

40 questions on corporate governance in government owned limited liability companies and foundations in Aruba



This document contains information of a general scope. It is not meant to be a legal advice. In specific situations the reader is recommended to seek further legal advice. The examples herein are used exclusively by way of explanation and illustration; they are coincidental and have no connection whatsoever with any real situation in the past or present.

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Preface

On the occasion of the introduction of its new name, the law firm VanEps Kunneman VanDoorne has conceived the plan to present the public legal entity the Netherlands Antilles, the various island territories and the public legal entity Aruba with a gift in the form of a short, informative booklet dealing with a number of aspects concerning governance of legal entities in which the governments have an interest either as a shareholder or as a stakeholder in a difference sense.

This booklet (which has been issued in all three languages used in the Kingdom of the Netherlands) deals with the most important questions and problems with which directors and supervisory directors of legal entities owned by the government may be confronted with. The number of questions that were dealt with could have easily been increased by another fifty. In particular those questions were selected that were asked and dealt with during the many courses and seminars on the subject of good (corporate) governance organised by VanEps Kunneman VanDoorne jointly with The Galan Group. For the sake of accessibility and a better understanding most questions are accompanied by separate clarifying examples.

On behalf of all my colleagues at VanEps Kunneman VanDoorne I would like to express the hope that this booklet will contribute to a better functioning of these legal entities and of those who are responsible for and in such entities.

Prof. Frank B.M. Kunneman, Esq.

I Government owned company, control and governance

1 Good governance: necessity or fashion?

Good governance is without a doubt “in fashion”. As a result of many cases of fraud and corruption at the top level of very large corporations, one came to realise worldwide that more attention is needed for the way in which the various bodies in a corporation deal with each other and are able to supervise each other. Keywords here are transparency and integrity. As a consequence of stricter laws in many countries the concern for “good governance” has also become a necessity if a person does not want to subject him/herself or the corporation to all kinds of undesirable sanctions. In Western Europe one tries to positively influence the “governance standard” by self-regulation. The code “Tabaksblatt” in the Netherlands is a good example. The United States are trying to improve the governance in corporations by introducing new laws, for example the Sarbanes-Oxley law of 2004. The increased awareness concerning good governance in the Netherlands Antilles and Aruba is a good thing. Many corporations still need a lot of improvement in the field of governance and the increased national and international interest in this subject works as a great incentive. However, the attention paid to good governance in companies can also degrade into disproportionately and inefficiently emphasising less important rules and procedures. One must try to pursue a just middle course leading to correct and transparent procedures and agreements that can assist the various stakeholders in the company to better work with each other in the interest of every individual and of the company as such. The main object of good governance is to prevent that trying to “do things good” leads to forgetting to “do the good thing”.

2 What is a government owned company?

With the term “government owned company” in Aruba reference is made to a limited liability company of which all or most of the shares are held by the country Aruba. Apart from these “government owned companies” there are also foundations established by the country Aruba, like for instance the Fundacion Centro pa Desaroyo di Aruba (CEDE) (*foundation Center of Development of Aruba*), the Fundacion Union di Organizacionnan Cultural Arubano (UNOCA) (*foundation Aruban Cultural Organisations*) and the Fundacion Cas pa Comunidad Arubano (FCCA) (*foundation housing for the Aruban Community*), and legal entities created by law, such as the Universiteit van Aruba (*University of Aruba*), the SVB Aruba (*Social Security Bank Aruba*) and the Central Bank of Aruba. All of these legal entities take care of/represent certain interests that directly or indirectly concern the national government. In many cases it concerns services that the

government initially took care of itself but at a later stage privatised either partially or completely.

3 **Why is there so much interest in government owned companies?**

The characteristic field of tension in which a government owned company operates originates for a large part from the fact that an interest that was originally a public interest is now taken care of by a private corporation. These two interests can, but do not necessarily, coincide. As long as a public entity like the country Aruba has any form of control in a private corporation, political considerations will also play a role in the direction thereof. Besides, often utility provisions are concerned such as the provision of water and electricity, communication services and gasoline. Everyone feels involved with that and has his/her own opinion. In such cases a balance should be found between the normal rules of good governance as these apply in every corporation, and the political interest of the authorities in a correct performance of the public interests that were transferred to the private corporation. In reality that is not easy. The field of tension is caused among other things by the fact that it is more and more clearly being recognized that public interests can in most cases and have to be taken care of more effectively and also more cost efficiently in a private corporation. However, as a result, politicians lose their influence. This is not always easy to accept.

4 **Who is the boss in a company?**

Nobody. Article 79 of the Commercial Code stipulates that the general meeting of shareholders has all powers which are not assigned to the board of managing directors or others. From this perspective, the shareholder is the boss. Each of the stakeholders in a company (shareholder(s), managing director(s), supervisory directors, employees) has his/her own duties and responsibilities. The framework for that is formulated in the law and in the company's articles of incorporation. This concerns a system of "checks and balances" where the managing directors are entrusted with managing the company and the supervisory directors are appointed by the shareholder(s) to render advice to and supervise the management. In doing so, both the shareholder(s) and the supervisory directors must be careful not to take the managing director's place: they are not allowed to act like a managing director and/or assume executive and administrative duties. The supervisory board should limit itself to determining and approving the main outlines of the conduct of affairs and to judging and keeping a watch on the manner in which this is being executed by the managing directors. Apart from that, the managing directors and supervisory directors must report to the shareholder periodically. The shareholder should not concern himself, neither

directly nor through the supervisory board, with the actual management of the business.

- ▶ *For a long time the conduct of affairs by the board of managing directors and supervisory board in government owned company “A” has been an eye-sore to the shareholder. The shareholder decides (at the company’s expense) to hire an external bureau to perform an operational audit in the company. From the point of view of good governance and based on the law this is neither correct nor possible. The shareholder is not authorised to impose an operational audit nor to represent the company in entering into an agreement to that effect. Besides, any questions and remarks relating to the company’s conduct of affairs should be put forward by the shareholder during the general meeting. Also keep in mind that the shareholder has entrusted the supervisory board precisely with the supervision of the board of managing directors. Should the shareholder have the feeling that the management fails and that the supervision is not exercised responsibly either, he should call the supervisory board to render its account and, as the case may be, appoint new supervisors and new managers. The shareholder himself cannot take the place of the supervisory board nor the board of managing directors and concern himself with the actual management of the business.*

5 What is the difference between a manager and a director?

There is no difference. Netherlands Antilles law uses the word “director” (*bestuurder*) where in ordinary language the word “manager” (*directeur*) is used as well. In a foundation, however, directors and managing directors do have different duties and responsibilities.

- ▶ *A is a member of the board of foundation B. The foundation has a manager C. To A the legal provisions on directors are applicable. To manager C they are not, because C is not a statutory director.*

6 Is there a difference in duties between a managing director and a supervisory director?

The managing director in a legal entity is responsible for the daily conduct of affairs. He gives direction to the employees of the legal entity. The supervisory director supervises these activities. He realizes such in particular by judging the managing director’s (plan of) management and by seeing to it that such management plan is executed. The main duties of the supervisory director are, among other things, appointing good managing directors, ensuring that the company’s administration is in good order and that the annual accounts are prepared in time. Sometimes the articles of incorporation include the provision that the supervisory board can give general directions concerning the company’s management of affairs.

- ▶ *The supervisory board of government owned company A has a discussion with the managing directors concerning the question who is responsible to prepare the management plan. In the opinion of the managing directors they should prepare the plan, whereas the supervisory directors are of the opinion that it is they who essentially are responsible for the company's management of affairs. In this example, the supervisory directors are wrong. The articles of incorporation of government owned company A contain no special provisions or powers for the Supervisory Board in this respect. Consequently, the board of managing directors prepares the management plan and the supervisory board can give management its feedback thereon. The supervisory board has the responsibility to ultimately approve this management plan in its final form and see to it that the management executes the management plan.*

7 What is the difference between a “one-tier” and a “two-tier” management model?

In a one-tier management model there is no clear division between an executing and a supervising body. There is a board of directors that consists of one or more members who are more specifically entrusted with the execution of the management of affairs. One-tier management models are often found in the United States. In Western Europe and in The Netherlands, the Netherlands Antilles and Aruba two-tier management models are common. This implies an executing body (the management board) which under the supervision of a supervising body (the supervisory board) performs its duties. Influenced by the discussions in the last few years concerning good governance, the two-tier models are more and more often introduced in the United States as well. In Aruba a one tier management model is not possible; in the Netherlands Antilles it is.

8 What is the meaning of “reasonableness and fairness”?

The concept “reasonableness and fairness” is one of the essential concepts of the law of contracts and (therefore) also an essential concept in corporate relationships. In every contractual relationship the parties must approach each other in accordance with the rules of reasonableness and fairness, which means “with reason and with heart”. This is a legal rule laid down in various sections of the civil code. Not only contractual parties should behave towards one another according to the rules of reasonableness and fairness, but also the stakeholders in a legal entity. Article 2:7 paragraph 1 of the Civil Code of the Netherlands Antilles dictates that the legal entity and those who, pursuant to the law or the articles of incorporation are involved in its organisation, should in that capacity behave towards one another in accordance with what is required by the rules of reasonableness and fairness. This implies that actions and decisions of bodies of a legal entity can be tested by the court based on the observation of the standards of reasonableness and fairness.

- ▶ *The supervisory board of government owned company A, according to the company's articles of incorporation must give its approval to the management board for entering into a legal commitment involving an amount exceeding AWG 150,000. Without assigning any reason and clearly acting unreasonably the supervisory board refuses to render its approval. The management board can have this refusal tested by the Court. If the Court is of the opinion that refusing the approval is in violation of what is required by the standard of reasonableness and fairness, the supervisory board must render its approval as yet, or better motivate its refusal. Indeed such an escalated difference of opinion (in this example even resulting in a court case) indicates a disturbance in the relationships to such an extent that either the board of managing directors or the board of supervisory directors should resign.*

9 Which of the two prevails: the articles of incorporation of a company or the law?

The law prevails over the articles of incorporation.

Sometimes the law contains provisions which according to the law may be deviated from by including a provision in the articles of incorporation that is different from the legal provision. This is called “regulating” law.

- ▶ *Pursuant to article 125 paragraph 1 of the Commercial Code the supervisory board is authorized to suspend every managing director, unless the articles of incorporation provide otherwise. The articles of incorporation of government owned company A dictate that the shareholder is authorized to suspend a managing director. In the case of government owned company A the provision laid down in its articles of incorporation applies and not the provision of article 125 paragraph 1 of the Commercial Code.*

10 What is a conflict of interests?

A conflict of interests occurs when a managing director or supervisory director in a company is unable to act freely and in the interest of the company because there is another interest at stake that concerns him or her personally and has no connection with the company.

11 What should you do when a conflict of interests occurs?

In the event of a conflict of interests it is recommended to discuss this with colleague-managing directors and/or supervisory directors and see how this conflict of interests can be neutralized. If one fails to do so, a breach of confidence will occur which in most cases is irreparable. Moreover, (external) liability could occur.

- ▶ *Supervisory director A in government owned company B must render his vote in the meeting of the supervisory board about a decision to render approval to the management board to enter into a contract with corporation C. Supervisory director A is co-owner of corporation C. This is a situation involving a conflict of interests. Prior to the initiation of the discussion concerning this item of agenda, supervisory director A should indicate that he will not be present during the discussion and that he will not vote on this item either. In case supervisory director A fails to bring this forward, it is the responsibility of the president of the supervisory board to do so. If A's co-supervisory directors realize only after the discussion and voting that there was a conflict of interests, it will be difficult for them to trust A in the future. In that case A will no longer be able to effectively function as a supervisory director and he will have to resign. Apart from that, A will possibly be subject to internal and external liability.*

12 Is the company's management board under an obligation to give the supervisory directors all the information they request?

Yes. If necessary, the board of managing directors should give information to the board of supervisory directors, whether or not requested to do so.

- ▶ *Supervisory director A with government owned company B repeatedly and to no avail requests from the board of managing directors certain information concerning the financial results of one of the company's departments. The management board refuses to provide this information, because it believes that the supervisory director will pass this information on to his political supporters. Failing to provide certain information notwithstanding a repeated request to that effect may be grounds for suspension or dismissal of (members of) the board of managing directors. In case the board of managing directors has valid reasons to doubt the trustworthiness of one or more supervisory directors, the management board should first bring this to the attention of the chairman of the supervisory board and subsequently, in case this does not lead to any actual result, to the attention of the shareholder. Failing to provide information as requested is in violation of the law.*

13 Is the company's board of managing directors under an obligation to give the shareholder(s) all the information they request?

Not under all circumstances. Pursuant to article 80 paragraph 1 of the Commercial Code at least one general meeting of shareholders is held each year. At that meeting the annual accounts prepared by the management board and co-signed by the supervisory directors is presented to the general meeting for approval (article 2:116 Civil Code Netherlands Antilles). Pursuant to article 7 paragraphs 1 and 2 Commercial Code every shareholder and every person with voting rights has the right to attend the general meeting either in person or by virtue of a written power of attorney, to address the meeting and, as far as he or she has voting rights, to exercise such voting rights. During the meeting the

board of managing directors can provide the shareholder(s) with the information they request, except when the board of managing directors considers this in violation of the company's interests. In principle, there is no right to information outside the general meeting.

- ▶ *The shareholder of government owned company A sends a letter to the board of managing directors of government owned company B containing thirty very detailed questions concerning the board's management of affairs. The management board of government owned company A has no obligation to reply to these questions. For each year at the general meeting a report is given concerning the preceding financial year and concerning the course of management contemplated for the following years. In addition, the supervisory board was installed by the shareholder to supervise the conduct of affairs and management of the company. In a given case, the shareholder should direct himself to the supervisory board.*

II The supervisory director

14 Supervisory director: job of honour or dog's job?

Not long ago it was considered a great honour to be a supervisory director in a limited liability company. The image at that time of a board of supervisory directors was a group of experienced ladies and (mostly) gentlemen who met no more than twice a year in order to take the (formally) necessary decisions in a short period of time and afterwards have dinner together while enjoying a glass of good wine. Even if this image was ever correct, in any case those times are gone. The supervisory board plays an important role in the company, anchored in the law. Upon each supervisory director individually rests an obligation to use his or her best efforts in the interest of the company. The requirements as far as the professional and personal qualities of a supervisory director are concerned, are high. If things go wrong with the company, the supervisory directors can be held personally liable as well.

► *A is asked by his party leader to take the position of supervisory director in government owned company B. A is very busy with various other positions and activities, but he feels honoured by the request and believes he cannot refuse. He does not have that much time to be present at meetings and is therefore unable to make himself aware of the financial and organisational situation in government owned company B. He was told that the supervisory board does not meet more than two to three times a year, which would not require much of his time. Within a few years government owned company B goes down-hill. Due to his other busy activities A is not really aware of this, let alone can he control the situation in any way. Besides, he has a blind trust in the chairman of the supervisory board. When finally government owned company B goes bankrupt, A is held personally liable based on article 116 Commercial Code.*

15 Which requirements can be imposed on a supervisory director?

In general it is accepted that supervisory directors should be selected in particular based on one or (preferably) more of the following qualities:

- financial expertise;
- legal expertise;
- market/branch expertise;
- management experience;
- organisational expertise;
- network and international experience.

In addition, qualities such as expertise in the field of ICT and social involvement could be important. It is recommendable to have a composition of the

supervisory board that is as well-balanced as possible, for instance by including not only one or two branch experts, but also a financial and a legal expert.

- ▶ *The supervisory board of government owned company A consists of five individuals who are either former members of the company's board of managing directors, or were politically appointed. They have some branch expertise but they lack a specific financial or legal background. From the point of view of a balanced composition of the supervisory board it is recommendable to add a financial and a legal expert to the board of supervisory directors.*

16 According to the law a supervisory director is both an advisor and a supervisor. Is this not conflicting?

Not really, since ultimately the supervising task prevails. Worldwide the position of supervisory director is considered a hybride and amphibious position, because that position unites the roll of “sound-board” and advisor on the one hand and someone who checks and supervises on the other hand. In this connection Americans speak of the “colleague or cop dilemma”. It requires a lot from a supervisory director on the one hand to effectively occupy his sound-board and advisor’s position, and on the other hand refuse certain requests from the managing directors when such requests do not seem to be in the company’s interest; to do that, he must be able to remain on friendly terms with the management board and at the same time, when necessary, keep his back straight and be able to say “no”. It requires tact, insight, wisdom and guts to effectively combine these two, often contradictory, roles.

- ▶ *Supervisory director A of government owned company B is on excellent terms with all the members of the management board. He visits the president of the board at his home on a regular basis and also regularly goes on vacation with one of the other members. The relationships are very good. The management board submits a request to the supervisory board for approval of a project involving an amount of up to AWG 2,500,000. In the opinion of the supervisory board this project is not in the company's interest. The request had not been sufficiently motivated and the supporting figures, as presented, are wrong. During a dinner the night prior to the meeting at which the decision would be taken, supervisory director A had said to the president of the management board that he would see to it that the proposal be accepted. Supervisory director A does not perform his duties correctly. Supervisory director A has wrongfully let his friendly ties with management prevail over the company's interest in view of article 106 jo. article 127 Commercial Code.*

17 Is a supervisory director an employee of the company?

A supervisory director is not an employee of the company. A supervisory director has an agreement of mandate (“*overeenkomst van opdracht*”) with the company. A person accepting a mandate, as is a supervisory director, has bound

himself to perform duties other than pursuant to an employment agreement. Other examples of people who render services based on a mandate are lawyers, civil law notaries, real estate brokers, doctors, barbers, architects, organisation bureaus, etc. The mere acceptance of a position of supervisory director is sufficient for the existence of an agreement of mandate. A agreement made up in writing is not required. It can be useful, however, to record certain arrangements and understandings in writing.

- ▶ *Supervisory director A never or seldom attends meetings. When the chairman of the supervisory board draws his attention to this, supervisory director A's defence is that he never entered into an agreement with the company. This statement is incorrect. Even if nothing was recorded in writing, and no specific terms were agreed upon, the law assumes that if A has accepted his appointment as supervisory director, there is (by law) an agreement of mandate. Pursuant to the law, he who has accepted a mandate must exercise good care when performing his duties. This means that he should act like a "normal", good supervisory director, implying that, in principle, he has the obligation to attend the meetings of the supervisory board and properly participate at such meetings. If he fails to do so, he is in default vis-à-vis the company. The fact that there is no written agreement with supervisory director A is irrelevant. In this respect article 120 of the Commercial Code stipulates that anyone who, whether or not under a different capacity, fulfils a task within the company that normally is assigned to a supervisory director, is considered to be a supervisory director.*

18 Does a supervisory director have the right to a monetary compensation?

Not always. Article 123 of the Commercial Code stipulates that supervisory directors as such can only earn the remuneration as assigned to them in the articles of incorporation. Therefore, in case the articles of incorporation explicitly contain a provision determining the conditions governing the compensation arrangement and the amount of the compensation and, as the case may be, of the expenses arrangement for the supervisory directors, it is not allowed to deviate from that. Incidentally, in view of the high requirements imposed these days on supervisory directors it is only proper to give them a decent compensation. In their turn the supervisory directors should comply with the requirements and prove the expectations.

- ▶ *The articles of incorporation of company A contain a provision that the supervisory directors do not have the right to a compensation for their duties, but they can claim a reimbursement of their expenses. At the request of the supervisory board, the board of managing directors of company A decides to award each member of the supervisory board a salary of AWG 2000 a month. Based on article 123 Commercial Code this decision is void.*

19 To what extent is a supervisory director independent?

The supervisory board has its own duties and responsibilities in a company and, except as far as the articles of incorporation and the law provide otherwise, are not responsible to anyone. The guidelines for the supervisory board's decisions are formed by taking into account the interests of the legal entity only. To this extent the supervisory director is independent. On the other hand, based on article 122 paragraph 1 Commercial Code a supervisory director is dependent in the sense that he can be suspended and dismissed by the shareholder or by the body authorized in the articles of incorporation to do such.

- ▶ *Supervisory director A has been appointed to represent political party B in the supervisory board of government owned company C. Supervisory director A is instructed by his political leader to vote against a certain decision of the board of managing directors. He does not follow this instruction because in his opinion this would violate the interests of the legal entity. Supervisory director A acts in conformity with the law.*

20 What is the maximum serving term for a supervisory director?

Often the articles of a company indicate the maximum serving time for a supervisory director. This can be done either by determining one or more terms after which, if so desired, the supervisory director can be re-appointed, or by including a maximum age in the articles of incorporation. Although there are no general standards, usually in Western Europe it is assumed that a supervisory director serves a minimum term of eight years (for instance two terms of four years) and a maximum term of twelve years. The advantage of this is that on the one hand this supervisory director can experience various "cycles" in the company and is able to use his experience to the company's benefit, and on the other hand timely make room for "new blood": a new supervisory director who, with a different view on things, may be able to further support the company. In Western Europe articles of incorporation often dictate a maximum age for supervisory directors of 65 or 70 years. This is not the case in the United States. The general opinion there is that a supervisor who functions properly should be able to continue to do so when he is at an advanced age.

- ▶ *The articles of incorporation of government owned company A contain no provision dealing with the maximum serving time of members of the supervisory board. Supervisory director B has been serving in that function for 25 years already. The other members of the board believe that supervisory director B has served long enough and that it would be better for him to resign. Unless the articles of incorporation are amended in this respect, there are no connecting points making it possible to accomplish this, since Aruban law does not dictate a maximum age for supervisors. Consequently, there are only two possibilities: supervisory director B is either convinced by his colleagues to resign voluntarily, or he is dismissed by the shareholder.*

- 21 How often should a supervisory board meet?**
The law does not contain any provision in this regard. Some articles of incorporation dictate a certain minimum frequency for meetings of the supervisory board. It is assumed that in the case of a company of some magnitude the supervisory board should meet at least four, preferably six and possibly eight to twelve times a year.
- 22 In case of a conflict between a managing director and a supervisory director, who should yield?**
In general, the supervisory director will have to yield, unless the conflict stems from a structurally insufficient or wrong functioning of the managing director in question and the supervisory board seconds that opinion. It is generally accepted that a supervisory director should resign before the expiry of his term not only in case he functions insufficiently, but also when there are structural differences of insight concerning how the management should be conducted, or when a structural incompatibility of interests is concerned. Also, a lack of trust on the part of the general meeting of shareholders should be a reason for a supervisory director to resign before the expiry of his term.
- 23 Is it allowed for a politically appointed supervisory director to serve the interests of his (political) supporters when performing his duties?**
Only to a very limited extent. Pursuant to article 106 jo. 127 Commercial Code the supervisory board must act in the best interest of the legal entity and, if applicable, the business connected thereto. So according to the law the interests of the legal entity are the most important. Other interests should yield.
- *Supervisory director A has been appointed in the supervisory board of government owned company B as representative of the labour union. The supervisory board must approve a decision of the management board which seems necessary for the continuation of the company's business but which also implies losing a few labour units. Supervisory director A votes against this approval although admitting that his vote is not in the company's interest. In doing so, supervisory board director A acts in violation of article 106 jo. 127 Commercial Code.*
- 24 Can supervisory directors suspend a managing director?**
The authority to suspend a (managing) director is mostly provided for in the articles of incorporation of a company. Pursuant to article 125 paragraph 1 Commercial Code the supervisory board has the authority to dismiss every managing director, unless the articles of incorporation dictate otherwise. For the limited liability company (*naamloze vennootschap*) article 111 paragraph 1

Commercial Code dictates that the general meeting of shareholders is at all times authorised to suspend or dismiss that director.

- ▶ *The articles of incorporation of government owned company A contain the provision that the managing directors are appointed, suspended and dismissed by the board of supervisory directors. This means that the shareholder does not have the power to appoint, suspend or dismiss the managing directors. The shareholder will have to try and realise his/her wishes in that respect through the supervisory board.*

25 Does the chairman of a supervisory board have more control or powers than the other members of the board?

No, unless the articles of incorporation say so. Some articles contain the provision that in the event of a tie, the vote of the chairman of the supervisory board is decisive. In every other sense the chairman of the board is equal to the other supervisory directors. On the other hand, he is expected to fulfil certain specific duties, such as seeing to a proper procedure of the meeting.

- ▶ *Chairman A of the supervisory board of government owned company B is very dominant. He avoids discussions on most subjects, settles everything in bilateral discussions outside the meeting and often enforces his own way. When one of the other supervisory directors carefully points his behaviour out to him, he reacts by saying that “the fact is that he is the boss”. This is wrong and may be a good reason to present a proposal for his dismissal to the shareholder.*

III Legal position and liability

26 Is the risk for directors and supervisors to be held liable smaller in Aruba than in the Netherlands Antilles?

In a sense, yes. On March 21, 2004 a new Book 2 of the Civil Code was introduced in the Netherlands Antilles. In Aruba the “old” Commercial Code still applies. A managing director or supervisor can only be held liable internally, meaning by the company itself, when he has committed a serious mistake. In other words, a director or supervisor is not liable for a “normal” mistake. There is no difference in this respect between Netherlands Antilles law and Aruban law.. Under Netherlands Antilles law the chances to be held liable externally, in other words by an outside person or party, are not much greater than under Aruban law. There is, however, an important difference when the company becomes bankrupt. In that case, contrary to Aruban law, managing directors and supervisors can be held liable for the entire deficit in the bankruptcy when it was a question of manifestly improper management and it is plausible that this was an important reason for the bankruptcy (article 2:16 Netherlands Antilles Civil Code). Also - and this is also new in the Netherlands Antilles - it is assumed that there was indeed a question of manifestly improper management, and that this was an important reason for the bankruptcy, in cases where the company did not comply with its bookkeeping obligations or the annual accounts were not prepared in time. The conclusion is that the liability risk for managing directors and supervisors in the Netherlands Antilles Civil Code has particularly increased in the case of bankruptcy of the company, certainly when the annual accounts were not prepared in time and/or the bookkeeping requirement was not complied with.

► *Managing director A of government owned company B is already 2 years behind with preparing the annual accounts. The supervisory directors of the company seldom meet and never protested against the financial chaos in the company, nor did they take adequate measures. The company goes bankrupt. In the Netherlands Antilles both managing director A and the supervisory directors are liable with their entire property for the total deficit in the bankruptcy. In Aruba it would be more complicated to hold A and the supervisory directors liable*

27 What does the bookkeeping obligation imply?

Article 2 jo. article 4 Commercial Code states that the board of managing directors has the obligation to keep an administration of the financial position of a legal entity and of everything concerning the activities of the entity in conformity with the requirements arising from these activities, and to keep books, documents and other information pertaining thereto in such a manner that the rights and obligations of the legal entity can become known at all times.

The concept “keeping books and other information” should be applied extensively: it concerns the books and documents in which notes have been kept, the balance sheets, minutes, agreements, correspondence, etc.

28 What does disculpation mean?

To disculpate oneself literally means to discharge oneself, to dismiss the charge against oneself. In certain cases the law offers directors and supervisors who are held liable for manifestly improper management the possibility to disculpate themselves. For instance, article 129 Commercial Code stipulates that supervisory directors are not liable if they can prove that certain deficiencies are not attributable to deficiencies in their supervision.

29 What does several (or individual) liability of directors and supervisory directors mean?

The law is based on the assumption of management by a body as a whole. This implies that, in principle, the other managing directors can be held liable for a mistake committed by one of them. Each of them is liable for the entire damage caused by each of the other ones individually.

► *Company A has a board of managing directors consisting of three managing directors. Managing director B issues a misleading prospectus. Company C can hold both the company and each of the three managing directors personally liable, regardless of the fact that two of the three directors were not involved in the issue of the prospectus.*

30 Are the standards for liability of managing directors different from those for liability of supervisory directors?

In case a managing director is liable, this does not necessarily imply liability of the supervisory director as well. In that sense there is a difference. The reason for the difference is virtually that the duties of a managing director are different from those of a supervisory director and not that the standards for liability are different. Managing directors as well as supervisory directors have an obligation towards the legal entity to properly fulfil the duties within the scope of their activities. If they do not meet those standards they are both liable to the same extent. Managing directors and supervisory directors are, however, judged based on their own respective duties and responsibilities. Managing directors are liable when they do not fulfil their duties as managing directors properly, supervisory directors are liable when they do not fulfil their supervising duties properly.

- ▶ *The supervisory board of company A has allowed the company to issue a misleading prospectus. Company B suffers damage as a result thereof. Both the managing directors and the supervisory directors of company A are personally liable.*

31 What is a break-through of liability?

A legal entity independently participates in judicial matters. In principle, those who represent the legal entity (like for instance the managing director) are not personally liable for legal actions of the entity. An exception to this rule is seldom made. In the United States those cases are referred to as “piercing the corporate veil”. Such an exception can, for instance, present itself when the representative of a company, the managing director, is held liable in the event of default made by the company. Article 130 Commercial Code stipulates that anyone who, without forming part of the management board of a company, performs acts of management, is regarded as being a managing director as far as such acts are concerned.

- ▶ *Government owned company A is the sole shareholder of company B. C is a managing director of government owned company A. C is intensively involved with the management of company B because in his opinion managing director D of that company is not really qualified for his duty. Company B goes bankrupt. It appears that the bookkeeping is a big mess. The receiver in the bankruptcy can hold not only director D liable, but also government owned company A, although generally in such cases shareholders cannot be held liable. In addition, C might be held personally liable as well.*

32 What is the difference between internal and external liability?

Internal liability concerns the liability of a managing director or supervisor vis-à-vis the legal entity itself. External liability concerns the liability of the managing director or supervisory director vis-à-vis third parties.

- ▶ *Managing director A purposely provides his supervisory directors with incorrect information, so that they will agree to a transaction which ultimately is detrimental to the company. The damage suffered by the company amounts to AWG 250,000. The company can hold managing director A personally liable for this damage (= example of internal liability).*
- ▶ *Managing director A enters into a transaction with distributor B, knowing that the company is financially unsound to such an extent that at the time of entering into the transaction it is already certain that the company will not be able to pay the distributor. The distributor is not paid. The distributor can hold managing director A personally liable for the damage he has suffered (= example of external liability).*

33 If you are asked to assume the position of supervisory director in an organisation that already copes with problems, are you also liable when ultimately things go wrong?

That depends. In principle, a supervisor cannot be held liable for facts that occurred or originated during the period that he had no connection with the company. Article 129 Commercial Code stipulates that supervisory directors are not liable if they can prove that certain deficiencies are not attributable to deficiencies in their supervision. The supervisor himself, who is held liable, should invoke this disculpation possibility. If he fails to do so, he will be held liable regardless. When a company goes bankrupt shortly after the appointment of a managing director or supervisor, the latter will rather easily succeed in being exempted. However, the longer he has been occupying his position, the more difficult this will become. Therefore it is recommendable for everyone who is approached to occupy the position of managing director or supervisor, to fully assure himself of the sound (financial) organisation of the company and the possibilities to improve this, if necessary.

34 Is it wise or necessary as a managing director and/or supervisor to take out a liability insurance?

That depends. This type of insurance is very costly. Also, generally these insurances are not or not yet available in Aruba. In many cases one must turn to either Holland or England for coverage. In addition, the number of cases in which a directors liability insurance is effective, is limited. For managing directors and supervisors are only liable when they commit serious mistakes. In any event, when minor mistakes are concerned they cannot be held liable internally. In those cases insurance is not necessary. On the other hand, many serious mistakes (for instance misleading explanatory notes to the balance sheet) are not covered by insurance. Therefore it is recommendable to prepare a risk analysis (or have one prepared) for the company involved. That way one can judge if the cost of the insurance counterbalances the coverage. In some cases it is useful to be insured in connection with the cost for legal assistance. These can go up substantially, even if it turns out that one is not liable.

- ▶ *When managing director A of government owned company B was appointed, he negotiated a directors liability insurance. As a result of negligence in the organisation of the company's financial administration it goes into bankruptcy two years after the appointment of managing director A. Managing director A is held liable by the receiver in the bankruptcy based on article 116 paragraph 1 Commercial Code. The directors liability insurance does not cover this event. Failing to keep the administration in order is a serious fault that is*

excluded in the policy. Managing director A, who is personally liable for the entire deficit in the bankruptcy, cannot claim payment under the insurance.

IV Government established foundations

35 What is the difference between a foundation and a limited liability company?

A foundation is a legal entity that aims at a purpose as described in the articles of incorporation, thereby utilizing a capital separated especially for that purpose. A foundation has no members or shareholders. A foundation is not owned by anyone. A limited liability company is a legal entity with one or more registered or bearer shares. Both the limited liability company and the foundation are incorporated by a deed passed before a civil law notary. The liability of the shareholders of a limited liability company is limited to the value of their capital contribution, and, as the case may be, of their shares. Originally, the object of profit was not possible in a foundation. Profit could only be the object of a limited liability company or closed company with limited liability (*besloten vennootschap*). Nowadays it is assumed that foundations can also aim at making profit. For that they may be taxed. A limited liability company is managed by a board of managing directors, also called management board (*directie*), the foundation by the foundation's board of directors (*bestuur*).

36 If a foundation has a managing director (*directeur*) or a general manager, what are his/her powers as compared to those of the foundation's board?

The board of the foundation can entrust the daily management of the activities to a managing director or a general manager. The latter exercises his duties and responsibilities under the responsibility of the board. The legal provisions concerning liability of directors continue to be applicable to the board members of this foundation, even if they do not concern themselves with the daily course of business. In such a case it is recommendable to establish in a directors statute which duties and responsibilities the general manager can exercise independently and for which decisions the approval of the board is required. When the foundation is larger and has more employees, it is recommendable for the foundation's board to function more from a distance, like a supervisory board does. Legally this can be accomplished by instituting a "board of supervision" (*raad van toezicht*).

37 What is a board of supervision?

In the articles of incorporation of a foundation it is possible to include a provision that the management is exercised by one or more directors, supervised by a board of supervision. In these cases it is as if a supervisory board is created which originally does not form part of the foundation. There are different possibilities to accomplish this:

- The executive board of the foundation consists of two or three members elected from the supervisory board. In his or her turn, the general manager functions under the supervision of the executive board (1);
- The general manager is promoted to executive board member of the foundation, consequently falling under the supervision of the supervisory board (2).

38 Is this board of supervision regulated in the law?

No, but legally it is possible to institute such a board by adapting the articles of incorporation accordingly. The civil law notary can take care of that.

39 Who is authorised in a foundation to dismiss a board member?

The board is the highest body in the foundation. It is the board itself that has the power to dismiss a board member. In most cases the conditions and the manner in which this can be effectuated are provided for in the articles of incorporation. In general, the board also has the power to appoint new board members, again according to the procedure outlined in the articles of incorporation. In other words, a foundation does not have another body (such as the general meeting of shareholders of a limited liability company) that has the power to fill up vacancies: the (other) members of the board of the foundation themselves decide who will become their new co-board members. This is called co-option.

40 Does a non-profit foundation also have a bookkeeping obligation?

Pursuant to article 2 Commercial Code, every legal entity that runs a business has a bookkeeping obligation.

Lawyers

At the core of our activities are our people, a dedicated and experienced staff of lawyers and other professionals that aim to deliver quality of services at international level.

Partners

J.M. Randolph Status van Eps (1955) obtained his law degree at the University of Amsterdam in 1982 and that same year joined VanEps Kunneman VanDoorne. He was part-time lecturer at the University of the Netherlands Antilles from 1995 to 1999 (International Private Law). He was Dean of the Curaçao Bar Association (*Orde van Advocaten*) from December 1999 until 2002. He has been a Board Member of the Netherlands Antilles Arbitration Institute (NAI) since 1999 and is a member of the Editors Board of the leading magazine on Antillean Law (TAR Justicia).
Main areas of practice: banking and finance, corporate law, commercial private international law, in particular conflicts of law in relation to cross-border security.
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Frank B.M. Kunneman (1954) obtained his law degree at the University of Amsterdam in 1979. In 1986 he obtained a doctorate (Ph.D.) in law at the same university and was appointed senior lecturer. He became a lecturer at the University of the Netherlands Antilles in 1989 and full professor of civil law in 1994. He was Dean of the law school for years. He is also an arbitrator and, until he joined VanEps Kunneman VanDoorne in 1999, was a deputy member of the Joint Court of Justice of the Netherlands Antilles and Aruba. He is the author of several books and dozens of papers on the subjects of civil law and law methodology. He was and still is editor (in chief) of various legal magazines and books and is supervisory director of the Maduro & Curiel's Bank N.V. and Integrated Utility Holding N.V. ("Aqualectra"). Since 1995 he has been board member of the Stichting Overheidsaccountantsbureau.
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Focco W. Lunsingh Scheurleer (1970) obtained his law degree at the Erasmus University Rotterdam in late 1994 and has been practicing law as an attorney since early 1995: first with the Rotterdam office of (as it was then called) Trenité Van Doorne. As of August 2000 he joined VanEps Kunneman VanDoorne, where he first worked as a senior associate and as from August 2004 as partner. Focco heads VanEps Kunneman VanDoorne's Banking and Finance and Corporate Law practices together with senior partner Randolph van Eps. Focco has been acting as counsel in numerous cross-border finance transactions structured through Netherlands Antilles and Aruban holding and finance companies but also acted as counsel in acquisitions of companies whose business activities are focused on the Netherlands Antilles and Aruban markets. He is a part-time lecturer at the University of the Netherlands Antilles on the subject of International Private Law and has published articles on collateralization of securities and other assets and was an editor and contributor to "Netherlands Antilles law for the banking and finance practice", Amsterdam, October 2004. He is a member of the board of the Curaçao International Financial Services Association (CIFA).



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Associates

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Jean M. (Jeannot) de Cuba (1966) obtained his law degree at the University of Leiden in 1994. After having worked for Loeff Claey's Verbeke in Amsterdam he joined VanEps Kunneman VanDoorne in Curaçao in 1996. In 1999 he left the firm and opened his own office with other partners in Aruba. In August of 2006 he will rejoin VanEps Kunneman VanDoorne.



He has conducted teaching courses on bankruptcy law and procedural law. He is a member of the Aruba Bar Association and the International Bar Association.

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Carine A.D. Jänsch (1969) obtained her law degree at the University of Amsterdam in 1995. From 1995 to 1999 she worked in the intellectual property department of Ekelmans Den Hollander (Lovells) in Amsterdam. In 2000 she joined VanEps Kunneman VanDoorne. She is a member of International Trademark Association (INTA) and Asociación Interamericana de la Propiedad Industrial (ASIPI), as well as various national specialist organizations. Currently she is the chairwoman of the Netherlands Antilles Association of Trademark Attorneys. She has also published numerous articles on intellectual property, advertising and E-commerce.



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Lisanne N. Asjes (1974) obtained her law degree at the Leiden University in The Netherlands in 1997 and joined VanEps Kunneman VanDoorne in that same year as a trainee lawyer. During the period June 2002 until June 2003 she sat as the chairperson on the Board of the Antillean Jurists Association (*Antilliaanse Juristen Vereniging*) and currently is a member of the Board. Until recently she was also a member of the Editors Committee of the newsletter of the Antillean Jurists Association.



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Freeke F. Kunst (1971) obtained her law degree at the Leiden University in The Netherlands in 1996. She joined VanEps Kunneman VanDoorne in 1997 and was admitted to the Curaçao Bar in the same year. She practices maritime law and commercial law in general and assists financial institutions and companies in the maritime and aviation industry with their corporate matters and litigation in the Netherlands Antilles. She has conducted numerous mortgage enforcement proceedings in the Netherlands Antilles and coordinated attachments in other jurisdictions. She is the author of the chapter on Arrest of Vessels in the Netherlands Antilles and Aruba in the *Maritime Law Handbook* (published by Kluwer) and has written articles for the Maritime Advocate and Lloyd's List. She lectured on the arrest and judicial sale of vessels in the Netherlands Antilles at the Fifth Annual International Ship Arrest Conference in London in December 1999 and at the regional conference of Latin America of the International Bar Association in Panama in March 2004. In November 2005 she lectured at the Tenth Annual Bunkering in the Americas Conference. She furthermore participated as a lecturer at the International Maritime Law Conference of the International Bar Association in Dubai in March 2006. She is a part-timer lecturer at the University of the Netherlands Antilles on the subjects maritime law and law of transport.



Main areas of practice: maritime law, aviation law, international trade and transport, financing, contracting, litigation and property and construction law.
Languages: Dutch, English, German, Spanish.

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Martijn Hendriks (1977) obtained his law degree at the Radboud University in Nijmegen in 2001. At the beginning of 2002 he joined a large regional law firm in Nijmegen, where he gained experience in general civil law and insolvency law. As of October 2006 he will join VanEps Kunneman VanDoorne.



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Languages: Dutch, English.

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Languages: Dutch, English.



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