Swiss Company Law in the European Context

The new Swiss Company Law and the Euro-Council Directives

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1. Introductory Commentary on the Law Governing the Swiss Joint Stock Company

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I. The Swiss Joint Stock Company

Literature:

Böckli Peter, Das neue Aktienrecht (Zürich 1992)
Honsell Heinrich/Vogt Nedim Peter/Wiegand Wolfgang, Kommentar OR II (Basel 1994)

The Swiss joint stock company („Aktiengesellschaft", „Société anonyme") is the predominant legal vehicle for any type of business activity in Switzerland. In 1990 161'964 stock companies were registered, in comparison to 2'756 limited liability companies, 13'858 co-operatives, 18'772 partnerships, and 146'770 other registered business entities, most of which were owned by one person. The stock company is the legal entity used by large public companies, by subsidiaries of multinational companies, by joint ventures and also by small business units for which the legislator initially created the form of the limited liability company. The stock company can theoretically also be used for non-commercial purposes (CO 620 III), e.g. for non-profit organizations.

As a general rule, the stock company is the legal entity that best suits the requirements of foreign business interests. No special licence is required to do business, except for such areas as banking, insurance, railways, etc.

The main features of the stock company are the following:

(a) It is a legal entity distinct from its shareholders, carrying its own company name.
(b) Shareholders are not personally liable for any liabilities of the company (CO 620 II). The shareholders' only obligation is to pay in the capital they subscribed to. Only exceptionally will courts pierce the corporate veil and allow creditors to satisfy their claims from the assets of shareholders.
(c) A stock company has a stated capital, which is divided into shares with a nominal value of at least CHF 10.– each.

II. The Reform of October 4, 1991

Literature:

Forstmoser Peter, Vom alten zum neuen Aktienrecht, SJZ 1992, 137–148, 157–169
Forstmoser Peter, Ungereimtheiten und Unklarheiten im neuen Aktienrecht, SZW 1992, 58 et seq.
Forstmoser Peter, Alter Wein in neuen Schläuchen?, ZSR 1992 I, 1 ff.
Homburger Eric, Leitfaden zum neuen Aktienrecht (Zürich 1991)
Tanner Brigitte, Die Auswirkungen des neuen Aktienrechts auf Gesellschaften mit beschränkter Haftung, Genossenschaften und Bankaktiengesellschaften, FS Forstmoser (Zürich 1993, 31–54)
An overview on the literature covering the reform may be found in Tanner Brigitte, Literaturübersicht, AJP 1992, 821–831

The law governing the stock company has not been changed since 1936. Shortfalls in the law were recognized in the early 1960's and the reform process started in 1968 was to last an unusually long 25 years.

The reform initially aimed to:
(a) ensure more transparency, notably by improving accounting standards;
(b) strengthen the protection of minority shareholders, e.g. by a reinforcement of subscription rights;
(c) improve the functioning of the governing bodies of the company;
(d) facilitate the raising of capital;
(e) avoid abuses of the corporate form.

Most of these goals have been achieved; transparency, however, still falls short of European standards and there is no efficient minority protection in case of a change of control. Criticism of a more general nature points to the fact that Swiss law still governs large public companies by the same set of rules as closely held businesses.

It is therefore expected that further changes will become necessary (see sections 6. Swiss Company Law in the European Context and 8. A Synopsis of Expected Changes of Swiss Company Law).

III. The Law Governing Stock Companies

1. The Formation of the Stock Company

Literature:

Biber René/Watter Rolf, Notariatspraxis bei Gründung und ordentlicher Kapitalerhöhung, AJP 1992, 701–707
Watter Rolf, Die Gründung und Kapitalerhöhung im neuen Aktienrecht, SAV Band 11 (Zürich 1992, 55–70)
Zindel Gaudenz/Isler Peter/Honegger Peter/Benz Ulrich, Statuten nach dem neuen Aktienrecht (Zürich 1992)

a) The Articles of Incorporation

The formation of the Stock Company is governed by CO 629–646. The process of formation is usually initiated by drafting the Articles of Incorporation, which must include (see CO 626):
(a) The name of the company (see CO 944–956); there is a large degree of discretion for the parties in choosing this name, provided it is distinct from other firm names, it is not misleading and does not serve merely publicity purposes. Restrictions apply to the use of geographical terms or terms such as „international", „center" or the like. It is customary to register the name in three or four languages (e.g. XYZ Phantasy AG, SA, Ltd.).
(b) The domicile of the company; generally no distinction is made between a registered office and a principal place of business as is the case in the U.S.
(c) The purpose or objects of the company.
(d) The share capital, the minimum being CHF 100'000.– (CO 621).
(e) The proportion of share capital that is paid in, the minimum being 20% or CHF 50'000.– (CO 632).
(f) The number, category (see para. III. 3 hereinafter) and nominal value of each type of share, the minimum being CHF 10.– per share.
(g) Rules regarding the convocation of the General Meeting and the shareholders' right to vote.
(h) Rules relating to the Board of Directors and Auditors.
(i) The form in which the company notifies its shareholders.

Parties will usually use as a basis standard forms in which the above items are filled in. Further issues that may be covered in the Articles include (see CO 627) among others:

(a) A possible date of dissolution.
(b) Restrictions on the transfer of registered shares.
(c) Special rights of certain shares.
(d) Limitations on voting rights or on the right of having one's shares represented by a third party at the General Meeting.
(e) The authorization to delegate the management of the company from the Board of Directors to individual members of the Board or to third parties (i.e. managers).
(f) Disclosure of a contribution in kind or of major investments to be made after the formation (CO 628).

b) The Incorporators' Meeting

Swiss Law requires a minimum of three incorporating shareholders attending in person or by proxy (CO 625); it is possible, however, to use a fiduciary as incorporator (e.g. an attorney). In practical terms, future directors will also act as incorporators because the law prescribes that directors must be shareholders (CO 707 I).

The incorporating shareholders must declare their intent to form a company with the Articles they have agreed upon in the presence of a notary public. The incorporators furthermore must disclose the number of shares each of them subscribes to (CO 629). If the shares are issued for cash, the incorporators must present a confirmation by a bank that the necessary amount has been deposited with such bank for the account of the future company (CO 633). In case of a contribution in kind (i.e. if a business, certain machinery or a patent is transferred to the company for shares), the law requires a written contract between the company and the person contributing assets (CO 634), a report of the incorporators which details among other points the valuation principles (CO 635) and a report of the Auditors which confirms that the incorporators' report is complete and accurate (verification report, see CO 635a). As mentioned above, the fact that there was a contribution in kind must be reflected in the Articles (CO 628).

A similar regime applies if a major investment is envisaged subsequent to a formation for cash (CO 628 II).

The incorporators then proceed to elect the members of the Board of Directors and the Auditors (CO 629 I).

c) The Registration in the Commercial Register

The company comes into existence upon its registration in the Commercial Register (CO 643). Acting on behalf of the future company is, however, possible (CO 645); shares issued prior to registration are void (CO 644). The Registrar supervises compliance with the law; in practical terms registration will require anywhere between 8 and 20 days.

The registration includes (CO 641):

(a) the date of the Articles, respectively the date of the incorporators' meeting;
(b) the name and domicile of the company;
(c) the purpose; furthermore (if specified) the limited duration of the company;
(d) the amount of the share capital and the amounts paid in;
(e) number, nominal value and category of the shares issued, transfer restrictions for registered shares;
(f) information on contributions in kind and on bonus shares;
(g) the names of the persons authorized to represent the company;
(h) the name of the Auditors;
(i) rules on how the company notifies its shareholders.

This information is not only publicly available, it is also published in the Commercial Gazette. Persons dealing with the company are deemed to have knowledge of the registration.

The law also provides for a special registration of branch offices (CO 642).

d) Tax Consequences of a Formation

The formation of a company triggers a 3% issuance tax (stamp duty) on the consideration received by the company for the shares issued (which is often equal to the stated capital). A reduced rate of 1% (or 0%, starting April 1, 1993) may apply for companies formed in the course of a merger, joint venture or reorganization.

Furthermore the company is liable for income and net capital taxes, which on the Federal level amount to a maximum of 9.8% on income and 0.0825% on net capital (including reserves). Cantonal income taxes vary from approximately 10% to 25%, capital taxes from 0.04% to 0.7%; special rates apply to holding companies and companies doing business abroad.

Dividends paid to shareholders are subject to a 35% withholding tax, which can be reclaimed in full by Swiss residents upon filing their personal income tax forms. Foreign residents may benefit from a double taxation treaty. Dividends received by Swiss residents are fully taxed as income with the exception of holding companies, whose income is virtually tax exempt.

2. The Increase of Share Capital

Literature:

Forstmoser Peter, Zulässigkeit des Festübernahmeverfahrens für Kapitalerhöhungen unter neuem Aktienrecht?, SZW 1993, 101 ff.
Hünerwadel Patrick, Vorratsaktien im Lichte des revidierten Aktienrechts, SZW 1993, 37–42
Isler Peter R., Ausgewählte Aspekte der Kapitalerhöhung, AJP 1992, 726–736
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von Planta Andreas, Aktionärsschutz bei der bedingten Kapitalerhöhung, SZW 1992, 205–209
von Planta Thomas, Der Schutz der Aktionäre bei der Kapitalerhöhung (Diss. Basel 1992)
Watter Rolf, Die Gründung und Kapitalerhöhung im neuen Aktienrecht, SAV Band 11 (Zürich 1992, 55–70)
Watter Rolf, Bemerkungen zur Unlogik der Sacheinlage- und Sachübernahmevorschriften im Schweizer Aktienrecht, AJP 1994, 147 ff.

a) The Ordinary Increase of Share Capital

Some of the most important changes in the new law have taken place in the area of the increase of share capital. While the General Meeting is still in charge of deciding on the capital increase, it is now the Board of Directors that must implement this decision within three months (CO 650).

The shareholders' decision to increase the share capital (taken by simple majority except in the cases mentioned hereinafter) must contain the following elements (CO 650 II):

(a) the nominal value by which the capital is to be increased as well as the percentage up to which the capital must actually be paid in;
(b) the number, nominal value and category of the shares;
(c) the issue price (consisting of the nominal value and a premium) or the authorization to the Board to fix this price;

(d) certain disclosures on contributions in kind or major investments made in connection with the capital increase; the respective resolution must be taken by a special majority (CO 704);
(e) a restriction of transferability of the new shares, if any;
(f) a decision on a restriction or cancellation of the subscription rights (see CO 652b); such a decision requires a special majority (CO 704) and may be challenged (CO 706) if no important grounds exist that would justify the restriction (CO 652b). The law considers such grounds to be inter alia a take-over of a company financed by shares or workers' participation through an increase in the share capital.

The Board of Directors will then solicit subscribers for the new shares; if the public is targeted, there is a prospectus requirement (CO 652a). The contents of such a prospectus are, however, rather limited compared to other jurisdictions. Subscribers need to send in a subscription form (CO 652) which must refer to the shareholders' resolution to increase the share capital.

The consideration for the new shares issued is then paid-in in accordance with the rules applicable to the formation (CO 652c, see para. III. 1. b above). Subscribers for cash must therefore pay the respective amounts into a blocked bank account; if there is a contribution in kind the special disclosure requirements need to be observed and the Board needs to confirm the adequacy of the valuation in a special report, which is then verified by the Auditors (CO 652e and f). The company may also transform reserves into share capital (CO 652d) and then distribute such newly-created shares to its shareholders; however, Swiss Federal taxes and some Cantonal tax laws treat such an issue of shares as income to the shareholders. In order to avoid practical problems, publicly traded companies often have their capital increases underwritten by a bank which undertakes to place the shares with current shareholders or the public.

This procedure ends with a notarized decision of the Board of Directors in which the Directors confirm that all shares have been subscribed to and that the requested amounts have been transferred to the company (CO 652g). In the same deed the Board amends the clause in the Articles relating to the stated capital. New shares may only be issued after registration of the increase in the Commercial Register (CO 652h).

b) The Authorized Share Capital

The General Meeting can also authorize the Board of Directors to increase the share capital within a period not exceeding 2 years from the date of such authorization (CO 651). This decision requires an amendment to the Articles.

The authorized share capital may not exceed 50% of the current stated capital. The Board of Directors may issue new shares within the scope of the authorization for cash or contributions in kind.

Once the Board of Directors has decided to make use of the authorized capital in whole or in part, the procedure is the same as in the ordinary increase of the share capital and ruled by the same provisions (CO 651a–652h): the Board will collect subscription forms either from current shareholders (if their subscription rights are not cancelled) or from the public by means of a prospectus.

c) *The Conditional Share Capital*

The main feature of conditional share capital is the fact that third parties, i.e. holders of option or conversion rights, decide on the increase by exercising their option or conversion rights.

Conditional share capital is created through an amendment to the Articles (CO 653) whereby the amount may not exceed 50% of the stated share capital (CO 653a). On this basis, bonds with conversion or option rights are issued which entitle the holders to subscribe for shares under specified terms. Options may also be granted to employees of the company in order to encourage workers' participation.

Subscription rights of current shareholders are always excluded (see CO 653b I. 4). They are, however, entitled to a priority subscription right for the newly issued bonds which may only be restricted or cancelled on important grounds (CO 653c). The conversion or option rights are protected against dilution through an increase of share capital or the issue of other equity-linked bonds (CO 653d II).

In order to exercise the conversion or option rights the holder must turn in the securities incorporating the respective rights together with a written declaration at a designated bank and either pay the required amount in cash (in the case of an option right) or surrender the bond – possibly with an additional cash payment – in the case of a conversion right (CO 653e). The holder of the rights then immediately becomes a shareholder.

After each business year a qualified Auditor verifies whether the issue of shares was made in compliance with the law and the Articles (CO 653f). On the basis of this report the Board of Directors then amends the clause in the Articles relating to the stated capital (CO 653g), while at the same time reducing the amount of the conditional capital correspondingly. The respective decision must be filed with the Commercial Register within three months after the end of the business year.

d) *Tax Consequences of an Increase in Share Capital*

The same 3% issuance tax already discussed in connection with the formation (see para. III. 1. d above) is levied upon an increase in stated capital.

3. The Various Classes of Shares and their Transfer

Literature:

Baumgartner Urs L., Die Vinkulierungsvorschriften des neuen Aktienrechtes und das schweizerische Ausländerrecht, SZW 1992, 129–156
Benz Ulrich, Gelockerte Vinkulierung, FS Forstmoser, Zürich 1993, 55–68
Brügger Urs, Aspekte des Börsenhandels mit vinkulierten Namenaktien, SZW 1992, 215–219
Du Pasquier Shelby/Oertle Matthias, Les restrictions au transfert des actions nominatives liées, AJP 1992, 758–764
Forstmoser Peter/Plüss Adrian, Probleme von Publikumsgesellschaften mit der „Lex Friedrich" unter neuem Aktienrecht, SJZ 1993, 297 ff.
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Kaufmann Hans/Kunz Beat, Vinkulierung von Schweizer Aktien/Shareholders restrictions in Switzerland, Bde. I und II, Bank Julius Bär (Zürich 1991)
Meier-Schatz Christian J., Statutarische Vorkaufsrechte unter dem neuen Aktienrecht, SZW 224–227
Messerli Beat, Die Verweigerung der Zustimmung zur Übertragung vinkulierter Namenaktien gemäss Art. 685b revOR – verfahrenstechnische Aspekte, SJZ 1993, 241 ff.
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Peter Henry, Les bons de participation sous l'empire du nouveau droit de la SA, AJP 1992, 752–757
Petitpierre-Sauvin Anne, L'acquisition indirecte par la société de ses propres actions, SZW 1992, 220–223
Pletscher Thomas, Vinkulierungsvorschriften bei kotierten Gesellschaften und statutarische Freiheit, SZW 1992, 210–214
Reymond Jacques-André, Les clauses statutaires d'agrément, SZW 1992, 259–262
Schleiffer Patrick, Der gesetzliche Stimmrechtsausschluss im schweizerischen Aktienrecht, Abhandlungen zum schweizerischen Recht (Bern 1993)

von Salis Ulysses, Beschränkung der Stimmkraft der Aktionäre durch Höchststimmklauseln, FS Forstmoser, Zürich 1993, 171–186
Zindel Gaudenz, Aktionäre ohne Stimmrecht und stimmrechtslose Aktionäre, FS Forstmoser, Zürich 1993, 199–218

Swiss corporate law offers the following classes of shares, which all can exist concurrently:

a) *Bearer Shares*

Bearer shares (CO 622, 683) offer a maximum of confidentiality to their holder since even the company has no secure kowledge of all the actual owners. Possession of such shares suffices to prove ownership. These shares are freely transferable and title passes with the transfer of possession. Such shares may only be issued if fully paid-up.

b) *Registered Shares*

Registered shares (CO 622, 684–687) confer full shareholders' rights only if the owner of the share is registered in the share register (shareholders' register, CO 686). Generally, registered shares are transferred by endorsement. Shares which are not fully paid in may generally only be transferred upon the company's approval, which may, however, only be withheld if the acquiror's solvency is questionable and if the security requested is not provided (CO 685, see also 687 if a transfer is made).

Transferability may further be restricted in the Articles by requiring the company's consent to such a transfer (CO 685a):

If the shares are not listed on a stock exchange, the company can refuse, within three months after the transfer, to consent to, and thus prevent, a transfer of all rights attached to the shares provided it states important grounds for its refusal. The Articles must enumerate such important grounds. The company may also refuse its consent if it is ready to acquire the shares at their intrinsic value (CO 685b), either for its own account or for the account of a shareholder. Finally, the company may oppose the transfer if the acquirer refuses to declare that he/she is purchasing the shares for his/her own account. A special regime applies if the shares are transferred by operation of law (by inheritance, bankruptcy etc., see CO 685b IV, 685c II). It should be noted that tax authorities may treat the acquisition of its own shares by the company as a partial liquidation if the shares are not resold within one year. This may lead to income tax consequences for Swiss shareholders and withholding tax consequences for foreign shareholders. The basis for these taxes is the difference between the purchase price paid by the company and the nominal value of the shares.

For shares quoted on a stock exchange the company can only refuse to consent to a transfer if the Articles provide that ownership of a shareholder may not exceed a certain percentage and if the acquirer would exceed this level after being registered. Many of the listed companies are expected to adopt a 3% level applying also to concerted actions by shareholders. Additional grounds for a refusal, applicable only to foreigners and foreign-controlled entities with respect to banks or companies owning real property may be found in Art. 4 of the Transitory Provisions as foreign ownership in such companies is restricted. It is expected that this restriction will be abolished when the underlying laws (the Federal Law on Banks and Savings Institutions and the so-called Lex Friedrich) are changed. Again, the acquirer may be forced to declare that he/she is purchasing the shares for his/her own account; and – as in the case of unquoted shares – a special regime applies to transfers by operation of law (CO 685d III). The acquirer immediately becomes a shareholder upon his/her purchase on the exchange. In off-exchange transactions the acquirer becomes a shareholder upon notification of the company. The right to vote is suspended until he/she is accepted by the company (CO 685f III), which must occur within 20 days, failing which the acquirer is deemed accepted as a new shareholder (CO 685g).

No transfer restrictions apply to shareholders who have refused to consent to a change (otherwise accepted) of the purpose clause of the company or to an introduction of super-voting shares (CO 704 III) during a period of six months after publication of the respective resolution.

The discretion of the Board to refuse registration was much broader under the old law, and in certain cases this discretion will continue for an interim period of 5 years (see para. III. 12 hereinafter). Restriction on transferability was therefore an often-employed and efficient defensive strategy against take-overs. It is expected that the new law will reduce this possibility to a considerable extent.

Registration of a shareholder may only be cancelled if false information led to the company's consent to the transfer (CO 686a).

c) *Preference Shares*

Preference Shares (CO 654, 656) entitle the holder to certain special rights compared to the holders of ordinary shares, such as a higher or guaranteed minimum dividend.

Preference shares enjoy such privileges as are expressly stated in the Articles. Their introduction, therefore, requires an amendment to the Articles. No special majority is required for such a decision. The current holders of preference shares have to agree to amendments to the Articles if such changes adversely affect their rights.

d) *Non-voting Shares (Participation Certificates)*

Non-voting shares (CO 656a–656g), referred to in the Code as „Participation Certificates“ are treated like ordinary shares (e.g. with respect to the issue of such certificates, categories and transfer), except in the following cases:

(a) the holder of a participation certificate not only has no right to vote, he/she is also deprived of the rights attached to voting rights, such as information rights on business matters or the right to call or participate in a General Meeting. The latter may, however, be granted by the Articles (see CO 656c). Despite the absence of voting rights, holders of participation certificates have a right to be informed about the General Meeting, its convocation and resolutions (CO 656d).

(b) minimum capital requirements (see CO 621) are not applicable (CO 656b II).

Participation certificates must be designated as such (CO 656a III), and the non-voting capital may not exceed 200% of the voting share capital (CO 656b I). The non-voting shares must at least have the same dividend-rights as the least-favored class of ordinary shares (CO 656f). If the shareholders adversely affect the position of the holders of participation certificates by one of their resolutions, such resolution may only be passed if the participation certificates are treated at least pari passu with the least-favored class of ordinary shares (CO 656f III).

The Articles may provide a right to the holders of participation certificates to be represented on the Board (CO 656e). Holders of participation certificates have a subscription right, which may even extend to shares in cases where only the share capital is increased (CO 656g).

e) *Bonus Certificates (Dividend Rights Certificates)*

Bonus certificates are typically issued to creditors or former shareholders in the context of a financial restructuring (CO 657). Bonus shares have no nominal value; they usually grant a right to a share in (future) profits. Their issue requires authorization in the Articles.

The holders of bonus certificates form a body to which the rules of the meeting of bondholders (CO 1157–1182) apply and which can, by resolution, waive rights granted to the holders.

f) *Interim Warrants*

Interim warrants are used only in cases where the printing of shares (which has become rather rare anyway) cannot be accomplished immediately. CO 688 is therefore of little practical importance.

g) *Super-voting Shares*

CO 693 allows a company to stipulate in its Articles that shares of different classes all carry one vote irrespective of their nominal value. The shares with the lower nominal values may only be issued as registered shares and must be fully paid-up. In the past, many companies have issued registered shares with a nominal value of CHF 100.– and bearer shares with a nominal value of 500.–, each share carrying one vote. The introduction of such super-voting shares requires the consent of the majority of two thirds of the shares and the majority of the capital represented, see CO 704 I. 2.

The law now limits the capital ratio of super-voting shares to ordinary shares to 1:10 and furthermore declares these super-voting rights as inapplicable under certain circumstances (see CO 693 II and III). Furthermore, CO 704 sets an indirect limit on the exercise of super-voting rights in connection with certain important resolutions as these must also be approved by a majority of the share capital represented.

Under Swiss law no share may carry more than one vote.

h) *Disclosure of Shareholding*

Shareholders of listed companies must be disclosed in the notes to the balance sheet if their holding exceeds 5% or such lesser threshold as the Articles may provide for maximum shareholding (CO 663c, see also para. III. 3. b).

i) *Purchase of its Own Shares by the Company*

The company may purchase its own shares only if there are sufficient unrestricted reserves (capital surplus) and only up to a maximum of 10% of the aggregate share capital (CO 659). If the company acquires shares in connection with transfer restrictions, i.e. because of its refusal to consent to a transfer of said shares (see CO 685b and para. III. 3. b, especially on potential adverse tax consequences), the limit is 20% for an interim period of up to two years. Such so-called treasury shares may not be voted (CO 659a); the same applies to shares held by subsidiaries (CO 659b).

4. The Rights and Duties of Shareholders

Literature:

Braun Thomas, Verbesserte Aktionärsinformation in der Schweiz, Der Schweizer Treuhänder, 1994, 281 ff.
Casutt Andreas, Die Sonderprüfung im künftigen Schweizerischen Aktienrecht (Zürich 1991 = SSHW 136)
Pedroja, Graziano Die Sonderprüfung im neuen Aktienrecht, AJP 1992, 774–783
von der Crone Hans Caspar, Interessenkonflikte im Aktienrecht, SZW 1994, 1 ff.
Watter Rolf, Der Minderheitenschutz im neuen Aktienrecht, AJP 1993, 117 ff.
Weber Rolf H., Vertrags- bzw. Statutengestaltung im neuen Aktienrecht, SAV Bd. 11 (Zürich 1992, 71–90)

a) The Share in Profits

The principal right of a shareholder is his/her proportional share in the profits and the liquidation proceeds of the company (CO 660, 661). This right is limited by the mandatory provisions of the law (and possibly of the Articles) regarding the creation of reserves (CO 671–674). Profits are furthermore only distributed to the extent that the General Meeting approves such distribution (CO 698 II. 4).

b) Duties of the Shareholders

Shareholders' obligations do not extend beyond the contribution of the issue price for the shares (CO 680). However, it is rather frequent that the shareholders agree on additional duties among themselves within the framework of shareholders' agreements which, in general, are not binding with

respect to the relationship between the company and its shareholders. While the company may not oblige its shareholders to provide future funding, shareholders may agree to such contributions among themselves.

Swiss company law does not address shareholders' agreements but it does contain rather detailed provisions concerning shareholders who fail to pay in capital they subscribed to (CO 681–682).

c) Right to Participate and Vote in the General Meeting

Each shareholder may participate in the election of the Board of Directors and of the Auditors as well as in all other matters reserved to the General Meeting (CO 698) by exercising his/her voting right(s) in the General Meeting (CO 689). The voting right(s) is/are in general proportional to the nominal value of the shares (CO 692, but see also para. III. 3. g for super-voting shares). Unless the Articles provide otherwise, the shareholder may by written proxy have his/her shares represented by a third person who need not be a shareholder (CO 689 II, 689a). The company must admit as persons authorized to vote anyone listed in the share register, any holder of a written proxy of such person and any holder of a bearer share (CO 689a). The holder of bearer shares may legitimate him-/herself by presentation of the shares or – as is generally the case in public companies – by a certificate of deposit issued by a bank (see 689a II).

The new law contains certain proxy rules, namely the obligation of the proxy-holder to vote the shares according to the shareholder's instructions (CO 689b). Special rules apply if the company solicits proxies on behalf of a Board member or other interested person (CO 689c), for banks or brokers regulated by the Federal Law on Banks and Savings Institutions and for professional money managers who hold shares for their customers and intend to represent such shares at the General Meeting (689d).

The number of proxies held by Board members, interested persons and independent representatives in the sense of CO 689c and banks must be disclosed at the General Meeting (CO 689e).

Proxies may not be given in order to circumvent limitations on voting rights (CO 691). Resolutions of the General Meeting may be contested if such a manoeuvre is discovered.

d) Inspection and Control Rights

The law assures shareholders of a certain control over management by requesting that they be given access to the Business Report (CO 662) at least 20 days prior to the General Meeting (CO 696). The Business Report is, however, sent out only to the shareholder upon his/her specific request. Publication of the Business Report is required only for companies with listed shares or outstanding bond issues (CO 697h) or may follow from listing requirements of the stock exchanges.

During the General Meeting additional information may be given by the Board or the Auditors upon request of the shareholders, provided no preponderant interests of the company, including business secrets, are at stake and the information requested is required for the exercise of shareholders' rights (CO 697). Shareholders may only obtain access to the books and correspondence of the company if authorized by the Board or the General Meeting (CO 697 III). Should the company refuse to provide its shareholders with pertinent information, shareholders may seek a court order to gain access to such information (CO 697 IV).

e) Right to Demand a Special Inspection

If the shareholders' inspection and information rights prove to be insufficient, each individual shareholder may petition the General Meeting that a special commissioner examine certain specific transactions or any other facts in a so-called special inspection (CO 697a). It remains to be seen whether this new instrument of control proves effective.

If the General Meeting approves such request, either the company or a shareholder may ask a judge at the company's seat to appoint a special commissioner within thirty days. Should the General Meeting deny this request, shareholders whose holdings represent at least 10% of capital or a nominal value of CHF 2'000'000.– may seek a court order for the appointment of a special commissioner (CO 697b). The judge must grant the request and appoint a commissioner (CO 697c) if he finds prima facie evidence that the Board infringed the law or the Articles (CO 697b II). The costs of the investigation are generally allocated to the company, only in exceptional cases to the petitioner(s) (CO 697g).

The special commissioner has unrestricted access to information (CO 697d) and is under a duty of confidentiality as to all data received (CO 697d). In the report, which must first be submitted to the judge, the company's business secrets must be safeguarded (CO 697e). Prior to forwarding the report to the petitioner the company may express any concern(s) regarding business secrets or other preponderant interests (CO 697e II) and the judge must then decide whether to eliminate those passages from the report. All parties may furthermore comment on the report and/or ask supplemental questions (CO 697e III).

The Board of Directors then submits the report and the comments to the shareholders at the next General Meeting (CO 697f). Each shareholder may request a copy of the report and the respective comments. Shareholders may then decide if the facts discovered by the special commissioner could serve as a basis for a claim based on directors' liability (CO 754).

5. The Accounts of a Stock Company

Literature:

Altenburger Peter R./Kroll Markus, Erweiterte Rechnungslegung und Konsolidierung, SJZ 1993, 57 ff.
Duttweiler Urs, Die Aufwertungen nach neuem Aktienrecht aus steuerlicher Sicht, Der Schweizer Treuhänder, 1993, 445 ff.
Fluri Edgar, Die neuen Vorschriften für die Rechnungslegung, AJP 1992, 800–805
Kloter Michael, Les réserves latentes dans le nouveau droit des sociétés anonymes, Der Schweizer Treuhänder, 1993, 33 ff.
Mettler Alfred/Nadig Linard, Zur Aufwertung von Grundstücken und Beteiligungen nach neuem Aktienrecht, Der Schweizer Treuhänder, 1993, 437 ff.
Neuhaus Markus R., Unternehmensbesteuerung nach neuem Aktienrecht, Der Schweizer Treuhänder, 1993, 873–878; 1994, 81–86, 125–133
Scholz Gregor, Der „Konzern" nach dem revidierten Aktienrecht, Der Schweizer Treuhänder, 1994, 295 ff.
Thiel Hanspeter, Stille Reserven als ungelöstes Problem, Der Schweizer Treuhänder, 1991, 556–560
Weber Rolf H., Stille Reserven und Sonderprüfung, SJZ 1993, 301 ff.
Zünd André, Ausbau der Publizität, Der Schweizer Treuhänder, 1991, 552–555
Zürcher Wolfgang, Der Gläubigerschutz im schweizerischen Aktienrechts-Konzern, Bern 1993 = ASR 547

a) In General

Swiss accounting practices lag behind European standards; even after the 1992 reform, the balance sheet does not necessarily reflect a true and fair view of the financial situation of the company, even though certain of the generally accepted accounting principles are explicitly stated in the law (CO 662a). A true and fair view is not achieved because the company may still create hidden reserves.

The Business Report, as the law now refers to it (see CO 662), consists of (i) the annual accounts (consisting of a balance sheet and a profit and loss statement) including the notes thereto, (ii) the Annual Report and (iii) – if required – the group accounts, respectively the consolidated statements.

The governing accounting principles are enumerated in CO 662a and are comparable to International Accounting Standards (IAS); they include:

(a) Completeness; it remains to be seen whether this principle will require the clear and concise disclosure of all significant accounting policies (IAS 1);
(b) Clarity and materiality (IAS 1, 5);
(c) Prudence (IAS 1); conservative valuation is still one of the most important principles of Swiss accounting practice and is evidenced by the continuing possibility of creating hidden reserves (see CO 669); the legislator thus values the principle of prudence higher than presentation of a true and fair view.
(d) Ongoing concern; consistency in presentation and valuation (IAS 1); changes must be disclosed in the notes (IAS 1, CO 662a III);
(e) No offsetting (IAS 5, 13).

Under the new law the company may omit statements in its Annual Report, in its balance sheet and in its group accounts that could be seriously detrimental to the company or the group; the Auditors must, however, be informed of such omissions (CO 663h).

b) The Profit and Loss Statement

The law prescribes only a minimal structure for the profit and loss statement (see CO 663) requiring that revenues on the one side be broken down into revenues from sales and services and from investments and into extraordinary income, and that expenses on the other side be broken down into costs for goods and services, for staff, for depreciation and amortization, thus evidencing the annual profit or loss. All figures must be accompanied by those of the previous year.

c) The Balance Sheet

The minimal structure of the balance sheet includes (CO 663a) the following items, again accompanied by the figures of the previous year:

(a) Current assets, subdivided into cash, accounts receivable from sales and services rendered, other claims and stock;
(b) Long-term assets, subdivided into financial investments, tangible assets and intangible property;
(c) Liabilities, consisting of debts from purchases and services, other short-term liabilities, long-term liabilities and provisions;
(d) Equity, subdivided into share capital, legal (CO 671–671b) and other reserves (see CO 672–673) and the annual profit.

Participations, usually defined as investments granting at least 20% voting power, (see CO 665a) need only be disclosed in aggregate; the same applies to claims and liabilities vis-à-vis group companies.

Formation costs and costs relating to a capital increase may be capitalized in the balance sheet, but must be written off over a period of 5 years (CO 664).

The cost principle applies to the valuation of non-current assets, i.e. the valuation may not exceed historical acquisition or manufacturing costs (CO 665) less reasonable depreciation. This also applies to non-consolidated participations. For the valuation of stock, finished goods or work in progress, the value may not exceed the lower of fair market value or production costs (CO 666). An exception to the cost principle applies to listed securities, for which the valuation may not exceed the average quotation during the month preceeding the balance sheet date (CO 667 I). A revaluation is permitted only for real property interests and participations in order to balance a net loss which would otherwise result in the share capital not being fully covered any longer (see CO 670). In such a case, a special reserve account must be created for the revaluation amount (see CO 671b).

d) The Notes

The notes (appendix) to the accounts contain additional information necessary to present a fair picture of the situation of the company in those areas that are not directly reflected in the accounts. The law requires the following disclosures (see CO 663b):

(a) contingent liabilities and pledged assets;
(b) leased property;
(c) insurance value of fixed assets;
(d) obligations to pension funds;
(e) outstanding bond issues;
(f) material participations;

(g) dissolved hidden reserves to the extent they exceed newly-created reserves; this is, however, only mandatory if the business year would otherwise be presented significantly more favorably;
(h) revaluations;
(i) treasury shares;
(j) authorized and conditional capital;
(k) other mandatory disclosures, such as the identity of major shareholders (see para. III. 3. h above).

e) The Annual Report

The Annual Report, prepared by the Board of Directors as part of the Business Report (see CO 716a I.6), describes the business activities in the past year and reports changes in share capital. Verification reports (see CO 652f, 653f) must be added to the report.

f) The Group Accounts

Group or consolidated accounts must be drawn up once a company and its subsidiaries meet certain thresholds with respect to balance sheet total, turnover and employees (CO 663e). They must also be drawn up if the company has bond issues outstanding, quoted shares, if group accounts are necessary to obtain an accurate view of its financial situation or if shareholders representing at least 10% of equity so request (CO 663e).

Sub-holdings are exempt from this requirement provided the group accounts of the ultimate holding company are made available to shareholders and creditors and those accounts at least meet Swiss standards (CO 663f). Again, outside shareholders representing at least 10% of equity may request that a sub-holding draw up its own sub-group accounts.

Consolidation must be made in compliance with Generally Accepted Accounting Principles; consolidation and valuation methods must be disclosed (CO 663g).

6. The General Meeting

Literature:

Tanner Brigitte, Neuerungen für die Beschlussfassung in der Generalversammlung, AJP 1992, 765–773
Zäch Roger/Schleiffer Patrick, Statutarische qualifizierte Normen, SZW 1992, 263–267

a) Competences of the General Meeting

CO 698, which declares the General Meeting the „supreme authority of the company“, appears to confer more power on the shareholders than on the Board. The shareholders' position is furthermore strengthened by the authority given to the General Meeting to remove Directors at any time (CO 705). In practice, however, companies are run almost exclusively by their Boards, with shareholders exerting little influence on the managership of the company. The new law lists those inalienable and non-transferable duties of the Board which may be delegated neither to managers nor to shareholders (CO 716a). This may create a greater imbalance between shareholders and the Board even in closely-held companies where the General Meeting has so far assumed the role of „supreme authority“.

Pursuant to CO 698, the General Meeting has the following powers: to vote on amendments to the Articles, to elect the Directors and the Auditors, to approve the Annual Report and the group accounts, to approve the annual accounts, to decide on the distribution of dividends and grant discharge to the Directors. In addition, the General Meeting has further competences in connection with the increase of capital (para. III. 2. above), the special inspection (para. III. 4. e. above), the liquidation of the company (para. III. 9. d hereinafter), and may have certain functions according to the Articles (CO 698 II. 6).

b) Convocation of the General Meeting

The Board of Directors, and in exceptional cases the Auditors (CO 699), convoke the General Meeting at least 20 days prior to the meeting in the form stipulated by the Articles (CO 700), i.e. most often in writing in the case of registered shares and by publication in the case of bearer shares. The convocation must contain the agenda and the propositions made by the Board and motions tabled by the shareholders (CO 700 II). No formal convocation is necessary if and when all of the shares are represented at the General Meeting (CO 701); many closely-held companies take advantage of this provision.

The law distinguishes between the so-called „Ordinary General Meeting", which must be held within six months after the end of the business year (CO 699 II), and the Extra-ordinary General Meeting. The ordinary meeting's agenda always covers elections, approval of the accounts, a decision on the distribution of dividends and discharge of the directors. Extraordinary meetings are called if the Board of Directors considers them necessary. Shareholders representing at least 10% of share capital have a right to request that a meeting be scheduled; shareholders holding shares representing a nominal value of at least CHF 1'000'000.– may request specific items to be included in the agenda of the next meeting (CO 699 III).

c) *Decision-making in the General Meeting*

Prior to the General Meeting, the Board takes the necessary measures to ensure the verification of the identity of holders or their proxies and the proper counting of the votes. The Board must also ascertain that minutes are kept which must disclose among others the exact number of shares represented by directors, independent and professional proxy-holders (CO 702 II and 689c, d, e, see also para. III. 4. c).

Unless the Articles provide otherwise, all decisions are taken by the majority of votes represented. A special majority of two thirds of the votes and (cumulatively) the majority of the nominal values represented (which in effect lowers the influence of super-voting shares, see para. III. 3. g above) is necessary for certain important decisions (CO 704), such as:

(a) change of the purpose clause of the company;
(b) introduction of super-voting shares;
(c) restriction of transferability of registered shares;
(d) special forms of capital increase;
(e) limitation of subscription rights;
(f) transfer of the company's domicile;
(g) dissolution of the company without liquidation, i.e. a merger (see para. III. 10. hereinafter).

If the shareholders wish to introduce more stringent voting requirements or a special majority for other matters, such resolutions must be adopted with this same majority standard (CO 704 II).

Shareholders may contest resolutions of the General Meeting within two months after the meeting (CO 706a) if the resolution deprives them of rights granted by law or the Articles or if they are treated unequally without

justification (CO 706 II). Resolutions are void, meaning that their nullity may be invoked even after the 2 months period has elapsed, if they restrict shareholders' rights to attend the General Meeting or their voting rights, their control or inspection rights or change the basic structure of the company (CO 706b).

7. The Board of Directors

Literature:

Busch Irene, Die Übertragung der Geschäftsführung auf den Delegierten des Verwaltungsrates, FS Forstmoser (Zürich 1993, 69–78)
Druey Jean-Nicolas, Das Informationsrecht des einzelnen Verwaltungsratsmitglieds, SZW 1993, 49 ff.
Ehrat Felix, Mehr Klarheit für den Verwaltungsrat, AJP 1992, 789–795
Forstmoser Peter, Organisation und das Organisationsreglement (Zürich 1992)
Lambert Claude, Das Gesellschaftsinteresse als Verhaltensmaxime des Verwaltungsrates der Aktiengesellschaft, Bern 1992 = ASR 535
Müller Marie-Therese, Unübertragbare und unentziehbare Verwaltungsratskompetenzen und die Generalversammlung im neuen Aktienrecht, AJP 1992, 784–788
Müller Roland/Lipp Lorenz, Der Verwaltungsrat, Ein Handbuch für die Praxis (Zürich 1994)
Nobel Peter, Klare Aufgaben für den Verwaltungsrat, Der Schweizer Treuhänder, 1991, 531–535
Schubarth Martin, Aktienstrafrecht?, SZW 1993, 54 ff.
Weber Martin, Vertretung im Verwaltungsrat, Zürich 1994 = SSHW 155
Zwicker Stefan, Der Inhalt des Organisationsreglementes nach dem neuen Aktienrecht, Der Schweizer Treuhänder, 1994, 55 ff.

a) *Election of Directors*

Directors are elected by the General Meeting (CO 698 II.2). Their number is often determined in the Articles or left to the discretion of the General Meeting. The term of office of a director is three years unless the Articles provide otherwise, which is frequently the case. A one-year term is customary (CO 710) and re-election of directors is permitted (CO 710 II). The General Meeting moreover has the right to remove directors at any time (CO 705).

Directors must be shareholders (CO 707 I) but this requirement is fulfilled by the transfer of a share to them on a fiduciary basis. If the shareholder is a company its representatives are eligible in its stead (CO 707 III).

The majority of directors must be Swiss citizens residing in Switzerland (CO 708 I); a rarely used exception applies to certain holding companies (CO 708 I). Foreign controlled companies often elect fiduciaries, such as attorneys bound by contract to follow the instructions of the shareholder, to the Board in order to meet this requirement. The nationality and residence rule is enforced by the Commercial Register which, in extreme cases, may declare a company as dissolved if the Board does not meet this requirement.

The Articles must also contain minority protection rules assuring the various classes of shares or shareholders of a representation on the Board (CO 709). If several classes of shares exist with respect to pecuniary or voting rights, the Articles must ensure that at least one representative of each class of shareholders be elected to the Board. While the election itself will still be carried out by the General Meeting, these special groups have a right of nomination which can only be overruled on important grounds.

Directors are registered in the Commercial Register, which also denotes their power to represent the company. Accordingly, their leaving office entails notification to the Registrar (CO 711).

b) Organization

Unless the Articles provide for election of the chairman of the Board by the General Meeting, the directors appoint the chairman from their circle (CO 712). The Board must also elect a secretary.

In the absence of anything to the contrary in the organizational rules set by the Board, decisions are taken by simple majority of the Board members present (CO 713). Unless the Articles provide otherwise, the chairman has the casting vote. Resolutions may also be taken by circular letter unless a director requests oral debate (CO 713 II). Minutes of all Board meetings must be drawn up (CO 713 III). The law grants each director the right to request that the chairman of the Board call such a meeting (CO 715). Internal rules established by the Board will often detail these provisions.

During the Board meetings each director has the right to obtain information on all relevant matters. The members of the Board and management must disclose all relevant details and answer all questions raised. The right to information is somewhat limited inbetween Board meetings since access to information on specific transactions depends upon authorization by the chairman. If the chairman refuses to authorize disclosure of the data requested, the Board may overrule this decision. The internal organization rules (CO 715a) of the company may grant additional information rights to its Board members.

c) Duties of the Board

The law presumes that all duties not assigned to the General Meeting as a matter of law or by the Articles will be carried out by the Board (CO 716). The Board may, however, delegate most of its duties to a managing board if authorized to do so by the Articles (CO 716b). CO 716a enumerates certain specific duties which the directors may not delegate, such as management supervision and certain strategic functions.

The creation of the two-tier Board as known under German law or of the system with a chief executive officer and outside directors, as used in the U.S. approach, is achieved by delegating most of the duties to the management or to certain members of the Board. Such delegation must be set out in so-called internal organization rules issued by the Board. The main consequence of such delegation – to the extent permitted – is a limitation of the duties of the „outside" directors to the duty of care regarding the selection, instruction and supervision of the persons actually in charge of the management of the company (see para. III. 11. hereinafter).

In carrying out their duties, directors are under a duty of care and loyalty vis-à-vis the company (CO 717) and must ensure equal treatment of shareholders.

Breach of a duty may not only lead to directors' liability (see para. III. 11. hereinafter), but may moreover lead to a liability of the company if third parties incur damages and if the breach constitutes a tort committed in the exercise of the directors' duties (CO 722).

d) Representation of the Company

The Board and other signatories appointed by the Board (CO 718 and 721), such as managers and clerks with signatory rights (so-called „Prokuristen"), represent the company vis-à-vis third parties.

Directors and managers may engage the company in any transaction not excluded by the purpose (objects) of the company (CO 718a). The signatory power may be restricted. Only the following two restrictions may, however, be held against bona fide third parties, namely the joint signature right and the limitation of signatory power to a branch office (CO 718a II), provided these limitations are entered in the Commercial Register (see CO 720 for registration in general).

Within these limits signatories may sign any contract on behalf of the company (CO 719) and neither special Board resolutions nor a corporate seal are required to make any contracts binding (CO 719).

8. The Auditors

Literature:

Abolfathian-Hammer Rosmarie, Das Verhältnis von Revisionsstelle und Revisor zur Aktiengesellschaft, Berner Beiträge zum Steuer- und Wirtschaftsrecht (Bern 1992)
Thiel Hanspeter, Bestätigungsbericht der Revisionsstelle, AJP 1992, 737–739

a) *The Election of Auditors*

Even though election of more than one Auditor is permitted (CO 727), it is customary to elect only one firm as Auditor, often the Swiss subsidiary of one of the leading international accounting firms (see CO 727 II and 727d). The new law not only explicitly demands independence for Auditors (CO 727c) but also sets out a minimum professional standard (CO 727a) and requires special professional qualifications for Auditors of listed companies, companies with bond issues outstanding and large enterprises as further defined by the law (CO 727b).

Auditors are elected by the General Meeting and may be removed at any time (CO 727e). Their term of office is specified in the Articles and is generally one year although the law would permit a term of up to three years; re-election is possible. The new law requires registration of the Auditors in the Commercial Register (CO 641.10, 727e IV). If the shareholders fail to elect an Auditor or an Auditor with sufficient qualifications, the court, under certain circumstances, may appoint an Auditor (CO 727f).

b) *The Duties of the Auditors*

The Auditors' primary duty is to verify the financial reporting with respect to its compliance with the law and the Articles (CO 728). A similar duty applies with respect to consolidated accounts (CO 731a). The result of this verification

is submitted to the shareholders in the form of the Auditors' report (CO 729), which must also contain a recommendation regarding the approval of the accounts by the shareholders (CO 698 II. 4). In the absence of such a report, no valid resolution may be taken with respect to the annual financial statements and profit-allocation (CO 729c). Furthermore, the presence of the Auditors is required at the meeting in order to respond to questions raised by the shareholders (see, however, CO 729c III).

An additional report is delivered to the Board of Directors in those companies that require qualified Auditors (CO 729a). Should the Auditors discover a violation of either the law or the Articles, the Board of Directors must immediately be informed and, in important cases (e.g. if a breach of the duties of the directors is discovered), the General Meeting (CO 729b). In the case of obvious over-indebtedness of the company, i.e. if the liabilities exceed the assets, the Auditors are under a duty to notify the judge (CO 729b II) if the directors have failed to do so (CO 725). Additional duties of the Auditors may be defined in the Articles (CO 731) although this is very rarely done in practice.

In delivering their report, the Auditors must safeguard confidential information, namely business secrets (CO 730). An exception applies vis-à-vis the special commissioner (CO 697a et seq. and para. III. 4. e).

9. Equity Requirements and Dissolution

Literature:

Brunner Alexander, Insolvenz und Überschuldung der Aktiengesellschaft nach altem und neuen Recht, AJP 1992, 806–820
Handschin Lukas, Auflösung der Aktiengesellschaft aus wichtigen Gründen und andere sachgemässe Lösungen, SZW 1993, 43–45

a) *Minimum Equity Requirement*

The Code of Obligations does not contain any rules as to the ratio between debt and equity, but tax authorities often demand that the debt-equity ratio must not exceed 6:1. CO 621 does, however, require a minimum share capital of at least CHF 100'000.–.

CO 725 furthermore requires the directors to call a General Meeting and propose restructuring measures if half of the equity (capital stock plus statutory reserves) is no longer covered. If there are reasons to suspect that the company is over-indebted, the Board must have an interim balance sheet drawn up and deliver it to the Auditors. Should this balance sheet reveal that claims of creditors are not covered any longer, neither by using a break-up value nor by assuming the continuing existence of the company, then the Board must notify the court, unless creditors agree to subordinate their claims in favor of others to the extent that liabilities exceed assets.

The judge must declare the company bankrupt unless and upon motion of the Board or a creditor there is a reasonable chance for a successful restructuring (CO 725a).

b) Rules Protecting Equity

Indirect protection of equity is also achieved by certain other requirements, e.g. the prohibition of the payment of interest on the share capital and the requirement that dividends may be paid only out of profits as shown in the balance sheet (CO 675). An exception applies for interest paid during a construction period prior to full operation of the business (CO 676). For similar reasons, bonus payments to directors are limited (CO 677); however, this is widely circumvented by promising directors a fixed income.

The law provides for restitution of certain payments (CO 678–679), including payments from non-arm's-length transactions, as an additional protection of equity.

c) Reduction of Share Capital

A company may decide to reduce its share capital, e.g. in the context of a partial liquidation or to attract new equity by third parties if it is in financial difficulties. In the latter case, the capital will often be raised to the previous level by new investors (see CO 732 I).

A reduction of share capital requires a special report by a qualified Auditor (CO 727b), confirming that all the company's creditors remain covered (CO 732 II). As an additional protection of creditors, a notice (CO 733) inviting creditors to file their claims within two months must be published three times in the Commercial Gazette. The share capital can only be reduced if all these claims are either secured or satisfied, which must be confirmed by the General Meeting in a second authenticated deed (CO 734). Notification of creditors is not required if no payments are made to shareholders, i.e. the reduction merely serves to eliminate a loss on the balance sheet (CO 735).

d) Dissolution of the Company

The company is generally dissolved by either a shareholders' resolution leading to a dissolution with (CO 739 et seq.) or without liquidation (CO 738, 748 et seq.) or by bankruptcy (CO 736), leading to a liquidation in accordance with the Federal Law on Debt Collection and Bankruptcy (CO 740 V).

The law also provides for other cases of dissolution which are, however, of little practical importance, such as a fixed term of duration for the company as set forth in the Articles (see CO 627.4) or a court order based upon the request of shareholders representing at least 10% of share capital, asserting important grounds for a dissolution of the company, such as misuse of the majority shareholder's position (CO 736.4, 740 IV for the appointment of liquidators). The judge may in such a procedure also grant other relief such as an acquisition of the minority shareholdings by the company or by the majority at fair market value. Additional grounds for dissolution are found in CO 625 (lack of the required corporate bodies), 708 IV (non-compliance with the provision regarding domicile and nationality of directors) and Art. 2 of the Transitory Provisions (failure to comply with the new law after expiration of the transition period).

A shareholders' resolution with regard to liquidation of the company does not require a special majority (see, however, para. III. 10. for the case of a merger) unless the Articles provide otherwise and must be authenticated by a notary. This resolution is then entered into the Commercial Register (CO 737) and the term „in liquidation" added to the firm name (CO 739). During the liquidation, the company remains a legal entity until it is deleted from the Commercial Register (CO 746). The liquidators who replace the directors are registered (CO 740 II). Their powers are limited to those acts necessary for the liquidation (CO 739 II, 743). These liquidators may be removed by the General Meeting and in exceptional cases by the judge (CO 741).

The liquidation process is initiated by drawing up a balance sheet; concurrently, three consecutive notices are published in the Commercial Gazette, requesting creditors to file their claims (CO 742). The date of publication of the last notice determines the point in time when the liquidation proceeds may be distributed to the shareholders, which generally may only take place one year thereafter (CO 745 II). The liquidators proceed to sell all assets (by auction or private sale, CO 743 IV), honor all liabilities, terminate court proceedings, settle disputes and may even enter into new transactions if necessary for the liquidation (CO 743 III). If the liquidation lasts for more than one year, the liquidators must draw up interim balance sheets. If the liquidators should find that the assets are insufficient to cover the liabilities, they must notify the judge, who will then declare the company bankrupt (CO 743 II). The liquidators must also deposit unclaimed monies and amounts necessary to cover disputed claims with the competent court, unless distribution is postponed (CO 744).

Upon satisfaction of all third party claims the liquidation proceeds may be distributed to shareholders; as mentioned above, in general, this may only take place one year after the the date of publication of the last notice (CO 745). As an exception, the judge may allow an earlier distribution provided a qualified Auditor confirms that no third parties' interests are at risk.

Liquidation proceeds are taxed as income at shareholders' level to the extent that these proceeds exceed the nominal value of the shares. A withholding tax of 35% is also levied on this amount but may be reclaimed according to the rules applicable to dividends (see para. III. 1. d).

The company is deleted from the Commercial Register after the distribution of the liquidations proceeds (CO 746). The liquidators must ensure that the books of the company are kept in a safe location as designated by them for another ten years (CO 747).

10. Mergers and Take-overs

Literature:

Meier-Schatz Christian J., Aktienrechtsreform und Unternehmensübernahmen, SAV Bd. 11 (Zürich 1992, 35–54)
Meier Robert, Barabgeltung bei Fusionen, FS Forstmoser (Zürich 1993, 131–146)
Pulver Urs, Zur Regelung öffentlicher Übernahmeangebote, FS Forstmoser (Zürich 1993, 239–262)
Taisch Franco, Das öffentliche Angebot im neuen Aktienrecht, FS Forstmoser (Zürich 1993, 263–275)
Vischer Frank, Drei Fragen aus dem Fusionsrecht, SZW 1993, 1–8
Vogt Nedim Peter/Watter Rolf, Mergers & Acquisitions in Switzerland, Basel 1993

CO 748 permits mergers between two Swiss companies, whereby the assets and liabilities of the target company are transferred by operation of law to the surviving entity, shareholders of the former receiving shares of the surviving company in exchange.

A merger is initiated by a merger agreement signed by the Boards of the two companies. The agreement is subject to shareholders' approval on the part of the target company; a special majority is required for this decision (CO 704). The shareholders of the surviving entity need to be consulted only if the share capital has to be increased to ensure the exchange of shares because there is no or not enough authorized share capital (or there are no treasury shares).

The law is primarily concerned with the protection of creditors of the target company. As is the case in the liquidation of a company, the law requires that notification be given to the creditors by way of individual notice and publication to file their claims. Additionally the board of the surviving company is required to separately administer the assets of the two merged entities for one year or until all creditors are secured or paid off (CO 748). Mergers are also possible between stock companies and partnerships limited by shares (see CO 750) and between other companies according to a recent court decision. A special rule applies in case a company is taken over by the government.

The law also permits other types of mergers such as the purchase of assets and liabilities (see CO 181), the purchase of shares against the issue of shares (see also para. III. 2. a above) and the consolidation of companies, i.e. the merger of existing entities into a new company (CO 749) which is, however, rarely ever done since a stamp duty of 1% (0% starting 1 April 1993) is levied in such a case on the combined net worth of the companies.

Take-overs are not regulated in the Code of Obligations; there is, however, a new stock exchange law pending in Parliament which contains rules for take-overs, mandatory offers to minority shareholders and certain principles such as equal treatment of shareholders. Similar rules, but not as far-reaching, are presently in effect under the Take-over Code, a self-regulatory body of rules issued by the Association of Swiss Stock Exchanges.

Defensive strategies against hostile take-overs generally include transfer restrictions, lock-up clauses in the Articles, limitations on the amount of shares that may be represented by one single person in the General Meeting and the creation of super-voting shares for white knights (see para. III. 3. b above). Directors' liability claims in cases where the Board has not favored the most advantageous offer have never been tested in court but find support in the legal literature.

11. Personal Liability of Directors and Certain Other Persons Including Shareholders

Literature:

Böckli Peter, Neuerungen im Verantwortlichkeitsrecht für den Verwaltungsrat, SZW 1993, 261 ff.
Eppenberger Matthias, Die Solidarhaftung der Revisionsstelle, Der Schweizer Treuhänder, 1991, 542–554
Forstmoser Peter, Die Verantwortlichkeit der Organe, Der Schweizer Treuhänder, 1991, 536–541
Forstmoser Peter, Die persönliche Verantwortlichkeit des Verwaltungsrates und ihre Vermeidung, SAV Bd. 11 (Zürich 1992, 7 ff.)
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a) In General

Four different cases entailing personal liability for persons performing certain duties for the company can be found in the Code of Obligations:

(a) Pursuant to CO 752, a purchaser of securities may base a claim on prospectus liability for any wrong, illegal or misleading statement in a prospectus or in other promotional material distributed in connection with the issue of securities.

(b) The company, its shareholders and creditors may have a claim based on CO 753 against the incorporators of a company (incorporators' liability) if the disclosure required in connection with a contribution in kind or with an important investment following the company's formation was incomplete, wrong or misleading. This provision also applies to capital increases where directors who have issued false statements (CO 652e) may be the target of such a claim.

(c) Directors' liability *strictu sensu* (CO 754) applies in cases where directors, managers or liquidators have caused damage to the company or its shareholders by a willful or negligent breach of their duties. In some cases liability has been extended to de facto directors by the courts. The Directors' duty is limited to the exercise of care in the selection, instruction and supervision of management in those cases where the Articles authorize the Board to delegate the management of the company to third parties pursuant to internal regulations established by the Board (see CO 716b and para. III. 7. c). In such cases managers will be the primary target of liability claims which can be brought by the company, its shareholders and its creditors.

(d) An analogous claim may be filed against the Auditors (CO 755), the issuer of a verification report (see CO 635a, 652f and 653f) or of a report in connection with a reduction of share capital.

b) Possible Claimants

Aside from a claim based on prospectus liability, which can only be brought by the holders of securities, claims can be brought by either the company (often the receiver in bankruptcy) or a shareholder acting in his/her own name but on behalf of the company (CO 756). In such a case the new law provides for a special mechanism for cost allocation (CO 756 II) should the claimant lose the procedure. Despite the fact that in general procedural laws in Switzerland provide for the award of costs and expenses to the prevailing party, the judge may rule that the company bear all or part of the costs, taking into account that the claimant carries the whole procedural risk but may only benefit proportionally to his/her shareholding from the outcome. Such procedural risk can be substantial because court costs and a party indemnity are based upon the amounts in litigation.

In exceptional cases, shareholders may claim so-called direct damages to be paid to them directly, e.g. in case of a failure of the Board to distribute dividends even though a respective resolution was taken by the General Meeting or the Board's refusal of a tender offer out of self-interest to the detriment of shareholders. In this context it should be noted that under Swiss procedural laws class actions as known in the U.S. are not permitted.

Creditors have a claim only after the company has been declared bankrupt (CO 757) and after having requested the assignment of the company's claims against the former directors (CO 260 of the Federal Law on Debt Collection and Bankruptcy), which will be granted if the receiver in bankruptcy does not pursue the claim himself.

c) Prerequisites for a Successful Claim

In order to ascertain the basis of his claim, the claimant may make use of the possiblity of requesting a special report (CO 697a et seq. and para. III. 4. e). The claimant must also prove the following elements in all liability claims:

(a) Damages suffered by the claimant (or the company, where payment is due to the company). Damages are generally defined by the courts as the difference between the claimant's present net assets and his/her net assets as they would be in the absence of a wrongful act by the defendants.
(b) A wrongful act on the part of the defendants, e.g. false statements in a prospectus, breach of the fiduciary duties of Directors or managers (such as self-dealing or transactions entered into despite an apparent conflict of interest) or the Auditors' careless examination of the books and accounts.
(c) Proximate causation of the damages by the wrongful act, i.e. evidence that it was the wrongful act or wrongful failure to act that caused the damages.
(d) Intent or negligence on the part of the defendants which is, however, in most cases presumed if the other factors are established.

Claims must be brought within 5 years of the claimant having acquired knowledge of the damage and the person liable for compensation (CO 760) and not later than 10 years after the wrongful act. The courts at the domicile of the company have jurisdiction (CO 761) but claimants may also choose to sue a director or other responsible person at his/her domicile.

d) Joint and Several Liability

The new law (CO 759) limits the strict joint and several liability rule of the old law: whereas there still is joint and several liability, defendants (who often include Auditors and directors) can no longer be compelled to pay more than the amount of damages attributed to their own wrongdoing by taking into consideration their degree of fault and other relevant circumstances.

e) The Effect of Discharge

The granting of discharge to directors by the General Meeting bars directors' liability claims brought by the company only if the claim is based upon facts known to shareholders at the time of approval of the respective resolution (CO 759).

Those shareholders who approved the resolution or shareholders who purchased the shares in cognizance of such resolution are likewise prohibited from filing a suit. All other shareholders must file their suit within 6 months of the respective resolution. In practice, the granting of discharge has hardly ever prevented a directors' liability claim as one can very often argue that not

all the relevant facts were disclosed to the shareholders prior to their granting discharge.

f) Separate Liability for Social Security Contributions and for Payment of Certain Taxes

Art. 52 of the Federal Law on Social Security Insurance provides for a separate liability of the employer for unpaid social security contributions. Courts have interpreted this rule very broadly and have imposed personal liability on directors for virtually all unpaid contributions.

Certain cantonal laws and Art. 15 of the Federal Law on Withholding Tax impose personal liability on directors and/or liquidators for unpaid taxes.

g) Shareholder Liability – Piercing the Corporate Veil

In the past Swiss Courts have in certain cases upheld claims against the shareholder of a company, generally based upon a theory that it constituted an abuse by the defendant to assert that the company was a distinct entity (alter ego) from the shareholder (Art. 2 of the Civil Code).

The few examples that are available cover cases in which the shareholder's and the company's business was not clearly separated, an impression was created that the shareholder acted on his own behalf and account and not for the company and, finally, where prejudice was caused to the company, e.g. through undercapitalization. These cases may also be relevant under the theory that the shareholder acted as a de facto director, which would allow a claim based on directors' liability.

Guarantees, letters of comfort and the like issued by a parent company in favor of its subsidiary lead to more common cases of shareholder liability.

12. Transitory Provisions

The new law on companies entered into force on July 1, 1992 and applies in full to companies incorporated thereafter (but see in para. III. 5. f.).

In principle, the new law applies also in full to companies incorporated prior to that date, with the following exceptions:
(a) provisions in the Articles which conflict with the new law may be maintained during a transition period of five years; these provisions must, however, be adapted within this period. However, certain rules and

regulations on participation certificates apply with immediate effect, notwithstanding provisions in the Articles to the contrary (see Art. 3 of the Final Provisions).

(b) companies incorporated prior to January 1, 1985 which have a stated capital of less than CHF 100'000.– may retain their old capital if it amounts to less than CHF 100'000.–; furthermore companies may retain super-voting shares even though the ratio in par values exceeds 10:1 (see Article 5 of the Final Provisions and para. III. 3. g above).

IV. The Swiss Securities Market

Swiss company law also heavily influences the securities markets as no separate securities laws exist except for certain cantonal laws which regulate professional dealings in securities. A proposal for a Federal Law on Stock Exchanges and on Securities Trading is currently being discussed.

Under the present law, there are no reporting requirements for securities transactions; however, there is a duty of banks to report the sale of registered shares to the issuer (see para. III. 3. b).

The market capitalization of listed securities as of December 31, 1991 amounted to US-$ 199'000'000'000.–, ranking Switzerland worldwide in seventh place, behind the United States, Japan, the United Kingdom, Germany, France and Canada, but ahead of Italy, Australia and the Netherlands. Capitalization is, however, very concentrated. The securities of the ten largest companies accounted for 64% of total equity market capitalization.

Securities trading is concentrated in the Zurich Stock Exchange, followed by the Geneva and Basel Exchanges. The Bern, Lausanne, Neuchatel and St. Gallen exchanges have either been closed down recently or only continue to exist with telephone trading. Dealings on the Zurich Stock Exchange are determined by the „à la criée"-system, whereby bargaining is carried out directly and verbally between ring bank representatives. The clerk of the Stock Exchange records all prices bid, asked and paid during the official trading hours. Securities dealers, including exchange members, are free to buy and sell stocks on or off the floor at any time, including during exchange trading hours.

The implementation of the proposed national Electronic Stock Exchange (EBS, Elektronische Börse Schweiz), expected for 1994, may further change trading in Switzerland. An important part of the trade in blue chips has, however, moved to the London market as a result of a securities transfer tax applied in Switzerland which, however, was partially abolished on April 1, 1993. There is also a market for securities that do not, or do not yet, meet listing requirements („Vorbörse").

The Clearing of securities transactions is effectuated by SEGA, Schweizerische Effekten-Giro AG, which also acts as a depositary system. SEGA transfers shares on an accounting based system, which is the reason why physical delivery of shares has become the exception.

A Swiss company whose securities are to be quoted must have been in business for at least 5 years, have published its audited annual accounts as well as its business report and have a capital of not less than CHF 5 Mio.