

BULLETIN NOVEMBER 2021

Series of publications on new Swiss corporate law

Minority shareholders

I. INTRODUCTION

The Parliament has adopted a new bill regarding Swiss corporate law on June 19, 2020. This new legislation is expected to enter into force in 2022.

This reform aims to modernize Swiss corporate law. A series of publications shall provide an overview of the main aspects of the reform, each of which shall deal with a specific topic.

This publication shall focus on the amendments aiming at expanding minority shareholders' right compared to the existing ones.

We will refer to the new amendments yet to come into as force as “the **New Law**”, whereas the currently applicable law which will be soon abrogated as “the **Current Law**”.

II. STRENGTHENED INFORMATION RIGHTS

The New Law entails strengthened information rights for shareholders:

- While any shareholder may still request some information to be provided by the board of directors during the shareholders' general assembly (the **General Assembly**), shareholders of private companies holding at

least 10% of the share capital or voting rights are entitled to request in writing **information** to the board of directors at any time.

- The board of directors shall provide the requested information within four months and make it available to all shareholders at the next General Assembly. In case the board of directors refuses to provide the requested information, it shall justify such refusal in writing.
- Shareholders holding at least 5% of the share capital or voting rights have the right to access **books and records** of the company.
- The board of directors shall give access to the books and records within four months. While consulting the documents, shareholders are authorized to take some notes. In case the board of directors refuses to give access to the books and records, it shall justify such refusal in writing.
- Shareholders that were denied access to information or books and records – even partially – may request from the judge within thirty days to force the company to provide the requested information and documents.

The Current Law already provides the shareholders with the right to file a request with the judge. The New Law merely specifies the time frame within which the claim shall be filed.

What does not change with the New Law:

- Any shareholder may still request that information shall be provided by the board of directors during the General Assembly;
- Information which may be requested shall be linked to the company's business and encompass *inter alia* the following: (i) information relating to the company's management, (ii) company's accounts, (iii) information relating to the board of directors and its remuneration.
- According to case law, within a group companies, shareholders of the mother company may request access to documents relating to a subsidiary as long as said documents are in the mother company's possession;
- Information is provided and access to the books and records is granted to shareholders only if it is necessary to the shareholders to exercise their rights does not jeopardize company's business secrets or other corporate interests worthy of protection.

III. SPECIAL EXAMINATION

Under the Current Law, any shareholder has the right to propose to the General Assembly to initiate a special audit in order to clarify some facts if this is necessary for the share-holder to exercise his/her/it rights. The proceeding is complicated and depends on whether the General Assembly has accepted or refused the special audit:

- In case the General Assembly has accepted to initiate the special audit, the company or any shareholder has to demand from the judge within thirty days to appoint the special auditor;

- In case the General Assembly has refused to initiate the special audit, shareholders holding at least 10% of the share capital or holding shares of a nominal value of at least CHF 2 million, has to demand from the judge within a three months-period to appoint the special auditor. Shareholders have to demonstrate that (i) the founding members of the company or corporates bodies (e.g., board of directors and directors) have infringed the law or the company's articles of association and that (ii) such violation had infringed the law or the company's articles of association and that (ii) it had caused a damage to the company or to the shareholders. The above-mentioned thresholds apply regardless of whether the company is public or private.

The terminology used under the New Law has changed from **special audit to special examination.**

The change is not a mere change in the wording of the institution.

The New Law entails many substantive amendments aiming at facilitating the proceedings to initiate said special examination:

- The threshold for shareholders to demand from a judge within a three months-period to appoint the special examiner is lowered to:
 - o 5% of the share-capital or voting rights in a public company;
 - o 10% of share-capital or voting rights in other companies.
- The request addressed to the judge may cover any question which was asked to the board of directors during the General Assembly (cf. supra II) as long as the answer is necessary for the shareholders to exercise their rights. This is a precision compared to the Current Law which derives from case-law rendered by the Swiss Supreme Court;

- The judge will admit the request to appoint a special examiner if shareholders demonstrate in a credible way that (i) the founding members or corporates bodies have infringed the law or the company's articles of association and that (ii) such violation *might cause a damage* to the company or to the shareholders. The New Law does not require anymore that a damage already took place which shall allow shareholders to act and file a request with the judge in a preventive manner.

IV. SHAREHOLDER'S GENERAL ASSEMBLY

A. Right to Request an Extraordinary Shareholders' General Assembly

The New Law has lowered the thresholds for shareholders who wish to request the convocation of an extraordinary General Assembly:

- For public companies: shareholders holding together 5% of the share-capital or voting rights;
- For other companies: shareholders holding together 10% of the share-capital or voting rights.

Under the Current Law, the threshold is set at 10% of the share-capital and no distinctions are made between public and other companies.

The shareholders shall request the convocation of the General Assembly in writing and shall submit (i) agenda items and (ii) motions for each agenda item. Otherwise, the convocation is not valid.

Agenda items are the objects on which the shareholders wish to vote. Motions are the propositions of the shareholders for each agenda item. See the below example which illustrates the distinction:

Agenda Item #1: Election to the Board of Directors

Motion: It is proposed to elect Mr. X as member of the board of directors.

Agenda Item #2: Election of the Auditor

Motion: It is proposed to elect the company X Ltd as new auditor.

In case the board of directors does not convene the General Assembly within 60 days, the shareholders may demand from the judge to convene the General Assembly. This change is welcome in terms of efficiency since the Current Law requires the board of directors to convene the General Assembly within a "reasonable period".

B. Right to Submit an Item on the Agenda and Motion Right

The New Law has also lowered the threshold for shareholders who wish to ask that an item be included in the invitation to a General Assembly. While the limit was previously set at shareholders holding shares with an aggregate nominal value of CHF 1 million, the New Law sets the threshold now as follow:

- For public companies: shareholders holding together 0,5% of the share-capital or voting rights;
- For other companies: shareholders holding together 5% of the share-capital or voting rights.

Under the same limits, the shareholders have the right to request that their proposals (motions) related to agenda items shall be included in the agenda to the General Assembly.

The New Law clearly specifies that, during the General Assembly, any shareholder may submit proposals regarding an agenda item (i.e., no threshold is required).

V. OTHER AMENDMENTS

Other amendments were made to the existing provisions in the view of reinforcing the minority shareholders' rights.

According the Federal Council's message dated November 23, 2016 addressed to the Swiss parliament, the following amendments are – inter-alia – aimed at better protecting minority shareholders:

- Delisting of shares of a public company is now subject to (i) the vote of the General Assembly and (i) to at least two-thirds of the voting

rights represented and an absolute majority of the nominal value of shares represented at the General Assembly;

- Dismissal of the auditors during their mandate is possible only in case of justified grounds;
- Conditions to file a claim for restitution have been amended. In particular, the New Law precises the scope of persons subject to the duty to return unduly received compensations (i.e., shareholders, board members, directors, advisory board members) and does not require anymore that such remunerations have been received in “bad faith”. In addition, any shareholder may request that the persons who transferred assets to the company in exchange of a counter-part, returns the latter when it is blatantly disproportionate with the value of the as-sets transferred to the company.
- Articles of association may contain arbitration clauses pursuant to which corporate disputes are subject to arbitration in Switzerland. Unless something else is provided in the articles of association, the arbitration clause is binding upon the company, its corporate bodies, members of said corporate bodies and shareholders.

VI. CONCLUSION

With the news amendments of Swiss corporate law, minority shareholder’s rights are reinforced albeit not to a great extent. For companies willing to offer a better protection to minority shareholders, the articles of association may go further and provide additional rights.

For a full overview of the minority shareholders’ rights, please refer to the enclosed chart.

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Overview of Minority Shareholders' Rights under Swiss Statutory Law – New Law

Non-Property Rights			
Participation Rights	Protective Rights		
<ul style="list-style-type: none"> - Right to attend the General Meeting (GM), including: <ul style="list-style-type: none"> o right to be invited and informed on the items brought to the agenda and the motions; o right to deliberate at the GM; o right to be represented at the GM by a person, shareholder or not, without written authority (see articles of association). 	<ul style="list-style-type: none"> - Right of Information: During the GM, any shareholder may request information (i) from the Board of Directors (the Board) on the affairs of the company and (ii) from the auditor on the execution and the result of its verification. The information must be provided to the extent necessary to exercise the shareholder's rights. It may be refused when the information would jeopardize business secrecy or other social interests worthy of protection. <u>In addition</u>, shareholders of non-public companies holding at least 10% of the share capital or voting rights are entitled to request in writing information to the board of directors at any time. The board of directors shall provide the requested information within four months and make it available to all shareholders at the next GM. 	<ul style="list-style-type: none"> - Right of Inspection: Shareholders holding at least 5% of the share capital or voting rights have the right to access books and records of the company. The board of directors shall grant the access within four months, unless business secrets may be jeopardized. Shareholders are authorized to take some notes while consulting the documents. In case the board of directors refuses to give access to the books and records, it shall justify such refusal in writing. 	<ul style="list-style-type: none"> - Right to Appoint Experts: The GM may, by a simple majority, appoint external experts to (i) audit the general organisation of the company, (ii) audit the effectiveness of certain decisions or (iii) exercise an internal control. In this case, the allocation of voting rights according to the number of shares is not applicable (i.e., no voting preference).
<ul style="list-style-type: none"> - Voting right: The shareholder may exercise voting rights. 	<ul style="list-style-type: none"> - Right to Instigate a Special Examination: Any shareholder may request the GM to have specific matters clarified by means of a special examination, provided that it is necessary for the proper exercise of shareholders' rights and that the shareholder has already exercised his right to information and inspection. If the motion is rejected by the GM, one or more 	<ul style="list-style-type: none"> - Right to Convene a GM: One or more shareholders together representing (i) 5% of the share-capital or voting rights in public companies or (ii) 10% of the share capital or voting rights in others companies may request a GM to be convened. The request shall be made 	<ul style="list-style-type: none"> - Right to Place Items and Motions on the Agenda: Shareholders representing collectively (i) 0.5% of the share-capital or voting rights in public companies or (ii) 5% of the share-capital or voting rights in other companies may demand that an item be placed on the agenda. The same limits

Non-Property Rights

Participation Rights	Protective Rights		
	<p>shareholders representing collectively (i) 5% of the share capital or voting rights in public companies or (ii) 10% of the share-capital or voting rights in other companies may request the judge to appoint a special examiner if they provide evidence that the founder members, directors or officers have violated the law or the articles of association and thereby might cause a damage to the company or the shareholders.</p>	<p>in writing and shall contain (i) agenda items and (ii) motions for each agenda item.</p>	<p>apply to the shareholders’ right of proposal (motions) related to item which are already included in the general assembly’s agenda, in the event a shareholder wishes that the motion is to be included in the invitation. During the GM, any shareholder may make proposals regarding an agenda item.</p>
<p>- Voting Preferred Shares: the voting preference is not applicable in the following cases: (i) to appoint the auditor, (ii) to appoint the experts to control the management, (iii) to decide upon a special examination, (iv) to decide upon a liability lawsuit and (v) for all others cases where the law provides that the votes are cast depending of the capital participation.</p>	<p>- Right to File a Claim for Restitution: Any shareholder may request that the company returns (i) unduly received dividends, shares of profits, other compensations, legal reserves or interest before commencement of operations paid to (ii) board members, shareholders, persons in charge of the management and to persons that are closed to them. In addition, any shareholder may request that the persons who transferred assets to the company in exchange of a counter-part, returns the latter when it is</p>	<p>- Right to Challenge Resolutions of the GM: The right to challenge lapses if the action is not brought within two months after the GM.</p>	<p>- Right to Initiate a Liability Action</p>

Non-Property Rights

Participation Rights	Protective Rights		
	<p>blatantly disproportionate with the value of the assets transferred to the company.</p>		
	<ul style="list-style-type: none"> - Right to Request the Dissolution of the Company: Shareholders together representing at least 10% of the share capital or of the voting rights may request the dissolution for good cause. 	<ul style="list-style-type: none"> - Right to be Represented in the Board: Where two or more different share classes exist with regard to voting or property rights, the articles of association must provide that the shareholders of each different share class are entitled to elect at least one representative to the Board. 	<ul style="list-style-type: none"> - Qualified majority: 2/3 of the shares represented and absolute majority of the nominal value of the shares represented to vote on certain matters (art. 704 CO).
Annual Accounts	<ul style="list-style-type: none"> - Right to Request the Annual Accounts to be Prepared Pursuant to the Principles Applicable to Large Companies: Shareholders representing at least 10% of the share capital may request the annual accounts to be prepared in accordance with the principles applicable to large companies. 	<ul style="list-style-type: none"> - Right to Request the Establishment of Financial Statements Pursuant to a Recognised Financial Reporting Standard: Shareholders representing at least 20% of the share capital may request the financial statements to be prepared according to a recognised financial reporting standard. 	<ul style="list-style-type: none"> - Right to Request Ordinary Audit of the Accounts: Shareholders representing at least 10% of the share capital may request the ordinary audit of the annual accounts.
Consolidated Accounts	<ul style="list-style-type: none"> - Right to Request Consolidated Accounts to be Prepared: Shareholders representing at least 20% of the share capital may request the company to prepare consolidated accounts. 	<ul style="list-style-type: none"> - Right to Request the Establishment of Consolidated Accounts Pursuant to a Recognised Financial Reporting Standard: Shareholders representing at least 20% of the share capital may request the 	<ul style="list-style-type: none"> - Right to Request Ordinary Audit of the Consolidated Accounts: Shareholders representing at least 10% of the share capital may request the ordinary audit of the consolidated accounts.

Non-Property Rights			
Participation Rights		Protective Rights	
		consolidated accounts to be prepared according a recognised financial reporting standard.	
Property Rights		Rights to the Conservation of Participation	
- Dividend Right: based on the nominal value of the shares, unless preferred shares are issued	- Right to a Pro Rata Share of the Liquidation Proceeds on Dissolution of the Company: unless preferred shares are issued.	- Pre-emptive Right in a Share Capital Increase: May be restricted or cancelled for good cause. No one should be unfairly advantaged or disadvantaged (i) due to the limitation or the withdrawal of the pre-emptive rights or (ii) due to the issuance price.	- Pre-emptive Right in Convertible Instruments and Instruments with Warrants: May be restricted or cancelled for good cause. No one should be unfairly advantaged or disadvantaged (i) due to the limitation or the withdrawal of the pre-emptive rights or (ii) due to the issuance price.