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NEW DEVELOPMENTS IN THE LAW OF LEGAL ENTITIES IN ARUBA

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Meeting Public Meeting 05/28/2019

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Meeting Location Details

Place: Aruban Parliament Conference Room
Time: 03:00 P.M.
Chairman: Mr. J.E. Thijsen

PARLIAMENT OF ARUBA

Year of Session 2018-2019

No. 19 [File No.]

ADJUSTED CONVOCATION

To attend a PUBLIC MEETING of the Parliament of Aruba on Tuesday, May 28, 2019 [Day, date, month, year] at 03:00 P.M. in the conference room of the Aruban Parliament

Agenda:

Draft National Ordinance to Amend the Civil Code of Aruba (AB 1989 No. GT 100) by Introducing a Book 2 on the Law of Legal Entities (National Ordinance on the Introduction of Book 2 concerning the Law of Legal Entities) (IS/70/17-18, dated October 16, 2017) (ZJ2017-2018-876).

Oranjestad, May 28, 2019

On behalf of the Chairman,
The Clerk,
mr. drs. Herman Ch. J. Hek

Aruba, July 18, 2019

1. INTRODUCTION

On May 28, 2019, the Parliament of Aruba adopted a National Ordinance to Amend the Civil Code of Aruba by Introducing a Book 2 on the Law of Legal Entities. The final provision states that this national ordinance will enter into force at a time to be determined by national decree. On the date of publication of this newsletter, this national decree has not yet been issued. In anticipation of its entry into force, we believe it is valuable to provide insight into this new legal text, which brings together regulations scattered across the Commercial Code, the National Ordinance on Cooperative Associations, the National Ordinance on Foundations, and the National Ordinance on the Limited Liability Company. Any provisions that had become obsolete were amended, whenever possible, in line with the amendments most recently made, or soon to be made, in Curaçao. There are, however, several differences with the Curaçao and Dutch regulations. In this newsletter, we will elaborate on some key aspects and differences.

2. STRUCTURE

The structure of Book 2 is as follows:
Title 1: General Provisions
Title 2: The Foundation
Title 3: The Association
Title 4: The Cooperative and the Mutual Insurance Company
Title 5: The Corporation (NV)
Title 7: Buy-out, Resignation, and Forced Transfer
Title 8: The Right of Inquiry
Title 9: Conversion, Merger, and Demerger

To stay as close as possible to the numbers and structure used in the Curaçao regulations, while the regulations concerning the Private Limited Liability Company have not been adopted in Aruba, Title 6 has deliberately been left out.

3. GENERAL PROVISIONS

Just like in the Netherlands, the general provisions have been laid down in the first title and apply to the private law legal entities regulated in the following titles. These are, in this order, the foundation, the association, the cooperative (coop), the mutual insurance company (MIC), and the corporation (in Dutch: *naamloze vennootschap*, or NV). The Curaçao Private Limited Liability Company (in Dutch: *besloten vennootschap*, or BV) and private foundation (in Dutch: *stichting particulier fonds*, or SPF) have not been included in the new Aruban law of legal entities. The reason is that the private limited liability company differs little from the regular corporation (NV), and there are doubts as to its added value for Aruba considering the possible variants of the “new style” corporation (NV), while the private foundation has been found unnecessary.
A difference with the Dutch regulations has been the decision not to include provisions concerning public law legal entities and religious associations. Another difference is that considerably more provisions have

been moved from the separate titles to the General Provisions, with a view to simplifying and ironing out certain inconsistencies within the Dutch law system that are hard to explain.

The new legislation has eliminated the obligation to give notice of the incorporation of a corporation (NV) in the *Landscourant* (Official Gazette) of Aruba. There is, however, a duty to file the articles of incorporation with the Trade Register. This duty lies with the notary. It does not affect the obligation for the managing directors to register the legal entity pursuant to the Trade Register Ordinance.

In addition, the new legislation has codified independent peremptory norms based on fairness and reasonableness that used to be applied by virtue of case law.

Further, the new legislation provides that the legal relationship between a managing director and a legal entity is not (also) considered an employment contract. This does not prevent the parties involved from stipulating in their contract that certain provisions governing employment contracts apply by analogy.

Unlike Dutch law, which is subject to the system of directives required by EC law, the new Aruban regulations, like their Curaçao counterparts, hold on to the system in which restrictions on management powers in principle extend to the power of representation and, therefore, have external effects. In other words, such restrictions on management powers can be used against third parties, whereas such third parties' duty of investigation is, in principle, limited to the obligation of searching the Trade Register.

Compared to the Netherlands, the new Aruban regulations provide broader possibilities for exculpation from director's liabilities. No liability lies with a managing director who can prove that, taking into account the duties assigned to him and his term of office, he cannot be seriously blamed for noncompliance with the obligations in question, and has not been negligent in taking measures seeking better compliance.

Because the new regulations have eliminated the requirement of securing a certificate of no objection at the time of incorporation as a form of preventative supervision, rules have been included that allow the court to determine, at the request of an interested party or the Prosecutor's Office, the existence of the grounds for dissolution listed in those rules, after incorporation of the legal entity. Likewise, the Chamber of Commerce may, in specific cases, request the court to dissolve a legal entity.

In addition, the notion of "meeting right" has been introduced. Unlike in the Netherlands and Curaçao, where this meeting right only exists in the corporation (NV) and private limited liability company (BV), in Aruba the meeting right exists for all legal entities listed in Book 2.

4. THE FOUNDATION

The new regulations in Title 2, which are based on the Curaçao regulations, largely coincide with the Dutch Book 2 and the National Ordinance on Foundations. One difference from this last-mentioned national

ordinance is that the court may henceforth, at the request of a founder, the board of directors, or the Prosecutor's Office, decide to amend the articles of association, even if the articles preclude such amendment. As mentioned earlier, the possibility of a private foundation (in Dutch: *stichting particulier fonds*) has not been included.

5. THE ASSOCIATION

Again, the new regulations mainly follow the example of Curaçao, which largely coincides with Dutch legislation.
Unlike in the Netherlands, however, article 74 allows a distinction to be made between ordinary members and other types of members, such as extraordinary members. The difference should be defined in more detail in the articles of association, so that the distinction also produces effects in relation to a non-ordinary member.

6. THE COOPERATIVE AND THE MUTUAL INSURANCE COMPANY

Just like in Curaçao, the current Dutch legislation has been copied almost in its entirety, except for the so-called "structure cooperative," given that the structure arrangement does not exist in Aruba.
Unlike in the National Ordinance on Cooperative Associations and in Dutch Law, the new general rule is that members and former members are not liable. This is also true in Curaçao. The articles of association may provide otherwise. This is because practice has shown that such liability is almost always precluded in the articles of association anyway, which justifies a reversal of the general rule.

7. THE CORPORATION (NV)

The legislator has sought to introduce more modern and more flexible corporate regulations, based on one capital corporation and the possibility for several variants. In this sense, the text of the new law differs from that in the Netherlands and Curaçao. This has likewise led to the decision not to include the Aruba Exempt Corporation (AEC) and the Limited Liability Company (LLC). In other words, no more AECs or LLCs can be incorporated once the new law enters into force. If an amendment to the articles of incorporation or bylaws is necessary, a currently existing and active AEC or LLC will simultaneously have to be converted. Non-active AECs will soon be collectively dissolved, and the National Ordinance on the LLC will be repealed by means of a separate national ordinance, which will set out the transitional provisions.
Further, the possibility has now been opened to provide in the articles of incorporation that holders of shares are personally (jointly and severally) liable for specific or all debts of the corporation.
The former legal concept of the "non-paid-up share" no longer exists, because the obligation to give shares a nominal value has been eliminated. In its place, the new regulations now refer to a "payment duty," which may have the nature of an "additional-payment duty."
Unlike in the Netherlands, no rules are given for the wording of restrictions on share transfers. As a result, it is possible

for such restrictions to preclude a share transfer or make it extremely inconvenient.
No audit or publication of the annual financial statements is required for the regular corporation (NV). The applicable rules have been simplified. The aforementioned obligations do exist for “large” corporations (NVs) that meet specific criteria that signify a certain social importance. These are therefore subject to stricter requirements, both in terms of the structure of the annual financial statements and in terms of their filing and publication.
Also, a new legal concept is introduced: the corporate agreement. Such an agreement exists when a shareholder agreement has certain consequences for the application of corporate law rules. The articles of incorporation must provide the possibility for the corporation to join a corporate agreement. A condition for the corporate agreement to exist is that it has been recorded in writing, all shareholders are parties to the agreement, and notice of the agreement has been given to the Trade Register. The provisions in a corporate agreement have the same legal effect as provisions in the articles of incorporation, unless the opposite arises from the law, the articles of incorporation, or the agreement itself. New shareholders will by operation of law become parties to any corporate agreements that may exist at the time they join the corporation.
An amendment to the articles of incorporation no longer requires a certificate of no objection. By way of compensation, minority shareholders are given a special right to annulment of a resolution to amend the articles of incorporation. Such annulment can likewise be claimed by any persons involved in the legal entity, such as managing directors or supervisory directors.
Unlike in the Netherlands, there is no rule stating that resolutions can be adopted without a meeting only if they are carried unanimously. The condition that all persons entitled to attend the meeting must consent to this way of decision-making either previously or afterward is considered to provide enough protection.
Another new legal concept that has now been introduced is the corporation with an independent board of supervisory directors.
Also, the law includes new regulations concerning the shareholder-managed corporation (SMC). These regulations have been designed to offer a simpler model for (family) companies operating as a sole proprietorship or public person company (formerly called general partnership (in Dutch: *vennootschap onder firma*) or limited partnership (in Dutch: *commanditaire vennootschap*)). The basic idea is that a distinction between the general meeting of shareholders and the board of directors is hard to make in an SMC and leads to unnecessary procedural problems. To alert third parties to this deviant structure, a matching denomination is required. Please note, however, that the SMC is not a separate legal form, but rather a special form of the corporation (NV), in which, among other things, the meeting of shareholders as a meeting and the board meeting coincide.

8. BUY-OUT, RESIGNATION, AND FORCED TRANSFER

These are completely new regulations that did not formerly exist in Aruba.
A buy-out means that someone who, on his own behalf, holds shares representing at least 95% of a corporation's equity capital can file a claim against the other shareholders for them to transfer their shares to him. The same applies if two or more group companies together hold the required number of shares. The percentage can be reduced down to 90% in the articles of incorporation.
With resignation, the emphasis is on minority protection. Resignation means that a shareholder whose rights or interests are prejudiced as a result of the behavior of the corporation or of one or more shareholders, to such an extent that he can no longer be required to continue his shareholdership, is allowed to file a claim against the corporation for his resignation, meaning that the corporation must take over his shares against cash payment. If the claim is granted, the court will appoint one or more experts, who will have to report in writing on the price to be paid.
A forced transfer occurs when the articles of incorporation provide that, in specific cases as defined in the articles, a shareholder has an obligation to offer and transfer all or part of his shares to the corporation under the conditions provided by those articles of incorporation.

9. RIGHT OF INQUIRY

The new regulations concerning the right of inquiry are, in some regards, a simplified version of the Dutch regulations. They differ from the previous regulations laid down in the Commercial Code. The new regulations provide the possibility for sanctions, in the form of either a court ruling (e.g. annulment of a resolution, dismissal of a managing director or supervisory director, dissolution or demerger of the legal entity) or a temporary measure (suspension of the effects of a resolution, suspension of a managing director or supervisory director, temporary appointment of a managing director or supervisory director, temporary departure from the articles of incorporation or the bylaws, temporary deprivation of the right to vote, temporary transfer of shares by title of administration, or an order to carry out or refrain from carrying out specific acts).
A request for an investigation into the management and the course of affairs in the legal entity should be filed with the Court of Appeal, which is to judge in the first instance. As a result, no appeal is possible. Unlike in the Netherlands, the right of inquiry can also be exercised in a non-commercial association or foundation. The Court of Appeal will grant the petition only if there turn out to be solid reasons to doubt the existence of proper management. If one or more investigators are appointed, the Court of Appeal may appoint an examining judge (in Dutch: *rechter-commissaris*, or RC). No legal remedies are available against decisions of the RC.

10. CONVERSION, MERGER, AND DEMERGER

This title begins with general regulations for the conversion of a legal entity to

another legal form. Though inspired by the Dutch regulations, there are several differences. For example, the Aruban regulations do not require a majority of at least 9/10 of the votes cast, but merely impose the same requirements that apply to a resolution to amend the articles of incorporation. Another difference with the Netherlands is that, in any cases that require court authorization, the request for authorization must be announced in both the *Landscourant* of Aruba and a local newspaper. Yet another difference with the Netherlands is that the Aruban regulations explicitly mention as a ground for denial that the conversion results in an unjustified benefit for or prejudice to one or more persons.

Cross-border conversion is only possible for the corporation (NV) and the foundation. One condition for the successful conversion of an Aruban corporation (NV) into a foreign legal entity is that the laws governing such foreign legal entity must not result in termination of the existence of the corporation. This is to prevent a corporation from being terminated without dissolution or liquidation, as a way to protect creditors.

In addition, a procedure has been provided for filing an opposition. The next regulations concerning conversion coincide with the provisions that apply to the conversion of a corporation (NV). Court authorization and an announcement are required.

The new regulations regarding a (legal) merger have been borrowed almost in their entirety from the Dutch legislation. This allows looking for support in relevant Dutch case law and literature. A difference with the Dutch legislation, however, is that the Aruban system requires no statutory reserves and does not provide for the institute of an employees' council or employee participation council regulated by law. The Dutch regulations, pursuant to which a minority shareholder of the disappearing corporation who voted against the cross-border merger can ask the court for damages, have not been included. An Aruban (minority) shareholder will be able to file a similar claim, and have it judged, under the regular rules of property law.

An Aruban version of the Dutch articles 329 and 330 is missing because the Aruban legislation lacks the concept of "share certificates issued with the cooperation of the corporation," and because the Aruban legislator is not bound by the rules of the European merger directives. Article 332 is likewise missing because, unlike the Netherlands, Aruba does not require a certificate of no objection in the event of an amendment to the articles of incorporation.

Next, the demerger is regulated. The articles of the new law are nearly identical to the existing Dutch provisions. The few differences that exist run parallel to those in the regulations concerning the merger. The new legal concept of demerger includes both a true demerger and a spin-off. In a true demerger, the assets of a legal entity that ceases to exist as a result of the demerger are acquired under universal title by two or more other legal entities. In the case of a spin-off, it concerns the assets, or part of the assets, of a legal entity that does not cease to exist as a result of the demerger. One requirement is that the parties involved in a demerger must have the same legal form. In the event of a demerger of an association, cooperative,

mutual insurance company, or foundation, it is also allowed to form corporations (NVs), provided that the legal entity that is demerging acquires all the shares of those corporations at the time of the demerger. The motion for demerging must be filed with the Trade Register, and this filing must be announced in both the *Landscourant* and a local newspaper. How the demerger resolution subsequently plays out depends on the legal form of the legal entity.

11. CONCLUSION

Given its limited scope, this newsletter contains only general information. It is by no means exhaustive and does not cover every one of the changes that have been made in the law of legal entities. If you have any questions about the potential consequences of the new Book 2 of the Aruban Civil Code for your specific case at the time of its entry into force, feel free to contact us.

CONTACT INFORMATION

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