SEMINAR

Checks and Balances in Corporate Governance on Curaçao

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- **The Board of Financial Supervision (*College financieel toezicht: 'Cft'*)**
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- **Dutch Caribbean Accountants Association (DCAA)**

"Looking back on the future: the further development of corporate governance in Curaçao"

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16.15 - 16.45 hours

The law of the Dutch Caribbean has been comprehensively discussed on *Karel's Legal Blog* (http://www.curacao-.law.com). For questions and comments: Karel.Frielink@SpigtDC.com.

1. Introduction

The title of my contribution requires some explanation. Everybody understands that looking back on what is yet to come, in other words the future, is impossible. So I will just pretend to look back on the years yet to come and in doing so I will describe in several broad outlines the route along which the doctrine of good corporate governance ought to develop in my opinion.

But I will start with a real retrospective because good governance issues have already been important for many centuries.

2. The future is no longer what it was either!

Placing the concept of corporate governance on a historic timeline requires us to describe the concept because otherwise a reasonable comparison cannot be made. There are many descriptions [1] of the concept of corporate governance. One unequivocal and generally accepted description does not exist. That is why I will give some of the most common descriptions (partly overlapping each other):

1. An indication of the manner in which a company manages its organization. modern companies (often listed on a stock exchange) are expected to have implemented a clear corporate governance code. This code must take into account the interests of society, employees and other interested parties.
2. Synonymous with good corporate governance (thus good governance): the management of and supervision and monitoring of a business whereby the Managing Directors must render account to the shareholders and the Supervisory Directors, if there are any. In business administration the term is used to indicate how a business should be managed properly, efficiently and responsibly and in order to render account to the interested parties with regard to the management conducted.
3. Good governance, proper management, corporate governance.
4. And from the economic point of view: management of a company. Regulations which must be observed in order to bring about good relationships in the organization between shareholders, management and the Management Board. Its content is strongly determined geographically (and therefore also culturally).

These are four descriptions which in my view give a good indication of what it is about. In order to be able to draw several lines from history to the present I describe the object of good corporate governance as follows: *"an organization characterized by good (proper) management and supervision and which is safeguarded against improper influences'*. In the end it is about the system by which the businesses are managed and monitored.[2] In this connection it is also called *"checks & balances"*.

[1] http://www.encyclo.nl/begrip/corporate%20governance
[2] It could obviously also relate to a country. Similar issues are important in public governance.

In antiquity[3] the philosopher Plato mentioned with regard to 'good governance' four cardinal virtues namely: *prudentia* (prudence), *justitia* (justice), *fortitudo* (courage, strength) and *temperentia* (temperance, self-control). Although these virtues were originally intended for public governance they are just as relevant to all economic sectors including the private sector.

At that time the term good governance meant more than merely 'doing good things'. It was all about 'doing things' in a proper institutional context with effective checks and balances as we would say nowadays.

Our - current - practice shows that those so-called cardinal virtues are under pressure in a society characterized by the race for profit and personal success. However, it is also good to know that during the Greek-Roman antiquity those virtues were 'reserved' for a small elite class: the upper layer of a strict authoritarian society. Even in the Rome of the first century BC in which the well-know phrase *Senatus Populusque Romanus (SPQR) - the Senate of the Roman populace* - acted as the official name of the Roman Empire, and which could be found as an inscription on public buildings and triumphal arches, we cannot ignore the fact that the governance was not in the hands of the Senate and the population: the Senate consisted of the 'distinguished' , the aristocrats (the socio-economic elite), had most of the power and had to approve the resolutions of the representative body of the people.

Further away towards the East, in inhospitable China, the philosopher and great thinker Confucius - who lived from 551 until 470 BC - had the following moral principle: *"Whatever you don't want yourself, don't impose that on others"*.[4] Profit and personal success[5] at the expense of others is therefore clearly not covered by this principle as the crisis in 2008 painfully revealed. Confucius also formulated several rationales even before the emergence of the modern Greek logic, completely in line with the latter doctrine. I single out the following rationale:

If you know where to stop, you have stability.
If you have stability, you are calm.
If you are calm you are at ease.

[3] Discourse of Dr. Klaas Abma - 18 April 2012 - *Is er in Friesland sprake van goed lokaal bestuur?* [Is there proper local governance in Friesland?]
http://friesegemeenten.nl/fileadmin/friesegemeenten/Is_er_in_Friesland_sprake_van_goed_lokaal_bestuur.pdf
[4] He also had the saying: *"In a properly governed country poverty is something to be ashamed of. In a poorly governed country wealth is something to be ashamed of."*
[5] For that matter there is nothing wrong with profit and personal success in itself.

If you are at ease you can be cautious.
If you are cautious you can achieve your goals.

According to Confucius respect, goodness and cherishing humanity were the route to the ideal society. This gives rise to the question of whether the prevention of a new crisis must be sought in people instead of in the technique of governance and risk management. In short, is governance particularly about people and less about structures and systems? Or is the reverse reasoning true? Or can the one not go without the other? The fact is that the logical reasoning mentioned above requires structure because you cannot know just where to stop without any structure.

A little further along the historical timeline we can indicate that corporate governance played a role in the Dutch East India Company (*Verenigde Oost-Indische Compagnie: 'VOC'*). The VOC was the first business which divided its capital into shares and thereby brought about a separation between management and ownership.

Already before several of the big present-day scandals there were reports with recommendations about good corporate governance for instance in the United Kingdom (1992)[6] and the Netherlands (1997)[7]. I ask myself then why that word 'good' must be put in front of corporate governance. Is that because it gives us a 'good feeling'? I don't think so. Can you still remember that CEO of General Electric: Jack Welch?[8] At the beginning of the eighties he was still advocating the universally praised *'maximizing shareholder value*', only to do away with it years later (2009) as *"the dumbest idea in the world"* and to regard it as *"short-term profit obsession".*

To what extent does history set us free? Under the title *'Socrates in the boardroom"* an attack has been launched against the *"overshoot into technocracy, models and systems"* and the importance of authoritative classical philosophers from antiquity have been emphasized.[9] The ideas of Socrates, Plato and Aristotle should be mandatory subjects in business universities and for leaders in the boardroom, as

[6] The Cadbury Report of 1992. *Report of the Committee on the Financial Aspects of Corporate Governance and the Code of Best Practice*, 1992, London: Gee, at par. 2.5.
[7] Report 1997 Peters Committee, *Aanbevelingen inzake corporate governance in Nederland. Aanbevelingen voor goed bestuur, adequaat toezicht en het afleggen van verantwoording* [Recommendations for corporate governance in the Netherlands. Recommendations for good governance, adequate supervision and rendering account], 25 June 1997
[8] http://en.wikipedia.org/wiki/Jack_Welch
[9] Article in De Telegraaf of 23 June 2012, Maarten Hage: "*My advice: delete the umpteenth discourse of the accountant to get everybody up to scratch with the IFRS rules. Read Socrates and discuss it. There is no sense in obediently ticking off all the articles in the corporate governance code. You would then only live according to the letter of the law. It is much more interesting to think about the spirit of the same law and to discuss it".*
See: http://www.vangorcum.nl/Bestanden/Artikel_Telegraaf_Maarten_Hage_20120623.pdf

suggested by *dr.* Maarten Hage. "*The financial sector has overshot into technocracy. The thinking is that everything can be included in techniques, models and systems. The human factor is much more important in corporate governance."* Is it really time for a renaissance? Must members of the Supervisory Boards continue to be primarily focused on refresher courses in the regulations and systems of corporate governance? Or is more required than just living according to the letter of the law and might it be more interesting to think about and discuss the spirit of the same Act?

That corporate governance is going strong is quite clear. In all its complexity this subject also represents the spirit of the age. Good corporate governance is not something autonomous. In each society the interaction and dynamic between the economic actors is inevitable. What this interaction and dynamic will look like depends on how it is detailed.

What distinguishes the present day from antiquity up to the end of the 19th century is that life was at that time radically different. This does not alter the fact that the lucid minds in those times could already express very well how all this could be organized. It was an era full of barbarian events; an era without any rights for women; an era of subjugation to a select elitist group which knew how to apply divide and rule tactics with great success. Luckily we can now see that a lot of progress has been made in those areas in the past century, but not sufficient by a long way and not everywhere by a long chalk. We are still far removed from perfection and we still have a long way to go.

So much for other times, now back to ours.[10]

3. The further development in Curaçao

I will now talk about state-owned companies ('NVs') but my argument is just as relevant to state foundations.

The Director of a state-owned company often has not got it easy. He is stuck between on the one hand

[10] And here I refer to the concluding sentence of the Dutch television programme *Andere Tijden* [Different times], the history programme of the public broadcasting network. See: http://www.geschiedenis24.nl/andere-tijden.html

(i) a government usually active as a shareholder and by Supervisory Directors appointed by the same government (often at least as active), and on the other hand

(ii) the multi-headed *"interest of the company"* which he is supposed to serve and which consists of a multi-colored palette of partial interests (continuity of the business, interests of employees, creditors etc.).

As far as I am concerned the government should make a clear choice: either activities are carried out in the form of a public service and under the direct responsibility of a minister (and then everybody is a civil servant) or activities are carried out in the form of a company (NV or BV), but then they must be kept as much as possible outside the political sphere of influence. The current situation has a hybrid nature: the company form was indeed chosen but with the retention of as much political influence as possible. This situation is unhealthy and sometimes leads to considerable tension.

When the role of the Supervisory Directors is taken into consideration one cannot get away from the impression that some (former) Supervisory Directors stretched the supervisory duties imposed on them by law and by the articles of association quite a lot. Not seldom do they appear to sit in the Director's chair or they consider the Director as someone who is supposed to follow blindly the instructions of the Supervisory Board or even of individual Supervisory Directors. Some Supervisory Directors in a manner of speaking spend more time in the company office than the Director himself or they drop in on a Director many times a day to discuss business. Those types of situations are unhealthy. It also impairs the autonomous performance of the Management Board.

On top of that, there are some supervisory Directors who inform the political party, which put them forward as a candidate, about their activities. This does not sit well with corporate governance and is in contravention of the duty of secrecy they have where confidential information is involved. There was even a politician who stated openly that he gave 'his' Supervisory Directors specific instructions about what they had to do or not to do. Such practices should be stopped.

It has been laid down in law (Section 2:19 subsection 7 of the Civil Code) that it is not impossible that a Supervisory Director stands up for the particular interests of those who appointed or nominated him and that he gives these interests relatively sufficient

weight. In my opinion an important short comment should be given on this. Although the political color often plays a role in the (nomination for the) appointment, the respective Supervisory Director is not appointed by a political party but by (a body of) the state as shareholder. If he gives the interests of those who appointed him sufficient weight, this should not be the party-political interests of the party to whom the respective minister belongs but rather something like the 'public interest'. It sometimes seems as if some politicians do not fully realize this aspect of the provision and appear to assume that the Supervisory Director they have nominated is allowed precisely to give weight to the political party interest. There is in any event no legal basis for this opinion.

The National Ordinance concerning corporate governance of Curaçao (*Landsverordening corporate governance*) and the Corporate Governance Code (*Code corporate governance*) cannot prevent political appointments being made. I do not expect either that the government will change the hybrid model in the short term. Taking this as a starting point we should not only consider whether a candidate fits the job profile (and whether the Management Board or the Supervisory Board has been composed in the correct manner), but whether current or potential conflicts of interests should increasingly be considered and how this should be dealt with. The core concept here is transparency. The person who is asked to take on a management or supervisory position in a state-owned company, should in my opinion provide a complete overview of his business interests and other jobs. The person entitled to appoint him as well as the SBTNO must assess whether foreseeable conflicts of interests might occur.

For instance it will generally be undesirable if a Director or owner of a company which competes directly with a state-owned company is appointed as the Supervisory Director of the latter company. That there is also a regulation with regard to conflicting interest (Art. 2.12 Code) is in my opinion not enough. In the Code the concept of 'independence' should be tightened up.

Recently some discussion arose about the request of the Country (the government) to ask Supervisory Directors collectively to resign and the intention if necessary to dismiss them collectively. In many discourses and publications in the past five years I opposed the political appointment and dismissal merry-go-round (*e kabayito di nombramentu polítiko i di retiro*). Although such a course of action by the government was initially accepted by the court, in recent years a clear turn has been observed in

case law. The starting point of the corporate governance rules is that a dismissal decision must be based on sound reasons. The question on which SBTNO must give its opinion is whether a dismissal can reasonably be decided on the basis of the arguments put forward. Moreover, SBTNO must examine whether substantial objections to the dismissal exist. This involves individual assessment. This would have to be examined for each Supervisory Director.

A general justification along the line that the government would like to carry out its policy and considers that it can be done less well with Supervisory Directors which it has not appointed itself, is insufficient. This is probably not a pleasant message but it is one which is directly related to my view that the rules of corporate governance must be taken seriously.

I would like to add to this that what the government calls 'policy' will usually relate to its public duties: those duties must be carried out by the government via law and regulations according to public law and precisely not as shareholder of a state-owned company.[11] So not much is left of this general justification to which I have referred.

A point of difficulty is that the National Ordinance concerning corporate governance does not contain a sanction system. For instance if the state as shareholder wants to deviate from a negative advice by SBTNO with regard to the appointment or dismissal of a Director or Supervisory Director, a written response stating the reasons would suffice after which the government can just take the intended decision (Art. 9 par. 5 and Art. 10 par. 3 National Ordinance concerning corporate governance).

For that matter, this response must be given 'immediately' but this does not have any further legal meaning. An insufficient response from the government can and should usually give reasons for a further exchange of ideas between the parties involved. If the government ignores advice for unsound reasons or otherwise violates principles of corporate governance, this should also be discussed in the public domain, in particular in the States General. With regard to the government violating the standards a *zero-tolerance* policy would have to be applied.

[11] K. Frielink, *Aansprakelijkheid van de overheid als aandeelhouder* [Liability of the state as shareholder], TAR-Justicia 2 (2010), p. 109-117

Moreover, in my opinion the *autonomy* of the Management Board of a state-owned company should again become a core issue. The Management Board manages the company, not the shareholder and not the Supervisory Board. Shareholders and Supervisory Board should refrain from giving specific instructions to the Management Board. And then as an illustration I am talking about instructions for instance aimed at buying or selling a certain building, appointing or dismissing personnel, hiring advisors and breaking existing contracts. It is recommended that the Corporate Governance Code be tightened up on this point. I know that Book 2 of the Civil Code allows the incorporation of a wide power of instruction in the articles of association but the rules and principles of corporate governance are opposed to this and there should be no misunderstanding about this.[12]

The shareholder has on the one hand (i) supervisory duties in connection with the Management Board rendering account in the meeting of shareholders (therefore afterwards), and has on the other hand (ii) the power to determine the main lines of the policy to be conducted (intended for the future). It should normally remain this way. Within those ranges the Management Board is free to act.

The Supervisory Board (i) also supervises, albeit more frequently and in more detail than the shareholder, (ii) is entitled to advise the Management Board, and (iii) its approval may be required for passing certain resolutions. The list of subjects which are subject to the approval of the Supervisory Board must be as restricted as possible while it should relate to essentials. Usually it should not be the case that engaging or dismissing an employee, or bringing lawsuits are by definition subject to the approval of the Supervisory Board.

The subject list which is at the moment included in all articles of association and for which approval is therefore required, is too extensive. The starting point should be that the Management Board should be able to strive for the objectives formulated in the articles of association without first requiring approval for all sorts of things (otherwise probably in a more general sense by the annually approved budget), and the outside limit appears to me to be in any event, that the list of acts requiring approval should not lead to an erosion of the management task.

[12] In 2005 the OECD issued the '*Guidelines on Corporate Governance of state owned Enterprises*'. It has been laid down in this amongst other things that the state (as shareholder) should not be involved in the '*day-to-day business*' and that the state should allow the business full operational autonomy. The regulation in Curaçao must comply with international standards, therefore in any event with these *Guidelines* (see Art. 3 par. 1 of the National Ordinance concerning corporate governance).

As far as I am concerned the starting point should be that the state as a shareholder and the Supervisory Board in principle should not be involved in the day-to-day business.

If it would be up to me a fundamental discussion would be held about the relationship of the various bodies of a state-owned company and the outcome of this should also be incorporated into the National Ordinance and the Corporate Governance Code. I already proposed the idea to have the independence of the Supervisory Board provided for in Book 2 of the Civil Code, and therefore also the annual accounts system of the large NV, mandatory for all state-owned companies. As far as I am concerned this should also be included in the discussion. Finally, I think that it is good to give some thought to the question of whether the circle of those persons who can submit an application for inquiry proceedings should be made wider. For instance what are the objections against giving SBTNO that right? Etienne Ys expressed this recently in similar terms and indicated that this right can already be included in the articles of association of state-owned companies (Section 2:272 subsection 2 under c of the Civil Code).

If it would be up to me SBTNO should be allowed to grow into the corporate governance watchdog par excellence. Not for nothing are the two major parts of the name "supervision" and "standardization".

It should be noted that it was explicitly considered in the Explanatory Memorandum (2008, 23, no. 3) that SBTNO has no monitoring or supervisory duties with regard to the state. Thus the politicians themselves indicate that they do not want to be monitored by SBTNO. This taken in itself is already a worrying position. Since SBTNO can also give unsolicited advice there is nothing in the way of this organization precisely following the government 's comings and goings discerningly and pointing out to the government its shortcomings by means of an advice also to be made public.

Several ideas I expressed today are intended as a contribution to the discussion. In my opinion the discussion should result in an adjustment (read: tightening up) of the

National Ordinance[13] and the Corporate Governance Code and possibly also of Book 2 of the Civil Code. In its present form the National Ordinance is in my opinion still too much free of obligation and gives politicians more play than is healthy.

I conclude with a quotation from Confucius: *"It is not difficult to recognize the good, but difficult to turn it into deeds."*

I thank you for your attention!

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[13] In this connection just think for instance about the question of whether an advice by SBTNO should not also be made mandatory for the appointment and dismissal of Directors of subsidiaries of state-owned companies. For that matter the parent company should comply with the Code for instance with regard to the job profile, independence etc.

Several more recent publications from my hand concerning corporate governance:

- K. Frielink, Good corporate governance in Sint Maarten: wordt het een lange of korte weg van papier naar praktijk? [Will it become a long or short road from paper to practice?], in: K. Frielink and M. Murray, 'Twee Curaçaose Meesters', Nijmegen: Wolf Legal Publishers 2011, p. 39-57 (lecture 2 October 2009).
- K. Frielink, Good corporate governance in Curaçao: controle en rechterlijke toetsing als noodzakelijke voorwaarden voor succes [Good corporate governance in Curaçao: public monitoring and judicial review as necessary conditions for success] , in: K. Frielink and M. Murray, 'Twee Curaçaose Meesters', Nijmegen: Wolf Legal Publishers 2011, p. 71-77 (lecture 13 April 2010).
- K. Frielink, Aansprakelijkheid van de overheid als aandeelhouder [Liability of the state as shareholder], TAR-Justicia 2 (2010), p. 109-117.
- K. Frielink, annotation to the judgment of the Joint Court of Appeal of the Netherlands Antilles and Aruba 10 August 2010, JOR 2010, 296 (Asjes/Tromp et al., StIP & Selikor).
- K. Frielink, annotation to the Court of First Instance of Curaçao 23 January 2012, JOR 2012, 105 (Selikor vs Asjes).
- K. Frielink, Stop politieke benoemings- en ontslagcarrousel [Stop the political appointments and dismissal merry-go-round], Antilliaans Dagblad 14 September 2010, p. 14-15.
- K. Frielink, Visie Land op overheids-nv's verkeerd [Vision of the Country on state-owned NVs wrong], Antilliaans Dagblad 15 April 2011, p. 16.
- K. Frielink, Overheidsentiteiten, statuten en Corporate Governance in Curaçao [state entities, articles of association and Corporate Governance in Curaçao], PAO-course 29 February 2012 (to be found on Karel's Legal Blog[14]).

[14] http://www.curacao-law.com/presentaties-karel-dutch/