



Minority Opinion From The ABC Board of Directors Regarding the Candidacy Issues in The Upcoming Election

This year's election for Aruba Beach Club Board Members has prompted owners to ask for clarification and complete transparency regarding this subject.

It is common knowledge that the membership voted to institute term limits for Board Members to two five-year terms in the 2012 election. The results of the 2012 election, as publicized in the 2013 convocation were 44,637 in favor (85%), 4,032 against (7%) and 4,088 abstained/invalid (8%). This overwhelming response to term limits illustrates and memorializes the membership's desire to institute term limits for Board Members.

The membership's official voting results were very clear in the member's desire to institute term limits of no more than 2 consecutive 5-year terms. The official results were also made public to the membership at the 2012 annual meeting of members, and the results were published in the 2013 convocation, as mentioned above.

The current controversy, as we understand it, centers around the Club and its Board of Directors responsibility to honor the will of the membership as per the published results of this agenda point voted on in the 2012 convocation. Some would argue no as the articles were not filed back then, while other would argue yes, because the subject of term limits was properly voted on as evidenced in the official minutes, the results being announced and publicized to those owners in attendance at the Annual Meeting as representing the will of the membership.

The subject of term limits arose once the Board was advised that the articles have not been filed with the Aruban Government.

In an attempt to amicably resolve this mounting controversy, the Board debated among themselves the topic of allowing this current Board member to run for a third consecutive term. A vote among the five members of the Board to decide if the member in question should have their name placed on the upcoming ballot, took place. The result of this vote was 3 yea (Kevin Foley, Rene D Maduro & Karen (Kandy) Cottrill and 2 against (Cindy Martorella & Arthur Langbaum) resulting in the existing Board members name appearing on the 2021 ballot.

Before the release of this information, we found ourselves in the midst of a heated controversy in which many owners have been questioning the ethics and integrity of the entire BOD.

Although proper procedure would dictate the member in question should have recused himself, that member with support from two other Board members chose not to follow that procedure

which should be considered a conflict of interest. It should also be noted if the member in question had recused himself, the result may have been an evenly split, which would not have allowed his name to appear on the ballot.

These two Members of the Board want to be clear that this controversy exists, not because of this member's performance or dedication to the Club, but his desire and insistence not to honor the will of the membership and its desire to honor the term limits that were voted on and passed.

This member has publicly and privately stated in meetings, public comments and via social media "let the owners decide!".

We wholeheartedly agree with that statement and we encourage every member to exercise your right to vote. However, we believe your decision should be a fully informed one.

Following this correspondence is the official written opinion of Ronald Wix, the Clubs attorney on this matter, that was presented to the Board on official letterhead dated January 22, 2021. We invite the ownership to review this opinion and come to your own conclusions. We have also invited the Board Member involved with this controversy to present his attorney's written opinion presented with his letterhead on this matter as well.

Respectfully,

Cindy Martorella – Vice Chairman
Arthur Langbaum – Project Manager



To Aruba Beach Club Cooperative Association (“ABC”)
Att. Board of Directors

Aruba, January 22, 2021

Re: legal opinion regarding regime about term limits applicable to ABC board member;

Dear Members of the Board,

Introduction

As agreed, I am providing you with my legal opinion with regards to the re-electability of a Board Member after the changes in the Articles of Incorporation dated January 20, 2021.

By notarial deed of January 20, 2021, the ABC Articles were amended and restated. For purposes of this opinion I will assume that all procedures and formalities required to change the Articles of Incorporation were complied with. The amended and restated Articles now contain a provision in article 18 section 3, which states that a board member can only be re-elected once. In other words, the amended and restated Articles introduced term limits for board members.

The question

Can a sitting Board Member that was elected and re-elected prior to the aforementioned change in the Articles of Incorporation be re-elected as a board member after the change?

Short Answer

The short answer to this question in my opinion is no¹. Based on the term limits regime of article 18 section 3 of the ABC articles, a board member can only be re-elected once. I will elaborate on the reasoning for this conclusion below.

Documents reviewed

In preparing this opinion I have reviewed:

¹ I emphasize “my opinion” Because I know that at least 1 other lawyer does not share my opinion and he came to the conclusion that a Board Member can still be re-elected after the changes were done regardless the fact that he already has been re-elected prior to the changes.



- The amended and restated ABC articles of association;
- The minutes of the General Members Meeting dated April 10, 2012 approving these changes;
- The Legal Opinion issued by a colleague in a similar case. In his Legal Opinion my colleague concludes that a Board Member can be re-elected after the change to the Articles of Incorporation (“Articles”) regardless the fact that he/she has already been re-elected twice *prior* to the changes of the Articles introducing a term limit regime;
- Such legislation, literature and case law that I deemed relevant;

Reasoning

I will first address the opinion given by my colleague and elaborate on why I do not agree with his conclusion.

1. My colleague argued that the introduction of a term limit (much like article 18 section 3 of the ABC Articles) should take into account the *intention* of the General Meeting of Members that approved the change to this article. Furthermore, he argued that the intention of the General Meeting of Members was, that the term limits would only apply to terms which commenced after the amend of Articles entered into effect;
2. He further argued that the article 18 section 3 of the articles cannot be applied with retro-active effect (*ex tunc*) since it is generally accepted that amendments of articles of legal entities only have immediate effect in the period as of the adoption of the amended articles going forward (*ex nunc*). Taking the fact that a sitting Board Member was already elected and re-elected prior to the changes into account, would imply retro-active application of the amended Articles according to my colleague.

I find neither of these two arguments persuasive for the following reasons

Interpretation of the ABC articles must be based on objective interpretation (the emphasis is on the text/grammar of the article) and cannot be based on a subjective interpretation (intention of the maker). It is generally accepted that a legal entity’s company or association articles must be interpreted objectively. In other words, the “intent” of a Member of group of Members is not decisive for the interpretation of article 18 section 3.

This is based on the following considerations:

1. Company or association articles are meant to serve as the binding and mandatory governance structure for the legal entity and its members, shareholders, officers and directors.
2. These articles are also meant to bind future members, shareholders, officers and directors, who may not have been present when the articles were first adopted or

subsequently amended, and who should therefore be able to rely on an objective interpretation of the articles, based on *the wording* of these articles.

3. Third parties must also be able to rely on the governance structure provided for in the articles and such third parties must therefore also be able to rely on an objective interpretation of the articles, based on *the wording* of these articles.

To summarize, company or association articles should not be regarded and interpreted as a contract between the founders of the legal entity (the “contract-doctrine”). Such articles are rather independent, mandatory rules containing the governance structure for the legal entity and governing the relationships between all stakeholders associated with the legal entity (the “institutional-doctrine”).

These articles can therefore only be interpreted objectively, based on their wording. The intention of the founders is irrelevant in such interpretation.

For support for the above I refer to the following :

- Asser-Rensen 2 III 2012 par. 40 and following;
- Asser-Maeijer-Kroeze 2-I-2015 par 175 & 181;
- Waaijer, Statuten en Statutenwijziging page 14;
- ECLI:NL:PHR:2019:768

An objective interpretation of article 18 section 3 of the ABC articles can therefore not take into account the subjective interpretation of the intention of the General Meeting of Members. Therefore, an objective interpretation, based on the wording of the article in question, leads to the conclusion that a Board Member cannot serve more than 2 terms.

An objective application of article 18 section 3 to the question whether a sitting Board Member that has already been re-elected once (for a second term) can run again for a position on the Board leads to a negative answer as he/she already had two (2) consecutive terms. This interpretation does not result in retro-active application of this provision.

The argument presented by my colleague in his opinion correctly assumes that the amended Articles do not have retro-active effect and application (*ex tunc*) but can only be applied with immediate effect as of the date the amended articles entered into force, going forward (*ex nunc*).

The manner in which my colleague’s opinion applies this principle to the question at hand however is wrong.

To demonstrate the above, I want to refer to the generally accepted principles regarding transitional law, which can be applied analogously to the question of whether taking

anterior facts into account implies that the ABC Articles have immediate or retro-active effect.

Immediate versus Retro-active effect of a new law or regulation

The subject matter is most clearly explained in the “Aanwijzingen voor regelgeving” or “Directions for drafting legislation” established and used by the Dutch Ministry of Justice.

Direction 5.61 Immediate effect

Immediate effect of a new rule of law or regulation does not mean that the new law or regulation only applies to matters which occur after the new rule becomes effective. On the contrary, immediate effect means, that the new rule or regulation also applies to whatever situation already exists at the time the new law or regulation goes into effect. Existing situations may be factual or may concern legal positions and relationships. Such existing situations etcetera are referred to as “anterior facts”.

Direction 5.62 Retro-active effect

Retro-active effect means that the legal impact of the new rule or regulation not only applies to existing or anterior facts, legal positions or relationships going forward, but that these legal effects also apply to and directly impact anterior facts, legal positions and relationships up to such point in time in the past, as explicitly provided for in the law or regulation.

The Aquaelectra case

A Supreme Court case in which the issue of immediate or retro-active effect of the so-called “enquete-regeling” under the corporate law of Curaçao, which was introduced in 2012, was decided is HR 6/7/2018 NJ 2019/394 (Aquaelectra case). This case provides a helpful illustration of how the subject matter should be handled. The lengthy opinion of the Attorney General is most instructive.

At issue was whether the Appeals Court could order an investigation, pursuant to the “enqueterегeling”, into alleged mismanagement of a public utility company, owned by the government, based on anterior facts, which occurred prior to 2012, when the “enqueterегeling” was first introduced into law.

The Supreme Court ruled that the “enqueterегeling” had immediate effect as of January 1, 2012, but that this did not mean that the Appeals Court could not base its decision to investigate misconduct by directors of Aquaelectra pursuant to the “enqueterегeling”, based on anterior facts, which occurred prior to 2012. Taking such anterior facts and circumstances into account, by no means implied retro-active application of the “enqueterегeling”. Taking anterior facts into account is merely a



direct result of applying the “enqueterегeling” with immediate effect as of January 1, 2012.

Although the facts of this case were different from the present ABC case, this does not detract from the general validity of this judgment of the Supreme Court on this specific point. Supreme Court rulings in general apply to future cases.

Application of the above principles to the ABC situation

Applying the above principles to ABC case I am of the opinion, that the immediate effect of the amended ABC Articles, means that these articles not only apply to facts and circumstances, which occur after the amended Articles entered into force, but also to *anterior* facts and circumstances, that existed at the point in time when these articles entered into effect.

To illustrate the difference between immediate effect and retro-active effect of article 18 section 3, I will use the following hypothetical example.

If we assume, for argument’s sake, that a sitting Board Member had been appointed as a ABC Board Member for the first time in 2009 and re-elected for the first time in 2014 and re-elected for a second time in January 2019, then retro-active effect and application of article 18 section 3 would mean, that his/her re-election in January 2019 would be considered null and void and that any actions he/she took as Board Member since his second re-election in 2019 would lack legal validity.

Immediate effect and application of article 18 section 3 on the other hand would only mean, that this Board Member could not be re-elected for another term once his third term, which commenced in January 2019, ended, since he would then already have served more than the maximum of two terms.

Therefore, since this Board Member has already been re-elected as ABC board member in 2019, he is not eligible for re-election once his current term expires, because article 18 section 3 of the ABC Articles prohibit re-election of a board member who has already served two terms.

Additional comment

As I informed the Board this merely my opinion and there are attorney’s that do not share my opinion as I outlined above. I could not find any case law that addressed this very specific issue. I encourage the Board to request a second opinion if need to. However, the Board is not bound to my opinion in anyway or form as, on basis of Article 28 of the Articles of Incorporation, *all matters which are not covered by the Articles of Association or the By-Laws shall be resolved by the Board.*

Should the Board have any additional question(s) please do not hesitate to contact me.



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