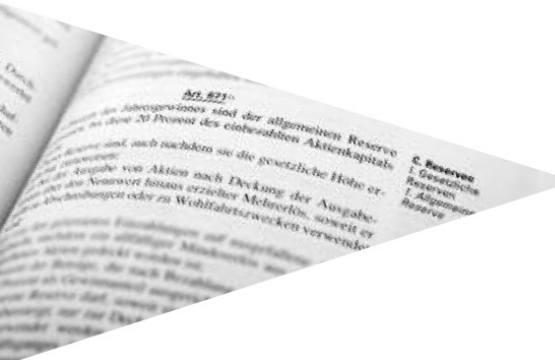


Legal News



The new Federal Act on Book-Entry Securities and amendments to the Swiss Code of Obligations

Daniela Klöti, attorney, LL.M., Legal Services,
daniela.kloeti@ch.ey.com

Dear clients and business friends

The new Federal Act on Book-Entry Securities (BESA) and some accompanying amendments to the Swiss Code of Obligations (CO) are due to enter into force on 1 January 2010.

The introduction of the BESA provides a clear legal basis for the intermediate custody of securities (safe custody of securities by banks and crediting of these securities to securities accounts) and the electronic trade in intermediary-held securities.

This article describes the basic principles of the Book-Entry Securities Act taking the limited liability company as an example; it also deals with the related amendments to the CO. While the provisions of the BESA are likely to be of particular interest to listed companies, the amendments to CO also bring interesting innovations and opportunities for small and medium-sized limited companies.

Daniel Bachmann
Partner, Legal
daniel.bachmann@ch.ey.com

1. Background to the BESA

In the case of shares - as indeed of all other securities - the applicable statutory provisions of securities law are still based on the following principle: the rights embodied in a share can only be enforced and therefore transferred if a person is in physical possession of the corresponding document (share or share certificate).

However, the reality has been different for some considerable time, especially for shares in listed companies. These are in fact often held directly by the banks in safe custody and stated on securities accounts (this being referred to as intermediate custody of securities). The trade in such documents is effected entirely by way of electronic book entries in the securities accounts. Physical documents - if they are still issued at all - no longer play any role in the enforcement of the related law.

2. Amendments to CO

A criterion for the smooth functioning of the electronic trade in shares is that the securities which embody the corresponding rights cannot be traded simultaneously both electronically and physically. To make sure that securities do not lead this "double life", the shares which are traded electronically need to be either immobilized or dematerialized.

The *immobilization* may be effected as follows:

- by depositing the issued shares with a custodian for collective custody or
- by issuing a number of fungible shares in the form of one single global certificate.

However, the company may also refrain altogether from the physical issue of shares and create what are known as uncertificated securities. In this case, we refer to the *dematerialization* of securities.

The concept of collective custody, global certificate and uncertificated securities is to all intents and purposes already used today and has proved successful in practice (primarily for listed companies). In addition, unlisted companies have also frequently refrained from the direct physical issue of shares under the existing law. In conjunction with the introduction of the BESA, these concepts will now be placed on a clear statutory basis. The provisions of securities law are being supplemented to include Art. 973a, 973b and 973c CO, thereby creating the necessary conditions for the intermediate custody of securities to function effectively.

3. Book-Entry Securities Act

The BESA creates a new type of asset called book-entry security. According to the statutory definition, book-entry securities are fungible claims or membership rights, i.e. for instance shareholders' rights which are credited to

the securities account of the beneficial owner. Book-entry securities are created in two stages:

1. immobilization or dematerialization of the share by depositing the security or registering the uncertificated securities with a depository institution *and*
2. crediting to the account holder's securities account.

If the BESA is to apply, only the entities named in Art. 4 BESA are eligible to act as depository institutions, e.g. the banks, the Swiss Post Office, securities traders within the meaning of the Stock Markets Act, the Swiss National Bank etc.

Once book-entry securities as defined above have been created, it no longer makes any difference whether their origin is attributable to the depositing of securities, a global certificate or the registration of uncertificated securities. The custody of these book-entry securities and hence of the shares underlying them and their transfer will in future be effected solely in compliance with the provisions of the BESA.

Art. 24 BESA stipulates that disposal of book-entry securities must be effected in two stages:

1. instruction given by the account owner to the depository institution to transfer the book-entry securities *and*
2. accompanying credit to the securities account.

The new beneficial owner therefore acquires ownership of the book-entry securities and hence of the shares embodied in these book-entry securities by a simple credit entry in the securities account.

The BESA only governs the rights in the book-entry securities, but not the right arising from the book securities (such as membership rights, interest and dividend payments etc.). These rights continue to be governed by company law.

The BESA remains applicable in respect of custody and disposal of book-entry securities until such time as delivery of the shares underlying the book-entry securities, or in the case of uncertificated securities, the issue of the security, is required. Whether the beneficial owner can in fact make such a request is determined by the provisions laid down in the articles of association and/or in the issue conditions. By the simple delivery of the shares or issue of such shares, the book-entry securities cease to exist and the BESA is no longer applicable. The transfer of the shares will in future be determined once again by the general rules of CO and law of property.

4. Conclusion

The BESA governs the intermediate custody of securities and electronic trade in securities and will in practice apply primarily to listed companies. The amendments to CO, together with the introduction of the provisions on immobilization and dematerialization, are the essential basis for the BESA to be applicable at all.

The possibility available in individual cases of waiving the physical issue of securities or of taking securities already issued into collective custody or issuing them in future solely under cover of a single global certificate, does, however, exist for every limited company and for every securities issuer and is not confined to those companies which wish the custody and disposal of securities to be governed by the BESA. The statutory provisions on immobilization and dematerialization are in fact being introduced into general securities law in virtue of Art. 973 a ff CO. The only requirement here is for the relevant arrangements to be made in the articles of association or in the issue conditions. It may be assumed that in future even unlisted limited companies will make increasingly frequent use of the opportunity not to issue physical shares.

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Imprint

Legal News

Electronic publication in German, French and English

Designed and produced by

Ernst & Young Ltd
Corporate Communications & Marketing
P.O. Box
8022 Zürich

Subscriptions / address changes

www.ey.com/ch/newsletter

www.ey.com/ch/legal

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Contacts Legal

Basel: **Thomas Bauer**
thomas.bauer@ch.ey.com

Berne: **Daniel Bachmann**
daniel.bachmann@ch.ey.com

Geneva: **Olivier Dunant**
olivier.dunant@ch.ey.com

Zurich: **René Schwarzenbach**
rene.schwarzenbach@ch.ey.com