The Consequences of the Dissolution of the Netherlands Antilles for the Practice of Corporate and Finance Law: A Puzzle with a Few Missing Pieces

By Bouke Boersma

I. Introduction

The Netherlands Antilles dissolved on 10 October 2010. The two largest islands that formed part of the Netherlands Antilles, Curaçao and St. Maarten, became independent countries within the Kingdom of the Netherlands. Apart from these two countries, the Kingdom consists of the Netherlands and, since 1 January 1986, Aruba. The four countries stand on equal footing: each country with its own set of laws but subject to the Statute of the Kingdom (*Statuut voor het Koninkrijk*) and certain Kingdom Acts (*Rijkswetten*). The Netherlands Antilles also included Bonaire, Sint-Eustatius and Saba, together known as the BES islands. The BES islands have, as public entities, chosen to become part of the Netherlands, a status comparable to that of a Dutch municipality.

Curaçao, St. Maarten and, insofar as it concerns the BES islands, the Netherlands are successors to the Netherlands Antilles. These countries have taken the place of the Netherlands Antilles with respect to applicable laws, legal obligations and legal relationships. It should be remembered that Curaçao, St. Maarten and the Netherlands can themselves decide, as autonomous countries, which legislation that was in force in the Netherlands Antilles before dissolution they want to amend or repeal. This article discusses the consequences of the constitutional reform in regard to the following topics: (i) the corporate and financial legislation of Curaçao, St. Maarten, and the BES islands; (ii) the applicability of treaties that were previously applicable to the Netherlands Antilles to Curaçao, St. Maarten, and the BES islands; and (iii) the validity of licenses, exemptions and other similar decisions issued or taken by Netherlands Antilles' authorities.

II. Corporate and Financial Legislation After 10 October 2010

A. Curaçao and St. Maarten

The corporate law of the former Netherlands Antilles was overhauled on 1 March 2004 and was incorporated in Book 2 of the Civil Code. The legislature of the Netherlands Antilles had intended to implement a set of ordinances to finalize the new civil law project before the dismantling of the Netherlands Antilles, but it is by now clear that the legislature of the Netherlands Antilles was unsuccessful in doing so. Curaçao and St. Maarten now want to implement these ordinances in 2011. The most important ordinances intend to amend Book 2 of the Civil Code, introduce the concept of trusts that is based on the Anglo-American trust,[1] amend the Code of Civil Procedure and the Bankruptcy Code of 1931 and, as the Netherlands intends to do, fully revise the outdated partnership legislation.[2] The most significant amendment is included in the proposal to amend Book 2 of the Civil Code and simplifies the conflict-of-interest rules. As under previously applicable law of the Netherlands Antilles, the proposed rule in principle only covers legal acts between the corporation and a managing director and legal proceedings between the corporation and a managing director. The corporation must in these limited circumstances be represented by the supervisory board if there is one, and, if not, by the other managing directors, acting jointly, and, if there are none, by a person who has been specially appointed by the general meeting of shareholders for that purpose.[3] All other possible conflicts of interest, for example, an employment contract entered into by the corporation with the son of a managing director, fall outside the scope of the proposed rule, unless the corporation's articles of association or by-laws provide otherwise. It should be noted that the conflicts of interest rule is optional and its applicability can be excluded partially or entirely.[4] A legal act executed in violation of Article 2:11 is void, unless the counterparty acted in good faith (which is in practice unlikely). The general meeting of shareholders will no longer have the authority to "always" appoint special representatives to represent the corporation in conflict-of-interest

situations; moreover, the corresponding obligation of the managing directors to timely disclose conflicts of interest to the general meeting is done away with.

The financial supervision of the former Netherlands Antilles was sector-based, as was the case in the Netherlands before it implemented the Financial Supervision Act on 1 January 2007. The Central Bank of the Netherlands Antilles supervised financial institutions of the Netherlands Antilles pursuant to the Banking and Credit System Supervision Act 1994 (*Landsverordening toezicht bank- en kredietwezen 1994*), the Act on the Supervision of Investment Institutions and Administrators (*Landsverordening toezicht beleggingsinstellingen en administrateurs*), the Act on Foreign Exchange Transactions (*Landsverordening deviezenverkeer*), the Supervision of Stock Exchanges Act (*Landsverordening toezicht effectenbeurzen*), the Supervision of Trust Companies Act (*Landsverordening toezicht trustwezen*) and the Act on the Supervision of Insurance Companies (*Landsverordening toezicht verzekeringsbedrijf*). The legislature of the Netherlands Antilles intended to harmonize various financial supervision laws before dissolution of the Netherlands Antilles, thereby eliminating inconsistencies that mostly resulted from the fact that none of the laws was enacted at the same time. The proposed legislation covered, inter alia, the following subjects: (i) silent receivership, (ii) fines, (iii) the publication of violations and, (iv) the appointment of an auditor in certain cases. The legislation cannot be described in further detail because it has not yet been published. In any event, it is by now clear that the Netherlands Antilles legislature did not enact this harmonization legislation before dissolution of the Netherlands Antilles.

The dissolution of the Netherlands Antilles itself did not materially change the corporate and financial laws applicable to Curaçao and St. Maarten. Ever since constitutional reform, a corporation with its seat on Curaçao or St. Maarten is governed by the law of Curacao and St. Maarten, respectively (on the basis of the incorporation doctrine). The legislation that was in force in the Netherlands Antilles immediately before dissolution remains in effect in Curaçao and St. Maarten, including the corporate and financial legislation described above. Additional Article 1 of the Constitution of St. Maarten (*Staatsregeling van Sint Maarten*) provides that legislation of the Netherlands Antilles that was in force before dissolution continues to apply in St. Maarten until it is amended or revoked. The Act on the General Transitional Regime and Administration (*Landsverordening algemene overgangsregeling wetgeving en bestuur*), adopted by the Island Council of Curaçao before dissolution of the Netherlands Antilles pursuant to Additional Article 1 of the Constitution of Curaçao (*Staatsregeling van Curaçao*), confirms the continued applicability of Netherlands Antilles' legislation, provided that the laws that no longer apply in Curaçao are listed in an attachment. This list includes constitutive laws that have been replaced with laws fine-tuned for Curaçao and St. Maarten, such as their respective Constitutions, and joint regulations that will be entered into by Curaçao, St. Maarten and/or Aruba. Pursuant to Article 60b of the Statute of the Kingdom, which entered into force on 16 September 2010, draft ordinances that have been enacted by the Island Councils of Curaçao or St. Maarten before the constitutional reform, have the status of ordinances since 10 October 2010. The Act on the General Transitional Regime and Administration and the Act Protecting Personal Data (*Landsverordening bescherming persoonsgegevens*), which area of law was not regulated in the Netherlands Antilles, were enacted by the Island Council of Curaçao on this basis before the constitutional reform.

The corporate and financial legislation of Curaçao and St. Maarten differs substantially from the corresponding legislation of the Netherlands and Aruba, but is at the same time very similar. A reason for the similarity can be found in Article 39(1) of the Statute of the Kingdom that provides that all countries within the Kingdom of the Netherlands are to have substantially the same civil and corporate laws insofar as possible (the so-called concordance principle). Although heavily debated in Dutch and Dutch Caribbean juridical literature, this principle is not affected by the constitutional reform. Curaçao and St. Maarten have agreed that their civil, procedural and bankruptcy laws will remain the same going forward. The new Joint Court of Appeal (*Gemeenschappelijk Hof van Justitie*) of Aruba, Curaçao, St. Maarten and the BES islands could otherwise not have properly functioned as a joint appellate court. It is noted that the agreement to have identical civil, procedural and bankruptcy laws will be limited to Curaçao and St. Maarten and does not extend to the BES islands or Aruba. Curaçao and St. Maarten have also agreed that their financial supervisory legislation will remain the same, partly because the Central Bank of Curaçao and St. Maarten, which is the successor to the Central Bank of the Netherlands Antilles, has

become the financial supervisor for both islands. It should be noted that when Aruba became independent about twenty-five years ago, Aruba and the Netherlands Antilles made a similar agreement (which probably came to an end on 10 October 2010) that was never followed upon.

B. BES Islands

The legal system of the BES islands is a hybrid and is complicated since the constitutional reform. Most of the laws of the Netherlands Antilles that were in force on 15 December 2009 have been converted into laws applicable in the BES islands (these are referred to as BES laws) without important changes. The Act on the Implementation of Public Entities BES (*Invoeringswet openbare lichamen BES*) contains a list of all laws of the Netherlands Antilles that remain in force in the BES islands. This list includes the Civil Code of the Netherlands Antilles and all financial laws of the Netherlands Antilles, with the exception, inter alias, of the Act on Foreign Exchange Transactions (*Landsverordening deviezenverkeer*). Legislation of the Netherlands Antilles that has thus been converted into Dutch legislation was immediately thereafter amended by way of the Amendment Acts Public Entities BES (*Aanpassingswetten Openbare Lichamen BES*). Although it is odd that laws of the Netherlands Antilles that were enacted or amended after 15 December 2009 did not immediately become applicable in the BES islands, this has mattered little in practice because the Amendment Acts purport to reflect amendments enacted by the legislature of the Netherlands Antilles after that date.

Since the constitutional reform, neither the law of the Netherlands in force before 10 October 2010 nor European law is directly applicable to the BES islands. The Netherlands therefore effectively has two separate legal regimes. Perhaps surprisingly, the legal complications arising from having one country with two legal systems seem quite limited. This can be illustrated by considering three possible complications. It appears that a corporation with its corporate seat in the BES islands can relocate its corporate seat to the European part of the Netherlands and vice versa. The Kingdom Act on the Voluntary Relocation of Corporate Seats (*Rijkswet Vrijwillige Zetelverplaatsing Rechtspersonen*), which only permits corporations to relocate their corporate seat in cases of an emergency, such as war, does not seem to apply to corporations changing their corporate seat within the Netherlands. This could, perhaps unintentionally, open the door to Dutch corporations relocating their seat to countries outside the European Union or the European Economic Area, which otherwise would only be possible in cases of emergency. A Dutch corporation would first have to relocate its seat to one of the BES islands and could then easily relocate to any third country if the corporation continued to exist in the receiving country. A fiduciary security transfer (*fiduciare zekerheidsoverdracht*) that is enforceable under the laws of the BES islands will be recognized in the European part of the Netherlands, because it can be deemed to be equivalent to a Dutch security right, in this case a right of pledge. Financial institutions from the BES islands cannot become active in the European part of the Netherlands without an additional Dutch license. The same is true, mutatis mutandis, for Dutch financial institutions that want to become active in the BES islands. It can be expected, however, that Dutch financial institutions will easily be able to obtain an exemption from the applicable license requirement from the Dutch Central Bank (DCB) or the Netherlands Authority for the Financial Markets (AFM), as the case may be.

The bulk of the law of the Netherlands Antilles has remained substantially the same in the BES islands since 10 October 2010, with a few notable exceptions for the corporate law practice, including two exceptions described below. The Business Establishment Act BES (de *Wet vestiging bedrijven BES*) has been partially revised. The Act prohibits anyone from establishing or conducting its business in the BES islands without a license. The Business Establishment Act that was applicable in the Netherlands Antilles excluded from its scope persons born in the Netherlands Antilles and who are older than twenty-one years of age, but that exception has been deleted. The Business Establishment Act BES does not seem to include a transitional period so that any person born in the Netherlands Antilles and conducting a business without a license is violating that Act. The Stamp Duty Act 1908 (*Zegelverordening 1908*) and the Registration Act 1908 (*Registratieverordening 1908*) have not become applicable in the BES islands. A Netherlands Antilles judge was not able to render a judgment on the basis of evidentiary documents that did not have the appropriate stamp or were not registered with the Netherlands Antilles tax inspector. In normal circumstances all that was required was the payment of a nominal fee. The notable exception concerned mortgage deeds, which could result in significant taxes being levied (0.2% of the amount

secured by the mortgage, excluding interest and costs). These taxes were payable at the time of execution of the mortgage deed before the civil-law notary.

The financial legislation of the Netherlands Antilles that is currently in force in the BES islands will initially not be changed, with a few exceptions, including the three exceptions discussed below. The Act on Foreign Exchange Transactions has not become applicable in the BES islands because the U.S. dollar will replace the Netherlands Antilles guilder as its official currency. It is worth noting that the Act on Foreign Exchange Transactions is, as of 10 October 2010, no longer in force, while the U.S. dollar will become the official currency on 1 January 2011. The Act prohibited all international payments from a Netherlands Antilles corporation or partnership as well as the granting of security relating to such international payments without a license from the Central Bank of the Netherlands Antilles, other than certain, not very common transactions that were allowed (the entering into short term banking facilities was by far the most commonly used exception). For the avoidance of doubt, the Act on Foreign Exchange Transactions remains in force on Curaçao and St. Maarten. Curaçao and St. Maarten will continue to use the Antillean guilder but will replace it in 2012 with a new currency, the Caribbean guilder. The Central Bank of the Netherlands Antilles has been replaced as financial supervisor by DCB and AFM. DCB supervises banks, insurance companies and trust companies, while the AFM supervises insurance brokers, investment institutions and investment administrators. Other financial institutions, such as securities issuing institutions, are not and will not be supervised on the short time, although they are subject to supervision in the European part of the Netherlands. As most financial institutions that are active in the BES islands are either an affiliate or a branch of financial institutions with their corporate seat in Curaçao or St. Maarten, the Central Bank of Curaçao and St. Maarten and the Dutch financial supervisors will work together more closely in the future.

It has, in principle, been agreed to replace the currently applicable BES laws with Dutch laws within approximately five years. The various financial-supervision laws are expected to be replaced by the Act Financial Markets BES (*Wet financiële markten BES*) and the Anti-Money Laundering and Financing of Terrorism Act BES (*Wet ter voorkoming van witwassen en financiering terrorisme BES*) on 1 January 2012. After this transitional period of relative legislative calm, the BES islands are expected to become a part of the European Union by changing the currently held “countries and overseas territories” status of the BES islands to “outermost area” status. In the final stage, primarily Dutch and European legislation will be applicable in the BES islands, although exceptions will be made insofar that is deemed appropriate in view of significant differences that could exist between the BES islands and the colder parts of the Netherlands.

III. Applicability of Treaties After 10 October 2010

A. Curaçao and St. Maarten

It is not entirely certain whether treaties that were applicable to the Netherlands Antilles continue to apply to Curaçao and St. Maarten without further action being taken on behalf of the new countries. The influential Dutch Advisory Council (*Raad van State*) believes that the Kingdom Administration (on behalf of Curaçao and St. Maarten) should inform the other parties to the treaties that were applicable to the Netherlands Antilles that such treaties continue to apply to Curaçao and St. Maarten. The Dutch Advisory Council bases its view on Article 17 of the Vienna Convention on Succession of States in respect of Treaties 1978 (*Verdrag van Wenen inzake statenopvolging met betrekking tot verdragen 1978*). The Dutch Minister of Foreign Affairs correctly disagrees with the Dutch Advisory Council, since the dissolution of the Netherlands Antilles did not constitute a succession of states but only a constitutional reshuffling of a part of the Kingdom. This can best be understood by remembering that the Netherlands, Aruba and the former Netherlands Antilles cannot enter into treaties themselves, only the Kingdom can. The applicability of treaties can obviously be limited to one or more parts of the Kingdom, which often happens in practice. The constitutional reform has done nothing to change this; it is still the Kingdom of the Netherlands and not one of the individual countries that enters into treaties. Consequently, Curaçao and St. Maarten are bound by and can derive rights from treaties that have been entered into by the Kingdom on behalf of the former Netherlands Antilles, including various tax treaties entered into by the Kingdom on behalf of the former Netherlands Antilles, without any further action being required therefore.

B. BES Islands

The constitutional changes do not affect the applicability of treaties to the BES islands. All treaties that were applicable to the Netherlands Antilles remain in force in the BES islands, even if they do not apply to the European part of the Netherlands, although the applicability of two treaties has been terminated (but they have no relevance for the corporate and finance law practice). Treaties applicable to the Netherlands, which were not applicable to the Netherlands Antilles, will for now remain only applicable to the European part of the Netherlands, with the exception of seventy-seven treaties that are not relevant to the practice of corporate and finance law. The Dutch legislature will further examine if other treaties should remain in force or become applicable to the BES islands. The Dutch legislature will decide in the future each time a treaty is entered into on behalf of the Netherlands, whether or not the treaty should also apply to the BES islands, taking account of the same circumstances that determine if Dutch legislation should become applicable in the BES islands.

IV. Validity of Licenses, Exemptions and Other Decisions After 10 October 2010

A. Curaçao and St. Maarten

Article 2 of the Act on the General Transitional Regime and Administration provides that non-legislative decisions taken by the Netherlands Antilles will remain in force in Curaçao. The explanatory notes to the Act on the General Transitional Regime and Administration make clear that these decisions include concessions, licenses and tax rulings. It is likely that the same holds true for St. Maarten, although St. Maarten has not yet adopted a law to that effect. The Act on the General Transitional Regime and Administration and the relevant BES laws that are described below can serve as a blueprint for St. Maarten. Pursuant to Article 44(2) of the Charter of the Central Bank of Curaçao and St. Maarten, licenses and exemptions granted by the Central Bank of the Netherlands Antilles remain valid on Curaçao and St. Maarten. Judgments issued by the Joint Court of Justice and the Courts of First Instance of the Netherlands Antilles and Aruba before the constitutional reform will remain in force. Legal proceedings that were pending before the Joint Court of Justice or a Court of First Instance are by operation of law deemed to be pending before the new Joint Court of Justice or the applicable new Court of First Instance, as the case may be.

B. BES Islands

Decisions taken by the Netherlands Antilles prior to the regime change are generally deemed equivalent to decisions taken by the Netherlands. Consequently, licenses, exemptions and other decisions issued or taken by the Netherlands Antilles remain in effect in the BES islands. Foreign credit institutions and insurance companies with a branch in the BES islands are exempt from most financial supervision rules, as long as they comply with certain conditions. DCB will supervise the compliance of these branches with anti-money laundering and anti-terrorism rules. It should be noted that financial institutions that have obtained a license from the Central Bank of the Netherlands Antilles but which were not active in the BES islands immediately before 10 October 2010 will not receive a license by operation of law to operate in the BES islands. If such a license holder wants to become active in the BES islands in the future, it must first obtain a license from DCB or the AFM.

V. Conclusion

The legislature of the Netherlands Antilles had intended to implement a set of ordinances before dissolution of the Netherlands Antilles, but it is by now clear that it was unsuccessful in doing so. The legislation that was in force in the Netherlands Antilles immediately before dissolution has substantially remained in force in Curaçao, St. Maarten and the BES islands; this includes corporate and financial legislation. The dissolution of the Antilles itself did not materially change the corporate and financial laws in force in Curaçao and St. Maarten. The most important exceptions for the BES islands are that the Act on the Foreign Exchange Transactions (*Landsverordening deviezenverkeer*), the Stamp Duty Act 1908 (*Zegelverordening 1908*) and the Registration Act 1908 (*Registratieverordening 1908*) have not become

applicable in the BES islands. Licenses, exemptions and similar decisions issued or taken by the Netherlands Antilles prior to the constitutional reform are generally deemed equivalent to decisions issued or taken by the Netherlands insofar as it concerns the BES islands. The same applies, mutatis mutandis, to Curaçao and St. Maarten, with the proviso that St. Maarten has not yet published a law to that effect. It depends on the circumstances whether a contract expressed to be governed by the law of the Netherlands Antilles should now be understood to refer to the laws of Curaçao, St. Maarten or the BES islands. In deciding this matter, a Dutch Caribbean court can be expected to take into consideration all relevant circumstances, including a possible choice of forum for a specific island in the contract, the location of the parties or the location of assets involved in the contract. Thus, a contract governed by the law of the Netherlands Antilles that is made between corporations located in the United States and Curaçao, respectively, would most likely now be deemed to be governed by Curaçao law. The same analysis also applies to forum choices of courts of the Netherlands Antilles. It will therefore in most cases not be necessary to amend a contract with respect to these matters.

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[1] Article 3:127 et seq. of the Civil Code.

[2] Title 13 of Book 7 of the Civil Code.

[3] Article 2:11(1) of the Civil Code.

[4] Article 2:11(2) of the Civil Code.