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Rans D. Rosendaal

Bert Westendorf

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SPECIAL FEATURES

Corporate and Tax Law in the Netherlands: A Review of a Modern Common Market Law System

Part I

FRANS D. ROSENDAAL and
BERT WESTENDORP*

Introduction

The Netherlands has a long history of being favored by many foreign investors as a gateway to the markets of Europe or as a stepping off place for international enterprises. Recently interest by foreign practitioners in aspects of corporate and tax law in the Netherlands has increased, and that is what led to this article.

This article does not treat the subjects exhaustively, but it does respond to those questions usually asked by foreign practitioners on becoming acquainted with the law of the Netherlands. This article also attempts to highlight pitfalls for practitioners and foreigners who want to set up a Netherlands company.

Several useful publications in English do exist, some of which try to cover the whole field of Netherlands corporate or tax law, while others treat more limited fields.¹ Another objective of this article is to supplement and update available information at a time when Netherlands' laws are changing continuously.

*Messrs. Rosendaal and Westendorp practice law in the Netherlands.

¹These publications include (without intent to slight publications we might inadvertently omit): P. SANDERS, *DUTCH COMPANY LAW* (1977) [hereinafter referred to as SANDERS]; J. M. M. MAEIJER, *A MODERN EUROPEAN COMPANY LAW SYSTEM* (1978) [hereinafter referred to as MAEIJER]; FOKKEMA, *et al.*, *INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS* (1978) [hereinafter referred to as FOKKEMA]; S. N. FROMMEL, *et al.*, *COMPANY LAW IN EUROPE*, (1975) [hereinafter referred to as FROMMEL]; *BRANCHES AND SUBSIDIARIES IN THE EUROPEAN COMMON MARKET* (1976) — published by Kluwer-Harrap; S. R. SCHUIT, *et al.*, *DUTCH BUSINESS LAW* (1978) [hereinafter referred to as SCHUIT]; M. J. ELLIS AND D. JUCH, *THE PARTICIPATION EXEMPTION IN THE NETHERLANDS* (1977) [hereinafter referred to as ELLIS AND JUCH]; S. N. FROMMEL, *TAXATION OF BRANCHES AND SUBSIDIARIES IN WESTERN EUROPE, CANADA AND THE U.S.A.* (1978). *Business Operations in the Netherlands*, TAX MANAGEMENT, FOREIGN INCOME PORTFOLIOS (1976); For a translation of statutes we mention, see *The Netherlands Business Corporation Law*, [1972] COMM. MKT. REP. (CCH) 193 [hereinafter referred to as CCH]. S. W. VAN DER MEER, *CORPORATE LAW OF THE NETHERLANDS AND OF THE NETHERLANDS ANTILLES* (1973) [hereinafter referred to as VAN DER MEER] A more recent edition of this text is reviewed elsewhere in this issue of *The International Lawyer*.

No article is a substitute for legal counsel. A foreign practitioner should consult with local Dutch counsel before making any final decisions.

Part I of this article will deal almost exclusively with corporate aspects either of doing business in the Netherlands or of doing business through a Netherlands company. Part II, which will appear in the Winter 1981 issue of *The International Lawyer*, will deal with taxation aspects of doing business in the Netherlands.

1. General Aspects of Corporate Law

1.1 An outline of the basic characteristics of Dutch company law will be given in this and the following thirteen sections. In each section the starting point of discussion will be the law regarding closed companies with limited liability, i.e., *Besloten vennootschap met beperkte aansprakelijkheid*, or "B.V.'s." The B.V. has been chosen as the central point for discussion because: as compared with the other legal entities known under Dutch law, the use of the B.V. is widespread;² and for a number of reasons to be discussed hereinafter, the B.V. usually will be the appropriate legal entity to be used by a foreign investor or tax planner. If the law applicable to the B.V. differs from that applicable to the anonymous company, i.e., *Naamloze Vennootschap* or the "N.V.," those differences will be mentioned at the end of each section.

1.2 The B.V. is relatively new. Until 1971, partnership and cooperatives aside, the only legal entity available under Dutch law for business purposes was the N.V.. In 1971, Dutch law adjusted itself to the first European Economic Community (EEC) directive for the harmonization of the company law of its member states, which adjustment, among other things, provided the incentive for introduction of the B.V. Since then, Dutch law has offered a choice between two forms of companies; this choice already existed in a number of other European jurisdictions.

In total there will be eight EEC directives and they will all affect Dutch company law.³ The EEC directives can be compared to the American uniform codes, except that the EEC directives, adopted by virtue of Section 54(3)(g) of the EEC Treaty,⁴ place a duty on the governments of the member states to put in force within a certain time limit such adjustments or additions to their legislation as may be necessary to comply with those Directives.

At present four directives—including the first directive discussed—have been adopted. The second directive was adopted on December 13, 1976. This directive deals with protection of the interests of shareholders and others with respect to the formation of an N.V. and the maintenance and modification of

²At the end of 1979 there were approximately 140,000 B.V.'s.

³Information about all of the Directives can be found in 1 COMM. MKT. REP. (CCH) 1350. Additional information about the directives can be found in 1355 (1st Dir.); 1371 (2d Dir.); 1381 (3d Dir.); 1391 (4th Dir.); 1401 (5th Dir.); 1405 (6th Dir.); 1407 (7th Dir.); 1411 (8th Dir.); 1406 (add'l draft Dir.).

⁴Treaty Establishing the European Economic Community, March 25, 1957, 51 AM. J. INT'L L. 865 (1957).

its share capital. Dutch legislation had to be adjusted to this directive within two years, but this adjustment has not as yet been completed. Although the directive applies only to the N.V., it is highly probable that Dutch legislation concerning the B.V. will also, at least partially, be adjusted to it.

The third directive, adopted on October 9, 1978, also concerns only the N.V. Its subject matter is the protection of the interests of shareholders and others in connection with the so-called statutory merger between N.V.'s. As a consequence of this directive, the statutory merger, which has been unknown in the Netherlands, will be introduced into Dutch law.

Shortly before the third directive, the fourth directive was adopted on July 25, 1978. It concerns the layout and contents of annual financial statements and the disclosure of those documents. The legislation necessary to adjust Dutch company law to this directive is being prepared.

There are a number of additional directives under preparation, and still others are expected. In the former category are the fifth directive, providing rules about the structure of N.V.s having at least 500 employees, including rules about workers' participation; the seventh directive, concerning group accounts; and the ninth directive, concerning groups of companies in general. Because of the political difficulties inherent in the subject matter of the fifth directive, it is to be expected that the seventh directive will be adopted first. In the Netherlands it is usual for a government committee, the *Commissie Vennootschapsrecht*, to prepare an interim report on the draft directives.⁵

1.3 The most important other legal entities available for business purposes under Dutch corporate law are:

a. "association for gain" (*maatschap*), a specific form of contract whereby two or more persons put assets, even nonmaterial assets like labor or knowledge, into a common pool with the object of sharing the benefits arising therefrom.⁶ This form of association is often used for combinations of lawyers, architects, accountants, etc.

b. general partnership (*vennootschap onder firma*),⁷ a partnership entered into for the purpose of carrying on a business under a joint name. All partners are jointly and severally liable for all obligations of the partnership.

c. limited partnership (*commanditaire vennootschap*),⁸ a partnership entered into between one or more persons, who are jointly and severally liable, and one or more persons as suppliers of equity (the limited partners), who are liable only to the extent of their capital contributions.

⁵For further information about these directives and their (expected) impact on Dutch law, see MAEIJER, *supra* note 1 at 23-26 and C. Schmitthoff, writing in 15 COMM. MKT. L. REV. 1 (1978).

⁶C.C. § 1655ff. When referring herein to the Civil Code we will use the abbreviation C.C. When referring to Book 2 of the Civil Code, which book contains most of the law applicable to legal entities of private law, the section or article number will be preceded by (2) C.C.

⁷C.C. § 1655ff and Code of Commerce § 15ff.

⁸C.C. § 1655ff and Code of Commerce § 19ff.

d. cooperative association (*coöperatieve vereniging*); cooperative associations have the object of furthering the material interests of their members. Unlike the N.V. or the B.V., they do not perform economic activities with the sole object of making a profit and paying this profit out to their members. Examples of cooperative associations are the cooperative dairy factory, with the object of processing the milk produced on its member farms and the cooperative trading business as a means of providing its members with commodities at low cost. The law further allows cooperative associations to manage interests of its members other than their material interests or even to extend their activities to nonmembers. The cooperative association is constituted by a notarial instrument.⁹

The partners of the partnerships mentioned under b. and c. may also be legal entities, thus creating entities comparable to the American joint-venture.¹⁰

2. Formation

2.1 A B.V. is formed (2.2) through the execution of a notarial deed of incorporation (2.3) in which execution at least two incorporators (2.4) (i.e., the first shareholders) take part. Furthermore, the Department of Justice must have granted its approval of the incorporation (2.5). Dutch law uses the term *verklaring van geen bezwaar*, which literally translated means "declaration of nonobjection." The word "approval" might give the impression that the Department of Justice explicitly approves the draft deed of incorporation, which is not the case. For the sake of brevity we shall, however, continue to use the word "approval." After incorporation, the managing board of the B.V. is under an obligation to record the incorporation with the trade register (*handelsregister*) of the Chamber of Commerce (*Kamer van Koophandel*), with such other additional information as required by law. An announcement of the recording is made in the *Dutch Official Gazette* (*Staatscourant*) (2.6).

2.2 The requirement that a B.V. be formed through the combined act of at least two persons is a remnant of the notion—now considered obsolete—that a B.V. is a form of partnership. Although the modern concept of the B.V. as an institution with its own rules has been widely accepted, the law still requires at least two incorporators.¹¹ B.V.'s may have only one shareholder, however.¹²

Because the approval of the Department of Justice must be obtained, it may take some time to form a B.V. Therefore, two concepts have acquired special importance and should be discussed here. The first concept is the so-

⁹(2)C.C. § 55ff.

¹⁰For further information about the above mentioned entities, see MAEIJER, *supra* note 1 at 1 & 2; FOKKEMA, *supra* note 1 at chs. 1 & 2; and SCHUIT, *supra* note 1 at ch. IX.

¹¹MAEIJER, *supra* note 1, at 34-36.

¹²Note that in Belgium, for instance, an S.A. must have at least seven shareholders.

called preliminary agreement. Under such an agreement, the incorporators establish their intentions in writing while waiting for the approval of the department, by signing an agreement that sets out in brief the essential data concerning the B.V. that they are going to form. With a signed preliminary agreement, the tax authorities consider the B.V. to have been in existence for tax purposes from the date mentioned in the preliminary agreement, provided that the actual incorporation does not take place too long after that date.¹³ As between the incorporators, the B.V. also is deemed to have been in existence from that date—hereinafter to be referred to as the preliminary date of commencement—but, of course, it is a legal entity only as from the actual date of incorporation.

The second concept is the so-called B.V. in formation (*B.V. in oprichting*, abbreviated to B.V.i.o.). The concept is based on a section of Dutch company law which provides that rights and obligations arising from any act performed on behalf of the B.V. before its formation shall accrue to the B.V., if it expressly or implicitly ratifies them after the formation has been completed. If, for example, a foreign corporation wants to be sure that the Dutch subsidiary it is going to form will have the necessary office space, it can rent an office acting on behalf of the B.V.i.o. or have anybody else who is willing to undertake the risk rent the space for the B.V.i.o. If the act is not ratified by the B.V. after its incorporation, the person who acted on behalf of the B.V.i.o. is liable for any damage caused thereby unless an agreement to the contrary has been made.

Furthermore, if one or more persons act regularly and frequently on behalf of a B.V.i.o., it can be said that a business enterprise is being conducted on behalf of the B.V.i.o. In that case, the business enterprise should be registered with the trade register in the name of the person or persons so acting with the addition of the letters B.V.i.o.¹⁴

2.3 A B.V. is formed through the execution of a deed of incorporation by and before a civil law notary.¹⁵ The deed begins by identifying the incorporators and expressing their intention to form a B.V. Next come the articles of association, which might be defined as a combination of the charter and the bylaws of an American corporation.

¹³See 7.3 in Part II of this article, which will appear in the Winter 1981 issue of *The International Lawyer*.

¹⁴MAEIJER, *supra* note 1, at 39.

¹⁵The Dutch civil law notary (hereinafter "the notary") should not be confused with the American public notary. The Dutch notary is a highly trained legal professional (special law schools and faculties exist for his training) whose practice deals with many areas of the law that in the United States fall within the attorney's domain. A Dutch notary can be compared to the English solicitor (see CCH, *supra* note 1, Introduction). The main field of activities of the notary consists of preparing and processing deeds of incorporation, partnership deeds and wills, administering estates and handling conveyances of real estate and mortgages. Some of these activities the notary shares with other legal professionals, but a number of important acts can only be effected by notarial deed, including conveyance of real estate, creation of mortgages, formation of N.V.'s, B.V.'s and a number of other legal entities, and execution of marriage contracts and wills. See also Bodewes in FOKKEMA, *supra* note 1, at 27-32, and SCHUIT, *supra* note 1, at 43-44.

The final part of the deed of incorporation contains a number of statements connected with the formation of the B.V. The first statement always found in a deed of incorporation concerns the legal obligation of the incorporators to subscribe together for at least one-fifth of the authorized share capital.¹⁶ The statement also mentions the manner in which the incorporators intend to pay for their shares. Although cash is usually used to purchase shares, other ways are allowed.¹⁷ Another statement always found in the deed of incorporation concerns designation of the first member(s) of the managing board. Of course, the general rule is that members of the managing board are appointed by a resolution of the general meeting of shareholders; however, to prevent B.V.'s from coming into existence without having a managing body, the law provides that the first member(s) of the managing board has/have to be designated in the deed of incorporation. The deed of incorporation, unlike most other notarial deeds, must be in the Dutch language.

2.4 As has been said, the formation of a B.V. requires the joint act of at least two persons. They can be natural persons or legal entities; no distinction is made between citizens or noncitizens, residents or nonresidents of the Netherlands. Furthermore, the incorporators can have themselves represented by proxy at the actual incorporation of the B.V.

2.5 There are two legal requirements for the formation of a B.V., namely, the execution of a notarial deed of incorporation and the approval of the Department of Justice. The procedure to obtain this approval is relatively simple. The notary, after having received instructions from his clients, sends a draft of the deed of incorporation to the Department of Justice, together with some background information on the incorporators and the first member(s) of the managing board as required by the Department of Justice. If it is already anticipated that the shares will be transferred to some persons other than the incorporators, their names have to be disclosed, too. The department has issued questionnaires to be completed by the incorporators and the first members of the managing board. Their signatures must be notarized.

The department will refuse its approval if: (i) based on the future plans or the antecedents of those who either alone or with others will determine the policy of the B.V. there is a serious danger that the B.V. will be used for unlawful purposes or that the B.V.'s activities will lead to injury to creditors; or (ii) the articles of association violate public policy or do not comply with the law, or the incorporators have not subscribed for one-fifth of the B.V.'s authorized share capital.¹⁸ Furthermore, the share capital to be paid-up at the formation must amount to at least Dfl. 35,000 (approximately U.S. \$18,000), minimum share capital level required since June 1, 1978.¹⁹

¹⁶See 4.2 in text, *infra*.

¹⁷See 4.6 in text *infra*. and MAEUER, *supra* note 1, at 48-53.

¹⁸(2)C.C. § 179.

¹⁹See 4.3 in text, *infra*.

In dealing with the criteria mentioned, the department is primarily making a judgment on the background and—insofar as this can be known—the future plans of the incorporators and the first members of the managing board.²⁰ For foreign incorporators a credit reference from a reputable bank or—if the foreign incorporator is a legal entity—the annual report is sufficient. Particular importance is attached to the past record of the incorporators and to the future members of the managing board if, during the previous eight years, they have been involved in a bankruptcy, or if they have had a criminal conviction.

Additional legislation is being prepared to prevent abuse of the B.V. and the N.V. One bill would render contractors liable for social security premiums and taxes that must be withheld by subcontractors and paid by them to the competent authorities. Another bill would make the managers of legal entities personally liable for payment of social security premiums and taxes to be withheld by such legal entities. Although the authorities charged with the execution of the social security acts and the tax authorities will be the first to profit by such legislation, it is hoped that indirectly other creditors also will be protected by that legislation on the theory that if it is more difficult to leave social security premiums and taxes unpaid, it also will be more difficult to neglect the payment of other debts.

Furthermore, it has been suggested that legislation be proposed that would extend the powers of the trustee in bankruptcy to hold liable those managers who, by mishandling the company's affairs, may be said to have contributed to a bankruptcy. The powers of the trustee would also be strengthened by making it easier for him to nullify voluntary acts of the company that are detrimental to creditors. Finally, the department is studying the possibility of legislation to prevent the buying of inactive companies in order to circumvent the necessity to obtain the approval of the Department of Justice.

In dealing with the approval criteria mentioned, the department also studies the draft of the deed of incorporation to see if the articles of association are in compliance with the law. In the past this study was rather time consuming, especially when complicated corporate structures were involved. For some time now, however, many notary firms and attorneys have been filing their standard models of articles of association with the department, which models previously have been checked by the department. Thus, in most cases, only the deviations from the standard models have to be studied. Furthermore, the department has published directives that enable the notary to reflect the department's guidelines when drafting the deed of incorporation. Hence, in most cases, obtaining the approval is a more or less standard procedure without excessive delay, although it still may take several weeks.

²⁰If the department refuses to grant its approval, the incorporators may address themselves to the Crown in a so-called administrative appeal (Appeal from Administrative Decisions Act of 1963 and (2)C.C. 179; see also MAEIJER, *supra* note 1, at 13-14).

2.6 In accordance with the Business Registration Act (*Handelsregisterwet*) of 1918, the owner of a business enterprise must file certain information with the trade register of the Chamber of Commerce in whose territory the enterprise has its place of business.²¹ Moreover, every B.V. must be registered with the trade register of the district where it has its corporate seat. If the corporate seat is within the district where the enterprise has its place of business, the registration of the enterprise implies the registration of the B.V., and the extra expense of having two registrations is avoided. It is thus recommended that one have the corporate seat coincide with the place of business. The managing board of a B.V. has to file (normally through the notary who handled the formation) the following information as soon as possible after its formation:

1. name, corporate seat and the actual place of business;
2. description of the business to be conducted. Usually the objects-clause of the B.V. is broader than the actual business to be conducted;
3. name, address, date and place of birth, citizenship, specimen signature and initials of each member of the managing board and, if there is a supervisory board, of each member of the supervisory board, and as far as members of the managing board are concerned, their powers to represent the B.V. (see 8.5 *infra*);
4. the amount of the authorized share capital, the number of shares issued and the amount paid up on those shares.

No filing must be made of the shareholders' names, except for holders of shares that are not fully paid up. The names and addresses of the holders of such shares must be filed with the trade register and entered in the shareholders register (see 5.1 *infra*). This latter register, kept by the B.V., must be open for public inspection insofar as these shares are concerned. In addition to the above-mentioned information, however, a certified copy of the deed of incorporation must be filed with the trade register, and this deed, of course, shows the names of the incorporators, who are also the first shareholders of the B.V. Thus, their identities will be disclosed, as the above-mentioned information and the certified copy of the deed of incorporation are open for public inspection. A later change in shareholders—except a change in holders of not fully paid-up shares—need not be recorded.

After the above-mentioned information has been filed with the trade register, the secretary of the Chamber of Commerce will cause a notice of the filing to be published in the *Dutch Official Gazette*. The announcement in the *Dutch Official Gazette* is rather brief and contains only the date of forma-

²¹The Chambers of Commerce and Industry promote the economic interests of commerce and industry on a regional level. The members of the chambers are appointed by the organizations of employers, tradesmen and employees. They have certain statutory powers. By statute, the Netherlands is divided into a number of districts, each of which districts has its Chamber of Commerce. Each Chamber of Commerce maintains a trade register, in which all business enterprises established in its territory must be entered. See also SCHUIT, *supra* note 1 at 10.

tion, the name and corporate seat of the B.V., its authorized and issued share capital and the names of the first members of the managing board and supervisory board.

The importance of the trade register should not be underestimated, however. For third parties about to enter into a transaction with a B.V., the information filed with the trade register will specify exactly how the B.V. is represented and who is capable of representing it. Third parties may rely on that information.²²

3. Name, Corporate Seat and Objects

3.1 The articles of association for a B.V. must contain its name, its corporate seat and its objects.²³ This name must be carried in all printed matter to which the B.V. is a party or that emanates from it.²⁴ In addition, in all correspondence the B.V. must indicate the trade register where (one of) its business enterprise(s) is registered and the registration number thereof. Attention should be given to avoiding violation of the Business Names Act (*Handelsnaamwet*). This is the responsibility of the incorporators and is not checked by the Department of Justice which, however, does require the name to be distinctive and in compliance with the directives issued by the department. Usually, the notary who handles the formation of the B.V. can advise whether a particular name will be acceptable. The name must contain the words *Besloten Vennootschap met beperkte aansprakelijkheid*, or the abbreviation "B.V."

In connection with the concept of corporate seat, it is worthwhile to remark that Dutch law, unlike a number of other continental systems, does not follow the doctrine of the so-called actual seat (*siege reel*). Rather, Dutch law has adopted the Anglo-Saxon system, meaning that a company formed under Dutch law and having its corporate seat in the Netherlands, is a Dutch company, existing under and governed by Netherlands law, even though it does not have its actual seat in the Netherlands.

3.2 The articles of association must also contain the objects of the B.V. In the description of the objects, the principal activities of the B.V. must be clearly stated. Apart from that, the objects-clause may contain clauses of a more general nature, although in contrast to the objects-clauses of American corporations, the objects-clauses of Dutch companies are normally relatively short. As a result of the First EEC directive, the law with regard to acts performed on behalf of a B.V. in excess of its objects-clause (*ultra vires*) has changed drastically. Before legislation adapted Dutch law to the First EEC directive in 1971, such an infringement of the objects-clause of the B.V. almost always would affect third parties, because in most cases, the B.V. would not be bound. The present law reflects the changes brought about by the first EEC directive:

²²See Lowensteyn in FOKKEMA, *supra* note 1, at 178-79; see also 8.5 in text, *infra*.

²³(2)C.C. § 177.

²⁴(2)C.C. § 186.

A legal entity (N.V., B.V. and the other legal entities dealt with in Book 2) may invoke the invalidity of an act if such act can in no way serve the stated objects of such legal entity and if it proves that the other party knew or could not have been unaware that the objects-clause was exceeded. Publication of the deed of incorporation shall not in itself be sufficient evidence that the other party should have had knowledge of the fact that the objects-clause had been exceeded.²⁵

One might safely say that the present statute will make it almost impossible for a B.V. to invoke the invalidity of a particular transaction. In order to be successful in such a claim, the B.V. must prove not only that the transaction can in no way serve the objects of the B.V., but also that the other party to the transaction was aware of this, which awareness cannot be assumed from the mere fact alone that the articles of association were published.²⁶

3.3 The name of an N.V. must contain the words *Naamloze Vennootschap* or the abbreviation "N.V."

4. Share Capital

4.1 Under Dutch law there are three types of share capital: authorized share capital (4.2), issued share capital (4.3) and paid-up share capital (4.4). The share capital, and the shares into which it is divided, must be expressed in Dutch currency. The shares must have a par value. Shares without a par value are not permitted under Dutch law.

4.2 The authorized share capital must be stated in the articles of association.²⁷ Authorized share capital is the sum of the par value of the shares that can be issued without an alteration of the articles of association.

4.3 At least one-fifth of the authorized share capital must be issued.²⁸ The issued share capital represents the total par value of the shares that have been subscribed. As stated above, the issued share capital and paid-up share capital must amount to at least Dfl. 35,000.²⁹ The issued share capital is far more important than the authorized share capital. The law acknowledges this in stating that the term "share capital" means the issued share capital unless expressly stated otherwise.³⁰

4.4 Whereas the issued share capital indicates the extent of the ultimate obligation of the shareholders to contribute, the paid-up share capital reflects the amount that has been actually contributed.³¹ Each member of the managing board, together with the B.V., is jointly and severally liable in full to third parties for all the obligations that he has caused the B.V. to undertake if the incorporators have not paid up: (i) at least 10 percent of the par value of each

²⁵(2)C.C. § 6(1).

²⁶See also SANDERS, *supra* note 1, at 89-90.

²⁷(2)C.C. § 178.

²⁸(2)C.C. § 179.

²⁹(2)C.C. § 178.

³⁰(2)C.C. § 189.

³¹(2)C.C. § 180.

share issued at the formation of the B.V.; and (ii) a total amount of at least Dfl. 35,000. The amount of the required minimum share capital (at present: Dfl. 35,000) may be adjusted by Royal Decree every two years if, in the opinion of the Crown, the attainment of a certain cost of living index to be designated by Royal Decree so requires. In all letters or other documents emanating from the B.V. in which the authorized share capital is mentioned, the issued and paid-up share capital must also be mentioned.

4.5 Shares in a B.V. may not be issued for a price lower than their par value.³² If a shareholder has paid for the full amount of the par value of his shares, he cannot be forced to pay any additional contribution without his consent.³³ On the other hand, if a shareholder has only partially fulfilled his obligation to pay for his shares, he will remain responsible for the remainder until the B.V. has ceased to exist. Even if he has sold and transferred his shares, he will remain liable for the unpaid amount unless he has been explicitly relieved from this liability by the managing board and the supervisory board. Relief is available only with regard to payments on shares to be made at least one year after the transfer.³⁴

A shareholder cannot relieve himself of his obligation to pay up his shares by setting this obligation off against any claim he might have against the B.V.³⁵ Nevertheless, the B.V. may invoke such a set off if a shareholder makes a claim against the B.V. Furthermore, the Supreme Court of the Netherlands has ruled that a contractual set off does not violate the law.

4.6. The basic payment rule is that the shares must be paid for in cash, in Dutch legal tender.³⁶ However, other ways of paying for shares are allowed. Articles 205 and 206, in Book 2 of the Civil Code contain a number of provisions with respect to the latter. Article 205 deals with the situation in which the incorporators of a B.V. intend to pay for the required share capital in whole or in part with other than cash. Article 206 deals with situations in which the B.V. exists and the share capital is to be increased through an issue of shares that will be paid for in a manner other than in cash.

Both articles are intended to protect present and future shareholders as well as future creditors. Article 205 provides that an incorporator may enter into an agreement that he will pay up his shares by means of a transfer or assignment of certain assets to the B.V. provided that such an agreement is embodied as a whole in, or is attached to the deed of incorporation. The agreement may be couched in general terms.³⁷ The directives of the Department of Justice³⁸ give further regulations on the contents of such agreements.

³²(2)C.C. § 191.

³³(2)C.C. § 192.

³⁴(2)C.C. § 199.

³⁵(2)C.C. § 191.

³⁶(2)C.C. § 205.

³⁷(2)C.C. § 205; *see also* 2.3 in text, *supra*.

³⁸*See* 2.5 in text, *supra*.

These directives require that a provision must be made to the effect that, if the assets to be transferred or assigned to the B.V. as payment on the shares have decreased in value between the preliminary commencement date and the actual date of incorporation to such an extent that the shares can no longer be considered to be fully paid up at the actual date of incorporation, the incorporator must pay the difference to the B.V.

Once the B.V. is formed, the managing board is allowed to enter into such agreements with proposed shareholders only pursuant to a resolution of the general meeting of shareholders, unless the articles of association provide otherwise.³⁹ Some articles of association provide that the managing board may enter into such an agreement on its own. Once such agreements are made, they must be published in the financial statements for the financial year in which those agreements were made. In principle, there are no restrictions as to the types of assets to be transferred or assigned to the B.V.⁴⁰ Even entire business enterprises—including goodwill, know-how, etc.—may be subject to transfer agreements. The only restriction is that the assets must be such that their value can be assessed.

4.7 Because an alteration of the authorized share capital does not affect the rights of shareholders and is thus of little practical significance, we will discuss only the alteration of issued share capital.

(a) Increase of issued share capital: The issued share capital may be increased up to the amount of the authorized share capital without a previous amendment of the articles of association. For example, if the authorized share capital amounts to Dfl. 200,000 and the issued share capital amounts to Dfl. 50,000, the issued share capital may be increased up to Dfl. 200,000 without amendment to the articles of association. On the other hand, to increase the issued share capital to Dfl. 250,000, the authorized share capital has to be increased accordingly, and, for this increase, an amendment of the articles of association is required.

As the law is not clear on this subject, the articles of association normally state who is authorized to increase the issued share capital. This power is often vested in the general meeting of shareholders or alternatively in the managing or supervisory board; in some cases this power is subject to the prior approval of the general meeting of shareholders or the meeting of holders of priority shares. Shareholders have no right of preference on new shares to be issued, unless the articles of association provide otherwise, which is often the case. Finally, it must be remembered that shares may not be issued below par.

³⁹(2)C.C. § 206.

⁴⁰Article 7 of the second EEC directive contains a provision to the effect that payment on the share capital can only be made in the form of assets that can be assessed according to economic standards and that an obligation to perform work or services cannot form a part of such assets.

(b) Reduction of issued share capital: Reduction of issued share capital can be effected in two ways. The first way is the repurchase and cancellation of outstanding shares. The second way consists of decreasing the par value, which may be done to amortize losses, to permit the return of share capital to shareholders or to achieve an exemption from the obligation to complete payment on partially paid up shares. The par value can be decreased through an amendment to the articles of association. Repayment or exemption from the obligation to complete payment following a resolution to decrease the par value is valid only if the statutory provisions relating to the publication of the resolution have been observed.⁴¹

The repayment or exemption from the obligation to pay up must be made pro rata on all shares, except where different types of shares exist and the articles of association contain a provision permitting repayment or exemption from the obligation to pay for a particular class of shares and this provision was incorporated in the articles of association before that class of shares was issued.⁴²

4.8 A B.V. may repurchase its own shares, provided these shares have been paid-up in full.⁴³ The articles of association must state the maximum amount of shares that can be repurchased, and this amount may not exceed fifty percent of the issued share capital.⁴⁴ Furthermore, no shares may be repurchased if, as a result of such repurchase, the amount paid-up on those shares that are not being repurchased by the B.V. thereby would become less than the required minimum share capital of Dfl. 35,000.⁴⁵ Shares that have

⁴¹(2)C.C. §§ 208, 209. The resolution must be filed with the trade register, an announcement of which filing must be made in the *Official Dutch Gazette* and in at least one local newspaper. During a two-month period, creditors of the B.V. can request a court order to the effect that the resolution will be nullified. The court will grant such an order if it considers the assets of the B.V. to be insufficient to secure the interests of such creditors if the reduction takes place. If two months pass and no creditor opposes the proposal, the procedure to amend the B.V.'s articles of association in order to effectuate the reduction may be started.

⁴²See also SANDERS, *supra* note 1, at 30-31.

⁴³(2)C.C. § 207. For tax consequences, see 5.3.1 in Part II of this article, which will appear in the Winter 1981 issue of *The International Lawyer*.

⁴⁴(2)C.C. § 207. A much discussed device to repurchase shares in excess of the fifty percent limit is the so-called Cascade-repurchase. This device works as follows: suppose the issued share capital is Dfl. 200,000; of this issued share capital Dfl. 100,000 may be repurchased. After the cancellation of the repurchased shares—which, according to some experts, requires an amendment of the articles of association if the issued share capital should fall below the amount mentioned in the articles of association—the new issued share capital will be Dfl. 100,000. Of this Dfl. 100,000 another fifty percent may be repurchased and cancelled. Thus, another Dfl. 50,000 is repurchased and cancelled. This procedure may be repeated indefinitely, except that the minimum required issued share capital is Dfl. 35,000. It should be pointed out that an authoritative writer has recently cast doubt as to the validity of this procedure.

⁴⁵It must be noted that in the near future the possibility of repurchasing shares of an N.V. will be further restricted as a result of the adjustment of Dutch law to the second EEC directive. One of the changes brought about by this directive will be that in no case may more than ten percent of the issued share capital be held by the company itself. It is uncertain at present if and how the Dutch legislature will apply this new rule to the B.V.

been repurchased by the B.V. may be sold at any time. Because such a sale is not considered as an issue of shares, those shares may be sold below their par value.⁴⁶ No votes can be cast on repurchased shares nor will those shares be taken into consideration when calculating a vote or a quorum.⁴⁷

5. Shares

5.1 A B.V. may not issue share certificates for its shares, and the transferability of shares must be subject to certain limitations.⁴⁸ The interdiction of share certificates and the restrictions on the transferability of shares are basic characteristics of the B.V. These two characteristics, and the generally different treatment of the B.V. and the N.V. with regard to the obligation to disclose annual accounts, (discussed below) form the principal differences between the B.V. and the N.V.

In order to maintain the closed character of a B.V., the shares of a B.V. always must be registered. The identity of the shareholders must be ascertainable from the shareholders' register. The managing board of a B.V. must keep this register and enter in it the names and addresses of the shareholders⁴⁹ and the amounts they have paid for their shares.⁵⁰ The shareholders' register is normally kept at the office of the B.V. It is the duty of the managing board to keep the register current. The register is open for inspection by the shareholders; if shares are issued that are not fully paid up, the information about these shares is open for public inspection. Upon request, the managing board will issue an extract from the register to each shareholder with respect to his rights to a share. Note that such an extract is not a share certificate.

5.2 An instrument of transfer is required to effect the transfer of a share in a B.V. This instrument must be served on the B.V. through notification by a bailiff (this is seldom done) or by written acknowledgement of the transfer on the strength of the production of that instrument of transfer to the B.V.⁵¹ No transfer is possible without an instrument of transfer. The instrument of transfer is usually a rather simple indenture, stating (in case of a sale) the agreement between the buyer and seller to the sale and the transfer, the particulars of the share to be sold, the purchase price and the manner of payment of that purchase price. If the acknowledgement procedure is followed, the instrument of transfer will contain a statement by the managing board acknowledging the transfer. The transfer is completed only when the acknowledgement has taken place or the instrument has been served. In case of a

⁴⁶See 7.2 in Part II of this article, which will appear in the Winter 1981 issue of *The International Lawyer*.

⁴⁷(2)C.C. § 228.

⁴⁸(2)C.C. § 195.

⁴⁹The register must also contain the names of pledgees and holders of a right of usufruct; see 6.4 *infra*.

⁵⁰(2)C.C. § 194.

⁵¹(2)C.C. § 196; see also FROMMEL, *supra* note 1, at 394.

transfer of shares that are not fully paid-up, the acknowledgement may only be made on the basis of an instrument of transfer bearing a fixed date.⁵²

5.3 The articles of association of a B.V. must contain a clause that restricts the transferability of shares.⁵³ This clause must ensure that the transferability of shares in a B.V. shall not be entirely unrestricted, hence preserving the idea that the group of shareholders in a B.V. will retain its closed character.

The law⁵⁴ offers a choice of two ways to restrict the transferability of shares. The articles of association must contain a clause to the effect that either:

1. the proposed transfer of a share must be approved by a governing body of the B.V. (which may be the managing board, the general meeting of shareholders, the supervisory board, etc.);⁵⁵ or
2. the share intended to be transferred must first be offered to the other shareholders.

A combination of the two systems also is permitted, and, in the case of different types of shares (e.g., common shares and preferred shares), one type of shares may be governed by one system and the other type of shares by another system. Although the articles of association must provide for some restrictions on the transferability of shares, the relevant provisions may be kept very simple if there is only one shareholder and that shareholder is a legal entity. In other situations, e.g., when there are a number of private shareholders, a system must be developed that provides for many, often rather complicated, events, such as the devolution of shares, the transfer of shares by a shareholder to a partnership in which he is a partner, and the allocation of shares held by such a partnership if it is subsequently liquidated. According to law, the articles of association must contain a provision to the effect that a shareholder who wants to transfer his shares will receive at least the value of his shares as determined by one or more independent experts.

If a system is used whereby shares must be offered to the other shareholders prior to a proposed transfer, the Department of Justice permits the articles of association to provide for a waiver of the system if all shareholders agree to such waiver. Care should be taken that the provisions concerning the restrictions on the transferability of shares are accurately observed in the case of a transfer, because noncompliance with these provisions will affect the validity of the transfer.

⁵²The normal procedure to fix the date on which an instrument was executed is by delivering the instrument for registration to the competent authorities, or to have the instrument notari- ally executed; see C.C. § 1917.

⁵³(2)C.C. § 195; see also FROMMEL, *supra* note 1 at 394 & 395 and MAEIJER, *supra* note 1 at 73ff.

⁵⁴(2)C.C. § 195; see also the directives of the Department of Justice.

⁵⁵For an explanation of the term "governing body" (*orgaan*), see MAEIJER *supra* note 1 at 96 & 188.

5.4 Unless the articles of association provide otherwise, equal rights and obligations are attached to all shares in proportion to their par value.⁵⁶ As mentioned above, the most commonly used types of shares created by virtue of a provision in the articles of association are preferred shares and priority shares.

Preferred shares confer a preference (normally by means of a fixed percentage) over the common shares with regard to the distribution of profits, or the distribution of a remaining balance after liquidation, or both. At the same time their other financial rights are usually severely restricted. A frequently used variation of the preferred share is the cumulative-preferred share, which confers upon the holder not only a preference to a fixed dividend or percentage of the profits in a particular financial year but also to an additional portion of the profits of the next year(s) in case of short-payment in the previous year(s).

Priority shares are used to confer some extra powers on particular shareholders or groups of shareholders. Although the law restricts the use of priority shares to some extent by requiring some powers to be held exclusively by the general meeting of shareholders (including all types of shares on an equal basis), certain powers nevertheless may be vested in the holders of priority shares. The following powers are, for instance, often conferred upon the holders of priority shares: the power to make a "binding"⁵⁷ nomination for the appointment of members of the managing board; the power to issue shares or to veto a resolution to issue shares; the power to veto a resolution to dissolve the B.V. or to alter its articles of association; and the power to retain parts of the profits.

5.5 Although of a completely different nature from the abovementioned types of shares, depositary receipts for shares (*certificaten van aandelen*) should be mentioned briefly.⁵⁸ Through depositary receipts (D.R.'s), the legal ownership of a share in a B.V. can be more or less separated from the economic ownership of that share. Although D.R.s have been used for a long time, it was not until 1971 that some provisions regarding this mechanism were embodied in the law.⁵⁹ At that time certain rights were given to holders of D.R.'s issued with the cooperation of the B.V., such as the right to attend and speak (but not to vote) at general meetings of shareholders and the right to inspect the annual accounts on the same footing as shareholders. The most common way to create a D.R. is to organize a foundation (a foundation is a legal entity created by a notarial deed, without members, which with the help of a capital fund destined thereto aims to carry out a certain purpose) and

⁵⁶(2)C.C. § 201.

⁵⁷See 8.3 in text *infra*.

⁵⁸(2)C.C. §§ 197, 198, 221 and 227.

⁵⁹For a more detailed study of this subject, see Westbroek in FOKKEMA *supra* note 1 at 159; FROMMEL, *supra* note 1 at 380, 397 & 405; SANDERS, *supra* note 1 at 46ff; and MAEIJER, *supra* note 1 at 148ff.

transfer title to the shares to the foundation to achieve a change in control of these shares (*fiducia cum amico*). The control, and with it the power attached to the shares, passes to the foundation while the beneficial interest, in the economic sense, remains fully with the former shareholders. The instrument embodying the right of such a former shareholder towards the foundation with regard to a transferred share is called a D.R. (*certificaat*), and the former shareholder is called a D.R.-holder (*certificaat-houder*). The D.R.s are transferable, then, although their transferability may be restricted by the conditions under which the share was effected. It is not necessary that a foundation be used for the transfer of title for control. In principle, transfer of title for control can be made to any juristic person whose objects allow for this, as well as to any natural person. However, the advantages of a juristic person over a natural person are evident, and the foundation has the added advantage over company forms, which are also juristic persons, of leaving more freedom regarding the organization of management. D.R.s are admitted for quotation on the stock exchange if certain conditions are fulfilled. D.R.'s with quoted stocks may not be irrevocably inconvertible into shares.

Note that, by virtue of Article 202 of the Civil Code, Book 2, bearer D.R.'s may not be issued for shares in a B.V. If this provision did not exist, then the creation of bearer D.R.'s for shares in a B.V. would be an easy way to create bearer indentures despite the fact that a B.V. may not issue shares to bearer.

5.6 The shares of an N.V. may be registered shares or shares to bearer.⁶⁰ Share certificates may be issued for registered shares and must be issued for bearer shares.

No share certificates may be issued for shares to bearer that are not paid up in full.⁶¹ The articles of association may allow both types of shares at the same time, for instance, by providing that the shares are registered shares but that they may be converted to bearer shares at the shareholder's option if they are fully paid up. Depositary receipts for shares to bearer may be issued for registered shares in an N.V.

6. The Rights of Individual Shareholders

6.1 Only shareholders are entitled to the right to vote, and each shareholder must have at least one vote. Shares without a right to vote are not permitted by Dutch law.⁶² With the help of D.R.'s, nonvoting shares can be created in effect by transferring the shares to a foundation that abstains from voting in the general meeting of shareholders.

The articles of association may, within certain limits,⁶³ restrict the number of votes each shareholder may cast, but in general the number of votes to be

⁶⁰(2)C.C. § 82.

⁶¹(2)C.C. § 82.

⁶²(2)C.C. § 228.

⁶³(2)C.C. § 228.

cast by each shareholder is proportionate to the number of shares held by him. Unless the articles of association state otherwise, a shareholder may be represented by proxy, provided the proxy is in writing. There are no statutory restrictions as to who may act as a proxy—even members of the managing board or the supervisory board may act as proxyholders—but the articles of association may contain certain restrictions.

6.2 Unlike the legal systems of some other European countries (such as France and Belgium), the Netherlands in principle permits the use of voting agreements.⁶⁴ Such voting agreements may serve various purposes, such as eliminating impasses in fifty-fifty divisions of shareholdings, forming a block of small shareholders in order to oppose or contend with a large shareholder, or restricting the voting power of one shareholder in order to obtain equal voting rights between two or more shareholders.

In connection with the foregoing, the question may arise whether an irrevocable proxy to vote is permissible under Dutch law and, if so, whether the existence of such a proxy estops the shareholder from exercising the voting rights attached to his shares. While the first question may in all probability be answered affirmatively, there is little agreement among learned writers on the answer to the second question.⁶⁵

6.3 What has been said with respect to voting rights also applies to the financial rights of shareholders: all shares with equal par value have the same financial rights,⁶⁶ unless the articles of association provide otherwise (e.g., through the creation of preferred shares). However, the directives of the Department of Justice state that a provision in the articles of association to the effect that certain shares are excluded from sharing in profits will not be accepted. The two basic financial rights are the right to a portion of profits and the right to share in the assets remaining after the B.V. has been dissolved and liquidated. Both rights are discussed below.

6.4 The situation whereby shares are pledged or subject to a right of usufruct (*vruchtgebruik*) will be discussed only briefly⁶⁷ because it is unlikely that this subject will be of concern for many foreign investors using a B.V. The basic provisions governing the right of pledgees and holders of a right of usufruct over shares are found in the Articles 197 and 198 of the Civil Code, Book 2. According to these articles, the principal rule is that the shareholder remains entitled to vote, even though his shares are pledged or subject to a right of usufruct. However, under certain conditions, the voting right may be vested in the pledgee or holder of the right of usufruct.

⁶⁴See SANDERS, *supra* note 1 at 52ff, and MAEIJER, *supra* note 1 at 106ff. Note that it is also possible for the articles of association to provide for a solution in cases where the votes are equally divided. (2)C.C. § 230.

⁶⁵See Westbroek in FOKKEMA, *supra* note 1 at 145ff.

⁶⁶(2)C.C. § 228.

⁶⁷For more information, see MAEIJER, *supra* note 1 at 82ff.

If, according to the principal rule, the voting right remains with the shareholder, the pledgee only has the rights attributed to holders of D.R.'s issued with the cooperation of the B.V., e.g. the right to attend meetings of shareholders if the articles of association so provide. If the voting right is vested in the pledgee, then the shareholder will still be entitled to attend meetings of shareholders. The same is applicable to the grantor of a right of usufruct (the shareholder) and the holder of such a right.

Often the pledgee and the holder of a right of usufruct have the same rights as the holders of D.R.s issued with the cooperation of the B.V. In order to avoid cumbersome provisions in the articles of association, it is sometimes provided that no D.R.s can be issued with the cooperation of the B.V. and that a pledgee or holder of a right of usufruct will have no voting rights or that the shares cannot be pledged. Such a provision simplifies the articles of association and can be safely incorporated into the articles of association of subsidiaries of foreign companies, for example, where the need to issue D.R.s, pledge shares or grant rights of usufruct cannot reasonably be anticipated.

6.5 Note that the position of holders of a right of usufruct over shares in an N.V. and the pledgees of such shares is slightly different from the system outlined in the previous paragraph.⁶⁸

7. General Meeting of Shareholders

7.1 In general, one has to turn to the articles of association to determine which powers are confined to the general meeting of shareholders. However, in a number of instances, the law requires that the general meeting of shareholders must be involved in the decision-making process. Such instances are the adoption of a B.V.'s financial statements, the appointment and dismissal of members of the managing board and the supervisory board, alteration in the articles of association, and the dissolution and liquidation of a B.V.⁶⁹ Although the general meeting of shareholders must be involved, this does not mean that the articles of association may not provide that the general meeting of shareholders may only resolve to alter the articles of association or to dissolve the B.V. after having obtained the approval of, for example, the supervisory board or the holder(s) of the priority shares.⁷⁰

7.2 At least one general meeting of shareholders must be held in each financial year.⁷¹ Unless the articles of association state a shorter period, this meeting, which is usually called the ordinary general meeting of shareholders, must be held within six months after the close of the B.V.'s financial year. The financial statements of the B.V. must be adopted at this meeting.

⁶⁸Compare C.C. §§ 88 and 89(2) with C.C. §§ 197 and 198(2).

⁶⁹For the special provisions concerning the "large" B.V., see 11 in text *infra*.

⁷⁰See MAEIJER, *supra* note 1 at 90ff and 8.3 in text, *infra*.

⁷¹(2)C.C. § 219.

In addition to this ordinary general meeting of shareholders, an unlimited number of extraordinary general meetings of shareholders may be held. As to the validity of resolutions, it does not make any difference whether a resolution is passed at an ordinary or at an extraordinary meeting. The managing board and the supervisory board are equally entitled to call a general meeting of shareholders.⁷²

Furthermore, holders of shares representing ten percent of the B.V.'s issued share capital (or such lesser percentage as the articles of association may state) may upon request be authorized by the president of a district court to call a general meeting of shareholders if the managing board or the supervisory board fails to call a meeting after requested to do so by a shareholder, provided such shareholder is able to make a *prima facie* case that he has a reasonable need for the general meeting to be held.

Article 223 of the *Civil Code*, Book 2, provides that each shareholder may, upon his request be authorized by the president of a district court to call the annual general meeting of shareholders or such other meetings of shareholders as the articles of association provide for in the event that the managing board or the supervisory board fails to call such a meeting. The articles of association occasionally provide that holders of a certain number of shares may insist upon a general meeting without the authorization of the president of the district court. Written notices of the general meeting must be sent at least fifteen days in advance (or earlier, as prescribed by the articles of association) to the addresses of the shareholders as stated in the shareholders' register.

No resolution can be passed as to subjects that are not stated in the notice, unless such a resolution is passed by a unanimous vote at a general meeting where all issued shares are represented.⁷³ As a result of this last mentioned provision, no notice is required in those situations where there is only one shareholder or a limited number of shareholders and the entire issued share capital is represented at the meeting. All resolutions (even resolutions to alter the articles of association or to dissolve and liquidate the B.V.) will pass by a simple majority of the votes cast, unless the articles of association require a greater majority.⁷⁴ In general, the articles of association may provide for a greater majority or even for a unanimous vote for all resolutions to be passed. The articles of association may also require a specific quorum for certain or even for all resolutions. (For an exception to this rule, see 8.4 *infra*.)

7.3 The law is generally considered to require that general meetings of shareholders be held within the Netherlands.⁷⁵ This might well be inconvenient for B.V.s with foreign shareholders. Article 238 of the *Civil Code*, Book

⁷²(2)C.C. § 220.

⁷³(2)C.C. § 224.

⁷⁴(2)C.C. § 230.

⁷⁵(2)C.C. § 226.

2, however, allows for an easy solution by providing that the articles of association may state that all resolutions that might be passed at a general meeting of shareholders may also be passed without a general meeting of shareholders being held, provided such resolutions are passed by a unanimous vote and the votes are cast in writing. Note that this procedure can only be followed if there are no D.R.'s outstanding that have been issued with the cooperation of the B.V. and if there are no pledgees or holders of a right of usufruct having the same rights as the holders of such D.R.s. As a result, in many cases, no actual general meetings have to be held, although it may be unwise to omit the annual general meeting.⁷⁶ Even then, the physical presence of the shareholders is not required because all of them may be represented by written proxy, unless the articles of association provide otherwise.

7.4 A resolution of the general meeting of an association, an N.V. or a B.V., may be annulled by a court order on the following grounds:

1. disagreement with the statutory provisions regulating the powers of the general meeting of shareholders and the manner in which resolutions shall be passed;
2. disagreement with the articles of association;
3. the resolution was not passed in good faith (*goede trouw*). The Dutch term *goede trouw* is more or less comparable to the Anglo-American term "equitable".⁷⁷

Each shareholder, member of the managing board of a B.V. or other interested party⁷⁸ may invoke a court order to annul a resolution on the basis of any of the foregoing grounds, provided that he has a reasonable interest in the due observance of good faith, the relevant statutory rules or provisions of the articles of association.

Because the grounds for annulling a resolution are imprecise, there are a great number of cases that outline further the situations in which a resolution may be annulled. Note that the right to bring suit for annulment of a resolution is limited to a period of one year starting from the day that the resolution was published or the day that the person bringing the suit first had knowledge of the resolution.⁷⁹

7.5 In principle, the general meeting of shareholders of an N.V. must be convened by means of a convocation announced in a newspaper, but if the N.V. has only registered shares outstanding and no bearer D.R.s have been issued with its cooperation, the articles of association may provide for another way of convening the meeting⁸⁰ in a manner similar to that used to convene a general meeting of shareholders of a B.V.

⁷⁶(2)C.C. § 219.

⁷⁷(2)C.C. §11; Article 11 is also applicable to resolutions of other governing bodies of the legal entities dealt with in Book 2 of the Civil Code, according to (2)C.C. § 13(2).

⁷⁸For instance, a holder of a D.R.

⁷⁹(2)C.C. §§ 113, 114.

⁸⁰See SANDERS, *supra* note 1 at 117ff, and MAEIJER, *supra* note 1 at ch. 11.

8. Managing Board and Supervisory Board

8.1 In translating the various terms that are used in Dutch to refer to what are called here the managing board and the supervisory board, an Anglo-American lawyer could be misled about the nature and the relationship of those boards. Dutch law calls the managing board *Bestuur* and its members *Bestuurders*, but those words are rarely, if ever, used in articles of association. The common denomination is *directie* and *directeuren* or, more especially in larger companies, *raad van bestuur* and *leden van de raad van bestuur*. The supervisory board and its members are designated by the words used in law, i.e., *raad van commissarissen* and *commissarissen*. The managing board runs the company, determines its policy and has the power to make basic decisions, although internally those powers may be limited by provisions requiring the approval of, for instance, the supervisory board or the general meeting of shareholders. The managing board may be supervised by a supervisory board consisting of one or more members. A supervisory board is obligatory in the case of a "large" B.V. or "large" N.V. (see 11 *infra*), where it should consist of at least three members.

The main tasks of the supervisory board are to give advice and to exercise supervision. The two boards are separate entities, each with its own tasks, but they should in principle be viewed as being of equal authority.

8.2 Members of the managing board and of the supervisory board do not have to be, but may be, shareholders of the B.V. There are no requirements with respect to citizenship or residency of members of a managing board or supervisory board, and consequently the membership may consist entirely of one or more foreign individuals or corporations. It should be noted, however, that the residency or citizenship of members of those boards may influence the nationality of vessels and airplanes owned by the company of which they are board members. It is also possible, either as a consequence of EEC directives or of national developments, that members of the managing board will have to be natural persons within the foreseeable future.

8.3 The first members of the managing board are designated in the deed of incorporation.⁸¹ Their names, places of residence, dates and places of birth, citizenship, and powers of representation are entered into the trade register, together with all other information concerning the B.V. that must be recorded after the incorporation.⁸² Once the B.V. exists, new members of the managing board are appointed by a resolution of the general meeting of shareholders.⁸³ Each new appointment must also be recorded in the trade register. If the B.V. fails to record the appointment of a new member of its managing board (or if it fails to record the dismissal of a member of its

⁸¹See 2.3 in text *supra*.

⁸²See 2.6 in text *supra*.

⁸³(2)C.C. § 242.

managing board) this failure will constitute an offense under Article 34 of Business Registration Act on the part of the B.V. However, the consequent incorrect entry in the trade register does not affect third parties, who may rely upon the information recorded with the trade register.

Normally, the general meeting of shareholders is free to appoint whichever members of the managing board it wishes to appoint. However, the articles of association may provide that, for instance, the supervisory board or holders of priority shares are entitled to make a nomination, which nomination is binding upon the general meeting of shareholders, except that the nomination may be overruled in a general meeting of shareholders by a two-thirds majority, provided that this majority represents at least half of the issued share capital.⁸⁴ The articles of association may not require a larger majority. As to the suspension and dismissal of members of the managing board, the same majority may be prescribed. Often such majority is required only if the suspension or dismissal is not supported by those who have the right to make the binding nomination.⁸⁵

8.4 Dutch law does not provide for a distinct delegation of every power of a B.V. to one or the other of its two principal governing bodies, *i.e.*, the managing board and the general meeting of shareholders. Hence, a number of powers—for example, the power to repurchase shares in its own share capital, the power to issue shares, and the power to order additional payments on shares that were issued without full payment—may be delegated in the articles of association either to the general meeting of shareholders or to the managing board or to the supervisory board.⁸⁶

It is of great importance that the articles of association be absolutely clear in these matters. The law has given power to the general meeting of shareholders in all matters not delegated by the Civil Code or the articles of association to other governing bodies. The management of the B.V. is—except for restrictions in the articles of association—the exclusive province of the managing board.

As noted, an area in which the law explicitly grants power to the managing board is in the management of a B.V.⁸⁷ The hallmark case in this area is the Dutch Supreme Court's decision in the *Forum Bank* case,⁸⁸ in which the Court ruled that the managing board has certain powers of its own in the management of a company that are not subject to the overruling power of other governing bodies of the company, such as the general meeting of shareholders or the supervisory board.⁸⁹

⁸⁴(2)C.C. § 243.

⁸⁵(2)C.C. § 244.

⁸⁶More stringent rules, concerning the delegation of these powers, are expected to be introduced soon as an adjustment to the second EEC directive.

⁸⁷(2)C.C. § 239.

⁸⁸Supreme Court, January 21, 1955, NJ 1959, 43.

⁸⁹See MAEIJER, *supra* note 1 at 112ff.

8.5 Another area of corporate power that belongs to the managing board is the power to represent the B.V. vis-à-vis third parties.⁹⁰ This is an area of the law that has changed drastically as a result of the adjustment of Dutch law to the first EEC directive in 1971. The principal rule now is that the B.V. can be represented by each member of the managing board acting alone. However, the articles of association may provide for a system whereby the B.V. may be represented only by a stated number of members of the managing board acting jointly. The system chosen in the articles of association affects third parties inasmuch as the B.V. may invoke the nullity of an agreement to which the B.V. is a party on the ground that the B.V. was not represented according to the system of representation laid down in the articles of association. A third party has the right to require that the B.V. announce—within a reasonable time limit—whether it will ratify the agreement or not. If the B.V. fails to announce itself, the third party ceases to be bound by the agreement. For example, when the B.V. has been represented vis-à-vis a third party by only one member of the managing board in a case where the articles of association provide for a so-called two-signature system, the nullity of the agreement may be invoked by the B.V. In order to protect third parties, the Business Registration Act of 1918 provides that the system of representation contained in the articles of association, as well as all changes thereto, must be recorded with the trade register. As discussed previously, the information recorded with the trade register protects third parties because they may rely exclusively upon such information. All other possible restrictions as to the power to represent the B.V. do not affect third parties.⁹¹ Nevertheless, one often finds provisions in articles of association to the effect that, for certain resolutions of the managing board, the prior approval of the supervisory board is required. Such a restriction, however, has only an internal effect.

For example, suppose that the articles of association and consequently the information available at the trade register state that the B.V. is represented by two members of the managing board acting jointly. Furthermore, the articles of association state that the managing board, in order to enter into binding agreements of sale, requires the prior approval of the supervisory board. In this situation, a third party, as buyer, obtains an enforceable agreement of sale, provided the agreement is signed by two members of the managing board. The fact that the supervisory board did not grant its approval to the sale will not affect the validity of the agreement. Under Dutch law, as contrasted to the American system, a third party dealing with a B.V. does not have to satisfy himself that a member of the managing board representing the B.V. is empowered to do so by a resolution of the managing board. Even if no resolution were passed to the effect that such a member of the managing board was authorized to perform a certain act on behalf of the B.V., the B.V. would still be bound.⁹²

⁹⁰(2)C.C. § 240.

⁹¹(2)C.C. § 240.

⁹²See SANDERS, *supra* note 1 at 83ff.

8.6 A member of the managing board is considered to be employed by the B.V.⁹³ In certain respects his position is not different from that of other employees of the B.V. One principal difference, however, is that the approval of the director of the Regional Employment Agency (*Gewestelijk Arbeidsbureau*), which is required for the dismissal of all other employees, is not required for the dismissal of a member of the managing board.

An even more important difference between members of the board and other employees is that a member of the managing board is liable for the proper performance of the duties assigned to him,⁹⁴ whereas an ordinary employee is obliged only to perform his work to the best of his abilities. One implication of this liability is that a member of the managing board might be removed from office if he represented the B.V. in a situation wherein the articles of association expressly state that the prior approval of the supervisory board (or other governing body) is required, which approval he did not obtain. In that instance the B.V. would be bound to a third party, but such an infringement of the articles of association could, in general, constitute sufficient grounds for the board member's dismissal.

It is possible that a member of the managing board who does not properly fulfill his obligations thereby personally commits a tort. There are court decisions to the effect that a member of the managing board who wilfully causes the B.V. to undertake a commitment that he knows the company will be unable to perform will be liable for tort. In groups of companies, the situation can be very complicated.⁹⁵

8.7 The supervisory board supervises the management of a B.V. as conducted by the managing board and advises the latter on matters that are of importance to the B.V.⁹⁶ If the articles of association provide for a supervisory board, then they usually also state the powers and duties of the supervisory board. Members of the supervisory board are appointed, suspended and removed from office in the same manner as members of the managing board.⁹⁷ Their names and other particulars are recorded with the trade register. The articles of association may provide that a number of members of the supervisory board (not exceeding one-third of the total number of members) are appointed by other than the general meeting of shareholders (e.g., by government agencies, banks, etc.).⁹⁸ In general, members of the supervisory board do not have the power to represent the B.V. One of the exceptions is

⁹³For tax consequences, see 8.7.4 in Part II of this article, which will appear in the Winter 1981 issue of *The International Lawyer*.

⁹⁴(2)C.C. § 8.

⁹⁵See MAEIJER, *supra* note 1 at 120ff.

⁹⁶(2)C.C. § 250.

⁹⁷Although members of the supervisory board are often appointed for a specific period of time, the appointment of members of the managing board is usually made for an indefinite period.

⁹⁸(2)C.C. § 253.

that the supervisory board can represent the B.V. in situations where there is a conflict of interest between the B.V. and one or more members of its managing board.⁹⁹

In general, a member of a managing board who has a conflict of interest with the B.V. is not qualified to represent the B.V. The main rule in such case is that the B.V. is represented by its supervisory board, but that the general meeting always is entitled to designate one or more representatives. The meeting must, of course, do this anyway if the B.V. does not have a supervisory board. The rules regarding conflicts of interest may be waived in the articles of association with the effect that a board member may even represent the B.V. in all conflicting situations.

Members of the supervisory board are not in the employment of the B.V. Normally, the general meeting of shareholders decides upon their remuneration, which must be published in the annual financial statements.¹⁰⁰

9. Financial, Statements, Distribution of Profits

9.1 Articles 306 through 343 of the Civil Code, Book 2, contain rather detailed provisions regarding the format of the annual financial statements of both the N.V. and the B.V. The requirements for disclosure of these statements to parties other than shareholders are different for N.V.'s and B.V.'s and are discussed below in 9.5 and 9.6. The detailed lay-out provisions are supposed to ensure an accurate and dependable presentation of the annual accounts to the shareholders of a company, and for interested third parties who contemplate participating in the company or doing business with it. The abovementioned articles provide that the annual financial statements, which include the balance sheet and profit and loss statement with the explanatory memorandum attached as an annex,¹⁰¹ must be drawn up in such a manner as to enable a true and accurate judgment to be made regarding the equity, solvency, liquidity and performance of the company.¹⁰² The valuation of the company's assets and liabilities must conform to sound business practice.¹⁰³ Special provisions exist with regard to the valuation of participations and to foreign affiliates or subsidiaries.¹⁰⁴ Under certain circumstances, as set out in Article 343 of the Civil Code, Book 2, a company affiliated with a group of companies and whose financial data are already mentioned in the annual accounts of another company does not have to conform to the provisions regarding the lay-out of the annual financial statements if all of its shareholders so agree before the end of the financial year.

⁹⁹(2)C.C. § 256.

¹⁰⁰(2)C.C. § 313.

¹⁰¹(2)C.C. § 247.

¹⁰²(2)C.C. § 308.

¹⁰³(2)C.C. § 311.

¹⁰⁴(2)C.C. §§ 318-321.

It should be noted that the legislation concerning the annual financial statements will be changed in the near future as a result of the fourth EEC directive.

If a B.V. does not comply with the rules set forth above, it risks being sued. Each "interested party" or the Attorney General of the Court of Appeal in Amsterdam acting in the public interest, may bring suit before the Business Enterprises Chamber (*Ondernemingskamer*) of the Amsterdam Court, which in turn may order the company to conform its financial statements to law.¹⁰⁵

9.2 Normally, the fiscal year of a B.V. coincides with the calendar year. The articles of association may, however, provide otherwise. The managing board must prepare the financial statements within five months after the close of the financial year. Within six months after the close of the financial year, the statements must be submitted to the general meeting of shareholders for adoption.¹⁰⁶ The power to adopt the financial statements cannot be vested in any other governing body. The adoption of the financial statements does not release the managing board from its liability for the conduct of the B.V.'s affairs unless the articles of association so provide.¹⁰⁷

9.3 A B.V. is not required to appoint a certified public accountant (*register-accountant*)¹⁰⁸ to examine the annual financial statements and to give an opinion on the correctness of these statements unless:

1. the B.V. has an issued share capital of Dfl. 500,000 or more;¹⁰⁹ or
2. the B.V.'s business activities include banking or insurance, the B.V. has bearer bonds outstanding, or bearer debentures are in circulation;¹¹⁰ or
3. according to its balance sheet, the B.V. possesses assets of Dfl. 8,000,000 or more and it has, directly or indirectly through a subsidiary company established in the Netherlands, at least one hundred employees.¹¹¹

9.4 With the adoption of the financial statements, the profits also will be determined. Unless the articles of association provide otherwise, the profits must be distributed to the shareholders.¹¹² Normally, the articles of association provide that the profits are at the disposal of the general meeting of shareholders, which means that it can reserve the profits in part or in whole (unlike some other European legal systems, Dutch law does not yet require mandatory reserves). However, the articles of association may provide that a

¹⁰⁵See Lowensteyn in FOKKEMA, *supra* note 1 at 177-178.

¹⁰⁶(2)C.C. § 210.

¹⁰⁷(2)C.C. §§ 248-249.

¹⁰⁸See FROMMEL, *supra* note 1 at 412-413. An accountant with foreign qualifications may obtain the status of "Register-accountant" via a special license.

¹⁰⁹(2)C.C. § 211.

¹¹⁰(2)C.C. § 211 in connection with (2)C.C. § 213.

¹¹¹(2)C.C. § 211 in connection with (2)C.C. § 214.

¹¹²(2)C.C. § 216.

certain percentage of the profits must be reserved, or that the decision on this subject is delegated to, for instance, the supervisory board.

No distribution of profits may be made if in any preceding year a loss has occurred that has not yet been recovered and that cannot be met from reserves or in some other manner.¹¹³ Dividends may be distributed in cash or, if the articles of association so provide, in some other form, e.g. as a stock dividend. The right to claim declared but unpaid dividends is limited to a period of five years after those dividends have been made payable.¹¹⁴ An interim dividend may be declared, provided that the articles of association so allow.

9.5 A B.V. is not required to publish its annual financial statements, unless (1) the business activities of the B.V. include banking, or insurance or the B.V. has bearer bonds outstanding, or bearer debentures are in circulation.¹¹⁵ A B.V. that has balance sheet assets of Dfl. 8,000,000 or more and has at least one hundred employees must publish its balance sheet in a simplified form together with the explanatory memorandum mentioned in 9.1 and the just-mentioned accountant's opinion.¹¹⁶

Under certain circumstances, a B.V. that fulfills the requirements set out in the preceding paragraph does not have to make public its balance sheet provided its parent company publishes a balance sheet in which the financial data of the subsidiary are incorporated, and it files a statement with the trade register in which it declares itself liable for the commitments of the subsidiary. Publication is achieved by filing the required statements with the trade register, which statements are then open for public inspection.¹¹⁷

9.6 One of the major differences between an N.V. and a B.V. is the requirement to publish the annual financial statements. Although considerable changes will be made when Dutch legislation is adapted to accommodate the fourth EEC directive, in most cases now a B.V. is not required to disclose any of its financial statements, whereas an N.V. must always disclose its financial statements. In addition, the law requires an N.V. to appoint a certified public accountant to examine those statements and to give an opinion on their correctness.¹¹⁸

10. Alteration of Articles of Association, Dissolution and Liquidation

10.1 The mechanics to alter (partially or wholly) the articles of association are almost identical to those used to incorporate a B.V.¹¹⁹ Thus, a deed

¹¹³(2)C.C. § 217.

¹¹⁴(2)C.C. § 216.

¹¹⁵(2)C.C. § 213.

¹¹⁶(2)C.C. § 214.

¹¹⁷See MAEIJER, *supra* note 1 at 167ff.

¹¹⁸(2)C.C. § 102. See note 108 *supra*.

¹¹⁹(2)C.C. §§ 234, 235.

must be prepared and executed before and by a civil law notary, the Department of Justice must grant its approval on the draft of the deed, and after execution of the deed, notice of the alteration must be filed with the trade register and published in the *Dutch Official Gazette*.¹²⁰ The power to alter the articles of association is vested in the general meeting of shareholders.¹²¹ The articles of association may provide that the general meeting of shareholders can only resolve to alter the articles of association after having obtained the approval of another body, for example, the supervisory board or the holders of priority shares.¹²²

10.2 Although the law recognizes four instances in which a B.V. shall be liquidated and dissolved, only two of them have a practical significance, namely, liquidation by virtue of a resolution of the general meeting of shareholders and in the event of insolvency, after the B.V. has been declared bankrupt or after termination of the bankruptcy as a result of the adverse condition of the bankruptcy estate.¹²³ In the case of bankruptcy, the trustee in bankruptcy (*curator*) will normally order payment in full on all shares that have not yet been fully paid up.

After its liquidation the B.V. continues to "exist" as long as its existence is necessary to liquidate its enterprise.¹²⁴ Normally the articles of association will provide who shall act as liquidator. If the articles of association lack such a provision, the liquidator may be appointed in the resolution by which the B.V. is dissolved. Lacking such an appointment, the members of the managing board will act as liquidators. In bankruptcy the B.V. is liquidated by the trustee in bankruptcy.

No distribution to shareholders may be made until two months have passed from the date announcement has been made of the plan of distribution (*plan van uitkering*).¹²⁵ Any interested party may oppose the plan of distribution by a written notice served upon the liquidators during this period. This notice summons the liquidators to appear before the district court, which will determine if the complaint of the petitioner is justified. After completion of the court proceedings or after two months have passed without anyone opposing the plan of distribution, the final distributions to the shareholders may be made. The procedure that must be followed in the event of a dissolution following bankruptcy is quite different from the procedure as outlined above.¹²⁶ A discussion of that procedure would, however, not fall within the limited scope of this article.¹²⁷

¹²⁰(2)C.C. § 236.

¹²¹(2)C.C. § 231.

¹²²See MAEIJER, *supra* note 1 at 254ff.

¹²³(2)C.C. § 276.

¹²⁴(2)C.C. § 23.

¹²⁵(2)C.C. § 279.

¹²⁶Bankruptcy Act (*Faillissementswet*). §§ 64-68.

¹²⁷See MAEIJER, *supra* note 1 at 258ff.

11. The "Large" B.V.

11.1 As discussed above, a B.V. must have a managing board, but it is under no obligation to have a supervisory board. Nevertheless, for the so-called large B.V., a supervisory board is mandatory. The special provisions that govern such a mandatory supervisory board—including provisions as to the appointment of the board and the special powers vested in it—are contained in Articles 263 through 275 of the Civil Code, Book 2.

A B.V. will become a "large" B.V. if the following three criteria apply:

1. the B.V.'s equity, *i.e.*, its issued share capital together with its reserves, amounts to at least Dfl. 10,000,000;¹²⁸
2. the B.V., or a legal entity of which it holds, directly or indirectly, for its own account at least half of the issued share capital, has created an employees' council by virtue of a statutory requirement;¹²⁹ and
3. the B.V., together with the legal entities of which it holds, directly or indirectly, for its own account at least half of the issued share capital, normally employs at least one hundred employees in the Netherlands.¹³⁰

A B.V. that meets these criteria must file a statement to that effect with the trade register. After the B.V. has kept such a statement filed for three consecutive years, the B.V. is considered to be a "large" B.V., and the special provisions are applicable to it.¹³¹ Failure to file the statement or to adjust the articles of association after the three-year period in accordance with the provisions described in 11.3 *infra* constitutes an "economic offense" under the Economic Offenses Act (*Wet op de Economische Delicten*).

11.2 In certain situations where a B.V. is part of a group of companies (whether domestic or foreign), the special provisions for the "large" B.V. are not applicable or are applicable only in part.¹³² A potentially "large" B.V. is completely exempt from complying with the special provisions for the "large" B.V. if:

1. at least half of the issued share capital of the B.V. is: (a) held by another company that itself is a "large" N.V. or a "large" B.V. and complies with the special provisions of (b) held by a number of such "large" N.V.'s or B.V.'s by virtue of a joint venture agreement between those "large" N.V.'s or B.V.'s; or
2. the activities of the B.V. are exclusively or almost exclusively confined to managing and financing the companies with which it forms a group, provided that a majority of its employees and of the employees of the companies with which it forms a group are employed outside the Netherlands (*i.e.*, the B.V. is a holding company); or

¹²⁸(2)C.C. § 263 (2)(a).

¹²⁹(2)C.C. § 263 (2)(b); See 13.2 in text *infra*.

¹³⁰(2)C.C. § 263 (2)(c).

¹³¹(2)C.C. § 263.

¹³²(2)C.C. §§ 263 & 265.

3. the activities of the B.V. are confined exclusively or almost exclusively to rendering management and financing services to the companies with which it forms a group (i.e., a service company).

In other cases, a potentially "large" B.V. will be partially exempt from the special provisions if it forms a part of a foreign based group of companies under the conditions set out by law. In such a B.V., the managing board is appointed by the general meeting of shareholders and the annual accounts also are adopted by the general meeting of shareholders, but the supervisory board is appointed in the same way as in other "large" B.V.s, and the resolutions, mentioned in 11.3 *infra*, also are subject to the prior approval of the supervisory board. The rules that apply to partially exempt "large" B.V.s are very complicated, as is, in fact, the whole system for the "large" B.V. Specialized counseling almost always is required to determine the applicability of the special provisions in a given situation.

11.3 If a B.V. is considered to be a "large" B.V. and no exemption applies, the articles of association of such a B.V. must comply with the following provisions:¹³³

1. There must be a supervisory board consisting of at least three natural persons;
2. Members of the supervisory board must be appointed by a resolution of the supervisory board (co-optation) and not by the general meeting of shareholders; the members of the managing board, the general meeting of shareholders and the employees' council (see 13.2) may make recommendations, and both the general meeting of shareholders and the employees' council may object to a particular proposed appointment on grounds set out in the law,¹³⁴ but unless the Social Economic Council¹³⁵ finds such objection compelling, the supervisory board may make the appointment according to its earlier proposal;¹³⁶
3. The power to appoint and dismiss members of the managing board must be vested in the supervisory board.¹³⁷ In regular B.V.s this power is vested exclusively in the general meeting of shareholders).

The general meeting of shareholders must be informed of a proposed appointment of a member of the managing board and the supervisory board may not dismiss a member of the managing board without previous consultation with the general meeting of shareholders. Members of the supervisory board of a "large" B.V. are appointed for a period

¹³³(2)C.C. §§ 267-275.

¹³⁴(2)C.C. § 268 (6).

¹³⁵The Social Economic Council (*Sociaal Economische Raad*) is a statutory agency consisting one-third of representatives of unions, one-third of representatives of employers' organizations and one-third of members appointed by the Crown. The council has a number of statutory powers related to certain social and economic issues; see also 12.2 in text *infra*.

¹³⁶(2)C.C. § 268.

¹³⁷(2)C.C. § 272.

not exceeding four years, and they can be dismissed only by the Business Enterprises Chamber of the Amsterdam Court of Appeal at the request of the supervisory board or a designated representative of the general meeting of shareholders or the employees' council;

4. Unlike a regular B.V., whose general meeting of shareholders annually adopts the financial statements, in a "large" B.V. this power must be vested in the supervisory board.¹³⁸ After adoption by the supervisory board, the general meeting of shareholders must approve the financial statements but cannot make amendments to them;
5. Resolutions of the managing board that could seriously interfere with the structure or the existence of the B.V. or of the enterprise conducted by it must be subject to the prior approval of the supervisory board¹³⁹ although the lack of such approval would not affect third parties.¹⁴⁰

11.4 The "large" N.V. is governed by the same provisions as the "large" B.V.¹⁴¹

12. Mergers and S.E.R. Merger Rules of Conduct

12.1 The following types of mergers are possible under Dutch law:

1. Merger by transfer of shares. This occurs when one company acquires the shares of another company by making a bid (tender offer) for them in which it offers to acquire the target shares either against payment in cash or against transfer of shares to be issued by the acquiring company, or when a newly formed company acquires the shares of two companies against an issue of its own shares or payment in cash to the shareholders of the acquired companies;
2. Business merger. This occurs when one company purchases the business enterprise of another company for cash or against transfer of shares to be issued, or when two companies transfer their assets to a newly formed third company in payment for the shares issued to them by that third company.

In both types of mergers the merging companies continue to exist. No amalgamation takes place. A merger by amalgamation—in which all of a company's assets, together with all of its rights and obligations, are transferred or assigned under a general title to the acquiring company and in which the shareholders of the acquired company become shareholders of the acquiring company by operation of law—is at present unknown under Dutch law. However, once the third EEC directive becomes effective, this type of

¹³⁸(2)C.C. § 273.

¹³⁹(2)C.C. § 274.

¹⁴⁰For more information about the "large" B.V. or N.V., see MAEIJER, *supra* note 1 at ch. 17 and SANDERS, *supra* note 1 at part 3.

¹⁴¹(2)C.C. §§153-165.

merger will be available not only in the Netherlands but also in comparable form in the other member states of the EEC.

12.2 In 1970 the Social Economic Council (S.E.R.) published the Merger Rules of Conduct (*SER fusiegedragsregels*),¹⁴² which were materially amended in 1975. These rules are not statutory rules. They do not have the force of law, and infringement of them does not constitute a criminal offense or nullity of a transaction. Nevertheless, these rules are of great importance because noncompliance with them in a public offering may cause the Dutch Association for the Stockbrokerage Business (*Nederlandse Vereniging voor de Effectenhandel*) to prohibit its members from participating in the offering.

In order to ensure the due observance of the S.E.R. Merger Rules of Conduct, the Commission for Merger Affairs (*Commissie voor Fusieaangelegenheden*) has been formed. In a number of instances, this commission must be informed of the particulars of a contemplated merger.

The Merger Rules serve two main purposes, i.e., to protect the interests of the shareholders and to protect the interests of the employees of the companies involved in the merger. In general, the Merger Rules that are designed to serve the first purpose are only applicable when a public offering is being prepared. In summary form the Merger Rules designed to protect the interests of shareholders include the following:

1. Rules relating to the obligation to furnish and publish information as soon as circumstances arise that indicate a need for such publication, "in order to promote a justified formation of the price of the shares in one of the companies concerned;"
2. rules that apply when the managing boards of the companies concerned have called for such a publication;
3. rules as to what information the notice should contain;
4. rules that apply in the event of a public offering when the managing boards of the companies concerned do not reach an agreement;
5. rules relating to the period during which shares can be tendered for the purpose of accepting an offering and rules relating to acceptance and refusal of an offering and withdrawal of the same;
6. rules for the purpose of preventing the abuse of inside information;
7. rules for the purpose of calling an information meeting of shareholders of the company to be taken over or the target company;
8. rules to prevent a company in the process of taking over another company from acquiring shares of the target company on terms more favorable than those set forth in the public offering documents.

The Merger Rules designed to protect the interests of employees are applicable when at least one of the business enterprises involved in the merger is

¹⁴²COMM. MKT. REP. 26,738.

established in the Netherlands and employs in its normal course of business one hundred or more employees. This means that because of the number of people employed by the large enterprise, the Merger Rules apply even in a routine situation where a very small enterprise is taken over by a very large one.

The unions must be consulted as soon as the negotiations on the merger have advanced to a stage where it is reasonable to expect that agreement will be reached. The unions must be consulted at this stage in order to make it possible for their observations to be taken into account before giving final shape to the merger. There are rules of secrecy to be observed by the unions. The Department of Economic Affairs also must be notified.

The rules concerning the protection of employees do not apply if all of the enterprises involved belong to the same group of enterprises or if the merger is not primarily controlled by Dutch law. An example of the latter would be a case where two groups of companies composed mainly of foreign corporations decided to merge and the merger happened to include two Dutch enterprises. The main purpose and effect of the merger would be located abroad in that case. Apart from the steps that may be taken by the Dutch Association for Stock brokerage Business, as discussed above, the S.E.R. Commission for Merger Affairs could censure a firm publicly or announce that a public notification had been issued. The commission publishes quarterly reports on its activities which, among other things, in cases of minor infringements of the rules, show such infringements without public censure being pronounced or a public notification being issued.

Unfortunately, a more detailed discussion of the Merger Rules is not possible within the scope of this article. However, it should be remembered that the Merger Rules are far more complex than the description above would indicate. With regard to EEC developments in this area, one should take note of the directive dated February 14, 1977, which deals with the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. This directive will in due course have its effect on Dutch law.

13. Employees' Interests in Business Enterprises

13.1 In recent decades the idea has developed that the business enterprises of larger companies are of importance not only to their capital contributors but also to their employees.¹⁴³ This growing understanding of the pluralistic significance of business enterprises has been responsible for a fair amount of recent legislation that recognizes this new concept. In this respect, two legislative enactments are most important: the Employees' Council Act

¹⁴³For European developments in this area, see W. Daubler in 14 *COMMON MKT. L. REV.* (1977).

(*Wet op de Ondernemingsraden*, or ECA) as enacted in 1971 and amended in 1979, and the Right of Investigation (*Enqueterecht*), as enunciated in Title 7, Book 2, of the Civil Code:

13.2 Under Section 2 of the ECA, each business enterprise (including nonprofit organizations) that normally employs more than one hundred employees is generally required to set up an employees' council (*ondernemingsraad*). An employees' council is composed of a number of employees—the actual number depends on the number of persons employed in the business enterprise—elected by their fellow employees. To a certain extent, unions which have members among the employees are involved in the election, as they are entitled to draw up a list of candidates for the council. The employees' council does not take part in management, but in certain cases it can exercise considerable influence. It meets with the managing board at least six times a year, and in those meetings all subjects have to be discussed which either the managing board or the employees' council desires to be considered. Twice a year the employees' council must have the opportunity to discuss the general condition of the company's business. Also the employees' council must have the opportunity to give advice on a number of important decisions, e.g., about the diminution, extension or other significant modification of the activities of the company. If the company does not choose to follow the advice of the employees' council, the company must suspend the execution of its decision until a month after the date on which the employees' council was informed of the decision, unless the employees' council waives this suspension. During that month, the employees' council may appeal to the Business Enterprises Chamber of the Amsterdam Court of Appeal, which may rule that, all interests involved being taken into account, the company could not reasonably have arrived at its decision. The consent of the employees' council is always required with regard to so-called tertiary employment conditions, such as pension and profit sharing arrangements, savings arrangements, working hours, safety measures, etc. The employees' council must receive the annual accounts for discussion as soon as possible after they have been adopted.

Legislation is being prepared to extend the ECA to small enterprises employing at least ten but fewer than one hundred employees. This group is subdivided into enterprises with at least ten but less than thirty-five employees and enterprises with at least thirty-five but less than one hundred employees. In the first group, the managing board must give the employees' council the opportunity to meet at least twice a year. In the second group, the ECA is applicable in principle, but in a considerably mitigated form. In this case an obligation to ask the advice of the employees' council would exist only if the decision involved could endanger the employment of at least one-fourth of the employees, or could change considerably the nature of their activities or the conditions and circumstances under which they work. However, the company would not have to suspend its decision if the council disapproved it, nor

would the council have the right to appeal to the Business Enterprises Chamber. Of course, it is uncertain what changes these proposals may undergo in parliament.¹⁴⁴

13.3 The second relatively recent legislative enactment recognizing the pluralistic significance of business enterprises involved a revision in the Right of Investigation. The Right of Investigation has existed for a considerable period of time but was only recently revised. It applies not only to N.V.'s and B.V.'s,¹⁴⁵ but also to cooperative associations and mutual assurance companies.

The Business Enterprises Chamber of the Court of Appeal in Amsterdam has been designated as the central agency to which all petitions for an investigation into the conduct of the business and the course of affairs of a legal entity must be addressed.¹⁴⁶ If the court acknowledges the grounds stated in the petition, it appoints one or more persons to carry out the investigation. In the case of an N.V. or a B.V. the following persons or groups of persons are authorized to file a petition:¹⁴⁷

1. one or more shareholders or holders of depositary receipts for shares representing either at least one-tenth of the issued share capital or shares or D.R.'s with a par value of at least Dfl. 500,000;
2. a union that has among its members persons employed by the N.V. or B.V.;
3. any persons authorized to file a petition under the articles of association or under a separate agreement with the N.V. or B.V.

The Attorney General of the Court of Appeals in Amsterdam may also initiate an investigation for reasons of public policy.¹⁴⁸ Provisions have been made to prevent petitions for an investigation on unreasonable grounds.¹⁴⁹ After an investigation has been completed, the results are filed with the Registry of the Court of Appeal. The court may permit public inspection of the investigation report. If the results of the investigation show that there has been mismanagement by the managing board, the court can take a number of measures, including the following:¹⁵⁰

1. the suspension or annulment of resolutions;
2. the suspension or dismissal of members of the managing board or the supervisory board;
3. the temporary appointment of one or more members of the managing board or supervisory board;
4. a temporary suspension of specific provisions in the articles of association;
5. the dissolution of the company.¹⁵¹

¹⁴⁴See SANDERS, *supra* note 1 at part 4, and MAEIJER, *supra* note 1 at 217ff.

¹⁴⁵(2)C.C. §§ 344-359.

¹⁴⁶(2)C.C. § 345.

¹⁴⁷(2)C.C. § 346.

¹⁴⁸(2)C.C. § 345.

¹⁴⁹(2)C.C. § 350.

¹⁵⁰(2)C.C. § 356.

¹⁵¹See MAEIJER, *supra* note 1 at ch. 13, and SANDERS, *supra* note 1 at 60ff.

14. Corporate Security Measures: The Application of the Kingdom Statute for the Transfer of the Corporate Seat

The interest in corporate security measures of the Netherlands can be traced to the 1930s, when concern arose that the Netherlands might not be able to maintain its neutral position in a second world war. It was feared that the involvement of the Netherlands in another war could result in an occupation of its territory, thereby endangering corporations seated within the Netherlands. History proved this fear to be well-founded, and on May 10, 1940, the Netherlands was invaded. However, a few days earlier, on April 26, 1940, a law was passed that enabled corporations established in the Netherlands to transfer their corporate seats to other parts of the Commonwealth or Kingdom of the Netherlands, which at that time included the Netherlands, Indonesia, Surinam and the Netherlands Antilles. Based on the Act of April 26, 1940, a number of Dutch corporations managed to transfer their corporate seats to other parts of the Commonwealth, thus maintaining the free use of most of their assets situated outside of Europe.

The Act of 1940 has been replaced by the Kingdom Act of 1967, which provides, under certain stated circumstances, for a transfer of a corporate seat from one part of the Kingdom of the Netherlands to another. At present, the Kingdom consists only of the Netherlands and the Netherlands Antilles. As a Kingdom Act, the 1967 Act is applicable to both parts of the Kingdom, thus offering a Netherlands Antilles corporation the possibility of transferring its corporate seat to the Netherlands and a Netherlands corporation the possibility of transferring its corporate seat to the Netherlands Antilles. The transfer is effected by means of a deed of alteration of the articles of association, executed before a civil law notary. The deed of alteration can be executed either by the general meeting of shareholders, the managing board or by a person appointed for that purpose by the managing board. Such an appointment itself must be recorded in a notarial deed. The person appointed can be an individual or a legal entity residing within or without the Netherlands. The deed of alteration effectuating the transfer of the corporate seat must be approved by the Department of Justice of the Netherlands or the Netherlands Antilles.

The execution of the deed of alteration and the subsequent approval of the Department of Justice do not in themselves constitute a valid transfer of the corporate seat. The actual transfer of the corporate seat takes place only when one of the events mentioned in the Act occurs. These events are: war, immediate danger of war, revolution or other similar extraordinary circumstances. It is, of course, highly recommended that a transfer of the corporate seat be prepared well in advance of any undesirable political developments.

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