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Dividend payments by Dutch BVs – law and practice

It is important for a Dutch BV's managing directors and shareholders to know under which circumstances dividend distributions are allowed. Especially so since a new statutory regime has been introduced in October 2012 for the payment of dividends and other distributions by BVs to their shareholders. For this reason, the main principles of this regime, as laid down in article 2:216 of the Dutch Civil Code, are summarized below and illustrated by means of two court cases.

The procedure

Unless the BV's articles of association provide otherwise, the general meeting has the authority to distribute dividends, to the extent that these exceed the reserves to be maintained by law or by the articles of association. This resolution only becomes effective after approval of the board of managing directors. The board may only withhold its approval if it knows or should reasonably foresee that the distribution will cause insolvency of the BV.

Unlawful distributions and potential liability

In the event that the board wrongly decides to grant its approval, the BV may hold the managing directors personally liable for any deficit that may arise due to the distribution. Shareholders who received a dividend and knew or should have reasonably foreseen that the BV would become insolvent due to this distribution are obliged to repay the amounts received, either to the BV or the managing directors, as the case may be, in order to cover the deficit.

In addition, based on established case law, prejudiced third parties may hold the managing directors or shareholders liable in tort. For example, on July 15, 2015, the District Court of Overijssel allowed the claim of a bank to hold a BV's managing director personally liable for a dividend distribution by the BV that had deteriorated the bank's debt recovery position under a guarantee agreement. The court stated that guarantee commitments of a BV towards third parties that have a material effect on the BV's solvency are relevant for assessing whether the BV will be able to continue paying its due and payable debts. In this particular case, the managing director should have taken into account the possibility of the bank invoking the bank guarantee, and that it was highly probable that the BV would fail to meet its guarantee obligations towards the bank as a result of the distribution.

This case illustrates the importance of following a strict procedure in order to comply with the statutory dividend payment regime and ensure that a fair judgement can be made as to whether a BV will be able to keep meeting its financial obligations after the dividend distribution. In order to do so, not only will a good insight into the BV's financial information be required, but guarantees, security rights and other contractual obligations that may have an impact on the financial situation should also be reviewed. In the end, it is the responsibility of the board of managing directors to see to it that the BV's contractual obligations are observed.

Outdated articles of association

In many instances, BVs have not yet made their articles of association compliant with the amended legislation. In this situation, the question may arise as to which dividend payment provisions will prevail: the old procedure in the articles of

association or the legislation currently in place? On February 17, 2014, in a case where the lawfulness of a dividend distribution was disputed, the District Court of Gelderland decided that both the articles of association and the current law should be taken into consideration. Such a decision shows that non-compliance of articles of association to the existing rules on dividend payments may lead to legal uncertainty. In addition, transitory law to the amended rules does not always provide a clear solution in these cases. For the avoidance of doubt, we therefore recommend amending old dividend provisions in the articles of association to reflect the amended statutory procedure.