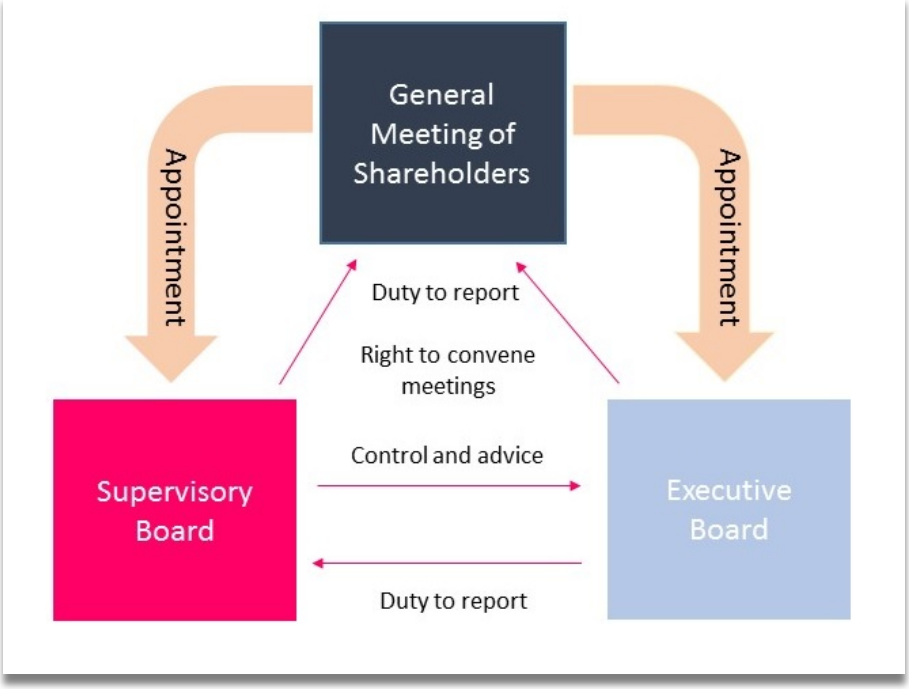
HBN
Newsletter

IMPLEMENTATION OF BOOK 2 CIVIL CODE: LAW OF LEGAL ENTITIES

Aruba



Aruba, February 2021

1. INTRODUCTION

In July 2019, HBN Law & Tax published a newsletter discussing the amendments announced at the time to the laws governing legal entities. This newsletter came in response to the enactment by the Parliament of Aruba of the National Ordinance Amending the Civil Code of Aruba (CCA) by Introducing a Book 2 on the Law of Legal Entities. This new Book 2 took effect on January 1, 2021, though it featured a good deal of variations from the previously announced version of May 28, 2019. Also, the necessary transitional law has meanwhile been codified. This is why we have prepared this new newsletter, which provides an updated overview of the legislation as it was ultimately adopted. The goal of the new legislation is to bring together in Book 2 a variety of regulations previously scattered across the Commercial Code, the National Ordinance on Cooperative Associations, the National Ordinance on Foundations, and the National Ordinance on the LLC. Whenever possible, any provisions that had become obsolete were amended in line with the amendments most recently adopted, or soon to be adopted, in Curaçao. There are, however, several differences from the Curaçao and Dutch regulations, which will likewise be elaborated on.

2. STRUCTURE

The structure of Book 2 is as follows:

Title 1: General Provisions (Art.1-39)
Title 2: The Foundation (Art. 50-58)
Title 3:The Association (Art. 70-89)
Title 4: The Cooperative and the Mutual Insurance Company (Art. 90-99)
Title 5: The Corporation (Art. 100-144)
Title 6: The Limited-Liability Company (Art. 150-187)
Title 7: Buy-Out, Resignation, and Forced Transfer (Art. 250-256)
Title 8: The Right of Inquiry (Art. 270-287)
Title 9: Conversion, Merger, and Split-Up (Art. 300-363)

3. THE GENERAL PROVISIONS

As 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, or, in Dutch: OWM[1]), the corporation (in Dutch: NV[2]), and the limited-liability company (LLC, or, in Dutch: VBA[3]). The private foundation (in Dutch: SPF[4]) as it exists in Curaçao and Sint Maarten was not included in the new Aruban law of legal entities, as such inclusion was considered unnecessary by the legislator. The same applied, initially, to the LLC, but developing insight ultimately prompted the legislator to maintain the LLC as a legal form for Aruba after all, alongside the corporation (NV). This is why most of the variations from the May 28, 2019 version are to do with the last-minute inclusion of references to the LLC. The legislator thought this inclusion was desirable because the corporation and the LLC cater to different social needs. The corporation, with its transparent structure, is better geared to public companies or to large enterprises with widely distributed stock, whereas the LLC, thanks to its flexibility, is better geared to smaller enterprises and to applications with strict requirements in terms of the possibility to define and shape mutual relationships.

One difference from the Dutch regulations has been the decision not to include provisions relating to public-law legal entities and religious associations. Another difference is that considerably more provisions from the separate titles have been moved to the General Provisions, with a view to simplifying and ironing out certain differences within the Dutch system of laws that are hard to explain.

The new legislation has eliminated the obligation to give notice of the incorporation of a corporation or LLC 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

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[1] "OWM" (in Dutch) stands for *onderlinge waarborgmaatschappij*, i.e. "mutual insurance company."
[2] "NV" (in Dutch) stands for *naamloze vennootschap*, which literally translates as "nameless company/corporation."
[3] "VBA" (in Dutch) stands for *vennootschap met beperkte aansprakelijkheid*, i.e. "limited-liability company."
[4] "SPF" (in Dutch) stands for *stichting particular fonds*, which literally translates as "private-fund foundation."

notary. It does not affect the obligation for the managing directors to register the legal entity pursuant to the Trade Register Ordinance.

The latest amendments resulted in the inclusion of sections that seek to explain more clearly, and harmonize, the information that needs to be recorded in a deed of incorporation. This includes, in any case, the data of the founders, the first managing directors, and, if applicable, the first supervisory directors and legal representative, as well as the articles of incorporation.
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, or all, private-law provisions governing employment contracts apply by analogy. Likewise, it does not prevent a managing director from being an employee of another legal entity, e.g. a group company. In the explanatory notes, the legislator observes that this new provision is not meant to bring about any changes in a managing director's tax position or in the field of social insurance.

Unlike Dutch law, which is subject to the system of directives required under 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, meaning that those restrictions on management powers can be invoked against third parties, whereas such third parties' duty of investigation is, in principle, limited to the obligation to consult the law, the articles of incorporation, and the Trade Register. At another party's request, the board will have an obligation to give a definite answer to the question whether the conditions for lifting a restriction have been satisfied. If no such definite answer is given within the established time limit, said other party may reject the legal act as invalid.

Because certain points in the previous regulations as contained in the National Ordinance on the LLC were found to be more complete than those laid down in the bill of May 28, 2019, it was ultimately decided to incorporate the corresponding provisions into the new Book 2. They include regulations relating to the nullity and annullability of resolutions, representation, the supervisory board, conflicts of interest, and the Country's right of objection to a cross-border conversion or merger.

Compared with the Netherlands, the new Aruban regulations provide broader possibilities for exculpation from directors' liabilities. No liability will lie with a managing director who can prove that, considering the duties assigned to him/her and the term served by him/her, he/she carries no serious blame for noncompliance with the obligations in question and has not been negligent in taking measures that sought to avert the consequences of improper management.

While leaving intact the possibility provided in the May 28, 2019 version to organize management around the one-tier model and the general/day-to-day management model, the new regulations widen the possibilities, in the sense that more powers can be granted to general management. Given that they were incorporated into the General Provisions, these regulations benefit all forms of legal entities.

One new provision is that a supervisory-board model cannot be combined with a one-tier model. This is to prevent a lack of clarity and an overlap of powers. The new regulations have lifted a previous restriction that allowed legal entities to act as supervisory directors only in non-commercial entities.

Because the new regulations have eliminated the preventative oversight that used to be exercised by requiring a certificate of no objection at the time of incorporation, new rules have been created under which any interested party, or the Prosecutor's Office, may ask the courts to establish the existence of the grounds for dissolution listed in those rules. Likewise, the Chamber of Commerce may, in specific cases, ask the courts 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 closed corporation (in Dutch: BV [5]), 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. Pursuant to the new Book 2, foundations now also need to be registered in the Trade Register. One difference from the national ordinance just mentioned is that the courts 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 has been dismissed. Because foundations lack a legally required oversight body, the new law confers special powers to the courts, the Prosecutor's Office, and any interested party. For example, at the request of the Prosecutor's Office or any interested party, the courts can dismiss a managing director, while also determining that the dismissed director cannot be a managing director of any foundation for five years.

5. THE ASSOCIATION

Again, the new regulations by and large follow the example of Curaçao, which largely mirrors Dutch legislation. The new Book 2 does not provide for the association without legal personality. Existing associations without legal personality are converted to associations with limited legal capacity. An association with limited legal capacity may register itself in the Trade Register, whereas an association with full legal capacity is legally required to do so. Commercial foundations further have an obligation to file annual financial statements with the Chamber of Commerce. Failure to make such filing will be considered an indication that a foundation is no longer active, which may result in dissolution by the Chamber of Commerce. An association with limited legal

[5] "BV" (in Dutch) stands for *besloten vennootschap*, i.e. "closed corporation."

capacity is unable to acquire registered property or be an heir. In addition, managing directors of such an association have joint and several liability, alongside the association, for any debts arising from legal acts performed under their management.

Unlike in the Netherlands, Aruba allows a distinction to be made between ordinary members and other sorts of members, such as extraordinary members. Detailed definitions of the different sorts of members must be provided 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

Like its Curaçao counterpart, the Aruban legislator has copied almost in its entirety current Dutch legislation, except for the so-called "structure cooperative," given that Aruba has not implemented the related "structure regulations."

Unlike in the National Ordinance on Cooperative Associations and in Dutch law, the new general rule is that no liability lies with members and former members. The same applies in Curaçao. The articles of association may provide otherwise. This is because, in practice, it was observed that such liability was almost always precluded in the articles of association anyway, which justified a reversal of the general rule.

7. THE COOPERATION (N.V.)

The legislator has sought to introduce more modern and more flexible corporate regulations, allowing for several variations on the capital corporation. In this sense, the text of the new law differs from those in the Netherlands and Curaçao.

Because the requirement for a certificate of no objection at the time of incorporation has been eliminated, the corporation, too, has been made subject to a legal prohibition dictating that the corporation's name must not cause confusion among consumers as a result of being equal, or very similar, to that of another legal entity or business that appears in the Trade Register.

The entry into effect of Book 2 means the final elimination of bearer shares. The issuance of bearer shares had been banned since 2012, and rights associated with existing bearer

shares could no longer be

exercised since February 1, 2015. The effect of the new regulations is that any bearer shares that may still exist are now, by operation of law, converted to registered shares. The rights associated with such shares are suspended until the holder surrenders the bearer certificate to the corporation. This must be completed by January 2, 2022. The holder of a bearer certificate will then be entitled to a replacement registered share in the corporation. Any bearer shares that have not been surrendered by this date will go to corporation by operation of law, without any form of compensation.

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." Likewise, the corporation, too, is now subject to the provision that a corporation is not allowed to give any guarantee, to or in favor of a shareholder or anyone acquiring a share, relating to the value of one or more shares in its capital. This sort of guarantee might undermine the risk-bearing nature of the amount paid for the shares, which is why the law prohibits it.

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.

Compared with the original version of Book 2, the version presently adopted provides a sanction in the event of noncompliance with the convocation requirements for general meetings. Such noncompliance will, in principle, result in the resolution being annullable, unless such annullability is evidently unjustified, such as when all individuals that are entitled to vote on the resolution in question are present or represented at the meeting.

A "regular" corporation has no obligation to have its annual financial statements audited and published. Such audit and publication are subject to the standard regulations. The articles of incorporation may, however, provide for application

of a stricter regime, shortening the time limit for preparing the annual financial statements, imposing more stringent requirements in terms of their structure, and making their audit and publication compulsory. Under both the regular and the stricter regime, any managing directors and supervisory directors of the corporation who signed the annual financial statements will be jointly and severally liable to third parties if those statements are misleading and such third parties have suffered damage as a result. This provision was borrowed from the previously existing legislation applicable to the LLC.

The original version of Book 2 introduced a new legal concept: the corporate agreement. The legislator ultimately decided to eliminate this concept and the corresponding regulations. The main reason for this decision was that a corporation needs to be based on the principle that its structure must be knowable to anybody and must therefore be laid down in the articles of incorporation.

Amendments to the articles of incorporation no longer require a certificate of no objection. By way of compensation, minority sharehol-ders are given a special right to annulment of a resolution to amend the articles of incorporation. Such annulment can likewise be sought by any individuals involved in the legal entity, such as managing directors and supervisory directors.

Unlike in the Netherlands, there is no rule stating that resolutions can be adopted without a meeting only if adopted unanimously. The condition that all individuals entitled to attend the meeting must consent to this way of decision-making, either previously or afterward, is considered to provide sufficient protection.

Another new legal concept that has been introduced is the corporation with an independent board of supervisory directors.

The shareholder-managed corpora-tion (SMC, or, in Dutch: ABV [6]), a special type of corporation, is subject to the provision that if each holder of voting shares is also a managing

[6] "ABV" (in Dutch) stands for *aandeelhouder bestuurde vennootschap*, i.e. "shareholder-managed corporation."

director of the corporation, any resolution of the general meeting of shareholders may be adopted at a board meeting, provided that all other rules relating to a shareholder resolution have been complied with.

With regard to the LLC, regulations were already in place governing the possibility for shareholders to bring a derivative action in order to hold managing directors liable for improper fulfillment of duties. The same regulations have now been implemented in relation to the corporation.

In addition, an obligation has been created for offshore corporations to appoint a legal representative. This obligation therefore does not apply if the corporation's board includes one or more natural persons who are residents of Aruba, or is made up by a legal entity whose board, in turn, includes one or more natural persons who are residents of Aruba.

8. THE LIMITED-LIABILITY COMPANY

The new regulations incorporate, unaltered, the vast majority of the provisions previously laid down in the National Ordinance on the Limited-Liability Company, with just a few changes to ensure alignment with the corresponding regulations regarding the corporation, and a few additions that provide for electronic storage by the Chamber of Commerce.

Like the corporation, the LLC no longer requires a certificate of no objection, while its regulations regarding capital reduction have been simplified and the possibility has been provided to voluntarily opt for a stricter regime in terms of the preparation, organization, and publication of its annual financial statements.

One particular feature of the LLC is the possibility to lay down in bylaws everything which, pursuant to the General Provisions, can or must be included in the articles of incorporation, provided that such bylaws have been laid down in, or attached to, a notarial deed, or have been filed with the Trade Register. Also, an LLC's articles of incorporation can preclude the possibility to invoke exceeding of the corporate purpose. Notice of such preclusion needs to be given to the Trade Register.
Other differences from the corporation are that the articles of incorporation may provide that a)

shares are to be assigned a nominal value, b) profit will be distributed to shareholders and other entitled individuals only upon request, c) shareholders are liable for all or specific debts of the company, d) managing directors are to be appointed through an election, or e) specific managing directors are to be elected by specific shareholders. The last two possibilities likewise apply to the appointment of supervisory directors. Finally, the minimum time limit for calling a general meeting is much shorter in the case of the LLC, namely five days, instead of the twelve days that apply in the case of the corporation.

9. REPEAL OF THE AEC

The Commercial Code regulations that were the basis for the Aruba Exempt Corporation (AEC, or, in Dutch: AVV[7]) have been repealed in their entirety, and no longer appear in the new Book 2. Consequently, it has no longer been possible to form an AEC since January 1, 2021. Existing AECs must be converted within three years. During this transition phase, they will be governed by the provisions that apply to the LLC. In addition, they are under the obligation to have a legal representative throughout the transition period. If an amendment to the articles of incorporation or bylaws is necessary, such existing AEC will simultaneously have to be converted. Converting an active AEC will only be possible if a notary has ascertained that the AEC has complied with its registration, filing, and payment obligations. Non-active AECs will be administratively dissolved by the Chamber of Commerce, a possibility that has likewise been included in the legislation of the Netherlands and Curaçao. This possibility is effective immediately, i.e. the Chamber of Commerce has been able to use it since January 1, 2021. Any AECs not converted within three years will be dissolved by operation of law.

10. BUY-OUT, RESIGNATION, AND FORCED TRANSFER

These are completely new regulations, which did not previously exist in Aruba.

A buy-out means that an

[7] "AVV" (in Dutch) stands for *Aruba vrijgestelde vennootschap*, i.e. "Aruba exempt corporation."

individual who, on his/her 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/her, allowing him/her to acquire 100% of the shares. The same applies if two or more group companies together hold the required number of shares. The percentage may be reduced to 90% in the articles of incorporation.

In the event of 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/she can no longer be required to continue being a shareholder, is allowed to file a claim against the corporation for his/her resignation, meaning that the corporation must take over his/her 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 those articles, a shareholder has an obligation to offer and transfer all or part of his/her shares to the corporation, subject to the conditions defined by the articles.

11. THE RIGHT OF INQUIRY

The new regulations concerning the right of enquiry are, in some regards, a simplified version of the Dutch regulations. They differ from the previous regulations laid down in the Commercial Code as they used to apply to the corporation. For the very first time, the regulations relating to the right of enquiry now apply by law to all legal forms, including the LLC. Unlike in the Netherlands, the right of inquiry can also be exercised in a non-commercial association or foundation.

The new regulations now 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 split-up 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, an order to take -or refrain from taking- a specific action).

A request for an investigation into the management and the course of affairs in the legal entity should be filed with the Common Court of Justice, which is to judge on the request in the first instance. This rules out the possibility to file an appeal, though a petition for judicial review can be filed with the Netherlands Supreme Court. The Common Court of Justice 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 Common Court of Justice may name an examining judge (in Dutch: *rechter-commissaris*, or RC). No legal remedies are available against decisions of the RC.

12. CONVERSION, MERGER AND SPLIT-UP

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. Unlike in the Netherlands, in any cases where authorization of the courts is required, the request for authorization must be announced in both the *Landscourant* (Official Gazette) of Aruba and a local newspaper. 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 individuals.

Cross-border conversion is only possible for the corporation, the LLC, and the foundation. One condition for the successful conversion of an Aruban corporation or LLC to 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. Court authorization and an announcement are required.

The new regulations regarding (legal) mergers have partly been borrowed from Dutch legislation and partly from the National Ordinance on the LLC. A merger occurs when two legal entities, and their assets and liabilities, melt together, with their assets and liabilities being conveyed under universal title. The disappearing legal entity ceases to exist, without liquidation, and its members or shareholders become members or shareholders in the acquiring legal entity, in accordance with an exchange ratio.

One difference with the Dutch legislation 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. In addition, the Aruban legislator is not bound by the rules of the European merger directives.

The next topic to be regulated is the split-up. The new articles of the 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 "split-up" includes both a clear split and a spin-off. In a clear split, the assets and liabilities of a legal entity that ceases to exist as a result of the split-up are acquired under universal title by two or more other legal entities. In the case of a spin-off, this happens to the assets and liabilities, or part thereof, of a legal entity that does not cease to exist as a result of the split-up. It is required for the parties involved in a split-up to have the same legal form, with the corporation and the LLC being considered legal entities with the same legal form. In the event of a split-up of an association, cooperative, mutual insurance company, or foundation, it is also allowed to form corporations or LLCs, provided that the legal entity being split acquires all the shares of such corporation or LLC at the time of the split-up. The motion for split-up must be filed with the Trade Register, and this filing must be announced in both the *Landscourant* (Official Gazette) and a local newspaper. How the split-up resolution

subsequently plays out depends on the legal form of the legal entity.

13. IN CONCLUSION

The transitional provisions provide as a general rule that the new provisions of Book 2 affect facts occurring after January 1, 2021. Facts that occurred prior to January 1, 2021, will, in principle, be assessed in accordance with the law in effect at that time. The transitional regulations establish a few exceptions to this rule. Most of the new obligations, or of the obligations that differ from the old law, will take effect in the first fiscal year starting after January 1, 2021.

Given its limited scope, this newsletter contains only general information. It is by no means exhaustive and does not describe all the amendments that have been made to the law of legal entities.

If you have any questions about the impact which the new Book 2 of the Aruban Civil Code may have on your specific case, please feel free to contact us.

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