

Webinar Corporate Governance and COVID-19

Organized by Dr. Miguel Goede

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Presentation: Karel Frielink

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Corporate Law – Managing Through the Pandemic

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Legal Challenges

Covid-19 has led to challenges in almost all legal areas.

Contract Law – Force majeure / Unforeseen circumstances

Labor Law – Termination / Discussion about cutting wages

Human Rights – Lock down / limited gatherings / travel restrictions

Competition and State Aid – Distortion of the level playing field

Regulation and Compliance - Increase in Covid-19 related crimes

Tenancy Law – Tenants not able to pay rent / Eviction during a pandemic?

Etc. etc.

My contribution today on corporate governance in relation to Covid-19 will only deal with legal aspects. More specifically, I will focus on corporate law. Sometimes it is difficult, or even impossible, for organizations to comply with the statutory requirements to which they are subject, including those relating to (i) the holding of in-person meetings, (ii) physical in-person inspection of corporate records and documents and (iii) timelines for filing certain corporate documentation.

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No ACU members meeting in 2020

(Amigoe, 30 November 2020)

Last Monday in the Amigoe you could read that ACU will not hold a member meeting this year. Covid-19 is mentioned as the reason. I don't know exactly what problems they have encountered in ACU, but there are three topics I would like to discuss today.

Directors' Duties

Board Meetings

General Meetings

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Curaçao Corporate Code

In Curacao there is no special legislation in view of Covid-19 when it comes to corporate law. There are two articles in the Curaçao Corporate Code (i.e. the Civil Code) that could be a bit of help under circumstances. What I am going to say about the law of Curacao also applies in St. Maarten and on the BES islands. As far as Aruba is concerned, this applies to the Aruba Limited

Liability Company (VBA) and to the other legal entities once Aruba has introduced its Corporate Code. And that may be the case soon.

What is required by law to be done in writing, may also be done electronically (Section 2:23(1) CCC). For the purposes of the provisions of this book, written expression shall be on a par with an expression made by writ, telegram, telex, telefax, e-mail or other text-conveying means of communication (Section 2:23(1) CCC). So, if the articles of association stipulate that a decision must be made in writing, this can also be done electronically, for example by email.

The other provision can be found in Section 2:7(2) of the CCC. Any rule or decision in effect among those involved in the organization of the legal entity, including the law and the articles of association, shall not apply insofar as, under the given circumstances, the same would be unacceptable according to the standards of reasonableness and fairness. This basically means that a judge, upon request, may declare certain provisions of the Code itself or the articles of association inapplicable due to the exceptional circumstances. Generally, whether or not this provision can be successfully invoked will be discussed (debated) in legal proceedings in which, for instance, the validity of a resolution is challenged.

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The Dutch Temporary Act of 24 April 2020

In the Netherlands, emergency legislation has been adopted in order to address consequences of the COVID-19 crisis. The Dutch Temporary Act of 24 April 2020 provides, among other things, for temporary derogation from certain provisions of Dutch statutory law and the articles of association, in order to:

- facilitate virtual meetings (through livestream, audio or video); the legislation also provides for a possibility to postpone the deadline for holding a general meeting with a maximum of four months;

- extend the period for preparing annual accounts by the management board (normally extending this period has to be granted by the general meeting of shareholders); and
- limit the 'presumption of proof' for directors' liability in case of bankruptcy if filing of the annual accounts is delayed as a result of the COVID-19 outbreak.

It is worth considering in the Caribbean parts of the Kingdom to include provisions in the law for the future so that a company, foundation or association can function as optimally as possible even during a crisis.

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Directors' Duties

The question is, do directors have a specific responsibility and liability in the context of Covid-19?

Covid-19 has made the job of (many) directors more demanding. In my opinion, directors may incur specific liability in the context of Covid-19. Directors have a duty to carefully and regularly review the impact and manner of dealing with the risks associated with Covid-19 in their own company, in order to ensure, among other things, the survival of the company in the short and long term as well as the health and safety of the employees. Some of the difficult decisions that need to be made include, for instance, the decision whether to close the facility, office or shop for a certain period of time, or whether to lay off employees.

Directors are having to deal with novel issues and matters for which they have no precedent or policy. Because of this, it is even more important now than before, that directors spend a sufficient amount of time in deliberative discussions exploring different options and weighing competing considerations and perspectives; and seek advice from experts for matters they have insufficient knowledge of (or just don't know nothing about).

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Board Meetings

Physical vs Virtual Meetings

Generally, in Curaçao board meetings (management board, supervisory board) can be held via telephone, zoom etc., but the articles of association should be checked for specific requirements. A meeting by telephone, zoom etc. qualifies as a "meeting", and decisions taken should in principle be documented in minutes. Signatures on minutes are often required, but electronic signatures are permissible. Alternatively, the minutes of a meeting by telephone, zoom etc. could be circulated by the chairman via email after the meeting, asking the other directors to confirm their consent by email.

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General Meetings of Members or Shareholders

Is it possible to deviate from the articles of association?

I already discussed Section 2:23(1) of the Curaçao Corporate Code: if the law or the articles of association require something to be done in writing, it is allowed that this be done electronically. The problem, however, is that the articles of association sometimes contain regulations that cannot be deviated from. For example, a rule that members or shareholders must meet physically at least once a year. Sometimes, the articles of association also contain specific rules on voting for persons that require a physical meeting to take place or casting a vote by using ballot papers and envelopes. And what about audits of annual accounts that cannot be completed on time, because the accountant cannot access the physical part of the administration. And there of course is a health and safety issue: the spread of Covid-19 must be prevented.

Strictly speaking, neither the law nor the articles of association can be deviated from. If it is not really necessary to hold a general meeting, it is advisable to postpone it as long as possible, even if the law and the articles of association require a meeting to be held. However, it should be considered whether there is an alternative way to hold a meeting.

Unlike in the Netherlands, the Curaçao Corporate Code does not provide for participating in general meetings of shareholders or general meetings of members by using electronic means of communication. However, in my opinion, this does not mean that this is therefore prohibited. There are a few issues or concerns though. I will mention a few.

- All those entitled to attend the meeting should be able to participate, but do they all have the electronic means to do so?
- If a lot of people are involved, how can they exercise their right to ask questions and participate in the discussion?

An alternative could be to organize a physical meeting with only a few participants. Other persons entitled to attend the meeting will then be asked whether they wish to grant a power of attorney. This can work particularly well for smaller companies and associations.

If the articles of association require a physical meeting and it cannot be held for a good reason, but a decision has to be made urgently, then I would follow the following procedure.

- Ensure careful and timely planning of the electronic meeting.
- Explain in the invitation as transparently as possible why this form of holding a meeting was chosen.
- Make sure everyone has timely access to all documents.
- Explain which decision must be made and why.
- Work as much as possible with proxies.
- As far as possible, try to have a discussion during the meeting if participants wish to start one.

There is always a risk that someone will start legal proceedings to have the resolution that has been taken annulled or nullified. I can say a few things about that.

- The first is that, as discussed, the court may determine that a certain legal or statutory provision does not have to be complied with in view of the exceptional circumstances.
- In addition, the question is whether the plaintiff has a reasonable interest in the annulment of the resolution. If this is not the case, the claim will not be granted by the court.
- If, for example, the plaintiff was mistakenly not invited to the meeting, the question is whether his possible dissenting vote would have affected the outcome. If not, it would be silly for another meeting to have to be held if the outcome is already known in advance.
- When it comes to a substantive assessment of the resolution, reasonableness and fairness play a role. This is (a.o.) about balancing the interests at stake by the judge.

The outcome of proceedings in court is often not easy to predict. It is therefore advisable to convene a regular meeting as soon as this is possible again, and to ratify the resolution.

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2021 Retrospective

Just a few words about the Black Swan and Hindsight Bias to conclude my presentation.

A “black swan” event is a rare event where the extreme impacts result in severe consequences and are often thought to have been predictable in retrospect. But Covid-19 was neither predictable, nor how intense and long-lasting this pandemic would be. But in court there is always the risk of hindsight bias. A judge always assesses a case retrospectively, based on facts from the past. Hindsight bias occurs when the judge evaluates events after their occurrence and judge them as being more probable and predictable than they really were before in advance. Usually it is easy to judge afterwards what should and should not have been done.

That is why it is important that in future proceedings (if any) a judge can be given as much information as possible about the facts and circumstances of the past, and if necessary, what only became known later. It is therefore important to properly prepare and substantiate decisions or actions, and to record all this as thoroughly as possible.

Examine the Issue, Prepare the Action Well, and Document all Steps. And prepare for the future. Adjust your articles of association as soon as that is possible. Provide for a provision that makes it possible to function as best as possible during a pandemic or any other disaster. Legal matters should also be part of your overall risk management!

Thank you!