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IMPLICATIONS OF THE NEW SWISS CORPORATE LAW FOR LENDING TRANSACTIONS

After several years in the making, a major revision of the Swiss law applicable to corporations (*Aktiengesellschaften*) and limited liability companies (*Gesellschaften mit beschränkter Haftung*) (the New Swiss Corporate Law) entered into force on 1 January 2023. The revision has been extensive and has adapted Swiss corporate law to better reflect current economic conditions and needs. The following provides an overview of the most significant changes relevant for lending transactions.

CAPITAL REGULATIONS WILL BECOME MORE FLEXIBLE

The provisions regarding the composition, protection and use of equity have not been fundamentally changed under the New Swiss Corporate Law. However, the new law provides for more flexibility as to the structure of equity. Under Swiss law, equity consists of share capital (in the case of a Swiss corporation) or quota capital (in the case of a Swiss limited liability company), certain types of reserves (namely statutory capital reserves, statutory retained earnings, voluntary retained earnings, minus reserves for own shares/quotas as well as profit/loss carried forward) and the annual profit/loss (see Art 959*a* para 2(3) of the Swiss Code of Obligations (CO)). In addition to share capital, Swiss corporations may also issue participation capital according to Arts 656*a* et seqq. CO. While the composition of equity as a residual value (ie assets minus debt) can fluctuate, share capital or quota capital remains the same as it represents the cumulative nominal value of the issued shares/quotas.

Under the New Swiss Corporate Law, share capital or quota capital no longer necessarily has to be denominated in Swiss francs but may also be denominated in a foreign currency recognised by the Federal Council, currently being EUR, GBP, JPY and USD (see Art 621 para 2 CO in conjunction with Art 45*a* of and annex 3 to the Swiss Commercial Register Ordinance). A prerequisite for the choice of a foreign currency is that the currency is essential for the relevant company's business activity (so-called functional currency) and the company's accounting is carried out in the same currency. If the share capital or quota capital is not already denominated in a foreign currency at the time of incorporation, the general meeting of shareholders can change the currency of the share capital or quota capital as from the start of the company's upcoming financial year (Art 621 para 3 CO). A retrospective change from the beginning of the ongoing financial year is also possible. In both cases, the exchange rate used for the conversion will be determined by the board of directors (Art 621 para 3 CO). For obvious reasons, in case of a prospective currency change, the board of directors will only be able to determine the actual exchange rate at the beginning of the relevant financial year, following the approval of the company's general meeting of shareholders.

According to the new Art 622 para 4 and Art 774*a* CO, the nominal value of one share or quota must only be greater than zero (under the previous law, it had to be at least one Rappen for shares and 100 Swiss francs for quotas). While the reduction of the minimum nominal value of the quotas has increased the flexibility in structuring the equity capital of limited liability companies, the effects of such changes on the structuring of equity in corporations will likely be of less practical importance.

Moreover, the New Swiss Corporate Law clarifies that the general meeting may decide to distribute interim dividends to shareholders (see Art 675*a* CO), the permissibility of which has been disputed under the previous law. Interim dividends are issued based on the profit of the ongoing financial year, as reported in the company's interim financial statements in accordance with Art 960*f* CO. The interim financial statements must be audited, unless:

- the company has opted out of audit; or
- all shareholders have agreed to pay the interim dividend and if the claims of creditors are not jeopardised by such distribution (Art 675*a* para 2 CO).

Another change with regard to distributions to shareholders is that under the New Corporate Law a distinction has to be made between distributions in the form of "traditional dividends" (ie distribution of profits/retained earnings) and distributions in the form of repayments of statutory capital reserves. These two types of distribution have to be resolved separately by the general meeting of shareholders (see Art 698 para 2(4)-(6) CO). With regard to all other distribution requirements (eg financial statements, audit report etc), we are of the opinion that the dividend provisions apply analogously to distributions in the form of repayments of the statutory capital reserves.

Finally, for corporations only, a new instrument in the form of a capital band has been introduced, which gives the board of directors the flexibility to increase and/or decrease the share capital within a certain range (not more than 50% of the company's share capital registered in the register of commerce) for a maximum period of five years (Art 653 et seqq. CO). This new instrument has replaced the instrument of the authorised capital, which allowed the general meeting of shareholders to authorise the board of directors to increase the share capital, but not to decrease it.

The new capital regulations, especially the increased flexibility in the structuring of the share capital or quota capital and the new distribution forms, may be of particular relevance in the area of up-stream/cross-stream undertakings, as they might have a direct or indirect impact on the company's freely disposable equity and thus on the amount for which up-stream or cross-stream undertakings are permissible. Furthermore, in contractual documentation in lending transactions, attention should be paid to the distinction between dividends and repayments of the statutory capital reserves (eg with regard to the regulation of (non-)permissible distributions by the borrower, etc).

INCREASED FLEXIBILITY FOR HOLDING SHAREHOLDERS' AND BOARD MEETINGS

Virtual and hybrid shareholders' meetings

Since 1 January 2023, so-called "COVID-19 general meetings" pursuant to Art 27 of the Swiss Ordinance 3 on Measures to Combat the Coronavirus are no longer permitted in Switzerland. However, similarly to the temporary measures adopted by the Swiss government during the COVID-19 pandemic, the New Swiss Corporate Law allows shareholders to take decisions by means of virtual meetings (ie exclusively by electronic means) or hybrid meetings (ie not all shareholders being physically present) (see Arts 701*c* and 701*d* para 1 CO).

Virtual (but not hybrid) shareholders' meetings require a statutory basis (Art 701*d* para 1 CO). In addition, the board of directors must appoint an independent proxy in the notice convening the meeting (Art 701*d* para 1 CO). Non-listed companies may waive the requirement for an independent proxy in their articles of association (Art 701*d* para 2 CO).

The board of directors regulates the use of electronic means (Art 701*e* para 1 CO). According to Art 701*e* para 2 CO, the board of directors has to ensure that:

- the identity of the participating shareholders is verified;
- the votes of the participating shareholders are transmitted immediately;
- each participant is technically able to submit motions and take part in the debate; and
- that there is no vote tampering.

If technical problems occur during the meeting so that it cannot be held properly, the meeting must be repeated (Art 701*f* para 1 CO). However, this provision only applies to technical problems that are attributed to the "sphere" of the company. In contrast, if technical problems occur that are attributable to the sphere of a shareholder (eg hardware or software problems, poor internet connection), the shareholder concerned bears the risk of not being able to properly exercise its rights. Moreover, resolutions that are passed by the shareholders before the technical issues occurred remain valid (Art 701*f* para 2 CO).

Physical shareholders' meetings in Switzerland, abroad, at several meeting locations or as universal shareholders' meetings

Traditional physical shareholders' meetings are of course still permissible under the New Swiss Corporate Law. In general, the board of directors determines the venue of such physical meeting (Art 701*a* para 1 CO). However, the determination of the place of the meeting must not make it unduly difficult for any of the shareholders to exercise their rights. Further, the new law requires a statutory basis if a physical shareholders' meeting is to be held abroad, and the board of directors has to appoint an independent proxy (Art 701*b* para 1 CO). Again, the requirement of an appointment of an independent proxy may be waived in the case of non-listed companies, provided that all shareholders agree (Art 701*b* para 2 CO).

Furthermore, the New Swiss Corporate Law allows for shareholders' meetings to be held simultaneously at different locations (Art 701*a* para 3 sentence 1 CO). In such a case, the votes of the participants must be transmitted directly in sound and vision (*in Bild und Ton*) to all meeting locations (Art 701*a* para 3 sentence 2 CO). In general, no particular statutory basis is required for such meeting. However, it is currently unclear whether a statutory basis is required if the shareholders want to hold their meeting simultaneously at different locations and one or more of these locations are abroad. To ensure the validity of the resolutions passed by such a shareholders' meeting, it is recommended to include a provision in the articles of association allowing shareholders' meetings to be held abroad, so that the company may hold:

- the shareholder's meeting entirely abroad (for which the law explicitly requires a statutory basis); as well as
- shareholders' meetings that are held simultaneously at different locations, one or more of these locations being abroad.

So-called universal shareholders' meetings, ie a general meeting at which all shareholders of the company (or their representatives) are present, were already permissible under the previous corporate law. The advantage of such universal shareholders' meetings is that they may be held without complying with the rules applicable to convening the general meeting, provided that all shareholders or their representatives attend the entire meeting and no objection is raised by any of them in this respect (Art 701 paras 1 and 2 CO). Universal shareholders' meetings may be held physically, virtually or in hybrid form.

Shareholders' meetings by circular resolution

Moreover, shareholders may now take decisions by means of circular resolutions without verbal deliberation, email being permissible (Art 701 para 3 CO). In that case, the rules for convening the shareholders' meeting do not apply, and a corresponding provision in the articles of association is not required. However, each shareholder has a veto right as they or their representative can request an oral deliberation.

Electronic board meetings explicitly permitted

To a certain extent and subject to certain conditions, the board of directors already had the above flexibility under the previous corporate law and practice. The New Swiss Corporate Law now explicitly reflects the possibility to hold meetings by electronic means and to take resolutions in electronic form, including email (Art 713 para 2 CO). Due to the absence of an explicit regulation, it is unclear whether a statutory basis is required for virtual board meetings (as it is the case for virtual shareholders' meetings). To ensure compliance with Art 713 para 2(2) CO, it is recommended to include a provision in the articles of association allowing virtual board meetings.

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CLARIFICATION OF RULES IN CASE OF OVER-INDEBTEDNESS AND INTRODUCTION OF NEW OBLIGATIONS IN CASE OF AN IMMINENT PAYMENT INCAPACITY

Another key aspect of the New Corporate Law is the modernised provisions applicable to companies in financial distress (Arts 725 to 725*c* CO). Of particular importance is that the new law explicitly obliges the board of directors to monitor the company's solvency and initiate restructuring measures not only in case of capital loss (Art 725*a* para 1 CO) but also in case of a so-called imminent payment incapacity (Art 725 para 1 CO). While the former scenario can be determined based on the company's balance sheet, the latter is not explicitly defined under Swiss law. Therefore, the monitoring of the company's liquidity situation by the board of directors and the determination of whether and when the relevant threshold (imminent payment incapacity) is reached can be somewhat difficult in practice.

Furthermore, the cases in which notifying the court to open formal insolvency procedures can be omitted are regulated more restrictively under the New Swiss Corporate Law:

- a subordination of claims is only valid if the interest accrued thereon is also subordinated; and
- a silent restructuring is only permissible if the over-indebtedness (ie negative equity) can be remedied within an adequate period but in any case within 90 days after the audited interim financial statements evidencing the over-indebtedness are available, and provided that the claims of the creditors are not additionally jeopardised (Art 725*b* para 4 CO).

A welcome clarification is that the New Swiss Corporate Law clearly states that a debt/equity-swap is always permissible regardless of the financial situation of the debtor company (see Art 634*a* para 2 CO), which was disputed among legal scholars under the previous law.

CONCLUSION

While the above-mentioned changes under the New Swiss Corporate Law are conceptually not substantial, they nevertheless introduce certain innovations, formalise the already existing practice and modernise certain processes within the relevant Swiss companies. Therefore, the amendments will inevitably have an impact on the legal and practical aspects in future lending transactions in Switzerland. ■