

Corporate Litigation – Swiss Supreme Court confirms abuse of right by a majority shareholder

The Swiss Supreme Court has provided useful guidance in a recent decision on the boundaries of majority shareholders' rights and confirmed an abuse of rights to the detriment of the minority shareholder.

WHY THIS DECISION IS RELEVANT

While minority shareholders have certain rights under Swiss law, it is in practice often difficult to successfully invoke the same. This decision is one of the few where a minority shareholder successfully challenged a resolution of the general shareholders' meeting on the basis of abuse of rights.

The Court recalled the general principles of majority right but also outlined the limits of an abuse of right. This court ruling provides useful guidance to both minority but also majority shareholders in relation to their (ab-)use of rights (and boundaries).

BACKGROUND INFORMATION

As a matter of Swiss corporate law, individual shareholders (including minority shareholders) do not, as a rule, have a right to be represented on the board. Only when there are different share classes (ordinary shares, voting shares, preference shares), does Swiss corporate law grant each class at least one representative on the board of directors.¹

One of the strongest weapons a minority shareholder holds is the right to challenge resolutions of the general shareholders' meeting.

THE FACTS

Here, in case [4A_416/2022](#), a dispute arose between a majority shareholder (holding class "A" shares and approximately 69% of the voting rights) and a minority shareholder (holding class "B" shares and approximately 22% of the voting rights). The company's bylaws granted the minority shareholder the right to have four (4) (out of the twelve (12) in total) representatives on the Company's Board of Directors.

At the shareholder's meeting, the majority shareholder approved an amendment to the company's bylaws to reduce the number of the minority shareholder's board representatives from four to one.

The minority shareholder voted against this amendment and subsequently challenged the resolutions.

In late 2021, the Court of First Instance annulled the shareholders' resolution that amended the company's by-laws. The Court determined that the resolution, which reduced the number of board representatives for the minority shareholder from four to one constituted an abuse of rights, as the amendment was not founded on any legitimate interest of the majority shareholder.



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The Appellate court dismissed the appeal filed by the company and acknowledged that the shareholders' resolution harmed the interest of the minority shareholder, therefore confirming the judgment of first instance.

Finally, the Swiss Supreme Court also upheld the lower court's ruling. The Supreme Court first reiterated the general principle according to which the minority must yield to the will of the majority. However, the Swiss Supreme Court ruled that this majority right is not absolute, but rather that the abuse of rights provides limits. Indeed, resolutions taken by the majority shareholder must not be tantamount to an abuse of rights. The Swiss Supreme Court set the following three conditions under which a resolution must be considered abusive: (i) the resolution is not justified by an economic rationale; (ii) it essentially harms the interests of the minority shareholder and (iii) it unjustifiably favours the interests of the majority shareholder.

Whether or not these conditions are met depends on the actual circumstances. At hand, the Swiss Supreme Court considered that the influence and persuasive power of the minority shareholder was indisputably stronger with four board representatives (as opposed to only one following the bylaws' amendments). Consequently, the influential power of the minority board representatives over the other board directors would be diminished, which both harms the interests of the minority and favors the interests of the majority. Finally, there was also no economic rationale for the proposed amendment. The challenge of the shareholder's resolution approving the amendment to the bylaws was therefore upheld by the Swiss Supreme Court.

TAKEAWAYS FOR MAJORITY SHAREHOLDERS

Majority shareholders should exercise caution and carefully consider the effect of a resolution, assessing whether the above mentioned criteria might be met. It is always recommended to strive to achieve an objective and justified business purpose with a resolution and document the same (e.g. in board minutes or other documents).

This decision also confirms that caution should be applied when granting minority shareholders' certain rights in the bylaws, which might become difficult to abandon. Even if such rights are granted, it might be worth clarifying the conditions under which these rights can thereafter be revoked. Furthermore, rather than granting preferential rights in bylaws, such rights would be better granted only in a shareholders' agreement. While this was not an issue in the decision at hand, Swiss law does not allow the challenge of resolutions taken at a general shareholders' meeting if the resolution merely breaches a shareholders' agreement (unless there has been a breach of Swiss law and/or the bylaws).

TAKEAWAYS FOR MINORITY SHAREHOLDERS

While minority shareholders have certain specific instruments to protect their rights – including information and inspection rights, right to instigate a special audit, right to challenge shareholders' resolutions – having a board representative typically allows them to exercise direct influence on the company's decision-making and provides greater access to detailed and timely information about the company's affairs.

For further questions or comments about this topic, please contact the authors.

References

¹ Article 709 Swiss Code of Obligations.