

FORMALITIES AND DOCUMENTS REQUIRED FOR THE INCORPORATION OF A DUTCH B.V. BY A NON-RESIDENT

Table of contents

1.	Introduction	2
2.	Pre-incorporation activities	2
3.	Incorporation procedure	2
4.	Information required	3
	4.1. Name of the Company.....	3
	4.2. Registered office	3
	4.3. Objects	3
	4.4. Share capital	4
	4.5. Share transfer restrictions	4
	4.6. Financial year	4
	4.7. Management and Supervision.....	5
5.	Payment	5
	5.1. Payment in cash.....	5
	5.2. Payment in kind.....	6
6.	Required information incorporators	6
	6.1. Individual	6
	6.2. Legal entity	6
7.	Ultimate beneficiary owner	7
8.	Post-incorporation: Registration in the Commercial Register	7
9.	Legal validation of documents	7
	9.1. Power of attorney	7
	9.2. Original extract / Certificate of Incorporation	8
	9.3. Passports	8
	9.4. Original documents	9
10.	End	9

1. Introduction

The incorporation of a Dutch private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid* or “**B.V.**”), the most commonly used legal corporate entity in the Netherlands and resembling an LLC, is a formal matter and can require some time, although in principle it can be effective within a few days. A B.V. comes into existence on the day that a Dutch civil law notary signs the notarial deed of incorporation.

Please note that this document provides the general outlines of the procedure for the incorporation of a B.V. It may not be relied upon in a specific matter.

2. Pre-incorporation activities

In the preparation phase, the B.V. “*in formation*” does not yet qualify as a legal entity. It is possible, however, for contractual rights and obligations to be assumed on behalf of the B.V. in formation. Unless otherwise stipulated, the person acting on behalf of the B.V. in formation will be liable towards the contracting third party for the obligations entered into, until the same are ratified by the B.V. after its incorporation. Even after ratification, the persons acting on behalf of the B.V. in formation remain to be liable under certain circumstances. In general it is therefore preferable to incorporate the B.V. first and register it in the Commercial Register of the Netherlands Chamber of Commerce KVK (the “**Commercial Register**”) before entering into any transactions.

3. Incorporation procedure

Incorporation occurs through the execution before a Dutch civil law notary of a notarial deed of incorporation. The incorporator(s) can be either one or more individuals or one or more legal entities or a combination of the two. The incorporator(s) and shareholder(s) can be represented by a third party through a power of attorney (see 9.1).

The notarial deed, which has to be executed in the Dutch language, contains in any event:

- a. the company’s articles of association;
- b. details on the shares issued at incorporation and on the incorporator(s) / shareholders(s)
- c. the appointment of the first managing directors (and (as the case may be) supervisory directors); and
- d. the determination of the first financial period of the company.

The notary will draft the articles of association.

The deed of incorporation will be executed in the Dutch language. The client will receive a copy of the deed with an English translation.

4. Information required

The following information is required for the preparation of the draft deed of incorporation and to register the Company in the Commercial Register.

4.1. Name of the Company

In order to avoid that the proposed name constitutes an infringement of third party's right to a trade name already validly used in the Netherlands, it is advised to conduct a name search in respect of the proposed name.

Before making a draft of the notarial deed, the notary will investigate the suggested name of the B.V. in the Commercial Register to make sure that there does not exist another company with the same name.

4.2. Registered office

The company's articles of association must mention the registered office (*zetel*) of the company. The registered office must be in the Netherlands and must be a municipality (e.g. Amsterdam, Rotterdam etc.).

The company's registered office does not necessarily have to be the same as the place where the actual business is located or carried out.

4.3. Contact information

To register the Company in the Commercial Register a phone number and e-mail address (of the Company) are required.

4.4. Objects

The articles of association of the company must contain a description of the company's anticipated activities (i.e. its objects). It is customary for Dutch companies to have relatively short and very generally worded objects clauses.

4.5. Share capital

The share capital of a B.V. must be divided in shares with a nominal (or par) value, which value must be expressed in the articles of association. The shares may be denominated in Euro, but may also be expressed in a foreign currency. As of 1 October 2012, the minimum share capital can be € 0,01.

It is not required that payment on the shares is made in the currency in which the shares are denominated.

Different classes of shares (with different par values) may be created in the articles of association. In addition to ordinary shares it is furthermore possible to create preference shares (carrying special financial rights) and priority shares (conferring rights of corporate control).

At least one (1) share carrying voting rights must be held by another party than the B.V. itself or its subsidiaries.

It is furthermore possible to create non-voting shares and/or shares that do not share in the profits and/or reserves of the B.V. It will not be possible, however, to create shares that have neither voting -, nor profit sharing rights.

4.6. Share transfer restrictions

The articles of association of a B.V. do not need to include transfer restrictions. Transfers may however be made subject to restrictions. The restrictions usually consist either of:

1. the requirement of approval of the transfer by a corporate body of the B.V. (e.g. the general meeting of shareholders); or of
2. the obligation of the transferring shareholder to first offer the shares to the fellow shareholders.

A combination of the two types of restrictions is also possible.

It is also possible to include a “lock-up” period in the articles of association. During the lock-up period a shareholder is not authorized to transfer his shares.

4.7. Blocking clause / offer obligation

The articles of association may contain a blocking clause to restrict the transfer of shares in the B.V., either in the form of an approval procedure or an offering procedure. The articles of association can also state that the shares are freely transferable. If the articles of association

do not contain a clause stipulating that the shares are freely transferable, Dutch law states that the shares in a B.V. must first be offered to the remaining shareholders proportionally.

4.8. Financial year

In the deed of incorporation one may provide that the company's first financial year is either shorter or longer than twelve months. The maximum is 24 months minus one day. This has various tax consequences and should therefore be discussed with a Dutch tax advisor. Usually, you see that a newly incorporated B.V. opts for an extended first financial year (i.e. until the 31st of December of the year following its incorporation).

4.9. Management and supervision

The B.V. must have at least one managing director. There are no legal requirements regarding the number, nationality or residence of managing directors. Individuals as well as legal entities may be managing directors.

In addition to a board of managing directors, the articles of association may provide for a board of supervisory directors. The duty of the board of supervisory directors is solely to supervise and advise the management. Legal entities may not be appointed as supervisory directors. Managing functions and supervisory functions may furthermore be combined into a "one tier board", consisting of executive and non-executive directors.

The board of managing directors of the company, as such, is always authorised to represent the company towards third parties. In addition, unless otherwise provided for in the articles of association, the individual managing directors are also authorised to represent the company.

It is not uncommon for articles of association of Dutch companies to provide that:

- (a) the signatures of a particular number or class of managing directors, acting together, are required to represent the company; and/or
- (b) certain management decisions/actions are made subject to the prior approval of the general meeting of shareholders or the board of supervisory directors.

Please be aware however that any lack of approval as set out under (b) may not be invoked against third parties.

5. Payment

5.1. Payment in cash

In most cases the shares issued at incorporation are paid up in cash. It is not legally required to pay up the shares prior to incorporation. However, we do advise to do so as soon as possible.

5.2. Payment in kind

The shares issued on incorporation may also be paid up by a contribution in kind. In such case, the incorporators must make a description of the assets to be contributed and they must mention the value of the contribution. The value must be stated per a date no longer than 6 months prior to the date of incorporation. If the incorporator knew that the value has decreased significantly after the valuation date, a new description is required.

6. Required information incorporators

Regarding the incorporators, first managing directors and supervisory directors (if any) we need to receive the following information:

6.1. Individual

If an individual:

- (a) full name;
- (b) place, country and date of birth;
- (c) nationality;
- (d) residential (private) address;
- (e) marital status;
- (f) certified copy of passport or other identity document; and
- (g) certified proof of address (utility bill or bank statement) (please note this may not be older than one month prior to incorporation).

6.2. Legal entity

If a legal entity:

- (a) certified copy of passport or other identity document of the director(s);
- (b) a recent certificate of good standing or extract from the trade register (please note this may not be older than one month prior to incorporation); and
- (c) a signed UBO statement.

In respect of the ultimate beneficial owner(s), we require - in addition to the aforementioned - a signed UBO statement (see 7).

7. Ultimate beneficiary owner

According to Dutch Law, an UBO (ultimate beneficial owner) statement must be signed. We have to know which individual(s) is/are the beneficial owner(s) of the legal entity.

An ultimate beneficial owner is a natural person (individual) who has the ultimate ownership or ultimate control of the B.V. or one or more of its incorporators/shareholders by being, either directly or indirectly:

- entitled to more than 25% of the shares and/or
- able to exercise more than 25% of the voting rights and/or
- entitled to more than 25% of the beneficial/economic interest in the entity, such as rights to the profits or the reserves of the Company and/or of the surplus after liquidation and/or
- able to otherwise exercise effective control of the entity.

We require a copy of the passport of the ultimate beneficial owner(s).

8. Post-incorporation: Registration in the Commercial Register

Upon signing the deed of incorporation by the notary, the B.V. exists. However, the B.V. still has to be registered in the Commercial Register. To do so, every candidate member of the management board and/or sole shareholder must fill in and sign a data card. If the candidate member of the management board and/or sole shareholder is a non-Dutch resident, a proof of the private address is required. This can be a copy of a recent utility bill showing the private address.

If a non-Dutch entity will become a managing director and/or the sole shareholder of the B.V., we have to register the entity at the Commercial Register. For this, we need an official extract (no older than one month) from the public register or an official certificate of incorporation (not older than one month).

We also must also register the information on the B.V. itself (the telephone number, number of employees, address et cetera).

9. Legal validation of documents

9.1. Power of attorney

Please note that each incorporator and each shareholder who cannot be at the notary office must give the notary a written power of attorney ('**POA**') to represent the incorporator to incorporate the B.V. and/or sign the deed of incorporation on his/her behalf.

The POA will be provided by the notary.

We need a confirmation that the signatures on the POA are correct and that the persons who have signed, are authorized to represent the foreign entity and that the foreign entity is not bankrupt. A civil law notary or lawyer may issue such statement. Please note that an apostille is required.

9.2. Original extract / Certificate of Incorporation

To verify companies an original extract or a certificate of incorporation is required.

An original extract/certificate from the registration in authority of the country of origin is required (for example from the commercial register of the country of origin). The extract must proof that the incorporator exists. The extract must not be older than one month.

A (civil law) notary has to confirm that this document is a valid extract from the registration in authority.

Please note that an apostille is required.

If such an extract is not available, a certificate of incorporation is a possibility. This certificate must not be older than one month. It must be validated by a (civil law) notary. Please note that an apostille is required.

Another possibility is a legal opinion made by a lawyer containing the same information. The lawyer has to confirm that he is a member of the bar and his legal opinion must be provided on his letterhead. An example of such a legal opinion is available.

9.3. Passports

To verify the identity of individuals a copy of the passport is required.

All copies of passports must be notarized. A statement by a notary, that the copy is a copy of the original will be sufficient. Please note that an apostille is required.*

(Proposed) directors must sign a data card. The data card must be notarized.

Please use the following wording:

Seen by me, [NAME NOTARY], civil law notary, residing in [PLACE][COUNTRY],
for legalization of the signature of [NAME],
bearer of passport numbered [NUMBER].

** if the signatures of the persons involved are already notarized on the POA another notarization is no longer required.*

9.4. Original documents

Please note that the original documents have to be sent to the notary. The Netherlands Chamber of Commerce KVK does not accept a copy or a PDF. The notary must attach the POA's to the deed of incorporation.

Please send us all the original documents.

10. End

Please do not hesitate to contact our office if you have any further questions or remarks.

Kind regards,

Fruytier Lawyers in Business