Revision of corporate law

On 1 January 2023, after a long lasting political process, the new corporate law (amendment of the Swiss Code of Obligations) has come into force. In addition to clarifications and administrative simplifications, the revision of the corporate law aims, among other things, to make the incorporation and capital regulations more flexible and to align them with the accounting law, to modernize the provisions regarding the board of directors and the general meeting of shareholders, and to strengthen shareholder rights. In addition, the revised law expressly allows the introduction of an arbitration clause in the articles of association. Hereinafter, selected topics in the following areas are briefly presented:

- incorporation and capital regulations;
- general meeting and shareholder rights;
- board of directors;
- accounting rules.

For the sake of simplicity, reference is made only to the unlisted stock corporation, although many provisions concerning the limited liability company and cooperative have also been amended (in particular by referring to the law on stock corporations).

1. Incorporation and capital regulations

1.1 Minimum capital and par value

The revision of the corporate law does not change the **minimum capital of** CHF 100,000 and the payment requirements (at least 20% of the par value, but at least CHF 50,000). However, the minimum par value of CHF 0.01 (one rappen) is adjusted – under the revised law the **par value** must be more than zero rappen. This change gives stock corporations more flexibility in determining their equity structure, as the par value can be set at any fraction of a rappen and, therefore, an unlimited number of shares can be issued.

1.2 Share capital in foreign currencies

Unlike to the former law, the share capital can now be in the **foreign currency that is essential for the** business activity, which is a facilitation especially for internationally operating stock corporations. Since 1 January 2023, the following foreign currencies are available: British pound, euro, US dollar and Japanese yen. If this option is used, the foreign currency chosen will apply to all capital-related aspects. For tax purposes, however, the stock corporations will still have to convert the relevant amounts into Swiss francs.

On the date of the notarized incorporation meeting respectively the notarized general meeting of shareholder resolving the currency conversion, the share capital in foreign currency must correspond to at least CHF 100,000 at incorporation respectively at least to the former share capital in Swiss francs of an already existing company. The conversion of the currency can be resolved as per the first day of either the current or the next business year using the exchange rate of such first day of the relevant business year.

1.3 Qualified payment instruments

The revision of the corporate law also affects the qualified capital payment provisions.

The **(intended) acquisition of assets** (e.g. cash payment of the capital with the intention to acquire real estate from a shareholder) has been abolished.

Furthermore, the **contribution in kind** (e.g. direct contribution of real estate) is clarified by explicitly setting forth in the legal text the criteria applied in practice for the admissibility to contribute in kind, i.e. balance sheet capability, free transferability, free availability and realisability. In addition, the revised provisions simplify matters as a single public deed at the company's registered office is now sufficient for real estate located in different cantons.

In the case of capital payment by way of **offsetting,** the law now expressly states that the offset receivable does not necessarily have to be recoverable. This clarification is of particular importance in restructuring cases, because until now the admissibility of the conversion of debts into equity was controversially discussed if the receivables were not fully covered by the company's assets. Finally, the offsetting facts (and the payment by conversion of freely disposable equity) now also must be disclosed in the articles of association and the commercial register.

1.4 Changes in capital, in particular capital band

The ordinary capital increase and the conditional capital increase do not undergo any fundamental changes. However, clarifications based on legal practice have been incorporated in various areas. For example, the revised law now expressly states that an ordinary **capital increase** with a maximum amount is possible and that no one may be favoured or disadvantaged in an unobjective manner when determining the issue amount. Furthermore, the deadline for implementing the capital increase was extended from three to six months. In the context of the **conditional capital increase,** the group of addressees of conversion and option rights was extended to third parties, and it was clarified that purchase obligations may also be imposed.

For **capital reductions,** the revised corporate law contains above all a simplification and flexibilisation of the procedure. For example, in the context of an ordinary capital reduction, only one notice to creditors will be required, which can be made either before or after the respective resolution of the general meeting.

The **capital band** replaces the authorised capital. In order to be able to adjust the equity to the actual needs in a timely manner, under the revised law the general meeting can authorise the board of directors in the articles of association for a maximum period of five years to increase and/or reduce the share capital within a certain range, but no more than ±50% of the registered share capital. The minimum contents required in the articles of association is the upper and lower limit of the capital band, the term as well as the number, par value and type of shares concerned. Furthermore, it is possible to subject such authorisation of the board of directors to certain restrictions, requirements or conditions or to restrict or cancel the shareholders' subscription rights for valid reasons. The capital band can also be designed unilaterally by authorising the board of directors to either only increase or reduce the share capital. If the limited audit of the annual accounts has been waived, for creditor protection reasons the board of directors may only be authorised to increase the share capital, but not to reduce it.

1.5 Further amendments

In the case of **treasury shares,** an amendment to the accounting rules should be noted: Treasury shares will no longer have to be recorded as an asset and reserve, but will be shown directly as a negative item in the equity. The incorporation and capital regulations of

the stock corporation will also be changed in **other areas,** whereby some amendments, e.g. on the permissible proportion of participation capital, will only affect listed stock corporations.

2. General meeting of shareholders and shareholder rights

2.1 Convocation of the general meeting of shareholders

Under the revised law, the general meeting of shareholders may also be convened **electronically** (e.g. by e-mail) if the articles of association provide this option. The business report and the auditor's report can also be made available to shareholders electronically.

Furthermore, the new corporate law contains detailed **requirements regarding the content of the convocation**. In particular, it must be noted that an agenda item may only include aspects that are closely related or mutually dependent (unity of matter). Furthermore, shareholders must receive all the information they need to pass resolutions.

2.2 Venue(s) of the general meeting of shareholders

With regard to the conduct, it is now possible to hold the general meeting of shareholders simultaneously at **various locations**. In this case, the oral contributions of the participants must be transmitted directly in picture and sound to all meeting locations.

Furthermore, a general meeting of shareholders may now explicitly be held at **meeting locations abroad,** provided, however, that the articles of association allow a meeting location abroad and that an independent proxy is appointed (which can be waived with the consent of all shareholders).

2.3 Use of electronic means at the general meeting of shareholders

As was already the case under the COVID provisions, the general meeting of shareholders no longer has to be held (merely) physically. On the one hand, the new provisions offer the possibility for shareholders who are not physically present at the meeting venue to exercise their rights electronically (**hybrid** general meeting of shareholders). On the other hand, it is also possible to hold a general meeting of shareholders exclusively by electronic means and without a physical meeting venue (for example, using Zoom or Microsoft Teams). Such a mere **virtual** general meeting of shareholders requires a corresponding basis in the articles of association and the appointment of an independent proxy (this can be waived, if so provided in the articles of association). As long as the articles of association have not been amended, a good solution is to hold a hybrid general meeting, whereby the presence of either the chairman, the secretary or a shareholder at the meeting venue should be sufficient.

If a general meeting of shareholders is to be held using electronic means, the board of directors must **ensure** that (i) the identity of the participants is known, (ii) oral contributions are transmitted immediately, (iii) all participants can make motions and take part in discussions, and (iv) the voting result cannot be distorted.

Should, with the infrastructure provided by the company, **technical problems** arise during the general meeting of shareholders, forfeiting a proper conduct of the meeting, the meeting must be repeated. Resolutions passed before the occurrence of technical problems shall, however, remain valid.

2.4 Universal meeting, written resolutions of the general meeting of shareholders

The new law also simplifies the holding of a universal meeting, since a hybrid or mere virtual meeting – in contrast to a mere physical meeting – is more likely to allow all shareholders to participate.

Furthermore, resolutions may now be passed in **writing** or in **electronic** form, unless a shareholder requests an oral deliberation. However, in our opinion, a resolution passed in electronic form must still be reflected in minutes in writing for proper documentation.

2.5 Shareholder rights

The revised law strengthens the rights of shareholders by granting the general meeting of shareholders **further non-transferable powers.** In addition, the catalogue of resolutions requiring a **qualified majority** ($^2/_3$ of the votes represented and the majority of the par value of shares represented) is expanded. This, for example, includes the introduction of a pro vision in the articles of association regarding the holding of the general meeting of shareholders abroad (cf. above), the waiver of the appointment of an independent proxy for the holding of a virtual general meeting of shareholders (cf. above) and the introduction of an arbitration clause (cf. below).

The right of shareholders to submit **agenda items** or **motions** is also simplified under the revised corporate law by lowering the threshold to 5% of the share capital or voting rights.

While previously the shareholders only had the right to request information on the company's affairs at the general meeting of shareholders, they now may exercise their **right for information** at the general meeting of shareholders or at any other time, provided they represent at least 10% of the share capital or votes. With regard to the **right to inspect** the company's books and records, shareholders who together represent at least 5% of the share capital or votes may submit such a request to the board of directors without the need for authorisation by the general meeting of shareholders. During the inspection, notes may be taken and the shareholders may be accompanied by a competent person.

In order to strengthen the position of the **auditors** in the structure of corporate governance, the general meeting of shareholders may **dismiss** the auditors only for valid reasons before the end of the financial year.

2.6 Arbitration clause

The revised law explicitly grants stock corporations the possibility to stipulate in their articles of association that disputes under corporate law shall not be decided by a state court but by an **arbitral tribunal with its seat in Switzerland.** The scope of application of the arbitration clause can be limited as desired, for example by only covering certain legal relationships or claims. However, the articles of association must ensure that persons who may be directly affected by the arbitral award are notified of the commencement and termination of the proceedings and may participate in the appointment of the arbitral tribunal and as a party to the proceedings. The articles of association may regulate the details of the arbitration proceedings and/or refer to arbitration rules.

If a company has introduced an arbitration clause in its articles of association, it must be disclosed in the commercial register.

3. Board of directors and management

As already known from the provisions for listed companies, the members of the board of directors shall now be **elected individually**. However, the election of the board of directors can still be carried out *in globo* if this is provided for in the articles of association or if the chairman of the general meeting orders this procedure with the consent of all shareholders represented.

As before, the board of directors may pass its resolutions at a physical meeting or by using electronic means (in analogous application of the provisions governing the general meeting of shareholders). In addition, the board of directors is given the option to pass resolutions without a meeting by written means on paper or in **electronic form** – for example as e-mail, text message or document signed with electronic signature of a provider that is not acknowledged in Switzerland. In principle, no signatures are required for electronic resolutions, unless the board of directors has stipulated otherwise in writing. However, in the case of electronic passing of a resolution, minutes must be drawn up and signed for archiving purposes. Still only written resolutions or minutes (i.e. signed with wet ink or with a "qualified electronic signature") can be filed with the commercial register.

Due to their duties of care and loyalty, the members of the board of directors and the management were already required under the former law to avoid **conflicts of interest** as far as possible. The new corporate law now expressly stipulates that the members of the board of directors and the management must immediately and fully inform the board of directors about conflicts of interest.

If the board of directors wishes to **delegate** the management of the company to third parties, such as the management, an authorisation is no longer required in the articles of association under the new corporate law. If, on the other hand, delegation is not to be permitted, this prohibition must be explicitly stipulated in the articles of association.

In addition to the members of the board of directors, members of the management now also have the right to participate in a general meeting of shareholders, whereby members of the management may speak on any item on the agenda, however, only members of the board of directors may submit motions.

4. Accounting rules

4.1 Reserves

In implementing the new accounting regulations, a distinction is made in the reserves between the legal capital reserve and the profit reserve (which in turn can be divided into a legal and a voluntary profit reserve). While the legal capital reserve includes the share premium, the amounts paid up on forfeited shares and other contributions from shareholders, the profit reserve includes all reserves formed from retained profits of the company.

4.2 Interim dividend

The new corporate law also clarifies the controversial issue of interim dividends: Based on interim financial statements, the profit of the current business year may now be distributed. As with the ordinary dividend, the interim financial statements must be audited by the auditors beforehand, if the company has statutory auditors. Exceptions: (i) If all shareholders agree and the claims of creditors are not jeopardised, such an audit may be waived; (ii) if the

audit of annual accounts has been waived (opting-out), the interim financial statements do not have to be audited either.

4.3 Financial restructuring

The creditors of stock corporations are protected by restructuring law provisions, which are further specified in the new corporate law and in part provide for new obligations to act for the company and its board of directors.

As before, the board of directors must monitor the solvency of the stock corporation. In this context, the revised corporate law introduces the **imminent insolvency:** If a company is threatened to become insolvent, the board of directors must take measures to ensure its solvency (provision of liquidity) with no delay. It shall take, where necessary, further restructuring measures or propose such measures to the general meeting of shareholders, if they fall within the competence of the general meeting (for example, capital cut or capital increase). Furthermore, the board of directors may file a request for a debt restructuring moratorium with the competent court. Although the revised law does not mandatorily require the preparation of a liquidity plan, such a plan should generally be the basis for the aforementioned measures.

The new provision on the **halfway capital loss** is based on the previous law. However, it is now clarified that only the non-distributable part of the statutory capital and profit reserves is included in the calculation of the capital loss, which is a facilitation especially for companies in the growth phase. In addition, the legal requirement was deleted according to which the board of directors must immediately convene a general meeting of shareholders in the event of a halfway capital loss. Now, companies without an auditor must have their last annual financial statements audited by a licensed auditor on a limited basis in the event of a halfway capital loss, before they are approved by the general meeting of shareholders, unless the board of directors has submitted a request for a moratorium. In this event the board of directors is responsible for appointing the auditor.

The calculation of **over-indebtedness** remains unchanged in the new corporate law. If there is justified concern that the company's liabilities are no longer covered by its assets, interim financial statements must be prepared. The new corporate law stipulates that if the going concern is assumed, interim financial statements at sale values can be dispensed with, provided that the interim financial statements at going concern values do not show any over-indebtedness. If the going concern assumption is not given, interim financial statements at sale values are sufficient. As in the case of a halfway capital loss, the interim financial statements (at going concern and/or sale values) must in any case be audited by a licensed auditor. If the company is over-indebted according to both interim financial statements, the court must be notified. The new legal provisions stipulate that the board of directors may waive the notification of the court

(i) if subordinations exist for the amount owed and the interest claims to the extent of the over-indebtedness, or

(ii) if there is a reasonable prospect that the over-indebtedness can be remedied within a reasonable period of time, but no later than 90 days after the audited interim financial statements are available, and that the claims of the creditors are not additionally jeopardised.

5. Need for action

From the entry into force of the revised corporate law on 1 January 2023, there will be a transitional period of two years to adapt the articles of association and regulations. There after, provisions that are not compatible with the revised law will automatically become invalid.

The existing articles of association and regulations

(i) **incompletely** reflect the new law and are therefore no longer suitable as supporting tool for the board of directors and shareholders (e.g. passing of resolutions in writing or by using electronic means, duties of the general meeting and the board of directors),

(ii) do not make use of the **newly granted possibilities** (e.g. general meeting of shareholders abroad, virtual general meeting of shareholders, capital band) and

(iii) may contain provisions that do **not comply** with the new law (e.g. right to add items to the agenda, acquisition of assets).

It is therefore advisable for companies to review their articles of association and regulations with regard to the revised corporate law and adapt them if necessary. Furthermore, the new restructuring law provisions require that the company's internal control system be updated and that the persons responsible for finances be informed accordingly.

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