The underrated role of the BoD secretary

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1. Statutory regulation
Switzerland's Law on Companies Limited by Shares mentions the secretary of the board of directors (“BoD secretary”) only briefly in two places. Art. 712 para. 1 of the Code of Obligations (CO) states that the BoD must designate a secretary who, however, need not be a member of the BoD itself. Art. 713 para. 3 CO stipulates that minutes must be kept of discussions and resolutions, and that these must be signed by both chairperson and secretary.

2. Tasks of the BoD secretary
Accordingly, the only task incumbent on the BoD secretary from a legal perspective is the keeping of minutes. In addition, the BoD - as part of its self-organization - can assign the secretary further tasks such as the organization of BoD meetings, management of the share register, responsibility for dealing with the Commercial Registry Office, administrative preparations for the AGM, and - subject to their possessing the requisite expertise - responsibility for dealing with legal questions. Finally, the BoD secretary can assume responsibility for the entire administration of the BoD and take on the role of its legal conscience.

The tasks of the BoD secretary are of a purely administrative nature. He or she does not exercise any executive management functions. However, the BoD secretary can make a significant contribution to the BoD's efficient fulfilment of its tasks.

3. Minute-keeping
3.1 Importance of minute-keeping
Minute-keeping is an important and challenging task. Minutes of BoD meetings enable board members to be accountable with respect to the issues they have discussed and the resolutions they have arrived at.

The minutes of BoD meetings can also play a crucial role in any liability proceedings (Art. 754 et seq. CO), such as in the evaluation of any alleged breach of due diligence obligations on the part of a board member involved in litigation.

In particular, the minutes of BoD meetings could act as crucial evidence with respect to the question of whether a BoD member involved in liability proceedings can claim protection under the so-called (Swiss) Business Judgement Rule. According to Federal Supreme Court case law, when evaluating business decisions "that have been arrived at through a flawless decision-making process, which is free of conflicts of interest and based on an appropriate level of information," courts should exercise restraint (Ruling of the Federal Supreme Court 4A_47/2012 of 18 July 2012). If the prerequisites that follow from this wording of the Federal Supreme Court are met, no comprehensive review of the business decision in question will be undertaken, and the commercial discretion of the decision-maker will take precedence (see Legal News of September 2013 "Responsibility under the Law on Companies Limited by Shares: New Developments in the Context of the "Business Judgment Rule").

3.2 Content of BoD minutes
BoD minutes represent the material memory of the company, and should make it possible to reconstruct the basis on which decisions were taken, opinions formed and resolutions passed.

Not least in order to fulfil the important evidential function, BoD minutes must provide the name of the company, the date, time and place of the corresponding meeting, as well as details of those present and their function. The minutes must be signed by the chairperson as well as the secretary. Moreover, it would also be useful to include a list of absentees (both excused and unexcused). This has the effect of making it clear who was invited to the BoD meeting in question, and who could have taken part. Further, BoD mi-
nutes should include the agenda items, the proposals submitted, the votes and statements of individual BoD members, as well as the resolutions arrived at (complete with voting breakdown, including dissenting votes and abstentions, ideally with names provided in each case).

The discussions and votes held are typically reproduced in summary form ("deliberation records"), with more or less detail provided depending on requirements. BoD minutes therefore do not constitute pure records of resolutions passed. Where detail is of the utmost importance, the verbatim reproduction of the voting process may be required ("verbatim minutes").

With respect to the potential significance of BoD minutes for contesting possible liability claims, each BoD member has a vested interest in ensuring that BoD minutes also include dissenting opinions as well as reservations, protests, and clear objections against individual resolutions, particularly as liability proceedings often involve large sums of money.

4. Organizational options

The secretary of the BoD is designated by the BoD by simple majority vote, unless specific provisions in the company's articles of association or organizational regulations specify otherwise. A number of different organizational options are open to the BoD in this respect.

4.1 BoD member as secretary

The BoD can designate one of its own members as BoD secretary. If the secretary is also a board member, he or she has the corresponding rights and obligations, and holds responsibility under Swiss company law as per Art. 754 et. seq. CO.

In this constellation, staffing costs are kept down and the expertise of the BoD minute-keeper is guaranteed. However, this BoD member will not be able to contribute fully to discussions and deliberations, as they will be focusing on the careful keeping of minutes at the same time. Another factor to take into consideration is that the BoD secretary must record minutes in an objective and neutral way. By contrast, a BoD member has to form his or her own opinion, and then defend that opinion in discussions and deliberations. As a result, there is a danger that minutes taken by a BoD member will have a large subjective element.

Problematic from a legal standpoint, however, is the combining of the roles of BoD chairperson and BoD secretary, given that Art. 713 para. 3 CO requires the BoD minutes to be signed by both chairperson and secretary. Where possible, therefore, this option should be avoided. Accordingly, the BoD of even a one-person stock corporation should designate a separate minute-keeper (even though intervention by Commercial Register officials need hardly be feared).

4.2 Third party as BoD secretary

The BoD secretary need not be a member of that body (Art. 712 para. 1 CO), nor need they be a shareholder. In other words, the BoD can entrust a third party (non-BoD-member) with the secretarial tasks. This may either be an external person who has the trust of the BoD (e.g. a business attorney) or a company employee (e.g. an in-house counsel).

The clear benefit of this option is that all BoD members can participate fully in discussions/deliberations and give their undivided attention to important matters without the distraction of taking minutes.

5. The BoD secretary’s required profile

In view of the numerous tasks that a BoD secretary can take on, and given the importance of BoD minutes, the role of the BoD secretary should not be underestimated. Accordingly, care should be taken when choosing a BoD secretary.

First and foremost, the BoD secretary should be a fluent writer, as well as quick on the uptake, loyal and discreet. In order for them to be able to execute the administrative tasks assigned to them as competently as possible, a certain degree of organizational talent is desirable. Finally, a BoD secretary should ideally possess a certain amount of legal knowledge so that he or she can also assume the role of “legal conscience”.

Legal News EY March 2015