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Representation of shareholders at the general meeting: reminder of some basics

Unlike members of the board of directors at board meetings, shareholders of a Swiss corporation may be represented at general meetings.

The principle and modalities of the right to be represented are provided for in articles 689 to 690 CO.

Such representation may be either (1) by another shareholder, (2) or by a member of the company's organs, usually by a member of the board of directors, (3) or by an independent representative, (4) or by a third party who is not a shareholder, (5) or, for example, by an authorized custodian within the meaning of the Swiss Federal Banking Act, or, (6) in the case of joint ownership of shares, by a joint representative, or (7) by the usufructuary.

The articles of association of the company may oblige its shareholders to be represented only by another shareholder.

If the company offers its shareholders to be represented by a member of its organs, the company must offer those shareholders the possibility of entrusting the representation of their rights to an independent representative instead of that organ.

The representative, whoever he may be, must be able to prove his authority at the general meeting by means of a written power of attorney. The board of directors presiding over the organization of the general meeting will therefore ensure that it requests proof of the representative's authority and identity.

Although Article 689b CO establishes the principle of the representative's obligation to follow the instructions of the principal, we are of the opinion, following the majority doctrine (CR CO II - RITA TRIGO TRINDADE, Art. 689a CO N 33), that the violation by the representative of the voting instructions entrusted to him does not result in the cancellation of the general meeting. The company therefore does not have to be concerned with whether the representative complies with the instructions he has received. The terms of the legal relationship between the shareholder and his representative are theirs alone. If necessary, the shareholder can sue the representative for compensation for any damage caused to him by the violation of his instructions. This is the case of the client of the depositary bank who did not follow the instructions of his depositing client or of the usufructuary who did not take the interests of the bare owner into "fair consideration". However, it will be necessary to prove the damage suffered and to establish an adequate causal link between the violation and this damage, which is far from easy in practice and a source of long and costly trials with an uncertain outcome.

As it stands, Swiss law provides that in the absence of instructions, the depositary and the independent representative will follow the proposals of the board of directors. The new law on corporations, which is to come into force on January 1, 2023, provides, on the contrary, that in the absence of instructions, the depositary and/or the independent representative must (or may) abstain.

As mentioned above, jointly owned shares, i.e. shares not yet divided between the heirs of an undivided estate, must only be represented by a "common representative" within the meaning of article 690 paragraph 1 CO. In case of violation of this obligation, the

shares must be considered as not being represented at the general meeting and will therefore not be taken into account for the calculation of the votes cast according to article 703 CO. Heirs who cannot agree on the person of the “common representative” are obliged to appeal to the judge who rules in summary proceedings. This is essential, as the Federal Court recently ruled that one of the shareholder heirs cannot rely on urgency to act alone as holder of the undivided shares without passing the appointment of the “common representative” (cf. ATF of August 28, 2017 4A_516/2016).

Article 689e CO provides that the above distinguished representatives must communicate to the board of directors the number, species, nominal value and class of shares they represent. The law sanctions the absence or the existence of a defect in this communication by the annulment of the general meeting according to the rules of article 691 paragraph 3 CO. In this case, the shares represented but not announced will not be considered as having been exercised and the result of the vote may be changed. If this is not the case, the meeting will not be annulled, as the Federal Court applies the principle that formal procedural defects can only lead to the annulment of the contested decisions if a correct course of the procedure would have resulted in different decisions (cf. ATF cited above, recital 2.3).

The chairman of the meeting must communicate to the shareholders present the information received from the representatives on the shares represented. However, this communication must only be global for each type of representation. If he fails to do so, despite a shareholder’s request, this omission may result in the annulment of the meeting, the same legal and jurisprudential principles mentioned above being applicable to this action.

As can be seen, the representation of shareholders at the general meeting is far from being an easy matter. The board of directors must master the details and anticipate the execution in the organization of the general meeting, otherwise the latter may be challenged in court by some of the shareholders.

Source : <https://www.wg-avocats.ch/en/news/company-law/representation-shareholders-general-meeting/>