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ADOPTION OF SHAREHOLDER RESOLUTIONS IN POST-COVID ERA. EXAMPLE OF ESTONIAN LAW

Keywords: shareholder rights in a general meeting, general meeting of shareholders, Estonian Commercial Code, Estonian company law, company law, corporate law

Summary

In 2020, the COVID-19 pandemic forced the world to find the right balance between protecting health, minimizing economic and social disruption and retaining the rights of individuals. States imposed a number of restrictions in order to prevent the spread of the pandemic, including restrictions on the movement of persons and restrictions on gathering. Traditionally, shareholders' meetings of companies have been taken place in the form of physical meetings. Company law also been based on the assumption that meetings are held physically. In the new situation, it was no longer possible to hold meetings in this way, at least for some time. This forced companies to use digital solutions. The legislator was also faced with the question of how to resolve this situation.

Different countries reacted differently in order to find company law solutions. In Estonia, new rules were adopted in May 2020 that allowed legal persons to adopt decisions using digital solutions, among other things, it is allowed to make decisions in a full virtual meeting. The central question in the way companies make decisions is whether the use of virtual solutions is possible, but whether the law provides companies with sufficiently flexible options, which would enable decisions to be taken in the light of the specificities and needs of each company and whether such practices ensure the exercise of shareholders' rights. This article analyses whether and how these objectives have been achieved in Estonian law.

There are three ways to adopt company's resolutions in Estonia: a meeting, a written resolution or a vote by letter. Meetings can take place physically, virtually or in a hybrid form. It is not possible to infringe the rights of the shareholder in making a written resolution, since if such a method is used, the resolution decision is adopted only if all shareholders agree. In the case of voting by letter, the law does not take into account the fact that in a shareholder of a public limited company has the right to receive information from directors only at the general meeting.

Therefore, the future case-law must lay down the principles of communication between the shareholder and the public limited company in the situation when the resolution has been adopted by using such option. The law stipulates that if digital means are used to hold a meeting, shareholders must be guaranteed all the same rights as they have in the event of a physical meeting. Since these rules have been in force only for a short period of time, there are no court cases based on them. Although the legal literature has been expressed some views on the use of digital solutions, it is not yet known how the courts will resolve these issues if disputes arise.

Introduction

In 2020, the COVID-19 pandemic forced the world to find the right balance between protecting health, minimizing economic and social disruption and retaining the rights of individuals. On 30 January 2020, the World Health Organisation (WHO) declared a public health emergency of international importance.[1] The spread of the virus did not stop and on 11 March 2020 the WHO declared a global pandemic situation due to the COVID-19 outbreak.[2] Since then, European states imposed several restrictions to prevent the spread of the pandemic, including restrictions on the movement and gathering of people. In Estonia, the government declared a state of emergency in 12 March 2020[3] and the next day the government issued a regulation on the content of the restrictions adopted[4], two days later, restrictions on crossing the border were introduced.[5] The new situation in which the world was put overnight had also a direct impact on company law. Namely, the principle that shareholder resolutions are to be taken at the physical meetings lays at the heart of company law.[6] In the new situation, it was no longer possible to hold physical meetings, at least for some time. The situation was also complicated by the fact that the spring of 2020, when lockdowns were implemented

[1] Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV). WHO 30.01.2020. Available: https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov) [viewed 05.11.2021.].

[2] WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020. Available: https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [viewed 05.11.2021.].

[3] Order of government on declaration of emergency situation in the administrative territory of the Republic of Estonia. RT III, 13.03.2020, 1. Available: https://www.riigiteataja.ee/en/eli/517032020002/consolide [viewed 05.11.2021.].

[4] Order of government on application of measures of emergency situation. RT III, 14.03.2021, 1. Available: https://www.riigiteataja.ee/en/eli/517032020005/consolide [viewed 05.11.2021.].

[5] Order of government on temporary restriction on crossing the state border due to the spread of the coronavirus causing the COVID-19 disease. RT III 15.03.2020, 1. Available: https://www.riigiteataja.ee/en/eli/517032020004/consolide [viewed 05.11.2021.].

[6] Hüffer U., Koch J. Beck'scher Kurz-Kommentare. Band 53. Aktiengesetz [Beck's short comments. Volume 53. Stock Corporation Act]. Verlag C.H. Beck München, 15. Auflage 2021. – Aktiengesetz § 118, Rn 6.

everywhere, was the usual time when annual meetings of the majority of companies were ahead and it was not known how long the restrictions will continue.

Therefore, most countries were in an urgent need for a legislative response and for an outcome where, despite everything, the annual reports of the companies could be approved. National solutions were different.[7] It can be argued that most countries opted for temporary measures, limiting their implementation in time.[8] Some countries did nothing. At the same time, some countries made more radical decisions and legitimised the possibility of adopting resolutions without physical assembly on a permanent basis. However, some countries had already foreseen such an opportunity in advance.

In March 2020, Estonia had no legislation on virtual shareholder meetings and therefore it was necessary to make legislative changes. On May 23, 2020, Estonian parliament passed a law supplementing, among other things, Art. 33[1] of the General Part of the Civil Code Act[9], which allowed members of the bodies of all legal persons to attend the meeting through electronic channels. The amendment entered into force the following day. The law implemented a general rule that applies to all types of legal entities and is applicable to all their bodies. This is a default rule, since the articles of association can exclude such a method of decision-making. As a matter of fact, considering circumstances, choosing an opt-out regulation was essentially the only option as the main aim of the new law was to resolve an unexpected situation and give companies the opportunity to hold virtual meetings also in case the articles of association of the company did not provide for such solutions. The restrictions on gatherings also prevented shareholders to adopt resolutions on amending the articles of association. It should be noted that being a default rule it leaves a company a possibility to exclude an option to hold virtual meetings in the articles of association, but the actual experience shows that this option is not being used.

Although the topic of virtual meetings has become substantial in connection with the COVID crisis, it has actually raised a much broader question of whether company law overall provides a sufficiently good and flexible way to adopt resolutions. It is clear that holding a physical meeting continues to be the very essence of many countries' respective rules but it has clearly become evident that

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[7] Zetzsche D., Anker-Sørensen L., Consiglio R., Yeboah-Smith M. COVID-19-Crisis and Company Law – Towards Virtual Shareholder Meetings. Available: https://ssrn.com/abstract=3576707 [viewed 05.11.2021.], p. 10 ff.

[8] For example, Germany adopted an Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law which included temporary rules as regards virtual general meetings of public limited companies (See: Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht Vom 27. März 2020 [Law to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure law of 27 March 2020]. Bundesgesetzblatt Jahrgang 2020 Teil I Nr. 14, ausgegeben zu Bonn am 27. März 2020).

[9] Tsiviilseadustiku üldosa seadus [General Part of the Civil Code Act]. 28.03.2002, RT I 2002, 35, 216. Available: https://www.riigiteataja.ee/en/eli/ee/501042021006/consolide/current [viewed 05.11.2021.].

this cannot be the best or preferred option in a situation where technology allows to arrange the communication and decision-making process more flexibly and conveniently.

Virtual meetings are a reality today, and the question of whether holding a meeting virtually is better or worse than a physical meeting cannot be considered a legal issue. It is, among others, a question of human interaction, psychology, cognition and technology. The legal question is whether adopting shareholder resolutions is something that necessarily requires a physical meeting of people in one room at the same time, or whether it is possible to guarantee the rights of individuals even without physical gathering. It is therefore not a question whether the meeting should be physical or virtual, but first of all, whether the law establishes for companies the possibilities to adopt resolutions without physical meeting. The legal question is also are the rights of shareholders guaranteed in case of using these alternatives. The fundamental rights of shareholders thereby include the right to speak, to vote, to make proposals and to ask questions.[10]

This article focuses on Estonian company law and analyses the regulations on private limited companies and public limited companies. The purpose of the article is to analyse what are the methods to adopt shareholder resolutions under Estonian law and to evaluate whether the Estonian law gives companies flexible opportunities to adopt such resolutions and is the protection of shareholders' rights thereby guaranteed.

1. Decision-making possibilities in Estonian company law

The possibilities for adopting resolutions prescribed by Estonian company law are slightly different depending on the form of a legal person. Firstly, the difference is somewhat inevitable since the different legal forms might need different solutions to establish the best possible decision-making process. The second reason, however, is more legislative in its nature as the various legal entities are regulated by different legal acts, which have been amended several times and it must be acknowledged that the amendment of law has not always taken place systematically.[11]

The laws adopted after Estonian re-independence in the early 1990s were based on the laws of other countries at the same time, according to the general logic that the main possibility to adopt resolutions was at the physically held shareholders' meeting. However, already the original text of the Commercial

[10] EMCA European Model Company Act (EMCA), 1st ed., 2017. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348 [viewed 05.11.2021.], p. 252.

[11] Legislative inconsistencies in the regulation of this issue have also been referred to in the Terms of reference for the review of company law. See: Ühinguõiguse revisjoni lähteülesanne [Terms of reference for the review of company law]. Tallinn: Justiitsministeerium, 2016. Available: https://www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_lahteulesanne_loplik_10.5.2016.pdf [viewed 05.11.2021.], p. 127.

Code,[12] adopted in 1995, provided for the possibility for private limited companies to adopt resolutions by a letter (§ 173). After that, the rules regulating the adoption of shareholder resolutions have been amended several times. However, the overall direction of these changes has been rather inconsistent. On one hand, the legislator has tried to reduce formalization and has provided for more flexible options. For example, in 2006 the law explicitly allowed private limited companies to adopt written resolutions, thereby the explanatory memorandum to the draft clearly stated the objective of facilitating decision-making.[13] On the other hand, at the same time, the legislator has also tried to clarify and supplement many of those rules which has once again made the regulations more rigid.[14] Lots of above-mentioned amendments have, of course, also had objective reasons, since some of them have been introduced to solve problems arising in legal practice. Sometimes new rules have been introduced, for example, mainly for the purpose of implementing the opinions arising from the case-law of the Supreme Court into law. On several occasions the transposition of the EU Directives has also increased the inconsistency of company law regulations. Shareholder Rights Directive[15] can be named as one example and one must admit that the way it was transposed was not well reasoned. According to article 1 of the Directive, it applies only to listed companies. Among other things, the directive also includes rules providing for the possibility for shareholders to cast their votes without attending a meeting, including in digital form (Art. 8). Estonia imposed the relevant rules not only on listed companies, but on all public limited companies and some of the rules even on private limited companies. Such extensive imposition meant that the law provided for inflexible procedures even for small companies and raised, inter alia, the question whether private limited companies were still allowed to provide for different arrangements in their articles of association or whether the provisions of the law were supposed to be mandatory. The prevailing view in the legal literature is that the rules of law regulating the internal relations of a private limited company are overwhelmingly default in its nature and that shareholders have an extensive

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[12] Äriseadustik [Commercial Code] 15.02.1995, RT I 1995, 26, 355. Available: https://www.riigiteataja.ee/en/eli/ee/522062017003/consolide/current [viewed 05.11.2021.].

[13] Explanatory memorandum to the draft Act amending the Commercial Code[Seletuskiri äriseadustiku muutmise seaduse eelnõu juurde], 2005. Available: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/3c7833d5-7972-3348-8cca-c210ab5e36ea/%C3%84riseadustiku%20muutmise%20seadus [viewed 05.11.2021.].

[14] In 2018 Estonian company law revision working group completed its final analysis and stated that, according to opinions of stakeholders, the problem of the law in force in Estonia is that the rules for convening and conducting shareholder meetings is excessively rigorous, complex, unreasonably diverse and inflexible. In addition, stakeholders have pointed out that the procedures, deadlines and requirements for convening of the meetings of different types of legal persons are unreasonably different. See: Käerdi M., Kärson S., Kõve V., Pavelts A., Saare K., Volens U., Vutt A., Vutt M. Ühinguõiguse revisjon. Analüüs-kontseptsioon [Company law revised. Analysis-concept]. Tallinn: Justiitsministeerium, 2018. Available: https://www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_analuus-kontseptsioon.pdf [viewed 05.11.2021.], p. 527.

[15] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies. OJ L 184, 14.7.2007, pp. 17–24.

private autonomy to agree differently. This view is well justified as the purpose of the regulation of a private limited company is to ensure the flexibility as well as the possibility for shareholders to establish, through the articles of association, the most appropriate regulation for both the relations between the shareholders and the relations between the shareholders and the company.[16] One must therefore conclude that the relevant rules are not mandatory *per se*, but there remains the question to what extent do the shareholders have the right to deviate in their articles of association from these extremely detailed rules foreseen in law. So far, the case-law has not to this question.

Before the amendments implemented in May 2020, the most general principle for adopting resolutions was that all the bodies of all legal persons adopt resolutions at the traditional general meeting.[17] In addition to this there were (and still are) two other options provided by law: a written resolution or a vote by a letter. However, the latter decision-making methods were regulated differently as regards different legal entities. The previous law (being a result of the transposition of the Shareholder Rights' Directive) also allowed to hold so-called hybrid meetings. This means that a company could stipulate in its articles of association that the shareholders may participate in the general meeting and exercise their rights using electronic means without physically attending the general meeting and without appointing a representative if it is possible in a technically secure manner. The law also provided some examples of electronic participation:

1) Participation at a general meeting by means of real-time two-way communication throughout the general meeting or in another similar electronic way, which enables the shareholder to watch the general meeting from a remote location, vote using electronic means throughout the general meeting on each draft of the resolution and address the general meeting at the time determined by the chairman of the meeting;
2) electronic voting on the draft resolutions prepared in respect to the items on the agenda using electronic means prior to the general meeting or during the general meeting if it is possible in a technically secure manner.[18]

2. Written resolution

In case a resolution is adopted in writing, the text of the resolution must be drawn up as a document, and the resolution shall be deemed adopted, if the document is signed by all the members of the body concerned. For example,

[16] Saare K., Volens U., Vutt A., Vutt M. Ühinguõigus I. Kapitaliühingud [Company Law I. Limited Companies]. Tallinn: Juura, 2015, p. 358; Vutt, M. Convening the General Meeting of Shareholders of a Limited Company: Estonian Law in a Digital Perspective. International Comparative Jurisprudence, 2020, Vol. 6, No. 1, pp. 95–107.

[17] E. g. Arts 290 (1) and 170 (1) of Commercial Code.

[18] Those complex rules were abolished with the amendments of the General Part of Civil Code Act in May 2020 and replaced by more general and flexible rules.

in the case of a private limited company, the company must be signed by all the shareholders. In such case, it is not necessary to comply with any formal decision-making requirements, e.g., it has no meaning whether the persons involved in the decision-making process have been previously notified or not. Since a resolution is considered to be adopted only if it has been signed by everyone, every person who considers that his or her rights have somehow been infringed has the right to refuse to sign the document, in which case no resolution has been adopted. Signature is subject to all general rules for making declarations of intent (General Part of Civil Code Act, Art. 69 and following). The document can be signed using all the permitted means, i.e., the signature can be either handwritten or digital (General Part of Civil Code Act, Arts 78 and 80). In a situation where, for example, different shareholders can sign a document using different forms of signature, it is also accepted in practice that there are two documents with the same content, one signed in hand by one shareholder and the other digitally by the other. Resolutions of both private and public limited companies shall be taken in writing if the company has only one shareholder. In this case, it is extremely convenient to make a written resolution, since in principle the sole shareholder can take resolutions at any time. The only requirement is that the resolutions must be documented and therefore the shareholder cannot later rely on the fact that he or she has taken a resolution, even though it was not properly documented.

The advantage of adopting written resolutions in comparison with the other decision-making options is, *inter alia*, that the written resolution cannot, in most cases, be challenged. Therefore, once a resolution has been adopted in writing, everyone has full confidence that it will remain in force. Generally, contestation of resolutions is possible under Estonian law either by a declaration of nullity of the resolution or by a request for revocation of the resolution (General Part of Civil Code Act, Art. 38). In the case of the declaration of nullity, the main basis for the claim in practice is a breach of the requirements of the convocation of the meeting or the decision-making procedure, but since the written resolution is adopted only when it has been signed by all shareholders, it is not possible to infringe any procedural rules. In such case, the shareholder can only contest his or her vote, but even if the vote turns out to be void, it will only have an impact on the validity of the resolution, if the existence of the resolution depends on that vote. The comments to the Act state that invalidity of voting may occur if the will to vote has been formed based on incorrect circumstances caused by the members of the body of the same company.[19] However, such cases are very rare in practice.

The resolution can also be claimed null and void if it infringes a provision of law established for the protection of creditors or public interest or if it does not conform to good morals (CC Art. 177^1 (1)). Although the law does not include such restriction, the damage to the interests of creditors can be relied on, in particular, in case of the bankruptcy of the company. However, the current practice shows

[19] Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne [General Part of Civil Code Act. Commented edition]. Varut et al. (eds.). Tallinn: Juura, 2010, p. 118.

that in case of the bankruptcy it is common to use remedies foreseen in bankruptcy law (Insolvency Act[20], Art. 109 and following) rather than contest the shareholder resolutions. The nullity of a resolution resulting from the contradiction of the resolution with good morals is exceptionally rare in practice and it is difficult to imagine a situation in which a shareholder who has voted in favour of a resolution can afterwards claim that it is null and void because it contradicts good morals.

There are also procedural regulations regarding the revocation of a resolution that make it difficult to apply to court to revoke a written resolution. Namely, Estonian law provides that a claim of the revocation of a resolution can only be filed by a shareholder who has clearly expressed his or her objections to the resolution (for example, in private limited company this rule is foreseen in CC Art. 178 (3)). In such situations deficiencies of a resolution can only arise from the shortcomings of a given vote, but if a vote has been cast in favour of a resolution, the resolution cannot be challenged without contesting the vote. As already noted above, the shortcomings arising from the casting of votes are rare in practice.

One can therefore conclude that since a written resolution assumes that all persons agree with the resolution, it is possible to use this form of decision-making in a situation where two presumptions are met: there are few shareholders with voting rights and there is no dispute between them. It is therefore the most convenient decision-making option especially for small private limited companies, as well as for the boards of all kinds of legal persons of private law. Practice shows that the vast majority of resolutions of small private limited companies are made in writing.

3. Voting by a letter

When voting by a letter, the resolution shall be adopted without a shareholders' meeting taking place. Instead, the shareholders are given the possibility to vote the drafts sent to them by the board. This form of decision-making must be distinguished from the situation where the shareholders' meeting takes place, but the shareholders are given, *inter alia*, the opportunity to cast their votes in writing.

When voting by a letter, the decision-making procedure first requires the draft of the resolution to be sent (at least in a form which can be reproduced in writing[21] to all shareholders, setting a time limit within which the shareholders must submit

[20] Pankrotiseadus [Bankruptcy Act] 22.01.2003, RT I 2003, 17, 95. Available: https://www.riigiteataja.ee/en/eli/521012021001/consolide [viewed 05.11.2021.].

[21] According to Art. 79 of General Part of Civil Code Act, the form which can be reproduced in writing means that the transaction shall be entered into in a form enabling repeated written reproduction and shall contain the names of the persons entering into the transaction but need not contain hand-written signatures. These requirements are met, e.g, in case of submitting one's votes by e-mail or fax.

their votes (again, at least in a form which can be reproduced in writing).[22] When sending their votes, the shareholders must follow the deadline which means that the declaration of the intent that includes his or her vote must reach the company before the end of the deadline.[23] If a shareholder does not reply within the time limit set by the board, he or she shall be deemed to have voted against the resolution. After the voting the board shall draw up a voting record that reflects the results of the voting. The record shall also be sent to all the shareholders.

One must note that when voting by a letter, shareholders will be able to vote, for example by a regular mail, but also by e-mail. Shareholders have the right to choose the specific means of communication as long as the form requirements are met. In principle, it is also possible to use web solutions that allow to make these types of declarations of intent. However, one must take into account that the chosen web environment must allow to identify the voters and therefore a simple web poll with answers "yes" or "no" but without identification of the persons giving their answers is not enough to meet the standards. Namely, the voting record must include both the votes and the names of all the persons who gave their votes. The purpose of this requirement is to ensure that it is afterwards possible to verify that all the votes have been correctly counted. The same objective is ensured by the requirement that the shareholders' responses must be added to the voting record.[24]

It is clear that if resolutions are adopted allowing shareholders to vote by a letter, the shareholders cannot be guaranteed absolutely all the same rights they have at the meeting. In particular, the shareholders' right to ask questions and express their opinions might be hindered.

Considering that every shareholder of a private limited company has the right to receive information from the management board at any time (CC Art. 166 (1)), it is in itself possible to obtain answers to his or her questions. However, the shareholder will probably not be able to receive these answers so quickly that it would affect his or her decision-making process in a particular vote. The problem appears to be even more considerable in a public limited company, where the shareholders' right to information is more limited. Namely, a shareholder of a public limited company can request information from the company only at the general meeting (CC Art. 287 (1)). One must admit that since the possibility to

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[22] The law does not prescribe how much time must be given to shareholders to vote, but the Supreme Court has expressed the view that the time given for voting must be reasonable according to the circumstances. See: Judgement of Supreme Court of 23 May 2018 in the Civil Case No. 2-16-9415, s. 22.

[23] In its nature, voting by a letter is making a declaration of intent to an absentee, which is regulated in Art. 69 (2) of General Part of Civil Code.

[24] In Estonian case law, there has been a case where a company organised voting in web environment. When applying to commercial register in order to change the relevant data the company provided the registrar with a voting record that only contained the results of an anonymous voting, and it was not possible to identify the persons who voted. Alas, the Supreme Court, solving the case, did not analyse the material problems as regards the voting and annulled the decision of the circuit court only for procedural reasons.

vote by a letter has only been possible for public limited companies for the last year and a half, there is currently no case law on this issue.

The fact that the law does not provide shareholders the right to ask questions in case of voting by a letter, seems to be a legal gap. The authors of the article are of the opinion that despite the lack of legal regulations, the management board must provide shareholders with information on draft resolutions also when voting by a letter. This obligation can be deduced from Art. 32 of the GPCCA, according to which the shareholders of a company and the members of the directing bodies of a company must act in accordance with the principle of good faith and consider each other's legitimate interests in their mutual relations.

The principle that shareholders vote on the drafts of resolutions is in fact similar regardless of the form of voting. Therefore, if the shareholders vote by a letter, the same principles must be applied to the provision of information on the draft that are applicable when the draft is put to the vote at the general meeting.

As regards Estonian case law, there have so far been only disputes about the draft resolution in connection with the election of members of the directors. In general, it can be concluded that in case of voting in written form, shareholders must be given the opportunity to present their candidates for the election before voting.[25]

For private limited companies the possibility to adopt resolutions by a letter, has been available from the beginning. Public limited companies, on the other hand were given such an opportunity only with the amendments of the Commercial Code in 2020. At present, there is no case law as regards the resolutions of public limited companies adopted by a letter, but the occurrence of such disputes cannot be ruled out.

There is also a separate problem related to listed companies, as the law allows them to adopt resolutions by a letter. However, the authors are of the opinion that this decision-making form could be justified in listed companies only in extremely rare cases where exceptional circumstances arise which make it impossible to hold a meeting. The Corporate Governance Rules[26] are also based on the assumption that the shareholders of listed companies adopt resolutions at the meeting. One must agree with the opinion expressed in the legal literature that it is reasonable to organize voting by a letter in case the issue to be decided is rather of a technical nature. However, when it comes to deciding on an issue that requires substantive discussion, a meeting should be convened.[27] One may also ask whether choosing an inappropriate form of adopting a resolution could lead to the possibility of contestation of a resolution. This issue has not yet been resolved in case law, but the authors are of the opinion that it cannot be ruled out.

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[25] Vutt A., Vutt M. Shareholders' Draft Resolutions in Estonian Company Law: An Example of Unreasonable Transposition of the Shareholder Rights Directive. Juridica International, 2019, Vol. 27, p. 75 ff.

[26] Corporate Governance Recommendations. Tallinn, 2004. Available: https://www.fi.ee/failid/HYT_eng.pdf [viewed 05.11.2021.], s. 1.1 ff.

[27] Saare K. et al. 2015, p. 187.

4. Virtual vs physical general meetings

One important difference between a physical and a virtual meeting is that in case of a physical meeting, the shareholder must confirm his or her attendance at the meeting with a signature (Arts 171(4) and 297(3) of the Commercial Code). If a shareholder participates in the meeting by electronic means of communication, there is no such requirement. This may later make it more difficult for both the company and the shareholder to prove the attendance at the meeting and it must be borne in mind that in case of a dispute, both the company and the shareholder must be prepared to prove that the shareholder attended (or did not attend).

The possibility of holding virtual general meetings was introduced into Estonian law in 2020. Prior to that, their admissibility was legally unclear. It is clear that it was possible to foresee such an option in the articles of association of a private limited company. As regards public limited companies, it should rather be considered that it was not possible to provide for the virtual meetings in the articles of association. However, it is rather an impractical question to ask as the legal situation has now changed and the possibilities to initiate a legal dispute regarding the previous situation are more likely theoretical. Under Estonian law, a physical meeting and a virtual meeting have the same legal meaning. The board always has the right to choose which form of the meeting to use, unless the articles of association explicitly preclude the holding of virtual meetings. One must note that the legal provisions on virtual meetings also do not preclude the holding of hybrid meetings, which means that the meeting can also be held so that shareholders have the choice whether to attend the meeting physically or by electronic means. As far as the authors know, there are currently no pending court cases regarding virtual meetings. The grounds for challenging the resolutions adopted at a virtual meeting are probably to be, at least partly, different from those for challenging those adopted at physical meetings. Among other things, technical problems related to the meeting may give ground to a challenge the resolution of a virtual meeting. In summary, the Estonian legal literature has taken the view that technical problems in conducting a virtual meeting can provide a basis for contesting the resolutions in case these problems were within the scope of the company.[28]

Conclusion

The crisis caused by the global coronavirus pandemic has given the world a chance to change. The same applies to company law and today it should be clear that the traditional model where shareholders make resolutions only at a physical meeting is outdated. The aim of this article was to analyse which possibilities are granted to shareholders to adopt resolutions under Estonian law and to evaluate

[28] Vutt M. Digital Opportunities for – and Legal Impediments to – Participation in a General Meeting of Shareholders. Juridica International, Vol. 29, 2020, pp. 43–44.

whether Estonian law gives companies flexible opportunities to adopt shareholder resolutions and whether the protection of shareholders' rights is thereby guaranteed.

It can be concluded that Estonian law gives companies a variety of possibilities to choose between: shareholders can adopt resolutions at physical meetings and virtual meetings as well as hybrid meetings. In addition to that, shareholders can adopt written resolutions and vote by a letter. At the same time, the companies themselves can prescribe more detailed rules of procedure in the articles of association, as well as exclude the use of some of the above-mentioned possibilities. Thus, it can be concluded that Estonian law gives companies a sufficient list of possibilities and every company can choose the best option that allows the most flexible interaction between the company and the shareholders. At the same time, it must be borne in mind that regardless of whether resolutions are adopted at a physical or a virtual meeting or voting by a letter, all essential shareholder rights must be guaranteed to shareholders. As a result of the analysis, one can conclude that the adoption of resolutions outside the physical meetings does not automatically entail infringements of the rights of shareholders.

At the time of writing this article, there is yet no case law related to virtual shareholder meetings in Estonia, and it is therefore difficult to predict the exact legal problems that may arise as regards virtual meetings. However, the disputes related to technical issues related to virtual meetings will probably arise in the future. The authors of the article are of the opinion that as regards technical difficulties, the principle that everyone is responsible for technical problems that fall within their sphere of influence must be applied. Therefore, one can conclude that technical problems can give ground to challenge a resolution only if the problems have significantly impeded the holding of a meeting or the exercise of shareholders' rights and in case it was within the company's sphere of influence to prevent those problems.

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