The anniversary series

Transitional rules with permanent consequences

The case of the statutory director in the BV/SRL

On 1 January 2020 the rules of the new Belgian Companies and Associations Code ("BCAC") became in principle applicable to all companies that were previously incorporated. The rules of the BCAC replaced the rules of the Belgian Company Code ("BCC"). The immediate application of all rules, including mere default rules, has some surprising consequences and holds some lessons for companies (re)drafting their articles of association.

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The BCAC transitional rules

Both mandatory and non-mandatory default rules of the BCAC became applicable to previously incorporated companies on 1 January 2020 (Article 39, § 2 of the Act introducing the BCAC). The mandatory rules of the BCAC apply notwithstanding any contradictory rules in existing articles of association. The default rules will only be applicable to the extent that the articles of association do not deviate from them (e.g. because they remain silent on a certain matter).

These transitional rules are not the ones usually applicable to contractual and similar relationships. As thoroughly explained by Thijs Vancoppernolle in his monograph on intertemporal conflicts of laws (found here), contracts are affected by new mandatory rules, but are left untouched by new default rules. Parties may therefore legitimately expect that their arrangements will remain governed by the legal provisions at the time of setting them up, unless new mandatory rules are enacted. If shareholders or directors of companies had similar expectations, they were in for a surprise: the BCAC has changed the legal framework for their companies, both with respect to mandatory and default rules. The Act introducing the BCAC does not contain grandfathering provisions, which limit the application of new rules on existing relationships.

Case-study: the statutory director of the limited company (BV/SRL)

The sometimes surprising effect of the BCAC's transitional regime can be illustrated by the example of the dismissal of the statutory director (statutair zaakvoerder/gérant statutaire) of a limited company (BV/SRL).

Under the BCC's Article 256, a director appointed in the articles of association could only be discharged by a unanimous vote of the shareholders. Under this regime the director concerned could, if he or she had one share, also vote, thus vetoing their own dismissal. In case of a compelling motive for dismissal (typically a wrongdoing), the decision required a majority of 75% of the votes.

Under Article 5:70, § 3 BCAC, the latter majority becomes the standard rule: a statutory director can be dismissed by a majority of 75% of the votes, even when there is no compelling cause for dismissal. In case such cause is present, the bar is lowered further: more than 50% of the votes is then sufficient for dismissal.

Absent any other provision in the articles of association, a statutory director could prior to 1 January 2020 only be dismissed by unanimity of the shareholders. The same director can from 1 January 2020 onwards be dismissed by 75% of the voting rights of the shareholders. In other words: if previously one vote was sufficient to block a dismissal (other than for cause), presently a director would need more than 25% of the voting rights to have this power. The statutory director who relied on the strong protection against dismissal under the rules of the BCC, lost a large part of this protection with the entry into force of the BCAC in 2020.

Are there any ways for the director concerned to still be entitled to the BCC's protection? Three avenues might be explored.

Firstly, the director may now take steps to secure protection against dismissal in the articles of association, by way of changing those back to the previous regime. Yet, this would require negotiation with the (other) shareholders, who have just been granted more power by the legislator and are under no obligation whatsoever to give that power away. With the director starting from that disadvantaged position, such negotiations would prove to be difficult.

Secondly, the director may support their claim to the old protection by arguing that their veto right is an acquired right. Case law is, however, very reluctant to acknowledge acquired rights for shareholders, unless it is a personal right granted in the articles of association. The abolished right of veto was, however, a *de facto* right granted to *all* shareholders, and not a personal one; it does not qualify for such protection.

Thirdly, the director could put forward that their mandate should be regarded as an irrevocable one as a matter of contract law. This would, however, be inconsistent with the long-established rule that a statutory director's mandate in a limited company can be ended at will by the company. The BCAC has not changed this.

A solution may lie in attacking the transitional rules of the BCAC themselves by arguing they breach legal norms of a constitutional nature which protect the legitimate expectations against the immediate application of new rules ("plea of illegality"). Another way out may be attempting to invalidate a dismissal as an abuse of majority and produce the legitimate expectations of the dismissed director as an element in the case. However, the outcome of these arguments is very uncertain for a statutory director unhappy with his dismissal.

What to learn from this when (re)drafting articles of association?

It is often advised to keep articles of association lean and mean, without any "needless" repetition of rules that are applicable, because they are in the code anyway.

The example we discussed shows that this may not be whole story. Applicability today does not guarantee applicability tomorrow. A carbon copy of statutory rules in the articles of association protects a company's stakeholders to possible future changes in the law with immediate application (such as in case of the BCAC).

Especially those who may enjoy certain safeguards in the current rules shall be vigilant and consider explicitly embedding these in the articles of association.

The increased flexibility of company law under the BCAC calls in general for a more tailored approach to articles of association: another example from the limited company. Under the old rules of the BCC, it was impossible to exclude a shareholder through a decision of the company. Under the BCAC however it is possible to include such an exclusion mechanism in the articles of association with a majority of 75%.

The excluded shareholder will get a financial distribution, but the statutory default rules on this distribution are not kind to the departing shareholder (Article 5:154 BCAC). If such exclusion mechanism is not agreed upon at the time of incorporation, a minority shareholder with 25% or less might think it wise to provide in the articles of association a right of veto against any future introduction of such an exclusion mechanism.

Minority shareholders in existing companies, however, could hardly have foreseen the introduction by the legislator of the possibility of this exclusionary mechanism in their company. Under the transitional rules of the BCAC they must undergo the new rules, without having had the possibility to bargain out of them at the time they joined the company.

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