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Series of publications on new Swiss corporate law

General Meeting of the Shareholders

I. INTRODUCTION

The Parliament has adopted a new bill regarding Swiss corporate law on June 19, 2020. This new legislation is expected to enter into force in 2022.

This reform aims to modernize Swiss corporate law. A series of publications shall provide an overview of the main aspects of the reform, each of which shall deal with a specific topic.

One of the main amendments relates to the general meeting of the shareholders (the **General Meeting**), in particular the possibility to hold such meeting, whether ordinary or extraordinary, (i) in Switzerland or abroad, (ii) physically or virtually and/or (iii) by using electronic medias.

The present contribution aims to present these different possibilities, their conditions and their advantages and/or disadvantages. The amendments shall enter into force in the course of 2022 or 2023.

II. PREPARATION OF THE GENERAL MEETING

A. Convening of the General Meeting

The new law will lower the thresholds for shareholders wishing to request the convocation of a General Meeting. The following thresholds shall be applicable:

— for public companies: shareholders holding together 5% of the share capital or of the voting rights;

— for other companies: shareholders holding together 10% of the share capital or of the voting rights.

Under the current law, the threshold is set at 10% of the share capital and no distinction is made between public companies and other companies.

The request to convene a General Meeting shall be made in writing and contain agenda items (the objects on which the shareholders wish to vote) as well as motions for each agenda item (the propositions of the shareholders for each agenda item).

In case the board of directors does not convene the General Meeting within sixty days, the shareholders may demand from the judge to convene the General Meeting. Under the current law, the shareholders may lodge a request before a judge if the board of directors fails to convene a General Meeting "within a reasonable time".

B. Right to Submit Agenda Items and Motion Rights

The new law will also lower the thresholds for shareholders who/which wish to request that an item be included in the invitation to a General Meeting. The following thresholds shall be applicable:

— for public companies: shareholders holding together 0.5% of the share capital or of the voting rights;

— other companies: shareholders holding together 5% of the share capital or of the voting rights.

The aforementioned thresholds may be lowered in the articles of association but they cannot be increased.

Under the current law, the threshold is set at shareholders holding shares with an aggregate nominal value of CHF 1,000,000.

Under the same limits, the shareholders have the right to request that their proposals (motions) related to agenda items shall be included in the agenda.

In addition, the new law clearly specifies that, during the General Meeting, any shareholder may submit proposal regarding an agenda item. In such a case, no threshold is required.

C. Information Right

The new law provides that the financial statements, the auditor report and the annual report shall be accessible to the shareholders twenty days prior to the General Meeting. The new law explicitly provides for a communication by electronic means.

The financial statements, the auditor report and the annual report shall be delivered to the shareholders requesting such delivery if these documents are not electronically accessible. As such, the shareholders do not have a right to receive personally a copy of the documents if they are communicated by electronic means.

III. CIRCULAR RESOLUTIONS OF THE GENERAL MEETING

The new law provides that the resolutions of the General Meeting may be taken in writing or by way of electronic means unless a shareholder requires a discussion. The shareholders may tacitly consent to such circular resolutions, for example if they participate to the decision or explicitly consent without participating.

This possibility is forbidden under current law.

IV. PLACE OF THE GENERAL MEETING IN GENERAL ACCORDING TO THE NEW LAW

The board of directors decides where the General Meeting takes place. However, the determination of the place of the General Meeting shall not complicate the exercise by a shareholder of his/her/its rights without cause. Otherwise, the relevant decisions may be challenged.

The General Meeting may be held simultaneously in different places. In such a case, the meeting shall be transmitted live by audiovisual means at each place.

V. GENERAL MEETING HELD ABROAD

A General Meeting may be physically held abroad provided that (i) the articles of association allow it and (ii) the board of directors appoints an independent representative.

The board of directors of non-listed company may waive the appointment of an independent representative if all the shareholders agree to such waiver. The board of directors shall set the rules applicable to the expression by the shareholders of their consent with respect to the waiver to appoint an independent representative if the articles of association do not provide for such rules.

The new law and the message of the Federal Council do not state if the shareholders have to consent prior to each General Meeting or if a global consent given for the future is sufficient until it is revoked. We are of the opinion that such global consent shall be permitted.

When holding a General Meeting abroad, the board of directors shall take into consideration potential issues that may arise, such as:

— the presence of a notary. Art. 25 of the Commercial Register Ordinance states that the notarized acts and legalizations made abroad shall be attached to a certification from the competent authority from the place where they have been made, certifying

that the notarized acts and legalizations have been executed by a competent public officer.

— the creation of a place of jurisdiction abroad. The art. 22 para. 2 of the Lugano Convention states that, in the matter of the validity of the decisions of corporate bodies, the jurisdiction of the seat of the company is competent. To determine the seat, each jurisdiction applies its own international private law. Hence, a jurisdiction may decide that the seat of a company based in Switzerland is in another country based on its national law.

The possibility to hold a General Meeting abroad may not be very useful in practice because of the formal requirements aforementioned.

VI. GENERAL MEETING AND ELECTRONIC MEDIAS

A. Virtual General Meeting

The General Meeting may be held virtually, without any physical place of meeting, provided that (i) the articles of association allow such virtual General Meeting and (ii) the board of directors appoints an independent representative in the convocation to the General Meeting.

With respect to non-listed companies, the articles of association may provide for the possibility to waive the appointment of an independent representative. The board of directors may then effectively waive the presence of the independent representative in the invitation based on the relevant clause of the articles of association.

It should be noted that a notarized resolution of the General Meeting may be taken virtually provided that cantonal laws do not prevent it. In such a case, it is recommended to work with a notary in the same canton as the seat of the relevant company in order to avoid any problem pertaining to the competence. The chairman of the General Meeting does not have to be in the notary's office.

This possibility will provide more flexibility for companies and may be very useful when the shareholders are located around the world. However, the predictability of the outcome of the votes at the General Meeting will be lowered since more shareholders will be represented and might change their opinion during the General Meeting, which very rarely occurs when shareholders are represented through a power of attorney granted prior to the General Meeting.

B. General Meeting Using Electronic Medias

According to the new law, the board of directors may authorize the shareholders who/which do not physically attend a General Meeting to exercise their voting rights by electronic means. The new article assumes that the General Meeting is held at least at one physical place.

The competence to authorize such electronic votes lies with the board of directors and no provision in the articles of association is required.

The message of the Federal Council seems to indicate that the vote by way of electronic medias may only be exercised during the General Meeting which excludes the possibility to allow the shareholders to register theirs votes prior to the General Meeting.

For the same reasons as mentioned above, the possibility to use electronic medias will also increase the flexibility with respect to the organization of the General Meeting but will lower the predictability of the outcome of the General Meeting.

C. Conditions Applicable to the Use of Electronic Medias

The board of directors shall regulate the use of electronic medias. In particular, the board of directors shall:

— establish the identity of the participants;

— make sure that the interventions are live broadcasted;

— make sure that each participant can make proposals and contribute to the debate;

— make sure that the results of the votes cannot be falsified.

The electronic medias used shall be determined by the board of directors by taking into account an average shareholder. A shareholder having customary knowledge and equipment shall be able to use the electronic medias chosen by the board of directors.

D. Technical Difficulties

If the General Meeting does not run according to the legal requirements, it shall be convened again. If the problem is temporary, the vote or election shall be repeated. The board of directors does not have to repeat the vote or the election if the problem had no influence on the result of the vote or the election.

It is only if the problem lasts and prevents the General Meeting from continuing that it shall be reconvened. In such a case, the notice does not have to comply with the twenty-days' period. However, the new date shall be set in a way that allows a majority of the shareholders to attend. It is only if the agenda is amended in the meantime that the formal requirements shall be met.

The resolutions passed before the occurrence of a technical problem remain valid.

A problem with the telecommunication company of a shareholder is not considered as a technical problem except if it is a major telecommunication company with general issues used by a majority of the shareholders.

VII. INDEPENDENT REPRSENTATIVE

A. Appointment of an Independent Representative

An independent representative shall be appointed in several cases based on the new law in addition to the situations already covered by the current law.

To summarize, based on the current and the new law, an independent representative shall be appointed:

- if the board of directors proposes to the shareholders to be represented at the General Meeting by a member of its corporate bodies or a dependent person;
- if the General Meeting is held abroad and that not all the shareholders waive the appointment of an independent representative;
- if the General Meeting is held virtually without any physical place of meeting and that the board of directors does not waive the appointment of an independent representative based on the possibility to waive such appointment provided for in the articles of association; and
- if the articles of association only authorize shareholders to be represented by another shareholder and if a shareholder requests the appointment of an independent representative.

B. Qualification of the Independent Representative

The independence of the independent representative shall not be limited in fact or in appearance.

As an example, the following positions are not compatible with the requirement of independence:

- membership of the board of directors, any other decision-making function in the company or any employment relationship with it;
- a direct or significant indirect participation in the share capital or a substantial claim against or debt due to the company;
- a close relationship between the person managing the audit/the independent representative and a member of the board of directors, another person in a decision-making function, or a major shareholder;
- the assumption of a duty that leads to economic dependence;
- the conclusion of a contract on non-market conditions or of a contract that establishes an interest on the part of the auditor/independent representative in the result of the audit/vote/election;
- the acceptance of valuable gifts or of special privileges.

VIII. CONCLUSION

The new law will provide for more flexibility and the companies will be able to use the new technologies when organizing their General Meeting. It will be easier for the shareholders to attend the General Meetings.

As a consequence, it will be more complicated for the companies to predict the outcome of the votes and elections since more shareholders will be able to attend and to debate over the items.

Finally, the appointment of an independent representative will be required in more situations than before. This will lead to increased formalities for the companies taking advantage of the new rules.

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