Swiss Corporate Law Reform: Personal membership rights

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This legal update is part of a series summarizing the most important upcoming amendments to Swiss corporate law in a condensed form as relevant for legal practitioners. Previously published legal updates can be found on our website at Swiss Corporate Law Reform 2020. New legal updates on the corporate law reform are regularly e-mailed to our newsletter subscribers and published on our website.

Overview

The comprehensive Corporate Law Reform, which is scheduled to enter into force in the course of 2023, will lead to various changes to shareholders' personal membership rights:

- **Proxy voting is generally regulated more strictly. The circle of potential proxies may be limited to other shareholders in the articles of association of non-listed companies only. In the absence of instructions from the represented shareholder, not only an independent proxy, but also a governing officer acting as proxy or custodian acting as proxy (both only permitted for non-listed companies) must abstain from voting.**
- **Limited confidentiality of voting instructions is introduced for listed companies.**
- **Shareholders of non-listed companies will in future also be able to exercise their right to information outside the shareholder meeting. However, the right to inspect business records will only apply to shareholders representing more than 5% of the votes or share capital.**
- **The revised law simplifies access to the 'special investigation' (as the 'special audit' will be called in the future).**
- **The possibility of introducing a statutory arbitration clause is now expressly provided for by law; in such a case, corporate law disputes can be adjudicated by an arbitral tribunal in Switzerland.**

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Introduction

On 19 June 2020, the Swiss Parliament adopted the final text of the revision of the Swiss Corporate Law Reform. According to current estimates by the Federal Office of Justice, the entire revision is expected to come into force in 2023. This comprehensive revision will, inter alia, amend the personal membership rights of shareholders as summarised below.

Proxy voting

Proxy voting is newly regulated in Art. 689 et seq. of the new Code of Obligations (nCO).

Until now, all companies could provide in their articles of association that only other shareholders of the company may be appointed as proxies; however, so far, only smaller, person-related companies have generally made use of this authorisation. In future, Art. 689d para. 1 nCO will allow this restriction of the group of possible representatives in the articles of association of listed companies only.

Pursuant to Art. 689a para. 3 nCO, a person in possession of a bearer share obtained in the context of a pledge, deposit or loan may exercise the attendant membership rights only if authorised to do so in writing.

In Art. 689b nCO, proxy voting by governing officers acting as proxy (Organstimmrechtsvertretung) and custodians acting as proxy (Depotstimmrechtsvertretung) are generally prohibited for listed companies. Independent proxies and (still permissible in the case of non-listed companies) governing officers acting as proxies and custodians acting as proxies who have not received instructions must now abstain from voting (Art. 689b para. 3 and Art. 689e para. 2 nCO). Under the previous law, in such a case, custodians acting as proxies had to vote in accordance with the proposals of the board of directors (Art. 689d para. 2 CO).

The new law now expressly stipulates that the independence of the independent proxy must not be impaired – in fact nor appearance (Art. 689b para. 4 nCO). In this respect, independence is governed by the provisions regarding the independence of the auditors in the case of ordinary audits (Art. 728 para. 2 – 6 nCO).

Pursuant to Art. 689c para. 5 nCO, the independent proxy of a listed company must keep the instructions of the individual shareholders (but not the fact of the representation) confidential until the beginning of the shareholder meeting.

For listed companies, the new law now expressly provides that their shareholders may issue proxies and instructions electronically (Art. 689c para. 6 nCO).

In principle, shareholders exercise their voting rights at the shareholder meeting in proportion to the total par value of the shares they own. As an exception to this principle, the current law provides in Art. 692 para. 3 CO that, in the event of a reduction in the par value of shares due to reorganisation of the company, voting rights may be retained in proportion to the original par value; this exception is abolished by the new law.

Information and inspection right

Pursuant to Art. 697 nCO, shareholders holding at least 10 percent of the voting rights or share capital may exercise their right to information beyond the confines of the shareholder meeting. However, this extension of the right to information outside the shareholder meeting applies only to non-listed companies. The board of directors must respond to the request for information within four months (Art. 697 para. 3 nCO). In order to ensure equal treatment, the response of the board of directors must be made available to all shareholders, at the latest by making them available for inspection at the next shareholder meeting.

Any refusal of a request for information must be justified in writing and may only be made if the information is not necessary for the exercise of shareholders' rights or if business secrets or other interests of the company worthy of protection are jeopardised (Art. 697 para. 4 nCO).

The right to inspect business records and files may only be exercised by shareholders representing more than 5 percent of the votes or share capital (Art. 697a nCO). It is expressly stipulated that notes may be taken during the inspection. Shareholders need only be granted access to the extent that this does not conflict with any business secrets or other interests of the company worthy of protection. With the new law, only the board of directors decides on the granting of the right of inspection and not the shareholder meeting. Pursuant to Art. 697a nCO, any refusal to grant access must be justified in writing. In such a case, the applicants may request the court to order inspection within 30 days (Art. 697b nCO).

Right to initiate a special investigation

What was previously known as the 'special audit' is renamed 'special investigation'. It is governed by Art. 697c - 697hbis nCO.

As was the case until now, the special investigation may only be requested at a shareholder meeting after the right to information or inspection has been exercised; in addition, the special investigation must be necessary for the exercise of shareholders' rights.

If the shareholder meeting approves the motion, the company or any shareholder may, within 30 days, request the court to designate the experts who will conduct the special investigation.

If the shareholder meeting rejects the request, shareholders of listed companies may, pursuant to Art. 697d para. 1 nCO, request the court to order a special investigation if the threshold of 5 percent is met; shareholders of non-listed companies may request the court to order a special investigation if the threshold of 10 percent is met. It is not necessary that the same shareholder(s) who exercised the right to information or inspection also request the special investigation. Applicants must now demonstrate to the satisfaction of the court that the founders or governing bodies of the company have violated the law or the articles of association and that the violation is likely to cause damage to the company or its shareholders (Art. 697d para. 3 nCO). This is a simplification since the rules to date require applicants to demonstrate to the satisfaction of the court that the company or its shareholders have actually suffered damage and not only that a violation of the law is likely to cause damage. According to the dispatch of the Federal Council regarding the Corporate Law Reform, there is no apparent reason why it should be necessary to wait until damage has actually occurred.

Preventive intervention should therefore be possible in the future.

The express mention of the written nature of the result of the investigation in Art. 697g para. 1 CO does not change anything from a material point of view, since a written report must already be submitted to the court today (Art. 697e CO). The possibility of using several experts is no longer explicitly mentioned, as this is taken for granted.

Statutory arbitration clause

The possibility of introducing a statutory arbitration clause is now expressly regulated in Art. 697n nCO. The articles of association of Swiss stock corporations may provide that all corporate law disputes shall be decided by an arbitral tribunal in Switzerland. Unless the articles of association provide otherwise, corporate bodies, members of corporate bodies and shareholders are bound by such a clause. Corporate law disputes include actions for defects in resolutions, actions for responsibility, actions to enforce capital protection provisions, actions for information and inspection, actions for convening a shareholder meeting, etc. The articles of association may reduce this scope of application as desired, but it is not possible to expand the scope of application.

Pursuant to Art. 697n para. 2 nCO, the provisions of Part 3 of the Swiss Civil Procedure Code apply to the arbitration proceedings. The twelfth chapter of the Federal Act on Private International Law is not applicable. Thus, when a statutory arbitration clause is introduced, the provisions on internal arbitration are mandatory. Furthermore, the articles of association may regulate the details of the arbitration proceedings and, in particular, refer to arbitration rules. For example, reference can thus be made to the Swiss Rules, ICC Rules or LCIA Rules.

In addition, according to Art. 697n para. 3 nCO, it must be ensured that persons who may be directly affected by the legal effects of the arbitral award are informed of the initiation and termination of the proceedings and that they may participate in the appointment of the arbitral tribunal and as intervening parties in the proceedings.

When a statutory arbitration clause is newly introduced through amendment of the articles of association of an existing company, the existing corporate bodies, the members of the corporate bodies and the shareholders of the company are bound by the arbitration clause. Accordingly, statutory arbitration clauses will not only be relevant for companies incorporated after the Swiss Corporate Law Reform comes into force, but for all companies where such a clause is newly introduced in the articles of association.

The Swiss Corporate Law Reform provides for the possibility of introducing a statutory arbitration clause not only for stock corporations but also for limited liability companies (GmbH) (Art. 797a nCO) and partnerships limited by shares (Kommanditaktiengesellschaft) through the general reference in Art. 764 para. 2 nCO.

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This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this legal update.

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