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NEW CODE OF COMPANIES AND ASSOCIATIONS

CONFLICTS IN COMPANIES

08

10 STEPS

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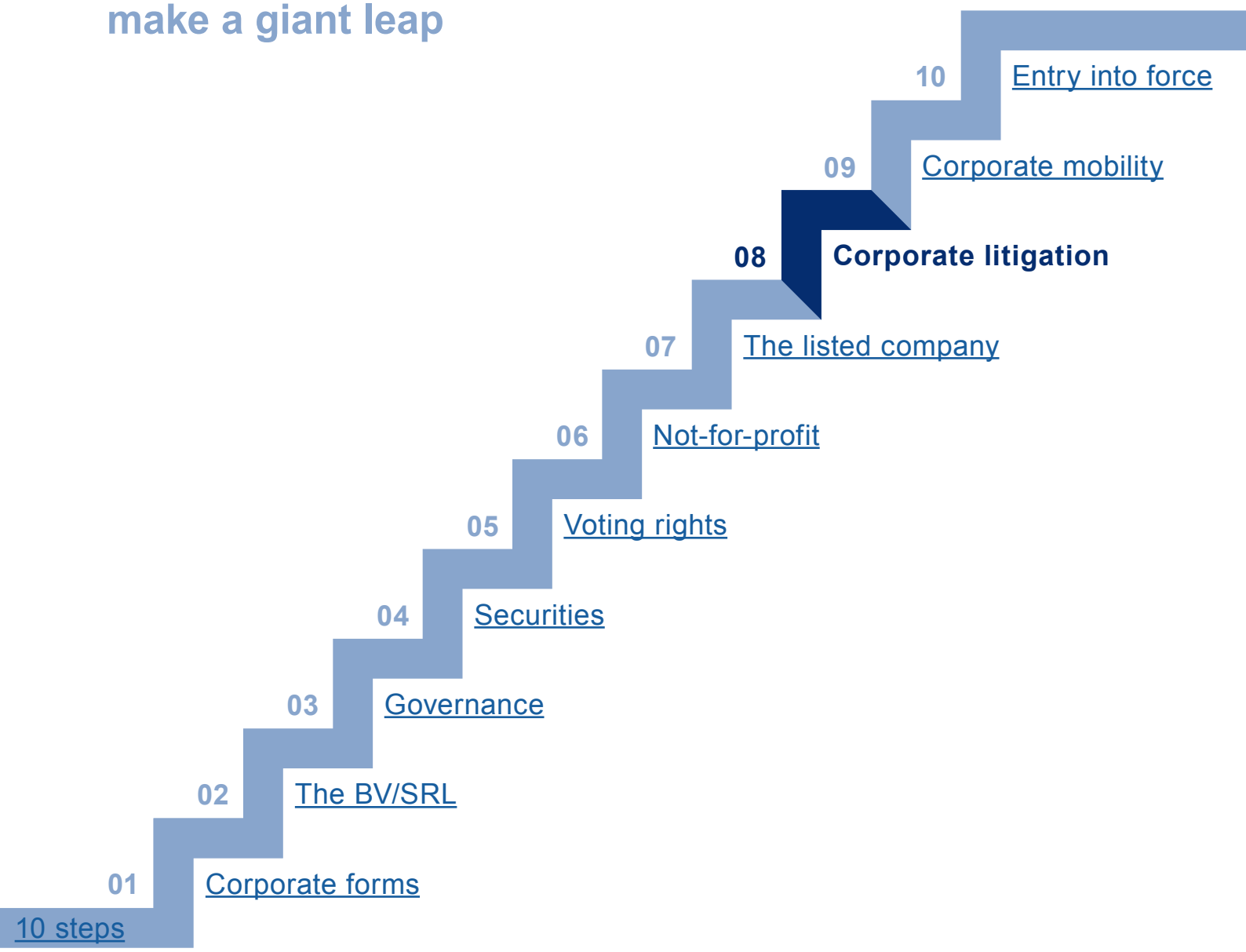

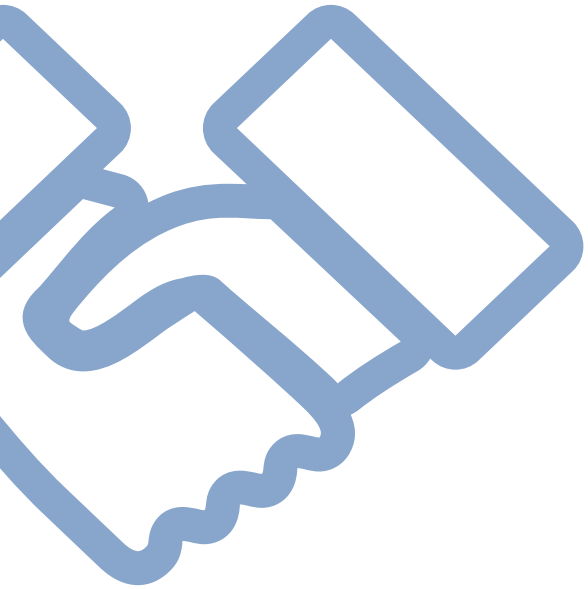

08

CONFLICTS IN COMPANIES

"WHAT ARE THE AVAILABLE MEANS OF ACTION?"

The Code changes (to a limited extent) and also further clarifies the existing means of action available in the event of conflicts in companies. With these modifications, the legislator' main aim is to make the existing means of action more effective. In addition, certain issues which have arisen in the relevant case law have been addressed.

Here we highlight the most striking changes, with regard to both out-of-court and judicial means of action.

Out-of-court means of action

The right to ask questions

The Code both clarifies and extends the scope of the right to ask questions. Shareholders, holders of registered convertible bonds or registered subscription rights and holders of registered certificates issued with the cooperation of the company have the right to ask the members of the governance body and the statutory auditor questions before the general shareholder meeting (by electronic means or otherwise) or during the general shareholder meeting.

The starting point remains that, in principle, the members of the governance body and the statutory auditor are obliged to answer such questions. However, the grounds of justification for the governance body members and the statutory auditor remaining silent have been changed slightly. The members of the governance body may refuse to answer questions if disclosure of certain facts or information could harm the company or would conflict with their confidentiality obligations or those of the company. The statutory auditor may also remain silent if communication of the facts or information concerned would be in violation of his/her professional secrecy obligations.

Resignation and exclusion at the expense of the corporate assets

A new feature is the introduction in the BV/SRL (private limited liability company) of the possibility of resignation and exclusion at the expense of the corporate assets. This regime is based on the regime which already existed in cooperative companies; in order to apply in a BV/SRL, it needs to be provided for in the articles of association. All payments made to a shareholder as a consequence of such resignation or exclusion are considered to constitute a distribution made by the BV/SRL and will therefore be subject to the double net assets and liquidity tests for distributions (please refer to the brochure on the BV/SRL for further details). This means of action will undoubtedly have a significant impact in the context of conflicts within BVs/SRLs.

Judicial means of action

Nullity of decisions made by the corporate bodies

The Code provides for a uniform regime for all legal persons concerning the annulment of the decisions made by all the corporate bodies. This means that the statutory procedure is no longer limited to decisions of the general shareholder meeting but also covers decisions of the governance body.

The company or any person who has an interest in the company's compliance with the violated legal rule may demand annulment of decisions made by corporate bodies. The **grounds for annulment remain essentially unchanged**. They include irregularities that could have influenced the decision-making process or the vote or which were engaged in with fraudulent intent, as well as abuse (of rights), exceeding or misuse of competences, and specific grounds for nullity provided for by law.

A claim for annulment must be brought before the business court. In urgent cases, a claim for suspension can be filed in summary proceedings before the president of the business court. The short expiry period of six months is maintained and will henceforth also apply to claims for nullity of decisions of the governance body.

Annulment of a vote cast during deliberation

The annulment of a vote cast during deliberation is now enshrined in the Code. **The invalidity of a vote can be invoked based on the ordinary legal validity requirements for a legal act**, such as a deficiency in consent. Such a claim will only lead to annulment of the decision if the annulled vote could have exercised a decisive influence on the result of the deliberation.

In the event of **an abuse of voting rights by a minority shareholder** which prevents the legally required quorum from being attained, the court can assert its judgment as a vote on behalf of that minority shareholder. In other words, this is a far-reaching form of reparation in kind.

The Code now also regulates the annulment of decisions made by the governance body and enshrines the annulment of a cast vote.

Dispute settlement procedure

In the event of conflicts between shareholders of a (non-listed) BV/SRL or SA/NV (public limited liability company), the dispute settlement system is the ultimate means of action. This procedure was introduced in 1995 and has proved to be very successful in resolving conflicts in companies on a lasting basis. ***The existing procedure is largely maintained and has been further refined***.

The Code extends the powers of the president of the business court. **The president will now also be able to rule on related disputes concerning the financial relations between the parties and the company** (or companies or persons affiliated with it). This includes disputes relating to loans, current accounts, guarantees and non-compete clauses.

The valuation issue has also been addressed. As far as pricing is concerned, the president of the business court must respect contractual provisions or provisions in the articles of association dealing with value determination to the extent that these provisions were formulated specifically in the context of dispute settlement. However, the president's discretionary power remains intact in the event of a manifestly unreasonable price. In principle, **the reference date for valuation is the date of the rendition of the judgment**, unless this would lead to a manifestly unreasonable result.

The new dispute settlement procedure applies to claims initiated on or after 1 May 2019. Claims initiated before that date will continue to be subject to the "old" rules.

The president of the business court can now also decide on related points in dispute when dealing with dispute settlement proceedings.

Minority claim

Minority shareholders may bring a liability claim against the members of the governance body on behalf of the company. In the BV/SRL, the claim accrues to the minority shareholder(s) holding at least 10% of the issued shares. The regime for the NV/SA has not been significantly changed. Since this claim is brought on behalf of the company, the compensation awarded is to be paid to the company and not to the minority shareholder who has introduced the claim on behalf of the company.

Judicial dissolution for legitimate reasons

Dissolution for legitimate reasons remains a possible means of action.

The president of the business court can dissolve the company in certain circumstances explicitly provided for by law.

The Code further clarifies that the following situations are legitimate reasons justifying judicial dissolution: (i) gross breach by a shareholder of his/her obligations; (ii) illness which makes it impossible for a shareholder to fulfil his/her obligations; and also (iii) any situation which renders the normal continuation of the company impossible, such as a profound and permanent disagreement between the shareholders.

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