CHAPTER 5

SWITZERLAND

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5.1 INTRODUCTION

Over the past few years, the shareholders' right of control and action – as part of the rights of the investors – has been the subject of many discussions in Switzerland.

Concerning the topic of investor rights, the past months have been extraordinary for the financial industry of Switzerland in two respects. On the one hand, like all other markets, it was hit by, among other things, the upheaval following the Lehmann and Madoff cases, and also by the overall recession of the financial markets. On the other hand 2010 has been just as remarkable for Switzerland because our friends from the United States and neighbouring countries have been using banking confidentiality's 'supposed lack of rights' to, if nothing else, try to weaken the so far strong Swiss financial industry. On both sides governments issued tax amnesties, while in Germany there was talk about the data theft scandal, when all of a sudden stolen customer data from Swiss banks turned up in friendly countries, which then did not shy away from using the evidence for their own purposes.

The consequence of all of this should have been that the assets managed by Swiss banks and trustees were returned. Surprisingly this did not happen; for example, the 'assets under management' increased in the first quarter of this year by more than 30 billion Swiss francs compared to last year.

Still, the Swiss banking industry suffered enough; rumour has it that the largest bank, UBS AG, almost ceased to exist. Its 'model bankers' have been under fire for many months now regarding their responsibilities. At the last general meeting of UBS AG, the shareholders denied the board of directors the discharge for their actions in regard to 2007 and thus left the option of a liability suit open.

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Furthermore, since the beginning of 2001, multiple parliamentary advances have been made, which especially challenge the federal council of Switzerland (the Bundesrat) to make improvements to the Swiss law regarding 'Corporate Governance'.

In view of the financial crisis, the Bundesrat has supplemented the current revision of stock corporation and accounting law in order to further strengthen the protection of the shareholders' property.

In the following section, the shareholders' essential rights of control and action, the most important sanctions according to civil law in the case of regulation violation of the stock market and stock trading laws as well as the sanctions of insider trading, will be presented. This is followed by procedural considerations regarding the enforcement of the rights of action according to civil law. In conclusion, we will assess the regulatory regime in Switzerland: possible consequences from the crisis shall be identified by formulating theses for a future-oriented regulation principle.

5.2 RIGHTS OF CONTROL AND ACTION

5.2.1 Overview

The Swiss stock corporation law generally knows four conventional types of liability:[1] prospectus liability;[2] formation liability;[3] liability for administration, management and liquidation;[4] and revision liability.[5] Prerequisite for all liability according to stock corporation law is – in compliance with the general principles of liability law[6] – the occurrence of a loss,[7] the breach of duty,[8] the causal connection between the loss and the breach of duty as well as a default. Claims for damages for responsibilities in accordance with stock corporation law may be asserted by the company itself, its creditors as well as the individual shareholders. Where the company possesses non-voting share capital, the participants are considered equal to the shareholders.[9]

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1 See Arts 752-760 Swiss Code of Obligations, CO.
2 Art 752 CO.
3 Art 753 CO.
4 Art 754 CO.
5 Art 755 CO.
6 See Art 41 CO.
7 This is the difference between the present asset status of the victim and the hypothetical status, which his/her assets would have had, had the damage not happened.
8 Therefore, a cause must be 'pertinent to the normal course of events and to life's experiences or bring about a success of similar nature as the incidence so that the occurrence of this success would seem generally advantaged due to the incidence' (see Federal Court Ruling 123 III 110; 113 II 52; 93 II 22).
9 Art 656a para 2 CO.

5.2.2 Prospectus liability

5.2.2.1 Facts of the case

All persons,[10] who intentionally or negligently assisted in the creation or distribution of a faulty issue prospectus or similar notifications are subject to the prospectus liability in accordance with Art 752 CO:

> If at the time of an incorporation or the release of shares, obligations or other titles in issue prospectuses or similar notices incorrect, misleading information or information not conforming to the legal regulation were made or published, everyone who intentionally or negligently took part in this action will be liable for the damage taken by the title's buyer.

5.2.2.2 Capacity to sue and be sued

The title's 'buyers' have the capacity to sue. This primarily applies to first takers, ie those individuals who applied for a title in the context of an issue.[11] According to overwhelming opinion, this also applies to those investors who purchased their titles from the secondary market after issue closing or from the bank who subscribed to the issue as a firm commitment. However, they are required to prove that the faulty prospectus information was causal for the purchase decision and that the purchase occurred on the secondary market due to technical reasons.[12]

5.2.2.3 Liability requirements

The prospectus liability requires the existence of an issue prospectus or a similar notice. For the public issue of shares through the company, ie for the issue of shares, share certificates, convertible bonds, option bonds, bonds or other company titles, which are equitable in 'effect' in terms of

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[10] The circle of the responsible persons may, besides the founders, organs – especially the board of directors and statutory auditor – and the company's employees, also consist of the leading issuing house. The latter is liable especially when it is involved in the formulation or evaluation of prospectus testimonies. Furthermore, all persons who are involved in the sale of shares, eg underwriters and stockbrokers, are under the control of the prospectus liability, provided that their involvement was essential. Ultimately, the company itself has the capacity to be sued.

[11] The primarily purpose of the prospectus liability is 'the protection of the public called for application prior to unconscionability' (Federal Court Ruling 112 II 258).

[12] Federal Court Ruling 131 III 306. The Swiss Federal Court has stated in its latest adjudication that the libellant may plead prospectus liability in so far an alleviation of the burden of proof would be warranted, because he/she would not have to produce exact proof of the natural and/or hypothetical causality. However, this burden of proof does not change the fact that the burden of proof remained with him/her. The Federal Court then proceeded to explain that a shifting of the burden of proof, as occasionally advocated in literature, is not provided for in the law and is at the same time foreign to the system. The alleviation of the burden of proof suffices to protect the legitimate interests of the libellant, who may difficulties proving his/her case in terms of enforcement of their claims (Federal Court Ruling 132 III 715).

the Stock Exchange Law,[13] an issue prospectus is mandatory.[14] However, the prospectus liability does not only comprise the actual issue prospectus, but all notices and information given to investors, with which the investors are to initiate the purchase of shares and which are qualified for this.[15] This includes, for example, advertisements in daily newspapers, publicly distributed research reports, circulars or brochures. The prospectus liability also applies in cases in which a document similar to a prospectus is created and distributed without the existence of a legal obligation for the creation of an issue prospectus. Therefore, an information memorandum or placement memorandum delivered in the context of the private placement of shares with investors also falls under this category. The prevailing view is that in the end those cases also, in which no issue prospectus is created in spite of the existence of a corresponding obligation, are subject to prospectus liability.

The *corpus delicti* of prospectus liability defines a dereliction of duty in line with attribution of liability (illegality) the display or circulation of issue prospectuses or similar notices containing information that is incorrect, misleading or does not comply with legal requirements. Due to the fact that the legal requirements regarding prospectuses only exhibit limited comprehensiveness, priority is given to the question of incorrectness and misguidance. 'Incorrectness' arises *if* a statement made in a prospectus or similar notice does not correspond to the facts; this also includes incorrect assessments or inexcusably frivolous prognoses in which the line of discretion has been clearly crossed.[16] 'Misguidance' must be assumed when though no false statements have been made, the relevant circumstances have been kept secret, which, when disclosed, shed a different light on the statements.[17] Misguidance also arises if the necessary information is correct, but has been specified in an unclear and deceitful manner.

The investor must present proof that the loss accrued due to a deficit in the prospectus. This loss consists in the difference between the actual value of the shares and the hypothetical value, which would become apparent if the information in the prospectus were correct. The substantiation of the loss regularly proves itself difficult, because other

[13] Arts 652a, 656a para 2, 1156 CO; see Art 2 lit a SESTA. Federal Act on Stock Exchanges and Securities Trading of 24 March 1995 (Stock Exchange Act, SESTA; SR 954.1).

[14] Swiss law only provides for prospectus liability with the issue through a company; so-called 'secondary placements', in which a major investor sells his titles to the public, are not covered. In contrast, firm underwritings by a bank or a bank group, who apply for the issue with a view to public placement, are subject to prospectus obligation and prospectus liability.

[15] However, not included are notices, which are not given to potential buyers in line with the issue of shares, e g information provided by the board of directors in the context of a general meeting in form of a letter to shareholders, as well as information in the context of restructuring documentation (Federal Court Ruling 112 II 258).

[16] Federal Court Ruling 47 II 272.

[17] Federal Court Ruling 112 II 172.

factors can have an influence on the price of shares (eg general fluctuations of the market price, other price-sensitive facts within the company) and are difficult to quantify. Furthermore, the deficiency of the prospectus must be causal in proportion to the accrued loss, whereas the libellant only has to plausibly prove this causality.[18] The persons subject to the prospectus liability are liable for any kind of default, including negligence. The due care is objectified and acts in accordance with those competencies, which are postulated by the communication of the trading person, while the level of default of each person involved compared to the victim must be looked at separately.[19]

5.2.3 Formation liability

5.2.3.1 Facts of the case

Article 753 CO stipulates the liability of all persons involved in the formation in a qualified manner:

> Founders, members of the Board of Directors, and all persons involved in the formation become responsible for the loss of the company as well as the individual shareholders and creditors, if they
> 1. intentionally or negligently provide, withhold or conceal incorrect or misleading investments in kind, acquisitions of assets or the granting of special advantages in favour of shareholders or other persons in the statutes, a formation report or a capital increase report, or if they act contrary to the law in the context of approval of such a provision;
> 2. intentionally or negligently arrange for the incorporation of the company into the Commercial Registry on the basis of an attestation or certification containing incorrect information;
> 3. knowingly contribute to the acceptance of applications from illiquid persons.

5.2.3.2 Capacity to sue and be sued

Subject to formation liability are all persons 'involved in the formation'.[20] However, it also applies in capital increase proceedings.[21] In regard to capital increases, in particular the members of the board of directors are liable.[22] According to part of the theory, the statutory auditor, which audits the formation and capital increase reports,[23] also has the capacity

[18] Federal Court Ruling 47 II 272.
[19] Art 759 para 1 CO.
[20] In the formation phase, the circle of responsible persons particularly encompasses the founders (Art 629 CO), those acting at the behalf of the company prior to incorporation into the Commercial Registry (Art 645 para 1 CO), those active in the formation in a fiduciary capacity, the appointed authorities (especially future members of the board of directors) and possible investors providing the founders with a temporary loan for formation support (Federal Court Ruling 76 II 307).
[21] Arts 650 ff. See reference to the capital increase report in Art 753 para 1.
[22] There is competition for administration and management (Art 754 CO).
[23] Arts 635, 635a, 652e, 652f and 653f CO.

to be sued; another part of the theory on the other hand only apply the revision liability to the statutory auditor.[24] As with the prospectus liability, the analysts involved in the activities are also subject to the formation liability,[25] provided that their involvement was of an 'intentive' nature.[26] Furthermore, a registrar of the Commercial Registry may be held liable as well; he/she is also subject to the general tortious liability.[27]

5.2.3.3 Liability requirements

The formation liability knows four types of liabilities: (1) false information about the statutes, in the formation report or in the capital increase report in regard to contributions in kind, acquisitions of assets as well as to the granting of special advantages in favour of shareholders or other persons;[28] (2) contraventions in the context of approval of a qualified formation;[29] (3) intentional or negligent incorporation of the company into the Commercial Registry on the basis of an attestation or certification containing incorrect information;[30] and (4) acceptance of applications from illiquid persons.[31] The practical focus is not the non-compliance with legal regulations in the case of a qualified formation or capital increase. According to the case-law the responsible persons act contrary to duty especially when they simulate a formation cash down while only supplying the company with tangible assets and/or conceal a projected acquisition of assets,[32] overvalue contributions in kind[33] or are involved in asset payments of the share capital.[34] Unlawful is also the false confirmation of the free use of the shareholders' funds in case of a capital increase from capital resources[35] or the false confirmation of the existence and the allocation of a debt in case of allocation payment in full.[36] The enforceable loss generally corresponds with the difference between the company's (or the libellant's) assets as it would have been if no unlawful action had taken place and on the basis of the current assets. With quasi-payments in full or worthlessness of the contribution in kind, in most cases the loss is identical with the subscribed to, however not fully paid, share capital. The responsible persons are also held liable for slight negligence in cases regarding Art753 paras 1 and 2 CO. The facts of the

[24] Art 755 CO.
[25] As e g barristers and (controversial) the notary.
[26] See Federal Court Ruling 76 II 164.
[27] Art 928 para 1 CO.
[28] Art 753 para 1 CO.
[29] Art 753 para 1 CO.
[30] Art 753 para 2 CO.
[31] Art 753 para 3 CO.
[32] Federal Court Ruling 83 II 284; Federal Court Ruling 59 II 434.
[33] Federal Court Ruling 90 II 490.
[34] Federal Court Ruling 102 II 353; 76 II 307.
[35] Arts 652d, 652e para 3 CO.
[36] Art 652e para 2 CO.

case mentioned in Art 753 para 3 CO on the other hand assumes that the applications of illiquid persons were consciously accepted, which excludes negligence.

5.2.4 Liability for administration, management and liquidation (liability suit)

5.2.4.1 Facts of the case

The arguably most important lawsuit tool of any shareholder is the liability suit according to stock corporation law.[37] It permits action for damages against the formal and factual authorities of the company where these neglect their duties.

> 1 The members of the Board of Directors and all persons involved in the management or the liquidation are responsible for the losses, which were caused by intentional or negligent breach of their duties, taken by the company as well as by the individual shareholders and creditors.
>
> 2 Anyone who transfers the completion of a task to another executive body, will be held liable for any damage caused by them, unless he/she can prove that he/she used due diligence as necessary in the given circumstances in regard to choice, training and monitoring.

5.2.4.2 Liability requirements

5.2.4.2.1 Damage

The capacity to sue on the one hand depends on whether the titles are enforced apart from or in the company's insolvency, and on the other hand with which legal body the damage was incurred. The damage to the company signifies an indirect damnification of the shareholders and creditors. Shareholders and creditors, however, may also incur direct damage without damnifying the company at the same time. *Apart from insolvency* creditors as well as shareholders may sue for recovery for themselves, provided that they were *directly* damnified by the actions of the responsible authorities. In contrast, the *indirect* damage apart from insolvency may only be asserted by the company or a shareholder (with means of action for payment to the company).[38]

With regard to this case, creditors do not have the capacity to sue, because their claims are still covered in default of the company's illiquidity. *In insolvency* the shareholders lose their right to sue. Henceforth, the collectivity of creditors is entitled to the claims for damages and the insolvency management is entitled to their enforcement.[39] Only if the

[37] Art 754 CO.
[38] Art 756 para 1 CO.
[39] Art 757 CO.

insolvency management stays passive and/or waives the enforcement of the claims may the creditors as much as the shareholders exercise their right to sue for the assets on the basis of a release of covenant. For the circulation of the claim results, the suing creditors will be considered first. If they are fully satisfied with the result, the suing shareholders will have their turn.

The decisive factor for the differentiation between *indirect* and *direct* damage, according to the latest adjudication by the Federal Court, are the affected assets and not the legal basis and/or the neglect of duty concerned.[40]

5.2.4.2.2 Neglect of duty

The neglect of duty (illegality) constitutes the responsibility according to stock corporation law. At the same time, the law of responsibility does not describe the duties of the members of the board of directors in great detail, but rather only speaks of the damage 'caused by intentional or negligent neglect of their duties'.[41] Particularly the duties from the behavioural rules according to stock corporation law are relevant to the liability of the members of the board of directors: due diligence, fiduciary duty and equal treatment obligation. The due diligence qualifies as the core standard of the responsibilities according to stock corporation law.[42] However, the duties from the catalogue of the indefeasible and not transferable main tasks of the board of directors[43] are also of essential significance. Furthermore, other duties regulated by stock corporation law must be observed as well: eg the duties of investment share protection,[44] the prohibition of concealed capital gains distribution[45] as well as the general duty of the diligent administration of the company's assets. Other laws may apply as well, particularly the Stock Exchange Act for public companies and the criminal code. Liability-relevant duties can also be found in competition law, social security law and tax law.

The majority of liability cases concern neglects of duties by the members of the board of directors and management in the areas of finances and bookkeeping. Judicial practice provides the following examples:

It is controversial whether the non-compliance with corporate governance recommendation or lack of diligence in their implementation constitutes responsibility. As most of the Swiss corporate governance rules and standards do not have legal force and primarily contain recommendations and only few binding requirements for the implementation of better

[40] Federal Court Ruling 131 III 306, 311 E. 3.1.2; defined in 4C.122/2006 from 27 June 2006.
[41] CO 754 I.
[42] See CO 717.
[43] CO 716a I.
[44] CO 725.
[45] CO 678.

corporate governance, neglects of duties shall only be accepted with caution. Furthermore, many of these requirements and recommendations of corporate governance are geared toward 'best practice' and not to a minimal standard, whose neglect can be substantiated with a neglect of duty.

The members of the board of directors as well as all persons in charge of company management can be held responsible on the basis of stock corporation law, if they have neglected their duty of due diligence and ensuing legal norms. Therefore, the board of directors may generally conduct all legal actions entailed by the corporate purpose specified in the statues.[46]

Thus uncommon businesses are also permitted, as long as these are covered by the corporate purpose. In addition, successful economic activity always means risk assumption, which is why corporate decisions must always be granted scope of discretion. Within this broad scope of discretion, the board of directors may make decisions and take risks. Management decisions stemming from the exercise of 'informed business judgement', ie those that rest upon an appropriate basis of information, and that are anteceded by serious decision-making, therefore present a neglect of duty themselves, if they turn out to be false. Therefore, a bad decision or a major business loss alone does not constitute liability.

If justification exists, the executive body's neglect of duty is omitted. Particularly, should the victim ('*volentia non fit iniuria*') consent, the infringement is withdrawn. If, for example, the board of directors makes certain transactions with knowledge and approval of the sole shareholder, the basis for a late liability suit of the shareholder is omitted.[47]

5.2.4.2.3 Restriction of liability in context of authorised delegation

If the board of directors was authorised to transfer the completion of a task to a different executive body or party and acts on it, it will only be liable for the damages done by the third party, if it cannot prove that it used due diligence, training and monitoring suitable for the circumstances.[48] In addition, the delegation shall be carried out formally and in regard to content, ie the statutes must authorise the board of directors to do so and the exact arrangement must be determined in line with organisational regulations.[49] Furthermore, the delegation must be based on a recorded resolution of the board of directors. At the same time it must appoint the necessary authorities, define their roles and put

[46] See Federal Court Ruling 11611320; Federal Court Ruling 111 11284.
[47] Federal Court Ruling 131 111 640.
[48] Art 754 para 2 CO.
[49] Art 716b para 1 CO.

reporting procedures into place.[50] Physically the task must be delegable, ie it must not be part of the catalogue of not transferable and undelegable tasks of the board of directors.[51]

5.2.4.2.4 Solidarity

If the liability requirements are fulfilled, all responsible parties will be jointly and severally liable for the total damage,[52] as long as the damage is personally attributable due to their own default.

5.2.4.2.5 Discharge resolution ('décharge')

By means of discharge resolution, the general meeting may waive the enforcement of indemnity claims against potentially liable parties and grant it according to the 'décharge'.[53] The waiver only applies to events and facts that the shareholders were informed of at the time of the discharge resolution or of which they at least knew. The resolution does not involve any consequences regarding a liability suit of directly damnified shareholders, who did not agree to the enactment or purchased shares without the knowledge of the *décharge* after the fact. Shareholders who fulfil these requirements must lodge their claims within six months of the discharge resolution with the general meeting, otherwise the liability claim is forfeited.[54]

5.2.5 Revision liability

The statutory auditor is liable for any damages caused by the auditor's neglect of duty, ie intentional or negligent damages:[55]

> All persons involved in the annual and consolidated financial statements, the formation, the capital increase or the capital increased are responsible for the damages caused by intentional or negligent neglect of their duties toward the company as well as individual shareholders and creditors.

Due to this liability, the statutory auditors are not only exposed to the claims of their own client, but especially of the shareholders and (in the case of insolvency) of the creditors.

5.2.6 Claim in case of deficiencies in the organisation

Article 731b CO provides for a consistent system for the elimination and sanction of all deficiencies in the legally mandatory organisation of the

[50] Art 716b para 2 CO.
[51] Art 716a para 1 CO.
[52] Art 759 para 1 CO.
[53] Art 758 para 1 CO.
[54] Art 758 para 2 CO.
[55] Art 755 CO.

public company. If the company is lacking one of the required bodies or if one of its bodies is not composed rightfully, a shareholder, a creditor or the registrar of the Commercial Registry may request from the judge to take necessary measures. Particularly, the judge may:

(1) set a deadline for the company under threat of liquidation, within which the lawful status shall be restored;

(2) appoint the missing executive body or a trustee;

(3) liquidate the company and order the liquidation according to insolvency regulations.

If the judge chooses to appoint the missing executive body or a trustee, he/she will also provide the timeframe for which the appointment shall be effective. He/she commits the company to bear the costs and provide financing for the appointed individuals. It is for the court to prescribe the measures appropriate for the enforcement of the mandatory legal requirements considering the circumstances.

A shareholder may ask the judge to dismiss individuals appointed by him/her, should important grounds exist.

5.2.7 Action for restitution

If a member of an executive body or a person close to them has drawn benefits clearly disproportionate to the return, the shareholder may resort to a restitution claim:[56]

> 1 Shareholders and members of the Board of Directors as well as persons close to them, who have wrongfully and in bad faith drawn bonuses, royalties, other dividends or interim interest, are obligated to make restitution.
>
> 2 They are also obligated to make restitution for other benefits, provided that these are clearly disproportionate to the return and to the company's economic status.
>
> 3 The company and the shareholder are entitled to restitution; they will sue for performance in favour of the company.
>
> 4 The obligation of restitution will become time-barred five years after the performance has been received.

This provision is a particular case of wrongful enrichment. For the restitution, the applicable law assumes the recipient's bad faith. The burden of proof lies with the plaintive shareholder.

[56] Art 678 CO.

5.2.8 Action for nullification

Decisions of the board of directors as much as decisions of the general meeting may become the subject of an application for a declaration of nullification. In Article 706b CO the law mentions the most important facts of a nullity case, which, according to the reference provisions in Art 714, correspondingly also claim validity in regard to decisions of the board of directors.

> Null and void are especially those decisions of the General Meeting, which:
>
> 1. withdraw or restrict the right of participation in the General Meeting, the minimum votes right, the right to sue or other rights of the shareholder given by the law;
>
> 2. restrict the shareholders' rights of scrutiny beyond the degree admissible by law, or
>
> 3. disregard the basic structures of the public company or breach the regulations for investment share protection.

Thus, in particular, those decisions of the general meeting or the board of directors that restrict the shareholders' core rights, namely the legal right to participate, right to information and right to sue, which disregard the basic structures of the public company or breach the regulations for investment share protection, are considered null and void. Besides the deficiencies of the decisions of the general meeting in regard to content mentioned in the law, serious formal deficiencies also lead to nullification. Thereafter, a decision breaching mandatory legal norms apart from the stock corporation law would be null and void.

If an action for nullification filed by a shareholder is approved, it will apply to anyone; however, if the action is declined, it will only be valid among the shareholders. Nullification is also given when the norm breached by the decision had to be established in the public interest and when the breach is serious.

Besides the right to sue, Swiss law does not provide for a rescission of decisions of the board of directors.

5.2.9 Action for liquidation

Shareholders combined representing at least 10% of the share capital may sue for a liquidation of the company in terms of an '*ultima ratio*' or another appropriate solution reasonable for all persons involved, if important grounds for the action exist.[57]

[57] Art 736 para 4 CO.

The purpose of the action for liquidation specifically consists of the protection of the shareholders' minority from the majority's effective abuse of power. Strict criteria are applied to the existence of important grounds. The action for liquidation in particular contains an important protective function for the minority shareholders in private and smaller public companies, who are denied the exit option because (as is common with public companies) their shares do not have a market.

5.2.10 Overview of the regulation in the context of supervision by shareholders

Equality principle	Article 717 para 2 CO Articles 1, 24 para 2 SESTA Articles 9, 49 para 1 SESTO[58]
Tender duty	Article 32 SESTA Articles 28 ff. SESTO-FINMA[59] Articles 1 ff TOO[60]
Right of petition and inclusion on the agenda	Article 699 para 3 cl 2, 700 para 2 CO cl 2 SCBP[61]
Right of convocation	Article 699 para 3 cl 1 CO cl 2 SCBP
Right to vote and dismissal	Article 698 para 2 cl 2, 703, 705 CO cl 1 and 7 SCBP
Exoneration of the Board of Directors	Article 698 para 2 cl 5, 758 CO cl 1 SCBP
Approval of the annual financial statements	Article 698 para 2 cl 3 CO cl 1 SCBP
Invoice acceptance and usage of the net profit	Article 698 para 2 cl 4 CO cl 1 SCBP
Appointment of an enquiry board	Article 731 para 2 CO
Assessment of maximum indemnifications	Article 627 Number 4 CO 1991, cl 8-9 SCBP 2007 Article 716b para 1 CO Article 731e CO Article 731f CO

[58] Ordinance on Stock Exchanges and Securities Trading of 2 December 1996 (Stock Exchange Ordinance, SESTO; SR 954.11).

[59] Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading of 25 October 2008 (Stock Exchange Ordinance FINMA, SESTO-FINMA; SR 954.193).

[60] Ordinance of the Takeover Board on Public Takeover Offers of 21 August 2008 (Takeover Ordinance, TOO; SR 954.195.1).

[61] Swiss Code of Best Practice for Corporate Governance (SCBP) of Economiesuisse.

Approval of employee participation plans	Article 653 CO Article 627 Number 4 CO Article 717b CO Article 731c para 2 CO
Granting of authorisation for decisions by the Board of Directors	Article 716b CO Article 29 para BEHG 1995 Article 716b para 1 CO Article 731e CO
Restriction of transferability	Article 685, 685a ff. CO cl 2 SCBP
Electronic voting in the General Meeting	Article 689a para 2 CO Article 700 para 1 CO Article 701c CO Article 701d CO cl 7 para 2 SCBP 2002
Subscription right	Article 652b CO Article 652b para 5 CO
Right of pre-emption	Article 653c CO
Limitation of voting right privileges	Article 693 para 2 CO Article 704 para 1 Number 2 CO cl 2 SCBP 2002
Quorum requirements	Article 704 CO cl 7 SCBP 2002
Entitlement to representation in the Board of Directors	Article 709 para 2 CO
Right to information and inspection	Article 697 CO Article 716b para 2 CO Article 697 para 2 CO cl 6 and 8 SCBP cl 4.4 and Rz. 30 ff. GL 2006
Right to special auditing and inspection	Article 697a ff. CO Article 697a ff. CO cl 1 para 2 SCBP 2002
Prospectus liability	Article 752 CO
Liability suit	Article 754 CO
Claim in case of deficiencies in the organisation	Article 731b CO
Action for restitution	Article 678 CO
Action for nullification	Article 706b CO Article 714 CO
Action for liquidation	Article 736 cl 4 CO

5.3 ABUSE OF THE MARKET

5.3.1 Sanction in case of breach of the restriction of action by the takeover candidate's advisory board

Legal transactions concluded by the board of directors in violation of Art 29 para 2 or 3 SESTA, are in principle null and void in accordance with the theory's contents. The reason for this is that the Stock Exchange Act effectuates a temporary and factually limited shift of the allocation of competencies according to stock corporation law and therefore the legal consequence of a competency-adverse opt-out in accordance with Art 714 in conjunction with Art 706b para 3 CO in the nullification of the board of directors' decision in question persists.

The Stock Exchange Act prohibits the board of directors the 'decision of legal transactions'. The question is whether this addresses the actual decision-making and the prohibition therefore only applies to the company's internal relationships or whether the norm also limits the power of representation and therefore also controls the external relationships. If the norm only applies to the power of representation, it is possible that the third party concluding the unlawful legal transaction with the company is protected provided that they acted in good faith. However, if the above-mentioned prescription limits in fact the power of representation, the concluded legal transaction will be non-binding for the third party provided that they acted in good faith.

The prevailing opinion assumes that, in relation to the purpose of the norm as a means of protection of bona fide rights, only the power of representation as well as the authority of the board of directors is limited. Thus, if the third party acts in good faith, the contract concluded in violation of Art 29 para 2 SESTA will now be directed against the company. On the other hand, the accounting decision of the board of directors proves null and void.

As a result of illegal or unauthorised opt-outs, the shareholders may suffer a loss. An indirect shareholders' loss may arise, for example, when the board of directors, in the context of an illegal change, sells the 'crown jewels' below their actual value and the company is forced to assert the sale as a result of the acquirer's good faith. The board of directors is liable to the shareholders for the damages suffered by the conditions specified in Art 754 and Art 41 of the CO in conjunction with Art 29 paras 2 and 3 SESTA. In contrast, the provider cannot refer to the nature of the protection standard as in Art 29 paras 2 and 3 SESTA.

As a result of the competence shift caused by Art 29 para 2 SESTA of the board of directors to the general meeting, in contrast, the members of the board of directors' responsibility according to stock corporation law as specified in Art 754 CO to those who are responsible for the conclusion of

decisions of the general meeting is practically impossible; however, the entitlements of those shareholders, who did not agree at that time, are subject to change. Since the general meeting has the competency to decide over opt-outs starting with the submission of the tender, a corresponding decision consequently does not only contain a mandate for the board of directors, but also the exoneration of the same.

A different decision should only be made, if a member of the board of directors carries out an illegal decision, although he/she should have discovered its inadmissibility while using due diligence.

5.3.2 Sanctions according to civil law in the context of the violation of statutory reporting and reporting requirements in the course of a tender offer

Should the board of directors breach Art 29 para 1 BEHG by creating no or a false or an incomplete report, he/she is also liable according to civil law as to Art 754 CO and Art 41 CO in conjunction with Art 29 para 1 or Art 42 BERG. The shareholder may then suffer a direct loss especially if he/she, based on the faulty report, does not recognise a favourable offer as such or rejects it.

The Stock Exchange Act does not contain provisions on the liability consequences of false or incomplete information by the provider in the offer prospectus. As a constituent of the secondary market, the tender offer will be excluded on principle from the scope of the prospectus liability in accordance with Art 752 CO. However, the provider is liable for a faulty offer prospectus pursuant to Art 41 CO in conjunction with Art 24 para 1 BERG. Here, the principles developed in correspondence with Art 752 CO may be remedied.

5.3.3 Sanctions in the context of the neglect of duty for the submission of a tender offer

Given the public nature of the legal obligation to submit an offer, its legal enforcement is impossible. Should a transferee disregard the obligation to submit an offer, then the civil judge may suspend their voting rights. It is controversial whether this is an active or an independent legal remedy of capital market law. It is crucial that this does not qualify as a coercive administrative measure, but rather as a legal remedy of the Stock Exchange Law due to its legal basis according to stock exchange law, whose assessment is the responsibility of the civil judge. This way, the acquirer who is bound to submit an offer may be denied the exercise of control until the obligation to submit an offer has been fulfilled. Each shareholder, the takeover candidate as well as the merger commission observing the interests of the entitled shareholders in representative action have the individual capacity to sue.

5.4 INSIDER TRADING

5.4.1 Utilisation of the knowledge of confidential information

Article 161 Criminal Code makes the utilisation of the knowledge of confidential information a punishable offence.

> 1. Whoever, as a member of the Board of Directors, of the management, of the statutory audit devision or as designee of a public company or a company controlling or dependant on the same,
>
> as a member of a government agency or as a civil servant,
>
> or as an auxiliary person of one of the aforementioned persons,
>
> procures him-/herself or someone else a pecuniary advantage by using the knowledge of confidential information, the emerging of price of stock traded in Switzerland on or pre-market, other value papers or corresponding ledger effects owned by the company or options, which would significantly impact the same, or who uses this fact or forwards the information to a third party,
>
> will be penalised with imprisonment of up to three years or with a monetary penalty.
>
> 2. Whoever receives such information directly or indirectly from a person mentioned in item 1 and still uses this information to procure a pecuniary advantage,
>
> will be penalised with imprisonment of up to one year or with a monetary penalty.
>
> 3. […]
>
> 4. Should two public companies plan their incorporation, items 1 and 2 apply to both companies.
>
> 5. Items 1, 2 and 4 apply correspondingly when the use of the knowledge of confidential information is regarding a company's or a foreign company's shares, other value papers, ledger effect or corresponding options.

Insider trading is done by those who procure their own or someone else's pecuniary advantage by using confidential information available to him due to special relations with a company, which could potentially have a significant impact on stock prices should they become known.

5.4.2 Market price manipulation

Whoever, against their better knowledge, spreads misleading information with the intention to significantly affect the effects traded on the Swiss

market in order to procure an unlawful pecuniary advantage for him-/herself or a third party, or whoever purchases or sells such effects, which on both sides are directly or indirectly bought for the account of the same person or a person connected to the same purpose, shall be punished with imprisonment of up to three years or with a monetary penalty.

5.5 LITIGATION CONSIDERATIONS

5.5.1 General information

The responsibility according to stock corporation law exhibits a few special characteristics in comparison to general liability law.[62] Thus not only the company but also shareholders and creditors may sue for the loss incurred by the company, which may be implemented as mere reflex damage only because the stock corporation law provides the corresponding basis for a claim.[63] In addition, the members of the board of directors along with others involved, in particular with the members of the management or the statutory auditors, are sued jointly; also when their organisational positions and their damage contributions are not known to the libellant.[64]

The liability suit is a complex process and it must be distinguished whether the action against the executive bodies of a public company is filed in the context of insolvency or apart from insolvency, whether the applicant finds him-/herself directly damnified or derives his/her claim to compensation from the fact that the defendant executive body reduces the company's assets and thereby indirectly damnifies the libellant, and whether the libellant is a shareholder or creditor of a company.

5.5.2 Shareholders' right to information

The shareholders' right to information plays a central role in connection with the enforcement of the right to sue, namely the right to initiate a special audit.[65] This allows the general meeting the appointment of a special auditor under the supervision of the judge. The purpose of the special auditing institution in particular is the information search in terms of liability and revocatory claims. A special audit may be requested of shareholders even if rejected by the general meeting, as long as they represent either alone or with third parties 10% or two million francs of the share capital.[66] With regard to this case, the substantiation of damage to the company caused by illegal wrongful actions of the exercising bodies

[62] Art 41 ff. CO.
[63] See Arts 756 and 757 CO.
[64] Art 759 CO.
[65] Arts 697a ff. CO.
[66] Art 697b para 1 CO Code.

is additionally required.[67] The special audit can, to a certain extent, replace the 'discovery', which plays a central role in the United States.

5.5.3 Procedure and costs

Ordinary court proceedings generally require the exchange of two briefs by each party, followed, if necessary, by the submission of evidence.

Often, an advance payment for the approximate court costs and attorney fees must be made to the court, particularly by foreign claimants (cash or Swiss bank guarantee required).

Under Swiss procedural rules one should also be aware that costs and attorneys' fees for both sides are usually charged to the losing party. Thus, a claimant winning a case will be compensated for all or most of his court costs and attorneys' fees while the losing party ends up paying not only his/her own costs and attorneys' fees but also the other party's.

Contingent fee arrangements between clients and attorneys are limited in Switzerland.

5.6 ASSESSMENT OF SWISS REGULATION

5.6.1 Initial situation and assessment in an international context

Regarding the shareholders' right to sue it should be noted that Swiss regulations (for example in contrast to the German liability law) grant each shareholder the right of action and does not provide a percent hurdle.

The liability law can, by European standards, be regarded as rather strict (e g liability for minor negligence, consideration of natural presumptions in favour of the plaintiff's evidence, etc). The cost of the system is a deterrent; however, it is left to the discretion of the judge to split the costs between the company and the libellant should the claim be declined.[68] The economic incentives to file a complaint, however, remain few and contrast with US law as a plaintiff-friendly extreme (contingency fees, class-action lawsuits, 'discovery', low legal fees, no party compensation costs, etc).

The situation is not just that many Swiss citizens are directly involved with the financial market. Federal laws, including those that affect the financial market, are subject to the Swiss traditional democratic format of the facultative referendum. According to Art 141 of our Federal Constitution, 50,000 voters or eight cantons may request a popular vote

[67] Art 697b para 2 CO.
[68] Art 706 para 3, Article 756 para 2 CO.

within the referendum period of 100 days after the publication of federal laws by the Parliament. Thus the decision will only become effective, with the exception of urgent federal laws, once it has been approved after a vote. In other words, legislation in Switzerland means that the adjudication enacted by the previously already elected political representation of the people (the Parliament) may be made subject to repeated inspection by the people. Additionally, laws in Switzerland are only enforced after a very comprehensive consultation process, as all interested associations are called on to give statements, which, whenever possible, shall be considered with any legislative enactment. This may result in very long law revisions.

5.6.2 The development of the law and regulation

However, this now also means that this established law on the one hand features a certain slowness and that this legal tradition is in contrast to case-law, which is prevalent in Anglo-American countries. One must be aware of this fundamental difference when assessing Swiss law. After the financial crisis, the law ultimately has one essential function, to act as a corrective, because often the law has not yet grown enough with the new issues and must first adjust to new knowledge. In addition, Swiss law does not possess the complexity and density of rules exhibited by other legislative systems. Thus the decisions of the Swiss Supreme Court do not exhibit the absolute case-law, but rather their continuous development and seminal relevance, while a Swiss court does not have the capacity to influence the law to the same degree common in countries practicing case-law. The Federal Court is bound to federal laws, and in Switzerland the so-called application law pursuant to Art 191 BV applies. After the financial crisis, however, the question in this country now is: How far are our laws capable to withstand crises?

In principle, Switzerland has a good legislative system, which must continue to develop further. The need for further development especially arises in crises; history teaches us that those have always lead to reactions of the legislature, sometimes even to the transformation into criminal law. The United States has often been responsible for such legal developments and, as a result, other countries have gone through the same process. Typical is the introduction of the US Securities and Exchange Commission (SEC) after Black Friday in 1929; in 1979 the Lockheed scandal lead to the FCPA Foreign Corrupt Practices Act; and, last but not least, the year 2002 marked the birth of the Sarbanes Oxley Act as a result of the Xerox and Worldcom scandals. Especially the latter law also resulted in extensive legislative changes in Switzerland as well as in other European countries. After a financial crisis the question has to be whether access to law is both substantially and formally guaranteed. As a result, we will discuss to what extent the Swiss legislative system allows for corrective possibilities within an investor's crisis, or to what extent changes are underway.

5.6.3 Hard cases make bad law

It is questionable whether this principle of English law is also valid for the Swiss legal system. This is rather doubtful. By this we mean that extreme cases lend themselves poorly to the preparation of new laws. However, what happened in Switzerland and in Europe generally as a result of financial rejection were not extreme cases, but rather unexpected mistakes caused by negligence.

5.6.4 Discussion in Switzerland

In Switzerland, the leading banking institutions recognise that conflict resolution is not provided by existing procedural and substantial regulations. Thus, for example, Credit Suisse paid compensation to 3,600 victims of the Lehman Brothers insolvency; a collective approach would have been difficult. Whether the legal basis would have constituted the claim sufficiently is questionable. The bank has acknowledged that the confidence of customers can best be won back with a fair offer. Undoubtedly, CS is a bank, which, in comparison with other European countries, paid the most generous and complete compensation for its victims. Last but not least, this brought them the title of 'best bank in Europe'. Other banks as well, such as for example the Luzerner and Berner Kantonalbank, settled the disputes themselves without legal recourse and despite the lack of access-to-law. The top executives of the much-scolded UBS realise that the entire law enforcement system and possibly the legal basis of responsibility should be reconsidered. In private conversations they recognise this without compromise. This understanding exists and can make a big difference.

The Swiss Financial Market Supervisory Authority has presented a paper for consultation, which aims to improve the protection of assets. This is also one of the more serious tasks of this institution. At the present time, therefore, a comprehensive discussion is taking place as a consequence of the crisis; here, the readiness and ability to assume risk are discussed as well as the audit of general terms and conditions by financial supervision, extensive disclosure requirements, reporting requirements for client meetings, etc. Switzerland has learned its lessons from the crisis and has tried to improve the enforcement options of the laws. It should and will take much to transform Switzerland into the most attractive banking centre, not only in regard to know-how. We believe that banks in Switzerland are the treasure and not the sediment. Switzerland also should assume a leading position in regard to conflict resolution in investor disputes.

5.6.5 Consequences of the crisis: theses for a future-oriented regulation system

The legal processing of the consequences of the financial crisis has proven difficult in our country due to flaws inherent in the legal system. Victims only received financial compensation by means of a legal 'crowbar' or as a result of the foresight of a few institutions. In this context, CS has received too much criticism and too little recognition for their actions.

It is not acceptable that we do not draw any legal consequences from the financial crisis. The soul of the 'bank' is confidence, but this can very quickly metamorphose into mistrust. Trust does not only mean high profits in the financial market; another reason for trust also is the question of how one handles situations of loss with customers; or, to put it in the words of former West German Chancellor Helmut Schmidt: 'Character emerges in crisis'. Fair treatment is the key to winning back the customers' trust, which must happen particularly fast. Legislative changes take a long time; the banks could act in a self-regulating manner in advance. Because court cases last too long in Switzerland, are too expensive and delayable, one should also seek the help of alternative forms of dispute resolution.

Such a system is the Swiss-Banking-MedArb-System,[69] a combination of previous mediation and the failure of the same immediately following the Court of Arbitration (the 'Arbitration'). This procedure is particularly recommended to the financial centre of Switzerland due to its fast, discrete, inexpensive and uncomplicated and confidence-building nature. Thus possible factors could be: oral procedure only, final authority sensitivity, other languages besides the national languages (eg English), absolute secrecy, court costs only in regard to time expenditure and not the amount in disputes, regardless of the outcome halving of the costs, and the principle that each party may be required to bear their own legal fees.

5.6.6 Amendments also in other areas

Today, in case of a financial claim with a large group of persons concerned, access to law does not exist. They are not provided the opportunity to sue, because the court costs are prohibitively high and because efficient process-economical organisational formats (eg pattern-process) do not exist. The stonewalling strategy or the 'walls-building' on the part of the defendant then leads to 'apathy' on the part of the victims. In year two after the Lehman Brothers and in the year of the BP-scandal, the need for collective actions cannot be seriously doubted anymore. We need an efficient process so that groups can join forces and file joint

[69] Daniel Fischer 'In case of a dispute, the banks shall offer their customers fair solutions' in Claude Baumann and Ralph Pöhner (eds) *New Beginning, 50 ideas for the strong financial centre Switzerland* (Verlag Neue Zürcher Zeitung, 2010), p 137 ff.

complaints; a moderate group action Swiss-style. Currently, our concept is distorted and dominated by the American class action, however, a de-Americanisation of this concept is necessary. The Swiss format should not be able to express any form of punitive damage, which can destroy a company, or incriminate the vulnerability of business secrets through extensive disclosure requirements in terms of the US document discovery. The class action also must be depoliticised. Its purpose should be to serve the 'poor' as well as the wealthy.

5.7 CONCLUSION

Unfortunately, financial crises entailing undue capital losses for investors cannot be ruled out in the years to come. Furthermore, this means that the legislation, particularly access to justice, must be improved and adapted to the challenges of the twenty-first century. Compared with other European countries, Switzerland has been relatively generous in its compensation to investors affected by the financial crisis. Swiss banks have today realised that our country's asset management ranks among the best in the world; it is also significant that, in the event of difficulties, Switzerland offers the best conflict resolution mechanism for the investor.