New rules
New choices
New opportunities

Flex BV and joint ventures
New Dutch company law rules

• NautaDutilh
No need for changes, but opportunities for new joint ventures
Introduction

New Dutch company law rules on private companies, contained in the Private Company Law (Simplification and Flexibilisation) Act (known for short as the Flex BV Act), will enter into force on 1 October 2012. Another law that will have important practical consequences is the One-Tier Board Act, which is expected to enter into force on 1 January 2013. The introduction of more flexible provisions on Dutch private companies will have an impact on existing and future joint ventures. This brochure is not intended to provide a complete overview of the changes, but merely outlines a few subjects of importance to joint ventures.
An important question is whether the articles of association of BVs (private limited liability companies) should be amended on account of the new legislation. The short answer is no. Only if an existing BV has a supervisory board should provision be made when the articles of association are next amended to regulate the situation where there are supervisory board vacancies or members are unable to perform their duties. If depositary receipts for shares have been issued with the cooperation of the BV provision must be made in the articles of association for holders of these depositary receipts to have the meeting rights.

Please note that if elements of the existing legislation (e.g. the rules on dividends, the purchase by the company of its own shares and financial assistance) have been incorporated into the articles of association, whether or not in modified form, this may possibly be treated from the date of entry into force of the Flex BV Act as a ‘choice’ and hence become binding on the company under the articles of association. If the company nonetheless wishes to be able to make use of the new and more flexible statutory provisions, we recommend that the articles of association be amended in such cases.

Nor is there any need to change existing shareholder agreements. Nonetheless, it may still be worthwhile doing this for certain subjects (see below under ‘dividend payments’ and ‘conflict-of-interest rule’).

In general, we do not expect that joint venture partners will immediately change existing shareholder agreements/articles of association in order to take advantage of the new flexibility of Dutch law on private companies. There are two main reasons for this:

- Parties will not be inclined to break open the results of their commercial negotiations on their joint venture in order to make ‘formal’ changes.
- The new and more flexible provisions on Dutch private companies provide only limited solutions for problems that parties currently solve by contractual means. For example, good/bad leaver schemes and tailor-made share transfer restrictions are now recorded in share agreements to the satisfaction of the parties.

For future joint ventures it may be useful to include a number of provisions in the articles of association. A few examples are given at the end of this brochure.
Shareholder and joint venture agreements often contain a clause obliging the parties to ensure that the BV distributes at least part of the profit. Such a clause may possibly fail to take account of the new statutory requirement that each dividend payment must be approved by the management board (at present the management board merely acts in an advisory capacity).

Under the new rules the management board may withhold approval only if the BV would be unable, after making the dividend payment, to discharge its obligations during a period of one year. This is known as the ‘distribution test’. The joint-venture partners may anticipate this by modifying the rule in the shareholder agreement in such a way that the dividend payment may be made only in so far as the results of the distribution test permit this.

As an unjustified dividend payment could result in the liability of the management board members, we recommend that the requirement of management board approval and the reasons for this should be recorded in writing.
Owing to the new conflict-of-interest rules it would be advisable to alter the provisions in joint-venture agreements or articles of association that relate to a quorum or require a qualified majority for decisions of a management board or supervisory board.

As from the entry into force of the One-Tier Board Act (expected 1 January 2013), a management board member or supervisory board member who has a conflict of interest with the company may no longer take part in the deliberations or decision-making. As a result, majorities may occur in the supervisory board of management board which were not anticipated when the joint-venture agreement was entered into.

If the articles of association or the joint-venture agreement provide, for example, that certain management board resolutions may be passed only unanimously (the representatives of all joint-venture partners must vote in favour of the resolution in order for it to be passed), a management board member who has a conflict of interest may no longer obstruct the resolution, unlike under the current legislation. This is because the management board member may not take part in the decision-making.

In order to solve this problem in a practical way, we recommend that a provision be included in the shareholder agreement or articles of association to the effect that a resolution in respect of which one or more management board members or supervisory board members have a conflict of interest with the company requires the approval of the general meeting of shareholders.

A management board member with a conflict of interest will, however, be able to represent the company in the future, unlike under the current legislation. Any provision to the contrary in the articles of association of the joint venture will cease to be valid from the date on which the One-Tier Board Act enters into force.
Flexible capital structure for future joint ventures

It will be possible to organise the capital structure of new joint ventures in the form of BVs much more flexibly after the introduction of the new Dutch company law rules, in keeping with the wishes of international practitioners. The changes are as follows:

- the minimum capital requirement of EUR 18,000 will no longer apply;
- the share capital may be denominated in a currency other than the euro;
- there will be greater freedom to reach agreements about the time when amounts are to be paid up on the share capital;
- voting rights can be awarded to individual shareholders on a much more customised basis; certain shares can carry more votes;
- it will be possible to have shares without voting rights;
- it will be possible to have shares without the right to participate in profits.

We expect much use to be made of these possibilities for structuring a joint venture BV more as if it were an English limited company, Luxembourg SARL or Delaware LLC, particularly in international practice. We foresee that in family companies, separating the right to vote from the right to participate in the profits will, in particular, prove to be very useful. The introduction of shares without voting rights may, in certain cases, be a simple alternative for the issuing of depositary receipts and the use of a trust office.
Should future joint ventures be arranged under articles of association rather than by contract?

Under the Flex BV Act it will be possible to include various arrangements in the articles of association. A few examples are:

- the direct appointment of management board members by holders of a given class of shares or with shareholders of a given designation will be possible under the Flex BV Act; the system of binding nominations combined with a voting agreement, as often now included in the articles of association because direct appointment by a class of shares is not permitted, will no longer be necessary;

- the lock-up (under the articles of association the possibility of transferring shares can be excluded for a given period);

- obligations of a contractual nature; there will be more scope for imposing such obligations on the shareholders in the articles of association, such as the obligation to provide a loan to the BV or the obligation to deliver products to the BV.
Articles of association or joint venture agreement?

Parties to future joint ventures will have to choose whether they wish to record certain agreements in the articles of association or in a joint venture agreement. The advantage of an agreement is that the arrangements it contains do not become public; a joint-venture agreement is not, after all, a public document. By contrast, articles of association must be deposited at the trade register. The advantage of having arrangements in articles of association, particularly for a minority shareholder, is that the protection under the articles of association goes further than protection under a joint-venture agreement. Acts that are contrary to provisions of articles of association are void. An act in breach of a joint venture agreement is not void. In such cases the injured party is, in principle, entitled only to compensation.

In each case the parties will have to ask themselves what is more important: secrecy or legal protection.

Share transfer restrictions

Finally, it will be possible to remove the share transfer restrictions from the articles of association or to tailor them to the specific circumstances of the case. For example, a price clause can be recorded between the parties in the articles of association that differs from the statutory rule requiring a ‘reasonable price’ to be paid. Although the legal protection afforded by a provision in the articles of association goes further than that afforded by a shareholder agreement, here too the parties may prefer to keep such arrangements secret.
We expect much use to be made of these possibilities for structuring a joint venture BV more as if it were an English limited company, Luxembourg SARL or Delaware LLC, particularly in international practice.
Our offices

Amsterdam
Strawinskylaan 1999
1077 XV Amsterdam
The Netherlands
T. +31 20 717 10 00
F. +31 20 717 11 11
E. info@nautadutilh.com

Luxembourg
2, rue Jean Bertholet
L-1233 Luxembourg
Grand Duchy of Luxembourg
T. +352 26 12 291
F. +352 26 68 43 31
E. info@nautadutilh.com

Brussels
Chaussée de la Hulpe 120
B-1000 Brussels
Belgium
T. +32 2 566 80 00
F. +32 2 566 80 01
E. ndbru@nautadutilh.com

New York
One Rockefeller Plaza
N.Y. 10020 New York
United States of America
T. +1 212 218 2990
F. +1 212 218 2999
E. info@nautadutilh.com

London
2 Cophall Avenue
London EC2R 7DA
United Kingdom
T. +44 20 7786 9100
F. +44 20 7588 6888
E. ndlondon@nautadutilh.com

Rotterdam
Weena 750
3014 DA Rotterdam
The Netherlands
T. +31 10 224 00 00
F. +31 10 414 84 44
E. info@nautadutilh.com

www.nautadutilh.com
info@nautadutilh.com
This publication is intended to highlight certain issues. It is not intended to be comprehensive or to provide legal advice.