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Do your articles of association comply with the new Stock Corporation Law?

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The revision of the stock corporation law is a fact. The changes will come into force on 1 January 2023. In January 2021, we already provided an overview of the most important innovations of the revision of the corporation law (link). It is now time for all Swiss companies to adapt their articles of association to the new stock corporation law.

The revision also regulates the term of office of the board of directors members. In this regard, a landmark Federal Supreme Court decision was issued at the end of 2021, which we also refer to.

1. Introduction

The revision of the stock corporation law contains numerous changes and simplifications that a company can, but does not have to, make use of. For example, the change of the currency of the share capital or the introduction of the possibility of a virtual general meeting of shareholders (GMS) require an amendment to the articles of association. This can only be validly decided by the GMS, and the decision must also be certified by a notary.

2. Overview of the most important changes

2.1 Virtual General Meeting and Circular Resolution

The most important change concerns the virtual GMS. If there is a statutory basis, the GMS can in future also take place electronically or by video conference (e.g. via MS Teams/Zoom). Listed companies need an independent proxy for this, which is not required for other companies.

A "GMS circular resolution" is now also possible, which is common today with the LLC. If all shareholders sign, the statutory summons period of 20 days can be waived and the resolution is passed with the signature. This is a welcome simplification in practice for small and clear shareholder structures.

A GMS can now also be held at different meeting locations at the same time and/or abroad provided that the articles of association permit this and that the votes of the participants are transmitted directly (both video and audio) to all meeting locations.

Further to the Covid 19 Regulation 3 (still) in force, initial positive experiences with electronic and/or written GMS have already been made. These innovations are now also anchored in the law and make the practical conduct of a GMS much easier.

2.2 Capital band

The articles of association can now allow the board of directors (BoD) to increase and/or decrease the share capital within a certain range for a maximum of 5 years. Previously, this "authorised capital change" only existed for capital increases, but not for capital reductions; moreover, the period was limited to 2 years.

The capital band may not exceed half of the share capital. Once it is anchored in the articles of association, only a resolution of the BoD is required (i.e. no further approval by the GMS) for actual capital increases.

The introduction of a capital band provision in the articles of association makes sense especially where acquisitions or investments are planned and the BoD should react quickly and change the capital accordingly.

2.3 Change of currency of the share capital

Keeping the share capital in a foreign currency may be particularly interesting for group companies with a foreign group parent or for such companies that generate their turnover mainly in a foreign currency. The share capital can be in a foreign currency according to the articles of association, provided that it amounts to at least CHF 100,000. The permitted foreign currencies are determined by the Federal Council (e.g. EUR, USD, GBP). If the share capital is in a foreign currency, the books of account can also be kept in this currency.

2.4 Introduction of a statutory arbitration clause

It is now possible to stipulate in the articles of association that any disputes between the company and shareholders or corporate bodies shall be settled by a private arbitration court with its seat in Switzerland rather than a state court. Depending on requirements, the scope of the arbitration clause may be limited and apply, for example, only to certain legal relationships or certain claims. Finally, a reference to such statutory provision should be recorded in the commercial register so that new shareholders are also informed.

The main advantage of a statutory arbitration clause is that the company, its organs and the shareholders submit, in the event of disputes under stock corporation law, to confidential arbitration proceedings, the key points of which (initiation of the proceedings, number of arbitrators, structure of the proceedings, etc.) are either already regulated in the articles of association or determined by reference to existing arbitration rules.

2.5 Restructuring law

The entire "early warning system" of the restructuring law has been reorganised and made more detailed, thus increasing the chances of a successful restructuring. In addition to the known facts of capital loss and over-indebtedness, which were not changed in content, the "imminent insolvency" was included in the law as a preliminary stage. Accordingly, the BoD must constantly monitor the solvency of the company and take appropriate measures to ensure it. In practice, the failure to do so is a major case of board liability.

If the existing provisions of the articles of association contain references to loss of capital and over-indebtedness, these would have to be adapted to the new legal order.

2.6 Shareholder rights and interim dividend

For the sake of completeness, two changes should be noted, which, however, do not generally require amendments to the Articles of Association.

First, the **thresholds** of the following shareholder rights were enhanced as per the below summary.

Shareholder rights	**Applicable law**	**Revised law (non-listed companies)**
Right to put items on the agenda	Nominal value of CHF 1 million or 10% of the share capital	5% of the share/participation capital or votes
Right to information outside the AGM	not yet available	10% of the share capital or votes
Right to inspect business records	No threshold so far	5% of the share capital or votes

The right to information outside the GMS used to be a practical problem for shareholders because, in contrast to listed companies, no regular information was usually provided to shareholders. Shareholders jointly holding at least 10% of the

share capital or votes can now request information from the BoD, which must respond within four months. These answers must be available for inspection by the other shareholders at the next GMS.

Secondly, interim dividends are now expressly permitted, which was previously controversial, if audited interim financial statements and a GMS resolution are available. The auditor's examination can then be waived if all shareholders agree to the distribution at the GMS and the claims of creditors are not jeopardised thereby.

The payment of an interim dividend can also be decided relatively "spontaneously" at an extraordinary general meeting. These changes will simplify the distribution of liquidity, especially in group structures, but also in companies with shareholders who are accustomed to distributing dividends on a quarterly basis due to their origin, as is customary in the USA or England.

3. Term of office of members of the board of directors

Apart from the revision of stock corporation law, a recent Federal Supreme Court ruling regarding the term of office of BoD members also gives reason to amend the articles of association.

Most articles of association provide that a board member is elected for a term of 1-3 years (the legal maximum term is 6 years). The Federal Supreme Court recently addressed the question of whether a board mandate is tacitly renewed if no GMS is held within six months after the end of the last business year corresponding to the term of office and thus no re-election is held in due time. One part of the doctrine affirmed a tacit extension of the term of office until the next GMS, another part argued that the non-re-elected BoD from this point on only acts as a *de facto* body and that there is deficient organisation. Another doctrine differentiated whether the GMS was not held at all or whether a GMS was held but the election was forgotten.

The Federal Supreme Court has now clarified the situation and ruled that the board mandate ends in any case 6 months after the end of the last business year for which the respective board member was elected. The decision is based on the fact that the Code of Obligations stipulates that the ordinary GMS must be held by 30 June of each year and that the GMS is responsible for the election.

If a company does not have a validly elected BoD because the re-election was forgotten or not held in time, there is deficiency in the organisation. The fact that the non-elected BoD is still registered in the commercial register does not change this. The consequences of a lack of organisation can be serious. Since in such a case a company no longer has a validly elected BoD, no GMS can be convened and its resolutions would be null and void. This can be solved by the auditors calling a GMS or by all shareholders holding a universal assembly at which the BoD is newly appointed. If neither of these options is successful, a shareholder or creditor can apply to the court for a new member to be appointed.

In order to avoid any misunderstandings, it should be made clear in the articles of association that the BoD is elected until the next ordinary GMS. A provision in the articles could read as follows:

"The Board of Directors shall consist of one or more members. The term of office shall be until the next ordinary general assembly. Re-election is possible."

4. Registration of the amendment of the articles of association

Since the revision of stock corporation law will not come into force until 1 January 2023, there is uncertainty around the due date for the amendment of the articles of association . Although the Federal Commercial Registry Office (FCRO) allows the articles of association to be amended "conditionally" already, the respective amendments will in any case only come into force on 1 January 2023. We therefore recommend that the amendment of the articles of association be put on the **agenda of the ordinary GMS 2023** and that the articles of association be subjected to a general overhaul there. A public deed by a notary public is required for the amendment of the articles of association. For the sake of simplicity, this can be done by means of powers of attorney so that the shareholders do not have to be physically present.

5. Conclusion

The new stock corporation law offers numerous possibilities to design and simplify the organisation of a private limited company in line with the times. In order to benefit from the changes, the articles of association must be revised and adapted to the new law. It is advisable to plan the amendment of the articles of association at an early stage and to submit them to the ordinary GMS in 2023.

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