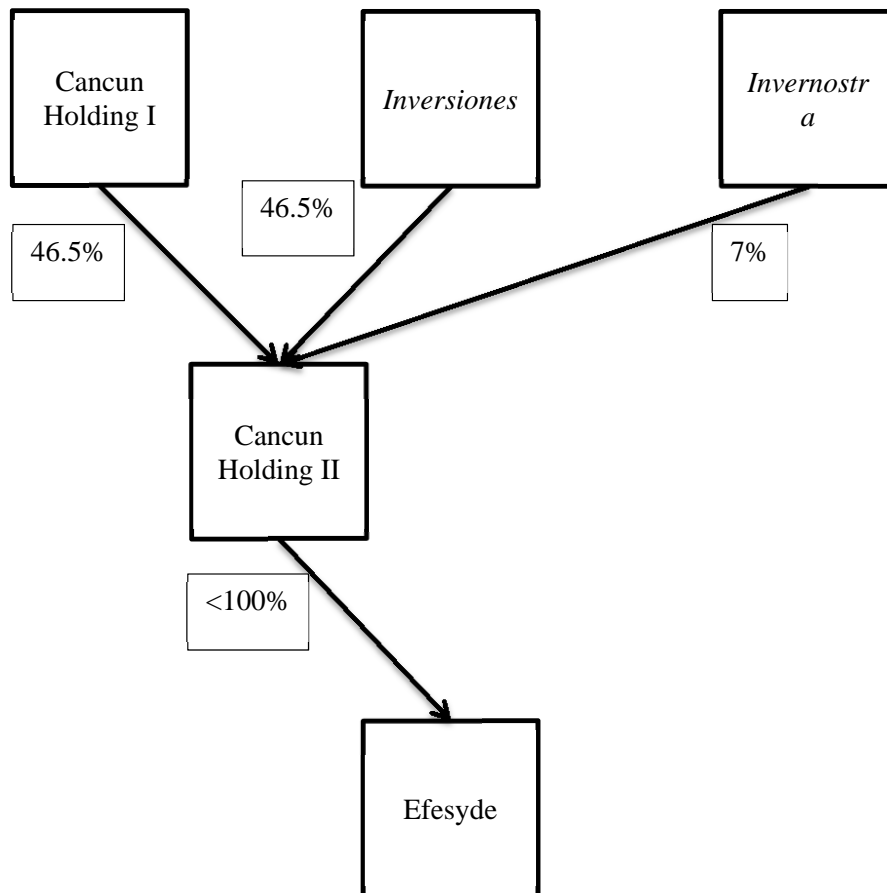
The judgment of the Supreme Court of the State of Delaware in *Selectica*, like the judgments of the Dutch Supreme Court in the Doetinchemse IJzergieterij, Forum-Bank and ASMI cases, allows corporate boards a wide margin of discretion in conducting the affairs of the corporation. That corporate boards have this wide margin of discretion is inherent in the corporate form where shareholders as investors entrust resources to the corporation.²² In that sense, the judgments of the Dutch Supreme Court and the *Selectica* judgment of the Supreme Court of the State of Delaware point in the same direction. However, the idea that corporate boards have this wide margin of discretion does not in itself give much guidance to a corporate board as to whose interests it should take into account in conducting the affairs of the corporation. On that issue, the judgment of the Dutch Supreme Court in *Cancun* may be of help. This judgment is discussed in the following paragraph.

7 THE CANCUN CASE IN THE NETHERLANDS: IS THE PENDULUM SWINGING IN A NEW DIRECTION?

7.1 The Cancun case (2014)

Cancun Holding II BV (*Cancun Holding II*) had been established in August 2005 by Cancun Holding I BV (*Cancun Holding I*, an (investment) company of the Lliteras family) for the purpose of realizing a hotel complex in the Mexican city of Cancun through its (almost wholly-owned) subsidiary company Efesyde SA de CV (*Efesyde*). In October 2006 Cancun Holding II became a joint venture company between Cancun Holding I and Inversiones Ma y Mo SL (*Inversiones*, an (investment) company of the Nicolau family). On 18 June 2009 Invernostra SL (Unipersonal) (*Invernostra*) acquired 7% of the shares of Cancun Holding II; Cancun Holding I and *Inversiones* each retained 46.5% of the shares of Cancun Holding II.

22 R. Kraakman, 'The Durability of the Corporate Form', in: P. DiMaggio (ed.), *The Twenty-First-Century Firm. Changing Economic Organization in International Perspective*, Princeton/Oxford: Princeton University Press 2001, pp. 147-160 (150).

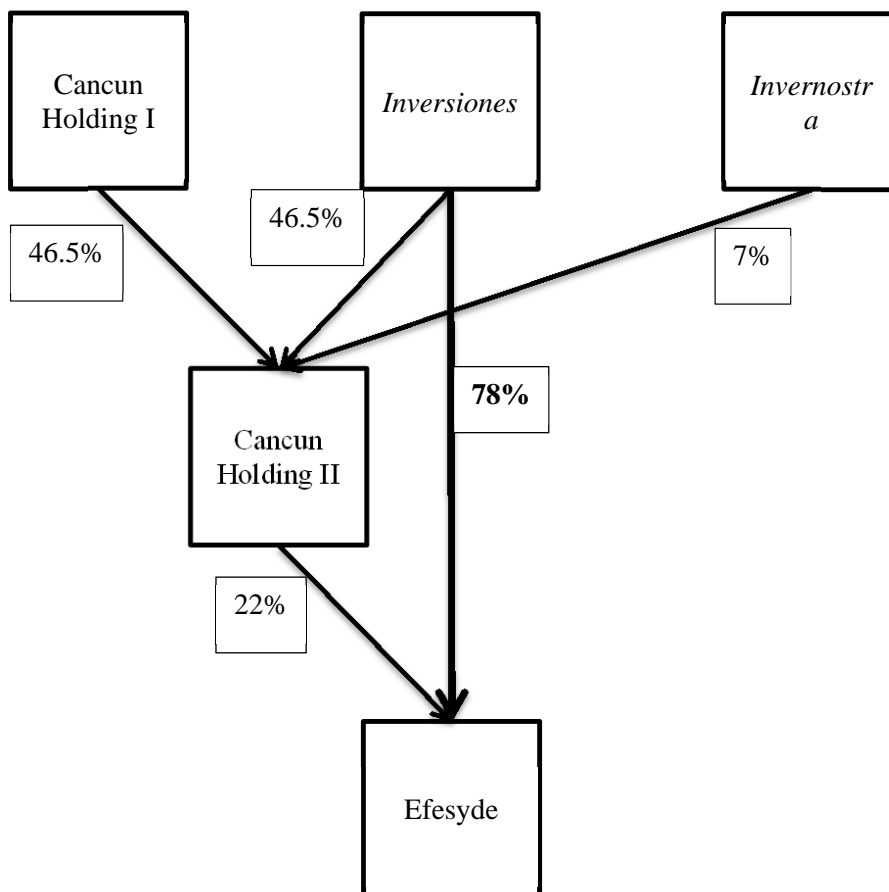


The costs of realizing the hotel complex amounted to USD 140 million; the hotel complex ('Secret Silver Sands') started operating in August 2008. During the summer and fall of 2008 differences of opinion began to emerge between Cancun Holding I (the Lliteras family) and *Inversiones* (the Nicolau family) about the costs involved with building and operating the hotel complex.

The shares that Cancun Holding I held in Cancun Holding II were 'A shares', the shares that *Inversiones* held in Cancun Holding II were 'B shares', and the shares that Invernostr a held in Cancun Holding II were 'C shares'. Under the articles the A, B and C shares carried with them the right to nominate managing directors of Cancun Holding II. The C shares carried with them additional rights that implied that some decisions of the management board could only be made in a meeting of the management board where at least two board members were present, among whom at least one board member who was nominated by the holder of the C shares, and that these

decisions had to be approved also by at least one board member who was nominated by the holder of the C shares. Since 18 June 2009 the management board of Cancun Holding II had consisted of K.H.K.L.B. Roovers (managing director A, on behalf of Cancun Holding I), Equity Trust Co. NV (managing director B, on behalf of *Inversiones*) and J.M. Navarro Lacoba (managing director C, on behalf of Invernostra).

Inversiones had a claim against Efesyde (that was at the time not completely immediately due) for work it had performed on the hotel complex. When Efesyde asked its bank to enhance its credit, the bank indicated that it would only be willing to do so if Efesyde was somehow able to bring its debt position vis-à-vis *Inversiones* to an end. In order to accomplish this, Efesyde issued a large number of shares to *Inversiones* on 1 July 2009 that *Inversiones* paid up by balancing its claim against Efesyde. As a consequence of this, *Inversiones*

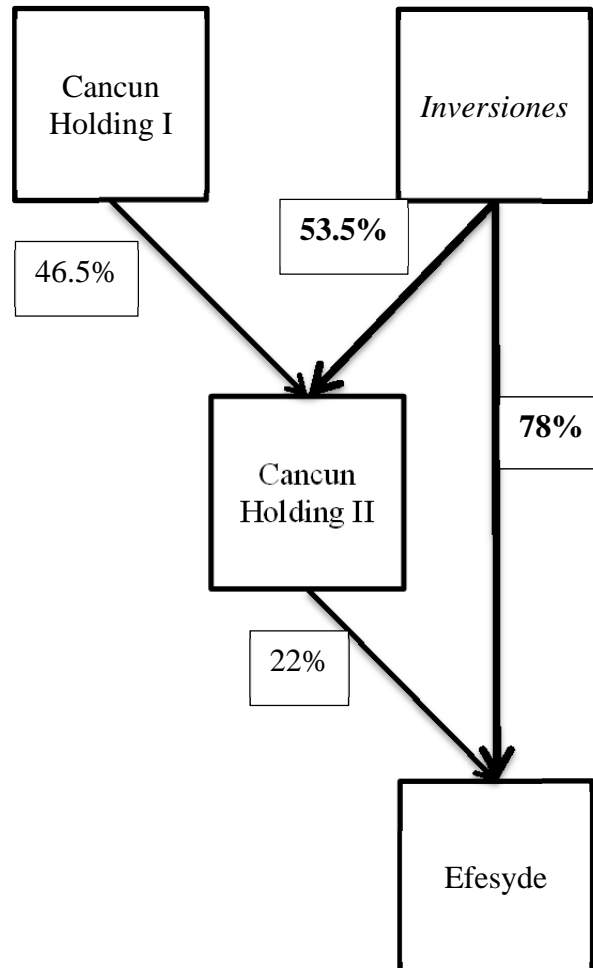


became a 78%-shareholder in Efesyde and the participation of Cancun Holding II in Efesyde decreased from almost 100% to 22% ('the first watering down' of the participation of Cancun Holding II in Efesyde). This arrangement was intended to be temporary only.

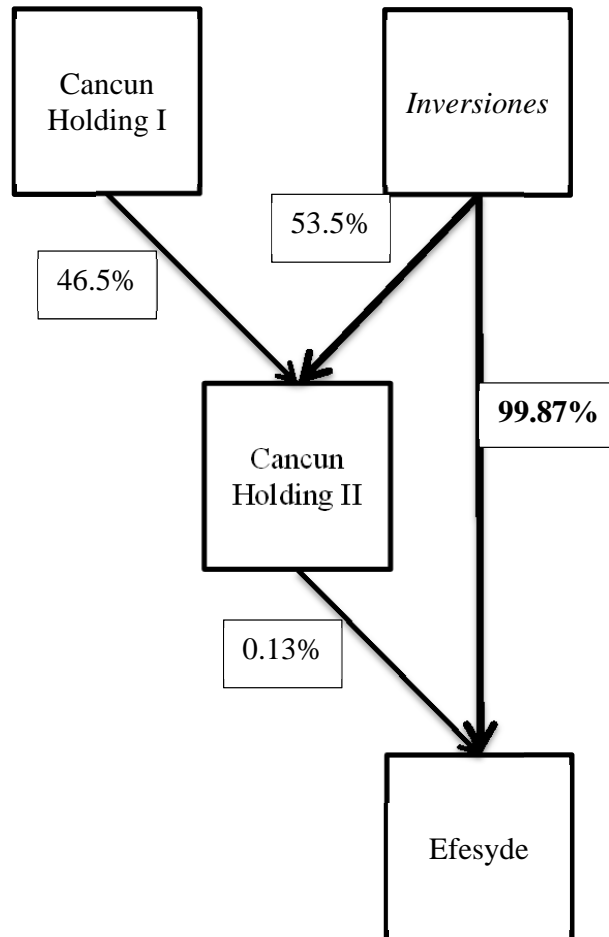
The management board of Efesyde had for a time consisted of three persons from the Lliteras family. Of these three persons, following the issue of shares to *Inversiones*, only Margarita Lliteras remained on the board, and G. Nicolau Salleras (on behalf of *Inversiones*) and J.M. Navarro Lacoba (on behalf of *Invernostra*) became board members.

At some point during the summer of 2009 the management board of Cancun Holding II put forward the proposal that Cancun Holding II issue shares to *Inversiones* and *Invernostra* (but not to Cancun Holding I). This proposal would result in the participation of Cancun Holding I decreasing to 0.08%, *Invernostra* retaining its participation of 7% and *Inversiones* increasing its participation to 92.92%. The background of this proposal was to compensate *Inversiones* for giving up its claim against Efesyde. Obviously, Cancun Holding I was against the proposal and did not attend the general meeting that would decide on the issue of the shares. As a result, the shares could not be issued because under the articles of Cancun Holding II a decision to issue shares required the presence of all shareholders and a unanimous vote. However, the articles also provided that in such a case a second general meeting could be convened where a decision to issue shares could be made regardless of the number of shareholders present and by a simple majority. The management board of Cancun Holding II convened such a meeting. This meeting was never held because on 21 September 2009 Cancun Holding I filed a lawsuit against Cancun Holding II under the provisions on the Right of Inquiry in Title 8 of the Second Book of the Dutch Civil Code. But then ...

... on 1 October 2009 *Invernostra* made over its participation in Cancun Holding II to *Inversiones*. *Inversiones* now held 53.5% of the shares in Cancun Holding II.



Also, on 3 November 2009 the general meeting of Efesyde decided to issue shares to *Inversiones*. The notice convening this general meeting had been published in a local Mexican newspaper. Cancun Holding I was not represented in this general meeting because it was not aware that it had been convened (the fact that the general meeting would be held had been discussed during a meeting of the board of Efesyde but Margarita Lliteras had not attended that board meeting). As a consequence, the participation of *Inversiones* in Efesyde increased from 78% to 99.87% and the participation of Cancun Holding II BV in Efesyde decreased from 22% to 0.13% ('the second watering down' of the participation of Cancun Holding II in Efesyde).



In the proceedings instituted by Cancun Holding I against Cancun Holding II the Enterprise Court in its judgment of 28 April 2010 came to the conclusion that there were well-founded reasons to doubt Cancun Holding II's policies and awarded the request of Cancun Holding I that an independent investigation be conducted into the policies and the course of affairs of Cancun Holding II.²³ On the basis of the outcome of this investigation, the Enterprise Court on 19 July 2012 concluded at the request of Cancun Holding I that there had been mismanagement on the part of Cancun Holding II.²⁴ The Enterprise Court in particular held it against the management board of Cancun Holding II that it had not done enough to protect the position of Cancun Holding I during 'the first watering down' of the participation of Cancun Holding II

²³ Enterprise Court 28 April 2010, ARO 2010/71 (Cancun).

²⁴ Enterprise Court 19 July 2012, JOR 2013/7 and ARO 2012/113 (Cancun).

in Efesyde, the transfer by Invernostra of its participation in Cancun Holding II to *Inversiones* and ‘the second watering down’ of the participation of Cancun Holding II in Efesyde.

Several parties involved lodged an appeal to the Dutch Supreme Court against this judgment of the Enterprise Court. On 4 April 2014 the Dutch Supreme Court rebutted these appeals in four judgments.²⁵ Some of the arguments put forward before the Dutch Supreme Court raised the question whether the Enterprise Court could have based its judgment that there was mismanagement on the part of Cancun Holding II on the conduct of the company’s management board. In two considerations the Dutch Supreme Court went into the duties of the management board of a company both in general and with a focus on a joint venture company. The first consideration reads:

‘In fulfilling their duties the managing directors are to be guided by the best interests of the company and the undertaking connected with it [...]. What these interests are, depends on the circumstances of the case. If there is an undertaking connected with the company, the interests of the company are normally defined by the advancement of the continued success of this undertaking. In the case of a *joint venture* company the interests of the company are furthermore defined by the nature and the contents of the cooperation as agreed upon by the shareholders. The nature and the contents of the collaboration in a *joint venture* company where the shareholders are on an equal footing may imply that the interests of the company too are served best by the continuation of stable relationships between the shareholders; this may mean that the relationships between the shareholders must not be changed any further than is necessary in the light of the circumstances.’

The second consideration reads:

‘In fulfilling their duties the managing directors are furthermore [...] bound to exercise due care towards the interests of all those associated with the company

25 Dutch Supreme Court 4 April 2014, ARO 2014/71 (Cancun), Dutch Supreme Court 4 April 2014, ARO 2014/72 (Cancun), Dutch Supreme Court 4 April 2014, ARO 2014/73 (Cancun) and Dutch Supreme Court 4 April 2014, JOR 2014/290 and ARO 2014/74 (Cancun). M.J.G.C. Raaijmakers, ‘Cancun: een joint venture klem tussen contract en instituut’, *Ars Aequi* 2014, pp. 459-465. M.J.G.C. Raaijmakers, ‘Bestuursautonomie in een (gezamenlijke) dochter-B.V.: een novum in concernverhoudingen?’, *Tijdschrift voor Ondernemingsbestuur* 2015-1, pp. 2-12. M.J.G.C. Raaijmakers, ‘De “institutionele opvatting”: grondslag en inhoud?’, *Ondernemingsrecht* 2015-5, pp. 155-164. On the implications of the Cancun judgment: *Autonomie van het bestuur en haar grenzen voor en na de Cancun-uitspraak*, Deventer: Kluwer 2015: M.J.G.C. Raaijmakers, ‘Over de oorsprong, zin en betekenis van de “institutionele” opvatting’, pp. 10-29, A.F.M. Dorresteijn, ‘“Cancun”, bestuursautonomie en vennootschapsbelang’, pp. 30-38, J.B. Huizink, ‘Bestuursautonomie na Cancun’, pp. 39-48, W.J.M. van Veen, ‘Vennootschapsrechtelijke doorwerking, bestuursautonomie en bestuurstaak bij joint ventures na Cancun: what’s new?’, pp. 49-66, A.F. Verdam, ‘Tets over de verhouding tussen de institutionele opvatting, het vennootschapsbelang en de norm van redelijkheid en billijkheid, mede in relatie tot bestuurders, commissarissen en aandeelhouders’, pp. 67-78. M.P.P. van Buuren, ‘Vennootschappelijk belang? Leg uit en pas toe’, *Fiscaal Tijdschrift Vermogen* 2014 pp. 13-18.

and its undertaking. [...] This duty of care may imply that managing directors in serving the interest of the company shall ensure that the interests of all those associated with the company or its undertaking are not being harmed unnecessarily or disproportionately. As also follows from [the last part of] the foregoing consideration, the duty of the managing directors of a *joint venture* company to exercise due care towards the shareholders may involve a special duty of care towards the position of a shareholder whose interest is watered down or threatens to be watered down (further).'

7.2 A short comment

In the Cancun case the Dutch Supreme Court did not in so many words refer to the corporate form as a contractual relationship between its participants. However, the Dutch Supreme Court did refer to a joint venture company as a company where 'the interests of the company are [...] defined by the nature and the contents of the cooperation as agreed upon by the shareholders', and added to this that the management board of a joint venture company is under an obligation to protect 'the position of a shareholder whose interest is watered down or threatens to be watered down'. This could be regarded as an implicit recognition of the special organizational nature of a joint venture company as a contractual relationship between its shareholders.

8 CONCLUDING REMARKS: THE DUTY TO ADVANCE AND PRESERVE

For courts in adjudicating cases before them to refer to the characteristics of a company is not unusual and would only be expected. The Dutch Supreme Court *e.g.* in a judgment of 6 December 2013 upheld a judgment of the Enterprise Court by considering that the Enterprise Court had not erred in considering that 'more knowledge and insight (and more efforts to acquire that knowledge and insight) may be expected on the part of a systemic bank (in view of its duty of care [...]) than from others under other circumstances'²⁶ However, the Dutch Supreme Court had not before referred to the characteristics of a company in connection with the duty of directors to be guided by the best interests of the company and the undertaking connected with it. In connection with this duty, the Dutch Supreme Court on several occasions underlined the autonomous position of corporate directors vis-à-vis the company's shareholders and the general meeting: corporate directors are free to take decisions that contravene the interests of shareholders (*Doetinchemse IJzergieterij*); in the absence of provisions in the articles corporate directors are not obliged to follow instructions given to them by the general meeting (*Forum-*

26 Dutch Supreme Court 6 December 2013, *JOR* 2014/65 (Fortis).

Bank); in the absence of statutory provisions or provisions in the articles a management board is not under an obligation to consult the general meeting about strategic issues; and a supervisory board is not under an obligation to intermeditate in conflicts between the management board and shareholders (*ASMI*). This reasoning principally left it to corporate boards and directors themselves to determine what is in the best interests of the company and the undertaking connected with it. While allowing boards and directors a wide margin of discretion, this reasoning also provided little guidance. It would seem that for the first time such guidance is now available. It follows from *Cancun* that corporate boards and directors are obliged to advance the continued success of the undertaking that is connected with the company, taking into account the organizational specifics of the company. In *Cancun* these organizational specifics were that the company was a joint venture company in which the shareholders were, and were supposed to remain, on an equal footing. In other cases other organizational characteristics may be relevant: e.g. that the company is the parent company of a group, that the company is a subsidiary company in a group, that the company has only one shareholder or that the company is a family business. That corporate boards shall be guided by the best interests of the company and the undertaking connected with it means, as the *Cancun* judgment indicates, that their prime duty is to advance the success of the undertaking that is connected with the company (the fact that there is an undertaking connected with the company is certainly an important characteristic) as well as to preserve the company's other organizational characteristics. Thus, this is *The Duty to Advance and Preserve*. Interestingly, this is neatly in line with a consideration of the Supreme Court of the State of Delaware in the *Selectica* case on protective measures against a possible hostile takeover: 'Delaware courts have approved the adoption of a Shareholder Rights Plan as an anti-takeover device [...]. Any NOL poison pill's principal intent, however, is to prevent the inadvertent forfeiture of potentially valuable assets, not to protect against hostile takeover attempts' (italics added). As a conclusion it would seem safe to say that in the Netherlands the statutory core legal concept of the company is now being decisively influenced by another statutory core legal concept: the duty of corporate directors in the performance of their duties to be guided by the best interests of the company and the undertaking that is connected with it. Whereas the company remains an abstract organizational form in which the authority of the board of directors is pre-eminent, corporate boards are now being offered guidance in deciding how they should fulfil this duty. Corporate directors may go on the assumption that they should regard the undertaking that is connected with the company as well as the company's other organizational characteristics as strong indications of what 'their' company is about essentially.

