Belgium
Minority Shareholder Rights
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SOURCES OF PROTECTION AND ENFORCEMENT

Please provide an overview of the sources of protection for minority shareholders in your jurisdiction. Who enforces these rights?

Sources of protection under law

The primary source of protection for minority shareholders is the Belgian Code on Companies and Associations (BCCA).[1] It lays down the rights and obligations of shareholders and the rules on decision-making, among others. Some mechanisms, just to name a few, that protect minority shareholders are:

- the preferential subscription right;
- the right to lodge a minority claim;
- the right to convene a general meeting when a minority shareholder has a certain participation interest in the company; and
- the right to seek the dissolution of the company if it is loss-making.[2]

This Guide will focus on minority shareholders' rights in the two most used company types in Belgium: the private limited liability company (*besloten vennootschap*/*société à responsabilité limitée* or BV/SRL), and the public limited liability company (*naamloze vennootschap*/*société anonyme* or NV/SA).[3]

For companies whose shares are admitted to trading on Euronext Brussels (*genoteerde vennootschap/ société cotée*), an additional set of rules, such as the Belgian Corporate Governance Code of 2022, applies. This is the reference law code that listed companies must apply according to the 'comply and explain' principle or the rules on related party transactions.[4] The latter set of rules aims to improve governance and protect minority shareholders. Other sets of rules include those on the mandatory disclosure by shareholders with significant participation.[5]

Sources of protection under contract

As well as relying on the protection mechanisms under law, minority shareholders also use various contractual mechanisms for extra protection, such as concluding shareholder agreements, which contain arrangements on exercising their voting right, the transferability of

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[1] Act of 23 March 2019 on the Belgian Code of Companies and Associations, *Belgian Official State Gazette* 4 April 2019, text in official languages available at www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2019032309&table_name=wet. The Belgian Federal Parliament adopted in April 2019 the Royal Decree implementing the new BCCA and repealing the old Royal Decree of 30 January 2001 (*Koninklijk besluit tot uitvoering van het Wetboek van vennootschappen en verenigingen*/*Arrêté Royal portant execution du Code des sociétés et des associations*) Royal Decree of 29 April 2019 implementing the Belgian Companies and Associations Code, *Belgian Official State Gazette* 30 April 2019, text available in official languages at www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2019042901.

[2] Art 7:97 of the BCCA.

[3] All original Dutch and French terms in this article are expressed in brackets in the respective order (ie, Dutch term first, followed by the French term).

[4] Art 1:11 of the BCCA. Some provisions also apply to companies whose shares who are admitted to trading on Euronext Growth or Euronext Access.

[5] Law of 2 May 2007 on disclosure of major holdings in companies whose shares are admitted to trading on a regulated market, and on various provisions. Belgian Official State Gazette 1 January 2008, text available in official languages at www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=nl&nm=2007003215&la=N.

shares, special majority, and quorums for board and general meeting decision-making. These agreements take a variety of forms and can be concluded between some minority shareholders themselves or between the minority shareholders and the majority shareholders. For enforceability purposes, some terms contained in shareholder agreements should be incorporated into the bylaws of the company.

Protection through court

Minority shareholders can also resort to the courts to seek relief. This way, through case law, provides another layer of minority shareholders' protection. For example, minority shareholders can invoke the courts' interpretation of catch-all concepts such as abuse of rights, corporate interest, and equal treatment of shareholders, among others.

Enforcement

Most provisions are enforced before the court upon the request of one or more minority shareholders.

The Financial Services and Market Authority (*Autoriteit voor Financiële Diensten en Markten*/*Autorité des services et marchés financiers*, or FSMA) also plays a role in protecting the rights of minority shareholders. The FSMA is responsible for ensuring that the financial information disseminated by listed companies is reliable, complete, and made available to the public at the same time. The FSMA also ensures that holders of securities of listed companies are treated equally (for example, when a takeover bid is launched).

Furthermore, the FSMA checks the information (eg, a prospectus) that companies make available when they offer securities to the public. Finally, the FSMA supervises market infrastructures such as Euronext Brussels. The FSMA can intervene in various ways if a company fails to comply with the rules. It could, for example, issue a warning, suspend the listing of a share, or impose fines.

PROTECTION AGAINST DILUTION

Are there any mechanisms in your jurisdiction to protect against dilution of shareholdings? For example, are existing shareholders granted any rights on the issue of new shares in a company?

The first pillar of protection against dilution of shareholdings is that, in principle, only the general meeting can decide to issue new shares and securities that are convertible into shares. The general meeting's share issuance decision requires approval from 75 per cent of the votes cast. Minority shareholders who have a participation of more than 25 per cent in the company can veto the general meeting's decision to issue new shares to avoid dilution. However, minority shareholders do not have such veto power if the board decides to issue new shares within the framework of the general meeting's mandate to the board to increase the company's capital (NV/SA) or equity (BV/SRL).

The second pillar of protection is that, in principle, minority shareholders have a preferential right to subscribe to new shares and securities that are convertible into shares. This enables them to maintain their stake in the company.

Finally, if shares are issued with cancellation of the preferential subscription right, then the BCCA prohibits the reference shareholder who is the beneficiary of the issuance and the directors who represent the reference shareholder from voting if the board decides on the share issuance. These protection mechanisms of the BCCA offer only a limited protection to minority shareholders, so it is common that they resort to contractual mechanisms for more protection against dilution.

General principles on issuance

Share issuance by the general meeting

The BCCA confers power on the general meeting to increase the company's capital (in an NV/SA type company) or equity (in a BV/SRL, since this company type has no capital). The general meeting's decision to do this must be approved by a 75 per cent majority of the votes cast at the general meeting[6]. This gives minority shareholders who hold more than 25 per cent of the votes (alone or together with others) the right to block a capital or equity increase. The 75 per cent majority is the minimum set by the BCCA, which can be set higher in the company bylaws. Minority shareholders who have bargaining leverage can seek to have a greater majority stipulated in the bylaws. Having sufficient voting power at a general meeting is therefore the first means of protection for minority shareholders against dilution of their shareholdings.

Share issuance by the board

The general meeting can delegate its power to the board to increase the company's capital (*toegestaan kapitaal/capital autorisé*) or equity (*uitgifte bij delegatie/émission en vertu d'une delegation*) by having this stipulated in the bylaws. This delegation must have a maximum duration of five years. For companies whose shares are listed, the board's power to increase

[6] Art 7:177 of the BCCA (NV/SA) and Art 5:120 of the BCCA.

the capital is capped at 100 per cent of the amount of the capital.[7]

The decision to have a clause in the bylaws stipulate the delegation to the board to increase capital/equity requires a 75 per cent majority vote on that decision. Minority shareholders who hold more than 25 per cent of the votes can block the vote to have this delegation stipulated in the bylaws. Minority shareholders should be cautious when approving this decision, as such delegation can have far-reaching consequences.

Limitations to the board's delegated power and exclusion of it

To protect minority shareholders, the BCCA sets various limitations concerning the general meeting's ability to delegate to the board its power to issue shares. One of them, which is relevant to the subject of share dilution, is that the board cannot issue (1) new share classes, (2) shares (or securities that are convertible into shares) carrying multiple voting rights, or (3) warrants that are offered predominantly to one or more determined persons who are not staff members.[8]

In a similar vein, the board is also not allowed to exercise this delegated power for capital or equity increases that consist primarily of a contribution in kind (ie, if the percentage of non-cash contribution exceeds 50 per cent), which is exclusively reserved for a shareholder who holds the company's securities with more than 10 per cent of the voting rights.[9] These rules are mandatory law, so the bylaws cannot deviate from them.

The preferential subscription right

Principle

Just as all shareholders have a preferential subscription right (*voorkeurrecht*/*droit de préférence*) under the BCCA to subscribe to new shares if these are issued in return for a cash contribution, minority shareholders have this right too. Existing shareholders can subscribe to the new shares, according to the proportion of the participation interest that their shares represent in the capital (for an NV/SA), or according to the proportion of the number of shares they hold (for a BV/SRL).[10]

The existing shareholders also have a preferential subscription right if convertible bonds (c*onverteerbare obligaties*/*obligations convertibles*) or warrants ('*inschrijvingsrechten*/*droits de subscription*) are issued in return for cash contribution. The preferential subscription right also applies to the latter securities because these can be converted into shares and can therefore have a significant impact on the shareholding. If the board issues shares within the framework of the general meeting's delegation, then it must also offer the shares first to the existing shareholders. However, and more importantly, the general meeting can grant power to the board to use the delegation to offer shares, warrants, and convertible bonds outside the preferential subscription right. A minority shareholder wishing to protect its shareholding should obviously be wary of granting the power to the board to issue securities outside the preferential subscription right.

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[7] Art 5:134 of the BCCA (BV/SRL) and Art 7:198 of the BCCA (NV/SA).
[8] Art 7:201 of the BCCA (for NV/SA) and Art 5:136 of the BCCA (for BV/SRL). Please also see section 4 of this guide.
[9] However, one can bypass this prohibition if the capital/equity increase is sought from other majority shareholders and third parties, besides those with the 10 per cent voting right.
[10] Art 7:188 of the BCCA for the NV/SA and Art 5:128 of the BCCA for the BV/SRL.

Limitations of the preferential subscription right protection
As indicated above, the preferential subscription right under the BCCA applies only if shares, warrants, or convertible bonds are issued in return for a cash contribution. It does not apply if these securities are issued in return for a contribution in kind (ie, anything else that is not cash). The fact that the preferential subscription right does not apply to a share issue by contribution in kind means that the general meeting or the board can arguably circumvent the preferential subscription right easily by having easily marketable assets, such as receivables, contributed. Minority shareholders could seek to include a preferential subscription right, which also applies to an issuance by contributions in kind.

The second weakness of the preferential subscription right is that, although this right cannot be excluded by the bylaws,[11] the general meeting can cancel or limit the preferential subscription right of the existing shareholders if it obtains a 75 per cent approval of the votes cast at the time it decides to issue the shares. If a minority shareholder does not hold more than 25 per cent of the voting power, then it will be powerless against such a decision.

Voting prohibitions
To protect minority shareholders, the BCCA prohibits voting in certain scenarios. If shares are issued with cancellation of the preferential subscription right in favour of one or more determined persons who are not staff members,[12] then the beneficiary of the issuance may not participate in the vote at the general meeting if that person holds securities representing more than 10 per cent of the voting rights of the company.[13]

In a similar vein, to avoid abuse by the board, the BCCA provides that, if the board decides to issue shares with cancellation of preferential subscription right to persons that are not staff members, the *de facto* director who represents the beneficiary of the issuance (or the persons who are affiliated to such beneficiary) may not participate in the board's vote on the matter.[14] The notion of *de facto* director applies to the director who represents the reference shareholder even if the latter has no right to formally propose a director (please see section 3 on the right to propose candidates).

If the board of a listed company wishes to proceed with a share issuance for the benefit of certain related parties within the meaning of International Accounting Standard 24, then the board will have to follow the special procedure in Articles 7:97 and 7:116 of the BCCA on related party transactions.

Contractual mechanisms
Because of the limitations in the statutory protection, minority shareholders resort to conventional protection mechanisms, which can take a variety of forms. These include an issuance of anti-dilution warrants or call options. Anti-dilution warrants and call options can protect the shareholder's investment value by allowing the shareholder to subscribe to several new shares if new shares are issued at a lower issue price than what the shareholder had paid

[11] Art 5:130 of the BCCA (BV/SRL) and Art 7:190 of the BCCA (NV/SA).
[12] Art 5:131 of the BCCA (BV/SRL), Art 7:193 of the BCCA (NV/SA).
[13] To calculate the thresholds the securities held by the following persons are added to the percentage held by the beneficiary: (1) a third party acting in their own name, but on behalf of the beneficiary, (2) a natural person or legal persons affiliated with the beneficiary, (3) a third party acting in their own name, but on behalf of the affiliates of the beneficiary and (4) persons acting in concert with the beneficiary.
[14] Art 5:135,2° (BV/SRL) and Art 7:200,2° (NV/SA).

(so-called down round). The common types of protection used in Belgium are the full-ratchet and weighted-average mechanisms.

Another type of contractual arrangement is the granting of call options on existing shares. For example, one shareholder, who is the beneficiary of the option has the right to buy shares from another shareholder to keep its proportional stake in the company if dilution in the shareholdership occurs.

Other arrangements can be setting majority higher for certain matters in the bylaws or concluding a voting arrangement in which shareholders undertake to exercise their voting rights in a certain way with respect to changes in the company's capital/equity.

RIGHTS TO APPOINT DIRECTORS

Do minority shareholders have any special rights to appoint directors to safeguard their interests? Are other protections available to minority shareholders in this context (such as general duties of directors)?

Minority shareholders have no specific rights to appoint directors

Individual shareholders do not have the right to appoint one or more directors under Belgian law. The BCCA confers an exclusive power on the general meeting to nominate[15] and dismiss directors. Any clause in the company bylaws that would grant the right to an individual shareholder or a particular share class to appoint and dismiss directors is invalid.

A simple majority of the votes cast at the general meeting (ie, more than 50 per cent of the votes represented and cast) will appoint the nominated director.[16] If the company has a controlling shareholder, then the entire board will be appointed by the general meeting based on the majority shareholder's decision, unless other the bylaws stipulate other arrangements. In other words, unless the bylaws or a shareholder agreement grants a minority shareholder specific rights on board nominations and decision-making, the minority shareholder will not be able to weigh in on the nominations of board directors, hence the board's decision-making. Despite this, there are other contractual mechanisms, such as a right to propose candidates for a board mandate, voting arrangements, power transfer to the general meeting, and the requirement of specific majorities for board decision-making, that can protect minority shareholders to safeguard their interests.

The right to propose candidates

The right to propose candidate directors under the bylaws or a shareholder agreement

Minority shareholders can seek to have the bylaws grant them (or certain persons, groups of shareholders or a particular share class) the right to propose to the general meeting one or more candidate directors. Having this right and exercising it can achieve two purposes: (1) the general meeting will appoint the board directors in accordance with the law, and (2) the appointed director, who would have been proposed by the minority shareholders, can have some influence on the board's decision-making.

These clauses are considered to be valid. The clause takes the form of a voting arrangement whereby shareholders undertake to vote only for the candidates that one or more rightholders have proposed for a given vacancy.

A clause granting the right to propose candidate directors typically prescribes the minimum and maximum number of board mandates available for a particular shareholder or group of shareholders. In practice, this right can be a right granted under a shareholder agreement or an inherent right attached to a particular share class.[17] If it is the latter type of right, then a special procedure must be followed if the general meeting decides to introduce a new right to propose candidate directors or to abolish an existing right.

[15] Art 5:70 of the BCCA for the BV/SRL; Art 7:85, s 2 of the BCCA, Art 7:101, s 1 of the BCCA, Art 7:105 s 3 of the BCCA; Art 7:107, s 3 of the BCCA for the NV/SA.

[16] A simple majority means: 50 per cent of the votes cast plus 1 vote. Please also see Art 2:41 of the BCCA.

[17] In case the right is attached to a share class, the right will be transferred to the transferee in the event of a share transfer. Parties should foresee this or provide for an automatic share class conversion clause.

The former type of right – ie, one that is contractually stipulated in the company bylaws or a shareholder agreement – must fulfil two validity conditions. First, the general meeting must retain the effective right to choose. The holder of the right should thus propose several candidate directors per vacancy.[18] One should not propose a bogus candidate: case law considers this to be an abuse of rights.[19] If the rightholder proposes a bogus candidate, the right exercised under the bylaws or shareholder agreement cannot be enforced. Consequently, the company would have to resort to the system under ordinary law whereby the board proposes the candidate directors, and the shareholders elect them by relative majority.

If the newly appointed board position becomes vacant shortly after, the rightholder who proposed the previous candidate director will usually be allowed to propose a new candidate. Furthermore, if a board mandate becomes vacant and if the board fills it by 'co-option', then the board must accept one or more candidates proposed by the particular shareholder (or share class of shareholders) who proposed the director whose vacancy has become available.[20] With appropriate drafting in the company bylaws, minority shareholders can take the necessary precautions to prevent abuse in this context.

Enforcing a contractual clause conferring the right to propose candidate directors

If the general meeting refuses without just cause[21] to appoint one of the candidates proposed (by the minority shareholder), thus contravening the bylaws or contractual right to propose candidates for a vacant mandate, this will mean that the newly formed board of directors is not validly constituted as required by the company bylaws, which prescribes a minimum number of directors. In such scenario, the rightholder can seek remedies in court.

The rightholder may seek a provisional measure,[22] for example, by requesting the court to appoint an interim director whom the rightholder proposes. On the merits, the rightholder may request the court to replace the general meeting's nomination with a judgment appointing the proposed candidate. Alternatively, the rightholder could also ask the court to annul the general meeting's nomination and rule that any votes on a candidate who is not proposed by the rightholder at the next general meeting will be inadmissible. In addition, the rightholder could demand compensation (in the form of a periodic fine) for as long as the valid composition of the board is not attained.

If the general meeting appoints without just cause a candidate who was not proposed by the rightholder, the rightholder will again be entitled to seek remedy in court to enforce its right. Provisionally, the rightholder should request the court to suspend the appointed director's mandate and to appoint an interim director.

On the merits, the court could annul the appointment decision of the general meeting. This will be quite straightforward because a breach of the clause on the proposal of candidates stipulated in the company bylaws amounts to a transgression of powers by the general meeting, which leads to nullification of the appointment decision.[23]

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[18] The number of candidates proposed must thus always be higher than the number of vacant positions. It is desirable to regulate in the Articles of Association or contract how many candidates per vacancy should be proposed, whereby at least two per vacant mandate is advisable.

[19] Art 1134, section 3 of the Civil Code requires contracts to be enforced in good faith.

[20] Co-optation can be excluded in the bylaws.

[21] A 'just cause' could be the refusal to name a bogus candidate or manifest unacceptable candidate.

[22] Please note that conditions apply to a claim for interim relief. A case can only be dealt with by an interlocutory injunction if it is so urgent that, if provisional measures were not adopted immediately, the plaintiff would suffer damage of a certain magnitude or a serious inconvenience.

[23] Art 2:42, 2° of the BCCA.

If a contractually stipulated voting arrangement is breached, enforcing the right to propose a candidate director against the will of the company and all other shareholders is much more complex. In principle, the aggrieved party to the contract would be able to seek only performance in kind, and only if the breach (ie, appointing someone in contravention of the rightholder's right to propose) can still be undone. Naturally, the following general meeting could dismiss the appointed director and appoint a new one from amongst the candidates proposed by the rightholder.
If the rightholder seeks remedy in court, it can seek performance in kind of the voting arrangement at the next general meeting, which can be backed by a periodic fine for any non-compliance. As a last resort, the rightholder can even seek to have both the vote of the respective shareholder(s), who are bound by a contractual voting arrangement, and the general meeting decision annulled.

Petitioning the court for nomination of provisional director
The right to enforce better management when things start to go wrong in a company is just as important as the right for a minority shareholder to be represented on the board when everything is going well.

Over the years, case law has been rather inclined to find that appointing a provisional director[24] for a company is appropriate if the corporate interest of the company would be at risk. This inclination stems from the power of the president of the Court of Enterprises to order provisional measures when a company needs them urgently.[25]

Many different factors can lead to the conclusion that a company's corporate interest is indeed at risk. For example:

- a serious conflict within the company that cannot be resolved;
- a defect in the functioning of the board (eg, an unreasonable blocking);
- a dispute about the valid composition of the board (eg, if the right to propose candidate directors was not observed); or
- a manifest abuse of majority shareholder power, etc.

To address any of the above, a minority shareholder[26] may apply to the judge of the Court of Enterprises presiding over summary proceedings for urgent interim relief.[27] However, for the court to approve the measure of appointing a provisional director of the company, thus circumventing normal corporate appointment procedures, strict conditions must be met.

The first condition is that the court may order the nomination of a provisional director only in exceptional circumstances. The claimant will have to show that other measures would fall short in protecting the interests of the company and those of stakeholders. This exceptional nature of the measure also leads to the requirement of subsidiarity. The court may appoint a provisional director only if it determines that the company (through the general meeting and/or board of directors) has made reasonable endeavours to resolve the conflict internally such that the normal course of decision-making would no longer be able to provide solutions.

[24] Other protective measures that do not result in the appointment of a director who could be awarded by the court with a general managerial authority going concern fall outside the scope of this guide. They include for example: (1) the appointment of a judicial trustee over certain assets, (2) appointment of a liquidator, (3) appointment of a custodian, (4) the appointment of a judicial auditor/investigator, etc.
[25] Art 584 of the Judicial Code, *Belgian Official State Gazette* 31 October 1967, text available in official languages at www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1967101003&table_name=loi.
[26] In fact, anyone with sufficient standing (*locus standi*) can apply for this. Thus, the board of directors or the director (indirectly) appointed by the minority shareholder can also file a petition seeking the appointment of a provisional director. The principles relating to Art 17 of the Belgian Judicial Code apply.
[27] The claim should be introduced by way of petition (*bij verzoekschrift*/*par requêt*).

The second condition is that, given that a petition for urgent interim relief in summary proceedings requires the fulfilment of its own conditions, the judge must establish that the matter is still urgent at the time of the hearing. There is urgency if an immediate decision is clearly desirable to prevent damage of a significant magnitude or prevent serious inconvenience. In addition, the claimant will have to prove that it has a *prima facie* right. As the appointment of a provisional director is only a temporary measure, there is no need for the claimant to already prove that a specific and flagrant breach of a right has been committed. The claimant must only show that it has at least some grounds to be awarded the urgent interim relief it is seeking.

To this end, minority shareholders ought to show that the way the company is currently governed jeopardises their interests as a shareholder, and that having a provisional director could remedy this. The judge will weigh the interests of all parties involved and consider whether a provisional director is appropriate or if his or her appointment could cause more harm than good.

If the judge appoints a provisional director,[28] it will carefully delineate the duties of that role, the scope of work for which the director has been appointed and the duration of the mandate. The court can grant the provisional director full managerial powers[29] for a certain period and completely sideline the other directors. On the other hand, the court can also decide that the provisional director should have a much more limited task, such as chairing the board of directors and ensuring that the majority shareholder does not abuse its power[30] in the context of a certain transaction, or simply mediate in the board of directors and ensure that a conflict does not get out of hand. The court order will determine the exact extent of the mandate of the provisional director, which should be interpreted restrictively.

Cumulative voting

Another way that minority shareholders can have guaranteed representation on the board is the cumulative voting system.

This system helps strengthen the ability of minority shareholders to elect a director. In practice, voting takes place in two different ways. In regular, 'straight' voting, a voting round is held separately for each mandate. A candidate who receives a majority vote in each voting round is logically elected.

However, the company bylaws could also provide for a different voting system whereby only one voting round is held for all vacant mandates (cumulative voting). In cumulative voting, the shareholder is afforded the number of vacancies multiplied by the number of shares it holds (with one vote per share) from the start. The shareholder could choose to vote different candidates using that number of votes it has or vote all of its votes for one candidate. The mandates are then allocated to the candidates according to the number of votes they received.

Voting arrangements

The right to propose a candidate can be coupled with voting arrangements, which are set out in a shareholder agreement.

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[28] Please note that the appointment of a provisional director must be published in the Annexes to the Belgian Official State Gazette, pursuant to Art 2:8, s 1, 5° d) of the BCCA.

[29] The provisional nature of the measure means that the provisional director should take as few as possible crucial decisions that have a long-term impact. Only in exceptional cases will this be appropriate. The judge will therefore refrain from granting powers that are too extensive or too long so that the appointed director is not forced to contravene this principle.

[30] Case law qualifies an 'abuse of right by the majority' as a manifest abuse of powers by the directors whereby the interests of the company and its stakeholders are seriously threatened.

Special majority for board decision-making
The ability to influence the voting of who eventually becomes appointed director does not equal to the ability to influence decision-making power at board level. It is because the board makes its decisions by simple majority of the votes cast (more than 50 per cent), unless stipulated otherwise in the company bylaws.[31] Minority shareholders who have sufficient bargaining power can therefore seek to have a reinforced majority and/or quorum requirements included in the bylaws for the decision-making on certain specific matters.

Transfer of powers to the general meeting
Shareholders who are not guaranteed representation on the board could also seek to have part of the board's powers transferred to the general meeting by having a clause providing for this this in the bylaws. Such transfer can take the form of a full-fledged transfer or a right to veto certain decisions.

Breach of fiduciary duties; abuse of (majority shareholders) rights; and misuse, overstepping or deflection of competences
Even if minority shareholders fail in securing representation on the board, they know that the directors representing the majority shareholders owe a fiduciary duty towards the company and all its stakeholders to run the business to the best of its ability in the interest of the company. Therefore, directors must not consider only the interests of the majority shareholders or even prioritise them. This gives minority shareholders a certain degree of comfort as fulfilling this duty should entail considering their interests as well.

Because a director's fiduciary duties are towards the company, only the company (ie, the board of directors) may sue the director concerned for alleged breach thereof. In determining if the alleged breach was committed, the court must be satisfied that, in view of the specific circumstances at hand, a normal prudent and diligent director would have acted otherwise at that time.[32] Since the judge simply cannot rule (*post facto*) on the appropriateness of a business decision, only acts performed and decisions made that are manifestly not in the corporate interest would be a breach of this fiduciary duty.

As a board of directors will naturally be very reluctant to sue its own members, Belgian company law has given the general meeting of shareholders the right to sue on behalf of the company.[33] However, if the board's decision giving rise to any harm to the company was based on the majority shareholder's recommendation, it would be difficult to convince a majority of the shareholders at the general meeting to bring the suit. Considering that this would often be the fate of minority shareholders, the legislature provided a possibility for minority shareholders to bring a claim.[34]

Minority shareholders holding the percentage of securities prescribed by law[35] and who have not (or not with their informed consent) discharged the directors from their obligations at the following annual general meeting may sue the directors on behalf of the company.[36]

Minority shareholders who sue on grounds of director's liability often fails because of the heavy burden of proving the following: (1) the director or directors committed a fault that is not a contractual fault against

[31] Depending on the mandatory nature of the rule, it is always possible to structure voting thresholds or quorums.
[32] Art 2:56 of the BCCA.
[33] Art 5:103 and Art 7:156 of the BCCA.
[34] For the BV/SRL, please see Art 5:104 seq of the BCCA; For the NV/SA, please see Art 7:157 seq of the BCCA.
[35] In a BV/SRL, shareholders representing at least 10 per cent of the number of issued shares; In a NV/SA, shareholders holding at least 1 per cent of the voting securities of the company or holding securities representing a portion of the capital worth at least €1.25m.
[36] Any profits of a successful claim accrue to the company. This while the minority shareholders must first advance the costs of the proceedings. This makes that the procedure is not very popular.

the company under their mandate, and (2) the alleged fault caused harm or loss to the minority shareholders individually or collectively that is separate from any harm or loss resulting from poor execution of the mandate.

Unlike shareholders, who may also want to safeguard their personal interests (if these interests do not harm that of the company's), directors are accountable to the company for which they carry out the mandate. Therefore, their actions are judged differently. Directors have a functional mandate and may use their powers only for the purposes prescribed by law and that are in the company's corporate interest. Any use of their powers that would be driven by an ulterior motive is punishable.

Besides suing on grounds of director's liability, minority shareholders can also seek nullity of board decisions to rewind transactions or to prevent the board from further dealings. Article 2:42, 2° of the BCCA[37] recognises the right of minority shareholders[38] to have board decisions declared null whenever any of the following, among others, is found: an abuse of (majority shareholders) rights misuse, overstepping or deflection of competences. Claims on these grounds should be brought against the company within six months.[39] In urgent cases, minority shareholders can also sue in summary proceedings and seek immediate suspension of the board decision in question.[40]

[37] Before the entry into force of the BCCA, there was no specific legal provision concerning the annulment of board decisions. Nonetheless, case law and legal doctrine accepted a reasoning by analogy with the regime that existed for the annulment of resolutions of the general meeting.
[38] Given that they have the required *locus standi*, pursuant to Art 2:44 of the BCCA.
[39] Six months from the date when the decisions are capable of being relied upon by the person invoking invalidity, or from the date when they became aware of the decision in question.
[40] Art 2:46 seq of the BCCA.

PROTECTION AGAINST TAKEOVER BIDS FOR THE COMPANY

Do minority shareholders have any protection in your jurisdiction where the company is the subject of a takeover bid?

Mandatory takeover bid[41]

The Public Takeover Legislation provides one of the main protections for minority shareholders – the concept of a mandatory bid. A mandatory bid on the following must be submitted if a person (as a result of its own acquisition or the acquisitions by persons acting in concert with it or by persons acting for their account) directly or indirectly holds more than 30 per cent of securities carrying voting rights of a company having its statutory seat in Belgium and whose shares are wholly or partly admitted to a regulated market:[42]

- all the company's securities with voting rights; and
- all the company's securities giving access to voting rights.

The FSMA must be notified if a mandatory takeover bid must be launched.[43]

The aim of the regulations regarding mandatory takeover bid is to provide minority shareholders with an exit by obliging the person who has exceeded the 30 per cent threshold to offer to all the holders of that company's securities for all their holdings at an equitable price. The price of this mandatory takeover bid must be equal to the higher of these two sums:[44]

- the highest price that the bidder (or by a person acting in concert with the bidder) has paid for the target's securities over a 12-month period before the announcement of the bid; or
- the weighted average of the trading prices of the target's securities on the most liquid securities market over 30-day period of thirty calendar days before the event triggering the mandatory takeover bid.

The consideration may be in cash, in securities or in both. However, if the consideration does not consist of liquid securities listed on a regulated market, or if the bidder (or a person acting in concert with him/her) paid in cash for the target's securities during the 12-month period before the announcement of the bid or during the offer period, there must be cash consideration as an alternative.

[41] For the legislative framework (the Public Takeover Legislation) please see: Directive 2004/25/EC of the European Parliament and of the council of 21 April 2004 on takeover bids, *OJ L 142,* p.12, text available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX per cent3A02004L0025-20140702; (Takeover Directive); Public Takeover Bids Law of 1 April 2007, *Belgian Official State Gazette* 26 April 2007, text available in official languages at www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2007040145. (Public Takeover Bid Law); the Royal Decree on takeover bids of 27 April 2007, text available in official languages www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2007042770; and Royal Decree of 27 April 2007, text available in official languages www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=nl&nm=2007003226&la=N (Hereafter Public Takeover Bid Decree).

[42] Art 5 of the Public Takeover Bids Law of 1 April 2007. For the calculation of the threshold, the number of securities with voting rights are considered and not the number of voting rights.

[43] Various exceptions on the obligation to launch a public takeover bid apply and they are not dealt with here.

[44] Art 53–Art 55 of the Public Takeover Decree.

Sell-out
Minority shareholders have another means of exit: the 'sell-out' procedure.[45] If, following a public takeover bid or the bid re-opening, the bidder (alone or acting in concert, holds 95 per cent of the share capital conferring voting rights and 95 per cent of securities with voting rights in the target (and provided that the bidder obtained 90 per cent of the share capital conferring voting rights during the bidding period), the bidder must acquire the securities of the remaining securities holders upon their request, and this at the same price as the offer price.

Limitations to the board's powers
To prevent transactions that could frustrate a bid, the powers of the board of the target to engage in certain transactions are restricted. These limitations apply to both mandatory and a voluntary takeover bids.

Poison pill
In listed companies, only the general meeting has the power to grant rights that have a significant impact on the assets or to create a significant debt or obligation for the company if the exercise of these rights is conditional on a public bid on the company's shares (the so-called 'poison pill).[46]

Sale of 'crown jewels'
Once the company is informed by the FSMA that a public takeover of the shares has been submitted, and until the closing of the offer, only the general meeting may take decisions or proceed with transactions that can have a significant effect on the composition of the company's assets and liabilities.[47] The board could still, however, finalise transactions that are in a sufficiently advanced stage before it had received the FSMA's notice. Any such decisions made by the board must be notified immediately to the bidder, the FSMA and the public.[48]

Board's restriction on increasing the capital
Once the company has received the FSMA's notice, the target's board may not do the following until the closing of the bid:

- increase its capital by limiting or cancelling the shareholders' preferential subscription right;
- issue securities giving the right to subscribe or to acquire shares if these securities are not offered to all the shareholders in proportion to the capital represented by their shares.[49]

However, the second prohibition does not apply to capital increases that the board was expressly authorised by the general meeting' to conduct. This authorisation would have been granted before the bid under a specific provision in the bylaws and not more than three years before the FSMA's notice. If such issuance occurs:

- the shares issued from the capital increase must be fully paid up at issuance;

[45] Art 44 of the Royal Decree of 27 April 2007.
[46] Art 7:151 of the BCCA.
[47] Art 7:152, *ibid.*
[48] Art 7:152, *ibid.*
[49] Art 7:202, *ibid.*

- the price of the share issued must not be less than the price indicated in the takeover bid; and
- the number of shares issued on the basis of the capital increase does not exceed 10 per cent of the outstanding shares before the capital increase.[50]

Such capital increase must be communicated immediately to the bidder and the FSMA.

The squeeze-out procedure is not dealt with in this guide.

[50] Art 7:202, *ibid.*

ACTIONS AND SEEKING REMEDIES ON BEHALF OF THE COMPANY

Are shareholders in your jurisdiction able to bring actions and seek remedies on behalf of the company? For example, is there any mechanism for a judicial or other official representative to oversee or intervene in the management of the company?

In the NV/SA and the BV/SRL, the general meeting has the exclusive power to decide by simple majority (more than 50 per cent of the votes cast) to sue the company directors, the statutory auditor (*commissaris/commissaire)* or the liquidator (*vereffenaar/liquidateur)*.[51] Although minority shareholders cannot bring any claim against these individuals directly, they can, under certain conditions, bring a minority claim.[52]

The minority claim

The general meeting appoints the directors of an NV/SA or BV/SRL by a simple majority decision[53]. As the majority shareholder would have voted in favour of these appointments at the general meeting, it could be reluctant to vote for suing them. To protect the interests of minority shareholders in such situation, the BCCA provides for an exception to the rule that the general meeting exclusively decides whether to sue directors, the so-called minority claim *(minderheidsvordering/demande minoritaire*).[54]

Conditions

Minority shareholders in a BV/SRL holding at least 10 per cent of shares issued on the day when the annual general meeting decides to grant discharge (*kwijting/décharge)* to the directors may file a minority claim on behalf of the company against the directors.[55] Minority shareholders in an NV/SA have the same right to bring such claim if they, on the day when the annual general meeting decides to grant discharge to the directors, hold securities representing at least 1 per cent of the votes attached to all the securities existing on that day, or hold securities representing the capital of at least €1.25m.[56] A minority claim will only be available to the minority shareholder who:

- did not vote to have the directors discharged;
- abstained from deciding whether discharge them; or
- was absent from the meeting at which the directors were discharged.

The minority shareholder who wishes to bring an action on behalf of the NV/SA must unanimously appoint a special proxyholder, who does not have to be a shareholder.[57] In a BV/SRL, the minority shareholder does not need to appoint a special proxyholder to file the minority claim.

[51] Art 2:107 of the BCCA, art 5:103 of the BCCA (BV/SRL) and art 7:156 of the BCCA (NV/SA).
[52] For the management of the limited liability company, the BCCA provides the choice between three systems, (1) the monistic board (*monistisch bestuur/administration moniste*), (2) the sole director (*enige bestuurder/administrateur unique*) and (3) the dual board (*duaal bestuur/administration duale*).
[53] Unless the corporate bylaws or a shareholder agreement stipulates other special arrangements concerning director appointments.
[54] Art 5:104 s 1 of the BCCA (BV/SRL) and art 7:157 of the BCCA (NV/SA).
[55] Art 5:104 s 1 of the BCCA (BV/SRL).
[56] Art 7:157 s 1 of the BCCA (NV/SA).
[57] Art 7:158 of the BCCA (NV/SA).

Procedural costs
The applicant of a minority claim must pay the procedural costs upfront when it files the action. This, of course, discourages minority shareholders from bringing a minority claim. If the judge dismisses the minority claim, the minority shareholders may be personally condemned to pay the procedural costs and damages to the defendants (if there are grounds for ordering it). If the judge approves the minority claim, then the company will reimburse the amounts that the minority shareholders have paid in advance and that are not included in the costs that the defendants have been condemned and order to pay.[58]

Minority shareholders can seek nullity of a settlement agreement
The BCCA provides that if the general meeting and the directors conclude a settlement agreement (*dading/transaction*) before the minority claim was initiated, the shareholders who meet the conditions for filing a minority claim can seek to have the settlement declared void if the terms of the settlement are not favorable to all shareholders (BV/SRL) or security holders (NV/SA).

Other types of actions
Minority shareholders could also resort to other mechanisms, such as applying for the appointment of a temporary conservator[59] or expert,[60] [61] and seeking nullity of the resolutions made by the corporate bodies.

Temporary conservator
The protection mechanism of seeking the appointment of a temporary conservator *(voorlopig bewindvoerder/administrateur provisoire)* was developed by case law. The BCCA does not regulate this. The minority shareholder can petition the Court of Enterprises in summary proceedings to appoint one as an urgent and provisional measure to perform management tasks for and on behalf of the company with the aim of protecting the company's interest. Case law considers the appointment of a temporary conservator to be an exceptional and subsidiary measure. This means the minority shareholder can resort to this mechanism only if less far-reaching measures do not enable parties to resolve the situation.

Expert report
Having an expert investigate and produce a report (*deskundigenonderzoek/enquête de l'expert*) is also an important mechanism for the minority shareholder, because it can be perceived as a minority claim in the form of an investigative measure. Seeking to have an expert report will allow a minority shareholder to have sufficient knowledge to bring a minority claim.

The conditions for applying for an expert appointment are the same as those for filing a minority shareholder claim (*supra*). The minority shareholder must meet them by the time it files the application seeking the expert appointment,[62] which means the minority shareholder can seek this during the financial year and does not have to wait for the annual general meeting that decides on granting discharge to the directors.

[58] Art 5:105 of the BCCA (BV/SRL) and art 7:159 of the BCCA (NV/SA).
[59] Art 2:8 s 1, 5° d) of the BCCA.
[60] Art 5:106 of the BCCA (BV/SRL) and art 7:160 of the BCCA (NV/SA).
[61] Art 2:63 of the BCCA and art 5:155 of the BCCA (BV/SRL).
[62] Art 5:106 of the BCCA (BV/SRL) and art 7:160 of the BCCA (NV/SA).

Application for nullity

Any shareholder has, under certain conditions, the right to seek the Court of Enterprises to annul decisions taken by the general meeting and/or the company's board.[63] However, the shareholder applicant may not have previously voted for the resolution or waived, expressly or tacitly, the right to invoke it.[64] The applicant seeking nullity (*nietigheid/nullité*) has six months from the day when the decision was made, or when they became aware of the decision, to file the action for nullity of a decision made by the general meeting or the board.[65] In urgent scenarios, minority shareholders can seek suspension of a decision in question by applying to the Court of Enterprises in summary proceedings. The Court may order the suspension if it concludes from the pleas submitted that an action for nullity *prima facie*[66] A claim for suspension, which is brought against the company,[67] must also be filed within six months.

[63] Art 2:42 of the BCCA.
[64] Art 2:44 of the BCCA.
[65] Art 2:143 s 4 of the BCCA.
[66] Art 2:46 of the BCCA.
[67] Art 2:45 of the BCCA.

RIGHTS TO PARTICIPATE IN DECISION-MAKING

To what extent do minority shareholders have rights to participate in the decision-making of companies in your jurisdiction?

Main rights

All shareholders have the right:

- to attend the general meeting and receive a copy of all relevant documents for that meeting;
- to vote at that meeting; and
- to ask questions to the directors and the statutory auditor.

Shareholders holding at least 10 per cent of the capital (NV/SA) or of the shares (BV/SRL) have the right to request the directors and/or the statutory auditor to call a general meeting about the agenda items they are raising (at least), and this within three weeks from the date of the request.[68] If the directors refuse to call one, the requesting shareholders may seek a court order compelling that a general meeting be held. Alternatively, the judge can appoint an *ad hoc* administrator who will be tasked with calling the general shareholders' meeting or order the directors to appoint one.

All shareholders must be notified of the scheduled general meeting at least 15 days beforehand[69] (or 30 days if the companies' shares are listed).[70] The notice must mention the date, time and venue of the meeting, as well as the agenda of items that require resolutions to be made at the meeting.

Shareholders of listed companies who hold at least 3 per cent of the capital (NV/SA) or of the shares (BV/SRL) have the right to demand the removal of any item (subject matter) from the agenda or to propose new ones that need a resolution from the general meeting.[71]

Finally, minority shareholders also have a say in some of the most important decisions in the company's life cycle by virtue of the special resolution procedure. These decisions concern amending the company bylaws (which require a 75 per cent majority) or changing the corporate purpose or company type (which require an 80 per cent majority). This gives the minority shareholders indeed the ability to block certain important decisions.

Voting rights: limitations

Enforceability of voting arrangements

Voting arrangements are contracts (eg, clauses in shareholder agreements) whereby shareholders commit themselves to voting in a specific way at general meetings.

This type of arrangement is a way to organise how decisions will be made upfront about the company's operations, which minimises agency costs. However, a shareholder might not

[68] Art 7:126 of the BCCA.
[69] Art 7:127 of the BCCA.
[70] Art 7:128 of the BCCA.
[71] Art 7:130 of the BCCA.

always do what it has agreed to.

If performance in kind of the voting arrangement is still possible (eg, because the general meeting has yet to take place or because the decision can still be changed at a new general meeting without prejudice to third parties), then seeking performance in kind of the voting arrangement can be a good starting point. The other shareholders can either request the court to order the defaulting shareholder to perform the voting arrangement, which can be backed by a penalty payment, or request the court to appoint a one-time proxyholder to exercise the voting right.

If the voting arrangement can no longer be usefully fulfilled by the defaulting shareholder, the other parties will have to be satisfied with compensation. To overcome any issues concerning the estimation of adequate compensation, including a damage clause in the contract (eg, shareholder agreement) is recommended.

Abuse of voting rights

Shareholders with a right to vote must exercise their voting right in good faith.[72] The general prohibition of abuse of rights in contractual relationships applies because a company is a form of contractual collaboration. The voting rights stemming from such company contract must be exercised in accordance with what good faith requires of shareholders in a company.

Some consider that shareholders have a *quasi-discretionary power.* In other words, shareholder can pursue their own views but not at any cost. It is generally accepted that shareholders may vote in their own proprietary interest if this exercise also respects the company's corporate interest. If they cannot do this, the shareholder concerned will have to find another way to exercise their voting right.

If a shareholder nevertheless votes in a disloyal manner, the company and the other shareholders will be able to oppose this. Since the company itself would be a victim of abuse of voting rights by one or more of its shareholders, the board may bring an action for damages against the shareholder who voted abusively. Other shareholders who can prove they have suffered harm or loss resulting from the abusive votes may also claim damages.

In addition, shareholders may seek nullity of the votes and/or resolution of the general meeting.[73] This mechanism is certainly more useful than bringing damage claims if the resolution made by the general meeting continues to give effect.

[72] Art 1134, section 3 of the Civil Code.
[73] See sections 5 and 8 of this guide, which discuss applications for nullity of resolutions.

RIGHTS WHEN A COMPANY IS EXPERIENCING FINANCIAL DIFFICULTIES

Do minority shareholders have any particular rights or protections when a company is experiencing financial difficulties? For example, are they able to demand that the company be wound up?

It is the exclusive power of the general meeting to decide by 75 per cent majority of the votes cast[74] whether to dissolve and liquidate the company. This majority requirement can be lowered so that shareholders who hold less than 75 per cent of the votes can weigh in on the decision-making, but it cannot be made higher. The BCCA requires that a specific procedure be followed if a company's losses have reached a certain level. This is known as the alarm-bell procedure.

Alarm-bell procedure

Thresholds

An NV/SA must follow the alarm-bell procedure if the value of its net assets *(netto actief/actif net*) has fallen to less than half or one-fourth of the capital.[75] Thresholds for a BV/SRL are different because it has no required capital. The alarm-bell procedure must be followed if:[76]

- the value of the net assets face the threat of becoming zero or have become negative (solvency test); or
- it is no longer certain that, according to reasonably foreseeable developments, the company will be able to pay its debt in the following twelve months as they become due payable (liquidity test).

Procedure

From the moment when the loss is ascertained or should have been ascertained, the board must convene a general meeting within two months.[77] The board must either propose to the general meeting to dissolve the company or propose measures to safeguard the continuity of the company, which it sets out in a special report. If the board fails to produce this special report, the general meeting's resolution concerning the matter is null and void.[78]

If the general meeting decides to dissolve the company, it must obtain a 75 per cent majority of the votes cast.[79] However, if the value of the net assets of the NV/SA has fallen to less than one-fourth of the capital, only 25 per cent of the votes cast at the general meeting is needed to approve the dissolution of the company.[80] This means that minority shareholders holding 25 per cent of the votes do have say on whether the company (an NV/SA) should be dissolved.

Dissolution if net asset value is lower than the minimum capital

For an NV/SA, any party with standing may seek the dissolution of the NV/SA by petitioning to a court if the value of the net assets has fallen below the minimum amount of capital, ie, less

[74] Art 2:70 and 2:71 of the BCCA.
[75] Art 7:228 s 1 and s 4 of the BCCA (NV/SA), respectively.
[76] Art 5:153 of the BCCA
[77] Art 5:153 s 1 of the BCCA (BV/SRL) and art 7:228 s 1 1 of the BCCA (NV/SA).
[78] Art 5:153 s 1 and s 2 of the BCCA (for BV/SRL) and Art 7:228 s 1 of the BCCA (for NV/SA).
[79] Art 2:71 of the BCCA, art 5:153 s 1 of the BCCA (BV/SRL) and art 7:228 s 1 of the BCCA (NV/SA).
[80] Art 7:228, s 4 of the BCCA (NV/SA).

than €61,500. If necessary, the judge may grant the company a certain period to regularise its situation.

Non-compliance with the alarm-bell procedure

Failure to comply with the alarm-bell procedure has far-reaching consequences. If the general meeting was not convened by the board in accordance with the BCCA, any harm or loss suffered by third parties will be presumed to have been caused because of the absence of the convocation.[81] This presumption is rebuttable.

[81] Art 5:153 s 3 of the BCCA (BV/SRL) and art 7:228 s 5 of the BCCA (NV/SA).

RIGHTS ENFORCEABLE AGAINST OTHER SHAREHOLDERS

Do minority shareholders have any rights or protections which are enforceable against other shareholders; for example, where the majority of shareholders act in contravention of the company's articles of association?

Minority shareholders have rights and protections that can be enforced directly against other shareholders. They can also enforce rights and protections that have an indirect impact on shareholders.

Rights directly enforceable against other shareholders

Shareholder exclusion

In a BV/SRL type of company, one or more security holders with at least 30 per cent of the voting rights attached to all outstanding securities, or at least 30 per cent of the profit rights attached to the company's securities, have the right to seek exclusion of another shareholder.[82]

In an NV/SA type of company, the same right is conferred on security holders with at least 30 per cent of the company's voting securities or shares representing at least 30 per cent of the nominal value or accounting par value of the company's capital. Shareholders of listed companies do not have this right to seek shareholder exclusion, as they can use other mechanisms and the securities they hold are liquid tradable.[83]

When a claimant seeks shareholder exclusion, it petitions the Court of Enterprises[84] and seeks to buy out another security holder of the company, which can also be warrant holders, holders of convertible bonds, option holders, etc. As the minimum threshold is only 30 per cent, both majority and minority security holders can exercise this right to have another security holder excluded. The company itself cannot be the claimant initiating this type of proceeding,[85] but because the company will be involved, it will be subpoenaed as a party to the litigation.[86]

Given the very heavy consequences of this mechanism, the court will allow the application only if there is 'just cause' for the exclusion. As the law does not define the concept of 'just cause', courts rely primarily on case-law to identify the scope and elements of the concept. Courts have indicated (albeit in specific contexts[87]) that the following situations could constitute 'just cause' for shareholder exclusion:

- a profound and lasting disagreement between security holders that jeopardises the corporate interests of the company and endangers further cooperation within the company (without the need to prove any fault has been committed by a particular security holder);
- any act performed by a security holder that has severely harmed the company's corporate interest to such extent that it would not be desirable for the security holder to remain within the company (eg, blatant violation of a non-competition obligation, misuse

[82] Art 2:63 of the BCCA.
[83] Art 2:60 of the BCCA.
[84] Procedural rules similar to summary proceedings apply. Art 2:62 s 1 of the BCCA.
[85] Art 2:64 of the BCCA. The claim must be filed by a shareholder.
[86] Art 2:62 s 3 of the BCCA.
[87] Examples are an indication of retained grounds. The courts always examine each case on its own merits.

of the company's IP, misuse of the company's property (moveable or immoveable) and/or opportunities, repeated breach of a shareholder agreement, breach of fiduciary duties in its capacity as company director, etc); and
- systematic abuse of voting rights (as majority or minority shareholder) causing the company's corporate interest to be jeopardised (eg, majority shareholder strips its partly owned subsidiary, minority shareholder refuses to approve a much-needed capital increase, etc).

The courts always emphasise that the shareholder exclusion procedure should be an alternative remedy, reiterating that parties must always first try other dispute resolution methods. In this respect, the claimant seeking shareholder exclusion must first prove that it has made unsuccessful attempts to resolve the conflict with the shareholder concerned or prove that there are no other means to resolve the conflict definitively or to preserve its rights. Excluding another shareholder is therefore the *ultimum remedium*.

If the court finds that the defendant-shareholder should be excluded, it will order the transfer of the defendant's securities to the claimant. If the company bylaws or a contractual clause stipulates a pricing formula that should be applied in the event of a shareholder exclusion, the court must apply it. If the instruments do not stipulate anything on this, the court will determine the value of the securities at the time it orders their transfer.[88]

Shareholder withdrawal
A security holder may also seek to be withdrawn from the company.[89] The minimum 30 per cent threshold does not apply to this type of request: even the minority security holder with the smallest participation interest or the largest majority security holder may seek to be withdrawn from the company. This right is not available to shareholders of listed companies.[90] The company will also be involved as a party and will inform any other shareholders not directly involved about the action.

From a procedural point of view, the withdrawal procedure is quite similar to that for shareholder exclusion. However, in a shareholder withdrawal application, the claimant security holder will request to be bought out by the other security holder or holders who are responsible for the 'just cause' justifying its withdrawal.[91] Unlike the requirement for the shareholder exclusion procedure, the BCCA explicitly states that the 'just cause' being invoked in a shareholder withdrawal procedure must relate to another security holder. Although this will often be the case in both types of procedures, here it is a constituent part of the conditions for bringing the action. Nonetheless, courts are more inclined to conclude that a 'just cause' for withdrawal exists in comparison to shareholder exclusion procedures because in a shareholder withdrawal action, the claimant voluntarily wants to leave the company and is not dispossessed.

Whether the court finds that there is a 'just cause' often comes down to weighing the corporate interests against those of the security holders. The purpose of the withdrawal procedure is specifically to protect the interests of security holders who have a 'just cause' to withdraw from the company, whereas in an exclusion procedure, the interests and the continuity of the

[88] Art 2:67 s 3 of the BCCA.
[89] Art 2:68 of the BCCA.
[90] Art 2:60 of the BCCA.
[91] Art 2:68 s 1 of the BCCA.

company will weigh heavily. The same three categories of 'just cause' seem to surface in case-law, namely:

- serious misunderstandings between shareholders (eg, fallout between (two) shareholders following a divorce);
- harmful acts committed by a security holder (eg, a shareholder starts a similar business and breaches its non-competition obligation); and
- abuse of voting rights (eg, systematic reservation of profits to the detriment of minority shareholders, all the while reaping substantial management fees to themselves as director).

The right to petition for shareholder withdrawal should not be misused. One may not seek this just because the company's financial results are poor, or simply because minority security holders do not agree with the policy implemented by the company.

If a withdrawal petition is accepted, the claimant may still sell its securities during the proceeding. There is no lock-up.[92] If the court agrees that another security holder should acquire the claimant's securities, it will determine the price of the securities,[93] which will the defendant(s) must pay.

Capital decrease (NV/SA) or equity distribution (BV/SRL), share buybacks, exit mechanisms under contract or bylaws

At a given time, security holders may conclude that it is best to part ways. If this occurs, it is not always necessary to rely on an exit procedure prescribed by law or a specific exit mechanism enshrined in the bylaws. If there is still room for parties to come to a mutual consensus, security holders might want to reach an *ad hoc* arrangement.

For example, the general meeting of shareholders in an NV/SA may decide to execute a non-proportionate capital decrease.[94] This paves way for a particular shareholder to be granted an exit from the company. However, given that all shareholders should in principle be treated equal, the procedure requires unanimous shareholder consent.[95]

In addition, this *ad hoc* arrangement between shareholders requires the convocation[96] of an extraordinary shareholders' meeting and the signing of an amendment to the bylaws in the presence of a civil law notary. The general meeting can either decide to maintain the number of outstanding shares[97] or decide to cancel the shares of the exiting shareholder.

The capital decrease allows company funds to flow back to the exiting shareholder. This is a significant advantage of the procedure as there is no need for the shareholders themselves to fund the procedure. It is more complicated if parties also want to take into account any share premium paid or the current market value of the shares of the exiting shareholder. To pay back

[92] Art 2:68 s 3 of the BCCA.
[93] Art 2:69 ss 1 and 2 of the BCCA. The court will be bound by any pricing clause the parties have agreed on. Only if the pricing formula is manifestly out of the ordinary, the court may adjust this.
[94] Art 7:208 seq of the BCCA.
[95] Art 7:208 s 1 of the BCCA.
[96] The convocation must specify the purpose of the transaction and the procedure required to execute the capital decrease. Art 7:208 s 2 of the BCCA.
[97] The shareholders' register should reflect the exit of the shareholder. The amount of share capital which all outstanding shares now represent, is adjusted for the amount of the capital decrease.

these amounts as well, the general meeting could furthermore decide to incorporate reserves into capital and subsequently execute a disproportionate capital decrease.

As a capital decrease impacts creditors, it must meet additional conditions for the purpose of protecting their interests. After the transaction is announced in the Belgian Official State Gazette, it will be suspended for two months to allow creditors to seek security.[98] During this suspension period, the exiting shareholder(s) must not receive any payout. For urgent needs, parties can always structure any pay-out as a loan first and then compensate/repay later.

As a BV/SRL type of company has no capital, capital decreases cannot take place. Any funds that flow to the shareholders are regarded as a distribution to which a net assets test[99] and liquidity test apply.[100] Here, a disproportionate distribution that paves way for a particular shareholder's exit would require unanimous shareholder consent.[101] A BV/SRL's bylaws will need to be amended only if shares are cancelled or if any undistributable reserves (capital reserves) is distributed.

A similar *ad hoc* exit mechanism exists in the form of share buybacks. The company may decide to acquire its own shares, profit-sharing certificates or certificates relating thereto from another shareholder.[102] Similarly, a disproportionate share buyback requires the unanimous decision of the general meeting of shareholders.[103]

Several other conditions and formalities apply to a share buyback. They include the following (amongst others):

- the share buyback must be approved by an extraordinary 75 per cent resolution of the general meeting before the transaction takes place;
- the purchase price paid by the company must be available for distribution;
- the company may acquire only fully paid-up shares or certificates; and
- shareholders must be treated equally, unless the general meeting unanimously decides otherwise.

A significant advantage of this type of exit mechanism is that the shares or certificates are funded by the company. After the buyback, the company can decide to keep the shares as assets on its balance sheet, dispose or even cancel the shares. If the company decides to keep them as assets, it will have to create undistributable reserves (capital reserves) for this.[104]

The share buyback scheme under the BCCA relates to only shares, profit-sharing certificates or certificates relating to the aforementioned. This means the share buyback rules do not apply to the company's purchase of warrants, convertible bonds, bonds, options, etc, but the freedom of contract principle governs these purchases. Thus, the company's management can decide to buy out a particular security holder using the company's own funds.

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[98] Art 7:209 of the BCCA.
[99] Art 5:142 of the BCCA.
[100] Art 5:143 of the BCCA.
[101] Given that shareholders must in principle be treated equally. Art 5:80 of the BCCA.
[102] Art 5:145 seq of the BCCA (BV/SRL), and Art 7:215 s 1 seq of the BCCA (NV/SA).
[103] Art 5:145 s 4 of the BCCA (BV/SRL), and Art 7:215 s 1, 4° of the BCCA (NV/SA).
[104] Art 5:148 s 2 of the BCCA (BV/SRL), and Art 7:217 s 2 of the BCCA (NV/SA).

Naturally, shareholders and security holders may use other different types of arrangements under a contract or the bylaws to regulate an exit. These can take the form of the following mechanisms, for example: put and call options, transfer restrictions, tag-along and drag-along rights, right of first offer or first refusal, etc.

Rights enforceable against the company or a contractually bound shareholder that can affect other shareholders

Withdrawing or excluding a shareholder at the company's expense

Share buybacks are a way to buy out a shareholder at the company's expense. However, as detailed above, the decision to buy back shares is made by the company itself and cannot be made by a shareholder. Thus, if there is no goodwill within the company to facilitate an exit of a shareholder via a share buyback, shareholders who are considering exiting the company could use only the withdrawal and exclusion procedure against another shareholder,[105] but they will have to fund these procedures themselves.

The BCCA addresses fund flow and initiative issues by introducing two new rights for shareholders in a non-listed BV/SRL:[106] namely, the right to withdraw or exclude a shareholder at the company's expense.[107] However, the bylaws will have to explicitly provide for these rights for shareholders to exercise them.[108]

Various aspects of the shareholder withdrawal and exclusion procedures should be regulated in the bylaws. If they are not, onerous default company law rules will apply, especially the rule setting a price calculation formula for the shares. Shares can typically be offered[109] or bought back[110] at the amount of the actual equity contribution made (but not yet repaid) in exchange for which the shares were issued, unless stipulated otherwise. Thus, the reserved profits or current market value of the shares is not considered.

Given the strategic impact that the two types of procedures may have (eg, price, payment, timeline for initiating the procedure, destruction of shares, effective date of the transaction, etc), the parties must always thoroughly consider their rights and weigh the appropriateness of each procedure.

Right to file for company wind-up

Shareholders in a BV/SRL and NV/SA have the right to petition the president of the Court of Enterprises (presiding over summary proceedings) at any time to request the wind-up of the company if there is a lawful cause for it. The BCCA defines lawful cause non-exhaustively:

> 'There is a lawful cause not only when a shareholder grossly omits his duties or when a health condition makes it impossible for him to perform them, but also in all other cases that make the normal continuation of the company's business impossible, such as the

[105] As detailed above. Please see Art 2:68 seq of the BCCA (withdrawal); Art 2:63 of the BCCA (exclusion).
[106] The right to withdraw or exclude a shareholder at the expense of the company does not exist in a NV/SA, nor in listed entities.
[107] Art 5:154 s 1 of the BCCA.
[108] Art 5:154 s 1 of the BCCA (withdrawal); Art 5:155, s 1 of the BCCA (exclusion).
[109] In the event of a withdrawal at the company's expense, please see Art 5:154 s 1, 5° of the BCCA.
[110] In the event of an exclusion at the company's expense, please see Art 5:155 s 3 *juncto* Art 5:154 s 1, 5° of the BCCA.

profound and lasting disagreement between the shareholders.'[111]

Despite this definition in the law, the court still has the discretion to determine if there is a lawful cause to wind up the company considering all relevant facts of the case. Given the severity of the measure, the court is usually reluctant to order the winding-up of a company and will see if there is no other solution to protect everyone's interests.

The definition of 'lasting disagreement between shareholders' can be found in case law, which states that any form of cooperation or buyout that becomes impossible (permanently), resulting in the bringing of the company's normal operation to a halt, is a lawful cause. But a lawful cause does not always have to be found in a dispute. Case law has also ruled that a lawful cause for winding up the company is when none of the shareholders is interested in continuing the business of the company anymore.

Only a shareholder can exercise this right to seek the wind-up of the company. There is no minimum percentage of shareholding required: one share will suffice. Such action is brought against the company and not against the other shareholders. Nevertheless, it is advisable to involve the other shareholders in the proceedings, especially those having contributed to the lawful cause justifying the request.

Right to seek nullity of the resolution of the board of directors or general meeting or nullity of a vote

Minority shareholders have another important tool at their disposal, namely the right to seek nullity of a resolution made by the board of directors or the general meeting or the right to seek nullity of a vote. These rights will be particularly useful when a majority shareholder commits a breach of the company bylaws or when the board, which is induced by the majority shareholder, abuses or repudiates its powers.

Article 2:42 of the BCCA lists four grounds for an application seeking nullification of a resolution made by the board of the general meeting:

- any irregularity in the way a decision is reached, if the plaintiff proves that the irregularity committed either influenced the deliberation or the vote or was committed with fraudulent intent;
- abuse of law, misuse, exceeding or repudiation of powers;
- the exercise of voting rights that were suspended by virtue of a provision under law, not included in the BCCA, and, apart from these unlawfully exercised votes, the quorum or voting threshold required for the resolutions to be passed at the general meeting would not have been reached; and
- any other reason specifically stated in the BCCA.

These four grounds can also be invoked by a minority shareholder seeking nullity of a vote. The nullity of a vote can result in the nullity of the decision if the claimant can prove that such vote has impacted the deliberation or decision relating to it.[112]

[111] Art 2:73 s 2 of the BCCA.
[112] Art 2:43 of the BCCA.

For the causes listed above, any party with standing may sue the company and seek nullity of the resolution in question. The nullity declared by the court cannot bind bona fide third parties who did not have constructive knowledge of any irregularity, given their legitimate interests.