



Developments in the corporate banking practice: the authority to file for inquiry proceedings



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Recently a major financial institution in The Netherlands introduced a provision in its corporate credit general terms and conditions allowing it to initiate inquiry proceedings in respect of its corporate borrowers. An important development that may also be relevant for the banking practice in Curaçao and Sint Maarten.

Inquiry proceedings in Curaçao and Sint Maarten

The inquiry proceedings have been introduced in the Curaçao Civil Code on January 1, 2012 and in the Sint Maarten Civil Code on April 1, 2014. Through inquiry proceedings certain interested parties can request the Joint Court of Justice to appoint an expert to perform an inquiry regarding the policy and conduct of business of a public limited liability company (N.V.), a private limited liability company (B.V.) and certain foundations and associations that run an enterprise,

if there are sound reasons for doubting whether the policy has been appropriate.

The ultimate goal of the inquiry proceedings is to restore a proper course of business within the company, to provide transparency and to establish who is responsible for any mismanagement that may have occurred. Restoration of a proper course of business may be achieved through Court-imposed sanctions such as the annulment of corporate resolutions, dismissal or suspension of (managing and/or supervisory) directors, transfer of shares to a trustee etc.

Lenders do not have a statutory right to initiate inquiry proceedings against a borrower, except arguably for certain cases where the shares in the borrower have been pledged to the lender.

Contractual right to initiate inquiry proceedings

It is possible under Curaçao and Sint Maarten law to include a provision in credit agreements or in the lender's general terms and conditions that the lender may initiate inquiry proceedings against a borrower. This could be useful for several reasons such as:

- the borrower can be stimulated or forced to take certain measures;
- the lender can influence a change in the course of business that may ultimately prevent or cure an event of default situation and allow the lender to initiate recovery;
- initiating inquiry proceedings could be less intrusive than cancelling the credit arrangement.

Aruban legislation

Aruba is in the process of introducing similar legislation regarding inquiry proceedings. Due

to the fact that these efforts have not yet materialized, inquiry proceedings as mentioned above are not yet a possibility in Aruba. As soon as the legislation is in place however, the abovementioned would most likely also apply in Aruba.

Conclusion

Lenders that provide credit to corporate borrowers which are based in Curaçao and Sint Maarten may consider introducing the right to initiate inquiry proceedings against their borrowers. This right to initiate an inquiry against the borrower can be included in the credit agreements or in the lender's general terms and conditions.



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