9.1 Introduction (Chapter 1)

The title of this book is *Conversion as change of legal form*. The word ‘conversion’ has more than one meaning. One is conversion as meant in section 2:18, 2:71, 2:72, 2:181 and 2:183 of the Dutch Civil Code. I refer to that legal conception as ‘change of legal form’. These words better convey that this legal concept means the transformation of the legal form of the corporate entity. In the event of change of legal form the legal personality of the legal entity is maintained as a result of which its assets are maintained.

The central question is as follows:

What is the nature, the function and the advisable scope of the legal concept of change of legal form under Dutch corporate law?

Change of legal form has elements of continuity and discontinuity. The basic principle of the legislators is continuity of the legal person. In the event of change of legal form the legal entity is maintained. Change of the form of a legal entity leads to discontinuity.

The extent of (dis)continuity of change of legal form is determined by (i) the nature of the change of legal form (the form) and (ii) the implementation of the legal framework (the content). Change of legal form implies amendment of the articles of association. There are two types of changes: changes which are the direct result of statutory requirements (the necessary changes) and changes to be implemented by way of change of legal form but that are not necessary (non-necessary changes). Necessary changes are the result of the nature of the legal form after change of legal form. Non-necessary changes may also be implemented by way of an amendment of the articles of association before or after change of legal form.

9.2 Present legislation (Chapter 2)

Chapter 2 is a guide for a corporate lawyer who is engaged in change of legal form of legal entities. All aspects relating to present legislation are described. A
summary is included in which all possible variant changes of legal form are included in a step plan.

The concept of change of legal form can be divided into four categories, which are: (i) change of legal form of a foundation, (ii) change of legal form into a foundation, (iii) change of legal form between related legal forms and (iv) specific legal forms.

The number of changes of legal form in the Netherlands between 1956 and 24 December 2008 was 3,789. That number is small. By way of comparison: in January 2007, 966,697 legal persons under private law were registered with the Trade Register in the Netherlands. The majority of changes of legal form are from and into a foundation.

Change of legal form requires two resolutions: a resolution to change the legal form and a resolution to amend the articles of association. A resolution to change legal form requires in principle a majority of nine-tenths of the votes cast. In my opinion the legislators should integrate both decisions.

Change of legal form comes into effect after execution of a notarial deed. There is a waiting period of one month for change of legal form of an association (vereniging), cooperative (coöperatie) or mutual insurance company (onderlinge waarborgmaatschappij) into another legal form. During that period all members have the opportunity to terminate their membership. There is no obligation for a member to remain a member after change of legal form or to become a shareholder after change of legal form into a limited liability company (naamloze vennootschap) or private company with limited liability (besloten vennootschap met beperkte aansprakelijkheid).

A compensation procedure exists for shareholders in the event of a change of legal form of a capital company (NV or BV) into another legal form (not being an NV or BV). This procedure is based on the procedure relating to reducing share capital. Creditors are also now protected on the basis of this procedure. In addition, to the supervision by a civil law notary other supervision, by a court, the Ministry of Justice and auditor, may be supplementary dependent on the variant of change of legal form.

It appears under present law that change of legal form of an informal association (informele vereniging) is possible. In my opinion it is advisable that the law explicitly prescribes that the provisions on the change of legal form (Dutch Civil Code) are not applicable to informal associations because supervision by a civil law notary who is involved in relation to the change of legal form is not effective.
9.3 Nature of change of legal form in Dutch corporate law
(Chapter 3)

Privatisation is not to be regarded as change of legal form under my definition. Privatisation shares similarities with incorporation, liquidation, legal merger and change of legal form.

The legal concept of ‘change of legal form’ has developed in various ways and this legal concept has different legal consequences at various times. Under the Act on foundations (Wet op stichtingen) change of legal form was similar to liquidation of a foundation. At that time, even a partial change of legal form was possible (from a foundation to an NV). Afterwards there was a system of universal transfer of title (overgang onder algemene titel). The present system of change of legal form is that of continuity of the legal entity and the maintaining of assets.

The second development is from compulsory to voluntary change of legal form. Change of legal form was at first to avoid compulsory liquidation by law if and to the extent the legal person did not meet the requirements for that legal entity as stated by law. Later, voluntary change of legal form was introduced at the time when change of legal form implied the maintaining of assets. Compulsory change of legal form to avoid liquidation on the basis of section 2:21 Dutch Civil Code still exists.

It is interesting to review German law relating to change of legal form (Formwechsel). Germany has a long history relating to change of legal form. German law has an extensive statutory regulation. Under present German law it is possible to change the legal form of partnerships (personenvennootschappen). It is not possible to change the legal form of foundations. In the view of the legislators a foundation is unsuitable for this legal concept given the nature of this legal entity. As a result specific questions arise under Dutch corporate law that do not exist under Germany, such as blocked assets.

The central concept under German law is the process of evolution of a company (from sole trader to NV and vice versa). Under German law the focus is on the company and not the legal entity to which the company belongs. Dutch law could be regarded more as corporate law whereas German law could be regarded more as company law.

Change of legal form requires amendment of the articles of association. Amendment of the articles of association is part of the change of legal form. In my opinion change of legal form is a form of amendment of the articles of association. Because of the possible far-reaching character of change of legal form, supplementary legal requirements need to be included in the rules on amendment of the articles of association of each private law legal entity that is changing its legal form.
9.4 Blocked assets in the event of change of legal form of foundations (Chapter 4)

The foundation is a special legal entity under Dutch corporate law because of its objects clause. The protection of the assets of a foundation after change of legal form are more extensive than the protection during its existence as a foundation. From the parliamentary history no explicit choice of a stricter regime occurs. Both statutory regimes need to be linked to one another, section 2:285 subsection 3 Dutch Civil Code should be the point of departure for section 2:18 subsection 6 Dutch Civil Code.

The interpretation of the present ‘blocked assets’ clause (section 2:18 subsection 6 Dutch Civil Code) is unclear. I suggest introducing a reserve relating to change of legal form. Under present legislation there is a strict and a flexible theory. Blocked assets under the strict theory means the blocking of all individual assets of the legal entity. In this theory it is not possible to spend assets in another way than the original objects of the foundation because a court will not grant such permission (based on section 2:18 subsection 6 Dutch Civil Code). In the flexible theory, blocked assets means assets minus liabilities at the time of change of legal form of the foundation.

The difference between the strict theory and the flexible theory is based in the explanation of the benefits of the blocked assets. Under the strict theory the benefits and benefits of the blocked assets (vruchten van beklemd vermogen) remain blocked, also after change of legal form. Under the flexible theory the benefits of the blocked assets refers to the benefits of the assets minus liabilities at the time of change of legal form (and not afterwards). Present case law follows a strict theory.

It is difficult to analyse enforcement of blocked assets after the change of legal form of a foundation. The civil law notary and judge who are involved in the procedure of the change of legal form do not have always a clear picture of all the interests to be protected. A blocked assets clause suggests protection which is not or barely actual. Sanctions on non-compliance with the blocked assets clause may lead to the general theory of mismanagement.

Change of legal form is not to be regarded as a donation (schenking) nor as a gift (gift). Change of legal form does not constitute a change in assets. Under the flexible theory, change of legal form from a foundation into a capital company may result in a gift to the extent the capital at the time of the change in legal form will be paid up by the assets of the foundation which is to be regarded as a deviation from the objects of the foundation.
9.5 Existing legal relationships (Chapter 5)

Chapter 5 prescribes the consequences of change of legal form to present legal relationships such as contracts. The question if and to what extent contracts remain into existence need to be answered in the basis of the general provisions of Books 2, 3 and 6 Dutch Civil Code. There is no specific facility as there is in case of a legal merger or demerger. This is also not necessary as the general provisions as stated before are satisfactory.

Governmental authorities may act as a party to an agreement. In principle the same regulatory provisions as for private parties are applicable. However, in the public interest special provisions are applicable to governmental authorities.

It is advisable for civil law notaries to be attentive to wording in notarial deeds (such as a donation or a last will) because of a possible change of legal form of a legal entity.

A public benefit organisation (algemeen nut beogende instelling) may retain its charitable status after change of legal form only to the extent the organization still meets all the requirements. It is necessary to inform the tax authorities of a change of legal form.

It is not always clear what the consequences are of change of legal form on licences. Depending on the type of licence and the conditions, it may be necessary to apply for a new licence because the licence is deemed to be cancelled. It may be possible to change the name of the licence because of the change of legal form.

Civil law notaries should realise that it is possible to include change of legal form in the share transfer restrictions of a capital company as a situation where shares have to be offered to other shareholders. Change of legal form may lead to change of control. Change of legal form of a limited liability company into a private company with limited liability does not result in change of control. If a shareholder or a member terminates his shareholding or membership at the time of change of legal form change of a capital company into an association, cooperative of mutual insurance company (or vice versa), this may well constitute change of control. Change of legal form from or into a foundation leads to change of control.

9.6 Defects in relation to change of legal form (Chapter 6)

Legislation includes several procedures for the handling of defects: Book 2 Dutch Civil Code and elsewhere, for example Book 3 Dutch Civil Code. In my opinion, the point of departure is retroactive effect if and to the extent interests are not prejudiced and the consequences of a different opinion are impracticable or barely practicable.
The main rule is that a defect in the procedure of change of legal form leads to an invalid change of legal form (nietigheid). Under Dutch law several documents need to be attached to the notarial deed of change of legal form. If not, the result is nullity. These defects include:

1. absence of authorization by the court in the event of change of legal form from or into a foundation or from a capital company into an association;
2. ministerial declaration of no-objection is absent;
3. a notarial deed is absent or there is no authentic deed;
4. an auditor’s statement is absent or the auditor’s statement does not meet the requirements under Dutch law;
5. the notice period for members of an association has not been observed;
6. not every member has become shareholder of a capital company and the member did not terminate his membership;
7. absence of written permission of members whose shares are not paid up by the reserves of the legal entity; or
8. capital reduction procedure has not been observed or has not been properly observed.

These defects may all be rectified on the basis of section 3:58 Dutch Civil Code. Sometimes the law includes a specific provision such as for decision-making. Rectification is also primarily based on Book 2 Dutch Civil Code.

Ratification, legally, has retroactive effect. The same applies to (legal) acts based on ratified acts. This principle is circumscribed by the interest to be protected, such as public order, legal certainty or third-party rights or interests. Third-party rights need to be protected.

A notarial deed may also reflect such rectification of a defect in the process of the change of legal form.

9.7 Specific changes of legal form (Chapter 7)

Chapter 7 is devoted to specific changes of legal form, first and foremost, religious denominations. Under present Dutch law it is unclear whether a religious denomination may change its legal form into a private legal entity (not being a religious denomination). To the extent necessary, it is unclear if such change of legal form is based on section 2:18 Dutch Civil Code. Change of legal form of a private legal entity, not being a religious denomination, into a religious denomination is based on section 2:18 Dutch Civil Code.

The second category of specific legal forms is partnerships (personenvennootschappen). At this time there is a legislative proposal on partnerships (Title 7.13

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1. Exception is the ministerial declaration of no-objection.
Dutch Civil Code) on which basis an incorporated public partnership (OVR) may change its legal form into a private company with limited liability and vice versa. The change of legal form of an OVR into a private company with limited liability requires:
1. an agreement or resolution;
2. notarial deed of change of legal form;
3. description;
4. authorisation by a court;
5. declaration of no-objection of the Ministry of Justice;
6. auditor's statement; and
7. filing with the Trade Register.

The change of the legal form of a private company with limited liability into an OVR requires:
1. resolution;
2. notarial deed of change of legal form;
3. description;
4. possibility to object;
5. authorisation by a court; and
6. filing with the Trade Register.

Internationally, EESV, SE and SCE have legal personality. To date the cross-border forms of cooperation, such as the EESV, SE and SCE, are not truly evident. This is to say that this is more the result of the lack of a true cross-border character because the EESV, SE and SCE are national instruments, rather than a reticent attitude on the part of careful, conservative jurists and entrepreneurs.

The SE and SCE have legal personality on the basis of the applicable EU regulation. The EESV does not yet have legal personality based on legislation implementing the EU regulation in the Netherlands. Each of the aforementioned legal entities is restricted on change of legal form. The rules are set out in the relevant EU Regulation (Verordening) and the Implementation Act (Uitvoerings-wet). The rules concerning SE and SCE are almost identical.

An EESV may be changed into a cooperative having statutory liability (coöperatie W.A.). A cooperative (no joint liability, excluded liability or limited liability) may be changed into an EESV. An SE may be changed into a limited liability company and vice versa. Change of legal form of an SCE may only be from and into a cooperative.

In my opinion change of legal form is a form of amendment of the articles of association. Therefore, in my opinion, change of legal form from an OVR, EESV, SE or SCE should be included into Book 2 Dutch Civil Code. The other provisions, into an OVR, EESV, SE and SCE may be maintained in the present legislation.