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## *SHAREHOLDER RIGHTS, EQUITABLE TREATMENT AND THE ROLE OF THE STATE*

### *Shareholders Meetings and Voting Procedures*

By

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## **SHAREHOLDERS MEETINGS AND VOTING PROCEDURES**

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### **Introduction**

The Shareholders Meeting (the “Meeting”) is the highest governing body of any joint stock company in Ukraine. The procedures for the convocation of the Meeting, for the determination of its quorum, its competence, as well as the procedures regulating the conduct of the Meeting, the maintenance of its minutes are governed, for the most part, by the Law of Ukraine, “On Business Companies,” dated September 19, 1991, as amended (the “Business Company Law”), and also by the company’s charter and other by-laws. Certain matters are also governed by normative acts issued by the State Commission for Securities and the Stock Market (the “State Commission”), the State Property Fund of Ukraine (the “SPF”) and other state agencies.

Regardless of the existing Law and regulations governing the Meeting, the company’s charter and other by-laws play an important role in the area of regulation of various procedural aspects of the Meeting. There is at least a twofold reason for this. The first and the main one is that in many instances the Business Company Law and regulations provide only the most important procedural principles or merely adumbrate certain procedural steps to be taken in the course of the preparation for and, particularly, conduct of the Meeting.

The second reason predicates on the first one: the procedural lacunas existing in Ukrainian legislation with respect to the Meeting afford the companies more opportunities to develop their own procedures, provided that they comply with the principles set up in the law. Currently, in an effort to create corporate rules affording the most efficient avenues for the resolution of potential procedural difficulties which may arise at the Meetings, Ukrainian companies include in their charters and by-laws not only the rules prescribed by law, but also recommendations of competent state bodies, corporate customs and traditions accumulated by the Ukrainian corporate practice for the past ten years.

For instance, in 1996 the SPF approved a model of the Shareholders Meeting Schedule, as well as a number of other models of corporate documents, which develop the various procedural aspects of the Business Company Law and suggest important guidelines as to the organization and conduct the Meetings. Obviously the use of such models may be helpful for developing corporate procedures relating to the Meeting.

### **Types of the Meetings and Procedures for the Convocation**

Save for the constituent/founding Meeting (which is convened at the creation of the company), there exist three distinct types of the Meetings:

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<sup>1</sup> Salans Hertzfeld & Heilbronn is a full service international law practice of over 400 lawyers with offices in Paris, London, New York, Kyiv, Warsaw, Moscow, St. Petersburg, Almaty and Baku. The information set out in this presentation is of a general nature only. Specific advice should be sought in all instances before taking any action in connection therewith.

- (a) annual Meetings, normally convened by the management body of the company;
- (b) Extraordinary Meetings called by the management body upon demand of the relevant corporate bodies (such as the management board, or supervisory council or revision commission of the company); and
- (c) Extraordinary Meetings to be held upon demand of shareholders that own a certain minimum percentage of the votes (shares).

## **Bodies and Persons Entitled to Convene Meetings**

The annual Meetings that normally consider results of the company's activities for the calendar year are convened at least once a year, unless the company's charter provides otherwise. The Business Company Law does not determine the specific corporate body responsible for making a decision as to the convocation of the annual Meeting. Usually, companies' charters provide that this decision is made by the executive (management) board of the company. It should be noted however the company's charter may vest this authority in the supervisory council.

The Extraordinary Meetings are convened in case of an insolvency of the company and also under the circumstances specified in the company's charter, as well as in any other case where general interests of the company so dictate. The body responsible for the convocation of such an Extraordinary Meeting is the executive (management) body of the company, which is charged with the day-to-day activities of the company and is competent and capable to determine the occurrence of insolvency or other factors requiring the conduct of an Extraordinary Meeting.

The Extraordinary Meetings must also be convened for the reasons stated above by the executive body (the management board) of the company upon a written demand of the supervisory council of the company or that of the revision commission. Such a written demand is to indicate the specific basis which gave rise to the necessity of the Meeting and the proposed Agenda for such a Meeting. Within 20 days from the receipt of such a written demand, the executive body must make a decision as to the convocation of the Extraordinary Meeting with the Agenda proposed by the supervisory council (or by the revision commission, as the case may be).

Importantly, the Business Company Law does not envisage remedies in the event of failure of the management board to convene the Meeting upon demand of the two said bodies. Since such bodies are not entitled to convene the Meeting themselves (an in this respect their authority to convene an Extraordinary Meeting is more limited than that of the shareholders), it would appear that they can request shareholders who have more than 10% of votes to convene the Meeting.

In addition to the above bodies competent to convene the Extraordinary Meeting, such a Meeting must be convened by the management board upon demand of the shareholders who own in total more than 10% of votes. Such shareholders are entitled to raise such a demand at any time and for any reason. If the management board does not fulfill their demand within 20 days, the shareholders have the right to convene an Extraordinary Meeting themselves in accordance with the general convocation provisions of the Business Company Law (Article 43).

***In practice, in the event of the failure of the company's management board to convene the Extraordinary Meeting, the realization of this authority directly by the shareholders does not appear to be feasible. Indeed, the shareholders do not have full access to the register of the shareholders. This makes it virtually impossible for them to notify the other shareholders regarding the Meeting and to effect in due manner the registration of the shareholders that arrived for the participation at the Meeting.***

Perhaps for the elimination of this (and many other) corporate legislative drawbacks the President of Ukraine adopted the Edict No. 280/2002, dated March 21, 2002. The Decree directs the Cabinet of Ministers of Ukraine to take measures, *inter alia*, for the improvement of the procedures for preparation and conduct of the Meetings. Hopefully, if the Presidential directions are duly realized, the existing incongruity in the Business Company Law regarding the convocation of the Meeting by shareholders will be rectified.

## **Notification Requirements**

The notification is to specify the date, time, the place (venue) where the Meeting is to be held. Such a place must be located in Ukraine and, as a rule, at the location of the company. However, in instances where as of the date of the Meeting 100% of the company shares are owned by foreigners, persons without citizenship, foreign legal entities and also international organizations the place of the Meeting may be abroad.

Ukrainian law prescribes two methods of notification. One of them involves the notification of shareholders who own bearer shares (general notification) and the second – notification of those who own registered shares (personal notification).

Regarding the general notification, the shareholders are notified by a Meeting announcement. This announcement is to be published both in the local press at the location of the company and also in one of the official publications of the Verkhovna Rada, Cabinet of Ministers of Ukraine or the State Commission.

The announcement must be made no later than 45 days prior to the date of the Meeting. If necessary, the same announcement may be placed again.

## **Notification in the Event of Increase (Decrease) of the Charter Fund**

Where the Agenda includes issues regarding changes to be made in the company's charter fund, the publication announcement on convocation of the Meeting must also contain the following points:

- a) motives, method and minimum amount of increase or decrease of the charter fund;
- b) draft changes of the charter connected with the increase or decrease of the charter fund;
- c) information on the number of shares to be additionally issued or to be canceled and on their total value;
- d) information on new par value of the shares;
- e) the shareholders rights resulting from the additional issue of shares or from the cancellation thereof;
- f) date of the commencement and termination of the subscription to the shares that are to be additionally issued or canceled;
- g) procedure for the reimbursement to the owners of shares for the losses related to changes in charter fund.

## **Organization of the Convocation of the Meeting**

Practically all issues regarding the organization of the Meeting are resolved by the company's management board as well as by the working bodies elected by the said board. The management board makes decision as to the conduct of the Meeting, confirms the Agenda, the date, time, place of the Meeting.

Once the Agenda has been drafted and confirmed, the management board is to ensure that all documents (such as draft decisions of the Meeting, new or amended corporate rules to be adopted by the Meeting, etc.) and information (such as information in the candidates to the management board, various reference materials, etc.) relating to all items of the Agenda is collected, enabling the shareholders to familiarize themselves with such documents and information.

Notably, a specific procedure for familiarization by the shareholders with information has been developed by the SPF, on the basis of which many companies adopted their own familiarization procedures.

The management board also appoints a specific person (or committee) directly responsible for the organization of the Meeting and appoints members of the mandate, counting, editing commissions (if any). In addition, the management board compiles a list of the shareholders (their names, addresses, etc) who are to be notified personally regarding the Meeting.

Once the above issues have been resolved the management board proceeds to the preparation of a relevant number of personal notification papers, ballots and registration/voting cards. Thereafter, the management board proceeds to the actual notification of the shareholders of the upcoming Meeting, which is to be done in a manner prescribed by law and company's corporate documents as described above.

### *Agenda of the Meeting*

Since the Agenda is a key point of the Meeting, the body or persons responsible for the preparation of the Agenda must formulate all issues of the Agenda with due accuracy and precision. The management board, which confirms the Agenda, must not accept any vague items of the Agenda, to wit, "Organizational Issues," "Miscellaneous." The main reason for this is that such formulas do not allow the shareholders to familiarize themselves in a timely manner with the applicable information and documentation, which is required by law. This also prevents them from working out their prospective position on the relevant issue in advance (which is the main purpose of the prior notification requirement).

Notably, the management board is entitled to decline shareholders proposals as to the Agenda, with the exception of the proposals offered by the shareholders who own in total as of the date of the proposal more than 10% of the votes.

With respect to the Agenda, one should also bear in mind that the incorporation of changes to the Agenda upon the initiative of the company's management board or state bodies or persons that are not shareholders is not permitted. Also, the shareholders are not entitled to offer changes to the formulated issues of the Agenda or to exclude certain items from it. They are only entitled to supplement the Agenda by a particular item (or items) or to supplement a particular item of the Agenda with an additional point (points).

The Meeting is entitled to consider any issues entered into the Agenda of the Meeting. However, issues that have not been entered into the Agenda may not be considered by the Meeting. Also, pursuant to the Business Company Law, the Meeting is not entitled to change or to supplement the Agenda in the course

of the Meeting. This point is important to note as it protects the rights of the shareholders that are not present at the Meeting.

Any shareholder is entitled to bring its own proposals as to the Agenda of Meeting, however this is to be done no later than 30 days before the convocation of the Meeting. The decision on inclusion of these proposals into the Agenda shall be made by the executive body of the company (company's management board). Proposals of the shareholders who own more than 10% of votes must be included into the Agenda.

The decisions on changes in the Agenda shall be made known to all shareholders no later than 10 days prior to the Meeting in accordance with the procedures envisaged by the company's charter. This being said, where the proposals to change the Agenda concern the increase (or decrease) of the company's charter fund, the above noted publication regarding motives and other points of the charter fund increase (decrease) is mandatory. This point was expressly explained in by the State Commission.

Prior to the Meeting the shareholders must be given an opportunity to get acquainted with documents connected with the Meeting's Agenda. As noted elsewhere in this presentation, the Meeting has no right to make decisions on issues that were not included into the Agenda.

### **Registration of the Shareholders**

Shareholders (or their representatives, as the case may be), taking part in the Meeting, are registered with identification of the number of votes that each of them owns. The registration is performed by the a person authorized by the company or by a registrar (the "Meeting Registration Body"), in the latter case on the basis of the agreement concluded between the company and the registrar. The said registration is to be effected in accordance with the Shareholders Register compiled as of the date of the Meeting. The registration document is signed by the Chairman and Secretary of the Meeting.

To be registered the shareholders must present relevant documents, confirming their ownership in the company as well as documents confirming their identity. The registration at the Meeting is evidenced by a registration card issued to each shareholder (its representative), which card is to bear the number of votes at the disposal of the relevant shareholder. The registration of shareholders who own bearer shares shall be performed on the basis of presentation by them of either their shares (shares certificates), or relevant excerpts from their account of securities. It is important to note that, the shareowners who have not been entered into the Register are not permitted to participate in the Meeting.

### **Authority of Shareholders and their Representatives**

All shareholders who own company's shares on the day of the Meeting have the right to take part at such a Meeting regardless of the number and type of shares they hold. Members of the executive bodies of the company, who are not shareholders, may also take part in Meeting, however their rights are limited only to the advisory voting.

The shareholders may participate in the Meeting either directly or through their representatives acting on the basis of a power of attorney. The power of attorney issued by physical persons are to be notarized, while the powers of attorney issued by corporate shareholders may dispense with notarization, provided that it is duly signed and sealed by the company seal.

A power of attorney authorizing to take part and vote at the Meeting may be certified by the registrar or by the company's board. A representative may be chosen from among other shareholders or from among third parties. Representatives may have permanent or temporary status. In either event, prior to the Meeting the

company must be duly notified regarding representatives appointed by the shareholders. Each of the powers of attorney submitted to the company is assigned a specific number and entered into a specific registry of powers of attorney issued by shareholders.

Notably, the fact of issue of a power of attorney to a representative does not prevent the shareholder to participate at the Meeting directly, instead of its authorized representative. Furthermore, the shareholder is entitled at any time to recall or replace its representative by notifying both the representative and the management of the company.

Shareholders who own more than 10% of the votes and/or the State Commission may appoint their representatives to supervise the process of registration for the Meeting, of which they shall inform in writing the company's executive body before the registration begins. The representatives of the State Commission are appointed and operate in accordance with the Regulations on the Shareholders Registration Control confirmed by Decision No. 199 of the State Commission, dated December 23, 1998, as amended.

## **The Determination of Quorum**

The work of the Meeting Registration Body results in a protocol evidencing the existence (or absence) of the quorum, which protocol is announced by the head of the Registration Body or is passed for announcement to the person who opens the Meeting. Although the existence or absence of the quorum is determined by the moment of the commencement of the Meeting and not by the moment of voting on each particular issue, the recent judicial practice shows that courts are inclined to invalidate by their judgements those Meeting decisions which were made in the absence of the quorum, even though at the commencement of the Meeting the quorum was available. (See commentaries to business Court Decisions published in the "Business Court Herald" No. 1, 2002, p.p. 173-174).

While certain legal commentators recommend that Meeting Schedule should provide that where the persons registered at the Meeting do not take part in consideration of particular issues of the Agenda, this does not affect the capacity of the Meeting to make decisions on these issues, this provision may not change the imperative provision of law according to which the Meeting is deemed to be competent to make its decisions if there are shareholders who own more than 60% of the votes present at the Meeting.

This rule should apply to voting on any particular issue of the Agenda and if it is established that decision of the Meeting on a particular issue was made in the absence of the quorum, this decision may be invalidated even if there have been brought proofs that at the moment of the commencement of the Meeting the quorum has been met. This being said, it should be noted that in certain instances the court take as an evidence the protocol, without verifying whether or not the said protocol is true to the fact.

The working bodies of the Meeting are the Chairman and the Secretary. Although the creation of commissions is not required, for the purposes of facilitating the operation of the Meeting the shareholders may elect a mandate commission, counting commission, protocol commission and editing commission.

The Chairman of the Meeting governs the proceedings at the Meeting, announces items of the Agenda, gives floor to those who wish to make statements, conducts the voting process and announces the results of the voting.

## **New Meeting and Adjournment of the Meeting**

Where the Meeting did not take place for the lack of quorum, the management board of the company is entitled to convene new Meeting with the same Agenda. In this case the specification of the Agenda in the notification regarding the new Meeting is not required. Instead the new notification must contain an indication that this is the Meeting designated to take place instead of the one that has not collected the quorum.

The issue of the adjournment of the Meeting is not covered by the Business Company Law. The SPF's model of the Meeting Schedule does not provide in this respect any guidelines. Since the adjournment of the Meeting clearly falls within the scope of procedural issues (such as issues of the opening of the Meeting, determination of the order in accordance with which the issues are to be discussed, method of voting, etc., decisions on which are made by simple majority open vote) it would appear that the adjournment of the Meeting is to be resolved by shareholders by simple majority votes as any other procedural issue.

The above effectively means that the adjournment of the Meeting is entirely in the hands of the shareholders. Obviously, in the event of the adjournment for the next or any other day the shareholders who were not duly registered on the first day of the Meeting when the registration took place may not be admitted to voting, as this would effectively mean a new Meeting.

### **Voting Procedure and Decisions**

Each shareholder has the number of votes equal to the number of shares it owns. The voting at the Meeting is effected in accordance with the principle "one share – one vote", which effectively means that any share, except for the privileged one, gives a shareholder one vote. However, the charter of the company may envisage the participation in the voting of the owners of the privileged shares as well.

The majority of 3/4 votes of shareholders who take part in the Meeting is required for the decisions on the following matters:

- a) a change in the company's charter;
- b) the adoption of decisions on termination of the company's activity;
- c) the adoption of decisions on the establishment and termination of branches, affiliates and representative offices of the company.

The decisions on the rest of the issues shall be made by simple majority of votes of present shareholders. Notably, the decisions made by the Meeting have preemption over decisions made by the company management board or by other bodies of the company. Such decisions are mandatory for all shareholders, regardless of whether or not they took part at the Meeting, and whether they vote for or against a particular decision. Such decisions are also mandatory for all bodies, officers and employees of the company.

The decisions of the Meeting are made by means of casting votes on each issue of the Agenda. The organization of voting as well as the counting of votes are made by the Meeting's counting commission, or by mandate commission (if elected) or by the Chairman of the Meeting (if none of the commissions were created). The counting commission (or mandate commission or the Chairman, as the case may be) must apprise the shareholders with the voting procedure on each particular issue of the Agenda.

The voting may be open or secret. In the event of open voting, the shareholders vote by raising their registration cards, where the number of their votes is reflected. In the event of secret voting the shareholders cast ballots. In practice, the ballots may be of the following three types: (a) ordinary; (b) ordinary closed; (c) secret closed.

The ordinary ballots contain information regarding the voted issue, the shareholder and the number of votes. This is deemed to be a named voting as it becomes known how each of the shareholders has voted. The ordinary closed ballot contains information regarding the voted issue and the number of votes. Since in certain instances this method does not secure the true secrecy of voting, there also exist secret closed ballots. Based on this method of voting each shareholder receives not just one ballot but a number of ballots equal or proportionate to its votes.

The number of votes is calculated by the members of the counting commission (or by the Chairman of the Meeting, as the case may be). The results of the voting are to be reflected in the protocol.

Generally, the method of voting on each issue of the Agenda is determined separately by simple majority vote. However, the company's charter or the Meeting Schedule may provide for some other procedure as to the determination of the specific method of voting.

One should distinguish the voting on the substantive issues that must be included into the Agenda in advance (otherwise the voting would not be valid) and those of the procedural nature determining the various organizational and voting issues that are not reflected in the Agenda but must be resolved in the course of the Meeting. The latter issues include:

- a) the opening of the Meeting and the election of its working bodies;
- b) specific schedule and procedures for the discussion of issues included into the Agenda;
- c) the determination of the methods of voting, timeframe for delivery of reports and for statements;
- d) breaks in the Meeting;
- e) closing of the Meeting.

The voting on the procedural issues must also follow the general principle: one share – one vote. The Meeting Schedule may also entitle the Chairman of the Meeting to determine certain insignificant procedural issues by himself.

### **Minutes (Protocol) of the Meeting**

The responsibility for the maintenance of the minutes of the Meeting rests with the Secretary of the Meeting. The minutes are to reflect in detail the course of the meeting and, in particular, all issues discussed at the Meeting, the results of the shareholders voting on each particular issue of the Agenda and the decisions made by the Meeting. Shareholders that took part at the Meeting and disagree with its decisions are entitled to make their dissenting statements, which are to be noted in the minutes.

The completeness of the minutes and the authenticity thereof are certified by the signatures of the Chairman and Secretary of the Meeting. The minutes of the Meeting together with attachments thereto (such as the ballots cast, protocols of the mandate and counting commissions, etc.) shall be finally executed and signed by the Chairman and by the Secretary. Thereafter the minutes shall be passed to the company's executive board within three business days after the date when the Meeting was closed.

Pursuant to the SPF recommendation, the certified copies of the minutes and supplements thereto are to be executed within five working dates from the date of the Meeting.

The Minutes and all attachments thereto shall be kept with the company's management board for the entire period of operation of the company. Copies of the minutes or certified extracts thereof must be made available to shareholders any time upon their demand by the Secretary of the Meeting.

### **Liability for Violation of the Convocation and Conduct of the Meeting**

Since Ukrainian law does not envisage express liability for violation of the procedures for convocation and/or conduct of the Meeting, these issues are to be determined on the basis of the relevant internal rules established by the company's charter and by-laws adopted by the Meeting.

For instance, pursuant to the SPF's recommendation set forth in the model Meeting Schedule, the Chairman and Secretary of the Meeting are responsible for the authenticity and accuracy of the data reflected in the minutes of the Meeting. The Secretary of the Meeting is personally responsible for the safekeeping of the minutes. However, these provisions do not establish specific measures of liability of the above persons for the said violations.

Where it is established that certain procedural violations committed by a particular person resulted in damage to the company, the person may be held liable by court on the basis of the civil law liability envisaged by the Civil Code of Ukraine.