

Dutch company and partnership law: some proposed changes

by Frank Wooldridge

This article considers planned reforms of the law relating to the private company and the partnership which are likely to come into force in the near future.

The account given of the proposed reforms of the Dutch private company has been influenced by the excellent account of them by Mr Marco Langenboen, Legal Adviser at the Netherlands Ministry of Justice in his paper *Reform of the Private Limited Company in the Netherlands*. This article will also make some mention of the 2008 proposal that certain companies might have a double board system or have single tier boards consisting of executive and non-executive directors (as in the United Kingdom). Furthermore, it will make brief mention of the recent proposal for a new Title 6A to be included in Book 2 of the Netherlands Civil Code governing a new type of semi-public company, the *maatschappelijke onderneming* (socially orientated undertaking) which should prove useful for schools, universities, hospitals, care institutions and housing corporations.

PROPOSED REFORMS OF THE PRIVATE LIMITED LIABILITY COMPANY (BESLOTEN VENNOOTSCHAP MET BEPERKTE AANSPRAKELIJKHEID, BV)

Motivations for and general characteristics of the proposed reforms

The latter reforms are not expected to come into effect until the end of 2009. The reforming Act will be accompanied by another one, dealing with the effect of the reform upon the present law. At present, the rules of law governing the Dutch public and private company are in general similar. This situation does not give a great deal of flexibility to the private company. An attempt has been made to give a brief account of the principal reforms which are contained in the preliminary draft Bill submitted by the Ministry of Justice to the Dutch legislature in the text below. The structure of this account substantially follows that contained in the paper on the Bill by the legal adviser, Mr Marco Langendoen, at the Department of Legislation of the Ministry of Justice of the Netherlands. The reforms are motivated by a desire to create a simpler and more flexible legal structure, and are intended to introduce a

new system of protection without any minimum capital requirements. They aim at removing unnecessary restrictive rules and legal uncertainties, and giving added freedom to shareholders to choose their favoured type of organisation, whilst providing guarantees for minority shareholders and other interested parties.

The preliminary draft Bill also endeavours to reduce the number of mandatory legal provisions and lessen the regulatory burden on companies. It was largely based upon the report of a group of experts under the chairmanship of Professor de Kluiver. It was also inspired by studies in comparative law and, in particular, by the law of the Netherlands Antilles governing private companies; the comparative studies also considered the United States Revised Model Business Corporation Act, the law of Delaware, New Zealand and Australian law. The proposals are partly aimed at making the Dutch private company a useful form for subsidiaries of Dutch companies in other EU Member States, which benefit from the rules of Community law governing freedom of movement set out in such cases as *Centros* (Case C-212/97, *Centros* [1999] ECR I-1459) and *Inspire Art* (Case C467/02 *Inspire Art* [2003] ECR I-10155). They will involve a number of alterations in the provisions of Book 2 of the Netherlands Civil Code concerning private companies.

Proposals aimed at flexibility

Certain of these proposals govern the general meeting and shareholders' rights, whilst others involve the internal structure of the company. Under the existing rules governing the *besloten vennootschap* (BV) voting rights are in principle proportional to the nominal value of the shares. The new proposals permit a different distribution of voting rights. An alteration of the articles so permitting will require a unanimous vote at the general meeting (preliminary draft Bill, art 228(4)). It appears that voteless (but not no-par value) shares will also be permitted (preliminary draft Bill, art 228(5)). It will also be possible to issue shares which do not participate in the profits or reserves (art 216(7) *ibid*). Certain existing restrictions on

the possibility of making decisions outside the general meeting will be removed. According to the reform proposals, such decision making will be possible where all the persons entitled to attend the meeting so agree (art 238(1) *ibid*). If all the shareholders are also directors of the company, the annual accounts may be adopted by this method unless the articles otherwise provide (art 238(3) *ibid*). Shareholders will be permitted to express the nominal value of the shares in a foreign currency; at present this must be expressed in euros, in accordance with article 178(2).

Significant amendments will also be made to article 242(1) of Book 2 of the Netherlands Civil Code, which provides that the directors shall be appointed by the general meeting. The new form of article 242(1) will provide that the first directors shall be appointed in the deed of incorporation whilst later ones shall be appointed by the general meeting, or if the articles so provide, by a meeting of shareholders of a particular kind or class, at which each shareholder having a voting right may vote for the appointment of at least one director. A similar rule will be applicable to the appointment of members of the supervisory board, except where the company is a large company to which the rules governing such companies are applicable. The new possibilities concerning the appointment of directors and members of the supervisory board should be of assistance in structuring joint venture companies.

The general meeting of a Dutch private company will be able to take place outside the Netherlands if all the shareholders and all other persons entitled to attend the meeting so agree (art 226(2) *ibid*). According to the proposed new article 220(1) of Book 2 of the Civil Code, a shareholder or shareholders who represent at least 1 per cent of the share capital will be able to demand a general meeting which must be called within four weeks. The directors and the supervisory board (if any) are both required to ensure that this takes place.

As is clearly pointed out in Mr Langendoen's explanatory paper which has been cited above, certain of the proposed changes in the law will affect the internal structure of the company. Provision has been made for more flexible internal structures by removing the requirement contained in article 195 of Book 2 of the Civil Code that the articles should contain a restriction on transfers of shares to third parties. It will still be possible for the articles of the company to contain such a restriction, even a prohibition for a limited period of time. It is clear from article 192(1) of the preliminary draft that the articles will be able, with the consent of all the shareholders, or of all the shareholders of a particular kind or class, to provide that such shareholders should have obligations towards the company, or third parties, or towards each other, of a contractual character. The provision governing obligations between the members will, when enacted, represent a change in the law. It is now recognised that the articles may

impose obligations towards the company. According to proposed article 192(3), a shareholder who fails to comply with an obligation resulting from article 192(1) may have his voting rights, rights to a dividend, or rights to attend meetings suspended in accordance with the provisions of the articles. Agreements contained in the articles will bind future shareholders of the company.

Increased legal certainty

The need for legal certainty is reflected in certain of the provisions which relate to minority protection, which protection is emphasised in the rules governing private companies in many states. Thus all shareholders in a Dutch private company are (and will be under the new proposed provisions) entitled to participate in a general meeting. According to article 227(2) of the preliminary draft Bill, these will include those who have granted a usufruct in respect of, or pledged, their shares, and who have no voting rights, unless the articles provided that such shareholders have no such entitlement. A unanimous vote of all the shareholders will be required if the articles are altered, so as to introduce flexible voting rights, the vote will be required to take place at a meeting where all the issued share capital is represented (art 228(4) *ibid*). According to article 228(5) of the preliminary draft Bill, if the articles are to provide that certain shares belonging to a particular class or of a particular kind are to have no voting rights, all the shareholders of the company must agree to this proposal. A unanimous vote will be required if the transferability of shares is to be excluded for a period of time. It will have to take place at a meeting at which all the issued capital of the company is represented.

The rules governing minority protection contained in the court procedures permitting the withdrawal of shareholders who have been unfairly prejudiced by the actions of other shareholders, or the compulsory exit of shareholders who have acted to the detriment of others contained in article 336 et seq of Book 2 of the Civil Code, have been stigmatised as unsatisfactory and uncertain in their effect. In one notorious case, *Hoffman v. Hoffman*, JOR 2005/57, the procedure took 14 years to complete, which was a shorter period than in *Jarndyce v Jarndyce*. The abbreviation JOR stands for *Jurisprudentie Onderneming & Recht*. The preliminary draft Bill is designed to improve this procedure by abolishing intermediate rights of appeal and making it possible for the decision of the court relating to the withdrawal of the shareholder also to pronounce on damage claims (art 343(3), *ibid*).

The present system of valuation of shares by independent experts will be maintained. However, it is clear from article 337(1) of the preliminary draft Bill that this system may be replaced by relevant provisions of the articles, or of an agreement governing dispute settlement, except where the arrangement would make the transfer of shares impossible or considerably difficult. According to draft article 337(2), a dispute may also be settled by the business section

(*ondernemingskamer*) of the Court of Appeal at Amsterdam, or by arbitration.

The status of the holders of certificates has given rise to uncertainties in the Netherlands. Such certificates are in common use in the Netherlands and Belgium. In the Netherlands, the shares are owned by a foundation (*administratiekantoor*) which exercises the votes attached to the shares. The certificates are issued by the foundation, and their holders enjoy the financial rights attaching to them, including the right to a dividend, subject to a specific agreement. Article 227(2) of the preliminary draft Bill makes it clear that the company's articles may grant the right to attend the general meeting to the certificate holders. There were previous uncertainties concerning this matter. The names and addresses of the certificate holders should be entered in the company's register.

Share capital and creditor protection

The preliminary draft Bill does not provide for any minimum capital requirement for the private company. No such requirement exists in United Kingdom or French law. The utility of such a requirement has been doubted on the grounds that it does not guarantee that the capital is available at the time when a creditor seeks payment. Furthermore, it has been pointed out that the amount of capital available for distribution is based upon the annual accounts which have been drawn up in the previous year, which are frequently out of date at the time of the distribution. The minimum capital requirement has also been regarded as unsatisfactory because it applies both to large and small businesses. Certain Dutch rules which bear a relationship to those governing the maintenance of capital are somewhat complex, and may not be very effective. The proposal that the minimum capital requirement should be abolished was made after two research projects had been carried out in the Netherlands, one of which was of a comparative law nature and considered Australian, New Zealand and Delaware law as well as the Revised Model Business Corporation Act.

It is also proposed that there should no longer be any valuation by an independent expert in relation to contributions in kind. This is now required by articles 204a and 204b of Book 2 of the Civil Code. The preliminary draft Bill amends these provisions, and requires the company's directors to give a description, including a valuation of such a contribution. The rules governing the acquisition of assets from related persons within two years of incorporation (*Nachgründung*) now contained in article 204c of Book 2 of the Civil Code will be repealed. Article 121 of the Second Company Law Directive only imposes this requirement on public companies.

The preliminary draft Bill proposes a number of changes to the capital maintenance regime. All forms of distribution to shareholders, including distributions out of profits and reserves, acquisition of shares by the company

itself and capital reductions will be subject to a balance sheet test and a liquidity test. The distribution cannot take place without the approval of the board (see arts 207(1) and 216(2) *ibid*). According to the balance sheet test the directors may not distribute those reserves which must be maintained by the law or the articles. The liquidity test has been defined on page 9 of the explanatory memorandum concerning the proposal as requiring that, before the distribution is made, the directors must check whether, after the distribution has occurred, the company will be able to pay its debts as they fall due.

The balance sheet test has encountered considerable criticism. It has thus been argued that a negative balance sheet test does not necessarily mean that a company is unable to pay its debts as they fall due. The liquidity test has also been criticised on a number of grounds. It is thus doubtful whether contingent or prospective liabilities or assets should be taken into account, and whether it should be restricted to a particular period of time, for example the 12 months following the proposed distribution (see the discussion in the article by L Lennarts, "Directors and Shareholders' Liability: Protecting Creditors of the BV", 8 EBOLR 2007, p 136 at pp 139-140).

If the directors are aware or should have been aware that the company would be unable to continue to pay its debts after the distribution, they are jointly and severally liable for the amount of the distribution plus statutory interest thereon. A director is not so liable if he cannot be blamed for the wrongful distribution and was not negligent in taking measures to avoid its consequences (see arts 207(3) and 216(3) *ibid* which are in very similar terms in many respects). If the company becomes bankrupt within one year of making the distribution, a person who receives the distribution within that period of time and is then aware or might reasonably be expected to be aware that, after such distribution, the company cannot be expected to pay its debts as they fall due, must return the amount of the distribution to the company with interest at the statutory rate (see art 216(3) *ibid*). A similar obligation is imposed on a person from whom the company purchases its own shares by article 207(3) *ibid*. Such a person may well be a director of the company. The reversed burden of proof in the event of bankruptcy within one year has been subjected to criticism both in relation to directors and shareholders.

The rules governing the liabilities of directors and shareholders of a private company contained in the proposal are somewhat draconian and may possibly dissuade some persons from membership of such companies, or from becoming directors thereof. They may well undergo revision before the Bill is enacted.

Concluding remarks on the private company

The reform of the Dutch private company may do something to increase its attractiveness as a subsidiary of companies established in other member states of the EU

and elsewhere. It is doubtful whether it will prove so attractive a vehicle for this purpose as the United Kingdom private company. Although there will obviously be less emphasis on mandatory rules, and certain unnecessarily restrictive rules will be repealed, certain of the proposed reforming legislation seems somewhat burdensome and complex, particularly in relation to the proposed new system of creditor protection.

The proposed new legislation is likely to be followed by other reforming legislation. Thus it is intended to abolish the requirement of prior government approval for the incorporation of a public or private company. This relic of the old concession system governing the formation of companies is intended to prevent fraud. The new proposals concerning single tier board systems with executive and non-executive or supervisory directions, which would apply both to public and private companies, have already been mentioned above, and will be further considered in outline below. Legislation is also likely to be introduced permitting companies to use electronic communication systems for the purpose of calling and conducting general meetings.

REFORMS OF PARTNERSHIP LAW

Partnerships are defined in article 1655 of the Netherlands Civil Code as agreements whereby two or more parties contribute capital, labour or, for example, goods, rights or goodwill with the purpose of making a profit and distributing such profit among the participating partners. Three forms of partnership may be distinguished under Dutch law. These are the civil partnership (or *maatschap*), the commercial partnership (*vennootschap onder firma*) and the limited partnership (*commanditaire vennootschap*). As is the case in France and Germany, the civil partnership is commonly used for purposes of the legal and medical professions, and is at present governed by articles 1655-1688 of the Netherlands Civil Code, which are (at the time of writing) contained in Book 7 thereof. The civil partnership may be of a silent (undisclosed) nature or operate under a common name, as does the commercial partnership, which has the object of conducting a business. Special rules concerning the commercial partnership are (at the time of writing) contained in articles 14-34 of the Commercial Code (*Wetboek van Koophandel*), article 19 of which now governs the limited partnership which has managing partners who are jointly and severally liable for the obligations of the partnership, and other partners who are only liable to the extent of their contributions and who cannot act on behalf of the partnership.

New legislation reforming the law of partnership will come into force early in 2009. The new rules will be enacted as Title 13 of Book 7 of the Civil Code and will replace those mentioned above. The principal elements of the legislation will be described briefly. A partnership acting under a common name will be empowered to acquire legal personality by means, *inter alia*, of the execution of a

notarial deed, which will make it possible for the partnership to hold property. The partnership will also be empowered to terminate its legal personality. It will be possible to transform a partnership having legal personality into a private company. The transformation of a private company into a partnership will also be possible. Whether or not the partnership has legal personality, all partners in a partnership acting under a common name (including a *maatschap*) will be jointly and severally liable, except for the limited partners in a limited partnership, who will generally speaking be exempt from such liability.

PROPOSAL REGARDING A SINGLE TIER BOARD SYSTEM

The above proposal is intended to make Dutch companies more attractive internationally by introducing the option of a single board system which combines both executive and supervisory directors. The legislative proposal was made by the Minister of Justice, Ernst Hirsch Ballen in March 2008, and sent to various bodies for their comments. It is proposed that Dutch public and private limited liability companies will be able to opt for a dualistic model with a supervisory and management board, as in Germany, or a monistic model as described above. This option will not be available where companies have to have a supervisory board, as is the case with large companies and partly exempt large companies. A large or "structure" company, is defined in articles 263(3) and 153(2) of Book 2 of the Netherlands Civil Code. According to the balance sheet together with the explanatory notes the issued share capital must amount to a sum determined by Royal Decree, which is raised periodically and now amounts to €16 million. The company, or one dependent on it must, pursuant to a legal obligation, have set up a works council. Such an obligation is usually incumbent on companies employing at least 50 workers. Finally, the company, together with the dependent companies, must together normally employ at least 100 persons in the Netherlands. Certain companies which belong to groups of companies which include certain international groups, are exempt from the requirement of setting up a supervisory board contained in articles 168 and 258 of Book 2 of the Netherlands Civil Code. Such fully exempt private companies may set up one voluntarily.

It is envisaged that the new law granting the option of a single tier board system with executive and non-executive directors will contain rules governing directors' liability. The advantage of a monistic or one tier model is the simultaneous provision of information to all board members. This does not apparently always occur under the dual board system used in German public companies and certain private ones. German supervisory boards have sometimes met rather infrequently, and not taken a sufficiently serious approach to their tasks.

SOCIALLY ORIENTATED COMPANIES

The Minister of Justice has sent a legislative proposal concerning the socially orientated company (*maatschappelijke onderneming*) to various bodies for advice. This new legal entity would be intended to enable bodies in the public sector to act more decisively. An agreement has been made between the different political parties which participate in the coalition government in the Netherlands that such an entity should be introduced.

It is proposed that it would be governed by a new Title 6A introduced into Book 2 of the Dutch Civil Code. The socially orientated company would have a management board and a supervisory board and a representative body of interested parties (*belanghebbendenvertegenwoordiging*). The

supervisory board would appoint the management board, supervise its activities and offer it advice. The representative body of interested parties would be entitled to give advice on a number of management decisions provided for by law, as well as on decisions stipulated in the company's articles. A dispute settlement procedure might be invoked when the advice of the representative body was not followed, or a decision was taken without its approval when such approval was required. Furthermore, the representative body would be entitled to initiate an inquiry 

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