I

Postgraduate Course

Radboud University Nijmegen &

The University of Curaçao

FINANCIAL LAW MASTERCLASS

"Prospectus requirement and liability"

Thursday 13 March 2014 – WTC, Curaçao

Karel Frielink LL.M

5.45 pm - 8.00 pm

Please find below the explanation of various sheets forming part of the course material. The law of the Dutch Caribbean is comprehensively dealt with on *Karel's Legal Blog* (http://www.Curaçao-law.com). For questions and comments: Karel.Frielink@Spigtdc.com.

II

The subject of prospectus liability can be viewed from various perspectives. I will mention in this connection (i) the national liability law of the Netherlands, Curaçao and St. Maarten, and the BES Islands, (ii) the international private law of these countries and (iii) international jurisdiction issues. Today the first two subjects are central, with here and there a little side step. The starting point today is a company limited by shares ('NV') issuing shares (the issuing company) to the general public, although a prospectus is not only mandatory in the event of an issue.

Before these subjects are discussed, we first have to dwell upon the prospectus requirements in the Netherlands, Curaçao and St. Maarten, and the BES Islands (Bonaire, St. Eustatius and Saba). As a matter of fact the mutual differences are great.

PROSPECTUS REQUIREMENT

III

The Netherlands

The legal system in the Netherlands has a European origin. We will not discuss this further here.[1] Chapter 5.1 of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*: '**Wft'**) includes the rules for offering securities.

Section 5:2 Wft stipulates:

"It is forbidden in the Netherlands to offer securities to the general public or to allow securities to be traded in a regulated market situated or operating in the Netherlands unless - with regard to the offering or the admission - a prospectus is generally available which has been approved by the Dutch Authority for the Financial Markets ('AFM') or by a regulator of another Member State."

There are obviously exceptions to this prospectus requirement, this being an obligation to provide information. A major exception is already present in the description of the concept of an "offer to the general public". This is only the case if the offer (to buy or otherwise to obtain, or to offer) is aimed at more than one

[1] See the Prospectus Directive (2003/71/EC) published on 31 December 2003 in the Official Journal of the European Union (L345/64, 31.12.2003). On 1 July 2012 several amendments became effective in the Netherlands. This involves amendments as a result of the implementation of the reviewed Prospective Directive (Directive 2010/73/EC), the Omnibus I Directive (Directive 2010/78/EC) and amendments as a result of adjustments in the Prospectus Regulation (Regulation (EC) no. 809/2004) in 2012 (Delegated Regulation 486/2012/UG and Delegated Regulation 826/2012/EU) The Prospectus Regulation includes rules for formulating a prospectus.

person (Section 5:1 under a Wft). Therefore the one-to-one situation is excluded from the prospectus requirement. In addition, the prohibition only applies to offering[2] or admission 'in the Netherlands'. 'Offering from the Netherlands' is not covered by the prohibition; however, other countries themselves usually have such a prohibition.

Of the other exceptions I only mention offering securities exclusively to qualified investors or to a group of less than 150 persons (not being qualified investors), or if the securities offered can only be acquired at the counter value of at least €100,000 per investor, or if the nominal value per security amounts to at least €100,000 (Section 5:3 subsection 1 Wft).[3]

Section 5:21 Wft stipulates who should make the prospectus generally available. This is about the issuing company (the issuer), the supplier of the securities or the party who requested that the securities be listed on the stock exchange (admission to trade in the regulated market). This Section provides for the regulatory obligation to make the prospectus generally available. With respect to prospectus liability it should be mentioned that other parties may be liable as well.

[2] Insofar as this is relevant here, the term offering means: *"in the course of a profession or business making directly or indirectly a sufficiently determined proposal to enter as the counterparty into an agreement with a consumer with regard to a financial product other than a financial instrument, contributory pension claim or insurance or in the course of a profession or business entering into, managing or carrying out such an agreement"* (Section 1:1 Wft). It is also possible to broker. Insofar as this is relevant here, the term brokering means: *"all activities in the course of a profession or business aimed at forming an agreement as an intermediary with regard to a financial product other than a financial instrument, credit, contributory pension claim or insurance between a consumer and a supplier"* (Section 1:1 Wft).

[3] See further about exceptions and exemptions B. Bierman et al. (edit.), *Hoofdlijnen Wft [Main lines of Wft]*, Recht en praktijk, financieel recht (Law and practice, financial law) Part 6, Deventer: Kluwer 2013, p. 354-357

IV

Curaçao and Sint Maarten

The legal regulations in connection with the law providing for financial supervision are materially identical in Curaçao and Sint Maarten. For convenience sake we will mainly refer to Curaçao below.

The search for a prospectus requirement in the law on supervision will be in vain. The National Ordinance on the Supervision of Investment Institutions and Administrators (*Landsverordening toezicht beleggingsinstellingen en administrateurs*: '**Ltba')** prohibits everybody in Section 3 subsection 1 from asking or obtaining in or from Curaçao funds or other assets in order to participate in an investment institution - which has not been granted a license by the Central Bank of Curaçao and Sint Maarten - or from offering participation rights in such an investment institution. The Central Bank can grant an exemption from this prohibition (Section 10 Ltba).

In Section 8 of the *Directives on the Supervision of Investment Institutions and Administrators* it issued, the Central Bank made a prospectus mandatory for any offering by an investment institution and in Annex B of this listed what information must be included in such a prospectus. The major requirement in this connection is that the prospectus includes the details which are necessary for the investors to be able to form a sound idea about the offer.

Thus there is not a generic prospectus requirement in Curaçao and St. Maarten. Therefore there is no prospectus requirement for offering securities one-to-one (just as in the Netherlands), unless it would involve - in short - offering participation rights in an investment institution.[4] If securities are offered from

[4] With regard to the Netherlands it is pointed out that it has been laid down in Section 5:1a subsection 2 Wft that Chapter 5 Wft (rules for offering securities) is not applicable to offering to the general public or

Curaçao or St. Maarten in countries where a prospectus is a requirement, this would obviously have to be taken into account. In connection with offering securities via the internet this could easily give rise to problems.[5]

Aside: that there is no generic prospectus requirement obviously does not mean that securities can randomly be offered to the general public. For instance Section 45 of the National Ordinance on the Supervision of Banking and Credit Institutions (*Landsverordening toezicht bank- en kredietwezen*: '**Ltbk**') stipulates that anybody is prohibited from approaching the general public directly or indirectly with regard to raising funds unless these are credit institutions entered into the official register. It is generally supposed that offering bonds / debentures (bonds) to the general public is covered by this prohibition. In addition, the concept of 'general public' is then interpreted very broadly: as everybody except (registered) credit institutions.

This prohibition is not applicable to issuing shares or inviting limited partner participations. After all, in that case capital is raised and the capital provider will not be in the position of a creditor but that of a shareholder or limited partner.

V

BES (Bonaire, St. Eustatius & Saba)

It has been laid down in Section 4:10 subsection 1 of the BES Financial Markets Act (*Wet financiële markten BES***: 'Wfm BES'**) that an investment institution must

---

allowing trade in a regulated market of: a. participation rights in an investment institution bought or paid back directly or indirectly at the request of the holder to the debit of the assets; or b. participation rights in an institution for collective investment in securities, usually abbreviated as '*icbe'* (institution for collective investment in securities or fund for collective investment in securities).

[5] When securities are offered electronically the National Ordinance on Electronic Agreements (*Landsverordening overeenkomsten langs elektronische weg*) (P.B. 2000, 168) which came into force on 1 January 2001, is relevant. As soon as a commercial statement is involved as defined in this Ordinance, certain conditions must have been met. Offering and recommending securities is covered by the concept of commercial statement.

have a prospectus available with regard to the rights of participation it offers. The Act also prescribes which information must be included in the prospectus (cf Art. 5:4 Wfm BES) and that the prospectus must be updated as soon as there is reason to do so. I will not go further into this.

The system of the prospectus requirement in the BES differs on various points from that of the Netherlands but will only mention one important difference here. Section 5:19 subsection 1 Wfm BES includes a generic prospectus requirement:

"It is forbidden to offer securities in public bodies outside a closed circle to others than professional market parties or to allow securities to be traded in a stock exchange held in public bodies unless a prospectus that has been approved by the Authority for the Financial Markets (AFM) is generally available with regard to the offering."

Subsection 2 provides for two exceptions: when participation rights in an investment institution are involved (the Act includes a different arrangement for this) and when it involves securities which are excluded under a Ministerial Regulation (e.g. stock dividend or employee shares). But there is not yet such a Ministerial Regulation!

According to Section 1:26 Wfm BES the Minister of Finance may issue a Ministerial Regulation granting exemption, for instance with respect to securities of which the nominal value per security amounts to at least a certain amount, or if the securities are only offered to a restricted group. But there is not yet such a Ministerial Regulation!

In other words: outside a closed circle (and the one-to-one situation) securities can only be offered to professional market parties unless there is a prospectus approved by the AFM. The subject of listing is not further detailed here.

The concept of a 'closed circle' is not further described in the BES legislation. It seems obvious to tie in here with the arrangement in the Netherlands. In short: a well-defined group of people (objectively limited), access to the group is not easily realizable and there must be an existing legal relationship between the issuing company and the members of the group (e.g. an employment agreement).

So for the remainder there is no exception from the prospectus requirement for offering securities to others than the professional market parties. The professional market parties[6] are listed exhaustively in the Act. Section 1:1 Wfm BES:

"professional market party: investment institution, credit institution, pension fund, asset manager, insurer or other party appointed in or pursuant to an Order in Council."

There is no Order in Council referring to another party as such, such as in the Netherlands where the category of 'professional market party' is further defined in Section 3 of the Wft Definitions Decree.

The one-to-one situation where there is a party who wants to offer securities to one interested party only, is excluded from the prospectus requirement as well. According to Section 1:1 Wfm BES an offer means: in the pursuit of a profession or business make a sufficiently specific proposal, either directly or indirectly, to submit a sufficiently specific proposal to more than one party to act as the other party in a contract relating to the purchase or other form of acquisition of securities or an invitation to submit an offer for securities.

[6] According to the Dutch Central Bank it is characteristic of a professional market party to be able to assess financial products and services independently and to take decisions in that respect. A professional market party must be able to assess the risks of financial products and services himself. Source: http://www.cn.dnb.nl/nl/toezicht/toezicht_kredietinstellingen/markttoegang

So this means that there is a much broader prospectus requirement in the BES than in the Netherlands and in Curaçao en St. Maarten. And this is obviously rather odd!

LIABILITY ACCORDING TO NATIONAL LAW
THE LEGAL REGULATIONS

VI

A prospectus is an offer or an invitation to make an offer directed to the general public or to one (more specific) group of interested parties. The average person does not know anything about investing. The average person does not go further than generally known notions, such as: (i) risks are associated with investing; (ii) prices can rise but also drop and (iii) as the promised return increases the risks associated with investing are also higher.

Whether the last notion is equally in focus for everybody, I dare not say with certainty. I have the impression that in the past decades particularly those (extremely) high returns which people thought to be able to earn, have made them incautious. The hunger for returns makes them blind; strong hunger as blind as a bat even. And when investing - in any event in the West - has almost become a national sport, the large number of accidents should not really surprise you.

And these accidents are not uncommonly followed by lawsuits. If the average person is successful he boasts of his own qualities, if he suffers a loss he feels cheated and looks for a scapegoat. A variety of cases can be found in case law particularly in the past thirty years.

Although a prospectus can relate to all kinds of products, we will concentrate on securities. Where a prospectus requirement is in place the law includes detailed rules about the information which must be included in a prospectus. This can be indicated as an obligation to provide information. Against such an obligation there is usually the other party's obligation to examine the offer. The question is whether and to what extent investors have an obligation to examine the offer before they decide to acquire the securities on the basis of a prospectus. An exception might have to be made for certain professional investors or professional advisors engaged by an investor, but I would like to assume that the average investor has no obligation to examine the offer with regard to the accuracy, completeness and truthfulness of a prospectus.

Even if an investor has read an article in a newspaper in which questions are asked about the euphoria of a certain offer to the general public and critical comments are made about the prospectus, I would still think that the conclusion should not be lightly drawn that there is an obligation to examine the offer. Considering the rules applicable with regard to drawing up and approving the prospectus,[7] and the obligation of the issuing company to correct publicly any material inaccuracies or omissions emerging after the prospectus has been distributed,[8] after which - in the normal situation - these have been incorporated

[7] That a prospectus must be approved (in the Netherlands and the BES Islands by the Authority for the Financial Markets, and in Curaçao and Sint Maarten by the Joint Central Bank of these countries) does not guarantee that the prospectus is not misleading. Therefore approval by the regulator does not entail a guarantee. The approval can be considered as an administrative approval contributing to better quality and more uniformity of the prospectuses.

[8] In the WOL case the Supreme Court held (ground for decision 4.25.4): *"If amongst the general public to which the prospectus is aimed, although the information included in it is accurate and complete, an inaccurate picture or confusion or ambiguity is nevertheless created with regard to a subject that is relevant to the investment decision, there is in principle no obligation on the issuer to correct this for instance by publishing a press release or other notice. After all, the starting point is that upon an IPO it is sufficient for an issuer to issue a legally prescribed prospectus including the (accurate and complete) information which is necessary to enable the investor to take a sound investment decision. It therefore does not have to respond either to reports in the media demonstrating that there is an inaccurate picture or confusion or ambiguity with regard to a relevant subject. However, this rule has an exception if the inaccurate picture or the confusion or ambiguity relates to an issue relevant to potential investors and has been created by reports from or on behalf the issuer itself or which can be attributed to the latter. In such a case the issuer has an obligation arising from unwritten law to clarify the respective matter by making a public announcement in addition to the prospectus such as for instance a press release.* "

into the market sentiment, the investor can continue to rely on that market sentiment.

The most important purpose of a prospectus is to provide interested investors, and these can be laymen but also professional investors, with all the relevant information, so that these investors are or should be able to form an opinion in a sensible, properly informed manner on the basis of which they can take a decision to buy securities or to subscribe to an issue.[9]

However, for the average person a prospectus is an unreadable document. We will come back to the *World Online* case but I venture the assertion that of the 12,000 investors whose interests were represented by the Dutch Investors' Association (*Vereniging van Effectenbezitters*: 'VEB') only a handful had actually read the prospectus and that none of the investors based their decision to subscribe to this issue on the contents of the prospectus.[10] And I also dare to venture that less than 0.001% of all investors (and that would have been several hundred thousand) can state the faults on the basis of which the Supreme Court held in the end that World Online and the banks involved in the IPO acted wrongfully towards the investors.[11] And it also appears to me defensible that the average investor, if the prospectus would not have been misleading, would probably also have subscribed to the issue.

---

[9] If this involves an Initial Public Offering, or IPO, a distinction can be made between a *primary* IPO, in which new shares are issued and are included in the listing (dilution comes to mind), and a *secondary* IPO, in which shares are offered (by the shareholders and not by the company) that already exist and which will be included in the listing. A combination is obviously possible. Moreover, it should be borne in mind that a company the shares of which are already listed on the stock exchange, can issue new shares (a Secondary Public Offering or even better: a Follow-on Public Offering), in which a combination of new and existing shares can also be offered.

[10] About eight years ago a survey was held in Belgium demonstrating that 81% of the private (so non-professional) investors do not read a prospective or sometimes only a very small part of it. It is my impression that the percentage is 'in reality' higher, apart from the question of whether 'reading' also entails 'understanding' and 'being able to assess'.

[11] After the IPO it appeared that top woman Nina Brink had sold her shares (by means of a legal entity controlled by her) (this involved 15 million shares) several weeks before the IPO for 6 euro (the introduction price was 43 euro). The average investor was not aware of this. As a matter of fact the sale was stated cryptically in the prospectus and then even without mentioning the sales price. Just before the IPO Nina Brink announced in the media: "*I didn't sell any shares at this time*".

But the jurisdictions we are discussing today have rules with regard to liability for a misleading prospectus.[12] These regulations aim to provide the investors with protection, even though they were not directly guided by a prospectus with regard to their decision to acquire shares. They were guided by the market sentiment and that sentiment is usually affected by a prospectus (and the announcements made in addition to it). We will now first discuss the various legal rules and regulations.

VII

The Netherlands

In the Netherlands there is a two-track law concerning prospectus liability as professor Timmerman[13] calls it. There are two sets of rules supplementing the general doctrine of the wrongful act (Section 6:162 of the Dutch Civil Code ('BW-NL'):

A. the rules with regard to misleading and comparative advertising (Sections 6:194 - 6:196 BW-NL) and
B. the rules with regard to unfair commercial practices (Sections 6:193a – 6:193j BW-NL)[14]

[12] In the Netherlands a specific legal rule was included in the Commercial Code in 1928.
[13] L. Timmerman, *'De aansprakelijkheid van een bestuurder voor een misleidend prospectus'* (The liability of a director for a misleading prospectus), in: D. Busch and M.P. Nieuwe Weme (edit.), *Christels Koers* (Liber Amicorum prof. mr. drs. C.M. Grundmann-van de Krol), Deventer: Kluwer 2013, p. 703.
[14] The Dutch Unfair Commercial Practices Act (*Wet oneerlijke handelspraktijken*) came into force on 15 October 2008 (Bulletin of Acts Orders and Decrees 2008, 397 and 398). The Act implements Directive no. 2005/29/EC of the European Parliament and the Council of the European Union with regard to unfair commercial practices of undertakings towards consumers on the internal market (Official Journal EU 2005, L 149). Prior to this, Sections 6:194 and 6:195 (old) BW-NL formed the basis of prospectus liability with regard to misleading advertising.

A. Misleading and comparative advertising

Section 6:194 subsection 1 BW-NL:

"A person who with regard to goods or services, which are offered by him or the person on whose behalf he acts in the course of a profession or business, makes or has a statement made publicly known, acts wrongfully towards another acting in the course of his business if this statement is misleading in one or more respects (...)"

The rules with regard to misleading and comparative advertising are insofar as it is relevant to the present subject, aimed at a prospectus issued for instance by an issuing company (the issuer) and/or a bank acting as the lead manager of an issue. The statement that has been made publicly known (the prospectus) must be aimed at a person acting in the course of his profession (B2B). So this means someone who acts professionally (that is to say in the course of his business operations) but this does not mean to say that it involves a professional investor![15]

Section 6:195 subsection 1 BW-NL provides for a reversal of the burden of proof with regard to the accuracy of the prospectus and the accountability. So the person who alleges that he has been misled does not have to prove the misleading. I will return to this briefly in connection with the legal rules of Curaçao and St. Maarten.

B. Unfair commercial practices

The rules with regard to unfair commercial practices - which only came into existence on 15 October 2008 - aim at a prospectus distributed for instance by

[15] It is conceivable that a competitive supplier initiates legal action against his competitor on this basis if the prospectus of that competitor is misleading.

an issuing company or lead manager (the law calls this a trader) amongst consumers. A consumer is a natural person not acting in the course of a profession or business (Section 6:193a subsection 1 under a BW-NL).

A trader acts wrongfully towards a consumer if he carries out commercial practices which are unfair. Commercial practice is particularly unfair if a trader is guilty of a misleading commercial practice consisting of providing information which is actually inaccurate or which misleads or can mislead the average consumer, whether or not by the general presentation of the information (Sections 6:193b - 6:193c BW-NL).

In addition, a commercial practice is misleading if there is a misleading omission. A misleading omission is any commercial practice whereby essential information which the average consumer needs to take an informed decision about a transaction, has been omitted so that the average consumer takes or can take a decision about an agreement which he would not have taken otherwise (Section 6:193d BW-NL). The information referred to in Section 5:13 Wft, which Section aims at information to be included in a prospectus, is in any event essential within the sense meant herein (Section 6:193f BW-NL). Therefore, if information is absent from the prospectus that should be included in it by law, this constitutes a misleading omission.

Section 6:193j BW-NL provides for a reversal of the burden of proof *"if this appears to be suitable, considering the circumstances of the case and with due observance of the legitimate interests of the trader and of any other party in the procedure*". This will be decided by the court. In the event of the consumer alleging and being able to make somewhat plausible that a prospectus is misleading and why, the reversal would then come down to the burden of proof of the material accuracy and completeness of the prospectus resting on the issuing company (or the bank), whereby the blame of the issuing company (or bank) is assumed subject to evidence to the contrary. Should the issuing

company (or bank) be unsuccessful in furnishing that evidence, it will be an established fact that the prospectus is misleading. The consumer must then prove the causal link between this misleading prospectus and his loss. I will come back to this later on the basis of the WOL ruling in which the Supreme Court gives a helping hand to the consumer.

VIII

Curaçao and St. Maarten

In Curaçao (and St. Maarten) the prospectus liability is covered by the doctrine of misleading advertising and can be found in Sections 6:194 et seq. BW (not limited to B2B situations). It is a species of the wrongful act. And although according to local law the prospectus requirement is limited, there can also be reasons to issue a prospectus in other cases for instance when it is distributed in one or more jurisdictions where there is indeed a prospectus requirement (in this connection for instance the Netherlands and the BES Islands come to mind).

If the misleading nature of the statement is an established fact, this will automatically constitute a wrongful act. An assessment of whether the investor had indeed been misled is - contrary to what would normally be the case - unnecessary in order to reach the opinion that this is a wrongful act. The task of the court is limited here with regard to establishing the facts and assessing the consequences of the wrongful act.

Apart from the prospectus other statements can also lead to liability, for instance statements in adverts, brochures, interviews or statements made during a road show. The person who makes the statements as meant in this Section publicly known has the obligation to examine the accuracy and completeness of the information made publicly known (due diligence). Without such an examination any invocation of exculpation appears almost impossible.

For the benefit of the injured parties Section 6:195 BW includes two evidentiary rules. If the claim is brought pursuant to Section 6:194 BW against someone who determined in whole or in part the content and the manner of presenting the statement (the prospectus) or has this determined, the burden of proof will rest on him with regard to the accuracy or completeness of the facts included in the statement or which are suggested by it and on which the alleged misleading nature of the statement is based, except insofar as this allocation of the burden of proof is unreasonable.

This presumed burden of proof is only aimed at the material accuracy and completeness of the prospectus (and the other information that is provided) and with regard to the accountability of the wrongful act. This should not be confused with the reversal of the burden of proof where it is about the *condicio sine qua non* connection, which we will discuss later on in connection with the WOL case (that case was about an investor basing his claim for compensation on the fact that if he would have been informed accurately and completely, he would have refrained from the transaction).

IX

BES

In the BES Islands, as in Curaçao and St. Maarten, the prospectus liability is covered by the doctrine of misleading advertising and can be found in Sections 6:194 et seq. BW-BES.

LIABILITY ACCORDING TO NATIONAL LAW
CASE LAW AND LITERATURE

X

I will now deal with several subjects about which in all jurisdictions - considering the Supreme Court as the highest court of all these jurisdictions - the same can and should be thought. Undoubtedly the most important ruling with regard to prospectus liability is the ruling in the case of World Online (WOL) of 27 November 2009. Liability for misleading statements in the prospectus is in this case still assessed on the basis of Section 6:194 (old) BW-NL, where it is irrelevant whether the person aimed at is or is not acting professionally.

Objectified misleading

The prospectus liability is about a failure in the obligation to provide information which gives a truthful picture. Normally the party reproaching another with a breach of his obligation to provide information must prove the following:

A. that the information provided is inaccurate, incomplete and/or misleading (objectively; this entails violation of a norm or the wrongfulness of conduct); so it is not about the way the investor 'experienced' this information (this therefore differs from the 'normal' assessment of the question of whether there is wrongfulness);
B. that the information provider was or ought to have been aware of this (subjective; this entails the blameworthiness) and
C. that there is a causal link between the faulty information provision and the investment decision.

With regard to point A the various legal rules have provisions of an evidential nature giving a helping hand to the investor. In the WOL case the Supreme Court confirmed once again that in answering the question of whether a prospectus is misleading (within the sense of Section 6:194 BW-NL), the starting point should be *"the presumed expectation of an averagely informed, cautious and observant ordinary investor at whom the statement is aimed or which is received by the latter".* The Supreme Court continued (in ground for decision 4.10.3): *"It can be expected that this 'reference investor' is prepared to go deeply into the information offered but not that he has specialist or special knowledge and experience (except in cases where the advertising is exclusively aimed at persons with such knowledge and experience)."*

Not every inaccuracy in a prospectus is misleading (wrongful). In answering the question of whether this is the case, the reference investor must be taken as a starting point (sometimes also indicated as *bonus pater familias*). The Supreme Court held (in ground for decision 4.10.4): *"The court will therefore only be able to qualify an inaccurate or incomplete statement as misleading if it is reasonably plausible that the statement, read in the context in which it was placed, is of the essence for the investment decision of the 'reference investor'. After all, in that case it is plausible that the inaccuracy or incompleteness can reasonably affect the economic behavior of the 'reference investor'.*

According to the Supreme Court it is not required that the investor actually read the prospectus or was influenced by it in his investment decision. The question is whether the inaccuracy or incompleteness of the statement is sufficiently essential in order to be able to mislead the 'reference investor'. So it concerns an objectified misleading. For that matter it is a question to be answered by the court. So the court must try to put itself in the position of the reference investor.

XI

Causality

If the court establishes that the reference investor has been misled and that the issuing company has acted wrongfully, this does not mean to say that the issuing company is obliged to pay compensation to the investors. After all (see point C) it still has to be ascertained whether there is a causal link between the faulty information provision and the investment decision of the investor. In that connection the question comes up of whether the investor in taking his investment decision has actually been influenced by the misleading statement and has suffered losses as a result of this.

The main rule in civil litigation law in all the countries referred to above, is that the party who alleges something must also prove it. This burden of proof also relates to the causal link between the reproached behavior on the one hand (the wrongful act) and the loss alleged on the other hand. This loss will usually consist of a loss as a result of a price drop in the period after the shares are acquired by the investor.

In the WOL case the Supreme Court also gave its opinion on the causal link between the misleading statements on the one hand (in the prospectus and beyond) and the investment decision by the investor on the other hand (also indicated as the *condicio sine qua non* link, or *csqn* link). Whether there is a csqn link cannot - theoretically - be ascertained with absolute certainty. In the end it is up to the conviction of the judges deciding the case: whether they consider it (highly) probable that the link exists.

The Supreme Court established that the application of the normal rules with regard to the obligation to furnish facts and the burden of proof can be problematical. The Supreme Court held (in ground for decision 4.11.1): *"However,*

that evidence is problematic because an investor, with regard to his investment decision, will generally allow himself to be guided by a multitude of factors, while in addition it is often impossible to demonstrate that he actually took note of the misleading statement, let alone that he was actually influenced by that misleading statement. That influence could also have taken place indirectly by the investor trusting in the advice or going by current opinions in the market, which in their turn were created by the misleading statement."

In the majority of the cases the prospectus has not been read, let alone understood. Investment decisions by average people are (exclusively) taken on the basis of market sentiments [16] and the advice of account managers or investment analysts.[17] The question of the extent to which the content of the prospectus affects such sentiments and advice is difficult to answer. When the internet became a hype almost everybody wanted to invest in the 'new economy'; expectations were running high everywhere. There is no cure for the idea that trees grow to the sky,[18] probably not for a prospectus not being misleading either.

But it has been laid down in the Prospectus Directive that the national law must provide effective legal protection. Somebody must be able to be effectively held liable (thus without too many hurdles) for a misleading prospectus. That is why the Supreme Court held (in ground for decision 4.11.2): *"With a view to that effective legal protection and considering the protection of (potential) investors against misleading statements in the prospectus intended by the prospectus*

[16] In Germany this 'Anlagestimmung' has been accepted by the Bundesgerichtshof in the case of *Beton- und Monierbau AG* of 12 July 1982. See T.M.C. Arons, *Cross-border Enforcement of Listed Companies' Duties to Inform*, Deventer: Kluwer 2012, p 144 and 155.

[17] The question of any liability of investment analysts is not dealt with here. There is only reference to somewhat older decisions by the Dutch Securities Institute (DSI) Complaints Committee of 7 August 2002, *JOR* 2003, 64 and 20 September 2002, *JOR* 2003, 65 with annotation by K. Frielink and in particular to T.M.C. Arons, *'Aansprakelijkheid van financieel analisten'* (Liability of financial analysts), in: D. Busch et al. (edit.), *Aansprakelijkheid in de financiële sector* (Liability in the financial sector) (*Serie Onderneming & Recht Deel 78*) (Series Enterprises & Law Part 78), Deventer: Kluwer 2013, p. 773-832. The question is obviously interesting with regard to the causal link when an analyst's report is based on a misleading prospectus.

[18] NRC Handelsblad 22 July 2000: *"World Online had all the ingredients to become a conflagration with prices going through the roof, as they say in stock exchange folklore."*

regulations, the starting point should be allowed that the condicio sine qua non connection between the misleading and the investment decision is present."

The Supreme Court talks of a starting point: in actual fact it is a refutable presumption, or the reversal of the burden of proof.[19] There is also something to say about this choice. The prospectus including the misleading information in it (and/or provided afterwards), influences the market sentiment. A certain climate arises with associated expectations of investors affecting their decision to acquire securities. The issuing company is primarily responsible for providing information which is relevant to the respective market sentiment. The question of whether the market does or does not operate efficiently, and therefore whether the price (development) of the respective securities is a correct reflection of the information about those securities available at that moment in the market, appears to me to be rather within the risk sphere of the issuing company than in that of the investors, certainly if the prospectus appears to be misleading on essential points. The idea that the Supreme Court appears to follow: that investors go by the sentiment in the market rather than by the prospectus, appears to me correct.

The presence of a csqn connection will not have to be assumed if, for instance, the investment decision had already been taken before the misleading statement (the prospectus) was made publicly known. This might be applicable to (some of) the people who received candies from World Online in 2000. WOL shares were

[19] In Belgium it is stipulated in Section 61 §2 of the Prospectus Act 2006: *"The disadvantage inflicted on the investor, is, subject to evidence to the contrary, considered to be the result of the absence of or the misleading or inaccurate nature of the information in the prospectus and any additions to it, if the absence of this information or the misleading or inaccurate nature of it is such that a positive climate could be created in the market or the purchase price of the investment instruments could be positively affected."* (underlining added - KF). Section 61 of the Prospectus Act 2006 stipulates in §1 that the prospectus should state explicitly who is responsible for the integral prospectus and any additions to it. Only the issuing company, its executive, supervisory or management bodies, the supplier, the applicant for admission to trading and the guarantee underwriter can undertake this responsibility. This means that only these persons can be held liable on account of the Prospectus Act. In all other cases it is only possible to fall back on the general law on liability. If only the issuing company has adopted the prospectus liability, the others who it was desired to sue can only be sued on the basis of the general law.

reserved for business relations of WOL, friendly relations of top woman Nina Brink and family members for which they had priority of purchase.

In connection with the question of whether the court will take as the starting point that the csqn connection is present, the knowledge and experience of the respective investor also plays a role. If an investor is involved who has relevant knowledge and experience in this connection, and therefore can be recognized as a professional investor, there might be reason to take the ordinary rules of the law on evidence as a starting point. This will also depend on the assessment made by the court about the question of whether such an investor was influenced in his investment decision by the (misleading) prospectus. When an ordinary investor has been assisted by a relevant professional advisor, this can also play a role.

If an investor subscribed to an issue and acquired securities while it appears afterwards that the prospectus was misleading, the investor can sell his securities immediately in connection with his obligation to limit his losses as much as possible, unless the price drops immediately down to zero. If the investor sells his securities, his loss will be fixed and this can be considered as loss directly arising from the misleading nature of the prospectus. The investor can also choose to retain his securities, for instance because he expects the price to recover in the long term, or even increase. But the price can subsequently decrease further at a later stage for all kinds of reasons. The question in this respect is then, at what moment and to what extent is the csqn connection broken? The 'extra' loss caused because the investor did not sell his securities does not have a causal link with the misleading prospectus and therefore cannot be recovered from the issuing company (or the bank).

In quashing the judgment of the Appeal Court on that point, the Supreme Court declared it to be law in the WOL case (i) that by not stating in the prospectus for what amount the Kalexer shares were sold at the end of December 1999, World

Online, ABN AMRO and Goldman Sachs acted wrongfully towards the investors in World Online shares who subscribed to the IPO or bought World Online shares after the IPO, at the latest on 3 April 2000, and (ii) that by bringing about a misleading opening price ABN AMRO acted wrongfully towards the investors who bought World Online shares on 17 March 2000 or did not sell their shares in the period from 17 March up to and including 3 April 2000 on the basis of the misleading opening price of 17 March 2000.

Investors who bought shares after 3 April 2000 were aware of the discussion about the possible misleading nature of the prospectus and of the price drop which occurred in the meantime. They will then not be able to rely on the doctrine of prospectus liability. The csqn connection is absent with regard to them.

XII

Director of issuing company[20]

In my annotation in the WOL ruling I stated that the CEO of a securities issuing company is *qualitate qua*, so by definition, (co-)responsible for the prospectus,[21] which does not mean - and certainly not automatically - that this CEO is also personally liable for a misleading prospectus. Whether in an actual case there will be a personal liability of a director towards third parties will have to be assessed on the basis of the rules of the 'ordinary' wrongful act and this, I argued,

[20] See further on this subject C.W.M. Lieverse and M.H.C. Sinninghe Damsté, '*Aansprakelijkheid van bestuurders voor schending van financiëletoezichtswetgeving'* (Liability of directors for violation of financial supervision legislation), in: D. Busch et al. (edit.), *Aansprakelijkheid in de financiële sector* (Liability in the financial sector) (*Serie Onderneming & Recht Deel 78*) (Series Enterprises & Law Part 78), Deventer: Kluwer 2013, p. 663-710.

[21] Section 5:13 subsection 3 Wft stipulates: *"The prospectus must state whether the responsibility for the information provided in a prospectus rests with the issuing company, its executive or supervisory body or the Board, the supplier, the applicant for admission to trade in a regulated market or the guarantee insurer."* This subsection was added on 1 July 2012. As appears from the Explanatory Memorandum, Parliamentary Documents (*Kamerstukken*) II, 2011-2012, 33 023, no. 3, p. 9, it should be apparent from the prospectus which person takes the responsibility for the entire content of the prospectus. This can be multiple persons, however, at least one of the persons referred to in this Section must be responsible for the entire content. Then national law determines which person is responsible in the event that a prospectus appears to be misleading.

will not quickly be the case.[22] This is in line with the view defended in the literature that a director is not one of the persons meant in Section 6:194 BW who make a statement publicly known or have this made known.[23]

Prof. Timmerman,[24] following the example of others, pointed out that according to Dutch law there can still be a snag. The fact is that in Section 6:193a subsection 1 under b BW-NL the *"person who acts on his behalf"* is equated with a 'trader' (including an issuing company). The director of the issuing company acts on behalf of the issuing company. According to the literal text of the Act a consumer would also be able to bring an action on the basis of the doctrine of prospectus' liability against the responsible director. This could make the threshold for liability lower than in company law: after all, for personal liability this law requires that the director must be able to be seriously reproached.[25]

I wonder whether this risk is realistic. The issuing company has the prospectus distributed. This takes place under the responsibility of the Board, as also the prospectus has been formulated (formally) under the responsibility of the Board, quite apart from the question of the extent to which individual directors were involved in it. If a bank as the lead manager takes care of the distribution of the prospectus the same applies: that takes place (in the end) under the responsibility of the Board of the bank, even if the directors of the bank were not involved in the composition and the representation of the prospectus.

---

[22] Aside, I point out that the Wft has all kinds of rules which are applicable to everybody such as the prohibition of market manipulation (Section 5:48 Wft), the prohibition of insider trading (Section 5:56 Wft) and non-compliance with the obligation to report of Section 5:48 Wft. These rules do not deal with directors' liability.

[23] C.W.M. Lieverse and M.H.C. Sinninghe Damsté, '*Aansprakelijkheid van bestuurders voor schending van financiëletoezichtswetgeving'* (Liability of directors for violation of financial supervision legislation), in: D. Busch et al. (edit.), *Aansprakelijkheid in de financiële sector* (Liability in the financial sector) (Series Enterprises & Law Part 78), Deventer: Kluwer 2013, p. 680.

[24] L. Timmerman, *'De aansprakelijkheid van een bestuurder voor een misleidend prospectus'* (The liability of a director for a misleading prospectus), in: D. Busch and M.P. Nieuwe Weme (edit.), *Christels Koers* (Liber Amicorum prof. mr. drs. C.M. Grundmann-van de Krol), Deventer: Kluwer 2013, p. 707.

[25] Cf for instance Supreme Court 17 December 2010, *JOR* 2011/53 with annotation by J.B.S. Hijink with regard to *Nieuwburg c.s./ TMF*.

But can it be said of these directors - having the functional responsibility - that they 'act' as meant in the part of Book 6 BW-NL 'Unfair commercial practices'? And what about the employees of the issuing company and the bank receiving the instructions (and the power of attorney inherent therein) to distribute the prospectus? And what about the investment analysts employed by the bank and who make analyses for remuneration? Such analyses can strongly influence their clients, or if published, the market. In the terminology of the Act *"they act on behalf of the trader"* and therefore also run the risk of being held liable for a misleading prospectus.

It appears to me that the doctrine of "unfair commercial practices" should be about relevant as well as reproachable acts. With regard to directors and employees for instance of the issuing company, their acts are attributed to the company and therefore lose autonomous meaning in this connection. They cannot be considered as 'traders' in the sense of Section 6:193a subsection 1 under b BW-NL.[26] Certainly because in the history of this regulation no connecting factor can be found for the idea that the legislator intended to introduce such a form of liability for a large group of persons, I would think that someone (not being a trader) can only be sued if he can be personally or attributably reproached, thus if he knew or ought to have known that he cooperated with or implemented an unfair commercial practice.

[26] Wrongly different the District Court of Zwolle 27 July 2011, *JOR* 2012, 208 with annotation by J.B.S. Hijink in the case of *Hogeboom c.s./Cash & Property*.

INTERNATIONAL PRIVATE LAW

XIII

The Netherlands

Since 11 January 2009 Rome II has been applicable in the Netherlands with regard to the applicable law on non-contractual obligations.[27] Rome II is not applicable in Curaçao, St. Maarten, Aruba and the BES Islands.[28] This observation obviously does not exclude a certain reflex effect.

Rome II applies to events causing loss occurring after 11 January 2009 (Art. 31 Rome II). Non-contractual obligations, insofar as they are relevant here, involve obligations arising from (legal) obligations to pay compensation pursuant to a wrongful act.

In my opinion prospectus liability is covered in the scope of Rome II. After all, it is rather generally stipulated in Section 2 subsection 1 of Rome II that the term 'loss' means any consequence arising from a wrongful act, unjust enrichment, management of another's affairs or pre-contractual liability. So this also covers pure financial loss (losses suffered, lost profits), which will often be the case in connection with prospectus liability.

Under the operation of Rome II the applicable law must be determined, also by the Dutch court, according to the location where the loss occurs, regardless of in which countries the indirect consequences of this event occur. So it concerns the location where the direct loss has been suffered (*lex loci damni).* In the event of financial loss, the court must determine in which country the loss has been

[27] Regulation (EC) no. 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations, Official Journal L 199 of 31 July 2007, 40 ('Rome II').
[28] Explanatory Memorandum, Parliamentary Documents (*Kamerstukken) II*, 32 047, no. 3.

suffered or the profit was missed; after all, the pure financial loss occurs in that country (Art. 4 par. 1 Rome II). The country where the loss occurs will in many cases (also) be a country other than the country where the investing general public has initially been appealed to by means of a prospectus.

For instance an investor living in Austria comes to mind who subscribes to securities via his investment account held in Germany, which securities are offered in a prospectus - also - available in Austria. Investors' losses will often occur in multiple countries. For instance under Rome II the right of the country where the investor holds his investment account is applicable not the right of the primary publication location. For each investor it must be ascertained in which country he suffered his loss or missed his profit.

If there are ten investors who suffered a loss in ten different countries and believe that they have a claim on the grounds of a misleading prospectus (or statements made outside the prospectus which caused confusion amongst the general public relevant for the investment decision) each claim will be governed by the law of the respective country. Moreover, it can happen that one and the same investor holding investment accounts in various countries, suffers losses in multiple countries.

So with regard to the doctrine of prospectus liability Rome II creates uncertainty for the issuing company and its directors, but also for the syndicate leader or others who played a central role in the preparation, guidance and implementation of the issue. Taking the example of ten investors as a starting point, the application of the law of ten countries could therefore lead to very different outcomes. For instance it is quite imaginable that if the WOL case had been submitted to the highest court of justice in France, Greece or Germany, and had been assessed according to the national law of the respective court, the final ruling would have been (partly) different. This fact is at least at odds with the

starting point of the European (and also Dutch) regulations that investors must be treated equally.[29]

XIV

Curaçao and Sint Maarten

Pursuant to the international private law and inter-regional private law of Curaçao (and St. Maarten) prospectus liability is considered as a species of wrongful act and therefore governed by the law of the country where the wrongful act has been committed (*lex locus delicti*).

The location where the investing general public has initially been appealed to by means of a prospectus is considered as the location of the wrongful act. In this connection this is also called the publication location.

A claim submitted to the court in Curaçao against a Curaçao NV or BV which recommends its shares by means of a prospectus initially issued for instance in the Netherlands or the United States, will be governed by Dutch or American law respectively. This opinion is supported by the ruling with regard to the (then still) Netherlands Antillean company Polynesian NV[30] which had made available an issue prospectus in the Netherlands. In this ruling Dutch law was applied to the question of whether liability existed for untrue statements included in the prospectus without any considerations of international or inter-regional private law.

Could this be considered differently? The answer is affirmative. For as long as the legislator has not formulated any rule in this respect and for as long as no available case law points in a certain direction, other connecting factors than the

[29] Therefore it can be seen with regard to certain offerings that a prospectus is only provided to the person who gave his address and the location of his investment account.
[30] Supreme Court 20 December 1985, NJ 1986, 231 in the case of Polynesian.

primary publication location are defensible. The country where the (direct) loss occurs comes to mind, or the country where the aggrieved party has his fixed domicile or residence, or (in the event of a listing) the law of the country where the respective securities are included in the listing.

XV

BES

Pursuant to the international private law and inter-regional private law of the BES Islands, prospectus liability is considered as a species of wrongful act and therefore governed by the law of the country where the wrongful act has been committed (*lex locus delicti*). The same applies as has been said with regard to Curaçao and St. Maarten.

*** * * * ***