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Besluitvorming in rechtspersonen

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Summary

Introduction

1. Decision-making in corporate entities governed by private law is a difficult subject in Dutch law. It is not clear what rules of law should be observed by members of bodies of corporate entities and what legal consequences non-compliance with these rules has for the validity of the decisions made.

2. This indeterminate situation has been created by several factors that are connected with the system of decision-making law, some of which have a historical background. For example, the law only completely regulates the decision-making process in the general meeting: although the rules governing the invalidity of decisions apply to all bodies, those that govern decision-making only apply to the general meeting of *nv*'s, *bv*'s (types of limited companies) and associations. Furthermore - and this is especially true for pre-1992 law - the rules governing the invalidity of decisions are not particularly consistent with the rules for decision-making. Although the rules for decision-making each have their own purpose, until 1992 the legislature stipulated that any irregularity that might occur during the decision-making process carried the possible sanction of nullification of the decision. Another cause of this indeterminate situation is the fact that ideas about the corporate entity have changed over the last century. The contractual concept of the corporate entity (the corporate entity as an agreement) has been superseded by the view that emphasises the independent nature of the corporate entity (the corporate entity as an entity holding legal rights). This change in perspective has influenced the decision-making process. Whereas from the contractual point of view a decision is regarded as a multilateral legal act of the members of a body, the view in which the corporate entity is mainly seen as an independent entity emphasises the role of the corporate entity itself in the decision-making process: a decision is primarily regarded as a unilateral legal act performed by the corporate entity. This different view has consequences for the - interpretation of the - rules of decision-making law. It seems that this has not always been sufficiently recognised.

The three phases of the decision-making process

3. In this book, I have attempted to formulate answers to two questions: which rules of law govern the decision-making process and which legal consequences does non-compliance with these rules have for the validity of the decisions made?

4. These questions have been answered in a discourse that defends the proposition that three phases can be distinguished in the decision-making process: a preparatory phase (a); a phase in which the members of a body form the intent to

make a decision (b2); and a phase in which they actually make the decision (b1). In accordance with this tripartition, the rules for decision-making and the invalidity of decisions can be divided into three categories, both for the general meeting and for the other bodies of a corporate entity.

a. The phase in which the decision-making is prepared

5. In the first phase of the decision-making process, the decision-making is being prepared. During this period, certain conditions must be met and certain actions must sometimes be carried out to enable the members of a body to make a decision that may be imputed to the corporate entity. I refer to these conditions as *preliminary conditions*.

The preliminary conditions differ for the two types of decision-making that are distinguished in Dutch law: decision-making within and decision-making outside the meeting of the members of a body.

The preliminary condition for decision-making within meetings is that the meeting should be legally valid. To satisfy this condition, the meeting must have been convened by a qualified body or person within the corporate entity. Shareholders meetings, for example, may be convened by the board, while board meetings may be convened by the chairman of the board.

The preliminary conditions for decision-making outside meetings ('written resolutions') are different for each body. Concerning the decision-making of shareholders, for example, the law stipulates (among other things) that they can only make decisions outside meetings if the statutes of the limited company allow this. The decision-making by board members outside meetings is in principle not restricted by any preliminary conditions: board members are, in principle, always allowed to make decisions outside the board meeting.

If the preliminary conditions for either of these two types of decision-making have not been satisfied, the members of the body in question cannot make a decision that can be imputed to the corporate entity. If they still make a decision anyway, it cannot be regarded as a decision made by the corporate entity. As a decision, it is *non-existent*.

b1. The phase in which a decision is being made

6. If the preliminary conditions for decision-making within or outside the meeting have been satisfied, the members of the body in question may make a decision. To do so, they should meet the *constitutive requirements* for decision-making. These concern the actions to be taken by the members of the body to make a decision. These requirements differ for the two types of decision-making.

In principle, the following constitutive requirements must be met to make decisions within a meeting of the members of a body:

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SUMMARY

- a. if a quorum is required, it should be present (in principle, there is no quorum requirement);
- b. the decisions should be supported by a sufficient majority (in principle, an absolute majority is sufficient);
- c. if a voting procedure has been agreed upon, it should be followed (in principle, the vote is not rule-bound).

The following constitutive requirements should in principle be met to make a decision outside meetings:

- a. the co-operation of all members of the body who are entitled to vote;
- b. the agreement of all members (unanimity);
- c. if stipulated, a ballot procedure.

If not all constitutive requirements have been met, the members of the body cannot be said to have made a decision. In such cases, they have not all co-operated as required. I refer to such a decision as an *invalid decision*.

b2. The intermediate phase in which the intent to make a decision is formed

7. In some cases the decision - the expression of the intent of the corporate entity - may be annulled with retrospective effect, especially when the intent of the corporate entity has been formed unlawfully.

The rules governing this formation of intent oblige the body - and thus its members - to follow a particular procedure when making a decision. These rules have been formulated to allow the members of the body to consult each other and, if necessary, to allow third parties to be heard about the decision before actually making it. These rules contain *non-constitutive requirements* for the decision-making process.

There are different non-constitutive requirements for the decision-making process within and outside meetings too. The following requirements apply to the decision-making within meetings:

- a. the persons entitled to participate in the meeting or to speak at the meeting should be called to the meeting and be admitted to it;
- b. the terms stipulated for convening these persons should be observed;
- c. if necessary, the items to be dealt with in the meeting should be made public in advance; and
- d. if a specific location has been selected for the meeting, it should be held there.

The non-constitutive requirement for decision-making outside meetings is that the persons referred to under a should have been able to express their opinion about the decision.

Non-compliance with any non-constitutive requirement creates a *possibility for nullification* of the decision, unless, one might argue, the violation of the requirement has led to a situation in which a decisive number of members of the body have not been able to participate in the decision-making process. In that case, the decision may be held invalid (cf. section 6).