Headline Features: Making the Private Limited Liability Company even more flexible, new legislation 2012/2013

Status per 20130101

1.	**NEW LEGISLATION**	Per 1 October 2012 a new legislation regarding the Private Limited Liability Company (B.V.) has become operative. Various 'old' mandatory regulations will be abolished or eased. This upcoming legislation will make the B.V. **more flexible**. The unofficial name for this legislation is: Flexible B.V. The legislation **applies to all B.V.'s, so both new and already existing ones**. Sometimes it will be necessary to adopt (in due time) the articles of association of an existing B.V. in order to be able to use the new law. As per 1 January 2013 further legislation has become operative, such as the **introduction of the one-tier board**. At a company with a one-tier board, the supervisors are no longer seated in a separate supervisory board but in the management board itself, as non-executive directors. The executive directors in the management board will be managing the company on the day-to-day basis.
2.	**WHY THE FLEX B.V.**	The incorporation of a B.V. has become available to more persons, in particular because of the abolishment of the capital requirement of minimally EUR 18,000. The B.V. offers more opportunities for cooperation between shareholders in a joint venture for instance because of new classes of shares without profit entitlement or voting-right.
3.	**IMPORTANT CHANGES**	
a.	**SHARE CAPITAL**	The capital requirement of EUR 18,000 upon incorporation has been cancelled. The capital must consist of at least one share with a nominal value of at least 1 Eurocent (EUR 0.01) or a foreign currency. This share must have voting-right.
b.	**NEW CLASSES OF SHARES**	New classes of shares can be created: shares without or with a limited voting-right and shares without or with a limited profit or reserves entitlement. A share without profit or reserves entitlement must have voting-right.

c.	**PAYING UP SHARES**	Upon incorporation or issue of shares the nominal amount no longer needs to be paid; payment may also be made after a certain (stipulated) period or as soon as the company calls for it. A capital contribution statement or, in case of payment in kind, an auditor's opinion is no longer required.
d.	**BLOCKING CLAUSE**	The obligation to include a blocking clause in the articles of association has been cancelled. It is however still allowed. The new legislation describes a simple blocking clause but another arrangement under the articles of association which restricts transfer (for instance an approval blocking) is also permitted. It has also become possible to forbid in the articles of association the transfer of shares for a certain period.
e.	**SIMPLIFIED CAPITAL PROTECTION RULES**	(Profit) distribution: the general meeting may decide to distribute profit or other distributions, insofar the shareholders equity is larger than the reserves that must be kept pursuant to the law or the articles of association. (Formerly, one also had to take into account thereby the issued and called up capital.) A decision to distribute will not have any consequences as long as the board has not granted its approval. The board may not grant that approval if at the time of the distribution it knows or should in reason foresee that after distribution the company cannot pay its due and payable debts. If a distribution is made to a shareholder while he knew/should know that after that distribution the company could not pay its due and payable debts, he must repay the sum of the distribution with interest.
		Purchase of own shares by the company at a purchase price has been simplified. The board decides about the purchase of the shares. The company may only purchase own shares if the shareholders equity less the purchase price is not smaller than the reserves that must be kept pursuant to the law of the articles of association. (Formerly, one also had to take into account thereby the issued and called up capital.) The authorisation of the shareholders has been cancelled, just as the prohibition to purchase more than 50 % of the issued shares.
		The procedure of capital reduction has been simplified. The assets of a B.V. may be decreased insofar the shareholders equity is larger than the reserves that must be kept pursuant to the law or the articles of association. (Formerly, one also had to take into account thereby the issued and called up capital.) At least one share with voting-right and with a nominal value of at least EUR 0.01 (or a foreign currency) must remain.

		The opposition procedure (which means amongst others publication in a newspaper and a waiting period of two months) has been cancelled. The board must approve of a decision to reduce the capital by way of repayment on shares. This approval may only be refused if at the time of the distribution the board knows or should foresee that after distribution the company cannot pay its due and payable debts.
		Article 2:204c (Nachgründung) has been cancelled. Article 2:204c determined that if a B.V. obtains goods (i) which one year before incorporation or thereafter belonged to a shareholder or incorporator and (ii) within two years after the first registration in the Trade Register of that B.V., the shareholders meeting must grant permission for the acquisition concerned. The board must thereby compile a description with an evaluation of the goods on which an auditor report must have been issued.
		Article 2:207c (Prohibition against assistance) has been cancelled. Article 207c contained a prohibition for a B.V. to give security in view of others acquiring shares in the capital of that B.V. Furnishing loans in view of others obtaining shares in the shareholders capital of the B.V. only was allowed up to the sum of the distributable reserves and insofar the articles of association allowed so.
f.	**LIABILITY DIRECTORS**	Under the new legislation the assets of a company could decrease because of which creditors will have less recovery than at this moment. On the other hand there is an aggravation of the liability of the directors in case of distribution of profit, reserves or otherwise (such as purchase of own shares, reduction of capital). If after a distribution (of profits) the company cannot pay its due and payable debts, the directors who at the time of the distribution knew or should have foreseen in reason are severally liable towards the company for the deficit arisen through the distribution, with the legal interest as of the day of distribution. Not bound will be the director who proves that he cannot be blamed for the fact the company has made the distribution and that he has not failed to take measures to avert the consequences thereof.
g.	**APPOINTMENT DIRECTORS/ SUPERVISORY DIRECTORS**	Directors are appointed by the general meeting of shareholders. Under the new law a director may also be appointed by the meeting of holders of a certain class of shares provided every shareholder with voting-right can take part in deciding about the appointment of at least one director. A binding nomination may only consist of one person. The afore-stated also applied at the appointment of supervisory directors.

h.	**DECISION-TAKING OUTSIDE A MEETING**	Decision-taking of shareholders could and can still be made outside a meeting, provided in writing and furthermore only if all persons entitled to attend the meeting have voted in favour of that manner of taking decisions. An important change is that under the new legislation unanimity of votes is no longer required for taking decisions outside a meeting.
i.	**MEETING OF SHAREHOLDERS**	Each financial year at least one general meeting of shareholders will be held or at least once will be decided outside a meeting. The period of convening a meeting of shareholders has been shortened from at least 15 days to minimally 8 days. Holders of shares without voting-right will be entitled to attend the meeting and to speak there.
4.	**FLEXIBILITY**	Now the new arrangements are mostly of a regulating or optional nature and the flexibility in practice hence increases, the possibilities to shape agreements and arrangement for shareholders, directors and other stakeholders, and related corporate governance, whether or not together with a (new) shareholders agreement, have improved as well. The legislative changes also extend to amongst others (i) liability law of actual directors and directors under the articles of association, and (ii) tax law, amongst others in fields such as liability (VPB), material interest (IB), negative regular wage (LB). The impact of these can be extensive. Whatever the case may be, the Flex B.V. offers in practice more freedom pertaining to company law to set up things to one's own wishes.