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DROIT DES SOCIÉTÉS

L'Assemblée générale par voie de circulation
(art. 701 al. 3 CO) – Particularités et éléments
à prendre en compte



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The general meeting by circular resolution (art. 701 para. 3 CO) under the new Swiss Company Law

1. Introduction

Since the new Swiss Company Law on public limited companies came into force, [Article 701 para. 3 of the Swiss Code of Obligations \("CO"\)](#) (or Art. 805 para. 5 no. 5 CO in conjunction with Art. 701 para. 3 CO for limited liability companies) provides for the possibility of holding a general meeting (but also a meeting of the Board of Directors) by circular resolution. In other words, shareholders (or members of the Board of Directors) can cast their votes in writing or electronically, without the need for a so-called normal general meeting (in person, hybrid or virtual). This practice seems to be gaining ground in Switzerland, as it is very easy to get shareholders to sign a circular resolution using DocuSign, Scribble, PrivaSphere or similar means.

But what are the elements that need to be taken into account?

The present article aims to provide some answers, based on the example of the general meeting of shareholders in a public limited company, without claiming to be exhaustive.

2. Nature of the general meeting by means of circular resolution

It should first be stressed that a general meeting by circular resolution is not a normal general meeting (in-person, hybrid or virtual) that would simply take place in writing.

At a normal general meeting, shareholders enjoy the full rights provided for in the Swiss Code of Obligations. In particular, they have the right to place items on the agenda, to question the Board of Directors and to submit proposals.

In a general meeting by circular resolution, shareholders tacitly waive these rights and cannot exercise them at a later date.

For this reason, shareholders have the option of objecting to the general meeting by circular resolution and requesting oral deliberation at a normal general meeting. Thus, if a shareholder duly objects, the Board of Directors will be obliged to convene a normal general meeting following the standard procedure.

On the other hand, if no shareholder requests a normal general meeting, the company may assume that the shareholders waive their right to a normal general meeting and, consequently, to their shareholders' rights referred to above.

3. Convocation, procedure and modalities of a general meeting by means of circular resolution

Only the Board of Directors has the power to suggest the holding of a general meeting by circular resolution within the meaning of Art. 701 para. 3 CO. This power cannot be delegated to other bodies of the public limited company. In practice, a general meeting by circular resolution is therefore initiated by the Board of Directors, which assumes that all shareholders waive their right to hold a normal general meeting.

The Board of Directors is exempt from complying with the rules governing the convening of general meetings set out in Art. 700 of the Swiss Code of Obligations. Thus, for example, the company's Board of Directors does not have to observe the 20 days notice for notifying shareholders of the date of the general meeting by circular resolution.

Shareholders can make up their minds in writing, by answering "yes" or "no" – or by abstaining from voting – to the various questions relating to the items that the Board of Directors has put on the agenda. Questions must therefore be formulated in a precise manner. The written form stipulated in Art. 12 CO does not need to be respected, as an electronic signature (DocuSign, Scribble, PrivaSphere, etc.) is sufficient in this regard.

It is also worth mentioning that it is not necessary for all shareholders to participate in a general meeting by circular resolution. In practice, many people confuse the universal meeting with the meeting by circular resolution. However, art. 701 of the Swiss Code of Obligations (CO) does not require all shareholders to participate in a general meeting by circular resolution.

If certain shareholders do not take part in the circular resolution, the provisions of Art. 703 and Art. 704 of the Swiss Code of Obligations (CO) must be observed with regard to the required majorities.

4. Conclusion

All in all, it must be pointed out that a general meeting by circular resolution is a fast and efficient way of making decisions. There is no need to comply with the procedure for convening a general meeting, and the decision may even be signed electronically.

However, there is a clear distinction to be drawn between a general meeting held by circular resolution in accordance with Art. 701 para. 3 CO and a "normal" general meeting (in person, hybrid or virtual). Shareholders have full rights at a "normal" general meeting, which is not the case for a general meeting by circular resolution.

6. End note: The unfortunate practice of the Swiss Federal Commercial Registry Office

The joys of digitalization with regards to general meetings by circular resolution are slightly hampered by the Swiss Federal Commercial Registry Office, at least when it comes to circular resolutions that must be submitted to the commercial registry as proof of registration.

In fact, the Federal Commercial Registry Office is of the opinion that decisions by circular resolution within the meaning of Art. 701 para. 3 CO should also be subsequently summarized in the form of minutes. As a result, these minutes shall meet the requirements of Art. 702 CO, one of the requirements of which is the written form (handwritten signature).

This constitutes additional work for the Board of Directors and somehow contradicts the business-friendly approach that was intended with the adoption of [the new Swiss Company Law on public limited companies](#).

In this respect, it should be noted that art. 23 para. 1 of the Commercial Register Ordinance ("ORC") does not explicitly stipulate that a protocol of the decision by circulation must be drawn up. On the contrary, art. 23 al. 1 ORC even mentions that a decision by circulation constitutes a supporting document in its own right.

Art. 23 para. 2 ORC is problematic, in that it requires the written form for decisions taken by circular resolution, whereas Art. 701 para. 3 CO does not. In other words, the federal ordinance exceeds its jurisdiction, in that it prescribes a written form even though federal law did not intend to provide for it.

It would therefore be welcome if the Federal Commercial Registry Office was to change its practice and accept a decision by circular resolution solely as proof of registration in the commercial register.

Source :

<https://www.wg-avocats.ch/en/actualites/the-general-meeting-by-circular-resolution-art-701-para-3-co-under-the-new-swiss-company-law/>