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CONSULTANTS

The Netherlands Antilles
*
Corporate Law

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1 Introduction

The legislation with regard to legal entities under private law (such as the foundation and the limited liability company) has been regulated in Book 2 of the Civil Code (“CC”) of the Netherlands Antilles.

Book 2 CC almost exclusively contains regulations with regard to legal entities under private law. The legal entities explicitly regulated in Book 2 are:

- the foundation (*stichting*),
- the Private Foundation (*stichting particulier fonds*),
- the association (*vereniging*),
- the cooperation (*coöperatie*),
- the mutual guarantee company (*onderlinge waarborgmaatschappij*),
- the limited liability company (*naamloze vennootschap*), and
- the private limited liability company (*besloten vennootschap*).

Book 2 exclusively contains civil law. As this is of importance to actual practice, in this memorandum we will also discuss a number of fiscal consequences. The criminal regulations and other regulations under public law (such as the supervisory rules of the Central Bank) are not subject of this survey. If your company falls under the supervision of the Central Bank, further rules may apply to your legal entity.

2 Position managing and supervisory directors

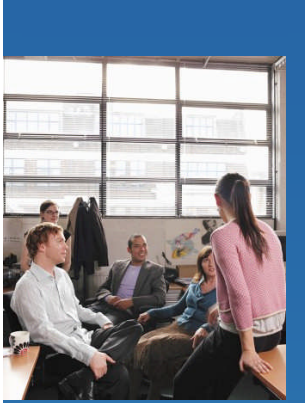
2.1 Director’s and officer’s liability

Book 2 contains protection of creditors in the form of increased liability for Managing Directors of all forms of legal entities. The Managing Director always has to be guided by the interest of the legal entity and the enterprise conducted by that legal entity.

In the event of bankruptcy of a legal entity that conducted a business enterprise, each Managing Director will be jointly and severally liable towards the bankruptcy estate for the deficit, if

- a. it is clear and manifest that management was conducted in an improper manner, and if
- b. it is plausible that such manifestly improper management is an important cause of the bankruptcy.

If the obligation to draw up financial statements has not been met, the financial statements have not been drawn up in time or the company did not keep its accounts and records up to date and keep the documents



pertaining thereto in such a manner that at all times the entity's rights and obligations could have been ascertained, there is a presumption (a) of manifestly improper management and (b) that it is plausible that this is an important cause of the bankruptcy. As a result, each managing director is personally liable for the deficit. There is also personal liability as described above for any "shadow director", i.e. persons not being appointed as Managing Directors who in effect have determined the policy and conduct of affairs either alone or in concert with others.

The rules with regard to the liability also apply to Managing Directors of a legal entity governed by foreign law, if this legal entity is adjudicated bankrupt in the Netherlands Antilles. Those who are charged with the management of the activities carried out in the Netherlands Antilles will in such event also be liable as if they were Managing Directors.

Also, in the event of dissolution without bankruptcy it applies that, if the ground for dissolution can be attributed in whole or in part to gross negligence of one or more founders, current or former Managing Directors or Supervisory Directors, or current or former members or shareholders, these are jointly and severally liable towards the dissolved legal entity for a deficit appearing upon liquidation.

Furthermore, with regard to a legal entity being a Managing Director of another legal entity, it applies that everyone being a Managing Director of this managing legal entity at the moment the liability of the managing legal entity arises, is jointly and severally liable.

Some other rules with regard to liability have been contained in the law. Summing up all the rules falls outside the scope of this memorandum. Please note however that the Managing Director who proves that improper performance cannot be attributed to him, and that he has not been negligent in taking measures to avert the consequences of the improper management, will not be deemed liable.

2.2 Administrative obligations

The Board of Managing Directors of all legal entities mentioned in Book 2 is obliged to conduct a management of the financial position of the legal entity and of all the legal entity's activities concerned in such a way that the rights and obligations of the legal entity can be known at all times.

The Board of Managing Directors of all these legal entities is obliged to draw up financial statements each year, within eight months after the lapse of the financial year. Except for the limited liability company and the private limited liability company (see below), no specific requirements exist as to the setup of the financial statements.

3 Limited liability company (n.v.) and private limited liability company (b.v.)

3.1 Articles of incorporation

The Board of Managing Directors of all legal entities mentioned in Book 2 is obliged to conduct a management of the financial position of the legal entity and of all the legal entity's activities concerned in such a way that the rights and obligations of the legal entity can be known at all times.

The Board of Managing Directors of all these legal entities is obliged to draw up financial statements each year, within eight months after the lapse of the financial year. Except for the limited liability company and the private limited liability company (see below), no specific requirements exist as to the setup of the financial statements.

3.2 Corporation “managed by shareholders”

A private limited liability company may be “managed by shareholders” which is in general more common for enterprises familiar with American law. This form of the private limited liability company does not have a Board of Managing Directors as a separate corporate body.

The joint shareholders will act as Managing Directors, which simplifies the taking of corporate action and the management of this type of company in general. Since no Managing Directors have been appointed as such, there are no formalities of appointment, suspension, and dismissal of Managing Directors, nor is there a difference between shareholders' meetings and Board meetings in this case. The shareholders may determine the details of the way in which they will manage the company, the division of tasks mutually agreed upon, etcetera, in a shareholders' agreement.

Using this type of company, a legal concept can be created that resembles the partnership (*commanditaire vennootschap*), the general partnership (*maatschap*), or the limited partnership (*vennootschap onder firma*), and at the same time benefits from the fact that, as opposed to partnerships, this company managed by shareholders is a legal entity with the ability to act, sue and be sued in its own name.

3.3 Ordinary n.v. and b.v.: financial statements

3.3.1 Required financial statements

- Each year, the Board of Managing Directors has to draw up financial statements within eight months after the lapse of the financial year, which statements consist of at least a balance sheet, a profit and loss statement, and an explanatory note for these statements.





The general meeting may extend this period by six months at the most, based on special circumstances not comprehensively enumerated any further.

- The financial statements drawn up have to be signed by all Managing Directors, as well as by all Supervisory Directors in office. The absence of a signature has to be explained.
- The financial statements drawn up have to be presented to the general meeting for adoption. The law does not attach a term to the adoption of the financial statements.
- The financial statements have to comply with generally acceptable standards and have to give such insight that a sound opinion can be formed on the capital and the results, as well as on the solvency and the liquidity of the corporation, in as far as the nature of the financial statements allows this. The law does not state what rules as to financial reporting are considered generally acceptable.

3.3.2 Audit requirements

The general meeting is authorized to appoint an external expert to supervise the bookkeeping on a regular basis and to report to the general meeting about the financial statements drawn up by the Board of Managing Directors. The law only states the authority to appoint an expert, but there is no obligation to do so. No definition or description as to what experts qualify as such is given and, in principle, to determine this is at the discretion of the corporate body that is authorized to appoint such expert.

3.3.3 Publication requirements

For the limited liability company, not falling under the regime of the large limited liability company, and the private limited liability company, the individual shareholders are entitled to inspect the financial statements during a period of two years after they have been drawn or adopted.

3.4 Large n.v.

3.4.1 Criteria when a large n.v.

For limited liability companies designated as large by certain statutory criteria, specific requirements apply with regard to setup and publication of the financial statements, as well as with regard to the audit obligation. Those specific requirements are in general more stringent. The law lists the following criteria on the basis of which such companies are designated as large:

- at any time in the period between one month before and one month after the date of the balance sheet, at least twenty employees (20 man-days per day or 100 per week) are employed with the company in the Netherlands Antilles by means of an employment contract with the company, a group company, a temporary employment agency, or a similar organization;
- the value of the assets amounts to more than ANG 5 million as per the date of the balance sheet; and
- the net turnover during the financial year amounts to more than ANG 10 million.

A limited liability company falls under the large regime if each and all of the three criteria have been met. A limited liability company not meeting aforementioned criteria may also voluntarily opt for applicability of the large regime by including this in the Articles of Incorporation.

3.4.2 Requirements financial statements large n.v.

- Each year, the Board of Managing Directors has to draw up financial statements and an annual report within six months after the lapse of the financial year. The financial statements consist of at least a balance sheet, a profit and loss statement, and an explanatory note to these statements. The general meeting may extend this period by six months at the most, based on special circumstances not comprehensively enumerated any further.
- The financial statements have to be drawn up as per the standards laid down by the International Accounting Standards Board ('IASB'). This means that the financial statements have to be in accordance with International Financial Reporting Standards ('IFRS'). This may imply a rather drastic operation. Drawing up financial statements as per IFRS in general does not mean another presentation of the existing figures, but implies a farther-reaching provision of information in several fields. Something that needs to be given attention, preferably in an early stage.
- The annual report should give a fair representation of the company's status as per the date of the balance sheet and its course of affairs during the financial year. In addition, the annual report should contain information on special events taken place after the ending of the financial year and expectations as to future affairs. The annual report should not contradict the financial statements.
- The financial statements drawn up should be signed by all Managing Directors and also by all Supervisory Directors in office. The absence of a signature has to be explained.



- The financial statements drawn up should be presented to the general meeting for approval. The general meeting may only approve the financial statements after it has been able to take note of the external expert's statement in writing containing his findings, conclusions and his opinion on the truthfulness of the financial statements following his investigation of such statements. As to this audit requirement, we refer to paragraph 3.4.3 below. The law does not attach a time-limit to the approval of the financial statements. However, in case of a lapse of a period of two months after the date by which the financial statements should have been drawn-up, the unapproved financial statements as drawn-up should be deposited at the offices of the company for inspection by interested parties. We refer to paragraph 3.4.4 below.

3.4.3 Audit requirements large n.v.

The large limited liability company is required to appoint an external expert to investigate the financial statement. The external expert should report on his investigation; his findings and conclusions should be reported in a statement in writing containing his opinion on the truthfulness of the financial statements. Therefore, there is an audit obligation under the large regime. It is clearly defined who is considered to be an external expert, namely a registered accountant, an accounting consultant, a certified public accountant, as well as an expert admitted by the Minister of Economic Affairs based on his professional competence.

3.4.4 Publication requirements large n.v.

- The large limited liability company is obliged to deposit a complete copy of the financial statements at the offices of the limited liability company for inspection by interested parties within eight days after approval of the financial statements and during two years thereafter. If the financial statements have not been approved within two months after they should have been drawn up, the financial statements drawn up until that moment should be deposited for inspection by interested parties.
- The Trade Register of the Chamber of Commerce will be notified of the deposit of the financial statements for inspection.
- It may be included in the Articles of Incorporation that an interested party wishing inspection has to be accompanied by an external expert as defined earlier.
- A large company is exempt from the obligations to publish its financial statements if:
 - a the financial data of the limited liability company have also been consolidated by another legal entity or company and the financial statements of this other legal entity or company meet the requirements imposed on the large limited liability company in question;

- b the other legal entity or company that also consolidates the financial statements of the limited liability company has assumed in writing joint and several liability for the large limited liability company's debts ensuing from legal acts;
- c the statement of liability meant under b. has been deposited with the Trade Register of the Chamber of Commerce where the limited liability company is registered within six months after the lapse of the financial year.
- d the consolidated financial statements of the aforementioned other legal entity or company consolidating the limited liability company's financial data have been deposited with either the limited liability company's offices the Trade Register of the Chamber of Commerce where the limited liability company is registered observing a period of no more than six months after the date of the consolidated balance sheet of the consolidating other legal entity or company.

3.5 Large n.v.

A Board of Supervisory Directors (*raad van commissarissen*) is optional and not mandatory. If put in place, the Board of Supervisory Directors can consist exclusively of natural persons. An independent Supervisory Director cannot be dismissed by the shareholders' meeting without reason.

It is not obligatory to include the possibility to appoint an Independent Board of Supervisory Directors in the Articles of Incorporation; it is the option of the company's shareholders. It should be noted, however, that if there is such an Independent Board of Supervisory Directors that the requirements applicable for the large N.V. as to financial statements and the auditing and publication thereof will become applicable for that N.V. irrespective whether or not any or more of the three requirements listed in paragraph 3.4.1 have been met. An additional requirement in that case is that for the financial statements as prepared by the Board of Managing Directors the consent of the Independent Board of Supervisory Directors is required and that the Board of Supervisory Directors is authorized to amend the financial statements prior to their submittance for approval to the general meeting.

3.6 Buy-out, forced takeover and forced transfer of shares

Both in a limited liability company and in a private limited liability company, a shareholder owning the majority of the shares in a limited liability company can force a minority shareholder to sell the minority shares. And the other way around, a minority shareholder can enforce takeover of his shares if he has got in a minority position against his will.



Furthermore, each shareholder whose rights or interests are harmed by conduct of the company or his co-shareholders in such a way that he could no longer be required to remain a shareholder may demand that the company takes over his shares against payment in cash. Transfer obligations in the Articles of Incorporation are allowed, but the law offers financial protection to a shareholder whose interests are affected by these obligations under the Articles of Incorporation.

4 Other corporate entities

4.1 Foundations in general

A regulation concerning right of inquiry with regard to foundations. There is also a regulation for making arrangements during the course of proceedings with regard to retirement. Because of this regulation, foundations can also be inspected by and on behalf of others than their officers. If an inquiry shows that there is question of mismanagement, an interested party may request the Court to dismiss one or more officers.

With regard to the name of a Private Foundation, the requirement has been added that the Articles of Incorporation have to state the words “stichting particulier fonds” (Private Foundation) or a translation thereof in the name. There is a transition period of two years to meet this requirement.

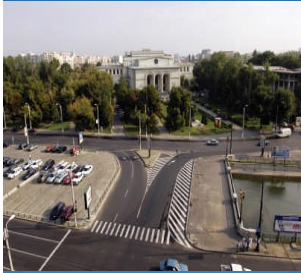
4.2 Fiscal consequences for Private Foundation

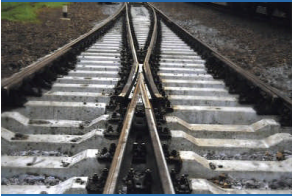
The Private Foundation is objectively exempt from Netherlands Antilles profits tax. A condition for this exemption is that the Private Foundation does not make a profit by conducting a business (enterprise). A definition of conducting a business is not included in the State Ordinance Profits Tax 1940.

It can be concluded from fiscal case law that only passively having an interest in another legal entity cannot be deemed to be conducting a business. Although according to Book 2 having an interest in another legal entity will not be deemed to be conducting a business, it has to be observed that this does not have to mean that the fiscal case law in this respect has been put aside.

4.3 Associations

All associations are legal entities. However, an association, the Articles of Association of which have not been included in a notarial deed, cannot acquire registered property and cannot be an heir.





5 Conversion, merger and division of legal entities

5.1 General information

The final chapter of Book 2 deals with the possibilities of conversion (change of corporation form), merger, and division of legal entities. In case of a merger, a foreign legal entity with a similar legal form may also act as amalgamated legal entity.

In principle, prior Court approval is required for each merger in which a foundation is involved. An exemption to this is only made for mergers between foundations and/or Private Foundations, if the Articles of Incorporation make it possible to amend all its provisions.

The conversion into or from a foreign legal entity from or into an Antillean legal entity (a cross-border conversion) is worth mentioning. This replaces the transfer of registered office and applies to all legal entities.

5.2 Fiscal aspects: legal merger

The legal merger is the legal act of two or more legal entities by which one of them acquires the other's capital under universal title, or by which a new legal entity, established by this legal act by those legal entities together, acquires their capital under universal title. In the event of a legal merger, the amalgamated legal entity will cease to enjoy profits from the business within the Netherlands Antilles.

In anticipation of new legislation, the Tax Department has announced a policy pursuant to which the hidden reserves, the fiscal reserves, and the goodwill can be passed on to the acquiring legal entity while retaining the fiscal claim.

5.3 Fiscal aspects: division (splitsing)

Book 2 makes it possible for the capital of a legal entity to be passed in whole or in part to one or more other legal entities within the framework of a division. The transfer takes place by executing a notarial deed of division by which no special acts of delivery are performed in connection with the transfer of the assets and the debts. The law makes a distinction between absolute division (*zuivere splitsing*) and partial division with a hive-off (hereafter: spin-off) (*af splitsing*).

In case of an absolute division, the dividing legal entity ceases to exist and the entire capital of this legal entity is passed to the two or more successive legal entities. In case of a spin-off, the dividing legal entity continues to exist and the entire capital or part thereof is passed to one or more successive legal entities.



In case of an absolute division, the amalgamated legal entity will cease to enjoy profit from the business within the Netherlands Antilles. In case of a spin-off, the dividing legal entity is deemed to have alienated only those assets that have passed to the acquiring legal entities within the framework of the division to these legal entities.

On the same basis as with regard to the legal merger, the Tax Department has announced a policy for the absolute division and the spin-off, pursuant to which the hidden reserves, the fiscal reserves, and the goodwill can be passed to the acquiring legal entity while retaining the fiscal claim.

5.4 Fiscal aspects: conversion

A limited liability company meeting the criteria of the large limited liability company can avoid the in general more stringent requirements with regard to the setup and publication of the financial statements as well as with regard to the audit obligation by having the legal form changed into a Netherlands Antilles private limited liability company. Based on fiscal policy, the change of corporation form itself does not have fiscal consequences, because the Tax Authorities retain their tax claim in respect of the hidden reserves, fiscal reserves, and goodwill. However, a thorough evaluation of the possible fiscal risks prior to the change of corporation form does not seem unwise.

6 Conclusion

This memorandum is meant to give information on a number of aspects of Netherlands Antilles corporate law. For purposes of readability and given its concise nature it does not purport to be comprehensive. We would gladly be of service to you with an advice catered to your organization and its needs.



This memorandum has been compiled as accurate and careful as possible, based on available information at the abovementioned date, and is meant only as a general guideline. We do not accept any responsibility for actions taken, based on the contents of this memorandum, without additional professional advice.

If you would like to learn more or if you have questions or remarks with respect to the contents of this memorandum you can of course contact one of the tax advisors of PricewaterhouseCoopers Netherlands Antilles or send an e-mail to info@an.pwc.com

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