THE REVAMPING OF SOME UNCLEAR PROVISIONS OF THE 1915 LAW PURSUANT TO THE 2016 REFORM ENACTED BY THE LAW OF AUGUST 7, 2023

The law of August 10, 1915 on commercial companies (the "1915 Law") was the subject of a major reform completed by the adoption of the law of August 10, 2016 modernizing the amended 1915 Law and modifying the Civil Code and the law of December 19, 2002 concerning the register of commerce and companies as well as accounting and the annual company accounts.

The 2016 reform of the 1915 Law brought improvements and innovations which have already been largely exposed and debated. However, the attention brought to the drafting work was not immune to certain material errors or omissions. Furthermore, the implementation of some new provisions of the 1915 Law had brought to light certain inconsistencies or uncertainties that it seemed useful to address after having been tested by practitioners. In that context, the Ministry of Justice lodged the bill no. 8007 on May 17, 2022 in order to fix the clerical mistakes and to clarify the issues created by some of the innovations of the 2016 reform. The bill no. 8007 has since been adopted by the law of August 7, 2023 and has become effective as of August 22, 2023 (the "New Law").

The New Law provides for many changes, some of which are purely clerical or grammatical. On top of these petty changes, the following improvements / clarifications have been notably brought by the New Law:

(i) Clarification of the quorum and majority rules

- Article 450-1 (9) of the 1915 Law provided (i) for the possibility for board of directors of an SA to suspend the voting rights of the shareholders which were in breach of their obligations (statutory or other) and (ii) for the possibility for any shareholder to voluntarily undertake not to exercise the voting rights attached to their shares (temporarily or definitively). However, the 1915 Law was silent as to whether the shares deprived of voting rights were to be taken into account or not for the calculation of the quorum and majority in case of shareholders' meetings. The New Law comprises a new paragraph to the above-mentioned provision to clearly state that such shares will not be taken into account for the quorum and majority at shareholders' meetings.

- Article 710-19 (which is the equivalent for the SARLs of the above discussed article 450-1 (9)) has been modified in the same terms to clearly exclude the shares which voting rights have been suspended or waived to be taken into account for the quorum and majority at shareholders' meetings.

- Article 710-5 (6) of the 1915 Law has been modified to provide that repurchased shares of an SARL shall not be taken into account for the calculation of the quorum and majority at shareholders' meetings (as it was already provided for SAs in article 430-18 of the 1915 Law).

- Article 1100-2 (1) of the 1915 Law has been modified to provide that the consent of the shareholders representing three-quarters of the share capital is sufficient to proceed with the opening of the liquidation of an SARL, where the former wording kept the double threshold majority rule (more than half of the shareholders representing three-quarters of the share capital) which had been abolished for the other extraordinary decisions by the 2016 reform.

(ii) The procedure of the article 710-12 (transfer of shares of an SARL to a non-shareholder)

- Article 710-12 provides that shares of an SARL may only be transferred to third parties with the approval of the shareholders representing at least 75% (or 50% if the articles of association provide so) of the share capital. The New Law removed an inconsistency in this article which suggested that the company had the possibility to refuse a transfer of shares. Article 710-12 has been amended in order to discard this reference to "the company", making clear that the approval or refusal of a non-shareholder is resolved upon by the shareholders of the company.

- Article 710-12 of the 1915 Law has also been amended to provide that, if the transfer is not approved by the shareholders and unless the transferring shareholder abandons the contemplated transfer, the company may proceed with the repurchase of the shares of the transferring shareholder without the latter's prior approval.

(iii) Clarifications for SARLs having a sole shareholder

When an SARL had a sole shareholder, the latter seemed excluded from the scope of application of certain provisions of the 1915 Law. The New Law provides the following clarifications:

- Article 710-28 has been modified to clarify that when an SARL has a sole shareholder, the latter does not need to comply with the provisions of article 710-12 to approve the transfer of shares to a non-shareholder.

- Article 710-28 has also been modified to confirm that it is possible for the managers of an SARL having a sole shareholder to transfer the registered office of the company and to modify the articles of association accordingly. The former wording of article 710-28 was misleading on that point.

- Article 710-28 introduces the possibility for the management of an SARL having a sole shareholder to issue shares within the limits of an authorized capital procedure pursuant to article 710-26 of the 1915 Law.

(iv) Leonine clauses null and void do not trigger the nullity of the entire SCSp

An agreement contrary to article 1855 of the Civil Code allocating all the profits to one shareholder or exempting a shareholder from any contribution to the losses shall be null and void.

Article 100-18 of the 1915 Law provided, for most companies except the special limited partnerships ("SCSp"), that the nullity sanction would only be applicable to the clause contrary to article 1855 of the Civil Code rather than the entire articles of association or agreement constituting the relevant company. The New Law extends the application of this provision to the SCSp.

Should you want to know more on this topic, please do not hesitate to reach out to our corporate experts in Luxembourg.

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