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Shares in the Form of Ledger-Based Securities

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I. Ledger-Based Securities

1. Introduction

In September 2020, the Swiss Federal Act on the Amendment of Federal Law with respect to Developments in the Technology of Distributed Electronic Ledgers (the «DLT Act») was unanimously adopted by Swiss Parliament. The DLT Act is a framework act comprising a bundle of amendments to various existing Swiss federal acts. The amendments by which the so-called «ledger-based securities» (*Registerwertrechte; droits-valeurs inscrits*) were introduced into the canon of securities pursuant to the Swiss Code of Obligations (CO) entered into force on 1 February 2021, together with other amendments to the Federal Act on Private International Law (PILA) and the Federal Act on Intermediated Securities (FISA). Subsequently, on 1 August 2021, the DLT Act fully entered into force along with its implementing ordinance.

Swiss civil securities law has traditionally been rather rigid, making the changes brought about by the DLT Act particularly noteworthy. The DLT Act freed the way for a legally sound «tokenisation» of shares (and other types of financial instruments) by enabling the creation of ledger-based securities. Almost a year into the amendments becoming effective, a closer look at selected aspects of the law on ledger-based securities appears warranted.

2. Nature and Legal Effects of Ledger-Based Securities

Ledger-based securities are uncertificated securities that can serve essentially the same functions as «traditional» certificated paper securities (*Wertpapier; papier-valeur*) or centrally registered book-entry securities (*Bucheffekten; titres intermédiés*). Any claim that can take the form of a paper security (whether fungible or non-fungible and whether or not issued in mass quantities) can, in principle, take the form of a ledger-based security. A key use case is the tokenisation of shares in Swiss companies limited by shares on the basis of a digital distributed ledger.

The new art. 973d *et seqq.* CO that have been introduced by the DLT Act provide for a non-deterministic set of rules on ledger-based securities and their legal characteristics, outlining the principles of their establishment, transfer, pledge and cancellation. Specifically, ledger-based securities are distinguished from «simple» uncertificated securities (*einfache Wertrechte; droits-valeurs simples*), which are governed by the amended art. 973c CO and which do not have the specific features and rights attached to ledger-based securities. In particular, the provisions of the CO on ledger-based securities protect the good faith of persons relying on the ledger entry (e.g. the debtor of a claim or the acquirer of a share in the form of a ledger-based security, *see* art. 973e CO) in a fashion similar to «traditional» certificated paper securities on the one hand or book-entry securities pursuant to the FISA on the other hand, while simple value rights do not offer such protection.

The rationale for vesting ledger-based securities with qualified statutory transactional protections is that ledger-based securities, among other elements, provide for (i) publicity in the form of a securities ledger that can be (and must be able to be) accessed by each creditor (*i.e.*, in the case of shares, each shareholder¹), as well as (ii)

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¹ The CO exclusively uses the terms «creditor» and «debtor» in relation to ledger-based securities. Where shares in a company are concerned, this must be read as «shareholder», and «company» or «issuer», respectively.