suterhowald
Rechtsanwälte
Attorneys at Law

NEWSLETTER

NOVEMBER 2022

Authors: Bettina Rudin and Urs Suter

The revised company law ante portas

On 1 January 2023, the revised company law will come into force. The aim of the revision was to modernise company law and adapt it to the economic needs of the coming years. In particular, the share capital will be made more flexible, the position of minority shareholders will be strengthened and general meetings of shareholders can be held virtually or in writing in the future. This newsletter highlights the most important changes that are of interest to public limited companies not listed on the stock exchange and any resulting need for action. The law governing limited liability companies is also affected by this reform.

I. CHANGES IN SHARE CAPITAL

1. Nominal value greater than zero

Currently, the minimum par value is CHF 0.01 per share. With the revision of the company law, the par value will now be made more flexible to the extent that it must be greater than zero in the future. This means that even companies with a share capital of CHF 100,000 can issue as many shares as they wish.

2. Share capital in foreign currency

Under the revised accounting and financial reporting law, financial reporting and accounting have since 2013 also been permissible in the functional currency relevant to the business activity. It is only a logical consequence that the revised company law now also permits share capital in foreign currency. For this purpose, the following requirements must be met cumulatively:

(i) The foreign currency is the functional currency for the business activity.

(ii) The share capital corresponds to an equivalent value of at least CHF 100,000.

(iii) If the share capital is denominated in a foreign currency, the accounting and financial reporting have to be administered in the same currency.

The eligible foreign currencies are USD, GBP, EUR and Yen. Cryptocurrencies do not qualify as an eligible foreign currency for determining the share capital. For tax purposes, net profit and equity are converted into CHF.

If an existing company wishes to change its currency, the general meeting of shareholders ("**GM**") may decide to do so proactively at the beginning of the future business year or retroactively at the beginning of the current business year. If the share capital is rounded up or down in the process, the regulations on capital increase or capital reduction must be observed. The Board of Directors ("**BoD**") subsequently adjusts the articles of association, determines that the preceding three prerequisites for a currency change are fulfilled

and records the conversion rate applied. The resolutions of the GM and the BoD must be publicly certified.

3. Flexibilisation and facilitation of capital change procedures

3.1 Capital band

With the capital band, the GM can, in the articles of association, grant the BoD the authority, limited to a maximum of five years, to increase the share capital by up to 50% or to reduce it by 50% without the need for further GM resolutions. The GM may also authorise only an increase or only a reduction by this maximum amount. The reduction may not reduce the capital below the minimum of CHF 100,000 or the equivalent in foreign currency. However, a reduction may only be authorised if the company has not waived the limited audit of the annual accounts.

With the instrument of the capital band, the authorised capital increase becomes obsolete, which is why it is cancelled. Existing authorised capital can continue to be used from 1 January 2023 but can no longer be extended or changed.

3.2 Ordinary capital increase

In the case of an ordinary capital increase, the previous procedure is retained, but the BoD is now granted a period of six months (instead of three months) to file the capital increase with the commercial register office for registration. In addition, the capital increase with a maximum amount is now explicitly permitted.

3.3 Capital reduction

The capital reduction procedure will also be simplified. In the future, only one call to creditors will be required (instead of three). The creditors will then only have 30 days after publication of the creditors' call to demand guarantees for their claims (previously two months). The company must then only guarantee the claims of creditors, who have requested guarantees, to the extent that the previous coverage is reduced by the capital reduction, unless it fulfils the claim or can prove that the fulfilment of the claim is not jeopardised by the reduction. For the execution of the capital reduction, a period of six months following the GM resolution will apply and the capital reduction is also permissible with a maximum amount.

3.4 Conditional capital

In the case of conditional capital, in particular the group of beneficiaries of option or conversion rights is expanded. While employees and creditors were previously entitled to subscribe, going forward "third parties" may also be granted conversion or option rights.

4. Distributions

4.1 Admissibility of the distribution of the share premium

The legislator now clarifies that the share premium, which is to be allocated to the legal capital reserve, may be repaid to the shareholders if the legal capital and retained earnings, less the amount of any losses, exceed 50% of the share capital (or 20% of the share capital in the case of holding companies).

4.2 Interim dividends

The distribution of interim dividends is permitted by law. It requires a GM resolution, which must be based on interim financial statements audited by the auditors. In addition, the provisions on dividends must be complied with. If all shareholders agree and if the distribution of an interim dividend does not lead to a threat to the claims of creditors, the audit of the interim financial statements, but not the preparation of the interim financial statements, may be waived.

If the company does not have an auditor due to an opting-out, no audit of the interim financial statements is required.

5. Clarifications and facilitations in the context of paying up the share capital

5.1 Legal definition of contribution in kind and abolition of the (intended) acquisition in kind

A contribution in kind must meet the following criteria to qualify as cover for the share capital to be subscribed: (i) it must be recognized as assets, (ii) it may be transferred to the assets of the company, (iii) it may be realized by transfer to third parties and (iv) it must be immediately available after the entry in the commercial register or, in the case of real property, the company receives an unconditional claim to entry in the land register.

The provisions concerning the (intended) acquisition in kind from shareholders or persons close to them have been deleted without replacement, which is to be welcomed due to the legal uncertainties this entailed. The (intended) acquisition in kind will therefore

no longer constitute a qualified formation or capital increase and it no longer has to be disclosed in the articles of association.

5.2 Clarification regarding paying up of the share capital by means of set-off

Until now, there had been a controversial discussion in the doctrine as to whether the paying up of the share capital by means of set-off with receivables that are not or not fully covered by the company's assets is permissible. The legislator has now clarified that the set-off with receivables that are not covered by the company's assets is permissible. Thus, an important restructuring instrument remains permissible. However, the articles of association must now disclose the amount of the claim to be offset, the name of the shareholder and the shares to which he is entitled.

II. STRENGTHENING SHAREHOLDER AND MINORITY RIGHTS

One of the main objectives of the reform of company law is to strengthen shareholders' rights. In particular, the thresholds for asserting participation and control rights are lowered as follows.

Right of participation and control	**Applicable law for all companies**	**New law for unlisted companies**
Right to convene a GM	10% of the share capital	10% of the share capital or votes
Right to add items to the agenda	Nominal value of CHF 1 million or 10% of the share capital	5% of the share capital or votes
Right to information outside the GM	- - -	10% of the of the share capital or votes
Right to inspect business records and files	No threshold	5% of the share capital or votes (now only the BoD has the sole authority to decide on an inspection request).
Special investigation (previously special audit)	10% of the share capital or nominal value of CHF 2 million.	10% of the of the share capital or votes
Action for dissolution	10% of the of the share capital	10% of the of the share capital or votes

The law now specifies that the BoD must comply with a request to convene a GM within a reasonable period of time, but at the latest within 60 days.

The BoD shall respond to requests for information and inspection within 4 months. The response to a request for information must be made available for inspection by the shareholders at the next GM at the latest. As before, the BoD may refuse information or inspection if business secrets or other interests of the company worthy of protection are at risk.

The requirements for initiating a special investigation have been relaxed in that it is no longer necessary to make a prima facie case that damage has occurred as a result of a violation of the law or the articles of association by the founders or governing bodies. It is sufficient to make a prima facie case that the violation of the law or the articles of association is likely to damage the company or the shareholders.

III. FLEXIBILITY IN GM

1. Simplification of the convening of the GM and the announcement of the annual and audit report

The convening of the GM and the announcement of the annual report and the auditor's report are governed by the form of the company's notices to its shareholders, as laid down in the articles of association. With a corresponding basis in the articles of association, the convocation of the GM can only be made electronically and it is sufficient to make the annual report and audit report available electronically at least 20 days before the ordinary annual GM, e.g., by posting them on a website. A shareholder may only

demand the timely physical delivery of these documents if they are not accessible electronically. The obligation to physically make these documents available for inspection at the registered office of the company prior to the GM no longer applies.

2. Future Universal Assembly permissible without physical presence

Universal meetings, i.e., meetings at which the rules on convening do not have to be observed, can in the future also be held without the physical presence of all shareholders or their representatives. This means that GM resolutions can be passed in writing (by way of circular) or in electronic form unless a shareholder or his representative requests oral deliberation. This form of GM should be suitable for a small group of shareholders and for routine agenda items.

3. The virtual GM becomes possible

Provided that the articles of association provide for it, a GM may be held virtually, i.e., by electronic means without a physical meeting location. In this case, the BoD must designate an independent representative of voting rights in the notice convening the meeting. The articles of association of companies whose shares are not listed on the stock exchange may waive the appointment of an independent representative of voting rights.

A so-called "hybrid" GM can also be held with one physical venue, while allowing shareholders who cannot be physically present to exercise their rights electronically.

In both cases, the BoD must meet the legally defined requirements for a technically flawless conduct of the GM. Should technical problems during the GM make the proper conduct of the GM impossible, the GM must be repeated, whereby those resolutions passed before the occurrence of the technical problems remain valid.

4. Flexibilities regarding the venue

4.1 Venue abroad

The possibility of holding the GM at a venue abroad is now explicitly permitted by the law. On the one hand, this requires a basis in the articles of association, and on the other hand, the BoD must designate an independent representative of voting rights in the notice convening the meeting. For companies not listed on the stock exchange, the appointment of an independent representative of voting rights can be waived if all shareholders agree.

In the case of a sole meeting place abroad, it must be noted that any resolutions requiring notarisation must be notarised by a person competent at the meeting location due to the principle of territoriality. The recognition of such a deed issued abroad by the commercial register requires the observance of certain formalities, which is why in such a constellation the simultaneous holding of the GM also at a meeting place in Switzerland is recommended (see section 4.2 below).

4.2 Multilocal GM

The holding of the GM simultaneously at different meeting venues is now permitted by law. The multilocal GM requires that the votes of the participants are transmitted directly in sound and vision to all meeting locations. There is no need for a basis in the articles of association for this.

In the case of resolutions requiring notarisation, a competent notary must be present at one of the meeting venues.

If at least one of the venues is in Switzerland, it is not formally a GM with a venue abroad, which is why it can be held without a corresponding basis in the articles of association.

4.3 Other innovations around the GM

If the articles of association of non-listed companies provide that a shareholder may only be represented by another shareholder, this remains permissible, but the BoD must appoint an independent representative of voting rights or a governing body as proxy at the request of a shareholder. It should be considered whether such a provision is still appropriate and, if so, the modalities for the appointment of a representative should be regulated in the articles of association.

The minutes of the GM must be made available to the shareholders of non-listed companies upon request within 30 days after the GM.

IV. NEW FEATURES OF THE BoD AND THE AUDITORS

1. Individual election of the BoD

The law now also provides for the individual election of BoDs in unlisted companies. However, the chairman may still order an election in globo with the consent of all represented shareholders, or the articles of association provide for an election in globo.

2. Adoption of resolutions also permissible electronically without signature

The law now clearly defines the manner in which the BoD can pass its resolutions. Among other things, virtual or hybrid meetings are permissible, analogous to the virtual or hybrid GM (see III.3 above). Circular resolutions can now also be passed electronically without a signature, e.g., via e-mail, unless a BoD member requests oral deliberation.

3. Delegation of management permitted without a basis in articles of association

Other than before, there is no longer any need for a basis in the articles of association for the management of the company to be delegated to the management board. However, in the case of a delegation of the management, the organisational regulations are still required, which regulate the management and determine who is responsible for what and who reports to whom.

4. Duty to provide information on conflicts of interest without delay

Going forward, BoD members and members of the management board must inform the BoD immediately of any conflicts of interest affecting them. The BoD must take the measures necessary to safeguard the interests of the company.

5. Deselection of the auditors only on significant grounds

The auditors can now only be voted out on significant grounds and the reason must be disclosed in the notes to the annual financial statements. This is intended to better protect minority shareholders.

V. CLARIFICATIONS IN THE EVENT OF FINANCIAL IMBALANCE

1. Supplementation of the early warning system in the event of financial crises

In addition to the duties of the BoD to act in the event of capital loss and over-indebtedness, the law now explicitly provides for the duty of the BoD to monitor the solvency of the company and to take the necessary measures in the event of impending insolvency. This fundamental duty is basically not new, as it is already implicit in the BoD's duty of care.

2. Clarifications in the event of over-indebtedness

The regulations governing the measures to be taken by the BoD in the event of over-indebtedness remain essentially unchanged. In principle, the BoD must notify the judge if there is a justified concern of over-indebtedness and the audited interim financial statements show over-indebtedness.

Notification of the judge can be dispensed with if a subordination declaration to the extent of the over-indebtedness has been submitted by individual creditors. It is now clarified that in the case of liability actions against person of the governing bodies, the claims subject to subordination are not to be included in the calculation of damages.

There is no need to go to court as long as there is a reasonable, i.e., realistic and plausible, chance to remedy the over-indebtedness and the claims of the creditors are not additionally jeopardised. It is now clarified that the BoD has a maximum of 90 days for the restructuring from the date the audited interim financial statements are available.

Despite these clarifications, the BoD continues to assume personal liability risk in remediation efforts.

VI. IS THERE A NEED FOR ACTION FOR EXISTING COMPANIES?

The revised law will become applicable to existing companies on 1 January 2023. There is a two-year transition period until 31 December 2024 to adapt articles of association and regulations to the revised law. Contrary to the last reform of company law in 1991, however, the revised company law does not contain any provisions that mandatorily require an

amendment of the articles of association. Nevertheless, it is recommended to review the articles of association and in particular the organisational regulations in order to be able to make use of the flexibilities and new possibilities offered and to adapt provisions that no longer comply with the law.

In particular, the form of the company's notices to its shareholders should be regulated in the articles of association in order to enable a purely electronic convocation of the GM and the creation of a basis in the articles of association for a virtual GM. If the non-listed company wishes to waive the independent representative of voting rights at the virtual GM, this must be anchored in the articles of association. If the election in globo of the BoD is to be retained, this requires a basis in the articles of association. The introduction of a capital band also requires a basis in the articles of association.

For foreign-controlled companies, the share capital in foreign currency and/or a venue abroad for holding the GM may be appropriate. Both can be introduced by amending the articles of association accordingly.

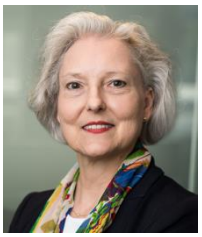
Arbitration clauses in the articles of association are now permissible for disputes under company law that provide for an arbitral tribunal in Switzerland. In this case, the articles of association can regulate the details of the arbitration proceedings.

In view of the duty of the BoD to monitor the solvency of the company, which is now explicitly mentioned in the law, it is recommended that the processes of liquidity planning and control contained in the regulations be reviewed for their suitability. Likewise, the new possibilities for holding board meetings should be reflected in the organisational regulations, if necessary.

VII. THE MOST IMPORTANT CHANGES TO THE LIMITED LIABILITY COMPANIES (GMBH)

The reform of company law also affects the Limited Liability Company (GmbH). In particular, the nominal capital in foreign currency will also be permissible for the GmbH and the nominal value of the company quotas will only have to be greater than zero in the future. Interim dividends will be permissible for the GmbH analogous to the stock corporation (AG) (see I.4.2 above). The rules of company law in the event of financial imbalance apply accordingly to the GmbH (see section V. above). It is therefore advisable to review the articles of association and regulations of the GmbH in the light of the new possibilities.

The content of this newsletter does not constitute legal advice and must not be used as such. For personal advice, please contact your contact person at Suter Howald Attorneys at Law or one of the following persons:



Bettina Rudin
Partner

bettina.rudin@suterhowald.ch

Urs Suter
Partner

urs.suter@suterhowald.ch

Suter Howald Rechtsanwalte

Räffelstrasse 26 | P.O. Box | CH-8021 Zürich