

Coming up: The LLC!

By Prof. Jaap W. Bellingwout and
Dr. Wino J.M. van Veen,
Baker & McKenzie
Amsterdam NV¹

Introduction

Modernising company law

After the successful completion of two major tax reforms aimed at reinforcing the attractiveness of Aruba for the offshore business and financial sector², Aruba is currently modernising its corporate law. This modernisation programme was initiated two years ago and coincides with similar developments in a number of other countries in the Caribbean and in Europe, including the Netherlands.

The modernisation will of course benefit the local business community.

The aim of the project is, however, certainly also to enhance the competitive edge of Aruba in attracting offshore business. The new legislation is also designed to provide the flexibility and reliability needed in advanced investment and joint venture structures.

The first step in the modernisation programme is the introduction of a Limited Liability Company (*Vennootschap met Beperkte Aansprakelijkheid* or VBA) in Aruba. The government's aim now is to have the new type of company available from 1 March 2008.

The Limited Liability Company (VBA)

Typology of the VBA

The VBA, which has legal personality, is the equivalent of the US Limited Liability Company (LLC) and the Sociedad Responsabilidad Limitada (Srl) known in the Latin American continent. This typology is consistent with the characteristics of VBA, which incorporates many features of the LLC and Srl types of entities. The literal translation of 'VBA' in English and Spanish is in fact 'LLC' and 'Srl', respectively. In operating its business,

the VBA may also present itself as Limited Liability Company (LLC), or as a Sociedad Responsabilidad Limitada (Srl).
Features of the VBA

The basic principles in the design of the VBA include its flexibility and transparency in combination with adequate provisions to protect the interests of minority shareholders and creditors. To mention just a few of its features, the VBA boosts *inter alia*:

- freedom of choice of denomination of the share capital, provided that it is freely negotiable;
- no minimum capital requirements;
- shareholders with full, partial, or limited liability;
- shares with full, with variable or with no voting rights;
- shares with or without par value;
- a share capital structure based on quotas is possible;
- maximum flexibility in respect of the appointment or election of directors;
- the internal structure can almost entirely be included in by-laws; the by-laws need not be notarized or published; the internal structure can also entirely be included in notarized articles of association;
- freedom of choice of language of articles of association and by-laws;
- freedom of choice between a one- and two-tier board structure;
- shareholder liability for (certain) debts of the company can be chosen so as to structure the company as a partnership with legal personality.

In addition to these features, it should be mentioned that the VBA will not be allowed to issue bearer shares and that it will be subject to annual financial reporting obligations. The annual accounts will have to be submitted to the Chamber of Commerce, but they will not be accessible to the public.

A truly "hybrid" entity

Because of these features and the utmost flexibility to tailor a VBA according to the wishes of its incorporators, the VBA can be characterized as a truly "hybrid" legal entity.

A VBA can in fact be structured either as a partnership with legal personality (including an LLP), or as a traditional type of company with a capital divided into shares and limited liability of its shareholders. The hybrid character of the VBA is supported by its fiscal position in Aruba: it will be allowed to opt for fiscal transparency treatment in Aruba (disregarded entity status), which effectively means that it will be treated as a fiscally transparent partnership for Aruba corporate income tax, dividend withholding tax and personal income tax purposes. As a result, the VBA will also become an interesting tool for international tax planning purposes.

From a company law perspective and consistent with the "incorporation system" applied in Aruba³, a VBA will always be governed by Aruban company law, despite its place of effective management and irrespective of where it carries out its activities. In other words, from a company law perspective, no substance requirements apply to the VBA, other than the requirement of having a registered agent who is a resident of Aruba. (Please see explanation below).

Incorporation

The VBA can be incorporated in a number of ways, some of which will be mentioned in the next paragraph. The VBA can be incorporated by one or more individuals or legal entities. The incorporation of a VBA requires a notarial deed of incorporation and a

ministerial certificate of no objection.⁴ Registration with the Chamber of Commerce is compulsory and is handled by the notary executing the deed of incorporation.

Registered agent

For the offshore sector, it is relevant to note that the VBA must have a registered agent (*wettelijk vertegenwoordiger*) who is a resident of Aruba. The position of registered agent can be filled by a company that has a permit from the regulatory authorities in Aruba to perform management services.

If, however, the managing director of a VBA is an individual, who is a resident of Aruba, the requirement of having a registered agent does not apply. This is also the case if the VBA is managed by a legal entity that has a managing director who is a resident of Aruba.

New tools!

Merger, demerger and conversion

Along with the introduction of the VBA, corporate law in Aruba is equipped with a number of tools to facilitate reorganisations. The most important of these are perhaps the introduction of the statutory merger (*juridische fusie*) and statutory demerger (*juridische splitsing*). These tools provide for the transfer of assets and liabilities by operation of law.

In respect of companies which have been dissolved as a result of the merger or demerger, no liquidation procedure applies. The shares in the disappearing companies are cancelled and replaced, by operation of law, by newly issued shares in the acquiring companies (with a few exceptions such as an upstream merger of a wholly owned subsidiary to a parent company).

Also the concept of "conversion" will be introduced. Conversion is a way of changing legal forms in such a way that the legal entity continues to exist. For example, a Naamloze Vennootschap (NV) or an Aruba Exempt Company (AEC) can be converted into a VBA without having to dissolve and be liquidated first.

Cross-border mergers and conversions

A noteworthy feature is that mergers and conversions will also be possible in a cross-border context, either inbound or outbound. For instance, a VBA can be merged or converted into a Delaware LLC, provided that Delaware law allows such a merger or conversion.

Likewise, a VBA can be formed by means of converting a foreign company into a VBA. This conversion can also be realised in a cross-border merger pursuant to which a foreign (acquiring) company is converted into a VBA with

its registered office in Aruba. Obviously, these types of cross-border mergers and conversions are allowed only if the legal and regulatory provisions of the law governing the foreign company are complied with.

Capital and capital requirements

The VBA is a company with a capital divided into shares. A contribution on shares is compulsory. Other than this, no minimum capital requirements apply in respect of the VBA. Therefore the issued and outstanding capital must be at least equal to one cent if one share is issued. The shares and thus the share capital may be denominated in a foreign currency, provided that currency is freely negotiable.

The shares can be transferred. However, the articles or by-laws can determine that all or certain shares are non-transferable or cannot be transferred within a certain period ('lock-up'). Also, the articles or by-laws can stipulate that the transferability of the shares is subject to prior offering of the shares to one or more other shareholders or to prior approval of, for example, the shareholders' meeting or board of managing directors.

In order to promote flexibility and transparency, the new legislation provides for a system of creditor protection against distribution of profits or reserves and repayment of share capital to shareholders. The aim of these provisions is to offer a sound basis for those who wish to use their share capital for operational business purposes, for example, to have access to loans on better conditions. Those who do not need this can opt for a lower share capital and thus enjoy fewer restrictions on the distribution of profits and repayment of capital. The amount of the share capital, and changes thereof, are entered into the trade register and are made accessible to the public by the Chamber of Commerce.

Shares and shareholdership Voting rights

The starting point in the VBA legislation is that all shares offer the same rights. In respect of voting rights, therefore, the basic rule is 'one share, one vote'. This rule is in no way compulsory. The articles or by-laws may state, for example, that the voting rights relate to the amount with which a shareholder participates in the share capital, or that each shareholder has one vote, irrespective of the number of shares or the amount of his participation in the share capital ('one man, one vote'). Moreover, the articles or by-laws may state that the voting

rights differ in respect to certain resolutions as compared to other resolutions, or that certain shares confer no voting rights at all.

Entitlement to profits, reserves, liquidation proceeds

In respect of the entitlement to profits, reserves and liquidation proceeds, the system is comparable to that regarding voting rights. As a rule, each share gives a pro rata entitlement to a part of the profits, reserves and liquidation proceeds. The articles or by-laws may, however, provide for entirely different profit distribution rules and even exclude a shareholder from any entitlement to the company's profits, reserves and liquidation proceeds.

Additional arrangements, obligations and requirements for shareholders

The provisions in respect of the shares are flexible in yet another perspective. The articles or by-laws may also impose additional obligations on shareholders. These can include, for example, an obligation to provide for additional funding with equity or debt, to accept liability for certain company debts, to refrain from competitive activities, to solve disputes by means of arbitration, and the like. Compliance with such obligations can be enforced by suspending shareholder rights, converting shares or expelling the shareholders from the company.

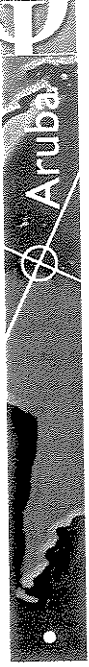
These provisions can be included in the by-laws (instead of in the articles), which as a matter of fact will not be made available to the public. This will offer the parties comfort that their arrangements are embedded in the corporate documents, without being made public. These features of the VBA are specifically tailored to the needs of venture capital and joint venture structures.

Protection of minority shareholders

Flexibility in respect of the internal structure and the ability to impose additional obligations on shareholders need to be balanced by providing adequate protection to minority shareholders and shareholders without voting rights. The proposed legislation provides this protection. The main features of these provisions are set out below.

Additional obligations can be included in the articles or by-laws, but cannot be imposed on shareholders without their consent. Furthermore, issues such as voting rights, financial rights, the right of appointment and dismissal of directors or the right to give instructions to the managing directors, are so fundamental in the arrangements initially agreed upon, that changes therein require a unanimous vote.





Moreover, in respect of specific rights of holders of shares of a certain type (including non-voting shares), a change in the articles or by-laws requires a majority vote of those shareholders to agree to the amendments.

These provisions are flexible to a certain extent. If a specific change is envisaged in the articles or by-laws prior to the amendment, the shareholders are deemed to have accepted this change in advance.

In respect of the protection of shareholders, we note that the proposed legislation provides for an exit right for minority shareholders in case of an outbound cross-border merger or cross-border conversion. This right pertains only to shareholders that have opposed the merger and have requested compensation for their shares. The amount of this compensation is determined by independent experts. The procedure is designed in such a way that the invocation of the exit right will not have to delay the merger or conversion for more than a few weeks. The articles or by-laws may determine that the exit right does not, or not under all circumstances, apply.

Taxation

The VBA will be subject to corporate income tax at a tax rate of 28% and to dividend withholding tax of 5 or 10% in Aruba, unless it has opted for disregarded entity status, as mentioned above. If the VBA has not

opted for disregarded entity status, it will be allowed to benefit from all the tax facilities already available to ordinary companies (NVs) and for Aruba Exempt Companies (AECs). This means that a VBA can benefit from the Imputation Payment Company regime⁵ and from the corporate income tax exemption for qualifying activities⁶. The VBA can also benefit from the participation exemption for the shareholding in qualifying subsidiaries. No specific roll-over relief will be available to VBAs engaged in mergers and conversions.

Conclusions

The VBA and the tools that come with it, meet all prevailing modern standards of flexibility, transparency and reliability for both onshore and offshore business. The VBA is suitable for relatively simple business activities but is designed also to cater to the specific requirements in sophisticated investment and joint venture structures. Under Aruba's "incorporation system", a VBA can also be used for activities in other jurisdictions. As such, this new legal entity type provides a better alternative for existing types of companies in many other jurisdictions. The hybrid character of the VBA, both from a company law and from a tax law

perspective, makes this new company type an excellent tool for international tax planning purposes.

END NOTES:

1. The authors are advisors to the Aruba Financial Centre and the Ministry of Finance and Economic Affairs of Aruba. Dr. Wino van Veen is the principal drafter of the upcoming LLC legislation.
2. See *Offshore Investment - Issue 162, February 2006*.
3. The Netherlands and the Netherlands Antilles, as well as most Anglo-Saxon jurisdictions, apply the "incorporation system," as opposed to the "real seat" system applied in other European countries (i.e., France, Germany, Spain, and Italy).
4. The supervision is restricted to the antecedents of the incorporator(s). The content of the articles of association is not subject to investigation.
5. Under the IPC regime, a shareholder of a company that is subject to the ordinary corporate income tax rate of 28% is entitled to an imputation payment of 26% from the government upon a dividend distribution by the company. The distribution of dividends and the imputation payment are subject to dividend withholding tax.
6. These activities include: holding company activities, passive investment (other than in real estate), financing or group financing activities, and the exploitation of IP.



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IMC International Management & Trust Company
L.G. Smith Boulevard 62, Miramar Building, Suite 301
Oranjestad, Aruba

Tel.: + 297-5823301 | Fax.: + 297-5836454

Contact: Marc Ingwersen (marc.ingwersen@imctrust.com)

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