Shareholders' Rights and Obligations

A Global Guide

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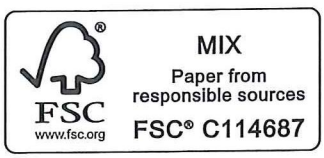

Switzerland

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1. Types of companies

1.1 In general

Swiss law distinguishes between two types of limited liability company, the company limited by shares or stock company (*Aktiengesellschaft/société anonyme/società anonima*)[1] and the limited liability company (*Gesellschaft mit beschränkter Haftung GmbH/société à responsabilité limitée/società a garanzia limitata*)[2] which are available as corporate forms with separate legal identity for capital corporations to engage in business ventures. Further corporate forms include:

- the partnership, in which all the partners have full personal liability;
- the limited partnership, in which at least one partner has full personal liability;
- the association, which is not meant to have a business purpose; and
- the cooperative, which originated as a self-help organisations and which focuses on its members rather than raising capital.

The SICAV and the SICAF are special corporate forms for collective investment schemes. In this chapter, we will primarily discuss the stock company while pointing out some aspects of the law governing the limited liability company.

In essence, the statutory rules governing the stock company and the limited liability company are very similar in most respects. As a general rule, the rules regarding the limited liability company are less restrictive and allow for more flexibility in the corporate structure. Still, by far the most important corporate form remains the stock company.

Given the similarities, in the following, we will first describe the stock company and then, for the limited liability company, only point out the important differences.

1.2 The stock company

A stock company can be incorporated by one or more incorporators by way of a public deed instituting the company's articles of association. The company comes into existence upon its registration in the registry of commerce. The minimum share capital is CHF100,000 of which at least CHF50,000 must be paid in. The minimum

1 Articles 620 onwards of the Swiss Code of Obligations.
2 Articles 772 onwards of the Code of Obligations.

nominal value of a share is CHF0.01. Special safeguards apply for contributions in kind and acquisitions in kind upon incorporation to avoid fraud. Persons acting on behalf of a company prior to its incorporation are personally liable unless the company explicitly assumes any such pre-incorporation liabilities within three months after its incorporation.

Shares can have the form of registered shares and bearer shares. For registered shares, the company has to keep a share register and only shareholders registered in the share register are entitled to vote in a shareholders' meeting and to receive dividends.

To combat money laundering, the ultimate beneficial owner of shareholdings of 25% or more of the share capital and any shareholding of bearer shares must be notified to the company or to a fiduciary appointed by the company. As long as the notification has not been made, the respective shares have no voting rights and are not entitled to any dividends.

Shares can be embodied in share certificates. Where share certificates have been issued, the transfer of the properly endorsed certificate is necessary for the transfer of the share.

In the event of a capital increase, each shareholder has a subscription right in proportion to its current shareholding. These subscription rights can be waived for important reasons, in particular if the capital increase is made to acquire a company, a business or a participation, or if the new shares are needed in connection with employee participation.

An individual or a legal entity can become a shareholder of a company by subscribing for shares upon incorporation or later upon a capital increase, or by way of a share transfer from another shareholder. The transfer of registered shares requires a written assignment or, if share certificates have been issued, an endorsement and transfer of the certificate. No such assignment or endorsement is required in the case of a universal or automatic succession by operation of law, for instance, in case of an inheritance. As a general rule, shares may be freely transferred. Accordingly, a transfer restriction in a shareholders' agreement creates only contractual rights between the parties and cannot be enforced against a third party which could still validly acquire the shares. However, as an exception to the rule of free transferability, the articles of association of a non-listed company may provide for transfer restrictions for registered shares. The articles of association may only restrict transfers for important reasons that are specifically set out in the articles. Such important reasons include reasons that protect the company's purpose or its economic independence. The board decides whether a transfer complies which any such rule. If the transfer restrictions are breached, the board of directors may refuse to register a purchaser of shares. Also, the board of directors can exercise on the company's behalf a statutory pre-emptive right to acquire the shares at their true value. Bearer shares can never be subject to transfer restrictions.

The dissolution of a stock company requires a two-thirds majority in the general meeting. Also, shareholders representing at least 10% of the share capital can request a court to order the dissolution for important reasons. Being an equitable remedy, a court will decide on a case-by-case basis whether it deems the actual circumstances

to be a sufficient basis for a dissolution, and therefore amount to important reasons. In the event of a dissolution, the purpose of the company changes to the sole purpose of liquidating the company. The board of directors or a liquidator appointed by the general meeting is responsible for the liquidation.

1.3 The limited liability company

In most respects, the rules governing the limited liability company (LLC) are very similar to the rules governing the stock company. The following differences should be noted, however.

Most differences affect the relationship between the shareholder and the company. While, in the case of a stock company, the shareholders' rights and obligations are basically limited to the right to participate in the general meeting and to receive distributions and the obligation to make the capital contribution, the rights and obligations of a shareholder in an LLC are more extensive and can be shaped much more individually in the articles of association to the shareholders' particular needs.

The minimum share capital is CHF20,000 (rather than CHF100,000 for a stock company). The share capital must be fully paid in. Unlike in case of a stock company, the LLC's articles of association may provide for supplemental duties for the shareholders to provide additional capital. Such duties are only enforceable if explicitly provided for in the articles. The minimal nominal capital of a share is CHF100, but it may be reduced to CHF1 in a restructuring.

In addition to the share register to be held by the company, the shareholders of an LLC must be registered and, therefore, disclosed in the register of commerce. An LLC does not issue share certificates.

By default, the relation between the company and its shareholders are very similar in a stock company and an LLC, but in an LLC the shareholders have much more freedom to adapt this relationship to their particular needs. Any such change needs to be reflected in the articles of association. In a stock company, these special rights cannot be provided for in the articles of association, but only agreed to as contractual obligations between the shareholders in a shareholders' agreement. Matters that can be adapted in a LLC include:

- additional duties on the shareholders for further contributions, such as future capital contributions or further obligations towards the company;
- pre-emptive rights for the company or the shareholders to buy the company's shares;
- a non-compete obligation on the shareholders;
- contractual penalties to enforce the shareholders' obligations;
- rights for the shareholders to veto certain decisions of the general meeting;
- additional rights for the general meeting and the requirement for ratification of certain decisions of the board of directors by the general meeting;
- exit rights for shareholders;
- special exclusion and termination rights.

Any transfer of shares of an LLC requires the approval of the general meeting. A

transfer can be rejected without reason, so a shareholder can remain locked into the company; although there is an exit right where there are important reasons. The articles of association can freely deviate from the statutory regime and provide for even more restrictive or less restrictive provisions. For instance, the articles of association could provide for a free transfer right without restriction, limit the rejection right to a limited number of reasons or, at the other end of the scale, provide for a complete ban of transfers (always subject to the fundamental right to an exit where there are important reasons).

The shareholders of a limited liability company have a full information right regarding all business affairs of the company and, if the company has no auditor, also a right of full access to the company's books. Access can only be restricted if there is a risk that the information obtained may be used to the company's detriment.

At the same time, the shareholders have a duty of confidentiality regarding the company's business secrets and a duty of loyalty to the company. The shareholders may not perform business transactions that benefit themselves, but compromise the company's purpose. If so desired, the articles of association can restrict the shareholders even more and provide for a fully fledged non-compete obligation.

Individual shareholders have a right to exit the limited liability company for important reasons. Likewise, the company can exclude a shareholder for important reasons. Being an equitable remedy, a court will decide on a case-by-case basis whether it deems the actual circumstances to be a sufficient basis for an exit or an exclusion and, therefore, amount to important reasons. The leaving shareholder is entitled to be compensated with the true value of its shares. The articles of association can modify the exit and exclusion reasons, as well as the compensation to be paid in the event of such additional reasons. Also, any shareholder could file a claim in court for the termination of the company for important reasons.

2. Classes of shares

2.1 In general

Swiss law does not distinguish between different classes of shares, but allows for several deviations from the standard concept of one share one vote. In the standard concept, there is one class of shares, each share has the same nominal value, carries the same voting power and same entitlement to proceeds, namely dividends, from the company.

This standard model can be varied by creating special forms of shares, namely voting shares, preference shares, participation rights and dividend rights.

2.2 Voting shares

Voting shares leverage the voting power of the shareholders with voting shares. The articles of association can provide for shares with different nominal values, but specify that each share regardless of its nominal value carries one vote. The maximum leverage permitted for voting shares over regular shares is 10.

2.3 Preference shares

Preference shares carry a monetary preference over ordinary shares. There are basically no restrictions on designing the preference. Quite typical would be dividend and liquidation preferences up to a certain amount. The preference always relates to preferences in payments from the company to shareholders (not for payments between shareholders). The preference rights have to be included in the articles of association and must be worded completely unambiguously and without reference to the current shareholders, as they will have effect against all third parties and also bind any future shareholder. Given their importance and, often, their complexity, it is advisable to pre-file and clear preference clauses with the commercial registry before implementing them.

2.4 Participation rights

Participation rights only carry economic rights. A participation rights holder makes a capital contribution to the company like a regular shareholder, but only receives dividend and liquidation rights without any voting rights. The participation capital may not exceed twice the company's regular nominal share capital. To protect the participation rights holders, shareholders resolutions reducing their rights are only permitted if and to the extent that the rights of regular shareholders in the same position are reduced likewise. Participation rights are created by shareholder resolution and corresponding amendment of the articles of association. The participation rights holders have no mandatory representation on the board of directors, but the articles of association can provide for such representation.

2.5 Dividend rights

A dividend rights certificate grants its holder rights to dividend payments or subscriptions rights as set out in the provisions of the articles creating those rights. Dividend rights are typically issued without consideration to persons or entities having a special relationship to the company such as existing or former shareholders, creditors or employees. Dividend rights cannot have a nominal value and cannot be linked to a capital contribution. The creation of the dividend rights requires a shareholders' resolution and a corresponding amendment of the articles of association.

In practice, what is more frequently used than dividend rights is phantom stock. Phantom stock is a purely contractual concept. While phantom stock mimics certain shareholders' rights, in particular, rights to dividend payments or compensation in the event of a sale, it only creates a contractual obligation on the grantor to make the respective payments to the grantee if the respective trigger events occur. Phantom stock does not create any rights for third parties, nor is it reflected in the articles of association.

2.6 Particularities in the limited liability company

Conceptually, an LLC is more geared towards manager-shareholders and, therefore, typically, there is less financial engineering. Still, the law permits most of the classes of shares existing for the stock company to be used by an LLC as well. So, an LLC

may have voting shares, preference shares and dividend rights, in each case in accordance with the same rules applying to the stock company. However, an LLC cannot provide for participation rights.

3. The corporate bodies of the company

A Swiss company basically has three bodies, the general meeting, the board of directors and the auditor.

3.1 The general meeting

The general meeting is considered the supreme body of a stock company. Responsibilities of the general meeting include the election of the board of directors and the auditors, approval of the annual report and resolution on dividends, amendments of the articles of association, resolutions on capital increases and decreases, and the dissolution of the company. The general meeting cannot be involved in business decisions, nor can the general meeting ratify decisions falling within the board of directors' areas of responsibility as the board of directors is exclusively responsible for all business decisions.

The general meeting has to convene at least once a year for an ordinary meeting to approve the annual report and to elect the board of directors and the auditors, who are appointed annually for listed companies, or from time to time as provided in the articles of association for private companies. Unless all shareholders approve otherwise, the meeting must be called by the board of directors with at least 20 days' notice.

As a general rule, resolutions require a simple majority of the votes present at the meeting. Certain resolutions of particular importance require, in addition, a two-thirds majority of the votes cast. These resolutions include amendments to the articles of association that change the corporate purpose, introduce transfer restrictions for the shares, introduce voting shares, limit subscription rights, create conditional or contingent capital, or resolve on the dissolution of the company. The articles of association can provide for different majority requirements.

Resolutions of the general meeting that are in breach of fundamental principles of company law are null and void. All other resolutions in breach of company law can be challenged by any shareholder or the board of directors within two months of the resolution.

3.2 The board of directors

The members of the board of directors of a Swiss company are elected by the general meeting annually in case of a listed company or, in the case of a private company, for three years or another period (not to exceed six years) as determined by the articles of association. They may be re-elected. Only individuals can serve as board members. The board members have to be registered in the registry of commerce.

The minimum number of board members is one, although where there are different share classes (voting shares or preference shares), each class is entitled to one member. There are no longer nationality requirements for the board members, but there must be registered signatories (one in the case of single signing authority,

two in the case of joint signing authority) with residence in Switzerland who are able to act on behalf of the company in all respects.

The board of directors has the following non-transferable and inalienable duties:[3]

- leading the company;
- definition of the company's organisation;
- organising the accounting;
- appointment and control of the management;
- preparation of the annual report; and
- making an over-indebtedness filing, in the event of distress.

In accordance with the articles of association, the board of directors may delegate the company's management, but the board of directors remains responsible for the control of the management.

The board of directors can have executive and non-executive board members, but at least one member must be executive. There is no requirement to have a non-executive or an independent member. Swiss law, therefore, follows the one tier concept and there is no supervisory board; although, Swiss law is rather flexible and it is possible to create a board with mostly non-executive board members whose primary function is to supervise the management that takes care of the executive tasks.

The board members have a duty of care and a duty of loyalty. The duty of loyalty is always owed to the company (not to the shareholders or other constituencies) and the board members must act in the best interests of the company. For instance, the board members of a subsidiary only owe their duty of loyalty to the subsidiary and are not permitted to prioritise the interests of a parent or sister company, or the group at large. Regarding the duty of care, as a general rule, the board of directors has broad discretion in its business judgment. In the event of a breach of their duties, the board members become liable for any damage caused by the breach. Each of the company, the company's creditors and the shareholders can sue the directors for any damages suffered directly by themselves. In addition, the shareholders and, in the event of an insolvency, the company's creditors, may bring a derivative suit to claim the company's direct damages on behalf of the company. In practice, directors' liability is mostly invoked after an insolvency. Not only the registered board members are subject to directors' liability, but any person, be it an individual or an entity, that acts in fact as a director, in particular by giving directions.

3.3 The auditors

The auditors are responsible for the review of the annual financial statements. The general meeting elects the auditors for a period of one to three years.

Not all companies must have an auditor or get a full audit. A full audit is required for listed companies and any company exceeding two of the following threshold in two subsequent business years:

- a balance sheet of CHF40 million;

3 Article 716a of the Code of Obligations.

- turnover of CHF20 million; and
- the equivalent of 250 full-time employees.

Companies that are not required to get a full audit must get a review of their annual financial statements. A company that is not required to get a full audit and does not employ more than the equivalent of 10 full-time employees, may waive the review requirement with the consent of all shareholders, and then does not need to elect an auditor.

3.4 Particularities in the limited liability company

In essence, the LLC has the same structure as a stock company, with a general meeting of the shareholders, a board of directors and an auditor. However, the basic approach of the statute is a convergence of shareholders and directors, so as a basic rule all shareholders of an LLC participate in the management of the company and form the board of directors. Also, the general meeting appoints any further persons that manage the company and can act on behalf of the company. The articles of association can provide for different rules. Therefore, it would be possible to have in an LLC a system of corporate governance that is similar to that of a stock company.

4. Relationship between shareholders, between shareholders and other corporate bodies, and between shareholders and third parties

4.1 In general

The sole duty of a shareholder of a Swiss share corporation is to contribute the amount fixed for issued shares for which the shareholder has subscribed. The articles of a share corporation cannot impose additional duties of shareholders, it being understood that the fundamental duty to exercise rights in good faith in accordance with Article 2 of the Swiss Civil Code applies. The members of the board of directors must perform their duties with all due diligence and safeguard the interest of the company in good faith. They must afford the shareholders equal treatment in like circumstances.[4]

Shareholders may enter into shareholders' agreements. The general principles of Swiss contracts law apply to such agreements. A decision of a company that is the result of a breach of an obligation under a shareholders' agreement is valid as long as there is compliance with corporate law and the articles of the company.

Swiss law does not provide for a works council with rights similar to those in countries of the EU. A commission representing employees is not a body of a company according to corporate law.

4.2 Shareholders among themselves

Swiss corporate law does not grant any rights to shareholders to force a transfer of shares to them because a shareholder has conducted itself in a certain way. A company may be dissolved by court judgment if shareholders together representing

4 Article 717 of the Code of Obligations.

at least 10% of the share capital request its dissolution for good cause. The court may order a different solution if appropriate.[5] A company will only be dissolved if the court comes to the conclusion that the company's existence is no longer justified. Such a cause could be ongoing discrimination against the minority shareholders. An appropriate solution could be the distribution of dividends or a buy-back of shares of minority shareholders. It is possible for shareholders to stipulate additional duties on shareholders and the consequences of breaches of such duties in shareholders' agreements.

4.3 Shareholders and other corporate bodies

According to Article 698(1) of the Code of Obligations, the general meeting of shareholders is the supreme governing body of the company. However, generally speaking, the board of directors and the general meeting are in a relationship of parity. The general meeting has no right to take away powers allocated by law to the board of directors as mandatory powers. There are, however, extraordinary circumstances in which the general meeting may assume powers of the board of directors or the board of directors may assume powers of the general meeting. In listed companies the shareholders have additional competences, mostly relating to the remuneration of the members of the board of directors and of the top management.[6] If the Financial Market Infrastructure Act is applicable, certain powers of the board of directors are shifted to the general meeting once a takeover offer has been published, particularly with regard to transactions which would have the effect of significantly altering the assets or liabilities of the company.

The general meeting elects and dismisses the members of the board of directors (Swiss share companies have no supervisory board) and the auditors.

4.4 Shareholders and third parties

Generally speaking, creditors of a company have no claims against shareholders if they have paid the amount fixed for their shares.

If a shareholder can be classed as a *de facto* director of the company then the principles of directors' liability apply. If a majority or sole shareholder is not itself director (particularly, if it is not a natural person) then the risk of being classed as a *de facto* director is considerable if that shareholder in reality takes decisions which should have been taken by the board of directors.

Shareholders may commit contractually, particularly in shareholders' agreements, to provide funding to the company. Such commitments will be enforced in an insolvency by the insolvency estate itself or such claims could be assigned to creditors.

Parent companies cannot be held liable by the insolvency estate simply because they are parent companies unless they qualify as *de facto* directors, have entered into legally binding commitments, or there are claims under provisions on fraudulent transfers. In certain circumstances creditors may have direct claims against a parent

5 Article 736(4) of the Code of Obligations.

6 See the so-called Ordinance against Excessive Compensation in Listed Stock Companies, which is a result of the Constitutional initiative with regard to 'say on pay' (known as the Minder initiative).

company based on the principles of *Vertrauenshaftung* (ie, where the parent company has created concrete and specific expectations on the part of the creditors of the subsidiary that it will honour the financial liabilities of its subsidiary) or under the doctrine of piercing the corporate veil.

5. Judicial procedures

Switzerland has a reliable and efficient judicial system. Shareholders' actions will typically be handled by competent and trustworthy judges. Their general attitude is to favour settlements, which drastically reduces the average duration of shareholders' disputes before Swiss courts.

The Swiss judicial system has a federal structure. While judicial procedure has been governed since 2011 on the national level, the organisation of the court system still lies mainly in the competence of the 26 cantons. This has the consequence that the court system and the denomination of the courts are different from canton to canton. In civil matters (with the exception of patent matters), only the highest court, the Swiss Federal Tribunal, is a federal court.

Shareholders' actions may be brought before the courts at the registered seat of the company or before the courts at the domicile of the defendants.[7]

In the Canton of Zurich, the Commercial Court has jurisdiction over shareholders' disputes. Commercial courts typically have the advantage of having a better economic understanding than ordinary courts. Judgments of the Zurich Commercial Court can be appealed only to one instance, namely the Swiss Federal Tribunal.

However, most cantons provide two cantonal instances. For example, in the Canton of Basel-City, the Civil Court has jurisdiction over shareholders' disputes. Judgments of the Civil Court can be appealed to the Court of Appeal of the Canton of Basel-City whose decisions can be then appealed to the Swiss Federal Tribunal. While cantonal courts deal with both factual and legal issues, the Swiss Federal Tribunal, in principle, only reviews legal issues.

The ordinary judicial procedure applies to shareholders' actions. Both parties will typically have to submit two written submissions with documentary evidence. Afterwards, a main hearing and, in some cases, evidentiary proceedings take place.

Most cases are settled with the support of the court. In the Canton of Basel-City, the president of the court will direct a conciliation hearing after both parties have submitted short submissions (a request for conciliation and an answer to the request for conciliation). The Commercial Court of Zurich invites the parties to court-conducted settlement negotiations after one round of submissions (the statement of claim and the statement of defence). As a consequence of the high rate of settlements, the majority of disputes are resolved within one year.

A shareholders' action is generally defined as a "court case initiated by a firm's one or more shareholders, on behalf of its shareholders in general, to enforce a cause of action of the firm against third parties".[8] This definition excludes actions of

7 Article 151 of the Federal Act on International Private Law and Article 40 of the Swiss Code of Civil Procedure.

8 www.businessdictionary.com/definition/shareholder-action.html.

shareholders against the company itself. Nonetheless, actions of shareholders challenging resolutions of the general meeting,[9] enforcing their right to information and inspection against the company[10] and asking for special audit[11] may be taken into consideration in connection with disputes among shareholders.

A challenge to a shareholders' resolution is currently receiving much attention in Switzerland. The board of directors of the listed company, SIKA, limited the voting rights of its majority shareholder (in terms of voting rights) after it sold its shares to the French competitor Saint-Gobain. The first instance, the Cantonal Court of Zug, rejected an action of the majority shareholder against the limitation of voting rights. Appeal proceedings are currently ongoing.

One of the greatest hurdles with respect to challenges to shareholders' resolutions is the timing. Shareholders' meetings are held every year. This means that a judgment may arrive late, even too late, from a claimant's perspective. As a consequence, interim measures are important in relation to shareholders actions. Despite the existence of the federal Code of Civil Procedure, the practices with regard to interim measures still vary between different cantonal courts.

Shareholders who intend to enforce their rights to information and inspection against a company or who ask for a special audit require stamina. The reason for this is that such actions are typically preparing the ground for monetary claims. This means that subsequent court proceedings are needed. Also in Switzerland, consecutive court proceedings are time-consuming.

Unlike other jurisdictions, Swiss company law does not allow for shareholders' actions expelling a shareholder or demanding that another shareholder takes over the shareholders' shares.

6. Mass claims and derivative suits

Under Swiss law, damage claims by shareholders are individual claims. Class actions or similar proceedings are unknown in Switzerland. There are no special rules or provisions for mass claims by shareholders under Swiss law. There also seems to be no need for such rules in our opinion, since it is unusual in Switzerland that a high number of shareholders initiate shareholders' actions.

A derivative suit is defined as "a lawsuit brought by a shareholder on behalf of a corporation".[12] Actions against former board members and other responsible persons have become quite common in Switzerland in the event of insolvency of a company. Outside insolvency proceedings, such actions are rarely initiated.

Under Swiss law, derivate suits compromise four possible different actions:

- liability in respect of the administration, business management and liquidation of a company;
- liability arising from the issue prospectus;
- liability on the part of the incorporators; and
- liability on the part of the auditors.

9 Article 706 of the Code of Obligations.
10 Article 697 of the Code of Obligations.
11 Article 697a onwards of the Code of Obligations.
12 www.law.cornell.edu/wex/shareholder_derivative_suit.

With the exception of the possibility of liability arising from the issue prospectus, these grounds for liability also apply regarding LLCs.[13]

There are four general requirements for derivate suits under Swiss law: as a rule, liability requires a breach of duty, damages, a causal relationship between the breach of a duty and the damages, and intent or negligence.

6.1 Liability for administration, business management and liquidation

Swiss law provides for the liability of board members, managers and liquidators in respect of administration, business management and liquidation.[14] A person is also liable if he or she acts as a *de facto* corporate body. A person taking a decision instead of the formal corporate bodies or conducting the actual business is considered to be a *de facto* (or shadow) corporate body.

A shareholder or participation certificate holder can only claim in its own name in respect of damages that it suffers directly. As a rule, a shareholder cannot directly claim damages for losses that the corporation suffers directly and his shares suffer only in as a result. In the case of damages suffered by the company, the shareholder is only entitled to claim damages on behalf of the company.[15] Due to the substantial risk borne by shareholders in respect of costs in such cases, such actions are rare in Switzerland.

A current legislative project to revise the law applicable to share companies provides that the court may allocate costs to the share company or to the claimants if the shareholders have lost their case.[16] This draft provision would reduce the risk of initiating shareholders' actions. However, it is still unclear whether this draft provision, which differs significantly from current principles on the allocation of costs under Swiss law, will be approved by the Swiss parliament.

Besides individual shareholders, the company itself can initiate shareholders' claims against board members, managers and liquidators.[17] Voting shares do not provide additional rights when the general meeting of shareholders is taking a decision on initiating an action against the (former) management based on their liability for administration, business management and liquidation.[18] If the general meeting decides on the appointment of external counsel for such a claim, the voting privilege of voting shares also does not apply.[19]

In the event of insolvency, actions against board members are frequent in Switzerland. However, such claims can be initiated by insolvency administrators in the first place, by creditors in the second place and by shareholders only in the third place. Hence, such actions are initiated in most cases by insolvency administrators[20] or by creditors,[21] and only in rare cases by shareholders.

13 Article 827 of the Code of Obligations.
14 Article 754 of the Code of Obligations.
15 Article 756 of the Code of Obligations.
16 Article 107(1*bis*) of the draft Swiss Code of Civil Procedure.
17 Article 756 of the Code of Obligations.
18 Articles 693(3)(4) and 806(3)(3) of the Code of Obligations.
19 Decisions of the Federal Tribunal (DFT) 132 III 707, consideration 3.
20 Eg, DFT 142 III 23; DFT 140 III 533.
21 Eg, DFT 117 II 432; DFT 113 II 52; DFT 111 II 373; DFT 107 II 349.

6.2 Liability for the issue prospectus

Both the initial and later acquirers of shares are entitled to initiate damage claims for misleading information given in issue prospectuses or similar statements published when the company is established, or on the issue of shares, bonds or other securities.[22] They can claim damages from any person involved in establishing or distributing the issue prospectus.[23] Possible defendants include board members, members of the top management, lawyers, consultants, banks and the issuer.

An important requirement is that there must be a causal link between the information contained in the issue prospectus and the decision of the acquirer to buy the shares.[24] The Swiss Federal Tribunal has decided that the applicable standard of proof for this causal link is likelihood.[25] Despite this reduced burden of proof, the requirement of a causal link is an important hurdle for claimants. Most acquirers of shares do not read issue prospectuses. Hence, information contained therein may not have had any influence on their decision to buy shares.

6.3 Incorporators' liability

In addition, Swiss law provides for liability on the part of the incorporators.[26] This liability mainly applies in the event of inaccurate or misleading information on contributions or acquisitions in kind. Additionally, this provision has been applied in a case where the founding capital consisted of a sham deposit that was immediately repaid to the creditors of the incorporators after the incorporation.[27] Possible claimants are the corporation, the shareholders or the creditors.[28]

6.4 Auditors' liability

Finally, Swiss law provides for the liability of auditors for breach of duty in auditing annual and consolidated accounts, the company's establishment, a capital increase or a capital reduction.[29]

In the event of bankruptcy, auditors' liability is typically invoked when the auditors did not comply with their duties of warning the company and informing the court that the company was over-indebted.[30] In these cases, the damages consist of the increase in the company's losses between the moment in time when the auditor should have provided information about the over-indebtedness and the time of bankruptcy. However, shareholders can introduce such actions in the event of bankruptcy only if no such actions are initiated by insolvency administrators or creditors.

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22 Article 752 of the Code of Obligations.
23 Article 752 of the Code of Obligations.
24 See DFT 131 III 306, consideration 1; DFT 132 III 721, consideration 3.2; on the other hand, see Watter, *Basler Kommentar – Obligationenrecht II*, Article 752 N 26a f.
25 DFT 132 III 721, consideration 3.2.1.
26 Article 753 of the Code of Obligations.
27 DFT 102 II 353, consideration 2.
28 Article 753 of the Code of Obligations.
29 Article 755 of the Code of Obligations.
30 See DFT 86 171, consideration 2.

7. Alternative dispute resolution

Switzerland is one the world's leading arbitration centres. Swiss arbitration proceedings are well-known for being reliable, neutral and efficient. Due to the long history of arbitration in Switzerland, there is a high number of experienced arbitrators in the country.

Furthermore, Switzerland benefits from arbitration-friendly legislation. The current project to revise the Swiss International Private Law Act provides slight modifications of statutory rules that aim at making Swiss law even more arbitration-friendly.

The case law of the Swiss Federal Tribunal shows great respect for the autonomy of arbitration. In relation to commercial arbitration, the success rate of appeals against arbitral awards lies around 7%. A further advantage of Swiss arbitration is that there is only one instance of appeal against both domestic and international arbitral awards, namely the Swiss Federal Tribunal.[31] The median duration for such appeals is only five months.

The inclusion of arbitration clauses in articles of association is permissible according to the case law of the Swiss Federal Tribunal and the prevailing opinion in legal doctrine.[32] The current legislative project to revise the law relating to share companies provides an explicit statutory basis allowing arbitration clauses.[33]

In particular, foreign companies may choose Switzerland as a seat of arbitration for their shareholders' disputes. In addition, a number of Swiss companies include arbitration clauses in their articles of association.

Mediation is also generally accepted in Switzerland. Since the entry into force of the Swiss Civil Procedure Code in 2011, there is even a statutory basis for mediation.[34] Nevertheless, mediation of shareholder disputes remains occasional in Switzerland. Most shareholder disputes are settled at a conciliation hearing or at a court hearing dedicated to settlement negotiations.

The binding determination of an expert[35] is sometimes used in disputes where technical knowledge is required, particularly in construction disputes. The resolution of shareholders' disputes requires legal rather than technical knowledge. For this reason, it is unusual in Switzerland to use binding advice to resolve shareholder disputes. The disadvantage of a binding advice compared to a court judgment or an award of an arbitral tribunal is that binding advice cannot be directly enforced.

8. Insolvency

The board of directors of a company has to notify the court if the legal requirements of Article 725(2) of the Code of Obligations are met, which is the case if the audited interim balance sheet, which has been prepared after over-indebtedness has been suspected, shows that the claims of the company's creditors are not covered, whether

31 The parties in domestic arbitration may agree explicitly that the only instance of appeal is the cantonal court in accordance with Article 356 of the Code of Civil Procedure Code (Article 390 of the Code of Civil Procedure).
32 DFT 4A_446/2009, dated 8 December 2009, consideration 2.2.
33 Article 697n(1) of the draft Code of Obligations.
34 Article 213 onwards of the Code of Civil Procedure.
35 Article 189 of the Code of Civil Procedure.

the assets are appraised at going concern or liquidation values, unless certain company creditors subordinate their claims to those of all other company creditors to the extent of the capital deficit. The notified court commences bankruptcy proceedings.[36] However, a stay of insolvency proceedings may be granted at the request of the board of directors or of a creditor if there is a prospect of financial restructuring. In such a case, the court orders measures to preserve the company's assets.

If a company has auditors, and if the board of directors does not notify the court if the company is clearly over-indebted, then the auditors have a duty to notify the court.

The general meeting of shareholders may declare the company insolvent in application of Article 191 of the Swiss Debt Enforcement and Bankruptcy Law. Such a resolution has to be recorded in a public deed. The board of directors will make an application to the court on the basis of such resolution. In practice, this way to commence bankruptcy proceedings is chosen if there are few shareholders, particularly if a universal meeting waiving compliance with notice formalities can be held, and if the costs of auditing an interim balance sheet should be avoided. A reason for going this route may also be that a company is not yet over-indebted at both going concern and liquidation values, but is running out of cash to satisfy claims as they become due.

A shareholder in its capacity as shareholder cannot apply for the opening of insolvency proceedings in respect of the company. As a creditor, a shareholder is treated as all other creditors. Whether or not the claim of a creditor who is also a shareholder is recognised in the insolvency proceedings (or reclassified in extraordinary, very rare situations as a subordinated claim), is not a question affecting that creditor's right to request the opening of proceedings.

Moratorium proceedings in accordance with Article 293 of the Debt Enforcement and Bankruptcy Law can be commenced by an application being filed by the company, represented by its board of directors, or by a creditor entitled to demand the opening of bankruptcy proceedings.

A liquidation by way of bankruptcy can be triggered by the resignation of directors so that the board of directors no longer complies with the law. In such a case, any shareholder or creditor, or the registrar of the cantonal register of commerce may request the court to take measures including the dissolution of the company in bankruptcy proceedings (in practice, first the registrar and then the court set a deadline to remedy defects in the organisation of a company).[37]

Shareholders as shareholders have no claims in insolvency proceedings. They have no vote in creditors' assemblies.

36 Article 725a(1) of the Code of Obligations.
37 Article 731b of the Code of Obligations.