JOINT STOCK COMPANIES UNDER DUTCH LAW

A "Joint Stock Company" *(Naamloze Vennootschap)*[1] is the only business association of Dutch law which limits the personal liability of all shareholders; it is also the most common form chosen for foreign investment in the Netherlands or for operation from the Netherlands.[2]

As in Dutch law there is no limited liability company,[3] not only the large and middle-size enterprise but also small ones adopt this juridical structure.

Practically a distinction is made between "close joint stock company" *(besloten naamloze vennootschap)* and "open joint stock company" *(open naamloze vennootschap).* Since the distinction is more economic than juridical, the law ignores it, and the former type of company is defined by inference. Art. 42*c* of the Commercial Code requires the publication of the balance sheet and the statement of profit and loss. A joint stock company is "close" when it is not bound to publish its annual balance sheets and statements of profit and loss. In this case, however, the company cannot issue bearer shares for a total amount of more than fifty thousand Florins, or have its share certificates or bonds or certificates of said obligations listed in the stock list of any stock exchange designated by royal decree. Moreover, the company cannot carry out a banking or insurance business. This company, rather popular in the Netherlands, is usually financed by a small group of persons, sometimes by a sole person: "one man company" *(eenmansvennootschap).* A company of such a type does not require convocation of shareholders' meetings or control by commissioners.

1. Words between quotation marks, when preceding words in parenthesis, translate the expressions used by the Commercial Code *(Wetboek van Koophandel,* hereinafter referred to as W.K.), Book One (Netherlands, 1838), modified by the Law of 2nd July, 1928, as amended, which governs joint stock companies.

2. One of the first and most famous joint stock companies was the East India Company *(Vereenigde Oost-Indische Compagnie)* founded and governed by a charter "*octroye",* that is to say granted. Following the Napoleonic invasion, the French Commercial Code of 1808 was enacted in 1811 in the Netherlands. Companies could only be organised pursuant to royal grant. The reform of the Code, which led to the new codes, the Commercial Code of 1838 and the Civil Code *(Burgerlijk Wetboek,* hereinafter referred to as B.K.) of the same year, maintained the law of the Netherlands along the traditional lines of French law. A new reform was proposed in 1860, and new projects were presented; but it was only in 1928 that a substantial amendment of the Code was carried out. Other changes were introduced at a later time, in 1933, 1934 and 1942.

3. *I.e.,* the equivalent of the *Société de personnes à responsabilité lmitée* or, shortly, S.P.R.L. of Begian law, of the *Société à responsabilité limitée* or S.A.R.L. of French and Luxemburger law, of the *Gesellschaft mit beschränkter Haftung* or G.m.b.H. of German law and of the *Società a responsabilità limitata or* S. a r.l. of Italian law.

Open joint stock companies are those with which we are concerned.

1. *Definition*

A "joint stock company" *(naamloze vennootschap)* is an association in which the "company's capital" *(maatschappelijk kapitaal)* is divided into "shares" *(aandeelen)* and in which each of the "shareholders" *(aandeelhouders)* participates for one or more shares. Shareholders are not personally liable for what is done in the name of the company.[4]

If one or more persons cease to participate, this does not in itself affect the validity of the participation of the remaining shareholders.[5]

2. *Organisation of a company*

Dutch law does not distinguish between simultaneous and deferred organisation of a joint stock company. When the founders have reached an agreement, they appear before a notary. The law in fact requires that, in order to be valid, a joint stock company must be formed by public deed or "notarial act" *(notarieele akte)* drawn up by a notary.[6] Dutch law views the articles of incorporation as a contract. Thus, rights and obligations provided for in the instrument must be exercised according to the provisions of the Civil Code and, insofar as the articles have the nature of a contract, the company must be formed by more than one person.[7] Subsequent consolidation of all the shares in the hands of one

4. W.K.: art. 36 (Netherlands, 1838).

5. W.K.: art. 36*a* (Netherlands, 1838).

6. W.K.: art. 36 (Netherlands, 1838).

7. Companies, both civil and commercial, are subject to the provisions of the Civil Code respecting contracts in general: B.W. arts. 1349 ff. Particular attention is drawn to art. 1356 which lists the requirements necessary for the validity of a contract, namely an agreement of the parties, their capacity to enter into the contract, a definite subject matter and a lawful cause.

   For lack of agreement or of a lawful cause, the company's contract is void. If the provisions of the Civil Code (particularly arts. 1655 and 1656) have not been complied with, the company is regarded as *de jure* non existent. Similarly, a company having as capital assets the whole or part of a member's patrimony is *de jure* non existent. Such a company is forbidden by art. 1658 of the Civil Code (Netherlands. 1838). In other instances a company's contract may be held voidable and subject to a judicial decision of annulment. This is the case of a company's contract either entered into by parties affected by incapacity to contract: art. 1367 of Civil Code (Netherlands, 1838), or contracted by mistake: art. 1360 Civil Code (Netherlands, 1838) or fraud: art. 1364 Civil Code (Netherlands, 1838).

   Art. 1374, para. 3, which provides that all contracts must be performed in good faith, is equally very important.

   Question has arisen as to whether non-performance by one of the parties to a company's contract may be regarded as a resolutory condition of the contract under art. 1032 of the Civil Code (Netherlands, 1838). The *Hoge Raad* (the Supreme Court of the Netherlands), deciding the question with reference to a civil company, has denied application of the articles: Decision of 3rd December, 1948, [1949] *Nederlandse Jurisprudentie* 358. The same should hold true in the case of a commercial company. On the company's contract in particular, see: arts. 1655 to 1689, Book Three, Civil Code (Netherlands, 1838).

shareholder does not endanger the existence of the company.[8]

The "instrument of incorporation" *(akte van oprichting)*,[9] to be written in the Dutch language, must be signed by the contracting parties appearing either in person or by proxy.[10]

It must indicate :

(i) the company's "name" *(naam).* The company's name is either preceded or followed by the indication of "joint stock company" *(naamloze vennootschap)* either in full or abbreviated to "N.V."

(ii) the "head office" *(plaats van vestiging).* The head office must be situated in the Netherlands. All "documents" *(geschriften),* "printed matter" *(gedrukte stukken)* and "announcements" *(aankondigingen)* to which the company is a party or which originate from it, except telegrams and advertisements, must mention the complete company's name according to the instrument of incorporation, as well as the "municipality" *(gemeente)* in which its business is established according to the "Commercial Register" (*Handelsregister*).[11] If mention is made of the company's capital, mention must also be made of the amount subscribed and of how much of the subscribed amount has been paid up.[12] Departure from the aforesaid provisions is allowed only and in so far as it is apparent from the same provisions.[13] The place where a company

8. See: *Hoge Raad,* Decision of 4th February, 1925, [1925] *Nederlandse Jurisprudentie* 445.

9. A registration fee of 2½ *per centum* of the paid up capital and ¼ *per centum* of the subscribed but not yet paid up capital (while 2¼ *per centum* is due for any subsequent payment of subscribed capital) is the first expense to be met.

Another fee must be paid to the notary and this fee varies according to the authorised capital. The minimum is 200 Florins for a company with a capital up to 10,000 Florins. In case of an authorised capital between 50,000 to 1,000,000 Florins, the usual rate is 485 Florins plus 4½ *per mille* of the amount of the capital; if the authorised capital is between 1,000,000 and 2,000,000 Florins, the rate is 710 Florins plus 2½ *per mille* of the amount of the authorised capital, *etc.*

10. W.K.: art. 36*b* (Netherlands, 1838).

11. The "Law on the Commercial Register" *(Handelsregisterwet)* of 1918, lately modified in 1954, contains provisions which apply to all types of enterprises carried out by both individuals and business organisations established in the Netherlands (art. 1, para. 1(c)). The Register is kept by the Chamber of Commerce and Industry of the place where the company's business is set up. Foreign companies which have a branch or an agent in the Netherlands are bound to file for registration at the place where they carry on business. Arts. 6 ff. of the Law contain the data to be filed. Non registration or incorrect registration of some data prevents the company from availing itself of the information withheld from third parties in good faith (Law on the Commercial Register, art. 22). Criminal sanctions are provided in case of failure to register or of incorrect registration (Law on the Commercial Register, arts. 33 and 34).

12. W.K.: art. 37*c* (Netherlands, 1838).

13. W.K.: art. 37*d* (Netherlands, 1838).

has its establishment means the head office of the company according to the instrument of incorporation.[14]

If mention is made of the Commercial Register, one means the Register of the place where the company's business is set up according to the Commercial Register.[15]

(iii) the company's "purpose" *(doel).*[16]

(iv) the "amount" *(bedrag)* of the company's capital. When an instrument of incorporation confers certain rights upon holders of shares who represent together a certain part of the company's capital, or whose presence or consent is necessary for the validity of any resolution of the general shareholders' meeting, the words "company's capital" are meant to be that part of the capital which has been subscribed, unless a contrary meaning is expressed in the instrument of incorporation.[17]

(v) the number and the nominal value of the shares.

(vi) the number of shares for which each of the shareholders participates in the company.[18]

(vii) the name of the first "directors" *(bestuurders).*

(viii) the duration of the company. Unless the instrument of incorporation provides for a "definite time" *(bepaalde tijd),* the company is presumed to be formed for an indefinite time.[19]

(ix) any "agreement" *(overeenkomst) :*

(a) which refers to the "subscription" *(nemen)* of shares and

14. A company may have the head office in one place and the management in another, provided that both places are within the Netherlands. A Law of 26th April, 1940, however, made it possible, due to the exceptional circumstances following the German invasion, to move the head office outside the country. In the Netherlands, as well as in Great Britain and France, the place of actual management of a company determines the nationality of the company itself. (On the contrary, in the United States the place of incorporation is the basis to determine the nationality). If a Dutch company transfers its head office abroad it is liable to lose its nationality and to be dissolved.

On this last point see also: Vander Heijden and Van der Grinten, *Hand. boek voor de naamloze vennootscap naar Nederlands recht,* (6th ed., Zwolle, 1950), Nos. 81 and 343.

15. W.K.: art. 37*e* (Netherlands, 1838).

16. W.K.: art. 36*c* (Netherlands, 1838). The company's purpose may be changed by amending the instrument of incorporation: *Hoge Raad,* Decision of 12th November, 1934, [1935] *Nederlandse Jurisprudentie* 86.

17. W.K.: art. 37*f* (Netherlands, 1838).

18. W.K.: art. 36*d* (Netherlands, 1838).

19. W.K.: art. 36*a* (Netherlands, 1838).

imposes "special liabilities" *(bijzondere verplichtingen)* upon the company;

(b) which refers to the "acquisition" *(verkrijgen)* of shares in a way different from that for which the "participation" *(deelneming)* in the company is open to the public;

(c) aiming at assuring some advantage to a "founder" *(oprichter)* of the joint stock company or to a third party involved in the organisation;

(d) which refers to "payment" *(storting)* of shares otherwise than by contribution in "Dutch legal currency" *(Nederlandsch wettig betaalmiddel)* (contribution in kind).

Should the company fail to mention these agreements in the instrument of incorporation, the company will have no right to ratify the agreements after its organisation. Any agreement must be either attached to the instrument by a copy made pursuant to art. 40 para. 3 of the "Law of Notaries" *(Notarisambt)* or entirely inserted in the document. With respect to the publication of the instrument of incorporation and certificate of non-objection required by the law, the copies attached to the instrument of incorporation are considered part of the document.[20] After the incorporation of a company, the aforementioned agreements may be entered into by the directors without authorisation of the general shareholders' meeting only if authority to do so has been formally granted in the instrument of incorporation.[21] The substance of the agreements entered into after the incorporation of the company must be included in the "report" *(toelichting)* accompanying the "balance-sheet" *(balans)* and the "profit and loss statement" *(winst en verliesrekening)* of the financial year during which an agreement was made.[22] Agreements entered into with those who professionally undertake to place shares for their own account are exempted from the aforesaid provisions.[23]

At the moment of the organisation, or subsequently in case of issue of shares or "bonds" *(schuld-brieven),* a company must publish a prospectus if it intends to appeal to the public for the subscription of shares. The Civil Code lays down the rules for the protection of the subscribers from the civil and criminal acts of the issuers.[24] Whoever believes to have been damaged by an incomplete or inaccurate prospectus must prove that he has subscribed for the securities in reliance on an incorrect representation concerning the business, due to the incompleteness and inaccuracy of the prospectus. He may then ask either for the reparation

20. W.K.: art. 40*a* (Netherlands, 1838).

21. W.K.: art. 40*b* (Netherlands, 1838).

22. W.K.: art. 40*c* (Netherlands, 1838).

23. W.K.: art. 40*d* (Netherlands, 1838).

24. See: Dorhout Mees, *Kort begrip van het Nederlands handelsrecht,* (2nd ed., Haarlem, 1956), Nos. 678 and 679; Vander Heijden and Van der Grinten, *op. cit.*, Nos. 105 ff.

of the damage, that he must prove, or for his release from the subscription. Those who issued the prospectus are jointly and severally liable, unless they show that they were not at fault.[25]

Founders must submit the instrument of incorporation and the attached documents to the Minister of Justice in order to obtain a "certificate" *(verklaring)* that no objections have been found to exist. The certificate may be refused only for one of the reasons indicated by the law, namely, that the company is contrary to "good *mores" (goede zeden)* or to "public order" *(openbare orde),* that the instrument does not comply with the provisions of the law or does not show that the founders have subscribed between them for at least one-fifth of the company's capital. In practice, a draft is submitted in advance to the Minister of Justice. In case of refusal of the certificate, the petitioner is informed of the reasons thereof.[26] However, the decision is not subject to appeal. If the Minister grants the certificate of non-objection to the organisation of the company, the company acquires juridical personality, *i.e.* becomes a "legal entity" *(rechtspersoon).*[27] It cannot undertake any activity until the directors have published the instrument of incorporation and the certificate of the Minister of Justice. For this purpose, a complete copy of the instrument, authenticated by the notary before whom it was entered into, and a copy of the ministerial certificate must be sent to the "Official Gazette of the Netherlands" *(Nederlandse Staatscourant).*[28]

"Rights" *(rechten)* and "liabilities" *(verplichtingen)* of a joint stock company arise from agreements entered into on behalf of it prior to its existence only if, after the organisation, it has ratified these agreements either expressly or impliedly.[29]

Directors are jointly and severally liable to third parties for transactions carried out before the publication required by the law and before the registration of the company pursuant to the Law on the Commercial Register or before at least one-tenth of the nominal value of each share subscribed to at the time of organisation of the company has been paid, without prejudice to the liability of the company in so far as the transaction carried out is within the powers granted by the instrument of incorporation.[30]

25. B.K.: arts. 1416*a* to 1416*d* (Netherlands, 1838).

26. W.K.: art. 36*e* (Netherlands, 1838).

27. W.K.: art. 37 (Netherlands, 1838). The company acquires juridical personality even if the fifth of the nominal capital has not yet been paid up. If there appears to be only one founder the company is null. And if anyone of the four requirements necessary for the existence of a contract is lacking the company cannot be incorporated. See also: *Hoge Raad,* Decision of 12th October, 1932, [1933J *Nederlandse Jurisprudentie* 1.

28. W.K.: art. 36*f* (Netherlands, 1838).

29. W.K.: art. 40 (Netherlands, 1838).

30. W.K.: art. 360 (Netherlands, 1838). See also: Law on the Commercial Register, arts. 1, 8 and 31.

3. *Company's capital and its protection*

Dutch law contains at least three different concepts of capital. *Maatschappelijk kapitaal* is the amount of capital which corresponds to the shares that a company may be authorised to issue without amending its by-laws.

Geplaatst kapitaal is the part of a company's capital actually subscribed by the founders.

Gestort kapitaal is the amount of the capital paid up.[31]

Shares cannot be issued for less than their nominal value. This follows from the provision of the law which requires that the instrument of incorporation indicate the nominal value of the shares.[32] Shares are frequently sold through institutions or syndicates with which the founders enter into an agreement before the organisation of the company. As a result of this agreement the capital of which a company actually disposes may be reduced considerably. The law provides, therefore, that those who professionally undertake to place shares for their own account may be permitted to pay less than the full amount of the shares they have taken, on condition that at least ninety-four *per centum* of the nominal value be paid in Dutch legal currency.

Another protection of the capital may be found in the prohibition to set-off the promised payment for a share against the possible credit of the shareholder towards the company.[33]

The instrument of incorporation cannot provide for the payment of "interest" *(renten)* to shareholders, for the amounts due on shares, if the payment of such interest is independent of the amount of the net profits, except for the time that the business of the company has not yet commenced and then exclusively at a rate and for a number of years to be defined in the instrument of incorporation, "under penalty of nullity" *(op straffe van nietigheid)* of the clause respecting the interest. The "rate of interest" *(rente-voet)* can in no case be higher than five *per centum per annum* and the number of years more than four. As far as the amount of non-compulsory payments is concerned, the instrument may provide for interest only on condition that this interest be paid out of the net profits. In the absence of such a condition, the payments are considered to be loans to the company and not payments on the shares.[34]

A company may redeem its own shares provided the following conditions are met:

31. The amount of capital paid up represents the extent of third parties' guarantee and is subject to several protective measures. See: Dorhout Mees, *op. cit.*, No. 583.

32. W.K.: art. 36*d* (Netherlands, 1838).

33. W.K.: art. 38*a* (Netherlands, 1838). Set-off is forbidden in order to protect the creditors of the company. But, for a decision authorising contractual set-off between a shareholder and his company, see: *Hoge Raad,* Decision of 10th January, 1940, [1940] *Nederlandse Jurisprudentie* No. 264.

34. W.K.: art. 41 (Netherlands, 1838).

a) that the "shares [are] entirely paid up" (*volgestorte aandeelen*) ;

b) that the sum redeemed equals the nominal amount set forth in the instrument of incorporation.

A redemption of shares realised in breach of the provisions of the law or of the instrument of incorporation is null, but such nullity cannot be pleaded against a "seller in good faith" (*vervreemder te goeder* trouw).[35]

4. *Shares and other securities*

Shares are the parts in which the company's capital has been divided in the instrument of incorporation. "Sub-shares" (*onderaandeelen*) are the fractions into which the shares are or can be divided by virtue of the instrument. The "provisions" (*bepalingen*) of the Code concerning shares and shareholders apply also to sub-shares and holders of sub-shares unless otherwise indicated in said provisions.[36]

Shares may be allocated for contributions in kind and services, with the exclusion of future services.[37] The law provides the issue of several classes of shares: ordinary shares, preference shares[38] which give a preference in the distribution of net profits or of bonuses at the liquidation of a company, and enjoyment shares in case of amortisation of capital.[39] Gratuitious shares, paid out of dividends, may be issued to the shareholders. If the instrument of incorporation thus provides, shareholders have an option right over the issue of new shares.

Unless the instrument of incorporation provides otherwise, all shares confer the same rights and liabilities in proportion to their nominal value.[40] Each share confers the right to exercise the powers attached to it, to participate in the shareholders' meetings, to vote, to request the call of a special shareholders' meeting, to invoke the nullity of resolutions of the company's bodies, to request investigations, to share in the profits, to obtain reimbursement of contributions and to receive bonuses at the liquidation of the company.[41]

No duty can be imposed upon a shareholder against his will apart from the duty of paying in full the nominal value of his share, not even

35. W.K.: art. 41*a* (Netherlands, 1838). For a criticism, see: Vander Heijden and Van der Grinten, *op. cit.*, No. 315.

36. W.K.: art. 38 (Netherlands, 1838).

37. See: Vander Heijden and Van der Grinten, *op. cit.*, No. 168.

38. There are also cumulative preference shares.

39. *Stricto sensu* these securities are not regarded as shares.

40. W.K.: art. 39*d* (Netherlands, 1838).

41. See: Dorhout Mees, *op. cit.*, No. 599; 6 Fredericq, *Traité de droit commercial beige* (Ghent, 1950) No. 880 (This volume deals with companies in Luxembourg and the Netherlands).

by an "amendment" (*wijzigning*) to the instrument of incorporation.[42]

The "securities" (*bewijzen*) representing the shares are either "nominative" (*op naam*) or "to the bearer" (*aan toonder*).[43]

Securities to the bearer may be issued only against payment of the nominal value of the shares, except in the case of shares given to those who professionally undertake to place shares for their own account.[44]

A company must keep a shareholders' register at least until such time as the subscribed shares have been entirely paid up. The names of those whose shares have not been completely paid up and the amount paid upon each share must be recorded in the register. The register must be written up regularly. Any "release" (*ontslag*) from liability for payments not yet made must be recorded therein. The register is kept in the company's "office" (*kantore*) by the directors, for public inspection. "Copy" (*afschrift*) or "excerpt" (*uittreksel*) may be furnished against payment of cost.[45]

Securities are transferred according to the ordinary provisions relative to negotiable instruments, through a contract which does not require any particular form. Delivery of the security transfers the property. "Transfer" *(levering)* of nominative shares takes place either by having a document of "assignment" (*overdracht*) notified to the company or by a "written acknowledgement" (*schriftelijke erkenning*) of the assignment issued by the company. If there is a share certificate, the acknowledgment must result by annotation of the assignment written on the document. In case of shares not entirely paid up, the acknowledgment may be made only if the document witnessing the transfer bears a certain date. In case of transfer of shares not entirely paid up, the date of transfer must be recorded in the register kept by the company.[46] The transfer of bearer shares is made by handing them over. After the transfer of a share which has not been entirely paid up, each of the former holders

42. W.K.: art. 38*b* (Netherlands, 1838).

43. The bearer of a bearer share is presumed to be the lawful holder of it, though proof is admissible to show that the bearer holds the share for another party and therefore is not the lawful holder: *Hoge Raad*, Decision of 4th June, 1920, [1920] *Nederlandse Jurisprudentie* 712. Possession in good faith and by onerous transfer constitutes good title for the holder of a bearer share under the Civil Code, art. 2014 (Netherlands, 1838).

A bearer share does not carry the name of the rightful claimant. The bearer is presumed to be the shareholder. This is not a presumption *juris et de jure* because it may be rebutted by proving that the bearer holds under a trust. See: Civil Code, art. 590 (Netherlands, 1838) and *Hoge Raad*, Decision of 4th June, 1920, [1920] *Nederlandes Jurisprudentie* 712. The purchase by a person who, being in good faith, acquired a bearer share for value from a seller who had no title to it is protected under art. 2014, para. 1 of the Civil Code. See also: Commercial Code art. 38*d*, at footnote 49, *infra*

44. W.K.: art. 38*c* (Netherlands, 1838). Securities are normally issued through an "issuing house" (*Trustmaastchappeij*).

45. W.K.: art. 39 (Netherlands, 1838).

46. W.K.: art. 39*a* (Netherlands, 1838).

is jointly and severally liable to the company for the balance to be paid on the share. When, as a consequence of the transfer of a share, directors and "commissioners" (*commissarissen*), if any, expressly release the former shareholder from any liability in connection with the transfer of the share, he remains liable only for payments demanded within one year from the date of the transfer. By paying up, a former shareholder is subrogated to the rights of the company against subsequent shareholders.[47] In case of a transfer *mortis causa,* the aforesaid provisions apply in the partition of shares owned by "tenancy in common" (*eenige gemeenschap*) for the assignment to the heirs.[48] The fact that a bearer share has not been entirely paid up or that the amount appearing as paid up in a statement issued by the company upon a nominative certificate has not been paid cannot be pleaded by the company against a subsequent purchaser in good faith.[49] In case of "bankruptcy" (*faillissement*) of a joint stock company the "trustee" *(curator)* is authorised to demand and collect all payments not yet made upon the shares, regardless of what has been agreed upon in the instrument of incorporation.[50]

A Dutch company may issue securities not representative of the company's capital which, however, entitle their holders to share in the company's profits (*winstbewijzen*). These securities are normally to the bearer but may be, sometimes, nominative. They do not confer upon their holders the status of shareholders, and, thus, do not entitle them to attend shareholders' meetings. Although the law does not provide for the regulation of a meeting of these holders of beneficiary securities, if the by-laws contemplate the existence of such holders, their rights cannot be modified without their consent.

A Dutch company may also issue founders' shares,[51] assigned for compensation of services rendered during and after the organisation of the company (*oprichtersaandelen*). These shares confer upon the holders shareholders' rights.

Bonds may be issued by a Dutch company. The issue of bonds is not governed by the law, either the Civil or the Commercial Code. However, several articles in these codes,[52] as well as the Law on the Commercial Register,[53] deal with bonds. Bonds may be nominative or to the

47. W.K.: art. 39*b* (Netherlands, 1838).

48. W.K.: art. 39*c* (Netherlands, 1838). See also: *Hoge Raad*, Decision of 4th March, 1881 [1881] *Weekblad van het Recht* 4622.

49. W.K.: art. 38*d* (Netherlands, 1838).

50. W.K.: art. 39*e* (Netherlands, 1838).

51. There are also preference founders' shares and cumulative preference founders' shares. On the juridical position of founders' shares, see: Vander Heijden and Van der Grinten, *op. cit.*, No. 194.

52. See the general provisions on loans in the Civil Code, arts. 1791 and 1802 (Netherlands, 1838) and in the Commercial Code, art. 42*c* (b) and (c) (Netherlands, 1838). See also the general provisions on the issue of prospectus, Civil Code, arts. 1416*a* to 1416*d* (Netherlands, 1838).

53. See Law on the Commercial Register, art. 17, which provides that nominative and bearer bonds must be entered separately in the Register.

bearer. In either case they carry a fixed interest and do not carry the right to vote at the company's meetings.[54]

Within eight days after the approval of the balance sheet and the profit and loss statement, the board of directors is bound to deposit complete copies of those documents and relative reports with the office of the Commercial Register, for public inspection, if the company has issued bonds or certificate of bonds to the bearer or if bonds or certificates of bonds are listed in the "stock list" (*prijscourant*) of any stock exchange designated by royal decree, regardless whether organised by local authorities or not.[55] Provisions of the Civil Code relative to the issue of shares to the public apply also to bonds. According to these provisions, in case of issue of shares or of bonds to the public, the prospectus is not necessary; nor are there in those articles provisions respecting the contents of the prospectus. The articles of the Civil Code, applied very rarely, contain only provisions as far as civil and criminal liability of directors is concerned.

Bonds with share in the profits may be issued. In this case, a common representative is appointed at the moment of the issue of the bonds. He represents bondholders in their relationship with the company. Bondholders may also elect one or more commissioners, and in any case, no more than one third of them.[56] There are no provisions for the organisation of bondholders' meetings, except a Law of 31st May, 1934, which applies only to the bearers of bonds issued prior to the entry into force of this law.[57]

5. *Company's bodies*

Dutch law provides for the organisation of three bodies in a joint stock company: the "general shareholders' meeting" (*algemeene vergadering van aandeelhouders*), the "board of directors" (*road van bestuurders*) and the"board of commissioners" (*raad van commissarissen*). A shareholders' meeting or the commissioners may appoint a certified public accountant with the duty of inspecting the company's books and accounting documents.

6. *General shareholders' meetings*

Within the limits of the law and those provided in the instrument of incorporation, a general shareholders' meeting is entrusted with all

54. From the economic point of view these securities resemble the shares in a company.

55. W.K.: art. 42*c* (Netherlands, 1838).

56. W.K.: art. 50*c* (Netherlands, 1838).

57. See: Vander Heijden and Van der Grinten, *op.cit.*, No. 196. The Law of 31st May, 1934, [1934] *Nederlandse Staatscourant* 277, provides rules for bondholders meeting. Among the purposes of that law is the re-organisation of a company. More frequently, in case of a bond loan, a trustee is appointed by agreement among the bondholders and the clauses of this agreement govern the relationship between the company, on one hand, and the bondholders, on the other, through the trustee.

powers which have not been conferred either to the directors or to other persons.[58] A general shareholders' meeting is called at least once a year. Unless the instrument of incorporation provides for a shorter term, the annual meeting is held within nine months after the "expiration" (*afloop*) of the company's "financial year" (*boekjaar*) .[59] Directors as well as commissioners, if any, have the power to call a general shareholders' meeting, unless the instrument of incorporation provides otherwise.[60]

When one or more shareholders who represent one tenth of the company's capital, or a lower amount if so stated by the instrument of incorporation, have requested, in writing and indicating the agenda, the directors or the commissioners, if any, to call a general shareholders' meeting and when neither the directors nor the commissioners, who are equally empowered in this case, have complied with this request in such a way that a general meeting can be held within six weeks after the request, the petitioners may be empowered by the president of the "tribunal" (*arrondissementsrechtbank*) having "jurisdiction" (*rechtsgebied*) over the place where the company's head office is situated, to call the meeting themselves.[61] The president of the tribunal grants the requested "authorisation" (*machtiging*) after having heard or properly summoned the company, if the petitioners summarily prove that the aforesaid conditions have been complied with and that they have a reasonable interest in holding the meeting. The president of the tribunal determines the form and time of the "convocation" (*oproeping*). He may also appoint a shareholder who shall serve as president of the general shareholders' meeting. The call as in above must mention that it is made according to a judicial authorisation. Such convocation is valid even if it appears afterwards that the authorisation has been unduly granted. There is no appeal against the decree of the president of the tribunal, "except on appeal on a point of law" (*behoudens cassatie in het belang der wet)* .[62] If those who are authorised in this manner or by the instrument of incorporation to send notice for convocation of meetings fail to call a general shareholders' meeting at least once a year, or in compliance with the instrument of incorporation, any shareholder may be empowered by the president of the tribunal to proceed to the convocation in the aforementioned forms.[63]

58. W.K.: art. 43 (Netherlands, 1838). However, a general shareholders' meeting cannot give to the directors of the company instructions which are against the law and the provisions of the by-laws. See: *Hoge Raad*, Decision of 21st January, 1955, [1955] *Nederlandse Jurisprudentie* No. 43. See: 6 Fredericq, *op. cit*., No. 882, Vander Heijden and Van der Grinten, *op. cit*., No. 203. As to whether a general shareholders' meeting may substitute itself to the board of directors in the decision-making process of a company (on the ground that the principal may always substitute himself to the agent) see: Dorhout Mees, *op. cit*., No. 659 Dorhout Mees, Lectures on the respective powers of management and shareholders' meeting of a Dutch joint stock company. (International Faculty of Comparative Law of Luxembourg, Summer 1958). Vander Heijden and Van der Grinten, *op. cit*., No. 237.

59. W.K.: art. 43*a* (Netherlands, 1838).

60. W.K.: art. 43*b* (Netherlands, 1838).

61. W.K.: art. 43*c* (Netherlands, 1838).

62. W.K.: art. 43*d* (Netherlands, 1838).

63. W.K.: art. 43*e* (Netherlands, 1838).

Unless the instrument of incorporation provides otherwise, the call for a general shareholders' meeting is made by "notice" (*aankondiging*) published in a newspaper of the municipality where the company has its head office or, in the absence of a newspaper published in the municipality, in a newspaper of the province where the company's office is situated. The president of the tribunal determines the form and time of the convocation.[64] The notice of the meeting must contain the agenda or indicate that the shareholders may take knowledge of it at the company's office. A shareholders' meeting cannot validly pass resolutions upon matters which have not been indicated in the agenda or have not been announced in a similar manner within the term indicated for the convocation, unless the resolution is passed by a unanimous vote during a general meeting of shareholders who hold the whole of the company's capital.[65]

Unless otherwise decreed by the president of the tribunal, the term for convocation is of at least five days, not including those in which the call is made and the meeting is to be held. If this term has not been abided by or the convocation was not made, no valid "resolutions" (*besluiten*) can be passed unless the resolutions have been passed by a unanimous vote and those who attend the meeting represent the totality of the company's capital.[66]

General meetings are held in the Netherlands in the place indicated in the instrument of incorporation or in the municipality where the company's head office is situated. At a general meeting held in a place other than it should be, valid resolutions can be passed only if the totality of the company's capital is represented.[67] Every shareholder has the right to attend general meetings, either in person or by proxy, to intervene and to exercise the "right to vote" (*stemrecht*),[68] Holders of sub-shares representing together the amount of one share exercise this right collectively, through representation either by one of them or by proxy. If the instrument of incorporation provides that the shareholders must deposit their securities before the general meeting, the notice of convocation of the meeting must indicate the place and the last day where the deposit must be made. This day cannot be set before the third day after that of the convocation of the general meeting nor earlier than the seventh day before that of the meeting. Directors and commissioners, if any, may participate in the shareholders' meeting with a "consultative vote" (*raadgevende stem*). Directors and commissioners and persons engaged in rendering services to the company cannot vote for others, and if they attempt to do so their vote is considered null.[69]

64. W.K.: art. 43*f* (Netherlands 1838).

65. W.K.: art. 43*g* (Netherlands, 1838).

66. W.K.: art. 43*h* (Netherlands 1838).

67. W.K.: art. 44 (Netherlands, 1838).

68. On voting trusts, see: Vander Heijden and Van der Grinten, *op.cit*., Nos. 217-1 and 246.

69. W.K.: art. 44*a* (Netherlands, 1838).

Only shareholders are entitled to vote.[70] Each shareholder has at least one vote. If the company's capital is divided into shares of equal value each shareholder has as many votes as he has shares. If the company's capital is divided into shares of unequal value, the number of votes to which a shareholder is entitled is equal to the number of times that the value of the smallest share is comprised in the total value of his shares; fractions of votes are not taken into account. However, the instrument of incorporation may restrict the number of votes of which a shareholder disposes, provided that holders of shares which represent the same amount have the same number of votes and that the restriction will not favour holders of shares which represent a greater value over holders of shares representing a smaller value. Departure from the aforesaid provisions may be allowed by the instrument of incorporation, provided that no more than six votes be granted to a shareholder, if the company's capital is divided into one hundred or more shares, and no more than three votes, if the company's capital is divided into less than one hundred shares.[71] Sub-shares which together amount to the value of a share enjoy the same right as a share.[72] Unless the instrument of incorporation provides otherwise, the votes cast for the shares held by those persons who, otherwise than as shareholders of the company, would acquire any right or would be released from any liability toward the company by the passing of the resolution, are invalid.[73]

All resolutions for which the instrument of incorporation does not require a higher majority are passed by an "absolute majority" (*volstrekte meerderheid*) of the votes cast. Departure from this provision may be provided in the instrument of incorporation in case ballots concerning elections are equally divided. Unless otherwise provided by the instrument of incorporation, the validity of resolutions does not depend upon the proportion of company's capital represented by the shareholders attending a meeting.[74] A company must keep minutes of the general shareholders' meeting.[75]

The nullity of a resolution of the general shareholders' meeting may be raised in court by every shareholder and every interested third party. However, nullity of a resolution on the ground that it was not passed in a regular way or with the collaboration of the shareholders as required by the law or by the instrument of incorporation cannot be alleged, except

70. Before the enactment of the present Code, the *Hoge Raad* held that a resolution passed with the vote of a person who held a share without having a lawful title to it could be annulled: *Hoge Raad*, Decision of 4th June, 1920, [1920] *Weekblad van het Recht* 10603. See also: 6 Fredericq, *op. cit.*, No. 885; Vander Heijden and Van der Grinten, *op. cit.*, No. 216.

71. For a criticism of this provision see: Vander Heijden and Van der Grinten, *op. cit.*, No. 217.

72. W.K.: art. 44*b* (Netherlands, 1838).

73. W.K.: art. 44*c* (Netherlands, 1838). On this point see: Dorhout Mees, *op. cit.*, No. 618; Vander Heijden and Van der Grinten, *op. cit.*, 218.

74. W.K.: art. 44*d* (Netherlands, 1838).

75. W.K.: art. 46 (Netherlands, 1838).

in cases of fraud,[76] after six months have passed from the date of the resolution, if the validity of the resolution has not been opposed on such ground. Similarly, the nullity of a resolution cannot be invoked on one of the aforesaid grounds after the ground of nullity has been rejected by a judgment, become *res judicata*, and rendered in a lawsuit in which, at the time when such ground was not yet barred, the validity might have been questioned for this reason.[77] Although the law does not indicate the specific grounds of nullity, nullity has been declared for violation of the law,[78] of the by-laws of the company,[79] of public orders, of good *mores* or good faith, including in this last instance abuse of the rights of the majority and *détournement de pouvoir*.[80]

7. *The board of directors*

The board of directors[81] is a compulsory body of a Dutch joint stock company. There need not be many directors; one director is sufficient. Moreover, the determination of the number of directors may be left to the commissioners. Directors need not be shareholders, but the instrument of incorporation may require that they be shareholders.[82] Directors are appointed for the first time in the instrument of incorporation and later on by a general shareholders' meeting.[83] The instrument of incorporation may provide that the election by a shareholders' meeting be made out of a "list" (*voordracht*) of at least two persons for each office to be filled. However, a general shareholders' meeting may waive at any time the compulsory presentation of such a list by a resolution passed with a majority of two thirds of the votes cast and representing more than one half of the company's capital.[84]

The law is silent as to the possible causes of ineligibility or the requirements for election.[85] There seems to be no provision against the election

76. See: Dorhout Mees, *op. cit*., No. 634.

77. W.K.: art. 46*a*. (Netherlands, 1838). The same action is open against those resolutions which are contrary to public order, good *mores,* or good faith. Art. 46*a* does not apply to resolutions having as object the alteration of the by-laws; art. 45 governs such cases.

78. See: Dorhout Mees, *op. cit.,* No. 636.

79. See: Dorhout Mees, *op. cit*., Nos. 638 ff.; 6 Fredericq, *op. cit*., 1303 at footnote 1; Vander Heijden and Van der Grinten, *op. cit*., Nos. 224 ff.

80. See: Dorhout Mees, op. *cit*., No. 641; Vander Heijden and Van der Grinten, *op. cit*., No. 224.

81. A juridical person may be director of a joint stock company: 1 Molengraaff, *Leidraad bij de beoefening van het Nederlands handelsrecht*, (9th ed., Haarlem, 1953), at. p. 275.

Vander Heijden and Van der Grinten, *op. cit*., Nos. 96 and 245.

82. See: Vander Heijden and Van der Grinten, *op. cit*., No. 245.

83. W.K.: art. 48 (Netherlands, 1838). See: Dorhout Mees, *op. cit*., No. 684; 6 Fredericq, *op. cit*., No. 890; 1 Molengraaff, *op. cit*., at p. 275; Vander Heijden and Van der Grinten, *op. cit*., No. 246.

84. W.K.: art. 48*a* (Netherlands, 1838).

85. See: *Hoge Raad*, Decision of 12th August, 1943, [1943] *Beslissingen in Belastinzaken* at p. 7697 and 7698; But see, contra: 1 Molengraaff, *op. cit*., at p. 288; Vander Heijden and Van der Grinten, *op. cit*., No. 284.

of a minor to the office, while a commissioner may be at the same time director.[86] The instrument of incorporation may provide that certain conditions be met for election, *i.e.,* that the director be a shareholder, or a Dutch citizen.[87] Directors, may be elected for a certain period of time and, at the expiration of this period, may be re-elected.[88] Their election must be recorded in the Commercial Register and the declaration must indicate their citizenship.

In the interest of a joint stock company, a pledge may be taken on shares belonging to a director, in order to guarantee the performance of his duties as director. The pledge may be taken, if the shares are to the bearer or nominative entirely paid up, by depositing them with a third party, in the name of the company and with the co-operation of the commissioners or, if these do not exist, with the co-operation of one or more shareholders designated for this purpose by the instrument of incorporation or by a general shareholders' meeting and, if they are nominative shares not paid up, by a relative annotation in the shareholders' register and by depositing the coupons of dividend relative to these shares with a third party, if the coupons are payable to the bearer.[89]

Except for the restrictions provided for by the instrument of incorporation, the directors are entrusted with:

a) the management of company's "business" (*zaken*),[90]

b) the "administration" (*beheer*)[91] of the company's "property" (*vermogen*), and

c) the judicial and extra-judicial "representation" (*vertegenwoordiging*)[92] of the company.[93]

86. Under Dutch law even persons who have been deprived of their civil rights may become directors: 1 Molengraaff, op. *cit.*, at p. 275; Vander Heijden and Van der Grinten, *op. cit.*, No. 245.

87. Or simply domiciled in the Netherlands: Vander Heijden and Van der Grinten, *op. cit.*, No. 245.

88. The length of the terms of office and their number are not provided for by the law. See: 6 Fredericq, *op. cit.*, No. 890.

89. W.K.: art. 48*d* (Netherlands 1838). See: Vander Heijden and Van der Grinten, *op. cit.*, No. 256.

90. Dutch law allows delegation of powers by directors to single persons and to executive committees (which need not be composed of directors of the company), but this delegation is limited to certain activities and cannot become a general delegation of all powers. See: Vander Heijden and Van der Grinten, *op. cit.*, Nos. 235-1 and 235-2. On the right to revoke *ad nutum* the powers of these persons and committees, see: Vander Heijden and Van der Grinten, *op. cit.,* No. 266. Directors may of course resign, but their resignation must not prejudice the business of the company. See: Vander Heijden and Van der Grinten, *op. cit.*, No. 254.

91. See: Vander Heijden and Van der Grinten, *op. cit.,* Nos. 232 to 235.

92. See: Vander Heijden and Van der Grinten, *op. cit.*, Nos. 232 to 235.

93. W.K.: art. 47 (Netherlands, 1838). The powers of the directors may be extended: 1 Molengraaff, *op. cit.*, at p. 271 and Vander Heijden and Van der

If there are several directors, the company is represented *vis-a-vis* third parties by each director, unless the instrument of incorporation provides otherwise.[94] Unless the instrument of incorporation provides otherwise, directors have no power to file a "petition for bankruptcy" (*faillietverklaring*) of a joint stock company without authorisation of a general shareholders' meeting.[95] At the moment of presentation of the balance sheet, profit and loss statement and attached documents to a general shareholders' meeting, the directors report about the trend of business of the company and its administration. A general shareholders' meeting may decide at any time that the report shall be made in writing. In this case the shareholders must have the opportunity of obtaining a copy of the report from the day in which convocation has been made till the day of the general meeting, against payment of cost.[96]

In the absence of a different provision in the instrument of incorporation, the "remuneration" (*bezoldiging*) of directors is determined by the general shareholders' meeting.[97] Often the remuneration is paid in the form of a percentage of the profits. The percentage is computed in a manner determined in the instrument of incorporation or by a separate convention between the company and the director.[98]

Grinten, *op. cit*., No. 232. But, see, *contra:* Dorhout Mees, *op. cit*., No. 659.

The expression "management of company's business" (*het besturen van de zaken der vennootschap*) seems to include not only the acts of administration, as defined under the Civil Code, but also acts of disposal necessary for the achievement of the company's objects, *e.g.* sale of company's assets if the company's business entails such sales or the setting up of branches.

"Administration of company's property" (*het beheer van haar vermogen*) connotes the acts of internal management.

"Judicial and extra-judicial representation" (*haar vertegenwoordiging in en buiten rechte*) is necessary for the performance of acts of management and administration within the limits laid down in the by-laws. Every limitation to these activities necessarily limits the power of representation. See: Dorhout Mees, *op. cit*., No. 656; 6 Fredericq, *op. cit*., Nos. 904 and 907; Vander Heijden and Van der Grinten, *op. cit*., Nos. 233, 234, 235, 273, 274, 278 and 281. The provisions respecting the nullity of a resolution of the general shareholders' meeting apply also to the resolutions of the board of directors. See: Vander Heijden and Van der Grinten, *op. cit*., Nos. 224, 226 and 228.

94. W.K.: art. 47*a* (Netherlands, 1838). On this point, see: Dorhout Mees, *op. cit*., No. 661; 1 Molengraaff, *op. cit.,* at p. 272; Vander Heijden and Van der Grinten, *op. cit*., No. 242.

95. W.K.: art. 48*e* (Netherlands, 1838).

96. W.K.: art. 49 (Netherlands, 1838).

97. W.K.: art. 48*c* (Netherlands, 1838). If the shareholders' meeting fails to do so the directors may have their remuneration judicially determined *ex aequo et bono*: 1 Molengraaff, *op. cit*., at p. 276; Vander Heijden and Van der Grinten, *op. cit.,* No. 251.

98. Normally the remuneration is paid under an employment contract which is governed by art. 1637*a* of the Civil Code (Netherlands, 1838). When remuneration is paid under form of percentage of profit, the director is entitled to inspect the company's books (arts. 1638*a* and 1638*n* of the Civil Code (Netherlands, 1838). A claim for remuneration is privileged and ranks with priority over the other debts due to company's creditors in case of bankruptcy (art. 1195, para. 4, Civil Code, and arts. 40 and 239 of the Law on the administration of Bankruptcy).

Every director is bound toward the company to faithfully carry out his "mandate" (*taak*). Liability,[99] therefore, is joint and several if arising from a matter which is within the scope of authority of more than one director. However, the director who proves that an act cannot be charged to him and that he did not neglect to take necessary measures to avoid the consequences thereof is not liable.[1] If a director who is sued for damages proves that his responsibility for the damage suffered by the company is comparatively small, the judge may take into account this circumstance in determining the amount of damages awarded against this director, thus departing from the principle of joint and several liability.[2] The tribunal of the place where the company's head office is located has jurisdiction over all claims relative to the contract between a joint stock company and its director, including a claim of the trustee against a director in the case of bankruptcy of the company, if the amount of the claims is indefinite or over 500 Florins. There is no appeal if the claim is for not more than 1,000 Florins. This provision departs from provisions of the Civil Procedure Code.[3] A director is liable within the scope of his mandate. When acting within this scope, he binds the company towards third parties and is not bound personally. Powers of representation of a company are mainly based on the law, on the instrument of incorporation and on the declared objects of the company. But an act of a director binds the company even if he exceeds his authority, provided that a third party has, in good faith, concluded that the director has had the authority to represent the company.[4] A director who acts beyond his powers with a third party in good faith does not bind the company but is held to have entered the transaction on his own account, unless the third party prefers compensation for expenses, damages and interest, without prejudice to the provisions of art. 1843 of the Civil Code.[5]

99. Liability of a director towards the company is of a contractual nature even in the absence of a contract between the company and the director. See: Vander Heijden and Van der Grinten, *op. cit.*, No. 257. On the shareholders' meeting may bring an action for liability against a director. See: Vander Heijden and Van der Grinten, *op. cit.*, No. 260.

Dutch law ignores the "derivative suit" brought by a shareholder in the name and on behalf of the company. See: Vander Heijden and Van der Grinten, *op. cit.*, No. 257.

On protection of minority shareholders see sec. 9, *infra.*

A personal action may be brouht by a shareholder against a director under art. 1401 of the Civil Code (Netherlands, 1838).

1. W.K.: art. 47*c* (Netherlands, 1838).

2. W.K.: art. 47*d* (Netherlands, 1838).

3. W.K.: art. 47*e* (Netherlands, 1838). See also: Civil Procedure Code (*Wetboek van Burgerlijke Rechtsvordering*), Book One (*Boek* I), Title Two (*Titel* II), Section Two (*Tweede afdeeling*).

4. See: *Hoge Raad*, Decision of 2nd March, 1956, [1956] *Nederlandse Jurisprudentie* No. 151.

5. W.K.: art. 476 (Netherlands, 1838). On the operation of the doctrine of *ultra vires,* see: Dorhout Mees, *op. cit.*, Nos. 568 and 665; Vander Heijden and Van der Grinten, *op. cit.*, Nos. 78 and 235. On the doctrine of *constructive notice,* see: *Hoge Raad*, Decision of 23rd March 1928, [1928] *Weekblad van het Recht* 11837; *Hoge Raad*, Decision of 17th November, 1933, [1933] *Weekblad van het*

In case of bankruptcy of a joint stock company, the trustee, notwithstanding the discharge given to a director for his administration, may claim damages on behalf of the trust-estate, if the situation of the company is chargeable wholly or partially to "gross fault" (*grove schul*) or "gross negligence" (*grove nalatigheid*) of such director, without any benefit accruing to the shareholders on that account.[6] If the balance sheet and profit and loss statement have not been drawn up according to the accompanying report, and if this balance sheet, statement and report do not faithfully represent the "situation" (*toestand*) of the company, directors are jointly and severally liable toward third parties for the damage resulting from their fault.[7] A director who proves that an act cannot be attributed to him is not liable.[8]

A general shareholders' meeting may at any time suspend or remove any director.[9] If, pursuant to the removal of a director, the company is liable to pay him damage and the judge deems these damages to be excessive, the judge may assess the damages at a smaller amount. The instrument of incorporation must contain provisions relative to the provisory management of the company in case of vacancy or impediment of one or more directors.[10] Unless otherwise provided for by the instrument of incorporation, commissioners are empowered to suspend any directors at any time.[11] The "suspension" (*schorsing*) may be set aside by a general shareholders' meeting.[12]

8. *The commissioners*

The control of the management of a company may be entrusted to

Recht 12708; *Hoge Raad,* Decision of 19th March, 1942, [1942] *Nederlandse Jurisprudentie* 445, and: Dorhout Mees, op. cit., Nos. 664 ff.; 6 Fredericq, *op. cit.*, No. 892; 1 Molengraaff, *op. cit.*, at p. 273; Vander Heijden and Van der Grinten, *op. cit.*, No. 235.

Nullity of the acts of a director whose appointment is defective under either the law or the instrument of incorporation cannot be raised as a defence against a third party in good faith. Nor will a third party be entitled to avail itself of such nullity: Vander Heijden and Van der Grinten, *op. cit.*, No. 246-1.

6. W.K.: art. 49*a* (Netherlands, 1838). See: Vander Heijden and Van der Grinten, *op. cit.*, Nos. 260 and 261.

7. Directors are equally liable on the same grounds toward a shareholder who may therefore bring a personal action. See: Dorhout Mees, *op. cit.*, No. 680; Vander Heijden and Van der Grinten, *op. cit.*, No. 262.

8. W.K.: art. 49*b* (Netherlands, 1838).

9. If suspension takes place without just cause the suspended director is entitled to damages. See: Vander Heijden and Van der Grinten, *op. cit.*, No. 253.

10. W.K.: art. 48*b* (Netherlands, 1838). A case of impediment is one where a director has an interest conflicting with that of the company. See text at footnote 83, *infra.*

11. If suspension takes place without just cause the suspended director is entitled to damages. See: Vander Heijden and Van der Grinten, *op. cit.*, No. 253.

12. W.K.: art. 51*a* (Netherlands, 1838).

one or more commissioners.[13] The appointment of commissioners is not compulsory but, if they exist, the instrument of incorporation must define their duties.[14] By regulations prescribed in the instrument of incorporation it is possible to lay down in detail the duties of the commissioners, or the distribution of the duties among the various commissioners. Regulations contrary to the law or to a valid provision of the instrument of incorporation are void. Such regulations cannot be pleaded against third parties unless they have been deposited at the office of the Commercial Register, where anyone may take notice thereof. The same provision applies to amendments to such regulations.[15] Anyone who, even under other name, carries out functions in a joint stock company which as a rule such company would entrust to a commissioner is considered a commissioner.[16]

When they are not appointed in the instrument of incorporation, the election of the commissioners is made by a general shareholders' meeting.[17] The instrument of incorporation may provide that the election by a shareholders' meeting be made out of at least two persons for each office to be filled. However, a general shareholders' meeting may waive at any time the compulsory presentation of this list by a resolution passed by a majority of two thirds of the votes cast and representing more than one half of the company's capital.[18] It is however possible to agree in the instrument of incorporation that one or more commissioners, but at the most one third of their total number, be appointed by persons different from the shareholders.[19] Thus commissioners may be elected by holders of preference shares, by bondholders or by the State. Commissioners may be elected for an indefinite period of time.[20] The law is silent as to the possible causes of ineligibility or the requirements for election of commissioners and as to their powers.[21]

In the interest of a joint stock company, a pledge may be taken on shares belonging to a commissioner, in order to guarantee the performance of his duties as commissioner. The pledge may be taken, if the shares are to the bearer or nominative entirely paid up, by depositing

13. A juridical person may be commissioner of a joint stock company: Vander Heijden and Van der Grinten, *op. cit.*, No. 284.

14. W.K.: art. 50 (Netherlands, 1838).

15. W.K.: art. 50*a* (Netherlands, 1838).

16. W.K.: art. 50*b* (Netherlands 1838). Under the Law on the Commercial Register the citizenship of each commissioner must be rendered public (arts. 5, para. 3 and 8, para. 5).

17. W.K.: art. 50*c* (Netherlands, 1838). See: Dorhout Mees, *op. cit.*, No. 684; Vander Heijden and Van der Grinten, *op. cit.*, No. 246.

18. W.K.: art. 48*a* (Netherlands, 1838).

19. W.K.: art. 50*c* (Netherlands, 1838).

20. The number of their terms of office is not provided for by the law. See: 6 Fredericq, *op. cit.*, No. 906.

21. See also text at footnote 85, *supra.*

them with a third party, in the name of the company and with the co-operation of the commissioners and, if they are nominative shares not paid up, by an appropriate annotation in the shareholders' register and by depositing the coupons of dividend relative to these shares with a third party, if the coupons are payable to the bearer.[22]

Commissioners must:

1) control the administration of the company and, in particular the accounting documents.

They may also:

2) give their consent to the carrying out of certain acts by the company, if the instrument of incorporation so provides,

3) call a shareholders' meeting when the directors fail to do so,

4) have the representation of the joint stock company in all cases in which it has an interest conflicting with that of one or more directors, unless the instrument of incorporation provides otherwise.[23] A shareholders' meeting, however, is always free to designate one or more other persons for this purpose.[24]

5) suspend any director at any time, unless provided otherwise in the instrument of incorporation. The suspension may be set aside by a general shareholders' meeting at any time.[25]

6) appoint an expert to regularly control the bookkeeping and to render account, with a report, to a general shareholders' meeting, of the balance sheet, the statement of profit and loss and the report, drafted by the directors, before these documents are presented to a general shareholders' meeting. As far as the appointment of an expert is concerned, a general shareholders' meeting is not restricted by any list. It may remove the expert at any time. The expert is entitled to see all books and documents of which he must take notice for a proper performance of his duty. The valuables (*waarden*) of the company must be shown to him upon demand. He is forbidden to disclose beyond the limits of his mandate what he learns or is told about the business of the company. His salary is determined by a general shareholders' meeting. Unless otherwise provided in the instrument of incorporation or by resolution of a general shareholders'

22. W.K.: art. 51*d* (Netherlands, 1838).

23. See *Hoge Raad*, Decision of 2nd May, 1952, [1953] *Nederlandse Jurisprudentie* 400.

24. W.K.: art. 51 (Netherlands 1838). For a criticism of this provision, see: 1 Molengraaff, *op. cit.*, at p. 289; Vander Heijden and Van der Grinten, *op. cit.*, No. 277.

25. W.K.: art. 51*a* (Netherlands, 1838).

meeting the expert may communicate his report to the commissioners, if any.[26] The expert may be revoked at any time by those who appointed him. His remuneration is determined by them and is paid by the company.[27]

Unless the instrument of incorporation provides otherwise, commissioners as such can receive no remuneration which has not been granted to them by such instrument.[28]

Each commissioner is bound toward the company to faithfully carry out his mandate. The liability of the commissioners is therefore joint and several if arising from a matter which is within the scope of authority of more than one of them. However, a commissioner who proves that an act cannot be attributed to him and that he did not neglect to take necessary measures to avoid the consequences thereof is not liable. Moreover, if a commissioner who is sued for damages proves that his responsibility for the damage suffered by the company is comparatively small, the judge may take into account this circumstance in determining the amount of damages awarded against this commissioner, thus departing from the principle of joint and several liability. The tribunal of the place where the company's head ocffie is located has jurisdiction over all claims arising out of the contract between a joint stock company and its commissioner, including the claim lodged by the trustee against a commissioner in case of bankruptcy of the company, if the amount of said claim is indefinite or over 500 Florins. This provision departs from provisions of the Civil Procedure Code.[89] In case of bankruptcy of a joint stock company, the trustee, notwithstanding the discharge given to a commissioner for his activity, may claim damages on behalf of the trust-estate, if the situation of the company is chargeable wholly or partially to gross fault or gross negligence of such commissioner, without any benefit accruing to the shareholders on that account.[30]

If the balance sheet and profit and loss statement have not been drawn up according to the accompanying report, or if the balance sheet, statement and report do not faithfully represent the situation of the company, the commissioners, if any, who are in charge of supervising the drawing up of these documents, are jointly and severally liable together with the directors towards third parties for the damage resulting from their fault. A commissioner who proves that the damage has not been caused by his negligence is not liable.[31]

All those, commissioners and others, who without taking part in the administration of a joint stock company, by virtue of some provision of

26. W.K.: art. 42*a* (Netherlands, 1838).

27. W.K.: art. 51*b* (Netherlands, 1838).

28. W.K.: art. 50*e* (Netherlands, 1838).

29. See *Wetboek van Burgerlijke Rechtsvordering*, *Boek* I, *Titel* II, *Tweede afdeeling.*

30. W.K.: art. 51*c* (Netherlands, 1838).

31. W.K.: art. 52 (Netherlands, 1838).

the instrument of incorporation or of some resolution of a general shareholders' meeting, for a certain time or under certain circumstances, perform acts of administration are considered directors in that respect, in so far as their rights and liabilities towards the company and third parties are concerned.[32]

"Ratification" (*goedkeuren*) or "authorisation" (*machtigen*) of specific managerial acts are not considered acts of administration.[33]

A general shareholders' meeting may at any time suspend or remove any commissioner; if the commissioner concerned was appointed by persons different from the shareholders *(i.e.,* holders of privileged shares, bondholders or the State) these persons have the exclusive right to suspend and remove him. If, pursuant to the revocation of a commissioner, the company is liable to pay him damages and the judge deems these damages to be excessive, he may assess the damages at a smaller amount.[34]

9. *Protection of minority shareholders*

Dutch law grants further protection to the rights of minority share, holders.

On a written "petition" (*verzoek*) of one or more holders of shares representing at least one-fifth of the subscribed capital or of a lesser amount as determined by the instrument of incorporation, the tribunal having jurisdiction over the place where the company's head office is located may appoint one or more persons, not being directors or commissioners of the company, to investigate the "management" (*beleid*) and the "course" *(gang)* of company's business, either in the whole or in part or for the aforementioned shareholder or shareholders has or have made similar requests to the directors or the commissioners, if any, and to a general shareholders' meeting without result. The petition is motivated and presented in duplicate. The "registrar" (*griffier*) of the tribunal sends without delay one of the copies to the company. The tribunal urgent deals with the petition "in chamber of council" (*in raadkamer*) and decides after having heard or properly or assisted the joint stock company; parties appear either represented or assisted by their "attorneys at law" (*procureurs*). Before deciding, the tribunal may order the appearance of all directors and commissioners and hear witnesses and experts, even on its own initiative.[35]

The tribunal rejects the petition if it has not been proved that there are well founded reasons to doubt the correctness of the management

32. W.K.: art. 52*a* (Netherlands, 1838).

33. W.K.: art. 52*b* (Netherlands, 1838).

34. W.K.: art. 50*d* (Netherlands, 1838).

35. W.K.: art. 53 (Netherlands, 1838). This right of inspection which may also be granted to bondholders, either in the instrument of incorporation or pursuant to a special agreement, is seldom used. It cannot be used by "close" companies. Pursuant to art. 11 of the Commercial Code a shareholder is entitled to inspect the books and records of a company. See also: *Hoge Raad,* Decision of 9th October, 1942, [1942] *Nederlandse Jurisprudentie* No. 821.

and a proper course of business or that any petitioner has posted bond as determined by the tribunal to coyer the expenses of the "investigation" (*onderzoek*). If the tribunal rejects the petition, it may at the same time order petitioner or petitioners to repair the damage caused to the company by the filing of the petition,[36]

Within three weeks from the day of the decree of the tribunal, the petitioner or petitioners, or as many of them as represent at least one-fifth of the company's subscribed capital, as well as the company, may appeal to the *"Court of Appeal"* (*gerechtshof*). The brief of appeal must be motivated and filed in duplicate. The registrar of the tribunal forwards one of the copies to the opposite party. The Court of Appeal urgently deals with the petition, in chamber of council, and decides, after having heard or properly summoned the joint stock company; parties appear either represented or assisted by their attorney at law. Before deciding, the Court of Appeal may order the appearance of all directors and commissioners and hear witnesses and experts, even on its own initiative. The Court of Appeal rejects the petition if it has not been proved that there are well-founded reasons for doubting the correctness of the management and a proper course of business or that the petitioner or petitioners have posted bond as determined by the Court of Appeal to cover the expenses of the investigation. If the Court of Appeal rejects the petition, it may at the same time order the petitioner or petitioners to repair the damage caused to the company by the filing of the petition. There is no further appeal against the judgement of the Court of Appeal, except on a point of law.[37]

Persons appointed by the judge have the right to inspect the books and documents of the joint stock company of which they must take notice for a proper performance of their duty. Upon demand, the valuables of the company must be shown to them. Persons charged with an investigation are not allowed to disclose, beyond their mandate, what they have come to know about the business of the company.[38]

If the inspection of the books or of the documents of the company is denied to a person charged with the investigation, the president of the tribunal where the company's head office is located will give the orders required by the circumstances, upon request of said person and after having heard or properly summoned the directors of the company; these orders include the "order" *(bevel)* to the "police" (*openbare macht*) to render assistance in so far as necessary and the order to enter into a "dwelling house" (*woning*) if the place where the books or the documents are kept is a dwelling house or is accessible only through a dwelling house. Entry into a dwelling house against the consent of the tenant is permissible only upon presentation of the order of the president. Summonses are sent by the registrar. The same procedure applies in case of refusal to show the valuables of the company.[39]

36. W.K.: art. 53*a* (Netherlands, 1838).
37. W.K.: art. 53*b* (Netherlands, 1838).
38. W.K.: art. 53*c* (Netherlands, 1838).
39. W.K.: art. 53*d* (Netherlands, 1838).

If the instrument of incorporation or an agreement grants to persons different from sharebrokers the right to present such a petition, the above provisions apply in so far as possible.[40]

The report resulting from the investigation is deposited with the registry of the tribunal where it may be freely examined by the company, the shareholders, the directors, the commissioners and other persons to whom the instrument of incorporation or an agreement grant the right of petition. The registrar notifies the petitioner or the petitioners and the company of the deposit immediately after it has been made.[41]

The expenses of the investigation are paid by the petitioner or the petitioners. After having taken cognizance of the report, the tribunal may decide that these expenses shall be reimbursed wholly or partially by the joint stock company, by one or more of its directors or commissioners personally or by one or more other persons in the service of the company. Such decision, which may be also taken upon initiative of the tribunal, but never without having heard or properly summoned the person charged with the reimbursement, is not susceptible to appeal, except on point of law. Summonses are sent by the registrar.[42]

These provisions apply to a joint stock company, the instrument of incorporation of which does not allow the issue of bearer shares, only if and in so far as the instrument of incorporation contains provisions to this effect.[43]

10. *Balance sheet, accounting expert and profits of a company.*

Every year, within a period of eight months from the end of the company's financial year, except for extension of this term by the general shareholders' meeting because of extraordinary circumstances, the directors must draw up a balance sheet and a profit and loss statement which are submitted for approval to a general shareholders' meeting. The balance sheet and profit and loss statement are accompanied by a report indicating the criterion adopted in the evaluation of the movable and immovable property of the company. The balance sheet and the profit and loss statement are signed by all directors and by the commissioners, if any, charged with the supervision of the drafting of the balance sheet and of the statement.

The following separate entries must be indicated in the balance sheet of a joint stock company:

a) "cash" (*kas*) and "credits" (*vorderingen*) immediately payable by "banks" (*banken*), "cashiers" (*kassiers*) and "clearing institutions" (*giro-instelligen*) ;

40. W.K.: art. 54 (Netherlands, 1838).

41. W.K.: art. 54*a* (Netherlands, 1838).

42. W.K.: art. 54*b* (Netherlands, 1838).

43. W.K.: art. 54*c* (Netherlands, 1838).

b) "participations" (*deelnemingen*) in other "enterprises" (*ondernemingen*) and the credits from the enterprises in which the company has a participation;

c) "securities" (*fondsen*) which are quoted in a stock list of a stock exchange designated by royal decree, regardless of whether it is organised by local authorities or not, in so far as their possession does not constitute a participation in other enterprises;

d) securities which are not quoted in a stock list of a stock exchange designated by royal decree, regardless of whether it is organised by local authorities or not, in so far as their possession does not constitute a participation in other enterprises;

e) credits which do not come under (a) or (b) ;

f) "movable goods" (*roerende zaken*) being manufactured or intended to be manufactured or traded;

g) "immovable goods" (*onroerende zaken*), "machines" (*werktuigen*) and "apparatuses" (*toestellen*) with their accessories and tools;

h) "incorporeal rights" (*onlichamelijke zaken*) in so far as their separate mention is not required under another of these items;

i) the "balance of income" (*tegoed aan inkomsten*) falling due in the future years;

j) expenses and losses which are carried forward to the next financial year;

k) that part of the subscribed capital which has not been paid up.[44]

The general shareholders' meeting may and, if the instrument of incorporation prescribes it, must appoint an "expert" (*deskundige*) who shall control the bookkeeping regularly and report to the general shareholders' meeting about the balance sheet and profit and loss statement as they have been prepared by the directors. As far as the appointment of an expert is concerned, the general shareholders' meeting is not bound by any list. It may remove the expert at any time. The expert is entitled to see all books and documents of which he must take notice for a proper performance of his duty. The valuables of the company must be shown to him upon demand. He is forbidden to disclose, beyond the limits of his mandate, what he learns or is told about the business of the company. His salary is determined by a general shareholders' meeting. Unless otherwise provided in the instrument of incorporation or by resolution of a general shareholders' meeting the expert communicates his report to the commissioners, if any.[45]

44. W.K.: art. 42 (Netherlands, 1838).

45. W.K.: art. 42*a* (Netherlands, 1838).

From the day of convocation of the general shareholders' meeting in which the balance sheet and the profit and loss statement are to be approved, and until the end of that meeting, these documents and the report are deposited at the company's head office where the shareholders may take knowledge thereof. Each of them may obtain complete copies. If the signature of one of the directors or one of the commissioners, where they exist, does not appear in any of such documents, the reason thereof, in so far as it is known to the directors, is stated on the document. The same provisions apply to the expert's report as mentioned in above. No more than cost price can be charged for these copies.[46]

Directors are bound to deposit, within a period of eight days from the approval of the balance sheet and the profit and loss statement, complete copies of these documents and of the report of the expert at the office of the Commercial Register, for public inspection, if:

a) the instrument of incorporation of the joint stock company authorises the issue of bearer shares for a total amount of more than fifty-thousand Florins, or if the joint stock company has issued either shares to the bearer or certificates to the bearer or nominative shares, or if such certificates alone amount to a sum higher than fifty-thousand Florins;

b) the joint stock company has put into circulation bonds to the bearer or certificates to the bearer of nominative bonds;

c) share certificates or bonds of the joint stock company, or certificates of these obligations are listed in the stock list of any stock exchange designated by royal decree, regardless of whether it is organised by local authorities or not; or

d) the business of the company consists, at least in part, of receiving money belonging to third parties or of underwriting "contracts of insurance" (*verzekeringsbedrijf*).[47]

Unless otherwise provided in the instrument of incorporation, the profits are for the benefit of the shareholders.

In calculating the "dividend" (*winstbedrag*)[48] due to each share, only the amount of the compulsory payments upon the shares is taken into account, unless the instrument of incorporation contains a different provision. The right to payment of a shareholder is prescribed within a period of five years, unless the instrument of incorporation provides a longer period.[49]

46. W.K.: art. 42*b* (Netherlands, 1838).

47. W.K.: art. 42*c* (Netherlands, 1838).

48. The amount of dividend due to each share is proposed by the directors and determined by the general shareholders' meeting. It must be determined in good faith. *Hoge Raad*, Decision of 31st January, 1947, [1948] *Nederlandse Jurisprudentie* 115.

49. W.K.: art. 42*d* (Netherlands, 1838).

If it appears from the approved profit and loss statement that, during a year, a loss has been suffered which cannot be covered by a reserve or extinguished otherwise, no distribution of profits will occur in the following years until such loss has been made good.[50]

Dutch law does not provide for the establishment of a legal reserve. The establishment of hidden reserves engenders liability of directors and commissioners.

11. *Amendments of the instrument of incorporation*

The general shareholders' meeting has the power to amend the instrument of incorporation;[51] if the instrument of incorporation denies such power, it is nevertheless possible to proceed to amendments, but only by a unanimous vote a shareholders' meeting where the totality of the subscribed capital is represented. If the instrument of incorporation contains a provision limiting the right to modify one or more provisions of the instrument, this provision may be modified only subject to such restriction. If the instrument of incorporation contains a provision excluding the right to modify one or more other provisions, such provision may be modified only by a unanimous vote of a shareholders' meeting where the totality of the subscribed capital is represented.[52]

The amendment of a provision of the instrument of incorporation granting any right to a third party cannot cause detriment to such right if the owner does not assent to the amendment; unless the power to amend the provision has been expressly reserved at the time the right was granted.[53]

If a motion to amend the instrument of incorporation is presented to a general shareholders' meeting, the notice of convocation must always mention the motion.

Those who have made such convocation must simultaneously deposit a copy of the proposal, in which the proposed amendment is cited *verbatim,* at the company's head office, so that each shareholder may inspect it. Failing this, no resolution can be passed on the motion if

50. W.K.: art. *42e* (Netherlands, 1838).

51. Insofar as the instrument of incorporation is regarded as a contract, amendment thereof must take place according to art. 1374, para. 3 of the Civil Code (Netherlands, 1838). Amendments must be equitable and made in good faith: *Hoge Raad*, Decisions of 18th and 25th April, 1929, [1929] *Weekblad van het Recht* 11979.

The company's objects (*Hoge Raad* Decision of 12th November, 1924, [1925] *Nederlandse Jurisprudentie* 36) as well as the company's name (*Hoge Raad*, Decision of 13th March, 1929, [1929] *Weekblad van Privatrecht. Notarisambt en Registratie* 31.28) may be amended. See: Dorhout Mees, *op.cit*., No. 624; Vander Heijden and Van der Grinten, *op. cit.,* No. 343; Dutch law does not allow the transfer of the head office abroad: Vander Heijden and Van der Grinten, *op. cit*., Nos. 81 and 343.

52. W.K.: art. 45 (Netherlands, 1838).

53. W.K.: art. 45*a* (Netherlands, 1838).

shareholders who represent at least one-tenth of the capital represented in the meeting oppose it. Shareholders must be given the opportunity to obtain a copy of the aforementioned proposal from the day in which deposit has been made until the day of the general shareholders' meeting. These copies must be provided without charge.[54]

Under penalty of nullity, an act amending the instrument of incorporation must be drafted before a notary. The act must be written in Dutch. The act may consist of notarial minutes of the shareholders' meeting which adopted the amendment or of an instrument executed subsequently. Directors have the power to make the amendment, even without being authorised by the shareholders' meeting. The general shareholders' meeting may authorise the directors or one or more other persons to make the modification which may prove to be required to obtain the certificate as referred to hereinafter.[55]

The amendment of the instrument of incorporation has no juridical value until the Minister of Justice has declared that no objection has been found to it. Such a declaration may be refused only on the ground that the amendment or the way in which it has been carried out is against good *mores,* public order, the law or a valid provision of the instrument of incorporation or — in case of an increase of the company's capital — that it is not shown that at least one fifth of the increased capital has been subscribed. To obtain the declaration, the instrument of amendment or a draft of it must be sent to the Minister of Justice. If the instrument consists of a notarial minutes of the general shareholders' meeting, it is possible to send a notarial excerpt of this minute. If the amendment involves a reduction of the company's capital, it must be shown, at the moment of notification, to the Minister of Justice, that the purpose of the reduction is neither to render possible a reimbursement upon shares, nor release from the liability to pay for shares not yet paid up, and that the relative provisions of the law have been complied with. The latter duty also holds for an amendment of the instrument of incorporation respecting partial or total reimbursement of money paid upon shares. This is allowed if and in so far as there is sufficient net profit, and also if the extent and the manner in which such reimbursement may be made are provided in the instrument of incorporation. If the ministerial declaration is refused, the reason thereof is communicated to the petitioner.[56]

Directors are due to publish the act — or, if said act consists in a minute of the general shareholders' meeting, a notarial excerpt of said minute — containing the amendment of the instrument of incorporation and the aforementioned declaration, as soon as possible by means of the Official Gazette of the Netherlands. For that purpose a complete copy of the act, or an excerpt — according to the distinction made before — certified as an authentic copy or excerpt by the notary before whom the act has been signed, with a copy of the declaration, are sent to the Official Gazette of the Netherlands. Whatever has not been publish cannot

54. W.K.: art. 45*b* (Netherlands, 1838).

55. W.K.: art. 45*c* (Netherlands, 1838).

56. W.K.: art. 45*d* (Netherlands, 1838).

be pleaded against third parties in good faith.[57]

During the state of bankruptcy of a joint stock company, no amendment can be made to the instrument of incorporation, except with the consent of the trustee.[58]

A judge is free to give such evidential value to the minutes of the general shareholders' meetings as he thinks fit in each indvidual case, without prejudice to the full faith given to an authentic act.[59]

The nullity of a resolution of the general shareholders' meeting may be invoked at law by every shareholder and every interested third party. However, nullity of a resolution because of the fact that it has not been passed in a regular way or with the co-operation of shareholders as required by the law or by the instrument of incorporation cannot, except in case of bad faith, be alleged after six months have elapsed from the day of the resolution, without the validity of the resolution having been questioned at law on said ground. Similarly, nullity of a resolution cannot be invoked for that reason when this ground for nullity has been rejected by a judgement, which has become *res judicata*, and rendered in an instance in which, the validity of the resolution could have been questioned for the same reason.[60]

With regard to a joint stock company the instrument of incorporation of which does not allow the issue of bearer shares, special provisions of the law respecting the right to call a general meeting by a minority of shareholders apply only in so far as the instrument of incorporation contains provisions for this purpose. The instrument of incorporation of such a company may provide that consultation of shareholders may take place in a way different from the shareholders' meeting. In this case the provisions where the law makes reference to a general shareholders' meeting, or a resolution passed by it, must be referred to such other manner of consultation or a resolution passed in virtue of such other manner of consultation.[61]

12. *Capital increase*

As Dutch law distinguishes between the company's capital and subscribed capital, distinction must be made between the increase of the former and increase of the latter, which may not exceed one-fifth of the company's capital. As long as the company has not issued shares for the

57. W.K.: art. 45*e* (Netherlands, 1838). The law requires that an amendment be deposited at the office of the Commercial Register, but third parties cannot avail themselves of the failure to deposit an amendment (art. 31, para. 3 of the Law on the Commercial Register).

58. W.K.: art. 45*f* (Netherlands, 1838).

59. W.K.: art. 46 (Netherlands, 1838).

60. W.K.: art. 46*a* (Netherlands, 1838). The application of this provision has been extended to resolutions of the commissioners: *Hoge Raad*, Decision of 1st April, 1949, [1949] *Nederlandse Jurisprudentie* No. 465.

61. W.K.: art. 46*b* (Netherlands, 1838).

amount of its capital, it may increase the subscribed capital without any particular formality. The decision to increase the capital is in the discretion of the general shareholders' meeting, which may entrust this duty to the directors. Shareholders do not have a pre-emption right on the shares of a new issue, although this right is recognised to them as a matter of practice.[62] The increase of the company's capital requires amendment of the instrument of incorporation which is subject to the formalities mentioned in Sec. 11.

13. *Reduction or amortisation of capital*

"Reimbursement" *(terugbetaling)* upon shares in cases where there is no sufficient net profit, or release from the liability to make payments upon shares which are not entirely paid up, can only occur after and in so far as the company's capital will have been reduced by an amendment of the instrument of incorporation.[63] The resolution to amend the instrument of incorporation defines the way in which the "reduction" *(vermindering)* is to be carried out, and the following provisions are complied with.[64]

A resolution to make such an amendment must be deposited at the office of the Commercial Register, so that everybody may take notice of it. This deposit is annnounced by the directors in the Official Gazette of the Netherlands and in a newspaper of the municipality where the company's head office is located or, in the absence of a newspaper published in that municipality, in a newspaper of the province in which the company's head office is located. Within two months from the day in which the publication has taken place, each creditor may oppose the amendment.[65]

The opposition is made by filing a petition requesting the annulment of the resolution in the tribunal which has jurisdiction over the place where the company's head office is located. The petition must be submitted in duplicate. The registrar of the tribunal sends without delay one of the copies to the other party. The tribunal urgently deals with the request to nullify the resolution in chamber of council. When more than one petition has been filed all will be decided together. At least one week in advance, the registrar notifies the company and the petitioner of the date of the hearing. The registrar also announces the date in a newspaper of the municipality where the company's head office is located or, in the absence of a newspaper published in that municipality, in a newspaper of the province in which the company's head office is located, and notifies the office of the Commercial Register. The tribunal decides, after a hearing of the joint stock company and of the petitioner, if they have appeared. The tribunal will also hear the other creditors who may have appeared and may hear witnesses and experts, even on its own initiative. The opponent and the joint stock company may appear either

62. See: Vander Heijden and Van der Grinten, *op.cit.*, No. 164.

63. See: Vander Heijden and Van der Grinten, *op.cit.*, No. 317.

64. W.K.: art. 41*c* (Netherlands, 1838).

65. W.K.: art. 41*d* (Netherlands, 1838).

through an attorney at law or assisted by attorneys at law.[66]

The tribunal rejects the opposition if it is not shown that the amendment or the manner in which it was carried out is against good *mores,* the public order, the law or the instrument of incorporation or that the assets of the company would constitute an insufficient guaranty for the creditors of the company as a result of the company's capital reduction. Each party pays its own costs, unless the tribunal finds that in the circumstances a different order should be made. As soon as the tribunal has rendered its decision, the registrar notifies the parties stating the date of the decree.[67]

Within three weeks from the day of the decree of the tribunal, both the company and the opponent may appeal to the Court of Appeal. The brief of appeal must be motivated and filed in duplicate. If the decision was granted on several petitions, the brief of appeal is filed in so many more copies. The procedure follows the same steps as seen in above. However, if the appeal merely concerns the expenses, the announcement of the date of the hearing in the newspapers and the notice to the office of the Commercial Register are omitted. In that case, the decree of the tribunal on the merits becomes *res judicata.* Within three weeks from the date of the decision of the court, parties may file an appeal on a point of law. The court registrar urgently notifies the other parties.[68]

The provisions respecting a resolution to make reimbursement upon shares, apply also to a resolution to amend the articles of incorporation containing a provision for the reimbursement of cash paid upon shares or an alteration of such provision.[69]

Dutch law contains a provision[70] which seems to provide for capital amortisation, that is to say, the reimbursement upon shares without reducing the amount of the subscribed capital. But the difficulties encountered in applying this provision have led the Minister of Justice to exclude the application, by refusing authorisation for companies the by-laws of which contain a provision such as this.[71]

14. *Dissolution of a company*

The "public prosecutor" (*openbaar ministerie*) has the power to request the "dissolution" (*ontbinding*) of a company operating against

66. W.K.: art. 41*e* (Netherlands, 1838).

67. W.K.: art. 41*f* (Netherlands, 1838).

68. W.K.: art. 41*g* (Netherlands, 1838).

69. W.K.: art. 41*h* (Netherlands, 1838),

70. W.K.: art. 41*b* (Netherlands, 1838): "Partial or total reimbursement of money paid upon shares is authorised only if and insofar there is sufficient net profit and, at the same time, if it is provided by the instrument of incorporation to what extent and in which manner such reimbursement can be made."

71. See: Dorhout Mees, *op. cit.*, No. 594; 1 Molengraaff, *op.cit.*, at p. 297; Vander Heijden and Van der Grinten, *op. cit.*, No. 316.

good *mores* or public order. The judge, decreeing the dissolution of the company, also determines the moment at which the dissolution is deemed to have taken place. The "judgement" (*vonnis*) declaring the dissolution of the company contains the appointment of one or more trustees and the designation of one of the members of the tribunal as "judge-commissioner" (*rechter-commissaris*). The trustee is entrusted with the liquidation of the business of the dissolved company under the supervision of the judge in accordance with the provisions of the "Law of Bankruptcy" (*Fillissemelwet*). The decree declaring the dissolution of the company must be published in the Official Gazette of the Netherlands. Notice of the dissolution must equally be deposited at the office of the Commercial Register, for registration. Rights acquired by third parties in good faith before compliance with these formalities are unaffected.[72]

A joint stock company is further dissolved:

1) by expiration of its duration;

2) by a resolution passed for that purpose by a general shareholders' meeting;

3) by its "insolvency" (*insolventie*), after having been declared in a state of bankruptcy.[73]

If the time for which the existence of a joint stock company has been contracted has expired without extension of its term by a timely amendment of the instrument of incorporation, this term is extended for one year by operation of the law, if, before the expiration of the time for which the company was entered into, the general shareholders' meeting has passed a resolution amending the instrument of incorporation with the view to extending the term of the company, and if at the same time copy of such resolution has been deposited at the office of the Commercial Register for public notice and announced in the Official Gazette

72. W.K.: art. 37*b* (Netherlands, 1838). This type of dissolution is quite rare. See: Dorhout Mees, *op. cit.*, No. 703.

73. W.K.: art. 55 (Netherlands, 1838). There do not seem to be other causes for dissolution and both doctrine and case law support the view that, except for the case contemplated in art. 37*b*, the list contained in art. 55 is exhaustive: Dorhout Mees, *op.cit.*, No. 704; 6 Fredericq, *op.cit.,* No. 928; Vander Heijden and Van der Grinten, *op. cit.*, No. 372 ff. See also: *Hoge Raad,* Decision of 31st December, 1958, [1959] *Nederlandse Jurisprudentie* No. 92.

A company may be declared bankrupt, though the board of directors has no power to ask for declaration of bankruptcy of its own company (art. 1 of the Law on Bankruptcy). But directors of a joint stock company have power to file a petition for bankruptcy of their own company if they are so authorised by the instrument of incorporation (art. 48*e*). Even when in liquidation a company may be declared bankrupt: *Hoge Raad*, Decision of 5th February, 1892, [1892] *Weekblad van het Recht* 6152. The director or commissioner of a joint stock company which has been declared bankrupt may be prosecuted under the provisions of the Criminal Code (Netherlands, 1866) relative to bankruptcy (arts. 342 and 343). The dissolution of a company does not entail termination of directors' functions even if they have not been appointed as liquidators. They maintain a right to be indemnified under the contract of service with the company. See: 1 Molengraaf, *op.cit.*, at p. 314; Vander Heijden and Van der Grinten, *op. cit.,* No. 254-1.

of the Netherlands and in one of the newspapers of the municipality where the company's head office is located or, in the absence of a newspaper published in that municipality, in one of the newspapers of the province in which the company's head office is located.[74]

A resolution of dissolution of a joint stock company must be published in the Official Gazette of the Netherlands. The resolution must further be notified to the office of the Commercial Register for the purpose of registration. As long as these formalities have not been complied with the dissolution has no effect toward third parties who declare in good faith that it was not known to them.[75]

After dissolution, a joint stock company continues to exist in so far as this is necessary for the liquidation of its business. In all documents, printed matter and announcements to which the company is a party or which originate from it, except telegrams and advertisements, the words "in liquidation" (*in liquidatie*) fully written must be added to the name of the company.[76]

16. *Liquidation of a company*

When the dissolution of a company is caused by insolvency and a declaration of bankruptcy, or by a judgement pronounced upon the demand of the public prosecutor, the liquidation proceeds according to the provisions of the Law on Bankruptcy. The "liquidators" (*vereffenaars*) may demand of the shareholders to make full payment of heir shares.

If liquidators have not been appointed either in the instrument of incorporation or by resolution of the general shareholders' meeting, the directors act as such. Provisions relative to appointment, suspension, removal, powers, duties and liability of the directors are applicable to liquidators. If neither the instrument of incorporation nor a resolution of the general shareholders' meeting provides otherwise, commissioners have, with regard to the liquidators, the same duty as they had *vis-a-vis* the directors before the liquidation.[77]

What is left of a dissolved joint stock company's assets after pay ment to the creditors is distributed among the shareholders and other rightful claimants in proportion to their rights, without prejudice to the power of the liquidators to make a provisional distribution, if the situation of the trust-estate justified this.[78]

No "distribution" (*uitkeering*) whatsoever as referred to in above may take place before at least two months have elapsed from the date that it has been announced by the liquidators in the Official Gazette of the

74. W.K.: art. 55*a* (Netherlands, 1838).

75. W.K.: art. 55*b* (Netherlands, 1838).

76. W.K.: art. 55*c* (Netherlands, 1838).

77. W.K.: art. 55*d* (Netherlands, 1838).

78. W.K.: art. 56 (Netherlands, 1838).

Netherlands and in one of the newspapers (of the municipality where the company's head office is located or, in the absence of a newspaper published in that municipality, in one of the newspapers of the province in which the company's head office is located) notifying that the plan of payments forming the basis for the distribution has been deposited at the office of the Commercial Register and at the company's head office if this still exists, for everybody to take notice of it. Within the abovementioned term every interested party may oppose the payment or the way of distribution. This opposition is made by serving a writ on the liquidators at the head office of the dissolved company, or if there is no head office, at the residence of the liquidator, or if there are several, at the residence of one of them, with summons to appear before the tribunal of the place where the company's head office is located, for the purpose of hearing the decree that the distribution shall not take place or that the amount will be diminished of a sum determined by the judge, or that the distribution will take place according to other criteria to be determined by the judge. The serving of the opposition suspends the planned distribution until said opposition has been withdrawn or decided with judgement become *res judicata*.[79]

Pending such a lawsuit, after the expiration of such term of two months and at the request of the liquidators or of one or more other interested parties, the tribunal of the place where the company's head office is located may authorise the liquidators to make a provisory distribution to be determined by the tribunal in such a way that the interests of the opponents are not prejudiced. The judge will not give his order before the opponents have been heard or properly summoned. The parties appear either through an attorney at law or assisted by their attorneys at law.[80]

On a petition from one or more interested parties, the tribunal may order that the assets of which the liquidators of the company are depositaries be delivered either to the organ entrusted to receive judicial deposits or elsewhere, under the conditions to be determined by the judge. If the petition has been made by others than the liquidators, the tribunal decides only after having heard or properly summoned the liquidators. The judgement of the tribunal is not susceptible to any appeal, except on a point of law. Whatever has been deposited according to the aforesaid provision can be disposed of only by authorisation of the tribunal.[81]

Sums which have not been distributed within six months from the order to pay the last distribution are delivered to the organ entrusted to receive judicial deposits.[82]

Within one month after the expiration of the provided period, liquidators must deposit their accounts and documents at the place indicated by them, provided that this place is within the municipality where

79. W.K.: art. 56*a* (Netherlands, 1838).

80. W.K.: art. 56*b* (Netherlands, 1838).

81. W.K.: art. 56*c* (Netherlands, 1838).

82. W.K.: art. 56*d* (Netherlands, 1838).

the dissolved company had its last head office, and also at the office of the Commercial Register of this place, so that everybody may take notice thereof within three months; this period begins the day after the deposit has been announced in the Official Gazette of the Netherlands and in a newspaper, according to the aforesaid provisions. If, during this period, the liquidators have not been called upon to render an account in the forms prescribed by the Civil Procedure Code, accounts and documents deposited by them are regarded as approved.[83]

If at any time thereafter a creditor files a claim, or the existence of another asset is discovered, the tribunal may re-open the liquidation upon petition of the interested party and, if necessary, appoint liquidators. Liquidators are authorised to ask the shareholders and the other rightful claimants to return whatever was overpaid on their shares.[84]

The provisions of the law referring to the sums delivered to the organ entrusted to receive judicial deposits, to the rendering of account and to the re-opening of liquidation do not apply in case of bankruptcy or of dissolution by order of the judicial authority.[85]

Unless the instrument of incorporation provides otherwise, the books and the documents of a dissolved joint stock company remain for thirty years after the liquidation in deposit with the person who has been designated for this purpose in the instrument of incorporation or, failing such designation in said act, with the person appointed by the general shareholders' meeting. If no depositary has been appointed, any interested party may petition the tribunal of the place where the company had its last head office to appoint a depositary. The judgment of the tribunal is not susceptible to any appeal, except on a point of law. Each depositary is bound to notify the declaration of his designation or appointment to the office of the Commercial Register where the company was recorded. The shareholders of the dissolved company or their rightful claimants may be authorised by the aforesaid tribunal to take knowledge of the books and documents if they prove to have a reasonable interest to such inspection.[86]

16. *Civil and criminal liability of directors and commissioners*

Directors are bound towards the company to faithfully carry out their mandate. Their civil liability is joint and several if arising from a matter which is within the scope of authority of more than one director. However, the director who proves that an act cannot be charged to him and that he did not neglect to take necessary measures to avoid the consequences thereof is not liable.[87] If a director who is sued for damages proves that his responsibility of the damage suffered by the company

83. W.K.: art. 56*e* (Netherlands, 1838).

84. W.K.: art. 56*f* (Netherlands, 1838).

85. W.K.: art. 56*g* (Netherlands, 1838).

86. W.K.: art. 56*h* (Netherlands, 1838).

87. W.K.: art. 47*c* (Netherlands, 1838).

is comparatively small, the judge may take into account this circumstance in determining the amount of damages awarded against this director, thus departing from the principle of joint and several liability.[88]

This liability is based on a contractual obligation of the directors towards the company and it may be raised only in an action brought by the company. In other words, the shareholders *uti singuli* have no action against the directors. An individual action by a shareholder is possible only when a director may be sued for an unlawful act.[89]

Directors are liable to the company, jointly and severally. For lack of specific provisions in the Code, liability to the company may be deemed to extend to any omission or commission by a director which may arise from non-observance of the duties imposed upon him by the law or by the instrument of incorporation. Directors are jointly and severally liable if they have failed to supervise the general trend of the administration of the company or if, being aware of facts prejudicial to the company, have failed to do everything in their power to avert the occurrence of such facts or to remove or reduce their harmful consequences. Liability for omissions or commissions cannot be held against a director who, not being at fault, declares and is able to prove his dissent from the resolution of the board of directors.

A director is entitled to be released from liability by a resolution of the general shareholders' meeting passed at the expiration of the director's office. Said release is given subject to the accounts as evidenced by the balance sheet, the profit and loss statement, the directors' report and the expert's report.[90] However, and despite of such a release, the trustee of an insolvent joint stock company may claim damages on behalf of the trust-estate, if the situation of the company is due to gross fault or gross negligence of one or more directors.[91]

If the balance sheet and profit and loss statement have not been drawn up according to the accompanying report, and if the balance sheet, statement and report do not faithfully represent the situation of the company, directors are jointly and severally liable toward third parties for the damage resulting by these documents, unless a director proves that the fact cannot be attributed to him.[92]

Directors are, further, liable toward third parties for issuing data, statements or allegations which fraudulently misrepresent, conceal to or, simply, inaccurately or incompletely inform, third parties about the establishment or the economic conditions of the company. A director who succeeds in informing the public that the publication of the data,

88. W.K.: art. 47*d* (Netherlands, 1838).

89. B.W.: art. 1401 (Netherlands, 1838). See also footnote 99, *supra.*

90. See: *Hoge Road,* Decision of 20th June, 1924, [1924] *Nederlandse Jurisprudentie* 1107.

91. W.K.: art. 49*a* (Netherlands, 1838).

92. W.K.: art. 49*b* (Netherlands, 1838).

statements or allegations took place without his knowledge or against his will, or in proving that none of these facts are due to his fault, may be released from liability, which — otherwise — is joint and several.[93]

Directors (and not the petitioners) may be held liable to pay the expenses of an investigation started upon petition of one or more shareholders and filed with the tribunal having jurisdiction over the place where the company's head office is located.[94]

Commissioners are bound toward the company to faithfully carry out their mandate.[95] They are jointly and severally liable together with the directors for the damages caused by their fault if the balance sheet and profit and loss statement have not been drawn up according to the accompanying report or if the balance sheet, the statement and the report do not faithfully represent the situation of the company. However, a commissioner who proves that the fact has not been caused by his negligence is not liable.[96] They are also liable for issuing data, statements or allegations which fraudulently misrepresent, conceal to or, simply, inaccurately or incompletely inform, third parties about the establishment or the economic conditions of the company. A commissioner who proves that none of the facts occurred due to his fault may be released from this liability.[97]

Commissioners and others who, without taking part in the administration of a company by virtue of some provision of the instrument of incorporation or of some resolution of a general shareholders' meeting, for a certain time or under certain circumstances perform acts of administration are considered directors in that respect, in so far as their liabilities toward the company and third parties are concerned.[98]

Like the directors, commissioners may be held liable to pay the expenses of an investigation started upon petition of one or more shareholders and filed with the tribunal having jurisdiction over the place where the company's head office is located.[99]

Dutch case law applies to resolution of the commissioners the provisions relative to nullity of a resolution of general shareholders' meeting.

A joint stock company is liable for the unlawful acts committed by

93. B.K.: arts. 1416*a* through 1416*b* (Netherlands, 1838).

94. W.K.: art. 54*b* (Netherlands, 1838).

95. W.K.: art. 51*c* (Netherlands, 1838).

96. W.K.: art. 52 (Netherlands, 1838).

97. B.K.: arts. 1416*c* and 1416*d* (Netherlands, 1838).

98. W.K.: art. 52*a* (Netherlands, 1838).

99. W.K.: art. 54*b* (Netherlands, 1838).

1. See: *Hoge Raad,* Decision of 1st April, 1949, [1949] *Nederlandse Jurisprudentie..No.* 465.

directors in the performance of their mandate.[2]

Although the board of directors is just an organ of the company, the acts of the board of directors are considered acts of the company[3] and a fault of a director is considered the fault of the company.

A director may be personally liable as the author of an unlawful act when he knew or was supposed to know that the act was unlawful and when he was bound and able to abstain but did not.[4]

Provisions of the Criminal Code govern criminal liability of the directors in so far as data, statements[5] or the balance sheet[6] are concerned.

The same code provides that a director or a commissioner who acts against any provision of the law respecting the duty to indicate the company's name, the head office or the capital of the company is subject to a fine of not more one hundred Florins.[7]

The same article punishes a director, a commissioner, or any other person at the service of a company who:

— does not abide by the provisions relative to the keeping of a shareholders' register until such time when the subscribed shares have been entirely paid up,

— fails to give the publicity required by law to resolutions of shareholders' meetings and other documents of the company or to draw up the balance sheets.

A director or a commissioner who has performed or agreed to the performance of an act which was contrary to a provision of the instrument of incorporation, and by so doing has caused to the company a considerable prejudice, is subject to a fine or not more than ten thousand Florins.[8]

A statement intentionally false or incomplete rendered to the office of the Commercial Register is a crime, whereas the omission of a declaration constitutes a minor offence.[9]

V. G. VENTURINI.*

2. B.K.: art. 1401 (Netherlands, 1838).
3. See: *Hoge Raad*, Decision of 10th June, 1955, [1955] *Nederlandse Jurisprudentie* No. 552.
4. See: *Hoge Raad*, Decision of 25th November, 1927, [1928] *Nederlandse Jurisprudentie* 364.
5. See: art. 335, Criminal Code (Netherlands, 1866).
6. See: art. 336, Criminal Code (Netherlands, 1866).
7. See: art. 435, Criminal Code (Netherlands, 1866).
8. See: art. 347, Criminal Code (Netherlands, 1866).
9. Law on the Commercial Register, arts. 33 and 34.

* B.Litt.A., LL.M., S.J.D.; Member of the Italian Bar; Lecturer in Law, University of Singapore.