Summary and concluding observations

In 1622, disgruntled shareholders of the Dutch East India Company (*Vereenigde Oost-Indische Compagnie* or VOC) complained that their interests had been harmed, as the directors had entered into expensive warfare against the Spaniards. The States General had instructed the VOC directors to chase away the Spaniards from the East. The semi-public nature of the VOC was an important conflict of interest between shareholders and the VOC. More than two centuries later, holders of bearer shares of the Dutch Trade Association (*Nederlandsche Handel-Maatschappij*, or NHM), one of the predecessors of ABN AMRO, took legal action against the NHM, which had deprived them of their dividend rights without their consent. By the end of the 19th century, shareholders of Royal Dutch – which later merged with Shell – protested when Royal Dutch tried to prevent an unfriendly takeover by Standard Oil. Royal Dutch issued a new class of shares to insiders, who had the right of a binding nomination for the appointment of directors. In 2007, activist hedge funds forced a split up of Stork against the will of the board and many shareholders.

Conflicts between shareholders and the company are an inherent feature of company law. They do not only arise in case of mismanagement by the directors. Conflicts of interest between individual shareholders and the company or fellow shareholders also serve as an important source of shareholder revolts. These conflicts give rise to questions which are at the heart of company law: what is the relation between a shareholder and the company? What duties does a director owe his shareholders? How should the interest of the company be defined? Do directors need to take into account other interests than the company's interest? Are shareholders well suited to prevent mismanagement by directors? May shareholders act solely in their own interest, or do they need to take into account the interests of others?

This study addresses these questions from a historical perspective. It not only tries to find answers under current company law, but it also aims at deepening our insight into the evolution of company law, particularly with respect to the balance of power within companies. The focus is on Dutch law, but the argument is embedded in a broad international context, taking into account influences from other legal traditions, including the UK, the US, Germany and France.

Two legal forms, originating from Roman law, play an important role in this book: *societas* (partnership) and *universitas* (corporation). Both have historically influenced the development of company law. But they are also used as a metaphor for conflicts of interest between individual shareholders and the collective interest. The Roman *societas* attached great importance to the

interests of individual partners, whereas the *universitas* has emphasised the interest of the institution as a whole.

This book consists of five parts. Part I summarises the historical development of *societas* and *universitas.* Parts II–V chronologically analyse the development of the law on listed companies from the perspective of the relationship between shareholders and the company. Part V deals with the heart of the contemporary corporate governance debate.

Part I: Roots of the company limited by shares: *societas* and *universitas.*

Societas and *universitas* were each other's opposites in many respects. *Societas* has always been focused on profit in favour of the partners; originally, the *universitas* was a not-for-profit association. A *societas* dissolved as soon as one of the partners left the partnership. In principle, a *universitas* could exist for an indefinite period of time and its existence did not depend on the identity of its members.

The *societas* constituted a private contract between the partners. The *universitas*, however, is rooted in public law and had an institutional nature. The incorporation of an *universitas*, for instance, normally depended on governmental approval. As the *societas* was a contract, the decisions were taken by unanimity. Consequently, great importance was attached to the interests of individual partners who were trading in their own name. The *universitas*, however, was able to enter into third party transactions. This implied an emphasis on the unity of the organisation and its collective interest. Among the few rules regarding the decision making process of the *universitas* was the principle of majority voting.

Both *societas* and *universitas* evolved during the Middle Ages. The law on partnerships was developed on the basis of the *societas.* The *universitas* provided a suitable legal framework for the most diverse Medieval institutions, including the church, towns, boroughs, guilds and universities. Some of these, notably the guilds, were democratically organised: for instance, directors were appointed by the members in a general meeting.

The medieval *universitas* is also the basis for the emergence of a concept of legal personality in the 19th century. Rules on the internal decision making process and on the binding character of charters, regulations and resolutions were developed within the framework of the *universitas.* The institutional nature of the *universitas* implied that the members were bound by the rules of the *universitas*, not because they agreed to them, but because they were members. This doctrine did not only apply to members of a guild, but also to monks in a monastery and to citizens of a town.

The *universitas*, or *corporation* as it was called in England, was received throughout Europe, but it had various features in different countries. In England, for instance, the regulated company evolved out of the trading guilds.

The regulated company served as a legal basis for the joint stock company of which the English East India Company (EIC) is an important example. Like the guilds, regulated companies and joint stock companies were democratically organised. In the Low Countries, the *universitas* served as a framework for various (semi-)public institutions including water boards and the Admiralty. The organisation of the latter bore some similarities with the VOC.

Part II: The company limited by shares in the 17th and 18th century.

This part examines the *actiëncompagnie*, the company limited by shares as it evolved in the 17th and 18th century. The VOC, the world's most powerful company in the 17th century, was the result of a merger between the so-called precompanies (*voorcompagnieën*): partnerships of merchants incorporated for a single journey to the East. Investors enjoyed limited liability. The incorporation of the VOC in 1602, however, gave birth to a different institution. The VOC was incorporated pursuant to a charter granted by the States General, a representative body of the seven provinces of the Low Countries. The charter shows that the VOC was semi-public by nature. The charter, for instance, granted important public powers in order to govern the territories in the East which can be derived from the legal framework, offered by *universitas.*

Upon incorporation, it was envisaged that the VOC would exist for a long time. The incorporators did not realise, however, that they established a company for an indefinite period of time. The latter was made possible by the rapid emergence of the stock trade in VOC shares. As a result of the emergence of a secondary market, shareholders got an *exit*-opportunity without the dissolution of the company being required. A constantly changing shareholder base enabled a sustainable organisation.

Although the VOC was a company limited by shares, it cannot be considered an NV. It lacked a typical feature of the NV: a shareholders' meeting. Shareholders (participants) had no control rights whatsoever. As the VOC not only had a commercial character, but also served as a vehicle for the States General to fight the Spaniards and Portuguese in the East, the position of the participants was not enviable. The periods of warfare, the need for long-term investments, frequent abuse of power by the directors and the absence of accountability, led to an uprising of participants around the renewal of the Charter in 1623. This conflict resulted in a new corporate body, consisting of participants with large stakes, which had to supervise the directors. Furthermore, the new charter included some amendments aimed at preventing abuse of power by directors. In practice, however, few changes occurred.

Unlike the VOC, the EIC in the 17th century was primarily a trade company. As a result, fewer conflicts of interest arose than was the case with the VOC. More than the VOC, the internal organisation of the EIC had more similarities to current companies limited by shares. During its yearly general meeting,

shareholders appointed their directors. From a financial perspective, however, the EIC was less developed than the VOC, at least during the first decades of its existence. For instance, the EIC did not have a permanent share capital until the second half of the 17th century. Unlike the VOC, whose corporate governance would not really change after 1623, the organisation of the EIC would continue to develop. In the second half of the 18th century, the EIC would ultimately outstrip its Dutch counterpart.

In the course of the 18th century, the company limited by shares was gradually 'privatised'. The interference of the public authorities gradually diminished during the 18th century. Most of the companies which were set up during the bubble of 1720 still had some connection to the public authorities. The prior approval of the public authorities was necessary for incorporation, as is shown by the fact that the city council of Amsterdam blocked the incorporation of an insurance company.

In the second half of the 18th century, the influence of the *universitas* on companies limited by shares gradually disappeared. For instance, companies limited by shares were normally incorporated pursuant to a contract, without the public authorities being involved. Normally, shareholders had only a few control rights. To the extent that a company limited by shares had a shareholders' meeting, it was rarely convened; in practice, investors entrusted supervisory directors (*commissarissen*) with the monitoring and appointment of the directors. From the end of the 18th century, a Dutch company limited by shares typically had three corporate bodies: the board of directors, the supervisory board and a shareholders' meeting.

Some of these companies limited by shares were still close to partnerships. In two cases, judged by the Supreme Court of Holland and Zealand in 1782 and 1783, the supervisory directors the Amsterdam Insurance Society were held personally liable for the acts of a director, which they were supposed to monitor. Apparently, the legal regime of this company differed from the semi-public VOC and West India Company (WIC), whose directors were not personally liable. This study argues that, at the end of the 18th century, there were two types of companies limited by shares: the semi-public, such as the VOC and the WIC, and a purely private company limited by shares, such as the Amsterdam Insurance Society, which sometimes still retained certain characteristics of a limited partnership. The borders between a partnership limited by shares and a company limited by shares were fuzzy.

Part III: The company limited by shares in the 19th century.

In 1911, the French Commercial Code was introduced in The Netherlands. This Commercial Code included the French company limited by shares, the *société anonyme* (SA). Building on the French company limited by shares of the late 18th century, the SA had a contractual basis. The company was 'anonymous',

because the company was not allowed to include any of its shareholders in the name of the company. As shareholders were not externally liable for the debts of the company, creditors had to seek recourse from the assets of the company.

In order to prevent abuse of the SA, the Commercial Code required prior governmental approval before an SA could be incorporated. Initially, governmental approval in practice was little more than a formality. The internal organisation of Dutch SAs was similar to private companies limited by shares that were set up by the end of the 18th century. The introduction of the SA in the Netherlands originally had only a few practical consequences.

Things changed by the end of the 1820s when the Dutch government started to use mandatory governmental approval in order to exercise influence over the economy. It became more difficult to incorporate an SA as the government started to pay attention to the position of creditors and minority shareholders before it granted its approval. The King also argued that he could withdraw his approval from existing companies. As an SA could not *exist* without governmental approval, this implied that the company could be automatically dissolved.

This new policy resulted in great upheaval in the 1830s. Liberal businessmen argued that the governmental intervention went too far, relying on liberal principles of contractual freedom and *laissez faire.* On the other hand, the government defended its policy, equally relying on liberal principles: that the Dutch oligarchic tradition should come to an end and that the shareholders' meeting should be able to take its place as the highest body within the company. In the Dutch Commercial Code (*Wetboek van Koophandel* or *WvK*; 1838) a compromise was reached: governmental approval could only be refused if the articles of association violated the law or public order, and approval could not be withdrawn. On the other hand, directors would be personally liable if they violated the articles of association. What is more, in order to strengthen the position of minority shareholders, the WvK limited the number of votes to be cast by individual shareholders.

The second half of the 19th century is an important period for the law on the NV. During this period of economic growth, emerging international free trade led to European regulatory competition on company law. While the Dutch economy grew gradually, the turbulent German economy experienced jerky growth. The *Gründerkrise* in the 1870s led to an intense corporate governance debate in Germany, followed by a various legislative changes. When a large corporate scandal in Rotterdam came to light – the so called *Pincoffs Affair* – the German debate jumped over to The Netherlands. However, things went differently in the two countries: the German rules on company law constantly changed, whereas the Dutch were not able to agree upon a single change to Dutch company law.

Although the WvK was not amended, Dutch company law greatly developed in the course of the 19th century. As the incorporation of small private

companies limited by shares gained popularity, the number of NVs rapidly increased. The listed NV was equally emerging by the end of the 19th century. Listed companies were normally controlled by one or a few shareholders who successfully circumvented the mandatory maximum of votes that could be cast by single shareholders. One method, used in the first decades after the entry into force of the WvK, was the right of a binding nomination, effectively setting aside the power of the shareholders to appoint directors. The articles of association could provide that a director could only be appointed by the shareholders, if he was nominated by, for instance the supervisory board. In practice, the Dutch oligarchic tradition continued as far as the law allowed for it. Gradually, however, binding nominations made way for non-binding nominations.

By the end of the 19th century, Dutch law, including company law, gradually orientated towards German law. In Germany, Savigny had developed his theory on legal personality on the basis of the Roman *universitas.* Initially, this theory bore few consequences for German company law. The AG, the German company limited by shares, was considered a subtype of the *societas*, just like the SA or the NV. As a result of an influential work of Renaud in 1863, the German doctrine changed: Renaud argued that the AG was a legal person and a subtype of the *universitas.* The new German doctrine had consequences, amongst others, for the process of incorporation, the nature and character of the articles of association, the bylaws and corporate resolutions, as well as on the voting rules, including the principle of majority voting. In addition, the new doctrine allowed for a deviation of the company's interest from the joint shareholders' interest. In the course of the 20th century, Dutch legal scholars would build on these ideas which influenced the system of Book 2 of the Dutch Civil Code (on legal persons).

Part IV: Oligarchy and the growth of the enterprise.

In 1898, Royal Dutch Oil decided to introduce a defensive measure in order to protect itself against a possible takeover bid by Standard Oil. The holders of a newly introduced class of shares had the right to make a binding nomination for the appointment of directors. By that time, binding nominations had not been used for a few decades. Until the revision of Dutch company law in 1928, lawyers discussed whether such a binding nomination should be admissible. Meanwhile, many companies introduced similar oligarchic clauses in their articles of association. Controlling shareholders secured their power, even if their stakes were diluted as the result of many issuances of shares in the 1910s and 1920s. As shareholders normally trusted their directors, most shareholders accepted that they were *de facto* deprived of their right to appoint directors.

In the following decades, shareholder control rights were reduced even more as the result of the growth of enterprises. The growth of enterprises strengthened the position of directors, both in absolute and in relative terms. In absolute terms, because directors were managing larger enterprises; in relative terms, because the growth of enterprises was accompanied by a gradual dispersal of the shareholder base. A dispersed shareholder base in turn enlarged free rider effects, coordination problems and rational apathy. As the result, the risk increased that shareholders, holding only a small stake in the company, could exercise a disproportionate influence on the outcome of the meeting. In order to limit this risk, companies have introduced, in the course of the 20th century, various instruments to further limit the power of shareholders. This marginalised the power of shareholders even more, starting a vicious circle. In the decades after WWII, directors also started to pay attention to the interests of employees, as the result of which shareholders lost even more influence.

This development had important legal consequences. The first consequence was the so-called *institutional doctrine of the company.* The NV was no longer considered a contract. Under the new doctrine, which is by and large still adhered to today, the NV is governed by its own set of rules, including the applicable provisions in the law, the articles of association, bylaws, resolutions, as well as the principles of reasonableness and fairness. These rules are of an institutional nature: just as an act is binding upon all persons in a country, the rules governing the NV are binding upon all constituencies within this legal order, including shareholders. Under the institutional doctrine of the NV, directors are no longer considered agents of the shareholders: they derive their powers and authority from the legal order itself. In addition, under the institutional doctrine, the NV has its own interest, to be distinguished from the interest of the (joint) shareholders. The NV is no longer a contract between the shareholders, it is considered of institutional nature: *Universitas* replaced *societas.*

The second consequence was the introduction of the so-called *structure regime* in 1971, applicable to large Dutch companies. In these *structure companies*, shareholders were deprived of many control rights. For instance, directors were appointed by supervisory directors, whereas supervisory directors were appointed through co-option. Shareholders and the works council, an advisory body, consisting of employees, had the right to recommend a certain number of candidates for the supervisory board.

In the two decades following the introduction of the *structure regime* shareholder control rights eroded even further. This was the result of a new protective measure which had emerged by the end of the 1960s: the issuance of preference shares which aimed at neutralising the influence of the shareholders' meeting. Even if it was introduced as a defensive measure against hostile takeovers and corporate raiders, the instrument was also used in an offensive manner: boards used it in order to limit the influence of existing shareholders.

Part V: Under the stars of law and economics.

It seems self evident that, by the early 1990s, the balance of power had shifted away from shareholders to the board and supervisory directors. There was a clear need to restore the checks and balances within the company. At the same time the shareholder base of many companies was radically changed due to the liberalisation of capital markets and through preparation for the introduction of the Euro. Dutch pension funds, insurance companies and banks sold large parts of their shares in Dutch companies, mainly to American and British institutional investors. The terms of reference of the new shareholders were by and large formed by the agency theory, which became influential from the early 1990s.

The agency theory clearly has its merits. It has deepened our understanding of conflicts of interest within the company and the costs that arise from diverging interests between agents and principals. On the other hand, in many areas, the agency theory – which does not, for example, distinguish between a legal person, a company and its enterprise – is difficult to reconcile with Dutch law. Moreover, the theory is based on some questionable assumptions. For example, it assumes that an individual acts as a *homo economicus*, it assumes an efficient market, as well as appropriate international regulation of external costs. Over the past few decades, these assumptions have come under attack. The agency theory also ignores or underestimates non-quantifiable elements, both in its analysis and in its proposed solutions. As a result, the agency theory offers a sometimes incomplete analysis and it does not always take into account the harmful side effects of the remedies it proposes. Nevertheless, the agency theory is of great practical importance, because it is the internationally dominant paradigm on company law. It delivered an ideological basis for a revaluation of shareholder value.

This study argues that different streams joined together in the 1990s: a pragmatically driven need to strengthen the position of shareholders in order to restore the balance of power, the international furore of the agency theory, and a rapidly changing shareholder base. In 2005, 75% of Dutch listed shares were held by foreign investors. The scandals around the new millennium were a further catalyst for change: within a few years, proxy voting was introduced in the Netherlands, the structure regime was reformed and shareholders who hold a 1%-stake got the right to put items on the agenda of the general meeting. Furthermore, the civil code introduced a right for shareholders to approve certain transactions which change the identity or character of the company or its enterprise. At the same time, the Dutch corporate governance code, based on the principles of apply or explain, was drawn up. Many companies changed their own governance rules and strengthened the influence of shareholders, for instance, by abolishing protective measures.

These important changes occurred within a few years and had immediate consequences for the balance of power within the company. This became

apparent when offensive shareholder activists built up large stakes in listed companies and tried to determine the strategy. Directors and supervisory directors, who were gradually attaching more importance to the shareholders' interests, were not always prepared for the new balance of power. At the same time, uncertainty arose with respect to the rules of conduct in case of a conflict with offensive shareholder activists. This legal uncertainty worked in favour of the latter. Offensive shareholder activists did not hesitate to explore the boundaries of their new rights. More than once, they submitted their cases to the Enterprise Chamber which enthusiastically used its new powers to order immediate provisional measures.[1] The unintended consequence of this judicial enthusiasm was that inquiry proceedings were used as an instrument by offensive activists, even if there had been no reason to doubt the correctness of the company's management.

The various legislative changes and the Corporate Governance Code intended to improve the accountability of the board's management. The legislator had never aimed, however, at changing the division of powers between the directors and shareholders with regard to the company's strategy. It was never intended to give shareholders the right of initiative with regard to the strategy. Activist shareholders, however, ignored this subtle but important distinction.

The response to the offensive activism as it occurred in the case of *Stork* and *ABN AMRO* came quickly. The Supreme Court repeatedly corrected the Enterprise Chamber and underlined the importance of the autonomy of the board, including with regard to corporate strategy. Between 2008 and 2013 the law changed in various respects, and the Corporate Governance Code was amended as well; the position of the board of directors was strengthened. Meanwhile, the credit crunch temporarily affected the campaigns of offensive activists.

Over the past few years, the public discourse has shifted towards the promotion of sustainable shareholder engagement and of a continuous dialogue between the company and its shareholders. Various codes of conduct have been drawn up in order to improve the quality of the involvement of shareholders. Simultaneously, the dialogue between the board and shareholders has been hindered for various reasons. One such reason is that institutional investors often hold stakes in hundreds, if not thousands of companies. It is to be

1. The right of inquiry allows shareholders and companies to submit their disputes to the Enterprise Chamber of the Amsterdam Court of Appeal. If the Enterprise Chamber determines that there are well-founded reasons to doubt the soundness of the company's management, it can order an inquiry. Depending on the outcome of that inquiry, the Enterprise Chamber may then decide whether mismanagement has occurred. In that case, the Enterprise Chamber can order a range of far reaching measures. These can include the temporary transfer of shares, dismissal of directors and even the dissolution of the company. The Enterprise Chamber can also, at any stage, order immediate provisional measures. The right of inquiry proved to be a powerful instrument for activist shareholders.

expected that the debate over the next few years will focus on the question of how sustainable shareholder engagement can be further promoted.

The concluding chapter returns to the *societas* and *universitas*, symbolising the conflict of interest which can arise between individual shareholders and the interests of the company. Over the past decades, the ideological debate on the corporate objective has long been focused on the question of how value should be distributed among the various constituencies: should priority be given to shareholder or stakeholder value? This study proposes to move away from questions on the *distribution* of wealth and, instead, to focus on value *creation*, a collective interest of all constituencies. Normally, all stakeholders have an interest in the company's success over the long term. The company's success depends on its ability to create sustainable value. A focus on the long term success of the company also offers a pragmatic way out of distributional questions: depending on the situation, the company's long term success might be better served by increased investments, stable dividends or better wages for certain employees. The ideological discussion on the distribution of value among shareholders and other stakeholders will lose much of its importance when the focus of the corporate governance debate is shifted to long term value creation. From *societas* to *universitas.*

A focus on sustainable value creation also aligns the public interest with the interest of the company. This will require, however, sufficient autonomy for the board to take into account negative externalities which may be caused by the company. The board of directors should therefore promote the long lasting success of the enterprise, thereby, (i) to the extent reasonably possible, preventing directly interested parties from being disproportionally affected, and (ii) taking into account the risks on negative externalities.

A strong autonomy of the board of directors does not imply that it is not accountable. On the contrary, directors should be accountable in many directions, not only to their supervisory directors and shareholders, but also, for example to creditors under a credit agreement, to employees through the works council, to customers, to civic society and to the public authorities. This does not result in the board being accountable to nobody, as the board has a clear duty to promote the long term success of the company.

In principle, shareholders of a listed NV exercise their control rights in a *negative manner*. That is, shareholders can withhold their consent to proposals of the board, and they can ultimately dismiss directors and supervisory directors. Shareholders also have certain *proactive* or *positive* control rights. For instance, shareholders collectively holding a 10% stake have the right to convoke a general meeting. Shareholders may put items on the agenda if they collectively meet the threshold which was recently increased to 3% of the share capital (or, depending on the articles of association: a lower percentage). These

proactive shareholder control rights do not alter, however, the duties of the board and its authority to determine the strategy. When shareholders exercise their control rights in a negative way, a fair balance may be reached between the legitimate interests of shareholders and the collective interest of a strong board of directors: a fair balance between individual *socii* and the *universitas.*

The collective interest of a long lasting successful enterprise does not always correspond to the interests of certain shareholders. This is especially true when a shareholder prefers quick profit to sustainable profit. Short-termism by shareholders therefore constitutes an important source of internal conflicts of interest and may hinder sustainable value creation. In order to prevent short-termism in the case of a voluntary public offer, this study proposes to strengthen, in a European context, the control rights by shareholders of the *bidder* in case of a voluntary offer. More than the shareholders of the target company, the shareholders of the bidder have an interest in the long-term success of the takeover. This study also contends that the board of directors should focus its dialogue on those shareholders, whose influence it can be reasonably expected will promote sustainable value creation and the success of the company over the long term. Depending on the shareholder base, it might consider granting (within certain limitations) extra voting rights to long term shareholders.

When conflicts of interest between individual *socii* and the *universitas* cannot be eliminated, the question arises as to how they can be bridged in case of a conflict. The principle of proportionality can then be a useful tool. The principle of proportionality offers a formal framework, which enables shareholders and directors to determine their respective positions. The principle of proportionality cannot eliminate but can limit legal uncertainty, while allowing for pragmatic solutions: it defines the relevant questions in order to determine whether shareholders should take into account other interests than their own. The more influence shareholders can exercise and the more impact they can have on the interests of the company or of other constituencies, the more they need to take these interests into account. Conversely, the board of directors must promote the long term success of the enterprise, but do so as far as reasonably possible without disproportionately affecting the interests of other constituencies, such as shareholders. Consequently, the principle of proportionality can be helpful to strike a fair balance between the legitimate interests of individual shareholders and the collective interest.

Determinants of the division of power

Context matters

What are the determinants of the division of power between shareholders and directors? Let us make some giant leaps through the history of company law.

Due to high expectations among wealthy investors, the VOC could easily attract sufficient capital without granting control rights to its shareholders. Having learned from experience, investors were less enthusiastic when the WIC was incorporated 19 years later: only after shareholder rights and the monopoly of the WIC were expanded could it attract sufficient capital. The incorporation of the VOC and WIC illustrate that the position of shareholders depends on *supply and demand of capital.* Nowadays, things are not much different. Over the past decades, the liberalisation of international capital markets have strengthened the power of capital. As investors can easily move their money, they are able to strengthen their position in relation to the production factor labour.

As shown above, another important determinant of the power of shareholders is the *shareholder base.* In a concentrated shareholder base, controlling shareholders will have a strong position. In case of a dispersed shareholder base, the influence of shareholders will decrease, although unexpected shareholders might exert a disproportionate influence at the meeting. At the same time, the dispersion of the shareholder base was often closely related to the *growth of enterprises.* As shown above, the growth of enterprise has also decreased the power of shareholders.

Through the ages, the power of the shareholders has been influenced by *cultural factors.* For example, the reason why the supply of capital has always been sufficient is partly because of the thrifty Dutch Calvinist tradition. The homogeneous culture of the small country has always promoted a high trust society. More than elsewhere, Dutch investors were willing to invest in companies, trusting that the supervisory directors would guard their interests. Consequently, a developed capital market was accompanied by limited shareholder control rights. As the governing elite kept watch over public and private interests, shareholders were willing to invest without many control rights. Until the 1980s, corporate scandals were a rare phenomenon. Between the 1860s and 1928, a high trust society enabled shareholders and directors to work with an outdated Companies Act.

As shown above, the balance of power between shareholders and directors can also be determined by *political influence.* The VOC's war policy came at the expense of its shareholders. The EIC, however, was primarily a trade company and its shareholders enjoyed a much stronger position. The French *Compagnie des Indes Orientales*, in contrast, served as an instrument for the

French king who had full discretion in controlling 'his' company. In practice, shareholders enjoyed neither exit nor control rights; they were even forced to make additional payments on their shares in excess of the par value. The availability of an exit opportunity may be a substitute for voice. But the shareholders' voice also ultimately depends on a viable exit option.

The position of shareholders may also be influenced by *ideological motives.* The erosion of shareholder control rights as the result of the introduction of the structure regime partly was the result of an ideological movement in order to strengthen the position of employees. In the 1990's, the opposite occurred: the agency theory provided an ideological basis for shareholder primacy.

In short, the balance of power has always been the result of numerous factors, which at times strengthened and at others neutralised, each other.

Law matters?

When the balance of power is largely determined by other than legal reasons, what is then the significance of company law? Generally speaking, company law has two functions: an facilitative and a regulatory function. Company law *facilitates* entrepreneurship by creating legal forms which promote the collection of equity capital. The 17th century trading companies illustrate the importance of the facilitative function of company law. The excluded external liability of shareholders and the transferability of shares promoted the willingness of investors to invest their money in the VOC. When it subsequently appeared that their legal rights could not always be realised, it appeared more difficult for the WIC to collect sufficient equity.

Company law also has a *regulatory function*, aimed at protecting certain parties or the general interest. An example offers the right of inquiry which is of great importance for the internal relations of Dutch listed companies.

Both the facilitative and the regulatory function of company law are served by legal certainty and the efficient enforcement of rights. What is more, legal certainty and effective remedies to enforce one's rights serve an important intrinsic value: *suum cuique tribuere*, to each what he deserves.

Company law and the above mentioned determinants of the balance of power mutually influence each other. Normally, company law does not fulfill a proactive role: in response to external developments, company law normally takes away obstacles or imposes limits. In combination with these determinants, the law also influences the balance. An important change in the balance of power might then well lead to a new response from the law.

A recent example is offered by the authority of the Enterprise Chamber to order immediate provisional measures. This instrument has been introduced in order to protect minority shareholders. The legislator, however, was of the opinion that the Enterprise Chamber was using its authority too frequently. Shareholders not only used the right of inquiry as an instrument to protect themselves against,

for instance, abuse by majority shareholders; activist shareholders also made use of the right of inquiry in a proactive way: by creating nuisance value, they tried to determine the company's strategy. Consequently, the legislator had raised the threshold for shareholders to submit their case to the Enterprise Chamber.

Accordingly, the law plays an important role in the relation between board and shareholders, in addition to other factors which mostly fulfill a more proactive function. *Law matters.* As part of the ever-changing context.