BASIC INFORMATION ON THE TYPES OF LIMITED LIABILITY COMPANIES AND ON THE RIGHTS OF SHAREHOLDERS

1. What types of companies enjoy limited liability? If more than one, which ones have shareholders, i.e., holders of share certificates? Which one is the most common? Which one is mostly used by foreign investors?

In Switzerland there are three types of companies which truly enjoy limited liability: the corporation limited by shares (société anonyme or SA/ Aktiengesellschaft or AG) (the Corporation), the limited liability company (société à responsabilité limitée or Sàrl/Gesellschaft mit beschränkter Haftung or GmbH) (the LLC) and the Cooperative (société coopérative/Genossenschaft).

With a few notable exceptions, the Cooperative is nowadays rarely used in Switzerland to conduct profit-driven commercial activities as its capital and governance structure are generally ill-suited to this type of activity.

The Corporation and the LLC are the most common forms of limited liability companies in Switzerland. These forms are widely used across all industries to conduct all types of profit-driven commercial activities, from a pure holding activity to heavy industrial production.

The form of the Corporation is by far more prevalent than the form of the LLC. Due to a recent modernisation of the provisions of the Swiss code of obligations governing the LLC, this form of company is becoming more popular. Because its governance structure is simpler than the governance structure of the Corporation, Swiss subsidiaries of large international groups are increasingly being structured as LLCs.

Both the Corporation and the LLC have a stated capital divided in shares (for the Corporation) or in equity quotas (for the LLC), which will be referred to as the ‘shares’.

2. Are there minimum capital requirements and/or thin capitalisation rules in force?

Swiss law requires the Corporation to have a minimum stated capital of CHF 100,000. At the time of incorporation, 20 per cent of the stated capital of a Corporation or CHF 50,000, whichever is higher, has to be paid up by the founders. There is no upper limit to the stated capital of a Corporation.

Swiss law requires the LLC to have a minimum stated capital of CHF 20,000. At the time of incorporation, 20 per cent of the stated capital of an LLC or CHF 20,000, whichever is higher, has to be paid up by the founders.

Swiss general corporate law does not provide for any thin capitalisation
rules. On the other hand, Swiss tax authorities will deny the deductibility of interests paid by a company to its shareholders to the extent the company’s debt equity ratio exceeds a certain level. Such ratio will depend on the type of assets composing the equity of the considered company. However, specific rules provide for minimum capital requirements to financial institutions such as banks, insurance companies and collective investment schemes. Minimum capital requirements also stem from Swiss listing rules.

3. Describe the types of shares that can be issued by a company and the different rights that they attribute to their owners, as well as any other financial instruments (bonds or other) and other instruments of a participatory nature in the company's capital that can also be issued by the company.

The Corporation may issue either bearer shares or registered shares. It is possible for a Corporation to have both types of shares outstanding at the same time. The shares issued by a Corporation have a par value. The minimum par value of a share is CHF 0.01.

Unless the articles of association provide otherwise, the voting rights attached to a share are proportional to the par value of such share. It is not possible to issue shares without voting rights. Each share grants to its holder a right to a portion of dividend and liquidation proceeds proportional to its par value. It is not possible to issue shares with absolutely no right to the dividend or liquidation proceeds. A Corporation may issue different classes of shares. Each class of shares can have a different par value. However, the par value of the class of shares with the highest par value cannot exceed 10 times the par value of the class of shares with the lowest par value. The articles of association of the Corporation can provide that each share, irrespective of its par value and its class, has only one vote (one share one vote). In such a case, the class of shares with the lowest par value will be considered as benefiting from a voting privilege since for a lower investment it will grant its holder with the same voting right as the higher par value class of shares. The rights and privileges attached to each class of shares are set forth in the articles of association of the company.

The most commonly granted privileges are preferred rights of dividend or preferred right of liquidation, but it is also possible to provide other types of rights and privileges such as a privilege on the first subscription on a future issuance of shares.

The Corporation can issue participation certificates and profit sharing certificates. Participation certificates have a par value and form part of the stated capital of the company. The holders of participation certificates are entitled to the financial rights and privileges set forth in the articles of association. Participation certificates have no voting rights and cannot be granted any of the social rights typically attached to shares. Because participation certificates can be granted the same financial rights as ordinary shares, they are oftentimes referred to as non-voting shares. It is possible to issue different classes of participation certificates.

Profit sharing certificates have no par value and do not form part of the
stated capital of the company. The rights and privileges attached to the profit sharing certificates are set forth in the articles of association. Profit sharing certificates can only grant a right to a share of the dividend or liquidation proceeds or the right to subscribe new shares.

The Corporation may issue notes, bonds and other financial instruments such as options, warrants, etc.

Issuance of shares or bonds by a Corporation to the public requires that a prospectus be prepared in compliance with the relevant provisions of the Swiss Code of Obligations. Shares or bonds issued by a Corporation may be listed on an exchange in Switzerland or abroad.

An LLC may issue registered equity quotas. Equity quotas cannot be issued in the bearer form. The equity quotas issued by an LLC have a par value. The minimum par value per equity quota is CHF 100.

An LLC may issue different classes of equity quotas, as well as participation certificates and profit sharing certificates. The articles of association of the LLC set out the rights and privileges attached to the equity quotas, participation certificates and profit sharing certificates.

Equity quotas issued by an LLC cannot be listed on an exchange in Switzerland or abroad.

4. Can a company have only one shareholder and still enjoy limited liability?
Both the Corporation and the LLC can have one single shareholder/quota holder and still enjoy limited liability. However, the corporate entity will be disregarded and the veil of limited liability pierced under certain circumstances where adherence to the fiction of separate corporate existence would only protect fraudulent conduct.

5. Are the rights of shareholders the same in any type of company?
The rights of the shareholder of a Corporation and the rights of the quota holders of an LLC as set out in the relevant provisions of the Swiss Code of Obligations are substantially the same. The rights of the shareholders and the rights of the quota holders are however defined to a significant extent by the provisions of the articles of association of the considered company. Depending on the content of the articles of association, the rights of the shareholders may be significantly different from one Corporation to another.

6. What are the basic rights of any shareholder? Describe briefly the rights of minority shareholders and indicate which thresholds, if any, are required to allow the minority shareholders to exercise any such rights.
The basic rights of any shareholder are the right to vote and the right to receive a share of the profit or liquidation proceeds. These two rights can be limited in the articles of association but can never be entirely suppressed.

Each shareholder has a right of first subscription with respect to any issuance of new shares by the company. Such right can only be limited or suppressed by a resolution of a qualified majority (two-thirds) of the
shareholders and only if the company has a valid reason to do so. Financing new acquisitions or supporting employee stock option plans are examples of a valid reason where the right of first subscription of shareholders may be validly suppressed. Conversely, defending against a hostile tender offer is not considered as a justified ground for the suppression of the right of first subscription.

With respect to the right to be represented on the board, Swiss law provides that if there is more than one class of shares with regard to voting or property rights, the articles of association shall provide that each class of shareholder may elect at least one representative to the board of directors.

Each shareholder has a right to receive each year a copy of the audited accounts of the company, the management report of the board of directors and the audit report of the auditors. Each shareholder has in addition the right to ask questions during the shareholders’ meeting to the board of directors and the auditor. Information requested by the shareholder has to be provided to the extent such information is necessary for the shareholder to exercise its rights. Information can be refused if it puts in jeopardy the business secrets of the company or other worthy interests of the company. A shareholder only has to consult the books and accounts of the company if expressly authorised to do so by the shareholders’ meeting or the board of directors and only to the extent the business secrets of the company can be preserved at the same time.

If information or the consultation of the books and accounts are refused, the shareholder can request the competent court to decide whether its request has merit or not.

Each shareholder may propose to the shareholders’ meeting to initiate a special audit to investigate specific facts provided: (i) such audit is necessary for such shareholder to exercise its rights; and (ii) the shareholder has already exercised its rights to obtain information and consult the books and accounts of the company.

If the shareholders’ meeting refuses to institute a special audit, one or more shareholders representing at least 10 per cent of the stated capital or shares with an aggregate par value of at least CHF 2,000,000 may request a judge to appoint a special auditor within three months from the resolution of the shareholders’ meeting refusing the special audit. The judge will appoint a special auditor if the applicants show that the company’s organs have breached the law or the articles of association or have caused prejudice to the company or its shareholders.

Swiss corporate law provides very few specific rights for minority shareholders. Minority shareholders do not have the right to nominate a representative to the board of directors. Minority shareholders may request the board of directors to summon a shareholders’ meeting and/or to add an item to the agenda of the meeting only if they represent at least 10 per cent of the stated capital or shares with an aggregate par value of CHF 1,000,000.

Furthermore, a shareholder may on certain conditions challenge resolutions passed by the GM, initiate derivative actions against directors and apply to court for the winding-up of the company.
7. Do all shareholders enjoy the same rights or can some shareholders be attributed specific rights, whether by reason of the particular class of stock owned or other? Are such rights generally provided for at the level of the company’s by-laws and/or in shareholders’ agreements?

As a rule all shareholders enjoy the same rights. It is, however, possible for the company to issue different classes of shares, which will grant its holders different rights. The rights attached to the different classes of shares will be set forth in the articles of association of the company. As a principle, shareholders of the same class have to be treated equally by the company. If there is a need to treat shareholders of the same class differently, then this is usually addressed by way of a shareholders’ agreement among the interested parties.

8. May the rights of shareholders, generally speaking, be limited, modified, suppressed or waived in any way? If so, how? Are such modifications or limitations provided for in the company’s by-laws and/or in shareholders’ agreements?

The rights of shareholders may generally be limited, modified and even suppressed or waived. Such limitation, modification or suppression generally requires a resolution of the shareholders’ meeting and an amendment to the articles of association of the company. Certain rights, such as the right to vote or the right to a portion of the profits or liquidation proceeds can be limited but not entirely suppressed. The right of first subscription may be limited or suppressed but only if there is a valid reason to do so. Certain rights, such as the right to participate in the shareholders’ meeting, the right to information, the right to consult the books and accounts and the right to request a special audit may however not be limited or suppressed.

GENERAL MEETING OF SHAREHOLDERS (GM) AND VOTING RIGHTS

9. Which decisions are reserved to the competence of the GM?

The following decisions are reserved to the competence of the GM:

- adopting and amending the articles of association;
- appointing and removing the members of the board of directors and the auditors;
- approving the annual report and the consolidated financial statements;
- approving the annual financial statements and resolving on the distribution of dividends;
- voting the annual directors liability discharge;
- resolving on the following issues which are by law reserved to the shareholders’ meeting: share capital increase; share capital reduction; limitation or suppression of the rights of first subscription; creation of extraordinary reserves; appointment of special auditor; dissolution of the corporation; and appointment and removal of liquidators.
10. How does a shareholder participate in a GM? Are there any limitations to having a minimum number of shares? May a shareholder delegate attendance to another shareholder or to the board? May a shareholder obtain assistance from the courts or any other governmental body to intervene in a GM or to cause one to be held in some particular cases?

The GM is summoned by the board of directors by sending to the shareholders a summons or publishing the same at least 20 days before the GM. The summons mentions the agenda of the meeting and the proposals of the board of directors for each item of the agenda.

When a Corporation has issued bearer shares, the shareholder will be admitted to the GM by either presenting its share certificates or a statement from its bank that the company’s shares are held on its bank accounts. When shares are registered, only the shareholders registered on the company's share register at the date of the GM will be admitted to participate in the GM.

There is no limitation on having a minimum number of shares. The articles of association of the company can however provide that shareholders may not own more than a certain percentage of the stated capital of the company or that voting rights above a certain percentage will not be taken into consideration for the passing of resolutions of the GM.

A shareholder may grant a power of attorney to another person or entity to represent it at the GM. The articles of association can however restrict the right of a shareholder to be represented, by prohibiting such representation, by providing that only other shareholders can act as representative or by limiting the number of shares or shareholders that a representative can represent. Representation by depositary proxy such as banks and professional asset managers is also possible.

The board of directors may offer to the shareholders the possibility to grant a power of attorney to a member of the company's management to represent their shares. If the board of directors elects to do so, it has to offer to the shareholders the choice to designate an independent third party as their representative.

Minority shareholders representing at least 10 per cent of the stated capital or shares with an aggregate par value of CHF 1,000,000 may request the board of directors to summon a GM and/or to add an item to the agenda of the GM. If the board of directors fails to summon such GM promptly, the minority shareholders may request a court to summon such a GM.

11. May a GM be called and held at the request of any shareholder? Is there a threshold regarding the percentage of the stock interest owned in the company that may entitle a shareholder to such a right?

Only minority shareholders representing at least 10 per cent of the stated capital or shares with an aggregate par value of CHF 1,000,000 may request the board of directors to summon a GM.
12. May a shareholder bring up an issue to be resolved upon and put it to a vote if it is not included on the agenda? May a shareholder require more information from the GM and/or the board concerning the agenda of the GM to be put in a better position to exercise their vote?

No resolutions may be passed on items which have not been duly put on the agenda, with the exception of shareholders’ motions for the convening of an extraordinary GM, the initiation of a special audit or the appointment of auditors. Motions proposed by shareholders during the GM which fall within the scope of agenda items can be validly resolved upon. In addition, any item upon which no formal resolution will be passed can be discussed at the GM even if it was not included on the agenda.

Only minority shareholders representing at least 10 per cent of the stated capital or shares with an aggregate par value of CHF 1,000,000 may request the board of directors to add an item to the agenda of a GM.

Each shareholder has the right to ask questions during the GM to the board of directors and the auditor. Information requested by the shareholder has to be provided to the extent such information is necessary for the shareholder to exercise its rights. Information can be refused if it puts in jeopardy the business secrets of the company or other worthy interests of the company. A shareholder only has the right to consult the books and accounts of the company if expressly authorised to do so by the shareholders’ meeting or the board of directors and only to the extent the business secrets of the company can be preserved at the same time.

13. May a GM be held by telecommunication means and/or by correspondence (ie by written consent)?

Under Swiss law the GM can only be held physically. Attendance by videoconference, teleconference, or circular letter is not permitted.

14. Are voting rights always proportionate to the stock held by each shareholder or can they vary by share class?

By law the voting right attached to a share is proportional to the par value of such share. The articles of association can, however, provide that each share grants its holding with only the power to cast one vote (one share, one vote). The articles of association can also provide that the voting right of the shareholders is limited to a specific maximum percentage of the stated capital of the company. The articles of association can also provide that certain resolutions of the GM require a qualified majority of the voting rights or the approval of a certain class of share in addition to the general majority rule. At a minimum, each shareholder shall have at least one vote.

For certain resolutions of the GM, Swiss corporate law requires that the voting right be proportional to the par value of the shares present or represented at the GM. In particular, election of auditors, initiation of a special audit, resolution on the initiation of liability suit against the management or the auditor.
15. Are there non-voting shares? Is there a maximum percentage of capital represented by non-voting shares?
Swiss corporate law does not permit non-voting shares. Corporations and LLCs can issue participation certificates. The holders of participation certificates have the same financial rights as the holders of shares (unless the articles of association state otherwise) but they have no voting rights. The articles of association can, however, grant certain social rights to the holders of participation certificates such as:
• the right to call a GM;
• the right to attend a GM;
• the right to information;
• the right to consult the books and accounts; and
• the right to make motions at the GM.
The holders of participation certificates shall have the right to challenge the resolutions of the GM that violate the law or the articles of association and to initiate liability suits against the organs of the company for breach of their fiduciary duties.

16. Can shareholders group their shares in order to exercise their voting rights (eg, by trust, shareholders’ agreement or otherwise)?
Voting agreements are common in Switzerland and do not raise any issue with respect to privately held companies. With respect to publicly listed Corporations, a voting agreement will usually lead the parties to be considered as acting in concert and the shares held by such parties will be aggregated for the purpose of complying with disclosure requirements relating to substantial shareholdings. Such disclosure is required when a shareholder, or group of shareholders acting in concert, acquires or disposes of shares and thereby reaches, exceeds or falls below the limits of three, five, 10, 15, 20, 25, 33.3, 50 or 66.6 per cent of the voting rights of a Swiss Corporation listed in Switzerland.

17. Under what circumstances can a shareholder challenge the resolutions adopted by the GM? Are there thresholds concerning the stock interest owned to be able to bring such a claim?
Swiss corporate law makes a distinction between the resolutions of the GM which are void and the ones which are merely voidable.

Resolutions which are void can be challenged at any time by any shareholder. Resolutions which are only voidable can only be challenged within two months from the passing of the considered resolutions by shareholders who have not adhered to such resolutions.
There is no requirement for a minimum shareholding to challenges of GM resolutions which are void or voidable.
Under Swiss corporate law, a GM resolution is voidable if it:
• withdraws or limits the rights of a shareholder in violation of the law or the articles of association;
• withdraws or limits the rights of a shareholder without proper reason;
• favours a shareholder or discriminates against one in a manner which is
not justified by the company’s purpose; or
• transforms the company into not-for-profit organisation without the consent of all shareholders.

Under Swiss corporate law, a GM resolution is void if it:
• withdraws or limits the shareholders’ rights to participate in the GM, the minimum voting right, the right to sue, and other rights granted by mandatory provisions of law;
• limits the shareholder’s rights of control over the company provided by law; or
• disregards the fundamental structures of the company or violates the provisions for the protection of the stated capital.

18. What are the terms and procedures to challenge a resolution of the GM?

The commercial court of the place of incorporation of the company has jurisdiction over shareholders’ petitions challenging a resolution of the GM.

With respect to resolutions of the GM which are null and void, a shareholder can challenge the resolution at any time.

With respect to resolutions which are merely voidable, the shareholder has to challenge the resolution within two months from it being passed. To be entitled to take action, the shareholder shall not have voted in favour of the challenged resolution and shall have a legal sufficient interest to act. In particular, the plaintiff shall still be a shareholder at the time it initiates court proceedings to rescind the resolution of the GM.

In the event that the court decides in favour of the plaintiff, the resolution of the GM will be rescinded and such rescission will be binding on the plaintiff, the company and all the other shareholders of the company. In the event that the court decides in favour of the company, the court will decide at its discretion on the allocation of the costs of proceedings between the company and the plaintiff.

SHAREHOLDERS’ RIGHTS VERSUS DIRECTORS AND DUTIES OF OTHER CORPORATE BODIES IN THE COMPANY

19. What is the procedure for the appointment/replacement/revocation of directors and of statutory auditors, if any?

The directors and the statutory auditors are appointed, replaced and revoked by resolution of the GM. The board of directors will put the election, replacement or revocation of the directors and statutory auditors on the agenda of the GM and will outline the proposals of the board of directors in this respect.

It is customary for publicly listed companies and for large privately held companies to have a nomination committee whose task will be to make recommendations regarding vacancies to be filled on the board of directors or for the appointment/replacement of the statutory auditors.

The shareholders do not have to follow the recommendation of the nomination committee and may vote in favour of candidates which have not been vetted by the nomination committee.
The duration of a director’s term is set forth in the articles of association but it shall never exceed six years. Directors can be re-elected, unless the articles of association provide otherwise. In publicly listed companies and large privately held companies, the usual term for a director is one year. It is, however, possible to provide for longer terms and create a staggered board.

The election, replacement and revocation of directors and statutory auditors usually requires only a majority resolution. The articles of association can however provide for a qualified majority.

20. May shareholders challenge the resolutions of the board of directors? Is there a minimum percentage of capital required to challenge a board resolution?
A shareholder may only challenge resolutions of the board of directors which are null and void, such as:
• any resolution withdrawing or limiting the rights of shareholders or directors which result from mandatory provisions of law;
• any resolution limiting the rights of shareholders or directors to control the company; and
• any resolution disregarding the fundamental structures of the company or violating the provisions protecting the stated capital of the company.
There is no minimum percentage of capital required to challenge a board resolution which is null and void.

21. Are shareholders entitled to bring a legal action against the directors of the company? In which circumstances? Please describe briefly the principles of directors’ liability.
The directors of the company are liable to the company and the shareholders for any losses or damages resulting from the breach of their fiduciary duties. If such breach has caused a loss or damage only to the company, a shareholder can only bring a legal action for the indemnification of the company (derivative action). If the breach of fiduciary duty is causing a direct loss or damage to the shareholder (as opposed to an indirect damage resulting from the loss or damage suffered by the company), then such shareholder can bring a legal action against the breaching director and seek direct indemnification of its damage. The plaintiff will have to prove:
(i) the breach of the director’s fiduciary duties;
(ii) the damage suffered by the company or the shareholder itself;
(iii) the causation between the breach of fiduciary duty and the damage; and
(iv) that the breach is the result of a wilful action or negligence of the director.
If the board of directors has lawfully delegated the day-to-day business to a third party such as the management, the board is, however, exempt from liability provided that it can show that the management has been carefully selected, instructed and supervised.

22. What are the rights in connection with transactions where the directors have a conflict of interest situation?
The duty of a director is to always act in the interests of the company,
including when they are in a conflict of interest situation. If the director fails to act in the interests of the company and favours their own interests over those of the company and thereby causes damage to the company, they will be liable towards the company for such damage. Any shareholder will have the right to bring a derivative action against such director and seek indemnification on behalf of the company. Swiss corporate law does not provide for specific provisions to address conflict of interest situations. There is in particular no legal requirement to abstain from attending meetings of the board or casting their vote at such meeting when in a conflict of interest situation. Swiss companies will often adopt internal regulations to set out the appropriate course of action for directors in a conflict of interest situation (such as disclosure, abstention from the meeting and abstention from voting).

INFORMATION RIGHTS ON THE COMPANY’S BUSINESS

23. What information may be requested by the shareholders from the board concerning the general state of the company’s business or any specific transaction? Are information rights different depending on the number of shares owned? Are shareholders entitled to receive written information before, during or after the GM about the meeting agenda and to what extent? Is it possible for a shareholder to obtain a copy of the minutes of the GM?

Each shareholder has a right to receive each year a copy of the audited accounts of the company, the management report of the board of directors and the audit report of the auditors. Each shareholder has a right to obtain a copy of the minutes of the GMs. Each shareholder has in addition the right to ask questions during the shareholders’ meeting to the board of directors and the auditor. Such questions may relate to the general state of the company’s business or to a specific transaction. From a practical standpoint, it is advisable to communicate to the board of directors in advance the list of questions the shareholder intends to pose at the GM, so as to enable the board of directors to be ready to answer at the GM or to provide the shareholders with its answers ahead of the GM if the board of directors chooses to do so. The right of information of the shareholder is the same irrespective of the number of shares held.

Information requested by a shareholder has to be provided to the extent such information is necessary for such shareholder to exercise its rights. Information can be refused if it puts in jeopardy the business secrets of the company or other worthy interests of the company. A shareholder only has a right to consult the books and accounts of the company if it is expressly authorised to do so by the shareholders’ meeting or by the board of directors and only to the extent the business secrets of the company can be preserved at the same time.

If information or the consultation of the books and accounts are refused, the shareholder can request the competent court to decide whether its request has merit or not.
24. Do shareholders have the right/duty to resolve in the GM upon matters which were not on the agenda?
No resolutions may be passed by the GM on items which have not been duly put on the agenda, with the exception of shareholders’ motions for the convening of an extraordinary GM, the initiation of a special audit or the appointment of auditors. Motions proposed by shareholders during the GM which fall within the scope of agenda items can be validly resolved upon. In addition, any item upon which no formal resolution will be passed can be discussed at the GM even if it was not included on the agenda.

If all shareholders are present or represented at a GM, it is possible to resolve on an item which was not included on the agenda, provided all shareholders agree that a resolution be passed on such item.

25. Are shareholders entitled to inspect the corporate books and/or any other corporate or accounting documents? To what extent? Can they do it through external counsel or advisors?
A shareholder may only have the right to consult the books and accounts of the company if it is expressly authorised to do so by the shareholders’ meeting or the board of directors, if such consultation is necessary for such shareholder to exercise its rights and only to the extent the business secrets of the company can be preserved at the same time.

Once a shareholder is granted the right to inspect corporate books and/or any other corporate or accounting documents, it may do so either directly or through its legal or financial advisers.

SHAREHOLDERS’ AGREEMENTS
26. Are shareholders’ agreements validly enforceable? What are their typical contents and term of duration? Are they enforceable by or against third parties and, if so, to what extent?
Shareholders’ agreements are common in Switzerland and are enforceable against the shareholders who are parties to it. Shareholders’ agreements are however not enforceable against third parties (such as other shareholders) who are not party to it.

Shareholders’ agreements typically contain provisions regarding:
(i) the composition of the board of directors;
(ii) decisions of the board of directors or the GM requiring qualified majority, the consent of a specific shareholder or board representative or subject to certain veto right;
(iii) right of pre-emption;
(iv) tag-along, drag-along and other change of control provisions; and
(v) dividend policy and future financing, including anti-dilution protection.

Shareholders’ agreements can also contain certain undertakings of one category of shareholders (eg founders) towards another (eg financial investors).

Shareholders’ agreements governed by Swiss law usually provide for a fixed term with a mechanism of automatic renewal for further fixed term periods. It is not advisable to enter into a shareholders’ agreement for
an undetermined duration, as there is a risk that under Swiss law such agreement may be considered terminable at will by giving six months’ written notice.

27. Do shareholders’ agreements have to be disclosed to the public or registered in any public registry?
There is no requirement in Switzerland to disclose or register a shareholders’ agreement entered into in relation to a privately held company.

With respect to publicly listed Corporations, a shareholders’ agreement may lead the parties to be considered as acting in concert and the shares held by such parties will be aggregated for the purpose of complying with disclosure requirements relating to substantial shareholdings. Such disclosure is required when a shareholder or group of shareholders acting in concert acquires or disposes of shares and thereby reaches, exceeds or falls below the limits of three, five, 10, 15, 20, 25, 33.3, 50 or 66.6 per cent of the voting rights of a Swiss Corporation listed in Switzerland.

ECONOMIC RIGHTS AND RIGHTS OVER THE STOCK
28. Is the stock always freely transferable? Are there any legal limitations? Are there any restrictions on contractual limitations?
Bearer shares issued by a corporation limited by shares are always freely transferable. Such transfer is made through the delivery to the acquirer of the share certificates incorporating the shares.

Registered shares issued by a corporation limited by shares are also freely transferable unless its articles of association subject such transfer to the consent of the board of directors. The transfer of shares cannot however be per se prohibited.

If the transfer of registered shares issued by a privately held company is restricted, the articles of association can set out circumstances in which the board of directors is legitimately allowed to refuse its consent and therefore prevent the transfer of the shares. Such circumstances typically relate to the composition of the company’s shareholding (ie to limit a concentration of shares in one shareholder) or to the independence of the company (ie to prevent the company from being acquired by a competitor). The board of directors may also refuse its consent if the would-be acquirer does not confirm that it is acquiring the shares for itself and for its own account. The board of directors may also refuse its consent without giving any reason for such refusal, but in such a case the board of directors has to offer to buy back the shares for a price which corresponds to the value of the company as a going concern. If the registered shares are acquired through inheritance, liquidation of matrimonial regime or through debt enforcement proceedings, the board of directors may only refuse its consent if it offers to buy back the shares for a price which corresponds to the value of the company as a going concern. If there is a dispute between the company and the shareholder on such price, the price will be determined by the courts in the context of an appraisal proceeding or by an expert if the parties agree to such appointment.
If the transfer of registered shares issued by a publicly held company is restricted, the company can only refuse its consent if the articles of association provide for a maximum shareholding's threshold and such threshold is exceeded or if the would-be acquirer has not confirmed that it is acquiring the shares for itself and for its own account. The consent of the board of directors cannot be withheld if the shares have been acquired through inheritance, liquidation of matrimonial regime or through debt enforcement proceedings. If the shares with restriction of transfer issued by a publicly listed company are acquired on an exchange, the transfer of title from the seller to the acquirer occurs immediately but the acquirer cannot exercise its voting rights and other related rights until the transfer is approved by the board of directors. If the consent of the board of directors is validly denied, the acquirer will be registered as a non-voting shareholder in the shareholders’ register.

With respect to equity quotas issued by a limited liability company, Swiss corporate law provides that the transfer of such quotas require the approval of the GM. The articles of association can provide that the transfer can be made without the consent of the GM. The articles of association can also set out circumstances in which the GM may legitimately refuse its consent. The rules governing such limitations are similar to those applicable to privately held corporations limited by shares. Furthermore, the articles of the limited liability company can also provide that the transfer of quotas is per se prohibited, it being specified that a quota holder may exercise an exit right for good cause.

29. Are shareholders entitled to pledge their stock?
Shareholders of a corporation limited by shares are entitled to pledge their stock. In practice it is important for the pledgee to review the articles of association of the company for any provisions which may limit or hinder enforcement of the pledge. Limitations in the articles on the transferability of the shares or the percentage of stated capital or voting rights which can be held by a single shareholder may impact the value of a share pledge. It is common for shareholders of a Corporation to restrict their ability to pledge their shares through a shareholders’ agreement.

Quota holders of a limited liability company are entitled to pledge their quotas, except when the articles prohibit the transfer of quotas. In such a case, the pledge of the quotas is also prohibited. The articles of association may also submit the pledge to the approval of a majority of quota holders.

30. Are there financial assistance issues to be considered and other prohibitions to be evaluated in the context of a leveraged buyout transaction?
The provisions of Swiss corporate law aimed at protecting the stated capital of a Corporation limit the ability of a Corporation to guarantee the obligations of an acquirer who would have borrowed heavily to purchase the entire share capital of such Corporation.
A Swiss Corporation can only guarantee the obligations of its controlling
shareholder up to an amount which is equal to the accrued earnings and reserves of such Corporation which could be freely distributed by way of a dividend at the time the guarantee is called.

The possibilities of a ‘debt push-down’ (through a merger of the Corporation with the acquisition vehicle) are severely limited due to Swiss tax considerations. The tax authorities will typically refuse to consider as deductible any interest paid by the Corporation on the acquisition debt.

The answer is identical with respect to an LLC.

31. May a company buy back its own stock and if so under which cases and subject to which limitations?

A Corporation or an LLC may acquire its own shares or equity quotas only if it has freely disposable reserves to pay the purchase price and if the aggregate nominal value of such shares does not exceed 10 per cent of the nominal value of the share capital. The voting rights and associated rights attached to shares or quotas will lie dormant as long as they are owned by the company. If shares are acquired due to the restrictions of transfer applicable to the shares or equity quota, such limit of 10 per cent is increased to 20 per cent of the stated capital for Corporations and to 35 per cent for LLCs. Shares repurchased by a Swiss Corporation or LLC do not carry any rights to vote at shareholders’ meetings. Additionally, when a company buys back its own shares, a transfer of distributable profits or freely disposable assets must be made to an undistributable capital redemption reserve in the amount of the purchase price of the acquired shares or quotas on its balance sheet. Furthermore, in the event that the 10 per cent threshold is exceeded, the company shall either dispose of the shares (or equity quotas) in excess or cancel them within two years from their acquisition.

The abovementioned conditions do not apply if a GM resolves that a company shall buy back shares in order to cancel them so as to reduce the share capital. Moreover, there are no specific restrictions under Swiss law in relation to financial assistance by a corporation to persons intending to purchase shares of that corporation (although the board of directors has to ensure that such transactions are in compliance with general principles of corporate law and certain tax directives).

Listed companies intending to implement a share buyback programme may be subject to additional requirements stemming from the Swiss takeover rules. Indeed, all public offers by a listed company of its own shares are deemed to be tender offers, but after reviewing the offer, the Swiss Takeover Board may exempt certain conditions from the obligations to comply with the takeover rules.

From a Swiss tax perspective, share buybacks followed by a subsequent capital reduction are deemed partial liquidations of the company, resulting in income and withholding tax duties for private sellers on the difference between the redemption price and the nominal value of the shares. Share repurchase programmes with subsequent capital reduction are therefore attractive only for Swiss holding companies and tax exempt entities, although the negative consequences for the non-exempt sellers may be
avoided by using various schemes. Share repurchases with a subsequent capital reduction are not however considered as a partial liquidation of the company if the corporate law requirements are satisfied and the redeemed shares are not held for a period of more than six years.

32. Is there a legal right to withdraw from the company and, if so, under what circumstances? How is the shareholders’ stock valued and paid in such a case?

There is no legal right to withdraw from a corporation limited by shares. A shareholder may never request the company in which it has invested to repurchase its shares. Correspondingly a shareholder may in principle not be deprived of its shares by the company in which it has invested. There are however four exceptions to this principle:

(i) a shareholder has not fully paid up the subscription price of its shares and fails to pay up the balance after being requested to do so by the company – in this situation the shareholder will forfeit its shares;

(ii) in a situation where the company is over-indebted and needs financial restructuring, the stated capital of the company is reduced to zero and is then immediately increased back to its initial level and the shareholder fails to participate in such share capital increase – in such a situation the shares held by the shareholder will be cancelled without compensation;

(iii) in the context of a public tender offer if the offeror holds more than 98 per cent of the voting rights of the target company;

(iv) shareholders representing less than 10 per cent of the stated capital of a company may be squeezed out upon merger of such company into another entity. In such instance, the minority shareholders will receive cash instead of shares as merger consideration. This cash consideration will be determined by the companies party to the merger agreement and can be challenged by the minority shareholders in court should this consideration be inadequate.

33. In which circumstances can dividends be distributed among shareholders? Is it possible to exclude or limit the right of certain shareholders to dividends? Does a certain portion of the profits need to be set aside in a reserve fund where it cannot be distributed to the shareholders? Are advances on dividends allowed and, if so, under which circumstances? Can advances on dividends be reclaimed by the company?

Dividends may only be distributed by a Corporation or an LLC if such company has accrued earning or distributable reserves. The distribution of a dividend by a Corporation or LLC requires a resolution of the shareholders. Five per cent of the yearly profits have to be allocated to the legal reserves of the company until such reserve amounts to 20 per cent of its stated capital, it being specified that the articles of association may increase the five per cent and 20 per cent thresholds. In addition, 10 per cent of the portion of the dividend exceeding five per cent of the stated capital has to be allocated to the legal reserves of the company unless such company qualifies as a holding
company. As long as they do not reach 50 per cent of the stated capital of the company, the legal reserves cannot be distributed to the shareholders and can only be used to cover losses, unless the company qualifies as a holding company. The portion of the legal reserves exceeding 50 per cent of the stated capital can be distributed to the shareholders by way of a dividend. Swiss corporate law provides that dividends can only be distributed based on the last audited annual accounts, so in theory the payment of an interim dividend (ie dividend of the profit of the current financial year) is not possible. In practice, an interim dividend is admissible provided that it is based on interim audited accounts showing distributable profits.

34. What are the rights of shareholders in the case of an issue of new stock (increase of the company’s corporate capital) (pre-emption rights)?
Each shareholder has a right of first subscription with respect to any issuance of new shares by the company. Such right can only be limited or suppressed by a resolution of a qualified majority of the shareholders and only if the company has good cause to do so. Financing new acquisitions or supporting employee stock option plans are examples of good cause justifying the suppression of the right of first subscription.

35. May minority shareholders ban or limit the company's capital structure in any manner?
No.

36. Which financial assistance prohibitions are in force?
There is no formal prohibition on a Swiss Corporation or LLC extending a loan to an existing or future shareholder who will then use such loan to subscribe new shares issued by such Corporation or LLC. In practice, the executive organs of a Corporation or LLC should be extremely careful before extending such a loan as they could be held liable towards the company, the other shareholders or even the company’s creditors in the event that the borrower defaults on the loan.

37. Apart from publicly listed companies, in which cases (if any) are shareholders obligated to obtain an authorisation from, or provide information to, a public authority about events that have an impact on their stock interest in the company?
With respect to privately held Corporations, Swiss corporate law does not provide for any authorisation or information requirement. However, Corporations which are active in a regulated industry, such as banks, securities dealer, etc, may be required to obtain an authorisation or provide information with respect to material changes in the composition of their shareholding.

The quota holders of an LLC are registered in the commercial register so any transfer of quotas in an LLC has to be announced and registered with the commercial register.
SHAREHOLDERS’ RIGHTS IN CASE OF EXTRAORDINARY TRANSACTIONS AND/OR WINDING-UP

38. What rights are available to shareholders in the case of a sale of all or a substantial portion of the company’s assets? In case of a merger or de-merger?

As a general rule, the decision to sell the company assets lies with the board of directors, not the GM. However, if the Corporation is selling all or substantially all of its assets, it may be considered either as a fundamental change of the corporate purpose of the Corporation or a liquidation of the Corporation, which in both cases would require a resolution of the GM approved by a qualified majority. Minority shareholders could therefore challenge a resolution of the board of directors approving the sale of all or substantially all of the assets of the Corporation on the ground that the board of directors is not the competent organ to pass such a resolution. If the sale of all or substantially all of the assets is approved by the required qualified majority of the GM, the minority shareholders may no longer challenge the transaction itself but may obtain a judicial review of the terms of the transaction, determining in particular whether the assets were sold or transferred for adequate consideration.

Merger and de-merger require a resolution of the GM approved by a qualified majority. In principle, the rights of minority shareholders have to be maintained in the merger or de-merger and the minority shareholders have to retain an adequate stake in the merged entity or the company (or companies) created as a result of the de-merger. Swiss merger law however provides that consideration other than shares in the surviving company may be granted to minority shareholders. The merging companies may even provide in the merger agreement that the minority shareholders have to accept the settlement if at least 90 per cent of the votes of the absorbed company consent (squeeze-out merger).

Shareholders, who consider that their rights have not been adequately maintained or compensated in a merger or de-merger, may request a court to set an adequate monetary compensation for their shares. This request has to be filed within two months of the merger or de-merger resolution. Besides this request for monetary compensation, the minority shareholders do not have a cause of action to challenge the merger or de-merger itself, unless such merger or de-merger has been made in breach of the law.

39. Which rights are available to shareholders in the case of conversion of the company into a European Company (SE) or into another type of company?

Swiss law does not know the concept of European Company (SE). In a situation where a Swiss corporation or limited liability company is converted into another type of company, the same remedies are available to the minority shareholders as in a situation of merger or de-merger.
40. Which rights are available to shareholders of a company in liquidation?
Upon resolving on the dissolution of the company, the GM may decide to completely discharge the board of directors and to appoint third parties to act as liquidators of the company.

Each shareholder shall be entitled to a share of the liquidation proceeds to the extent that the articles of association do not provide for another use of the net assets of the company in liquidation.

Unless otherwise provided for by the articles of association, the net assets of the company in liquidation shall be distributed to the shareholders in proportion to the amount paid in and with due regard to the preferential rights associated to each class of shares.

Liquidation proceeds may be distributed at the earliest upon the expiry of one year from the date upon which the call for the filling of claims was issued for the third time. However, a distribution may already be made after a three-month period if a specifically qualified auditor confirms that the liabilities have been satisfied and that, under the circumstances, it may be assumed that no third party interests are jeopardised.

41. Can shareholders cause the liquidation of the company? How?
The company may be dissolved by a resolution of the GM made in the form of a notarised deed. This resolution may be passed at any time. At least two-thirds of the votes represented and the absolute majority of the par value of shares represented at the GM are required for such resolution to be passed.

COMPANY GROUPS
42. Is the concept of ‘group’ recognised as such under specific legislation? What are the implications?
The concept of ‘group’ is not recognised as such under Swiss law and there are no specific rules applicable to groups in Switzerland. Swiss corporate law provides however the obligation to maintain consolidated group accounts for the company that comprises by a majority of votes or in another way one or more companies under common management (ie a group of companies).

The absence of specific group legislation is particularly problematic in situations of group meltdown. Since each of the various companies composing the group is considered as a separate legal entity, there is no consolidation of all the assets of the various group companies for the satisfaction of all group creditors. The Swiss Supreme Court has developed an exception to the principle that each group company is only liable for its own obligations. Under the so-called ‘trust liability’, the Swiss Supreme Court has ruled that a parent company could be held liable to third parties for the obligations of its subsidiary if it had created the expectation with such third party that the parent company would provide its subsidiary with the sufficient financial means to satisfy its obligations.

Furthermore, under Swiss case law, a parent may be liable under certain circumstances for the acts of its subsidiary in application of the doctrine of piercing the corporate veil.
43. Does a controlling company have any particular duties vis-à-vis its controlled company shareholders?

Swiss law does not provide for any specific duty of the controlling company towards its controlled company shareholders besides the preparation of group accounts. The controlling company has to comply with the provisions of Swiss corporate law regarding the organisation and functioning of its controlled subsidiaries. If the controlling company does not comply with these provisions, it runs the risk of being considered a de facto organ of the controlled subsidiaries and be held liable towards third parties (including minority shareholders) in this capacity.

44. What are the rights of company shareholders when the controlling company puts in place actions and/or transactions that can be prejudicial to the shareholders?

If the controlling company is passing shareholders’ resolutions or board resolutions which are not in compliance with law or the articles of association of the company, the minority shareholders can challenge such resolutions in court. If the controlling company is usurping powers of the shareholders’ meeting or the board of directors, it could be held liable to the minority shareholders as a de facto organ of the company. If the representatives of the controlling company on the board of directors are in breach their fiduciary duties towards the company, they could be held liable to the shareholders and creditors for any damage that arises.

45. What are the limitations, if any, to the possibility of owning reciprocal stock interests in companies?

There is no limitation on the possibility of owning reciprocal stock interests in companies as long as none of these reciprocal interests is a majority holding. Once a company holds a majority holding in a company, which holds a stock interest in such controlling company, this stock interest will be considered to be treasury shares. Under Swiss corporate law, a company cannot hold either directly or through subsidiaries, more than 10 per cent of its own stock.