Spotlight 11/22

CORPORATE LAW REFORM

Brief overview of the main changes to the Stock Corporation Act as of January 1, 2023[1]

[1] Refers to the provisions of the Swiss Code of Obligations (*Obligationenrecht; "OR"*) set forth in Art. 620 et seq. thereof, governing stock corporations under Swiss law

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While part of the comprehensive corporate law reform has already entered into force, namely the regulations regarding the gender quota and the transparency requirements for commodity companies, the revised Stock Corporation Act will now enter into full force and effect as of January 1, 2023. Most relevant are a greater flexibility both in terms of the share capital and when holding general meetings as well as the strengthening of shareholder rights. The most important changes are outlined below, with a focus on unlisted companies.

More flexibility in capital requirements

The law reform will result in various provisions regarding the share capital being repealed, amended or clarified. For example, the previous **minimum nominal value** of CHF 0.01 has been abolished and now only has to be greater than zero. In addition, the qualified foundation requirement of an (intended) acquisition in kind has been deleted without substitution.

Furthermore, the legislator has explicitly codified the possibility of distributing an **interim dividend**. This means that the general meeting can approve an interim dividend based on audited interim financial statements. The audit is not required if the company has waived the limited audit. Furthermore, an audit need not be carried out if waived by all shareholders and the claims of creditors are not jeopardized as a result.

«ONE OF THE MAIN PILLARS OF THE CORPORATE LAW REFORM IS THE STRENGTHENING OF SHAREHOLDERS' RIGHTS.»

The previous version of the law had already provided for the admissibility of the company's bookkeeping and accounting in the functional currency; however, the share capital had to be mandatorily denominated in Swiss francs. Now, the share capital may be denominated in a **foreign currency** that is material for the business activity, provided that it corresponds to an equivalent value of at least CHF 100'000 at the time of incorporation or conversion. In this case, bookkeeping and accounting must also be done in the same currency. The determination of the currency of the share capital is an inalienable competence of the general meeting, which is subject to a qualified majority. The Federal Council determines which currencies are permitted; currently these are the Euro, the US dollar, the Japanese yen and the British pound.

The newly introduced **capital band** («*Kapitalband*») replaces the previous regulation governing the authorized capital increase and creates additional flexibility. The board of directors can now be authorized for a period of up to five years to implement a capital increase or reduction. The general meeting thus determines the limits - or *bandwidth* - within which the board of directors may increase or reduce the share capital, while the registered share capital may be increased or reduced by no more than half.

In addition, **offsetting** is now explicitly mentioned in the law. A shareholder can fulfill their payment obligation by offsetting a claim they have against the company, even if such claim is no longer covered by assets. However, in the case of offsetting, the articles of association must specify the amount of the claim to be offset, the name of the shareholder and the shares to which such shareholder is entitled. This considerably increases the publicity effect of such offsetting under the revised Act.

New forms of the general meeting

In principle, four forms of a general meeting are now possible: 1) *an attendance general meeting*, 2) a *hybrid general meeting*, 3) a *virtual general meeting*, and 4) a general meeting by *circular letter*. Irrespective of the form in which the general meeting is held, the board of directors determines the venue; however, this must not make it inappropriately difficult for any shareholder to exercise their rights in connection with the general meeting. In this context, it should also be noted that the catalog for the mandatory content of the minutes has been supplemented.

On the one hand, the revised Stock Corporation Act provides that the ***attendance general meeting*** may be held at several venues at the same time. In this case, the votes of the attendees must be audio- and video-transmitted directly to all meeting locations. On the other hand, the general meeting may also be held at a venue abroad, which, however, requires, among other things, a corresponding provision in the articles of association.

Furthermore, the board of directors is free to hold a ***hybrid general meeting***. This does not require a stipulation to this effect in the articles of association. In the case of a *hybrid general meeting*, there is a physical meeting place, but at the same time shareholders may also exercise their rights electronically without personal attendance.

In the case of a ***virtual general meeting***, such meeting is held exclusively by electronic means without a physical venue. In contrast to the *hybrid general meeting*, the holding of a *virtual general meeting* does require a mandatory stipulation in the articles of association.

In addition to the universal meeting already existing, a general meeting can now also be held by ***circular letter*** or in electronic form, but only on condition that no shareholder requests oral deliberation.

Strengthening shareholder rights

One of the main pillars of the corporate law reform is the strengthening of shareholders' rights. The following table provides an overview of the thresholds for shareholders' control and participation rights.

Currently, shareholders and the company already have the right to demand the **restitution** of dividends, shares of profits (paid to board members), other profit shares, interest paid to shareholders until commencement of the company's operations or other benefits from the other shareholders and the board of directors if they have received those without justification and in bad faith. The revised Stock Corporation Act now also allows for the restitution of remuneration, statutory capital and profit reserves or other benefits if those have been received without justification.

In addition, the group of persons standing to be sued is extended to include persons involved in the management of the company and members of the board of advisors and their close associates. In line with this, the above-mentioned group of persons becomes liable to restitution if the company takes over assets from them or enters into other legal transactions with them to the extent that there is an obvious disproportion between performance and counter-performance. The restitution is to be made to the company regardless of who the plaintiff is. The board of directors is primarily responsible for claiming on behalf of the company the restitution of unjustified benefits received. However, the revised Stock Corporation Act now explicitly states that the general meeting may also decide on the filing of a lawsuit. The general meeting may entrust the board of directors or a third party to conduct the litigation.

Finally, the articles of association may now contain an **arbitration clause** stipulating that an arbitral tribunal that has its seat in Switzerland may be specified for disputes under company law.

Restructuring and insolvency

The financial responsibility of the board of directors currently established in the law has been redefined with greater specificity and now includes the obligation to **monitor the solvency** of the company. If the company is on the verge of insolvency, the board of directors must take immediate action to ensure solvency. If necessary, restructuring measures must be introduced or an application for a debt-restructuring moratorium must be submitted.

In the event of a **capital loss**, the board of directors is no longer obligated to convene a general meeting right away but, as the first step, must take measures to eliminate the capital loss. When a capital loss has occurred, it is mandatory that the last annual financial statements be audited by the auditor or a licensed audit expert prior to the general meeting. This applies specifically also in cases where the company has waived the limited audit.

If there are reasonable grounds for concern that the company's liabilities are no longer covered by its assets, the board of directors must immediately prepare interim financial statements at going concern values and interim financial statements at disposal values. The interim financial statements at disposal values may be dispensed with when there is a going concern assumption and the interim financial statements at going concern values do not show any **over-indebtedness**. If this assumption is not met, interim financial statements at disposal values are sufficient. It is a mandatory requirement that these financial statements are audited by the auditor or - in the absence thereof - by a licensed audit expert. If the company is over-indebted according to both interim financial statements, the court must be notified and will commence insolvency

Shareholder rights	Until December 31, 2022	As of January 1, 2023	
		unlisted company	listed company
Disclosure right (outside the general meeting)	Only financial market regulations for listed companies	At least 10% of the share capital or votes	Financial market regulations, e.g., ad hoc publicity
Right to inspect the books of account	No threshold (but approval by general meeting or board of directors)	At least 5% of the share capital or votes	At least 5% of the share capital or votes
Right to convene the general meeting	At least 10% of the share capital or (according to standard practice) shares with a par value of CHF 1 million.	At least 10% of the share capital or votes	At least 5% of the share capital or votes
Right to add items to the agenda and submit motions	Shares with a nominal value of at least CHF 1 million or at least 10% of the share capital	At least 5% of the share capital or votes	At least 0.5% of the share capital or votes
Special investigation (previously *special audit*)	At least 10% of the share capital or shares with a nominal value of CHF 2 million.	At least 10% of the share capital or votes	At least 5% of the share capital or votes
Action for dissolution	At least 10% of the share capital	At least 10% of the share capital or votes	At least 10% of the share capital or votes

proceedings. However, the notification may be dispensed with if company creditors subordinate their claims to those of all other creditors to the extent of the over-indebtedness and defer their claims, provided that the subordination covers the amount owed and the interest claims for the duration of the over-indebtedness or for as long as there is a reasonable expectation that the over-indebtedness can be remedied within a reasonable period of time, but at the latest within 90 days after the audited interim financial statements are available, and the claims of the creditors are not further jeopardized. The instrument of stay of insolvency proceedings is no longer available.

Transitional provisions and amendment of the articles of association

The transitional provisions provide for a **period of two years** for the adaptation of the articles of association and regulations. Any provisions of the articles of association and regulations that are incompatible with the new law shall remain in force until they have been adapted, but for no longer than two years. This may result in, among other things, certain provisions under the old version remaining applicable for another two years, in particular participation and control rights.

The revision of the Stock Corporation Act was designed such that companies are not forced to amend their articles of association. However, in order to make use of the new possibilities, certain provisions of the articles of association may have to be amended or supplemented. Furthermore, the question of whether certain documents, e.g., draft minutes of the general meeting, need to be adjusted to the new provisions must be examined.

Wenger Vieli's team will be happy to assist you in implementing the corporate law reform.

Key facts

01 The revision of the Stock Corporation Act offers greater flexibility regarding the share capital and a strengthening of shareholders' rights.

02 Provisions of the articles of association that conflict with the new legislation will continue to apply for two years. They will automatically become invalid as of January 1, 2025.

03 In order to make use of the new possibilities, it may be necessary to amend the articles of association.

Download Guideline
More detailed information on this topic can be found in our Guideline.
Download publication via QR Code.

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