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5. Legal Status of Shareholders

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5.1 Acquisition, Transfer and Loss of Membership

272 Membership of a company limited by shares and all the rights associated with membership are linked to the possession of a share, which may be acquired from the company at its first issue through subscription and payment in full either on the incorporation of the company or on the occasion of an increase in capital, but it can also be obtained derivatively by means of a legal transaction (*e.g.* contract of sale), by inheritance or distribution of an estate or pursuant to matrimonial property law or debt enforcement proceedings.

273 Company law does not recognise a withdrawal or resignation of membership since this would mean an unlawful taking back of capital and therefore a reduction in the assets relied on as security for debts. The "resignation" of a shareholder can be achieved only through the valid transfer of the share to another person. This is accomplished in accordance with the principles of property law

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and securities law. In the case of bearer shares such a transfer requires a valid basic transaction under the law of obligations, the transfer of the possession of the share certificate and the seller's right of disposal or, in the event that the seller's power of disposal is unavailable, the good faith of the acquirer (CC 714; 933 et seq.; CO 967 I). For the transfer of registered shares, an endorsement is also required, *i.e.* a transfer confirmation on the share certificate (CO 684 II; 967 II; 968). If these requirements are fulfilled and there are no restrictions in law or in the articles of association opposing the transfer, the acquirer has the right to be listed in the company's share register, which is a condition of exercising shareholders' rights (CO 686 IV). If the registered shares of

the company are in the collective custody of SIS, which is regularly the case with large companies, the transfer is effected through the seller's written declaration of assignment (CO 165 I). The foregoing also applies to the transfer of undocumented registered shares, *i.e.* for registered shares the documentation of which has been deferred or rescinded in the articles of association namely of a company listed on the stock exchange (*cf.* LR 23 f.)[1].

274 A kind of "withdrawal right" is, however, provided for in the Merger Act, which makes it possible in the case of a merger for the participating companies to offer a financial compensation to the shareholders of the company being taken over either in addition to or even instead of participation or membership rights (Merger Act 8)[2]. An actual right to withdraw from membership is furthermore provided to minority shareholders by the Stock Exchange Act in the event of a change of control in that the Act requires the shareholder whose holdings exceed the threshold of 33 1/3 percent of the voting rights of a listed company to make a mandatory offer to the other shareholders (SESTA 32)[3].

275 Even the exclusion of shareholders under company law is allowed for one reason only, and that is the failure to fulfill the obligation to contribute (CO 681 et seq.; the "forfeiture" procedure)[4]. Membership under company law can also be compulsorily ended in the case of dissolution or liquidation[5]. When there is a "capital write-down", however, *i.e.* a reduction in capital accompanied by a simultaneous re-increase to the previous level, membership continues to exist

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even for those shareholders whose shares were reduced to a nominal value of zero and who fail to participate in restructuring activities through full payment for the newly issued shares (BGE 121 III 420)[6]. They remain shareholders of the company and have the right to a minimum of one vote (known in German as the *Virilstimmrecht, i.e.* the "virile" voting right).

276 The possibility of excluding shareholders is, however, provided for in the Stock Exchange Act which applies to publicly traded companies. In accordance with the Act, a bidder who in the course of a public takeover bid acquires more than 98 percent of the voting rights of a listed company may request the court to cancel the outstanding equity securities and thereby exclude their owners from the company (SESTA 33)[7]. The Merger Act goes still further by granting to the companies taking part in the merger the right to provide compensation (without membership rights) to the shareholders of the company being taken over provided 90 percent of its shareholders with voting rights consent to this course of action (*cf.* Merger Act 8 II together with 18 V)[8].

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1 On the transferability of shares, *cf.* also N 8 and N 202 et seq. above.

2 *Cf.* N 790 and 795 et seq. below.

3 *Cf.* N 1003 et seq. below.

4 *Cf.* N 57 and 154; *cf.* also BGE 113 II 275. A company limited by shares which has issued registered shares subject to restrictions on transferability may also cancel entries in the share register if they have been made on the basis of false information from the acquirer (CO 686a). The most common cases are those in which the acquirer when asked by the company states that he has acquired the shares in his own name and for his own account (CO 685b III; 685d II) and this confirmation is subsequently found to be incorrect.

5 On dissolution and liquidation, *cf.* N 623 et seq. below.

6 On the "capital write-down", *cf.* N 260 above.

7 On the so-called "squeeze-out" under SESTA, *cf.* N 1052 et seq. below.

8 On the "cash out merger" or on the so-called "squeeze-out" under the Merger Act, *cf.* N 790 and N 795 et seq. below.

5.2 Principles of Membership under Company Law

5.2.1 Capital-relatedness

277 The company limited by shares is a capital company. Membership of the company limited by shares is accordingly capital-related and is not geared to the person of the shareholder but to his financial participation. The only legal obligation of the shareholder therefore, the obligation to pay in full for the shares, is exclusively a financial obligation (CO 680 I)[9]. The shareholder's participation in capital is, however, also decisive for the extent of his asset-related rights and also affects his non-asset-related rights. As in every corporation, the company limited by shares is basically subject to the majority principle according to which the majority is determined not by a head count but according to capital participation. Only where permitted by law one may diverge in the articles of association from the principle of capital participation: such cases include the assessment of capital-related rights by means of preference shares (CO 654;

656)[10] and the introduction of voting shares conferring the voting rights (CO 693)[11] or imposing restrictions on voting rights (CO 692 II)[12].

5.2.2 Individual and minority protection

278 Despite the above, there are some legal constraints on the supremacy of capital and the majority principle; certain rights, for example, cannot be taken away from the individual shareholder regardless of his capital participation level. Other shareholder rights can be enforced by a qualified minority against the wishes of the majority, and finally there are certain important general meeting resolutions that require the consent of a special "qualified" majority[13].

5.2.2.1 Inalienable rights

279 The restriction or removal of certain shareholder rights, insofar as this can be done at all, can be done only with the consent of the affected shareholder. This arises from the contestability (CO 706) or nullity (CO 706b) of the general meeting resolutions as legal consequences of impairing such rights. The law on the one hand names certain general meeting resolutions that are subject to challenge if they affect shareholders' rights adversely (CO 706 II). These rights are not absolutely inalienable since the general meeting resolution in question remains valid unless the shareholder challenges it within the period specified by law (CO 706 a I)[14]. On the other hand, the impairment of certain shareholders' rights can lead to resolutions of the general meeting being null and void by law (CO 706b Sec. 1-3)[15]. The nullity of such resolutions, *i.e.* the qualified

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9 *Cf.* N 56 et seq. above and N 286 below.

10 *Cf.* N 191 et seq. above.

11 *Cf.* N 184 et seq. above.

12 *Cf.* N 297; and N 299 (in particular Fn 50) below.

13 In addition, the general principle of good faith applies, *i.e.* the exercise of shareholders' rights must not amount to an abuse of the law (CC 2). An abuse by the majority will also be prevented by the requirement of equal treatment and the requirement of objectivity as well as the requirement of the respectful exercise of legal rights. The Federal Supreme Court is, however, reticent about enforcing these principles: according to its precedents, the conduct of shareholders is not an abuse if they only "put their own interests before those of the company or of a minority of shareholders" (BGE 100 II 384; *cf.* also BGE 102 II 265).

14 *Cf.* also on this period N 441 et seq. below.

15 *Cf.* also N 442 et seq. below.

protection of shareholders' rights impaired by them, permits the conclusion that these rights are indeed inalienable. Rights deemed to be truly inalienable are accordingly (i) the right to participate in the general meeting (CO 689 I), minimum voting rights (CO 692 II), the right to take legal action or to assert other compulsory rights conferred by law (CO 706b Sec. 1) such as, for example, the right to be represented by a proxy (CO 689 II); (ii) rights of inspection (CO 706b Sec. 2), above all the right to receive the annual business report (CO

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696), the right to information and to inspection (CO 697) and the right to request the conduct of a special audit (CO 697a et seq.); and also (iii) the rights deriving from the basic structures of a company limited by shares (such as the right to have an auditor present or the right to hold general meetings rather than ballots) or from the provisions on capital protection (*e.g.* the prohibition on issuing stock below par) (CO 706b Sec. 3).

5.2.2.2 Qualified quorums for resolutions

280 The minority shareholders are also protected by the fact that for certain important resolutions of the general meeting the rule does not apply that for a resolution to be passed only an absolute majority of the represented votes is required (CO 703), and instead, a qualified majority of two thirds of the represented votes is required as well as an absolute majority of the nominal value of the shares represented (known as the "double quorum") (CO 704). This qualified majority is needed, for example, for the introduction of voting shares, the restriction on the transferability of registered shares and for the restriction on or withdrawal of the pre-emptive rights. In its articles of association, the company may specify a qualified quorum for resolutions other than those required by law (CO 704 II); it is not, however, permissible to relax the rules on passing resolutions[16].

5.2.2.3 Minority rights

281 Certain shareholders' rights, such as the right to information and to inspection (CO 697) or the right to take legal action, are essentially available to every shareholder. Other shareholders' rights can only (but can all the same) be enforced by a qualified minority against the will of the majority. Shareholders, for example, who represent shares with a nominal value of CHF 1 million may request that an item of business be included on the agenda of the general meeting (CO 699 III). Shareholders representing shares with a nominal value of CHF 2 million or 10 percent of the share capital may request the appointment of a special auditor (CO 697b). Regardless of the nominal share value they represent, shareholders who together hold 10 percent of the share capital may request the convening of a general meeting (CO 699 III), the preparation of group accounts (CO 663e III Sec. 3) and may for good reason request the dissolution of the company (CO 736 Sec. 4).

5.2.3 Anonymity

282 The correlative of the capital-related and impersonal nature of the shareholders' position is constituted by the principle of anonymity, which in the romanic

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Swiss languages is even an essential element of the legal term designating this type of company (*e.g.* in French *société anonyme* or in Italian *società anonima*). In principle, therefore, the company limited by shares is not acquainted with its bearer shareholders.

16 On qualified resolution quorums, *cf.* N 430 et seq. below.

According to prevailing expert opinion, the bearer shareholder does not need to make his identity known to the board of directors even when he wishes to exercise his rights at the general meeting[17]. In contrast, however, the registered shareholder is required to divulge his identity to the company, at least in respect of unlisted registered shares, if he wants to assert his rights (CO 685c). Nonetheless, his anonymity is preserved *vis-à-vis* his fellow shareholders since there is no right to inspect the share register except in respect of one's own entry[18]. In the case of listed registered shares, even the registered shareholder can preserve his anonymity *vis-à-vis* the company by refraining from identifying himself and therefore giving up his voting rights (CO 685f II) by having his shares kept as "Dispo-Shares" (*Dispoaktien*) and arranging for the bank that he is using as an accommodation address to credit him with the dividends paid by the company[19]. For major shareholders, however, the principle of anonymity no longer applies, for the very acquisition of a voting participation of 5 percent in a listed company must be reported to the stock exchange where the shares are listed as well as to the company, which in turn must publish such reports (SESTA 20)[20].

5.2.4 Requirement of equal treatment

283 The requirement of equal treatment is a key principle of company law and serves above all to protect minority shareholders. The requirement is directed primarily at the members of the board of directors, and it obliges them to treat shareholders equally in the same circumstances (CO 717 II). Resolutions passed at general meetings can also be challenged if they discriminate against or disadvantage shareholders in a manner not justified by the objects of the company (CO 706 II Sec. 3).

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284 The requirement of equal treatment, however, does not guarantee an absolute equality of treatment, but only equality of treatment "in the same circumstances", *i.e.* a relative equal treatment. Differences are therefore permitted provided they derive from the same criteria. In view of the capital-related structure of the company limited by shares, differences are mostly permitted in respect of capital participation. Financial rights, for instance, especially the rights to dividends, are measured according to the effective capital investment (CO 661) and the voting rights depend on the nominal value of the shares owned, *i.e.* on the financial obligations the shareholder has *vis-à-vis* the company (CO 692 I). Unequal treatment can also occur when it is within the law. Shareholders may be advantaged financially or in terms of their voting rights by introducing preference shares (CO 654; 656) or voting shares (CO 693) in the articles of association. In respect of the other participation and protection rights, on the other hand, there is an absolute equality of treatment. Every shareholder, for example, has the right to participate in the general meeting (CO 689 I), to information and to inspection (CO 697), to request a special audit (CO 697a I), to challenge resolutions (CO 706 I) and to bring actions of accountability (CO 752 et seq.). In accordance with rulings of the Federal Supreme Court, however, it is still possible to disregard the principle of

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17 For the required verification of the right of bearer shareholders to participate in the general meeting (CO 702 I), the articles of association or the board of directors in the invitation to the general meeting normally require that the right to participate be proven by a certificate or by an entry pass issued by a custodian bank or another depositary provided the bearer shares are deposited there and remain frozen until after the general meeting has been conducted. These certificates or entry passes are normally issued in the name of the holder and their production is sufficient as proof of the right to take part and to vote. Nothing is stated as to the identity of the shareholder in the background; the bearer of the entry pass may be the shareholder, but can also simply be a proxy. If entry passes bearing a name are also issued for bearer shares, then the name must be given in an access or presence check; however, here again there is no indication as to whether the bearer of the entry pass is the bearer shareholder or has a different function.

18 *Cf.* N 182 (in particular Fn 43) above.

19 *Cf.* N 210 and N 213 above.

20 *Cf.* also N 934 et seq. below.

equal treatment provided that the pursuit of the company's objectives in the interest of all shareholders would require such action. Different treatment is also allowed in cases where the treatment is not arbitrary but constitutes an appropriate means of achieving a justified goal (*cf.* BGE 117 II 290; BGE 102 II 265; BGE 95 II 157; BGE 91 II 298).

285 The principle of equal treatment has practical relevance with regard to legal transactions with shareholders involving, for instance, the acquisition or the sale of its own shares by the company (CO 659). A sale or purchase involving individual shareholders or groups of shareholders could be justified only by way of exception and probably only in the case of insignificant amounts of shares[21]. The requirement of equality of treatment also exists, in respect of the allocation of new issues of shares or bonds for which the pre-emption rights or priority rights of subscription have already been excluded, in particular if the terms are attractive to shareholders. The principle of equal treatment, finally,

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must also be observed when company information is disclosed. Even the granting of privileges to major shareholders would probably be allowed only in exceptional cases, for example, if a major transaction could not be executed without them. In the case of listed companies, inequality of treatment is largely precluded for important company information since the obligation to have ad hoc publicity (LR 72) makes market-relevant information available to all shareholders at virtually the same time[22].

5.3 Obligations of the Shareholder

5.3.1 Payment in full (duty to contribute)

286 In keeping with the principle of capital-relatedness and anonymity of membership, company law provides for only one obligation to be imposed on shareholders, and that is the obligation to pay the subscription price fixed at the time of issue in respect of the share he has subscribed to and receives (CO 680 I, the so-called *Liberierungspflicht*). In lieu of payment, it is also possible to transfer assets in the form of contributions in kind or of a full settlement through setting off claims against the company (CO 628)[23]. At the time of incorporation, the subscription price is normally the same as the nominal value of the share. Whereas shares may not be issued at less than their nominal value (below par), an issue at a price higher than nominal value (above par) is possible and is especially frequent in the event of an increase in capital. This means that when full payment is made, a profit can arise consisting of the difference between nominal value and issue price. This premium is known as an "agio" and must be allocated to the general reserve provided it is not used for depreciation or for welfare purposes (CO 671 II Sec. 1). If the share capital was paid only partially at incorporation, the board of directors can at any time request that the outstanding capital contributions be paid in part or in full (CO 634a). As long as the board has not decided the subsequent payment in full, the respective debt of the shareholder cannot prescribe; thereafter, the debt prescribes after ten years (CO 127). If the shareholder does not observe the obligation

21 In the case of publicly traded companies, redemption offers made by the company for its own shares to the extent of more than 2 percent of the capital are subject to the regulation on public takeover offers within the meaning of the Stock Exchange Act (SESTA 2 lit. e; SESTA 22 et seq.). The takeover offer from the company must accordingly be made to all shareholders. The Takeover Board (TOB) may however grant exemptions, but only, if equal treatment, transparency and fairness as well as the principle of good faith are guaranteed. *Cf.* Notice No. 1 of the Takeover Board dated 28 March 2000 as well as N 961 and N 976 below. *Cf.* also the recommendation of the TOB in the case of *swissfirst AG* dated 17 October 2002, Point 1 (public offers by a company to buy back its own shares are public takeover offers in terms of SESTA 2 lit. e).

22 *Cf.* also N 897 et seq. below.

23 *Cf.* N 69 et seq. and N 85 above.

to pay in full in good time, he is required to pay default interest (CO 681 I)[24]. If he still fails to pay despite a reminder from the board of directors, he runs the risk of forfeiture, *i.e*. the board of directors can declare his rights to be forfeited and issue new shares in place of the cancelled ones (CO 681 II)[25].

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5.3.2 Absence of further obligations under company law

287 No further financial or personal obligations may be imposed on the shareholder even by the articles of association (CO 680 I). Any additional obligation is thus excluded under company law. The shareholder has absolutely no duty to provide any further payment, to perform any services or, indeed, to owe loyalty to the company or to other shareholders. Nor is the shareholder under any obligation at all to safeguard or promote the interests of the company. Unlike the member of a general partnership (CO 561) or limited partnership (CO 598 II), the shareholder may also compete directly or indirectly with the company without incurring the risk of sanctions[26]. The only circumstances in which this is not the case is where shareholders are actively involved in the affairs of the company, for example, as employees and/or as members of the board of directors. These shareholders are required to safeguard the interests of the company limited by shares and they may be called to account in the event of wrongful conduct[27]. These obligations, however, derive not from the position as shareholder but from the special status as a corporate body (CO 717 I) or from his contract of employment (CO 321a). If mutual rights and obligations are to be established for the shareholders and thereby indirectly bring about obligations *vis-à-vis* the company, for which there is a certain need quite often in respect of small and medium-sized companies, such an arrangement would require the drawing up of a shareholders' agreement[28].

5.3.3 Obligations under stock exchange law

288 Major shareholders of listed companies are subject to further obligations imposed by the Stock Exchange Act. They are affected first of all by a disclosure requirement when their equity holdings reach, exceed or fall below certain thresholds specified in the Act (SESTA 20), and, secondly, by a requirement to make a public takeover offer to the owners of the remaining listed equity securities if their participation exceeds the threshold of 33 1/3 percent of voting rights unless the company has stated in its articles of association that a bidder is not bound by this obligation (SESTA 22 II; 32; 52). Shareholders who are members of the board of directors or who belong to the senior management of a company listed on the SWX Swiss Exchange are additionally required to

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disclose (direct or indirect) purchases and sales of its equity securities to the company (LR 74a)[29].

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24 The articles of association may also require a shareholder to pay contractual penalties in the event of failure (CO 627 Sec. 5).

25 On the forfeiture procedure, *cf*. N 57; N 154 and N 275 above.

26 The only limit of sorts on the conduct of the shareholder is imposed by the principle of good faith which applies throughout the entire legal system (CC 2).

27 On the liability of corporate bodies under CO 754 et seq., *cf*. N 558 et seq. below.

28 *Cf*. also N 325 et seq. below.

29 On these shareholders' duties under stock exchange law, *cf*. N 914 et seq.; N 934 et seq. and N 1003 et seq. below.

5.4 Rights of the Shareholder

289 On the basis of their function and of their content, shareholder rights can be divided into financial rights and non-financial rights. In the case of non-financial rights, a further distinction can be made between participation rights and protection rights; these latter rights can again be divided into rights to information and rights to take legal action. Since shareholders' rights are in principle related to capital and changes in capital can affect both financial and non-financial rights, the right to retain the level of shareholding, finally, has its own special importance.

5.4.1 Financial rights

5.4.1.1 Right to receive dividends

290 Among the shareholder's financial rights, the right to a dividend (CO 660 I), *i.e.* his right to a proportionate share of the balance sheet profit, is paramount[30]. The distribution of dividends normally takes place once each year. Dividends may, however, only be taken from (distributable) balance sheet profit and from special reserves created for this purpose (known as "dividend reserves") (CO 675 et seq.)[31]. This means that the profits realised are not distributed in their entirety. First of all, a portion must remain with the company in accordance with the reserves stipulated by law (*cf.* CO 671; 671a; 671b). In addition, the articles of association may provide that reserves be created in excess of those imposed by law and thus further limit the freedom for distributing dividends (*cf.* CO 672 et seq.). The dividend may thus be fixed only after the allocations to the statutory reserves and reserves in terms of the articles of association have been deducted in accordance with both the law and the articles of association (*cf.* CO 674)[32].

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291 The general meeting is responsible for the passing of resolutions on the use of balance sheet profit (*i.e.* in particular in relation to allocations to the reserves required by law and the articles of association) as well as the fixing of the dividend (CO 698 II Sec. 4). The written audit report on the annual accounts presented by the auditors must have been made available to the general meeting; otherwise its dividend resolution is null and void (CO 729c II). The dividend declared by the board of directors at the general meeting must be examined by the auditors to ensure that it complies with legal provisions and with the articles of association (CO 728 I), and the auditors are required to communicate the result of their investigation to the general meeting in writing. At the latest 20 days before the ordinary general meeting, the annual business report and the audit report must be made available for inspection by the shareholders at the registered office of the company and the shareholders must be informed of this (CO 696). The auditors finally must be present or represented at the general meeting, and if this is not the case, the resolution on the use of the balance sheet profit can be challenged (CO 729c II). The general meeting is to a large extent free to carry a distributable balance sheet profit forward to the next accounts and is not obliged to distribute it to the shareholders in the form of dividends. The shareholders' rights to dividends may, however, not be restricted arbitrarily or for purposes incompatible with

30 The right to a dividend also applies in principle to participants (*cf.* CO 656a II).

31 The dividend is accordingly measured not by the annual profit, but by the distributable balance sheet profit. This relates not only to the use of the profits from the financial year just ended, but also includes the decision on carrying forward the balance sheet profit or loss from the previous year and, if applicable, on the use of open, freely disposable reserves. A profit in the past financial year is thus not sufficient as any losses from earlier financial years must be compensated for.

32 On the regulations on the formation of reserves, *cf.* N 370 et seq. below.

the company's objects (BGE 99 II 55; BGE 91 II 298); also, the principle of equal treatment must be upheld at all times (OR 717 II)[33].

292 The dividend must be calculated in proportion to the amounts paid up on the share capital (CO 661). Any share premium or capital not fully paid up cannot therefore be part of the basis for calculation[34]. Resolutions are null and void when they grant individual shareholders or shareholder groups higher dividends without corresponding privileges being specified in the articles of association in the form of preference shares, profit-sharing certificates, etc. The dividend cannot be paid out until it has been fixed by the general meeting; nor does the shareholder have a right to sue for payment of the dividend until this has happened. Thereafter, this right to take action lapses at the end of 5 years

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(CO 128 Sec. 1)[35]. The dividend is generally distributed in cash, but dividends in kind are also permitted such as the distribution of tangible assets from the commercial activities of the company[36].

5.4.1.2 Right to a share in the proceeds of liquidation

293 Unless the articles of association provide otherwise, in the event of the company's dissolution, the shareholder has the right to a proportionate share in the proceeds of liquidation (CO 660 II). This right to a share in the proceeds of liquidation is closely connected with the right to a dividend, for the shareholder should profit at liquidation from any increase in value that has arisen from the failure to allocate profits - *i.e.* from the fact that dividends have not been distributed. The share in the proceeds of liquidation is calculated according to the amount of share capital that has been paid in and not according to the nominal value of the shares held by the shareholder; however, the articles of association can provide for different procedures (CO 661 and 745 I). The share in the proceeds of liquidation cannot be paid out until assets have been disposed of and all company creditors' demands have been satisfied (OR 745)[37].

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33 If the main shareholder decides against a distribution of dividends, but reduces the substance of the company by drawing an excessive fee, director's shares of profits or fictitious expenses, then this amounts to an unlawful hidden distribution of profits due to a violation of the provisions on capital protection provisions and the principle of equal treatment. In the absence of a resolution of the general meeting and audit report, these types of hidden profit distributions are regularly held to be null and void (CO 729c II). If related action is taken by a minority shareholder, this may even result in the dissolution of the company; *cf.* BGE 105 II 121 as well as N 628 et seq. below. On the tax problem of hidden profit distributions, *cf.* N 1085 et seq., in particular N 1087 and N 1175 et seq. below.

34 In practice, a company often does not pay a dividend on the shares it holds itself. The proposal on the allocation of the balance sheet profit made by the board as well as the respective resolution of the general meeting will then be based on a lower amount of capital that is entitled to a dividend.

35 The right to the payment of a dividend decided on by the general meeting is no longer a membership right, but simply a creditor's claim. This right may also be assigned to third parties like any other legal claim.

36 As a result of the double tax burden on dividends - tax is paid by the company on the profit used to make the distribution and by the shareholder as income on the dividend itself - alternatives to the traditional distribution of dividends have been developed: for example, the issue of free shares instead of dividends (a so-called "stock dividend") or the granting of an option between a cash dividend and subscription to new shares (a so-called "option dividend"). Also conceivable is an increase in capital with the granting of attractive pre-emption rights or a reduction in capital with a proportionate reduction in the nominal value and a corresponding cash payment to the shareholders. A share repurchase by the company using freely usable shareholders' equity with a subsequent reduction in capital to the extent of the repurchased shares is also possible. With the exception of the option dividend, these forms of profit sharing by the shareholders do not, however, constitute a distribution of profits and therefore are not dividends in the true sense.

37 On the liquidation of a company limited by shares, *cf.* N 639 et seq. below.

5.4.1.3 Right to construction period interest

294 In the early stage of a company limited by shares prior to its commencing operations (*e.g.* during the construction of the production plants), shareholders can be paid what is known as "construction period interest" on share capital. The disbursement of construction period interest represents a partial, and under company law actually inadmissible, refund of shareholders' equity to the shareholders (CO 680 II). Legally, therefore, this is permitted only within narrow

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material and temporal limits; in particular the articles of association must specify the time at which these payments of interest must terminate (CO 676 I)[38].

5.4.1.4 Right to enjoy company facilities

295 Although not explicitly mentioned in law, it is possible to provide for in the articles of association that the facilities of the company are available to the shareholders for their use or enjoyment free of charge or at preferential rates. Examples of such rights, which in practice tend to be rare, would be the use of accommodation owned by the company or the right to free rides for shareholders holding the shares of companies operating mountain rail links or ski-lifts. If such enjoyment rights represent a substantial pecuniary advantage, the legal requirements applicable to the distribution of dividends must be observed[39].

5.4.2 Rights of participation

5.4.2.1 Voting rights

296 Probably the most important of the rights of participation possessed by the shareholder is his right to vote. This includes his right to vote and to take part in elections at the general meeting (CO 692)[40]. The shareholder is entitled to vote as soon as the amount provided for by law or by the articles of association has been fully paid up (CO 694).

297 Unlike financial rights, the shareholder's voting rights are determined not by the amount of capital he has effectively paid in, but in proportion to the total nominal value of his shares, *i.e.* according to the total amount he has undertaken to pay in full, even though this amount may have been only partly paid up (CO 692 I). The articles of association, however, can provide for exceptions to this principle; for example, they may create voting shares by granting individual shareholders or shareholder groups higher voting rights determined according to the number of the shares owned by each shareholder irrespective of their nominal value (CO 693 I)[41]. In order to curb the influence of major shareholders or to thwart hostile takeovers, the articles of association can also

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38 In practice, the disbursement of construction period interest occurs very rarely for, first of all, it is precisely in its early period that the company needs all its resources for construction, and, secondly, it does not make much sense from a financial viewpoint for a company to seek to procure additional capital only so that it can subsequently return it to shareholders in the form of construction period interest.

39 *Cf.* N 290 et seq. above.

40 The voting rights must be exercised in the general meeting. Letter votes and circular resolutions are unlawful according to the prevailing expert opinion and legal precedent and any resolution of this type passed by the shareholders is null and void.

41 *Cf.* N 184 et seq. above.

impose restrictions on voting rights (CO 692 II). They may for example state that shares of a member or of several shareholders acting together do not carry a vote at a general meeting if they exceed a specified quota of the share capital (*e.g.* 5 percent). The retroactive introduction of such restrictions on voting rights is admissible provided it is objectively justified, is proportionate in respect of the desired objective and does not violate the principle of equal treatment[42]. Every shareholder, however, must always be left with at least one vote (CO 692 II; known in German as the *Virilstimmrecht, i.e.* the "virile vote")[43]. Contractual agreements on voting rights are also allowed in shareholders' agreements provided they do not seek to circumvent voting restrictions imposed by law or by the articles of association[44].

298 A denial of the voting rights is provided for in law in only a few cases[45]: One instance is that shareholders who have been involved in any way in company management have no voting rights on resolutions on the discharge of the board of directors (CO 695 I)[46]. The company itself is also generally prevented from exercising voting rights in respect of its own shares it holds (CO 659a I); likewise, the shares owned by a subsidiary lie dormant (CO 659b I)[47]. Certain acquirers of unlisted shares with restricted transferability are also prevented from voting until the company has given its consent for them to do so (CO 685c II) as are acquirers who have bought similarly restricted listed registered shares off-exchange and who must first be recognised by the company (CO 685f II)[48]. The court, finally, can also suspend the voting rights of an acquirer of control who is in breach of his obligation to make an offer (SESTA 32 VII)[49]. Beyond that, the law provides for no further restrictions on the voting rights. Since the

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shareholder owes no loyalty to the company, there is notably no exclusion of voting rights even in transactions in which he faces a conflict of interest.

5.4.2.2 Right to participate, bring motions and express an opinion at the general meeting

299 Every shareholder has a right to participate in the general meeting (CO 689) for it is there that he exercises his right in company affairs such as the election of corporate bodies, the approval of the annual business report and resolutions on the allocation of profits (CO 689 I; *cf.* also CO 698 II). At the meeting, the shareholder can represent his shares personally or be represented by a third party, who, unless the articles of association provide otherwise, need not be a shareholder (CO 689 II)[50].

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42 Provisions of the articles of association that grant the shareholder a right of veto, that make unjustified distinctions between individual shareholders on the grounds of nationality or that make the appointment of a proxy at the general meeting excessively difficult or even prevent such an appointment thus appear to be unlawful. On the other hand, what is permitted and common in practice are provisions of the articles of association according to which shareholders may only be represented at the general meeting by other shareholders (CO 689 II) or that a proxy may only act for one shareholder.

43 This minimum voting right remains, according to a precedent of the Federal Supreme Court (which has been criticised in doctrine), even if as part of the restructuring of the company by means of a reduction in capital the nominal value of the shares belonging to a shareholder is reduced to zero (BGE 121 III 420).

44 *Cf.* also N 325 et seq. below.

45 All share votes that are excluded when passing resolutions or which lie "dormant", are regarded as "not represented" in the determination of the voting quorum imposed by law or by the articles of association and must not be counted.

46 *Cf.* N 402 below.

47 *Cf.* N 162 above.

48 *Cf.* N 210 et seq. above.

49 *Cf.* also N 1026 et seq. below.

50 It may be provided in the articles of association that only other shareholders may be considered

300 The right to participate in the general meeting also includes the right to a formal invitation and to be notified of the agenda and of the motions of the board of directors (CO 700 II) as well as the right to express an opinion and to bring motions on the planned agenda items (CO 700 IV). Accordingly, a shareholder may, for example, make his own proposals for election under the agenda item "elections" or may propose a higher dividend under the item "allocation of the balance sheet profit" and put it to the vote. On the other hand, no motions may be brought in respect of agenda items that have not been properly notified (CO 700 III)[51], which is why a shareholder cannot, for example, propose that a member of the board should be removed in the absence of an agenda item on elections. Every shareholder, finally, may express himself freely on the agenda items or in the exercise of his information and inspection rights, but restrictions are allowed here provided they serve the orderly conduct of the general meeting and do not preclude a proper discussion. Whereas the shareholder's voting rights are in principle calculated in proportion to the size of his shareholding (CO 692 I; *cf.* as exception CO 693 I), the rights of invitation, participation, expression of opinion and bringing of motions are accorded to every shareholder irrespective of the size of his shareholding.

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5.4.2.3 Right to convene meetings and to include items on the agenda

301 General meetings are in principle called by the board of directors (CO 699 I), and the ordinary general meeting has to take place every year within six months following the end of the financial year (CO 699 II). Shareholders who together hold at least 10 percent of the share capital also have the right to request the board of directors to convene a meeting, with specification of the agenda items and their motions (CO 699 III). If the board of directors fails to respond to this request within a reasonable time, the shareholders can request the court to call the meeting (CO 699 IV). The court may, especially in the event of an imminent danger, convene the meeting itself; an act by the board of directors or a neutral third party is not necessary (BGE 132 III 355).

302 Since resolutions may be passed only in respect of agenda items that have been notified in the proper manner, it is important for the shareholders to have the power to influence the agenda. The law therefore provides that shareholders representing shares with the nominal value of CHF 1 million may request that an item be placed on the agenda of a forthcoming general meeting[52]. The request to have an item placed on the agenda must be submitted in good time so that the board of directors can include it on the agenda that must be sent out at least 20 days prior to the day of the meeting (CO 700 I)[53]. Although not explicitly specified in the legislation, prevailing legal opinion holds that

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as proxies. Furthermore, proxies must not be used in order to circumvent restrictions on voting rights (CO 691 I; *cf.* BGE 109 II 43; BGE 81 II 534). Each shareholder also has the right to object to the participation of unauthorised persons either by notifying the board of directors or by placing the objection on record at the general meeting (CO 691 II). In addition, he may challenge in court a resolution passed by the general meeting with the participation of unauthorised persons whereby the action will be approved unless the company proves that such participation had no influence on the decision made (CO 691 III). On the representation of shareholders at the general meeting, *cf.* N 413 et seq. below.

51 Matters which are not required to be placed on the agenda in advance are motions for an extraordinary general meeting to be convened (CO 699 II) or for a special audit to be carried out (CO 697a). These can be placed by any shareholder at any general meeting (CO 700 II).

52 Going beyond the wording of this provision, the general opinion is that shareholders who represent 10 percent of the share capital may also request that items of business be placed on the agenda even if the nominal value of their holding is less than CHF 1 million.

53 From a practical point of view, it is therefore recommended that either a provision on the deadline for filing requests for inclusion of items on the agenda (*e.g.* 45 days before the day of the general meeting) be included in the articles of association or that the board of directors publishes an invitation to file such requests and sets a deadline for this.

the right to place an item on the agenda, like the right to convene a general meeting (CO 700 IV) can be enforced by the courts; such enforcement is also possible after the publication of the notice convening the general meeting. Provided the court approves the shareholder's request and orders the agenda to be expanded, the board of directors, having regard for the minimum advance notice of 20 days for convening a general meeting, is regularly forced to set a new date for calling the meeting.

5.4.2.4 Right to be elected

303 In accordance with current legislation, all members of the board of directors are required to be shareholders of the company (CO 707 I), and this leads to the right of the shareholders to have themselves elected to the board of directors. This prerequisite for being elected, however, is in practice already at the

present time being relativised by the admissibility of the fiduciary transfer of shares and is in the process of being repealed in the revision of the law on the *GmbH*[54].

5.4.2.5 Right to be represented on the board of directors

304 If there are several classes of shares with regard to voting or property rights (*cf.* CO 693; 654; 656), the articles of association must provide that each class of shareholder may elect at least one representative to the board of directors (CO 709 I)[55]. This right to be represented thus exists for every class of shareholder and regardless of the number of the shareholders or shares in the respective class. Every shareholder class is guaranteed the right to propose a board member, whose election may be refused by the general meeting only for good cause (BGE 66 II 43; BGE 107 II 179).This entitlement is binding and must be laid down in the articles of association (CO 627 Sec. 9). Special provisions in the articles of association may also grant representation rights to other shareholder groups (*e.g.* owners of bearer shares and registered shares, employee shareholders) (CO 709 II), but it is not mandatory to do so.

5.4.3 Rights to information and inspection rights

305 As well as their rights of participation, shareholders are entitled to a further group of non-financial rights in the form of protection rights. These include, besides the right to take legal action, the shareholder's rights to information and inspection. These are designed to enable and facilitate an appraisal of the company position that the shareholder can use in order to avail himself of his rights of membership. The shareholder's interest in information can, however, clash with the company's interest in confidentiality, especially since shareholders owe no loyalty to the company, and this means that company information could be used to the detriment of the company as well and could notably impair its competitiveness. Company law accordingly provides for a balanced three-stage information system that does justice both to the information needs of the shareholder and to the company's interests in safeguarding secrecy (CO 696-696h):

54 Under the new legislation, the members of the board of directors no longer need to be shareholders of the company at the same time (D-CO 707 I), which is why they are granted the express right to attend and make motions at the general meeting (D-CO 702a).

55 The holders of participation certificates have no statutory right to representation on the board of directors. Nonetheless, the law grants participants the possibility of a right of representation in terms of the articles of association (CO 656e).

5.4.3.1 Right to see the annual business report and audit report

306 The company is in the first instance required by law to provide certain basic information "spontaneously", *i.e.* to make the information available to shareholders without being specifically requested to do so. Thus, the annual business report and the audit report must be made available for their inspection at the registered office of the company at least 20 days before the ordinary general meeting (CO 696 I)[56]. Registered shareholders must be given written notice, while bearer shareholders receive notice in the SOCG as well as in the form provided for by the articles of association (CO 696 II). In addition, for a period of one year following the general meeting any shareholder may request from the company the annual business report and the audit report in the form approved by the general meeting (CO 696 III).

5.4.3.2 Right to information and inspection

307 The shareholders are entitled to seek further information on their own initiative and may at the general meeting request information from the board of directors on matters relating to the company and information from the auditors on the conduct and results of the audit (CO 697 I)[57]. The company is accordingly required to give out such information when requested by shareholders to do so, but only insofar as it is necessary for the exercise of the shareholders' rights. According to a ruling by the Federal Supreme Court, a legitimate right to information must always be assumed to exist if a reasonable average shareholder needs it to reach an informed opinion in respect of adopting the accounts, the allocation of profits, elections, the granting of discharge to the board members, a special audit, challenging resolutions of the general meeting, initiating action for accountability or reaching a decision on a sale of his shares (BGE 4C.234/2002). Although the right to information must be exercised during the general meeting, it is not restricted in scope to the business items on the agenda. The information requested may nonetheless be refused if it jeopardises business secrets or other legitimate company interests (CO 697 II). According to the Swiss Federal Supreme Court, however, the risk to the interests

of the company must be proven by the company; just making the risk appear plausible is not sufficient (BGE 4C.234/2002; BGE 109 II 47; for a different view, *cf.* BGE 82 II 216). Since the shareholder is not bound by an obligation of loyalty, each individual case requires that a careful balance be struck between the interests of the company and the shareholder's entitlement to information. Current opinion tends to the view that the refusal to provide the information should be the exception. On the other hand, shareholders are permitted to inspect the business records and correspondence of the company only when explicitly authorised to do so by the general meeting or by a resolution of the board of directors and when business secrets are safeguarded (CO 697 III). In corporate groups, the inspection right may be extended to the annual accounts and audit reports of group subsidiaries provided the shareholder proves that this

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56 As the audit report normally only consists of a standardised text, the main document that provides information to the shareholders is the annual business report, consisting of the annual accounts (*i.e.* the balance sheet, the profit and loss account and the annex), the annual business report and, if required, the group accounts (CO 662). On the content of the annual business report (annual report and annual accounts), *cf.* N 343 et seq. below.

57 Though the right to information must be exercised at the general meeting, the advance submission of questions to the board of directors or the auditors is permitted and even desired, so that any research required to answer the questions can be carried out before the general meeting. The answer can also be given after the general meeting. In each case, the information must be included in the minutes, so that each shareholder has access to the same amount of information (BGE 132 III 71).

information is needed for him to exercise his rights as a shareholder of the parent company (BGE 132 III 71).

308 If information or inspection is withheld without justification, the court at the place of the registered office of the company will, on application, order information to be disclosed or allow an inspection (CO 697 IV).This so-called "action on information" is an independent right to take legal action and is not an action that must be raised as part of an action challenging a resolution or action of accountability[58]. Unlike, for example, the action challenging a resolution (CO 706a I), this type of action is not subject to a time limitation, and it therefore does not lapse if an action is not raised within two months of the information being refused at the general meeting (BGE 4C.234/2002).

309 Besides the shareholder's general right to information, the law also provides for specific rights to information and of inspection. Like company creditors, a shareholder is entitled to request the board of directors to provide in writing details on the organisation of the management. This request may be made at any time, including outside a general meeting, but when it is made, a legitimate interest must be plausibly established (CO 716b II). The shareholders are furthermore entitled to inspect the minutes of general meetings at any time (CO 702 III). Special rights of inspection and information, finally, are granted to shareholders by the Merger Act in connection with restructuring transactions (*cf.* Merger Act 16; 41; 63; 74)[59]. In addition, the board of directors is required in the case of a public takeover bid to submit to the shareholders of a listed company a report setting out its position on the offer and disclosing all the

information necessary for the shareholders to make a fully informed decision on whether or not to accept the offer (SESTA 29 I; TOO 29 et seq.)[60].

5.4.3.3 Right to request a special audit

310 The possibility of a special audit is used in law in an attempt to strike a balance between the shareholder's need for information on the one hand and the interest of the company in safeguarding secrecy on the other. Any shareholder at the general meeting may request the clarification of particular circumstances through a special audit provided such an audit is necessary for the shareholder to exercise his rights and he has already exercised his right to information or his right of inspection (CO 697a I). Like the right to information, the special audit is a means designed to provide the shareholder with access to information about affairs of the company so that he can make an adequately informed decision about exercising other shareholder rights (*e.g.* initiation of an action challenging a resolution or of accountability). The special audit is to a certain extent a more robust form of the right to information, and recourse can be had to it as a last resort when the avenues of information and inspection have been exhausted (BGE 123 III 261; BGE 120 II 392; BGE 4C.162/2004)[61].

311 The special audit must be "required in order to exercise shareholders' rights", a phrase that presupposes both an existing legitimate interest in the protection of rights and a connection between the desire for a special audit and the exercise of shareholders' rights. This presupposition is not present in cases involving questions abusing the law or obvious interests in information on the part of competitors or in respect of matters

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58 The plaintiff's claim must specify the need for information and inspection in detail as it is not sufficient simply to make a general request for information or for review of documents. In addition, the prior (unsuccessful) request for information or to inspect documents at the general meeting is a requirement for the action.

59 *Cf.* also N 797; N 817; N 828 and N 843 below.

60 *Cf.* N 1031 et seq. below.

61 The special audit is secondary to the right to information and to inspect documents; the latter must, however, only be asserted *vis-à-vis* the corporate bodies and not through the courts by means of an action for information.

already well-known or adequately clarified by the board of directors (BGE 123 III 261). The subject matter of the special audit moreover can only be "specific circumstances", *i.e.* only internal company matters and not legal questions or discretionary decisions made by corporate bodies; a comprehensive inquiry into the conduct of management is also precluded. The topic of the special audit must in addition be covered by prior requests for information and inspection. The decisive criterion here is the shareholder's need for information, a need that would have to be clear to a board of directors acting in good faith in their assessment of the shareholder's earlier requests for information and inspection (BGE 123 III 261).

312 The request for a special audit can be made without it having been already included on the agenda (CO 700 III). The board of directors is obliged to put the request to the vote even if it (the board) rejects the request or is prepared

to provide further information following the general meeting. Unless the articles of association provide otherwise, the general meeting decides with an absolute majority of the votes represented and any existing voting shares have no higher voting rights in this resolution (CO 693 III Sec. 3). If the proposal is approved, the company or any shareholder may request the court within 30 days to appoint a special auditor (CO 697a II). If the proposal is not approved by the general meeting, shareholders who together represent a minimum of 10 percent of the share capital or shares with a nominal value of CHF 2 million may request the court within a period of three months to appoint a special auditor (CO 697b I). Besides the general prerequisites for a special audit (specific nature of the circumstances to be clarified, necessity of information requested and earlier exercise of information right), the applicants must also in this case plausibly establish that incorporators or corporate bodies have infringed the law or the articles of association and have thus harmed the company or the shareholders (CO 697b II). This provision is meant to prevent the procedure of the special audit being abused for petty purposes and starting off an unjustifiable process that would be costly for the company.

313 The court makes its decision after hearing the company and the applicant (CO 697c I). If the court approves the application, it describes the scope of the investigation and instructs an independent expert to conduct the audit (CO 697c II)[62]. The court may appoint experts to conduct the audit jointly (CO 697c III). The special audit must be carried out within a reasonable time and without unnecessary disruption to company business activities (CO 697d I). During the investigation, incorporators, corporate bodies, agents, employees, commissioners and liquidators must provide the special auditor with information on material issues (CO 697d II). Before the special auditor finishes his report, he provides the company, *i.e.* the board of directors, with the opportunity to comment on the findings of his investigation (CO 697d III). The special auditor provides the court with a comprehensive report on the result of his audit while preserving business secrecy (CO 697e I). The court delivers the report to the company and decides on application by the company whether sections of the report breach business secrecy or other legitimate interests of the company and should therefore not be laid before the applicants (CO 697e II). The board of directors and the applicants may comment on the revised report and may submit supplementary questions (CO 697e III). The board of directors submits the report together with the comments on it to the next general meeting (CO

62 Regardless of his appointment by the court, the special auditor does not act in an official capacity. His legal relationship with the company is governed by private law and is similar to a mandate. The special auditor does not, however, have the status of a corporate body, which is why he cannot be held liable under company law (CO 754 et seq.).

697f I)[63]. For a period of one year following the general meeting, any shareholder may request an official copy of the report and the comments on it from the company (CO 697f II). The costs of the special audit must be borne by the company itself and it is required to make an advance payment. This is always the case if the general meeting has consented to the special audit. Only under special circumstances the court imposes the costs wholly or partly on the applicants as well (CO 697g)[64].

314 The special audit was introduced with the revision of company law in 1991, and its main aim was to enable the shareholder to make a correct assessment of internal company matters and to obtain information and evidence in respect of an action of accountability. An action of accountability is, however, hardly ever made easier for minority shareholders since their right to take legal action lapses within six months of a resolution on the discharge of the board of directors, and this is so irrespective of whether they voted for the resolution or not (CO 758 II)[65]. Within this brief period it is scarcely possible to carry out the procedure of a special audit. The restrictive court practise contributes to the fact that special audits rarely take place in practice. On the other hand the very threat of a possible special audit can induce the board of directors to improve their information policy[66].

5.4.3.4 Right to an independent and professional audit

315 The shareholder's entitlement to information and inspection also includes his right to professional auditors (CO 727a; 727b)[67] who are independent of the board of directors and the majority shareholder (CO 727c I). A shareholder may request the removal of auditors who do not fulfil these requirements of office by taking action against the company at any time (CO 727e III). The auditors are required to examine the accounting procedures and annual accounts and must ensure that the board's resolution on the allocation of the balance sheet profit complies with legal provisions (CO 728 I). The general meeting for its part is allowed to approve the annual accounts and decide on the allocation of

the balance sheet profit only if a written audit report has been submitted and the auditors are present (CO 729c I). If no audit report has been submitted, any resolutions are null and void; if no auditors are present, the resolutions may be challenged (CO 729c II). Although the general meeting may dispense with the presence of the auditors, it may do so only by unanimous resolution (CO 729c III).

5.4.4 Rights to take legal action

316 Under company law, the shareholder has a catalogue of specific rights at his disposal to take legal action for infringement of the law by corporate bodies. These include in particular the following actions:

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63 The board of directors is not obliged to call an extraordinary general meeting. In the same way as the annual business report (CO 696), the report of the special auditor must be presented at the required time and sent to the shareholders on request.

64 According to expert opinion, costs may be imposed on the applicants if they act in bad faith, *i.e.* if they are overhasty in requesting the special audit, or request it maliciously or with the intention of causing harm.

65 If discharge is not granted to the board, the ordinary prescriptive period of 5 years applies for an action of accountability (CO 760 I). In this case, the special audit represents an effective way of obtaining the basic information needed to assess the risks and chances of success of litigation.

66 As part of the planned revision of company law, the institution of the special audit, renamed the "special investigation" will apparently be revived by means of certain simplifications. *Cf.* N 748 below.

67 On the auditors, *cf.* N 486 et seq. below.

5.4.4.1 Action challenging resolutions of the general meeting

317 Every shareholder has the right to challenge resolutions of the general meeting that infringe the law or the articles of association (*cf.* CO 706 I)[68]. The right to challenge lapses if an action is not raised two months at the latest after the general meeting (CO 706 a I). Shareholders do not, however, have any right to challenge resolutions of the board of directors by taking legal action.

5.4.4.2 Action for nullification of resolutions of the general meeting and of the board of directors

318 If a resolution passed by the general meeting (CO 706b) or the board (CO 714) violates fundamental rules of company law, it is null and void. Any shareholder may at any time seek a court ruling on nullification. Grounds for the nullity exist in particular if resolutions restrict or remove mandatory rights, *i.e.* inalienable shareholders' rights such as the minimum voting rights, the right to participate in general meetings or the various rights to take legal action[69].

5.4.4.3 Action of accountability

319 Any shareholder may bring an action of accountability in the event of dereliction of duty on the part of members of the board - or on the part of other persons holding executive positions (management, directors etc.) - and on the part of the auditors (CO 754; 755 et seq.). He can equally take action against persons who have provided incorrect, incomplete or otherwise inadequate information in an issue prospectus or in a similar communication at the issue of

securities (CO 752) or who have taken part in an unlawful event on the incorporation of the company (CO 753)[70].

5.4.4.4 Action for refund

320 Any shareholder may take action against members of the board as well as against persons close to them and other shareholders for the refund of unjustified benefits acquired in bad faith in the form of dividends, directors' shares of profits, other shares of profits or construction period interest (CO 678 I). These persons are also required to refund other benefits received from the company in the event that these are clearly disproportionate to the consideration and to the economic situation of the company (CO 678 II)[71]. The right to obtain a refund is that of the company and the shareholders; the latter sue for payment to be made to the company (CO 678 III). The right to take an action of this kind lapses five years after receipt of the benefit (CO 678 IV)[72].

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68 On the action challenging a resolution, *cf.* N 434 et seq. below.

69 On the nullity of general meeting and board resolutions, *cf.* N 442 et seq. below. On inalienable rights, *cf.* N 279 et seq. above.

70 On the four actions of accountability under company law, *cf.* N 548 et seq. below.

71 There is a hidden distribution of profits, for example, if the company pays an excessive amount for work done by the recipient, excessive interest or licence fees for loans that he makes or intellectual property he provides or acquires an asset (*e.g.* a shareholding) from a shareholder at an excessive price. But it also arises in the opposite way, for example, if a shareholder pays the company an excessively low rate of interest on a loan it has granted, if the company grants him a loan knowing he has no intention of repaying it (so-called "fictitious loan") or sells him company assets at a price that is too low. On the tax aspects of hidden distributions (or cash-value distributions), *cf.* N 1090 et seq. below.

72 In contrast to the action challenging a resolution and the action of accountability (*cf.* CO 706a III; 756 II), a provision is missing here under which the court, in the event that the plaintiff loses,

5.4.4.5 Action for dissolution

321 Shareholders who together represent at least ten percent of the share capital may request the court to order the dissolution of the company for good cause (CO 736 Sec. 4)[73]. This request is also permitted if errors made during the company's incorporation represent a major risk to the interests of shareholders (CO 643 III) or if one of the required corporate bodies (in particular the board of directors and the auditors) is lacking (CO 625 II)[74].

5.5 Protecting the Level of Shareholding

322 For determining the extent of a shareholder's rights, the decisive factor is the level of shareholding, *i.e*. the number and the nominal value of the shares he

holds in proportion to the total share capital. Since there is no right that the share capital will remain unchanged[75], the shareholder may have an interest in assuming newly created capital proportionate to his earlier shares in order to retain his level of shareholding in the company. Otherwise he would have to be prepared to accept a dilution of his voting rights and earnings since the total number of shares entitled to vote and to receive dividends goes up through the increase in capital, whereas the number of shares he holds remains the same (*cf*. BGE 102 II 265; BGE 99 II 55). In addition, the increase in capital may lead to a dilution of capital if the new shares are issued free of charge (so-called *Gratisaktien, i.e*. "gratis shares") or, in the case of publicly traded companies, if the shares are issued below their current market value (BGE 102 II 268). The pre-emption right (CO 652b) and indirectly the so-called "priority right of subscription" (*Vorwegzeichnungsrecht*) (CO 653c) serve to protect the level of shareholding[76].

5.5.1 Pre-emption rights

323 The pre-emption right is intended to protect existing shareholders against a weakening of their legal position as a consequence of ordinary or authorised increases in capital (*cf*. CO 650 et seq.) by providing them with the right to newly issued shares in proportion to their current shareholding (CO 652b I). Due to its major importance for the legal status of the shareholder, the pre-emption right enjoys a high degree of protection; it may be repealed only by a resolution of the general meeting in connection with an increase of the share capital and only for good cause (CO 652b II). Its withdrawal must be carried out on each individual case and must be approved by the general meeting with a qualified majority or "double quorum" (CO 704 I Sec. 6). Good cause is deemed notably to be the takeover of the company, parts of the company or shareholdings as well as the participation of employees (CO 652 d II). Other examples of good cause include a merger, a contribution in kind or the conversion of

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relieve him of part of the costs and impose that part on the company.

73 On the action for dissolution, *cf*. N 628 et seq. below.

74 In this case as well as in cases in which one of these statutory corporate bodies has not been appointed lawfully, the revised law on the *GmbH* will give each shareholder, as well as creditors or the commercial registrar, the right to request the court to take the required measures (*cf*. D-CO 731b I).

75 Only in rare cases can a resolution on an increase in capital prove to be an abuse of the law, *cf*. as a borderline case the decision in BGE 99 II 55 in which the Federal Supreme Court upheld the capital increase resolution, but expert opinion predominantly found it to be an abuse of the law.

76 As part of increases in capital in listed companies, a trade in pre-emption rights is often organised as an alternative. If the shareholder does not want to invest additional funds and thus waives his preemption right, he can sell this right and accordingly at least realise its economic value.

participation certificates into shares. Further, the repeal of the pre-emption right must not advantage or disadvantage anyone without good cause (CO 652b II; *cf.* also CO 652e Sec. 4 and 652f). In addition, the board of directors is required in its report on the increase in capital to account for the withdrawal of the pre-emption right and for the allocation of withdrawn pre-emption rights (CO 652e Sec. 4) and this report must be reviewed by the auditors (CO 652f I). In the case

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of an authorised increase in capital (CO 651 et seq.), the decision on restricting or withdrawing pre-emption rights may be delegated by the general meeting to the board of directors; however, the general meeting is required in its resolution on such a delegation to specify the guidelines that must be observed by the board of directors (BGE 121 III 219)[77].

5.5.2 Priority right of subscription

324 If, in the case of a conditional increase in capital bonds or similar debt instruments are issued to which conversion or option rights are tied, these bonds must first be offered for subscription to the shareholders in proportion to their current shareholdings (CO 653c I). This indirectly ensures that the pre-emption right is safeguarded since the shareholder can subscribe to the issue and thus acquire the associated conversion or option rights. Like the pre-emption right this priority right of subscription may be withdrawn or restricted by a qualified majority of the general meeting (CO 704 Sec. 6). In this case, the provision in the articles of association on a conditional increase in capital must indicate the requirements for the exercise of the conversion or the option rights and the principles according to which the issue price is to be calculated (CO 653b II). The priority right of subscription may only be restricted or withdrawn for good cause (CO 653c II) and if no one is unfairly advantaged or disadvantaged (CO 653c III). In the case of publicly traded companies, the pre-emption right is in practice mostly precluded because a short-term placing of the bond on the capital market at current market conditions render a preceding priority right of subscription difficult if not downright impossible[78].

5.6 Shareholders' Agreements

5.6.1 Nature and description

325 The above comments on shareholders' rights and obligations provide only an incomplete picture of the legal status of shareholders in corporate practice. Membership under company law is structured in a capital-centred manner. It follows that shareholders of small and medium-sized person-centred companies often have the need to reach certain "mutual" agreements intended to do justice to special circumstances and personal concerns of the shareholders and thus to ensure the smooth functioning of the corporation.

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326 These agreements, which are very common in practice, are known as shareholders' (commitment) agreements. They are agreements involving two or more parties, which specify their mutual rights and obligations as shareholders and thus indirectly set out personal responsibilities *vis-à-vis* the company. Shareholders' agreements operate only

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77 *Cf.* also N 235 et seq. and N 244 or N 252 above.

78 According to the general opinion, the withdrawal will be regarded as lawful if (i) the bond was issued on market conditions, (ii) the company has a widely scattered group of shareholders, (iii) in the allocation of the bond, no individual shareholder groups or third parties are unilaterally preferred and (iv) the increase in capital effected by the exercise of conversion rights or options is relatively small.

between and among the contractual parties (*inter partes*), whereby the company is not a party. This means, for example, that a vote cast in breach of a voting commitment is a valid vote as far as the company is concerned. They therefore set out limits merely for what should be done, not for what can be done, by the party to the agreement.

327 In law, there is no provision regulating shareholders' agreements. The principle of contractual freedom applies, which is why such agreements can be entered into freely within the limits of the law (*cf.* in particular CO 19 et seq.)[79]. Depending on the content and structure, they can be qualified as contracts according to the general law of obligations or as a deed of association, *i.e.* in particular as simple partnerships (CO 530 et seq.)[80]. In practice, it is advisable to harmonise the organisation of the corporation and its articles of association with the shareholders' agreements, for a sensible structure can as a rule arise only when company law and contractual standards form a unified whole[81].

5.6.2 Typical content

328 The two most common objects of shareholders' agreements are agreements in relation to the exercise of the voting rights and in relation to the right to dispose of shares:

329 (i) *Voting agreements*: The shareholders may agree in relation to certain matters, or in respect of a specific general meeting, to vote in a unified manner so as to influence the company to act in their own interests. The incorporators of a company limited by shares, for example, can agree to elect each other to the board of directors. Such agreements do not occur only in small and medium-sized companies that are mostly dominated by one family, but also in publicly traded companies where the founding family or a group of investors wants to use the procedure to

protect its voting power in the face of widely circulating shares[82]. Voting agreements are lawful in accordance with court rulings and legal opinion since they appear neither to circumvent the regulations on the general meeting nor to put the operations of the company at risk (BGE 109 II 43; BGE 88 II 172). In contrast, however, voting agreements are null and void when they do circumvent a restriction on voting rights - such as in particular in the case of the discharge of the board of directors (CO 695) and the acquisition of own shares (CO 659a I) - or a restriction on the transferability imposed by the articles of association (CO 685f II and III; *cf.* BGE 109 II 43; BGE 81 II 534). General meeting resolutions that have been influenced by them are contestable (CO 691 III). According to prevalent legal opinion, votes that have been "bought" are also null and void since such practice is deemed to be immoral (CO 19 II).

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79 Shareholders' agreements are only rarely considered in reported cases (*cf. e.g.* BGE 114 II 57; BGE 109 II 43; BGE 88 II 172; BGE 81 II 534; BGE 31 II 896). This is because the parties attach a high value to confidentiality, which is why they attempt to resolve differences of opinion amicably or - if a dispute is inevitable - by means of an arbitration tribunal.

80 A shareholders' agreement that is limited to the granting of acquisition rights will probably be regarded as a simple contract. In contrast, there is normally a partnership agreement in cases where shareholders agree to act together in a specific way, for example, in the case of joint voting trusts.

81 In particular, provisions on restrictions on the transferability of shares in the articles of association (CO 685a et seq.) can by this means be extended by contractual takeover duties and rights or quorum rules under company law (CO 703 et seq.) may be harmonised through agreements on voting rights.

82 These pools of shareholders must be regarded as organised groups or the participant shareholders as persons acting in concert. In the event that voting rights in a listed company are bundled to a certain extent by the shareholders' agreement, the conclusion of the agreement triggers a duty of disclosure (SESTA 20 I and III together with SESTO-FBC 15 I and II) and, if the participation threshold of 33 1/3 percent is exceeded, even an obligation to make a public takeover offer (SESTA 32 I together with SESTO-FBC 27). *Cf.* N 934 et seq. below and N 1003 et seq.; *cf.* also N 977 et seq. below.

330 (ii) *Rights of disposal over shares*: In practice, shareholders' agreements regularly cover acquisition rights (purchase rights, pre-emption rights and rights of first refusal) as well as selling rights, obligations to buy and buy back or bans on disposal relating to the shares held by the parties. Whereas bans on disposal serve to commit the respective shareholders for a certain time, acquisition rights serve as a barrier preventing third parties from entering the closed circle of shareholders. Selling rights and obligations to buy, in contrast, make it possible for the minority shareholders to dispose of their holdings at a suitable price, for example, in the case of a change of control or on the cessation of employment.

331 In addition, the following matters are frequently regulated in the shareholders' agreements: rights to serve on the board of directors, loyalty duties, bans on competition, dividend policy, exercising pre-emption rights, structure of company management, any obligations or rights to subscribe shares, additional financial obligations of the shareholders (obligations for additional payments or the provision of credit, personal liability for company debts arising from cumulative assumptions of debt, credit guarantees or other guarantees) and the procedure to be applied in the event of a stalemate. Finally, provisions on enforcing the agreed obligations are regularly laid down in shareholders' agreements.

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5.6.3 Duration and termination

332 Shareholders' agreements, together with the articles of association, often form a unified structural whole, which is why they are generally agreed upon for the duration of the existence of the company. In terms of Swiss law, however, contracts may not be made on an indefinite basis (*i.e.* forever) (*cf.* BGE 113 II 209; BGE 97 II 390). In accordance with recent Federal Supreme Court precedent, shareholders' agreements made under company law may in principle be drawn up to cover the lifetime of the parties (but probably not for the "lifetime of the company"), and this certainly goes some way towards meeting the need for the long term durability of such agreements (*cf.* BGE 106 II 226). Generally though, it is advisable to specify expressly the duration and the grounds for termination in the actual terms of the shareholders' agreement[83].

5.6.4 Enforcement

333 The contractual parties to shareholders' agreements may by means of an action enforce the fulfilment of the agreed obligations and have this guaranteed using an injunction imposed by a court (*Realexekution*). This means, for example, that a shareholder who is subject to an obligation arising from a shareholders' agreement may be ordered by the court to vote in a certain way (*cf.* ZR 83 [1984], No. 53).This right to the actual fulfilment of the agreement, however, can prevent a breach of a shareholders' agreement only when it is asserted in good time or a decision of the general meeting is not yet definite. A vote that has already been cast and that is in violation of a commitment is a valid vote and must be respected in the terms in which it was cast. In the same way a shareholders' agreement containing a commitment to share pre-emptive rights or option rights can no longer be enforced if the shares have already been sold and transferred to a third party.

334 For this reason the following protective measures have arisen in practice:

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83 It is not uncommon in practice to dispense with provisions on the termination of the shareholders' agreement with the view that it should be of unlimited duration. This will achieve the opposite result: in the case of agreements conceived as a deed of partnership, the dispositive rules on the simple partnership come into play (CO 530 et seq.) and, in particular, the right of termination at any time based on six months notice applies (CO 546 I) (*cf.* BGE 106 II 226).

335 (i) deposit with or transfer of all committed shares to an escrow on the understanding that he may release them only with the consent of all contractual parties (CO 472-491; 480);

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336 (ii) agreement to pay penalty damages (*cf.* CO 160-163), if necessary by using the shares as a pledge to guarantee the obligations[84];

337 (iii) transfer of the committed shares to a trust controlled by a third party acting as trustee;

338 (iv) granting a proxy to a third party who will represent the shares subject to the shareholders' agreement[85].

84 The Federal Supreme Court approved high penalty damages in this area (*cf. e.g.* BGE 88 II 172). This is because penalty damages will only fulfil their purpose if they are set at a high level.

85 Granting the proxy is not an effective guarantee in itself as the proxy can be revoked at any time on the basis of the mandatory legal provisions (*cf.* CO 34 I and II).