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SPRENGER & ASSOCIATES
Netherlands and Dutch Caribbean law practice

Legal Update

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A counterparty of a Curaçao corporation, unless acting in bad faith, may since January 1, 2012 rely on a written or e-mailed certification by one of its managing directors that it will not invoke any lack of corporate power or authority

Important changes to Curaçao corporate law

Introduction

Curaçao's corporate law has been revised as of January 1, 2012. The changes are the first substantive changes to Curaçao's corporate law since Book 2 of the Civil Code became law on March 1, 2004. We will discuss four important changes for the corporate and finance practice:

(i) A counterparty, unless acting in bad faith, may now rely on a written or e-mailed certification from a managing director that the company shall not invoke any lack of corporate power or authority to nullify an agreement;
(ii) Simplification of conflict of interest rule;
(iii) Changes to ultra vires (lack of corporate power) rule; and
(iv) Introduction of a special type of shareholders agreement.

Please note that the productivity of the Curaçao legislator did not stop here. Several other changes to Curaçao corporate law were enacted as well, most notably the introduction of a special judicial proceeding in cases of serious mismanagement of a Curaçao company (*enquêteprocedure*), the introduction of an American styled trust (which may be unique for civil law jurisdictions such as Curaçao), and a full revision of the outdated limited partnership legislation (*personenvennootschappen*). We will discuss the latter two changes in upcoming Legal Updates.

Certification by one of its managing directors

Managing directors of a Curaçao company are generally speaking individually or jointly authorized to represent it. However, the authority of managing directors can be limited by the company's articles of association (the **Articles**), a board resolution, board regulations and certain shareholder agreements. The Articles can for example provide that prior approval of another corporate body is required for entering into certain significant transactions. Any lack of corporate authority would give the Curaçao company the right to invalidate a transaction, if the counterparty knew or, by conducting a search at the Curaçao Chamber of Commerce, should have known thereof. The Curaçao legislator recognized that properly conducting this due diligence can be time-consuming and costly. Curaçao law was therefore revised so that a counterparty of the Curaçao company may, unless acting in bad faith, rely on a written or e-mailed certification from one of its managing directors that the Curaçao company shall not invoke any lack of corporate authority. The same applies to a potential lack in corporate power (resulting from *ultra vires*). We recommend requesting this certification from a managing director as a condition precedent in any transaction with a Curaçao company.

Simplification of conflict of interest rule

The conflict of interest rule has been simplified. A conflict of interest between a managing director and the company is only deemed to exist in case of direct legal acts with, or legal proceedings against a

KEY CHANGES TO CURAÇAO CORPORATE LAW:

- A counterparty, unless acting in bad faith, may now rely on written or e-mailed certification by a director that the Curaçao corporation will not invoke any lack of corporate power or authority
- Conflict of interest rule simplified
- Ultra vires (lack of corporate power) rules revised
- Introduction of a special type of shareholders agreement

managing director. The company must in these limited circumstances be represented by the supervisory board, or, if there is none, by the general meeting of shareholders or by a person appointed by the general meeting for that purpose (for a foundation (*stichting*) the court can appoint such person). The general meeting of shareholders' authority to appoint special representatives to represent the company in all conflict of interest situations has been abolished and so has the corresponding obligation of the managing directors to timely disclose conflicts of interest to the general meeting of shareholders. Legal acts entered into in violation of the conflict of interest rule can be invalidated by the Curaçao company. All other conflicts of interest fall outside the scope of the rule, unless the Articles, certain shareholder agreements or shareholder regulations provide otherwise. Other potential conflicts of interest between a director and the company have no consequences for third parties entering into a contract with the company, but may be relevant for purposes of director's liability.

Changes to ultra vires rule

As under previously applicable law, a Curaçao company can nullify a legal act that was outside of its corporate objects and the counterparty knew, or without investigation, should have known that was the case. However, the Articles can provide that the company is not entitled to invoke the nullity of a legal act on that basis. A welcome change is that Curaçao law now explicitly authorizes the general meeting of shareholders to ratify or confirm legal acts that may be outside the legal objects of the company. A second, less welcome change is that going forward a Curaçao company will have three years to contest a legal act on the basis of ultra vires, while previously the limitation period lapsed after six months. Please note that the certification by a managing director as referred to above on which counterparties may rely also applies to a lack of corporate power. We therefore recommend counterparties of a Curaçao company to request a written or e-mailed certification from one of its managing directors that the Curaçao company shall not invoke a lack of corporate power because the transaction is ultra vires.

Parties to a Shareholders Agreement relating to a Curaçao company should consider whether it would be beneficial to amend the agreement to give it the status of "vennootschappelijke overeenkomst"

Shareholders Agreement

Shareholders of Curaçao public companies (*NVs*) and private limited liability companies (*BVs*) can regulate their rights and obligations in a Shareholders Agreement. If a party breaches the terms of a Shareholders Agreement, the other parties thereto may have a claim for damages. Please note, however, that acts being performed in violation of a Shareholders Agreement, e.g. transferring shares to a third party in violation of an agreed transfer mechanism, are, perhaps surprisingly, valid under Curaçao law (this is referred to as the agreement lacking "corporate law effect"). This even holds true if a Shareholder Agreement explicitly provides, as it often does, that such transfers are null and void.

Since January 1, 2012, shareholders can arrange for a Shareholders Agreement to have corporate law effect (**Special Shareholders Agreement**), if the following formalities are followed:

(1) The agreement is in writing and expressly states that it constitutes a "*vennootschappelijke overeenkomst*" (these words mean "corporate law agreement", and purport to clarify that the agreement is no ordinary Shareholders Agreement);
(2) The Articles must provide that the company can enter into such shareholders agreement;
(3) The company and all shareholders must be a party thereto; and
(4) The Articles must expressly provide that no bearer shares (for public companies only) or bearer bonds can be issued.

The Special Shareholders Agreement must be signed by each managing director and supervisory director (if any) of the Curaçao company, unless it is explained why such director has not signed the agreement.

Provisions included in a Special Shareholders Agreement generally have the same legal effect as if they would have been included in the Articles, but, in case of conflicts between the two, the Articles prevail. Curaçao law provides that legal proceedings concerning a Special Shareholders Agreement must be litigated in Curaçao.

The existence or absence of a Special Shareholders Agreement is important for future shareholders and may be relevant for other third parties as well. These persons can be aware of its potential existence as the Articles, that are available to the public, must provide that the company can enter into a Special Shareholders Agreement. Future shareholders should carefully review the Articles and, if necessary, request additional information from the company or the selling shareholder, to confirm the existence or absence of a Special Shareholders Agreement as they become party thereto by operation of law. A Special Shareholders Agreement can also affect counterparties of a Curaçao company, in particular because it can limit the power of managing directors to represent a Curaçao company. We therefore recommend counterparties to request a written or e-mailed certification from one of its managing directors that the Curaçao company shall not invoke any lack of corporate power or authority. As discussed above, the counterparty may, unless acting in bad faith, rely on this certification.

Changes to the ultra vires rules now give counterparties excellent tools to ensure this no longer needs to be an issue in corporate finance transactions involving Curaçao entities

Conclusion

Important changes to Curaçao corporate law became effective on January 1, 2012. Generally speaking, these changes have immediate effect and are welcome as they provide more legal certainty in transactions with Curaçao companies. When dealing with Curaçao companies, we recommend requesting a written or e-mailed certification from one or more managing directors of the Curaçao company that it shall not invoke any lack of corporate power or authority. Counterparties of Curaçao companies may, unless acting in bad faith, rely on this certification. In addition, the law regulating shareholders agreements was revised. We recommend parties to a shareholders agreement to consider whether it would be in their interest to amend their shareholders agreement to give it the status of a "*vennootschappelijke overeenkomst*".

Who we are

Sprenger & Associates is a Netherlands, Dutch Caribbean and Suriname boutique law firm based in New York and founded by Helena Sprenger. Helena was a partner at the international law firm Allen & Overy LLP and headed its Dutch and Netherlands Antilles law practice in New York for 10 years.

We advise our clients, mostly international corporations and financial institutions, including UBS, Morgan Stanley, Deutsche Bank, Credit Suisse, Goldman Sachs, Bank of America, Banco Santander and Rabobank, on matters of Dutch Caribbean, Dutch and Suriname law in the context of international capital markets, corporate law and cross-border finance transactions, including aircraft financing.

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