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Revision of Swiss Corporate Law

The revision of numerous provisions of the Swiss Code of Obligations pertaining to Companies Limited by Shares (*Aktiengesellschaft / société anonyme*) has been passed to modernise Swiss Corporate Law and integrates the most recent legislative changes. The text adopted by the Swiss Parliament on 19 June 2020 includes the integration of the Ordinance against Excessive Remuneration in Listed Corporations (in force since 1 January 2014), aims at improving corporate governance for listed and non-listed companies, in particular with respect to gender equality, and sets new flexible rules in regard to fluctuations in share-capital while strengthening shareholder rights. The revision also aligns itself with the new provisions on accounting and includes proposals on new transparency rules for economically significant commodities companies.

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Overview

The revision of Swiss Corporate Law includes many amendments and new features, in particular by providing for gender representative quotas in top management of listed companies, integrating the remuneration restrictions for listed companies previously set forth in the Ordinance against Excessive Remuneration in Listed Corporations (**ExCompO**), introducing new flexible share capital rules (*e.g.* on the minimal nominal value of the shares, share capital currency and variation, reserves or clear rules on interim dividends distributions), enhancing shareholders rights (*e.g.* while setting a lower threshold to convene a general meeting or require a special audit, granting extended information rights), providing more flexibility in relation to general meetings of shareholders (*e.g.* admissibility of general meetings abroad, in several venues or virtual general meetings), or allowing to provide for an arbitration clause in the articles of association as dispute resolution mechanism for such issues arising from corporate law.

Executive Summary

Gender Guidelines for Top Management

Five (5) years at the latest after the entering into force of the revised provisions, both genders must be represented to a minimum of 30% on the board of directors of listed companies. Ten (10) years at the latest, both genders must be represented to a minimum of 20% amongst the executive management of listed companies.

Based on a "comply or explain" system, failing to comply with the required thresholds within those time periods will not result in fines or sanctions to the company, but the company's remuneration report will have to state the reasons for not fulfilling the respective gender quotas.

Integrating the ExCompO and Strengthening Shareholder Rights

The revised corporate law further integrates the ExCompO provisions with a few changes and additions, such as the obligation to mention in the remuneration report the activities of members of the board of directors and top management, in comparable functions, for other companies with an economic purpose, or further restrictions on payments based on non-compete clauses. Private (i.e. non-listed) companies may decide to become subject to any of the new (ExCompO) rules set out in the revised corporate law.

Flexible Company Capital Requirements

The introduction of a "capital band" system allows companies to grant the board of directors the ability, within a five-year (5) period, to increase and/or decrease the share capital by up or down 50%. The company's share capital may further be set in a foreign currency and the minimal nominal value of the shares must be greater than zero (previously one (1) Swiss centime at least) and the revised provisions set forth clear rules for interim dividends distributions, which were controversial in practice so far.

Shareholders' Rights and Meetings

For listed companies, the threshold for shareholders to convene a general meeting is lowered from 10% to 5% of the share capital or the voting rights (unchanged at 10% for non-listed companies) and the thresholds to request the inclusion of an item on the agenda are now set at 0.5% for listed companies while lowered from 10% to 5% for non-listed companies. Books and records are now accessible to any shareholder representing at least 5% of the share capital or voting rights of the company, in so far as the information therein is necessary to properly exercise shareholder rights.

The board of directors may freely determine the place for holding a general meeting, including abroad if so permitted in the articles of association, provided however, that such a location does not put an undue burden for any shareholder to exercise its rights. Meetings may be held in several different venues (in Switzerland or abroad) provided that speeches are broadcast live in each venue. General meetings may be held virtually, i.e. through use of electronic media, if allowed so by the articles of association and provided that all participants are able to take part in and vote simultaneously at such a virtually held general meeting.

Greater Transparency in the Commodities Sector

Under the threat of criminal sanctions, commodities companies must now provide a special annual report on all payments made to public authorities exceeding the amount of CHF 100'000.

Subject to international treaties, this obligation may be extended by the Swiss Federal Council to commodity trading companies.

Liquidity Focused Restructuring Rules

The revised law recognizes the importance of illiquidity leading to bankruptcy and, while not fundamentally amending the former provisions on insolvency (aArt. 725 et seq. CO), provides for a major reorganization and addition through the codification of existing rules or practice.

The board of directors has the duty to monitor the company's liquidity and to take appropriate action in case of threatening insolvency. Facing a risk of insolvency, risk mitigating measures must be taken by the board of directors, including if necessary proposing measures to the general meeting and asking for a moratorium on debt restructuring. The existing balance sheet based duties of the board of directors in the event of capital loss or over-indebtedness remain in place with certain clarifications and amendments.

Revision of Swiss Corporate Law

Context of the Revision

The revision of Swiss Corporate Law is the result of the Swiss Federal Council's will to modernize Swiss corporate law and is focused on making the regulations more flexible in regard to the founding of a new company and to capital fluctuations, as well as strengthening the shareholders' rights, and further introduces restrictions on executive remuneration (as a consequence of the Minder Initiative). The purpose sought was also to make financial flows within the commodities sector more transparent and to introduce guidelines on gender representation, at senior executive level, in major listed companies in order to promote gender equality.

Gender Representative Quotas

The Corporate Law Reform introduces a new legal framework in the field of corporate governance by setting gender representation quotas. Representation of each gender in listed companies limited by shares ("listed companies") should reach 30% of the board of directors and 20% of the executive management. These representation quotas aim at intensifying the economy's efforts to promote women who are still clearly underrepresented in managerial positions.

According to the "comply or explain" principle, listed companies that do not comply with the abovementioned thresholds shall state in the remuneration report the reasons for failing to reach the quotas and explain the actions planned or already taken to promote the underrepresented gender.

With regard to transitional periods, the obligation to disclose information in the remuneration report shall be fulfilled at the latest in the financial year beginning five (5) years after the entry into force of the new corporate law, concerning the board of directors, and ten (10) years after, concerning the executive management.

Minder Initiative Implementation

As part of the revision of the Swiss Corporate Law, the provisions currently included in the ExCompO, which came into force at the beginning of 2014 as a result of the "Minder Initiative", are to a large extent transferred to the Swiss Code of Obligations (CO).

Sign-On Bonuses

While severance payments to members of the board of directors, the executive board and the advisory board or persons closely related to them have already been inadmissible under ExCompO and will still not be permitted according to the revised law, the new law also prohibits sign-on bonuses if they do not compensate for any verifiable financial disadvantage.

In order to be admissible, sign-on bonuses can, therefore, only be paid as a compensation for the loss of claims against the previous employer and they cannot be paid for the work to be done for the new employer.

In addition, sign-on bonuses must be disclosed in the remuneration report.

Vote on Remuneration

In line with the rules currently applicable, the vote on the remuneration of the board of directors, the executive board and the advisory board of listed companies is an inalienable power of the general meeting.

The articles of association must contain provisions detailing the voting process of the general meeting on remuneration.

Disclosure of Board of Directors and Executive Management's Involvement in Other Companies

As a novelty compared to the ExCompO, activities of the members of the board of directors, the management board and the advisory board, in comparable functions, for other companies with an economic purpose, must not only be restricted in

the articles of association (i.e. limited in terms of number of mandates), but they must also be mentioned in the remuneration report. The information in the remuneration report must include the name of the member, the name of the other companies and the function exercised.

This disclosure obligation corresponds to an internationally accepted approach. It allows shareholders to exercise a better control by allowing them to assess election proposals for the board of directors, to assess possible conflicts of interest and the availability of the respective person.

Opt-In for Non-Listed Companies

The provisions of the ExCompO which are being integrated to the CO as part of the reform of the stock corporation law apply to Swiss companies listed in Switzerland or abroad. Foreign companies remain outside the scope of these rules.

However, non-listed (Swiss) companies limited by shares ("non-listed companies") may provide in their articles of association to apply the respective provisions in whole or in part.

The provisions adopted from the "Minder Initiative" are, therefore, only applicable to listed companies and companies that have opted for the corresponding provisions to be applicable according to their articles of association.

No Restriction on Offices for Non-Profits without Economic Purposes

However, as mentioned above, the obligation to restrict and disclose such activities in the remuneration report only applies to comparable activities in other companies with an economic purpose.

Therefore, the new law does not contain restrictions on mandates/activities for non-profit organizations without economic purposes, such as for the foundation board of a tax-exempt foundation, nor do such activities have to be disclosed in the remuneration report.

Value of Non-Compete Covenants

The new law also contains restrictions on payments based on non-compete clauses.

In the ExCompO a corresponding regulation had been deliberately omitted, among other things because of the lack of a legal basis in Art. 95 paragraph 3 of the Swiss Federal Constitution.

Remunerations which are paid on the basis of a non-compete clause to members of the board of directors, as well as members of the executive board and the advisory board or parties closely related to them are inadmissible if they exceed the average remuneration of the last three (3) financial years paid to that person or if they are paid due to a non-compete clause not justified from a business point of view.

According to the explanations of the Swiss Federal Council, payments of remunerations due to a non-compete clause are justified from a business point of view if they safeguard interests of the company worthy of protection. This also applies for the duration of non-compete clauses which must also be justified on business grounds. For example, a payment for a non-compete clause lasting several years is not considered to be justified on business grounds, where no insight into sensitive data has been gained.

Other Remuneration Payment Restrictions

The new law contains further restrictions on other types of remuneration. Most of these restrictions have been transferred from the ExCompO to the CO.

Besides the new restrictions on sign-on bonuses and payments for non-compete clauses, a new restriction with regard to remunerations in connection with previous activities as a member of a governing body of the company which is not in line with the market has been adopted.

Payment restrictions also apply for remunerations to members of the board of directors, the management board and the advisory board for activities in companies which are controlled by the company subject to the relevant provisions if they were a) inadmissible if paid directly by the (controlling) company or b) if they are not provided for in the articles of association of the (controlling) company or c) if they have not been approved by the general meeting of the (controlling) company.

Maximum Number of External Mandates

The articles of association of listed companies must contain provisions on the maximum number of activities that the members of the board of directors, the management board and the advisory board may perform in comparable functions in other companies with an economic purpose.

In contrast to the provisions of the ExCompO, all such "comparable activities" are now covered in the new provisions of the CO and must therefore be restricted by the articles of association. Within the scope of ExCompO, the articles of association only had to limit the number of mandates in top management and administrative bodies, for example mandates as a member of the board of directors of a company limited by shares. Therefore, until now, mandates as members of the management board in other corporations have not been subject to the corresponding limitations under the ExCompO.

By contrast, corresponding activities for group companies (companies that are controlled by the company or that control the company) need not be restricted in the articles of association.

Transparency Requirements of Commodities Companies

Companies that are active in the extraction of minerals, oil or natural gas or the felling of wood in primary forests (commodity companies; *Rohstoffunternehmen; entreprises de matières premières*) will in the future have to draw up and electronically publish an annual report on payments to state institutions. The report must be published within six (6) months from the end of the financial year and must be publicly accessible for at least ten (10) years. This amendment affects only those commodity companies that are obliged to undergo an ordinary audit.

The report must disclose all payments exceeding CHF 100'000 per year, be it a single payment or payments in instalments. The new provisions in Art. 964a ff. nCO are aligned with two EU directives (2013/34/EU and 2013/50/EU) which came into force in 2013. The United States of America also have similar provisions.

The reason for these new provisions is that the majority of commodities are extracted in developing countries where constitutional structures are often not sufficient. Thus, there are concerns that funds paid to the government in these natural resource extracting countries may be swept away due to corruption and mismanagement or in the worst case be used to finance conflicts. The reports on the payments are intended to contribute to improving transparency. A trend towards more transparency has emerged internationally in recent years, which has led to pressure on Switzerland to adopt such provisions.

Corporate Law Changes

Flexibility for Share Capital and Dividends

a. Nominal Value of Shares below One (1) Swiss Centime

Under the current law, each share must have a par value of at least one (1) Swiss centime.

With this new bill, the Swiss Parliament has now voted in favor of greater flexibility in this respect without abolishing the basic principle of the fixed par value. In the future, the law only requires the nominal value of each share to be greater than zero. This allows for almost the same degree of flexibility as the introduction of the accountable par value share (*unechte nennwertlose Aktie, action sans valeur nominale improprement dite*) would have reached (if not cancelled from the final text approved by the Parliament), without the need of far-reaching adjustments to corporate law. In particular, companies will be able to split their shares freely without encountering unnecessary difficulties.

However, companies issuing share certificates have to cancel those certificates in the event of a split and issue new share certificates. While many companies have not issued share certificates at all, the disadvantages resulting from this requirement are of rather minor practical importance and will probably lead to even fewer companies having share certificates issued in the future.

b. Share Capital in Foreign Currency

While today the share capital must be denominated in Swiss francs, it will be admissible under the revised law to denominate it in a foreign currency if such currency is essential for the business activities of the company. The Swiss Federal Council will further define the currencies permitted. Companies with share capital in a foreign currency will have to keep accounts and file financial reports in the same currency.

The general meeting can decide to change the currency of the share capital effective as of the beginning of any financial year, resulting in a revision of the articles of association. Therefore, not only newly incorporated companies can benefit from this new flexibility.
This amendment mainly simplifies capital contributions and dividend distributions in foreign currencies. While such transactions are admissible under current law already, they are slightly cumbersome due to the requirement to convert the foreign currency into Swiss francs.

More importantly, the admissibility of share capital in foreign currencies eliminates the existing divergence between the Financial Reporting Law (*Rechnungslegungsrecht, droit comptable*), which already allows bookkeeping and accounting in a foreign currency, and company law. This difference has led to various uncertainties and additional financial expenses, which will no longer occur in the future due to the newly created coherence.

c. Capital Band

One of the major amendments is the introduction of the capital band (*Kapitalband, marge de fluctuation du capital*). This is a new legal instrument providing greater flexibility for capital increases and reductions. With the introduction of the capital band, the provisions relating to the authorised capital increase will be repealed.

Capital increases under the capital band are very similar to authorized capital increases under the current law. As it is already the case with the current provisions, the upper limit of the capital band is set at 150 % of the existing share capital. The period to conduct such a capital increase is, however, significantly extended from two (2) to five (5) years under the new law.

A further innovation is that the articles of association may now authorize the board of directors to reduce the existing share

capital by down to 50 % in the same way as it can be increased. Said authorization is only permissible for companies that have not opted-out from the requirement to conduct a limited audit.

Contrary to the Swiss Federal Council's proposal of 2016 which contemplated early creditor protection (i.e. prior to the general meeting's resolution on capital band), the revised provisions stipulate that for every capital reduction carried out under the capital band provisions, those provisions on securing claims, interim accounts and the audit report of the ordinary capital reduction are applicable. In cases where the board of directors would like to reduce the share capital in multiple steps during the period of the capital band, the adopted version of the law is slightly more cumbersome than the Federal Council's proposal of 2016 and limits to a certain extent the intended flexibility of the capital band for capital reductions.

If the general meeting resolves to (ordinarily) increase or reduce the share capital during the period for which the capital band was adopted, the capital band provision will lapse.

d. Capital Increases

In addition to the above, the procedure for the ordinary capital increase and the conditional capital are adjusted in some minor points.

The deadline for the board of directors to register the ordinary capital increase with the commercial register is extended from three to six months. The period starts from the date of the resolution of the general meeting and the deadline is met if the application for the registration is filed in time.
With regard to the conditional capital increase, the bill provides an extension of the persons entitled to subscribe for the new shares to existing shareholders, members of the board of directors and third parties.

e. Capital Reductions

In addition to being embedded in the same chapter as the capital increases and the capital band, the ordinary capital reduction also undergoes certain amendments in terms of content.

As with the ordinary capital increase, a six-month (6) period is now set for the registration of the capital reduction with the commercial register. This period, which can be shortened by the general meeting but not extended, primarily serves to distinguish the ordinary from the authorised capital reduction under the capital band.

Also, instead of three (3), only one (1) call for creditors will be required in the future. Since nowadays these calls are usually published on three (3) consecutive days, their purpose of preventing creditors from missing the calls is already largely defeated. Together with the fact that calls for creditors can be viewed online in the Swiss Official Gazette of Commerce for the past three years; the adjustment is undoubtedly justified. The call for creditors will also be permitted before holding the general meeting. Depending on the circumstances, this option gives the board of directors more leeway and increases transparency for the shareholders.

However, especially in cases where it is not clear whether the general meeting will approve the capital reduction, the assembly is likely to be held before the call for creditors. Additionally, if the modalities of the capital reduction should change after the call (i.e. if the general meeting resolves on a different amount for the capital reduction) the call must be repeated.

Creditors who wish to do so will have to register their claims to be satisfied or secured after the call within thirty (30) days instead of two (2) months. Finally, the company will not have to secure claims if it can show that the claim in question is not jeopardised by the reduction of the share capital. This is presumed if the audit report is available.

f. Reserves

The provisions concerning reserves are simplified in various respects and adapted to international practice. A distinction between capital reserves (*Kapitalreserven, réserves issue du capitale*) and retained earnings (*Gewinnreserven, réserves issue du bénéfice*) is made. As this distinction came into force in the Financial Reporting Law on January 1, 2013 already, the present revision brings more coherence in this respect.

The capital reserve originates from different kinds of capital contribution, in particular from *Agio*. Until the landmark decision of the Swiss Federal Supreme Court in 2014, there was a great deal of academic controversy as to whether *Agio* could be distributed to shareholders. The present bill codifies the practice that has been in place since this decision was passed and lays down the guidelines. The capital reserve may be distributed back to shareholders if the retained earnings and the capital reserve together, after deduction of any losses, are greater than half of the total share capital. For holding companies, the threshold is 20 % of the share capital.

Voluntary retained earnings may be formed only if they are justified for the long-term prosperity of the company, taking into account the interests of all shareholders. Among other things, this serves to prevent the "starvation" of minority shareholders.

g. Interim Dividends

The bill resolves the question of the permissibility of interim dividends.

Interim dividends are distributions which the company pays from the profit of the current year. For a long time, Swiss legal authors denied the permissibility of such

dividends due to the fact that under current law, dividends may be paid only from the disposable profit and from reserves formed for this purpose. Only in the previous years, a considerable part of Swiss legal authors argued that these dividends are admissible if approved based on audited interim financial statements. In practice, interim dividends are of importance, among other things, in groups of companies for the redistribution of liquidity.

With this bill, the legislator creates a clear legal basis and removes the pre-existing uncertainty.

The general meeting resolves on the interim dividend and approves the interim financial statements. Unless the company has opted out from the requirement to perform a limited audit, the financials must be audited prior to the general meeting's resolution on the interim dividends.

h. Participation Certificates

Under current law, the participation capital (*Partizipationskapital, capital-participation*) must not exceed an amount equal to double the share capital. This limit was imposed because the participants have no significant participation rights. In other words, the shareholders should not be able to make their decisions primarily at the risk of participants.

The Swiss Federal Council's proposal provided for the complete abolition of this limit for participation certificates listed on a stock exchange. The bill does not follow this proposal entirely but increases the limit of the participation capital to ten (10) times the share capital for participation certificates listed on a stock exchange. For unlisted participation certificates, the current regime remains in place.

The increase of the limit for listed participation certificates will lead to greater leeway in the structuring of the company's capital. However, in case of a delisting of participation certificates it is to be assumed that a reduction of the participation certificates must follow.

Furthermore, it needs to be mentioned that certain thresholds, such as those for the initiation of a special audit in the event that such request is rejected by the general meeting, will in the future be calculated separately for shareholders and participants. As a result, shareholders and participants will no longer be able to join forces to make such requests.

i. Reverse Share Splits

Under the current law, the consolidation of shares or reverse share splits (*Zusammenlegung von Aktien, regroupement d'actions*) requires the approval of all shareholders. Especially for listed companies with a broad shareholder base, this is a virtually impossible hurdle. The bill now introduces the qualified majority (2/3 of the votes represented at the general meeting and absolute majority of the entire nominal capital) for the adoption of this resolution by the general meeting. This is provided that the company is listed and all shareholders affected agree on the consolidation. For non-listed companies, on the other hand, there is no facilitation unfortunately, irrespective of the number of shareholders.

j. No Facilitation of Incorporation

The Swiss Federal Council proposed several facilitations for simply structured corporations. Incorporation, dissolution, liquidation and most amendments to the articles of association were to be made without the requirement of public deed. This facilitation would have led to financial and administrative relief especially for start-ups and small and medium-sized enterprises. The Swiss Parliament has, however, decided against these facilitations.

Shareholders Rights

a. New Threshold for Shareholders to Convene a General Meeting

For listed companies, the threshold for shareholders to convene a general meeting is lowered from 10% to 5% of the share capital or the voting rights. The aim of this modernization is to improve the legal status of shareholders in the interest of improved governance. For non-listed companies, there is no change and the threshold remains at 10% of the share capital or the voting rights.

The current law provides that the board of directors shall respond to the request for a general meeting within an appropriate period of time. As this principle has not been considered as sufficiently concrete, the new law sets a period of sixty (60) days for the board of directors to convene a general meeting, in the name of legal certainty.

b. New Threshold for Shareholders to Request the Inclusion of an Item on the Agenda

The thresholds to request the inclusion of an item on the agenda are lowered to 0.5% for listed companies and to 10% for non-listed companies. This percentage shall also be calculated on the share capital or on the voting rights of the concerned shareholders.

c. The Right for Shareholders to request Information from the Board of Directors at any Time

As of today, the shareholders of non-listed companies have only limited access to up-to-date information on the company.

In this context, the new law provides that the shareholders of non-listed companies representing at least 10% of the share capital or the voting rights may request business information to the board of directors in writing at any time and insofar as it is necessary for the exercise of

the shareholder's rights and does not compromise trade secrets or other corporate interests that require protection.

The board of directors shall reply to this request for information within four (4) months and the response from the board of directors shall be made available to the other shareholders at the latest during the following general meeting.

d. Books and Records Access without Prior General Meeting Approval

A company's books and records are now accessible to any shareholder representing at least 5% of the share capital or voting rights of the company, in so far as the information therein is necessary for the shareholder to properly exercise its rights. Such access is however limited by the need to preserve company trade secrets and other interests warranting protection; the explanation for any refusal of access must be given in writing. In comparison to the existing law, access no longer requires approval by a general meeting.

e. Lowering of the Special Audit Threshold

The ability to initiate a special audit - after such motion is rejected by vote of a general meeting - has been facilitated for shareholders of listed companies. Shareholders of such companies will only require 5% of the share capital or voting rights, as opposed to the current alternative thresholds set at 10% of share capital or shares with a nominal value of CHF 2'000'000. The current higher alternative thresholds will still be effective for non-listed companies.

f. Slight Leveling of the Information Playing Field through Confidentiality Requirements imposed on Independent Proxies

Concerning listed companies, the instructions given by individual shareholders to an independent proxy shall remain confidential until the general meeting. "General" information may nevertheless be provided by the independent proxy to the company, but not more than three (3) working days before the general meeting. If such information was provided, the independent proxy must state, during the general meeting, what information was shared with the company.

The confidentiality of such instructions will work to slightly level the information playing field between the company and shareholders, thus potentially easing changes of the board of directors and corporate takeovers.

g. Shifting of the Competence to Delist Shares from the Board of Directors to the Shareholders

The competence of delisting a company's shares will shift from the board of directors to the shareholders meeting. To do so, the general meeting's decision to delist the shares must be supported by at least two thirds of the represented voting rights along with a majority of the capital.

General Meetings

a. General Meeting Venue

As a general rule, the board of directors is solely competent in determining the place for holding a general meeting, including abroad if so permitted in the articles of association, provided that, however, such a location does not make it unreasonably harder for any shareholder to exercise its rights. If that was the case, the decisions of the general meeting can be challenged in court. It is also abusive to hold speeches or debates during the general meeting in a language not spoken by a large portion of shareholders.

General meetings may also be held simultaneously in several locations (in Switzerland and/or abroad), provided that speeches are broadcast live, by audio-visual means, in each concurrent general meeting venue.

If held abroad, the board of directors must designate an independent representative, whereas shareholders of non-listed companies may unanimously waive such a requirement. In case of general meetings held abroad, the board of directors should also take into account the risks of creating a forum abroad or the potential constraints for other participants (e.g. the auditor or the notary public if and when required[1]).

b. Electronic Media

The revision provides for the possibility for the board of directors to make use of electronic media while holding general meetings. Shareholders which are unable to attend the general meeting may vote electronically and general meetings may be held virtually if so allowed by the articles of association and if the board of directors has designated an independent representative while calling the general meeting. Once again, shareholders of non-listed companies may unanimously waive the requirement for an independent representative to be designated.

If held virtually, the board of directors must ensure that:

- (i) each participant is identified;
- (ii) speeches are broadcast live;
- (iii) each participant is able to make proposals and take part in the debates;
- (iv) the voting results cannot be distorted.

Therefore, all participants must be able to take part in and vote simultaneously at such a virtually held general meeting (electronically or not) and consequently a general meeting by email is not admissible. Visual interaction (video) is however not required.

1 It being understood that public deeds and legalizations drawn up abroad must be certified appropriately if filed with the commercial register as supporting document and or that cantonal restrictions may apply to general meetings held virtually.

The board of directors should set up and implement the use of electronic media with reference to the "average shareholder"[2], i.e. that a shareholder with ordinary IT knowledge and equipment (assuming he/she has such basic knowledge of technology and internet access) must be able to use the suggested electronic media. The board of directors must also ensure an appropriate technology monitoring system to make sure to adapt its rules on the use of electronic media to new devices (*e.g.* phones or tablets) or software (*e.g.* through a dedicated application).

If and when the general meeting does not take place as prescribed due to technical issues, it must be recorded as such in the minutes and the meeting must be reconvened. Decisions taken prior to the occurrence of such issues remain however valid.

Company Law Related Litigations

The revision also provided for a new dispute resolution mechanism while allowing the inclusion in the articles of association of an arbitration clause.

The admissibility of an arbitration clause in the articles of association has been controversial in Switzerland. While Swiss legal authors and courts were largely in favor of such a clause, Swiss Corporate Law prohibited up to now the setting upon shareholders of obligations that were not provided for by law.

The revised Swiss Corporate Law now allows to impose, through a provision in the articles of association, that disputes arising under corporate law be settled by an arbitral tribunal located in Switzerland. Subject to a provision to the contrary in the articles of association, such an arbitration clause shall apply to all disputes related to corporate law by or against the company, its organs, the members thereof and the shareholders. Arbitration proceedings shall be governed by the corresponding provisions of the Swiss Civil Procedure Code and the articles of association may provide for specific modalities within the framework set by the Swiss Civil Procedure Code, *e.g.* while referring to particular arbitration rules.

The existence of an arbitration clause must clearly result from the entry into the commercial register. In addition, the resolutions of the shareholders adopting such a clause requires a qualified majority (two-thirds of the voting rights represented and an absolute majority of the nominal value of shares represented).

Director's Duties in Case of Financial Distress

The revision brings a major reorganization and addition to Art. 725 et seq. CO, but does not change them fundamentally. Numerous new rules largely codify existing law or practice.

a. Threatening Insolvency

The revision newly introduces an explicit duty of the board of directors to monitor the company's liquidity and to take appropriate action in case of threatening insolvency, including the duty to convene a general meeting if proposed actions are to be resolved by the general meeting or to file for a composition moratorium if necessary. These new rules specify the general rule in Art. 716a CO according to which the board of directors has to ensure appropriate financial planning. Contrary to the Swiss Federal Council's proposal in its draft bill, the legislator has refrained from introducing a duty to draw up a liquidity plan in case of threatening insolvency.

"Insolvency" is not defined in the new provisions. According to the explanations of the Swiss Federal Council, insolvency is given if it is likely that the company doesn't have the means to pay its debts when due within the forthcoming twelve (12) months (six (6) months for companies who are not subject to the requirement to be audited) *and* doesn't have the creditworthiness to obtain these funds if necessary.

b. Duties in Case of Capital Loss and Over-Indebtedness

In addition to the newly introduced explicit duties about liquidity monitoring, the existing balance sheet-based duties of the board of directors in the event of capital loss or over-indebtedness remain in place with certain clarifications and amendments. The main changes adopted by the Swiss Parliament in this area include the following:

- In case the latest annual financial statements show a capital loss, the financial statements need to be reviewed by an auditor before they are approved by the general meeting (except if the board of directors' files for a composition moratorium) even in case the company has opted out of the audit requirement. This requirement aims to ensure that the board of directors dœsn't show the financial situation of the company to be in a more positive light than it actually is.
- The duty to immediately convene a general meeting if the latest annual financial statements show a capital loss is abolished (but of course the board of directors still has the right to convene a general meeting if it wants to propose restructuring measures to such meeting). In practice, such mandatory general meetings often result in an unnecessary delay and show limited added value. The abolition of the obligation to convene a general meeting therefore seems reasonable.
- The law now expressly stipulates when notification of the judge can be waived (or postponed) in the event of

2 Within the meaning set forth by the Swiss Federal Supreme Court while analysing the agenda and proposals included in the call for the general meeting.

over-indebtedness: if there is a reasonable prospect that the over-indebtedness be rectified within a reasonable period of time, but no later than ninety (90) days after the audited interim financial statements are available, and that the creditors' claims are not additionally put at risk. We should welcome the fact that these conditions are now explicitly stated. Whether the fixed ninety-day (90) period proves to be a good solution remains to be seen. On the one hand it brings more legal certainty, but on the other hand it will certainly prove to be too short in practice in some cases.

c. Abolishment of Stay of Bankruptcy

The revision also abolishes the corporate law stay of bankruptcy proceedings which remained largely unused in German-speaking Switzerland but was of (some) practical relevance in western Switzerland. The Federal Act on Debt Enforcement and Bankruptcy will be amended to include some elements of the abolished stay.

Enactement

The Swiss Federal Council is competent for setting the date of entry into force of the revised provisions of the Swiss Corporate Law.

Companies already registered within a commercial register but whose articles of incorporation and regulations are not compliant with the new law will have a two-year (2) transition period to make the necessary amendments.

The new transparency rules on commodities companies start applying only one (1) year after the revised provisions come into force.

As yet, there is no exact date as to when the entry into force will happen. It is theoretically possible, but highly unlikely, that the Swiss people will ask to vote on the revision through a referendum.

In the absence of any such referendum, the revised provisions can be expected to come into force around early 2022.

Conclusive Remarks

The revision of the Swiss Corporate Law includes many amendments and new features, which seem a most welcome modernization of provisions that had not been substantially revised since 1991.

While the provisions on gender representative quotas in top management of listed companies have received a large media coverage, it will not affect most of the companies. For those approximately 250 companies concerned, the impact may not be significant taking into account the long implementation deadlines (five (5) and ten (10) years), the absence of sanctions and the "comply or explain" principle, which may be seen as unfortunate.

Most companies shall instead be affected by the other corporate law changes. In particular, the new flexible share capital rules (*e.g.* on the minimal nominal value of shares, share capital currency and variation, reserves or clear rules on interim dividend distributions) and the flexibility in relation to general meetings of shareholders (*e.g.* admissibility of general meetings abroad, in several venues or virtual general meetings) should be welcomed by most practitioners.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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