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Commentary on Art. 701 OR

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I. Introduction

A. Concept of universal assembly

- 1 In principle, the shareholders must be formally invited to the General Meeting of Shareholders of a stock corporation, subject to a deadline and with binding information on the items on the agenda (see Art. 700 CO). These convening formalities serve to protect shareholders and ensure that shareholders have the opportunity to exercise their participation rights at the General Meeting.¹ Among other things, this ensures that shareholders are not taken by surprise at the meeting by unexpected items on the agenda and are not tempted to make rash decisions.²
- 2 The law provides an exception in Art. 701 CO, according to which a general meeting of shareholders may be held without complying with the rules prescribed for convening such meetings. The margin refers to this general meeting as a "universal meeting". The meeting is universal insofar as the shareholders or their representatives are comprehensively present at the meeting. It is therefore a full meeting of the shareholders (or their representatives). In the French and Italian³ language marginalia, the universal meeting is accordingly referred to as "réunion de tous les actionnaires" and "riunione di tutti gli azionisti". However, the fact that all shares of the company are present or represented is not sufficient for the meeting to be "universal" within the meaning of Art. 701 CO. Art. 701 CO also requires that the shareholders or their representatives be present without contradiction (for details of the requirements see below n. 11 et seq.). A universal meeting is therefore a general meeting at which all shareholders of the company (or their representatives) are present without contradiction.
- 3 If this is the case, the general meeting may be held without the provisions prescribed for convening it (Art. 701 para. 1 CO; see below n. 28). In the universal meeting, all matters falling within the scope of business of the general meeting may be validly discussed and resolutions passed (Art. 701 para. 2 CO). The universal meeting thus has all the powers of

¹ VON DER CRONE, para. 1018.

² ZK-Tanner, n. 1 to Art. 701 OR.

³ Duden, keyword "universal", available at: <https://www.duden.de/rechtschreibung/universal>

a general meeting (Art. 698 para. 2 items 1 - 6 CO).⁴ Both the ordinary and the extraordinary general meeting may be held as a universal meeting.⁵

B. Purpose of the Universal Assembly

- 4 The purpose of the universal meeting is "practical"⁶: the universal meeting is intended to enable shareholders to hold a general meeting at short notice and without major organizational hassles with regard to convening the meeting. This simplifies the convening of the General Meeting and facilitates the holding of General Meetings.⁷
- 5 If all shareholders (or their representatives) are present without objection, i.e. if they agree to the holding of the General Meeting without observing the convening formalities, insisting on the convening regulations is also not reasonable.⁸ On the contrary, it would be objectionable and contrary to the requirement of acting in good faith (Art. 2 para. 1 CC) if a shareholder (or representative) who was present without objection were in a position to subsequently challenge the validity of the resolutions of the General Meeting on the grounds of convocation errors.⁹
- 6 At the universal meeting, shareholder protection is rather ensured in another way: The shareholder or his representative has to protect himself from a possible overrumpeting (see above n. 1). If he does not agree with the conduct of the general meeting or requires more time to prepare an item for discussion, he may not participate in the meeting, leave it at any time or object to the handling of individual agenda items (see below n. 15 et seq. and n. 20 et seq.).¹⁰ Each shareholder thus has a right of veto against the conduct of the General Meeting as a universal meeting.¹¹
- 7 Due to this veto right, the holding of a universal meeting is not recommended if resolutions are to be passed on issues that are fundamentally opposed by individual shareholders. Similarly, a universal the shareholders are at odds with each other or if disruptive or delaying maneuvers are to be expected.

C. Practical significance of the universal assembly

- 8 In practice, single-member companies, companies with a small number of shareholders and group subcompanies with a 100 percent shareholding usually hold their general meetings as universal meetings.¹²

4 ZK-Tanner, n. 43 to Art. 701 OR.

5 VON DER CRONE, para. 1017.

6 ZK-Bürgi, n. 3 to Art. 701 OR.

7 BSK-Dubs/Truffer, n. 1 to Art. 701 OR.

8 ZK-Tanner, n. 1 to Art. 701 OR.

9 Cf. VON STEIGER, p. 193.

10 STUDER, p. 142.

11 FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23 N. 6.

12 ZK-Tanner, n. 3 to Art. 701 OR.

- 9 In the case of companies with a broadly diversified shareholder base, on the other hand, it is generally not possible to assemble all shares at a single meeting. Accordingly, it is practically impossible to hold a universal meeting for such companies.¹³
- 10 Likewise, due to the legal protection provisions in favor of the participants, the holding of a universal meeting is generally not possible if the company has issued participation capital.¹⁴

II. Prerequisites of a universal assembly

- 11 According to Art. 701 para. 1 CO, two things are necessary for a valid universal meeting:
- All shareholders of the Company are continuously present or legally represented.
 - No shareholder or representative objects to the holding of the Universal Shareholders' Meeting.

A. Presence or representation of all shares

1. Continuous presence of all shares

- 12 For a legally valid universal meeting, it is firstly required that all shareholders are continuously present or legally represented.¹⁵ The universal meeting is therefore only valid if all shares are represented.¹⁶ An exception to this applies to treasury shares, as voting rights are suspended for these shares (Art. 659a para. 1 CO).¹⁷
- 13 If all shares are represented in the hands of one shareholder, it is thus sufficient for a universal meeting in the extreme case that only one shareholder or only one representative is present and conducts the meeting.¹⁸
- 14 Only the presence of the shareholder or his representative is required. Active participation in the meeting, for example by voting, is not a prerequisite for a valid universal meeting.¹⁹ In other words, abstention from voting at the universal meeting is permissible.²⁰

2. Leaving the meeting

- 15 The presence of all shares is required for the entire duration of the universal meeting.²¹ If a shareholder or his representative leaves the meeting, the universal meeting shall be terminated immediately.²² However, the departure of a shareholder does not affect

13 CR-Peter/Cavadini, n. 1 to Art. 701 CO.

14 In this regard: BSK-Dubs/Truffer, N. 3b to Art. 701 OR; BÖCKLI, § 12 N. 57.

15 BSK-Dubs/Truffer, n. 3a to Art. 701 OR.

16 BGE 120 IV 199 E. 1.

17 CR-Peter/Cavadini, n. 3a to Art. 701 CO.

18 BÖCKLI, § 12 n. 55.

19 ZK-Tanner, n. 46 to Art. 701 OR.

20 BSK-Dubs/Truffer, n. 3 to Art. 701 OR.

21 BSK-Dubs/Truffer, n. 3a to Art. 701 OR.

22 BÖCKLI, § 12 n. 54.

resolutions already adopted. Resolutions passed previously remain legally valid.
²³Exceptionally, they may be invalid if it is obvious that they would never have been passed or would have been pointless without the resolutions provided for later.²⁴

- 16 After the departure, the remaining shareholders may continue to hold non-binding negotiations at the meeting. However, resolutions of the General Meeting can no longer be validly passed (on the consequences, see below n. 33 et seq.).²⁵
- 17 If not all shares are represented at the beginning of the meeting (or if a shareholder leaves the meeting), the meeting can be conducted (again) as a universal meeting after the arrival or return of the last shareholder.²⁶ Due to the fact that the shares are (again) fully represented at the meeting, the subsequent resolutions can be passed as a universal meeting. In contrast, the resolutions passed previously, when the shareholders were not fully represented, are not cured. However, if all shareholders (or their representatives) are present, the resolutions on the agenda items already passed may be repeated.²⁷

3. Written consent to the universal assembly?

- 18 An absent shareholder cannot consent in writing to the resolutions of a universal meeting in advance or afterwards, although this is repeatedly attempted in practice.²⁸ Such consent is invalid unless it could be interpreted as a power of attorney to represent the shares. If the shareholder does not wish to attend the meeting, but nevertheless does not wish to prevent the universal meeting, it makes sense for him to appoint a representative in advance who can represent his shares at the meeting.²⁹

4. Presence of the Board of Directors?

- 19 For the validity of the universal meeting, only the presence of all shareholders (or their representatives) is required, but not the presence of the members of the board of directors, even if they are entitled to participate in the meeting and to submit motions pursuant to Art. 702a CO.³⁰ Members of the Board of Directors may also not prevent the universal meeting by objecting to it.³¹ In the revised Stock Corporation Act, a tightening of the wording of Art. 702a CO clarifies that neither members of the Board of Directors nor members of the Executive Board have a legally enforceable right to participate.³²

23 BSK-Dubs/Truffer, N. 3a to Art. 701 OR; BÖCKLI, § 12 N. 54.

24 ZK-Tanner, n. 40 to Art. 701 OR; BÖCKLI, § 12 n. 54.

25 ZK-Bürgi, n. 6 to Art. 701 OR.

26 ZK-Tanner, n. 8 to Art. 701 OR.

27 CHK-Tanner, n. 2 to Art. 701 OR.

28 ZK-Tanner, n. 10 to Art. 701 OR; BSK-Dubs/Truffer, n. 5 to Art. 701 OR.

29 BSK-Dubs/Truffer, n. 5 to Art. 701 OR.

30 ZK-Tanner, N. 10a to Art. 701 OR; BSK-Dubs/Truffer, N. 1 to Art. 701 OR.

31 BÖCKLI, § 12 N. 54a.

32 Message 2016, p. 562 f.

B. No objection

- 20 In the case of a universal meeting, the shareholders waive the observance of convening formalities.³³ However, no shareholder must accept that a general meeting is held as a universal meeting (so-called veto right of the shareholder; see above n. 6). Secondly, a valid universal meeting thus requires that all shareholders (or their representatives) expressly or tacitly agree to the holding of the general meeting as a universal meeting.³⁴ Conversely, it is required that no shareholder (or his representative) objects to the universal meeting.

1. Form of the opposition

- 21 The objection of the shareholder or his representative is not bound to any form. However, the shareholder (or representative) must express the objection clearly and unambiguously.³⁵ In particular, the objection must be distinguished from a mere abstention from voting, which is permissible at the universal meeting (see above n. 14).

2. Content of the opposition

- 22 The objection of the shareholder (or his representative) may be directed against the holding of the universal meeting or against the passing of a resolution on a specific agenda item.³⁶ The latter already for the reason that a shareholder (or his representative) may legitimately take the position that different items of business are ready for resolution in different ways.³⁷ Moreover, the shareholders could break off a first universal meeting and immediately thereafter meet for a new universal meeting without the disputed agenda item.³⁸ It therefore makes no sense to break off the universal meeting just because a shareholder (or his representative) objects to an item on the agenda. Instead, the universal meeting will be held without the disputed agenda item.
- 23 However, an objection to individual motions on an agenda item is inadmissible.³⁹ In case of doubt, such an objection must be interpreted as an objection to the entire agenda item (see below, n. 40).
- 24 Nor is it permissible to declare the objection conditionally. For example, a shareholder may not make the waiver of the objection to an agenda item dependent on the result of the vote.⁴⁰

33 CHK-Tanner, n. 3 to Art. 701 OR.

34 BSK-Dubs/Truffer, n. 3 to Art. 701 OR.

35 ZK-Tanner, n. 27 to Art. 701 OR.

36 ZK-Tanner, N. 21 ff. on Art. 701 OR; BSK-Dubs/Truffer, N. 3 on Art. 701 OR; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23 N. 6. Other opinion: BÖCKLI, § 12 N. 53.

37 VON DER CRONE, para. 1021.

38 ZK-Tanner, n. 24 to Art. 701 OR.

39 ZK-Tanner, n. 22 to Art. 701 OR; BSK-Dubs/Truffer, n. 3 to Art. 701 OR.

40 VON DER CRONE, para. 1022.

3. Date of the opposition

- 25 The objection of the shareholder (or representative) may be made before or during the meeting.⁴¹
- 26 If the objection was raised prior to the meeting, but the shareholder or his representative attends the meeting, he must repeat his objection. Otherwise, the shareholder's participation without objection shall in principle be deemed to constitute a waiver of objection.⁴²
- 27 During the meeting, the shareholder or his representative may record his objection.⁴³ If the shareholder (or his representative) raises an objection after the start of the meeting, this objection may only relate to resolutions to be adopted. An objection to what has already been resolved is not possible and the resolutions passed up to that point remain valid (see above n. 15).⁴⁴ The objection thus does not have retroactive effect, but only for the future.⁴⁵

III. consequences

A. Waiver of convening formalities

- 28 If the above two conditions for holding the universal meeting are met, the general meeting may be held without the regulations prescribed for convening it (Art. 701 para. 1 CO). However, the formal facilitations of the universal meeting are limited only to the legal and statutory convocation requirements.⁴⁶ Thus, for example, no actual convocation is required for a universal meeting⁴⁷ and the agenda items can be changed at will⁴⁸.
- 29 In addition, the statutory provisions and provisions of the Articles of Association applicable to the General Meeting must also be complied with without restriction for the Universal Meeting.⁴⁹ In particular, the legal and statutory quorums (Art. 703 et seq. CO) must be observed. Accordingly, unanimity is not required at the universal meeting, but as a rule the majority of the votes of the shares decides (Art. 703 CO). The provision on the recording of the meeting (Art. 702 para. 2 CO) also applies without restriction to the universal meeting (see below n. 38 ff.).⁵⁰
- 30 If the legal requirements of Art. 701 para. 1 CO are met, any meeting of the shareholders (or their representatives) may in principle be declared a general meeting.⁵¹ For example, a joint meeting of all shareholders may be extended to a universal meeting and the resolutions reserved for the general meeting may be adopted at this meeting.

41 VON DER CRONE, para. 1022.

42 ZK-Tanner, n. 32 to Art. 701 OR; BSK-Dubs/Truffer, n. 3 to Art. 701 OR.

43 ZK-Bürgi, n. 11 to Art. 701 OR.

44 CHK-Tanner, n. 4 to Art. 701 CO.

45 VON DER CRONE, para. 1022.

46 VON DER CRONE, para. 1023.

47 ZK-Bürgi, n. 4 to Art. 701 OR.

48 CR-Peter/Cavadini, n. 6 on Art. 701 CO. For new agenda items in the event of representation, see ZK-Tanner, N. 48 ff. on Art. 701 CO.

49 Judgment 2C_115/2007 of February 11, 2008 E. 5.2; BÖCKLI, § 12 N. 53.

50 BGE 120 IV 199 E. 1; judgment 6B_300/2016 of November 7, 2016 E. 4.4.2; FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23 N. 5.

51 BSK-Dubs/Truffer, n. 1 to Art. 701 OR.

- 31 However, not every informal gathering of all shareholders of the company constitutes a universal meeting without further ado.⁵² For example, an informal meal together at the lunch table in a family company is generally not a general meeting, even though all shareholders would be represented at the meeting. For a valid universal meeting, the shareholders must be aware that they are forming a general meeting with a quorum and they must want to do so.⁵³ In addition, it must be remembered that (apart from the invitation formalities) the other requirements for a general meeting must be complied with, in particular minutes must be kept (see above n. 29).

B. Cure of Convening Deficiencies

- 32 If an "ordinary" General Meeting of Shareholders has been convened, but the convening was defective, for example because the deadline for convening was not observed or the agenda items were not specified in a legally adequate manner, the convening defect is remedied with the holding of a Universal Meeting of Shareholders.⁵⁴

IV. Prerequisites for universal assembly not met

A. Invalidity

- 33 According to the case law of the Federal Supreme Court, resolutions passed at a "universal meeting", even though not all shares were present or represented at the meeting, suffer from a serious formal defect and are null and void (Art. 706b No. 1 CO).⁵⁵ Irrelevant whether the shareholder who was not present could have prevented the resolution with his voting power.⁵⁶
- 34 The nullity of a resolution may be established ex officio by the court at any time.⁵⁷ This also means that anyone (i.e. also non-shareholders, such as creditors) may in principle invoke a null and void resolution of the General Meeting at any time.⁵⁸ Nevertheless, it is required that there is an interest worthy of protection in the determination of the nullity of the general meeting resolution (Art. 59 para. 2 lit. a ZPO).⁵⁹
- 35 Invalidity can also be established in appeal proceedings, namely also by the Federal Supreme Court. However, the Federal Supreme Court shall only rule on the nullity of a resolution of the General Meeting of Shareholders as a legal transaction under private law to the extent that the nullity can be based on the facts established by the lower court or if a legally sufficient supplementation of the facts is required.⁶⁰

52 MEIER-HAYOZ/FORSTMOSER/SETHE, § 16 N. 484.

53 ZK-Tanner, n. 6 to Art. 701 OR; STUDER, p. 142 f.

54 VON DER CRONE, para. 1019; ZK-Tanner, n. 3 and n. 13 to Art. 701 CO.

55 BGE 137 III 460 E. 3.3.2. ZK-Tanner, n. 7 and n. 68 ff. on Art. 701 OR; BÖCKLI, § 12 n. 54;

FORSTMOSER/MEIER-HAYOZ/NOBEL, § 23 n. 6. Differentiating: BSK-Dubs/Truffer, n. 3a on Art. 701 OR.

56 BGE 137 III 460 E. 3.3.2; ZK-Tanner, N. 7 to Art. 701 OR.

57 In this regard: judgment 4A_98/2020 of 21 January 2021 E. 3.3.4.2, intended for publication.

58 BGE 115 II 468 E. 3b; judgment 4A_131/2007 of 11 January 2008 E. 2.1.

59 Judgment 4A_282/2020 of 5 August 2020 E. 2.1.

60 In this regard in general: judgment 4A_20/2020 of 26 February 2020 E. 5.3.1.

B. Conversion of the universal assembly into an ordinary general assembly

- 36 If a shareholder or his representative leaves the meeting, it can be converted into an "ordinary" General Meeting.⁶¹ However, such a conversion will usually fail because the convocation rules have not been complied with.⁶² If, on the other hand, the convocation rules have been observed, the meeting can continue as an "ordinary" general meeting after a shareholder leaves.⁶³
- 37 The change from a universal meeting to an "ordinary" general meeting shall be recorded in the minutes of the meeting. If the meeting is continued as an "ordinary" General Meeting, the ordinary convocation rules shall apply. In particular, the scope of business on which the General Meeting may decide is limited to the items mentioned in the invitation.⁶⁴

V. Minutes and Conduct of Proceedings

- 38 The fact that all shareholders or their representatives are present and that no one objects must be recorded in the minutes of the universal meeting.⁶⁵ Under certain circumstances, it may also be appropriate to record that all shareholders or their representatives were present until the end of the meeting and to have the minutes signed by all those present.⁶⁶
- 39 If an objection is raised against the Universal Assembly as a whole or against individual agenda items, this must be recorded in the minutes. The chairman of the general meeting is recommended to clarify any ambiguities regarding the objection and to ensure legal clarity. If the shareholder's statement is not clear, the chairman should ask the shareholder or his representative whether he objects and, if so, to what exactly (to the universal meeting as a whole or to which specific agenda item).
- 40 If a shareholder raises an inadmissible objection to a motion (see above n. 23), it is also up to the chairperson of the meeting to inform the shareholder and ask whether the objection is directed against the entire agenda item. If this is the case, the hearing must be held without the disputed agenda item (see above n. 22). If the shareholder withdraws his objection, the universal meeting shall be continued without further ado. If, on the other hand, the shareholder or representative (inadmissibly) maintains his objection to an individual proposal, the statement is to be interpreted as an objection to the entire agenda item. Accordingly, the hearing is to be held without this item. In such situations, it is recommended that the individual statements be recorded (verbatim).⁶⁷

61 Cf. BGE 137 III 460 E. 3.3.2 S. 466.

62 ZK-Tanner, n. 9 to Art. 701 OR.

63 VON DER CRONE, para. 1019.

64 VON DER CRONE, para. 1019.

65 ZK-Tanner, n. 53 to Art. 701 CO. A sample protocol of a general meeting can be found, for example, on the website of the Commercial Register of the Canton of Zurich, cf. <https://www.zh.ch/de/wirtschaft-arbeit/handelsregister/eintrag.html>

66 VON STEIGER, p. 195.

67 OFK-Aktienrecht FRICK/STÄHELI, n. 3 to Art. 701 OR.

VI. Outlook for the revised stock corporation law

- 41 The revised Stock Corporation Act 2020 does not change the content of the previous standard of Art. 701 para. 1 and 2 CO. In paragraph 1 of the revised Art. 701 CO, only a conceptual clarification takes place by replacing the term "formal requirements" by "regulations". This is against the background that the universal meeting can not only deviate from formal requirements, but also from other regulations, for example with regard to convocation deadlines.⁶⁸ Art. 701 para. 2 CO is adapted to the newly envisaged possibility of using electronic means. "Be present" is therefore replaced by the term "participate". This expresses that a physical presence of the shareholder or his representative is not mandatory.⁶⁹
- 42 However, paragraph 3 of Art. 701 CO is new. Under the current law, there is no possibility to hold a general meeting in absentia, circular resolutions are inadmissible.⁷⁰ In the new company law, more room for maneuver is granted. Art. 701 para. 3 revOR provides that resolutions of the General Meeting may also be passed in writing (on paper) or electronically. For this type of resolution, all shareholders or representatives must give their consent.⁷¹

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⁶⁸ Message 2016, p. 555.

⁶⁹ Message 2016, p. 555.

⁷⁰ BGE 128 III 142 E. 3b p. 145; BÖCKLI, Aktienrecht, § 12 N. 52.

⁷¹ Message 2016, p. 555.

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