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Bruno M. Bernasconi* **and Evelyne Bernasconi-Mamie****

Mandatory and Non-mandatory Rules in Swiss Corporate Law – an Overview

I. Introduction

A. Approach and Scope of the Paper

The topic addressed in this paper could be perceived as being one essentially theoretical in nature. Its treatment could start with developing and expounding on differentiations between various types of mandatory rules, proceed to a thorough discussion of their ramifications and the relation between the single types of mandatory rules and their relation to, and interplay with, non-mandatory rules, to finally usher into a study of corporate law through the lens of this analytical framework.

Although we will not entirely abstain from discussing the concept of mandatory (private) law within the Swiss legal order as a whole we do not dare to rely our discussion of the topic on such an aspiring epistemological underpinning. Paying a tribute to experience and attitude of practising attorneys – and mindful of the fact that any discussion of the topic in a congress paper of 'reasonable' dimensions will likely resemble the famous Swiss cheese renowned for its gaping holes – we do not dwell extensively on theoretical considerations. Instead we proceed to discuss the topic within a framework oriented primarily after the different 'players' involved in bringing the abstract legal rules to work, to the driving forces that have the law materialize.

The way rules are enforced – how the law is brought "to action" – is quite important in corporate law when an assessment of the practical impact ('quality') of a mandatory or non-mandatory provision is to be made. The 'bite' of a legal provision depends greatly on who is responsible for its enforcement and what mechanism has to be triggered to make enforcement happen. This may be a private party, like a shareholder, a governmental office or a regulatory body or even a self-regulating

* Lic. iur. HSG Bruno M. Bernasconi, LL.M. (N.Y.U.) is a partner with the law firm Bernasconi & Bernasconi, Zurich.

** Dr. iur. HSG Evelyne C. Bernasconi-Mamie LL.M. (N.Y.U.) is a partner with the law firm Bernasconi & Bernasconi, Zurich.

organization (SRO) and it may be done in various ways, e.g. through a private parties' opposition or complaint, *ex officio* by a cantonal or federal office or agency either denying a request or issuing an order, to name just a few[1]. Finally, disregarding a mandatory provision may – by mere operation of law – entail serious consequences for the company or its promotors, namely render null and void certain desired legal effects (e.g. the existence of the corporation itself). On the other hand, mandatory law can remain dead letter if it doesn't serve real interests while non-mandatory law can be of paramount practical importance if there are powerful interests driving its enforcement. This also allows to integrate issues surrounding shareholder agreements[2] and their relationship to a corporation's articles of incorporation[3], as a separate part in the section on the enforcement by shareholders.

It would obviously go beyond the scope of the paper to try to be in any sort comprehensive in citing all legal provisions or other types of rules enforced by one or another party or furthering a specific interest. We thus limit ourselves to identify and discuss a number of core issues the approach to which appears to be illustrative for the ways and mechanisms Swiss federal legislature found fit to cope with the problem of balancing the need for reliability of the legal order with the requirement of adaptability of the latter to the needs of the individuals using the corporate vehicle. The purpose of the paper will be fulfilled if it enables the reader to see how the implementing mechanisms in Swiss corporate law basically look like and which interests are considered worth of protection. It would be daring to hope that the overview puts the reader in a position to assess how far – and from whose perspective – the body of Swiss corporate law can be regarded as an "enabling" legislation; we will be more than satisfied if we manage to convey just an idea of how things are in this respect.

B. Subject Matter(s) of the Paper (Some Remarks on Terminology)

When speaking of the "corporation" in this paper we refer to the share corporation (french: *société par actions;* german: *Aktiengesellschaft)*, a

1 We will let aside all enforcement mechanisms involving criminal sanctions complementing private law enforcement.

2 As such, not a subject matter of corporate law, but in practice a very important device in the corporate reality (see III.B.4 *infra*).

3 Throughout this paper we shall use the label "articles of incorporation", most common in translations of laws and literature on Swiss corporate law in the english language to denote the fundamental charter of the corporation, and which also could be called "by-laws".

type of company defined and governed by art. 620 to 763 of the Swiss Code of Obligations (hereinafter "CO", or "the Code"). We do not overlook that in a comparative perspective the "corporation" label might be understood to denote a much wider array of entities, depending on whether the classification is made with respect to presence or absence of legal personality or following other criteria, such as the non-persistence of contractual relationships between the members (shareholders) after the formation of the corporation[4], or still other criteria. However, as it appears, it would have us stray far afield to try to address all types of legal persons[5] and therefore we focus on the corporation (which we will also call company) in the narrow sense[6].

Occasionally, we will also make reference to or consider the situation of the Limited Liability Company (hereinafter: LLC) governed by art. 772 to 827 CO. This is justified both by practical and theoretical considerations. First, since the CO was substantially overhauled in 1991 after a legislative process of almost thirty years, the LLC – for decades a quite unpopular form for incorporating a business[7] – has gained relative attractiveness vis-à-vis the latter[8] and thus become a truly alternative vehicle for incorporation, in many situations a functional equivalent, sometimes maybe the better option[9]. Second, by virtue of the frequent cross-references in the law of the LLC leading to the applicability of whole complexes of corporate law provisions contained in the CO the LLC

4 GEENS, Koen, in his introduction to the *International Encyclopedia of Corporations and Partnerships*, The Hague 1991 et seq., general section, 22, uses this criterion to draw the line between corporations and partnerships. The Swiss corporation is not susceptible to be construed as a "contract corporation" and the post-incorporation legal relationship superseding the pre-incorporation contractual relationships between founders is of fundamentally non contractual nature.

5 Apart from the corporation this are: The limited liability company (french: *Société à responsabilité limitée;* german: *Gesellschaft mit beschränkter Haftung)*, the cooperative (french: *société coopérative;* german: *Genossenschaft)*, the association (french: *association;* german: *Verein)*, and the foundation (french: *fondation;* german: *Stiftung)*.

6 It could even be justified to label all *universitates personarum* (German: *körperschaftlich organisierte Personenverbindungen*) "corporations", or to use the term to denote all business companies with legal personality.

7 DRUEY, Jean Nicolas, "Der Dualismus von AG und GmbH in der Schweiz", in: ROTH, Günter H. (Hrsg.), *Das System der Kapitalgesellschaften im Umbruch – ein internationaler Vergleich*, Köln 1989, 107 et seq., at 110, put it bluntly: "Today we can say generally: Nobody in Switzerland thinks about incorporating in the form of an LLC." [translated by the authors].

8 The overall number of incorporated LLCs has increased sharply from around 2 500 in 1991 to around 52 500 in 2001, with the number of corporations remaining almost stable at about 170 000 throughout that decade. Interestingly, the gain in relative attractiveness of the LLC has ensued from the integration of a couple of mandatory provisions into the body of corporation law in 1991, such as the increased minimum share capital of CHF 100'000, a limitation also of the small and close corporations' possibilities to restrict share transfers by means of the articles of incorporation, and higher standards for annual financial statements and the annual business report entailing amongst other increased cost for auditors' fees, and similar charges.

9 See III.A.1.e) *infra*.

assumes a structural similarity with the corporation[10] and could even be qualified to be just a particular type of corporation with some distinctive features.

On one hand we restrict the ambit of this paper to essentially one single form of an incorporated business entity. On the other we will take into account laws (statutes / ordinances) rules and regulations not traditionally regarded or referred to as 'corporation law' or 'corporate law', understood in a narrow sense[11]. In this respect we proceed in a somewhat similar way to that chosen by CONARD, it in his well-known article on the laws of corporations in the US, published in the seventies[12]. CONARD distinguishes separate bodies of what he calls 'laws of corporations', amongst them the corporation codes (i.e. the 'corporation laws'), judge-made law of corporations, securities and securities transfer laws, rules of the stock exchanges, and accounting standards. This corresponds quite adequately to what is being taken into account in the present paper and which as a whole, is referred to as 'corporate law'[13] in a wider sense. Therefore, "rule" will be understood to cover a wide array of sources, ranging from formally enacted laws (statutes) of the Swiss parliament to ordinances of the Swiss Federal Council, to judge-made law to rules created by regulatory authorities or entities like self-regulating organizations (SROs) or even sets of rules laid down by trade or professional associations[14] – as long as they can be said to be binding because the law directly or indirectly refers to them.

10 The common denominator of the corporation and the LLC that sets them apart from other forms of legal entities is that both are capital-based. In this sense Swiss law knows a 'dualism of capital companies' (german: *"Dualismus der Kapitalgesellschaften"*). The law of the LLC is currently in the midst of a legislative process aiming at a clear (re)definition of the "new" LLC vis-à-vis the corporation. At the time this article is being finished there exits a pre-print version of the pertinent Federal Council's Message to the Parliament [german: *Botschaft des Bundesrates zur Revision des Obligationenrechts (GmbH-Recht sowie Anpassungen im Aktien-, Genossenschafts-, Handelsregister- und Firmenrecht)* which will ultimately be officially published in the Federal Gazette (french: *feuille fédérale;* german: *Bundesblatt).*

11 In that traditional, narrow sense, corporate law is made up of the provisions contained in the CO and the Civil Code (CC), in the latter's art. 52 – 59, with the inclusion of the ordinances (french: *ordonnances;* german: *Verordnungen*) thereto.

12 CONARD, Alfred E., "An Overview of the Laws of Corporations", 71 Mich.L.Rev. 623, 623 (1973). CONARD compares the evolvement of what he calls the 'laws of corporations' from the original US states' 'corporation laws' in the middle of the nineteenth century with that of the City of London since medieval times, growing far beyond its original narrow confines and encompassing more and more boroughs with the result that the aggregate generally came to be known as 'The City of London' (with the exception of the local residents who continued to call 'the City' only the originally walled square mile).

13 Our notion of corporate law is not so broad as to embrace further 'bodies of the laws of corporations' addressed by CONARD (see preceding fn.) – neither antitrust laws nor tax laws will be dwelled upon.

14 Examples are accounting standards like the International Accounting Standards (IAS) or the *Fachempfehlungen zur Rechnungslegung* (FER), a homegrown and less ramified Swiss set of accounting standards, a sort of Swiss GAAP. The standards emanate from a non-legislative body like a committee sponsored by one or several professional associations. By virtue of their wide

C. Mandatory and Non-mandatory Corporate Law (Rules)

1. Corporate Law as Partly Private Law, Partly (Federal) Public Law

Switzerland, a classic civil law country, has always known a distinction between public and private law. With the 1898 amendment to the Federal Constitution (FC) of 1874[15] the distinction became of pivotal constitutional importance, because the extent of the legislative power newly granted to the federal government depended directly upon the drawing of the line – sometimes quite fine – between private law and public law[16]. The specific constitutional setting as such is of no importance to our subject – all relevant laws in the field, whether private or public, are federal today. Yet the difference in scope and character of the two bodies of law may provide us with some guidance when pondering the question whether the Code's – still the centerpiece and main *sedes materiae* of Swiss corporate law[17] – or the courts' answers to specific issues are in line with the "enabling"[18] spirit of a private law codification[19]. In this context it is worth mentioning that public law is generally characterized by its inherently mandatory character,

acceptance they are often referred to as "soft law". See e.g. Böckli, Peter, *Einführung in die IAS*, Zürich 2000, n 6.

15 Art. 64 (2) to the 1874 FC, in conjunction with its art. 64 (1) provided for comprehensive and exclusive legislative authority of the federal power in the area of private law *(droit civil; Zivilrecht)* and laid the basis for the enactment of the 1907 CC, while art. 3 of the 1874 FC at the same time had the single cantons retain all "rights" (i.e. powers) not limited – namely taken away – by the FC itself. This model has been fully integrated into the new FC of April 18, 1999 that entered into force on January 1, 2000 (art. 3 and art. 122).

16 Several different theories have been developed over time to distinguish the two bodies of law, none of them fully resolving the problem. What prevails in today's court practice is a combination of theories, with an emphasis on the so-called theory of interests (german: *Interessentheorie)* that looks to wheter a provision of law involves primarily private or public interests (in the latter case it is public law) and the subordination theory (german: *Subordinationstheorie)* focussing on whether the state is in a position to unilaterally determine the content of the legal relationship addressed by the legal provision in question (in which case it is public law) or not. For the different theories see: IMBODEN/RHINOW/KRÄHENMANN, *Schweizerische Verwaltungsrechtsprechung*, Basel/Frankfurt am Main, 1976/1990, Nr. 1 B IV a.

17 The Code entered into force in 1882, well prior to the Civil Code. In 1911 when the latter was enacted the CO became the Civil Code's fifth part in 1911 and thereby completed the core Swiss private law codification. Other important pieces of Swiss private law legislation are the federal copyright, patent, trademark, unfair competition, antitrust, and the private international law acts.

18 ROMANO, Roberta, *The genius of American corporate law*, Washington 1993, 85 characterizes the modern (US State's) corporation codes as tending " ... to be enabling rather than mandatory statutes" and goes on to describe them as " ... standard form contracts specifying the rights and obligations of managers and shareholders, which can often be altered by private agreement to suit the circumstances of particular firms." Thereby she posits what appears to be a main, if not the core issue behind the theme of this paper: The "mandatory-enabling debate" (ibidem, 89).

19 Historically, the Code has always been seen as "enabling" in the sense of providing a liberal basis for the individual's economic activity, built around the governing principle of freedom of contract, thereby implementing economic constitutional rights such as the freedom of trade and industry (french: *liberté de commerce;* german: *Wirtschaftsfreiheit)* and the guarantee of private property (french: *garantie de la propriété*; german: *Eigentumsgarantie*). This is also true of its corporate law part, see: HUNGERBÜHLER, Caspar A., *Die Offenlegung aus der Sicht des Unternehmens*, Freiburg 1994, 6.

while private law, especially contract and commercial law[20], is traditionally considered to be typically lenient[21]. Commensurate with this understanding is the idea that public law is to be enforced by the government while private law typically operates and is effective without the latter's involvement[22]. There are many important exceptions to this basic order, though, from which our topic partly draws its interest.

2. Corporate Law as Partly Mandatory Private Law *(ius cogens)*

First, a word on mandatory private law (*ius cogens*) in general. A "blackletter law" definition would say it is (private) law governing legal relationships between two or more parties, the content of which cannot be altered by their agreement. Whether a private law provision is to be qualified as mandatory is a question of interpretation. Often the wording of a provision leaves no doubt as to the answer to this question[23] – if this is not the case, the answer must be given in the light of the *ratio legis*[24], its purpose and spirit. Both the quest for the *ius cogens* quality of a provision as such and the issue of the legal consequences agreements or other legal acts (German: *Rechtshandlungen*) not in compliance with that provision will entail are to be resolved considering the nature or relevance of the interests the provision is designed to further. Albeit these two topics are related to each other they are different[25], and we treat them accordingly. After this, we briefly mention the distinction between one-sided and two-sided mandatory rules.

In ascertaining the *ius cogens* quality of a rule some guidance can be derived from art. 19 (1) CO, guaranteeing freedom of contract "within the

20 Some areas of private law, codified in the CC, have always contained a very considerable amount of mandatory provisions, e.g. family law, inheritance law, and property law.

21 Over time, amendments to the CO's contract law sections tended to contain more and more mandatory provisions, shifting away from the original "ideological" fundament of the code (see ENGEL, Pierre, "Cent ans de contrat sous l'empire des dispositions générales du Code fédéral des obligations", Revue de Droit Suisse, NF 102, 1983, vol. II, in particular pp. 35-40, with critical and cautionary remarks).

22 JÄGGI, Peter, Privatrecht und Staat, Zürich 1976, 31. Of course, in a litigation setting it will ultimately always be the courts to adjudicate, unless arbitration has been provided for.

23 GUHL, Theo / KOLLER, Alfred, *Das Schweizerische Obligationenrecht*, 9. Aufl., Zürich 2000, § 7 N 21.

24 KRAMER, Ernst A., in: *Berner Kommentar zum Schweizerischen Privatrecht – Obligationenrecht*, Bern 1990, n 146 ad Art. 19-20 OR.

25 KRAMER, Ernst A., (fn. 24), n 135 ad Art. 19-20 OR. To mention just one example illustrative for this difference: Art. 683 (1) CO simply states: "Bearer shares may only be issued after payment of the full par value" – clearly a mandatory provision, but as such not allowing conclusive inference as to the legal status of shares issued in neglect of this prohibition. Only Art. 683 (2) CO makes clear that "shares issued prior to full payment are null and void". Obviously, if the nullity of not fully paid-up bearer shares would automatically ensue from the mandatory character of art. 683 (1) CO then art. 683 (2) would be superfluous.

limits of the law" with them also applying to the content of articles of incorporation or articles of association[26]. These limits, applied as a sort of "control criteria"[27] and used to assess the legal validity of a contract's content are those generally addressed in art. 19 (2) and art. 20 (1) CO, i.e. *ius cogens*, illegality, public policy[28], violation of *boni mores* and violation of basic personal rights[29]. The first criterion obviously nothing but presupposes what is being looked for, the second is purely formal and obviously cannot help with the task. The other three, however, refer to material interests to be identified when deciding on the *ius cogens* quality of a provision and namely "public policy" is generally recognized to be of special interpretive value in this context[30], indicating *ius cogens* quality in all areas of private law, corporate and other.

As for the consequences (sanctions) in case of violation of mandatory provisions the situation is as follows: If the content of a contract – or of a shareholders' meeting resolution or a board resolution, for that matter – violates a mandatory provision it is by far not always null and void, but often merely subject to avoidance or invalidation upon challenge by an interested party (a "player", as we put it in the beginning). Under art. 20 (1) CO the (radical) sanction of nullity applies only if a contract (or, for that matter, a resolution), respectively a specific clause in question[31] has "illegal contents". While the technical concept of "illegality" embodied in art. 20 (1) CO certainly embraces all violations of (obviously mandatory) provisions embodying public policy, *boni mores*, and basic personal rights mentioned in art. 19 (2) CO this goes not *eo ipso* for all cases where *ius cogens* and even (federal or cantonal) public law is not complied with. Both the majority of legal scholars and court practice[32] have restricted the application of the nullity sanction to cases where a provision explicitly or by its spirit requires that the legal act in question – or a legal situation ensuing from it – not exist at all. This *ut res magis valeat quam pereat* or

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26 See BGE 80 II 123, at 132.

27 KRAMER, Ernst A., (fn. 24), n 123 et seq. ad Art. 19-20 OR, particularly N 128 calls them (german) *Kontrollkriterien*.

28 Art. 19 (2) CO speaks of (french) *ordre public*, (german) *öffentliche Ordnung*, and (italian) *ordine pubblico*. We avoid the linguistically analogous term "public order" for which no accepted notion appears to exist in U.S. legal language and which doesn not evoke the appropriate idea to a reader with an english law background (see e.g. *Osborn's Law Dictionary*, 7th ed., London 1982, p 270 – entries 'public order' and 'public policy').

29 Art. 20 (1) CO also mentions "impossibility" as a ground on which a contract is to be regarded null and void, but this does not consist a limit as understood here.

30 KRAMER, Ernst A., (fn. 24), n 152 ad Art. 19-20 OR, with many references to other authors.

31 Art. 20 (2) CO – provided the contract would not have been entered into at all without that clause, in which case the contract as a whole is void.

32 For references to Swiss Supreme Court cases see: GAUCH, Peter / AEPLI, Viktor / STÖCKLI, Hubert, *Präjudizienbuch zum OR – Rechtsprechung des Bundesgerichts*, Zürich 2002, N. 7.

favor negotii principle is also part of Swiss corporate law, as illustrated by art. 643 (2) CO, which reads: "Legal entity is acquired upon entry (*scil.* into the Commercial Register) even if the prerequisites for the entry were not actually fulfilled".

Swiss law knows a distinction between "one-sided" and "two-sided" mandatory private law provisions. While the former type of provision practically aims at either protecting the parties against each other or indirectly protecting third parties (or the public) by unalterably fixing certain contractual contents the latter has the protection of one of the parties at its heart and is therefore susceptible to be changed (only) in favour of that protected party. The distinction is best known in employment law where two-sided (absolutely) and one-sided (relatively) mandatory provisions are explicitly mentioned and listed in art. 361 and art. 362 CO. There is no such list in the corporate law area but it is appropriate to call one-sided mandatory corporate law provisions those which ensure minimum protection of (minority) shareholders, but allow for enhancement of the protection level by the articles of incorporation. Such provisions are e.g. art. 700 (1) CO (general meeting of shareholders to be called at least 20 days before it is held), and art. 704 (1) CO[33] providing for a two third quorum of the votes represented at a shareholder meeting taking an "important resolution" on subjects listed under paras. 1 – 8 of same provision.

3. Principles Underlying Mandatory Corporate law

a) Minimum fixation of the structural shell and establishment of checks and balances to protect shareholders and the public

The concept of mandatory law can be said to be firmly entrenched in Swiss private corporate law and Swiss commentators typically stress that the bulk of it is mandatory in its nature. A narrower look shows that there are at least two different basic principles to which mandatory provisions can be linked and which they are designed to bolster.

On one side, in the general historical perspective, the role of mandatory corporate law is a consequence of switching the mode of

[33] DREIFUSS, Eric L. / LEBRECHT, André, in: *Kommentar zum Schweizerischen Privatrecht – Obligationenrecht II*, Basel/Frankfurt am Main 1994, N 3 ad Art. 704 OR underline that under the 1991 Code all qualified statutory *quora* have become one-sided mandatory rules. Under the 1936 Code, such a quorum could be lowered or done away with altogether by means of the articles of incorporation. Similarly, in the *Botschaft über die Revision des Aktienrechts vom 23. Februar 1983*, 158 the term one-sided mandatory is used – albeit inaccurately – in connection with the limitation on share transfer restrictions in the articles of incorporation, later enacted as art. 685b (7) CO.

incorporation from what had originally been the *octroi* system[34] to first the *franchise* system in the proper sense, and then to the system of *normative provisions*. The latter provides for incorporation of an entity under the sole condition that certain predefined requirements are fulfilled, thus ensuring accessibility of the vehicle to everybody and creating reliable transparency for both incorporators, potential shareholders, and the general public. From the outset in 1881 Swiss corporations law on the federal level has embodied the latter system – with mandatory provisions serving the principle of minimum structural homogeneity of corporations. Obviously, para. 3 of art. 706b CO discussed below fits perfectly into this picture.

On the other side, there is the idea of counterweighing structural imbalances by protecting interests of groups considered to be in a typically weak position in connection with specific issues, e.g. (namely) minority shareholders (access to information on the corporation and control on how it is run by management and the board). Paras. 1 and 2 of art. 706b CO discussed below clearly are furthering these interests. It can be said that the amount of mandatory provisions serving this principle of "protection of the weak" has been gradually increased over a long period of time. It also appears that this process is hardly over and the wording "... other rights mandatorily granted to shareholders by provisions of law" in para. 1 allows for the incorporation of new rights with *ius cogens* quality, whether created by courts interpreting existing legal provisions or by the legislature enacting amendments to the Code. It is foreseeable that some of the postulates of the corporate governance discussion which today are contained in "best practice" guidelines not legally binding might pass through the stage of "soft law" to ultimately enter the body of corporate law in the guise of mandatory rules[35].

b) The role of corporate-law-specific public policy

As can be gathered from the above (I.C.2. *supra*) public policy plays an important role both as an interpretive guideline and a material principle for the content control under art. 20 (1) CO. In corporate law, the role of public policy is even heightened as the general clause contained in the

34 Under this system the corporate entity was created by a Royal Charter of the sovereign (king) upon a case-to-case basis, typically linked to the grant of a monopoly in a specific trade or area. See FARRAR, J. H. / HANNIGAN, B.M., *Farrars Company Law*, London/Edinburgh/Dublin 1998, p. 16-17.

35 As this article is written, a September 18, 2001 draft for a "Swiss Code of Best Practice" (authored by Peter BÖCKLI in behalf of *Economiesuisse*, the Swiss umbrella organization for industry and trade) and a "Guideline on Information concerning Corporate Governance" (SWX Transparency Guideline", authored by Hans Caspar VON DER CRONE in behalf of *the Swiss Stock Exchange – SWX*) are widely circulated amongst interested parties in order to reach final versions to be approved by the respective organizations – a first step in this process.

general part of the CO with its inherent vagueness is put in more concrete terms by art. 706b CO. The latter (in its para. 1) provides for nullity of shareholder meeting resolutions doing away with or curtailing the shareholders' right to participate in the general meeting of shareholders (art. 689 CO), the minimum voting right [art. 692 (2) CO], the rights to sue, and – as the law puts it – "other rights mandatorily granted to shareholders by provisions of law". Under para. 2 shareholder meeting resolutions curtailing the shareholders' control rights beyond the extent the law allows for are null and void as well, a concrete application of this is addressed in art. 729c (2) CO which declares a shareholders' resolution approving annual accounts and use of profits in the absence of an auditors' report to be null and void; under art 706 b (3) CO the same goes for resolutions neglecting the "basic structure of the corporation" or violating the rules concerning the protection of the capital base.

3. Corporate Law as partly Non-mandatory Private Law

Referring to ROMANO (I.C.2., particularly fn. 18) and applying a qualification used in connection with the discussions turning around the reasons and justifications for the success of the corporation law model of the US state of Delaware we may say that the non-mandatory provisions of the corporate law body are those ensuring flexibility and thus determining the "enabling" quality of Swiss corporate law.

II. The Models of Corporations in Swiss Law

Traditionally one tenet of Swiss corporation law was its "unity", i.e that there existed only one legal type ('model') of corporation[36]. The business historic lawmakers in 1881 and 1936 had in mind and to the needs of which they tailored the statutory provisions was that of a the large corporation[37], designed to generate profits, owned by many shareholders with no special personal ties to either the corporation or between themselves. Yet the law never was meant to be an "one size fits all"

[36] In response to the existence of industry-specific requirements there exists special federal legislation, e.g. for banking corporations and insurance corporations. The corporations governed by those acts cannot be said to be separate 'models' or 'types' just because they have to comply with additional sets of rules, as the latter do not have corporate law specific 'value'.

[37] See the separate print edition of the *Botschaft über die Revision des Aktienrechts vom 23. Februar 1983*, 3 (publication in the Federal Register: BBl 1983 II 745 *et seq.)*

straitjacket[38], but has been construed as a flexible instrumentality to serve the needs of the incorporators and shareholders willing to pursue a business (or nonprofit)[39] activity under the corporate franchise. So it is no surprise business reality soon developed a number of "reality types", namely the "one-man" corporation with all the shares held by one single person, the "two-men" corporation with two shareholders each holding half of the shares, the closely held ('personalistic') corporation, often a 'family corporation' owned by few shareholders related to each other, the real estate holding corporation whose assets consist essentially in one or several pieces of real estate, and the holding company as such[40] to name those that spawned most of the discussions in legal literature. Indeed, over time, legal scholars and – to a lesser extent – courts came to recognize such subtypes of corporations but the 'typological interpretation' (german: *"typengerechte Auslegung"*) postulated by some authors in legal literature remained largely without consequences on how statutory law was applied to specific types of corporations. With shareholders asserting the application of corporate law rules to their specific situation as overly harsh or inequitable the Supreme Court's standard argument has been that who freely chose to incorporate a business (or invest in such a business) must live with the legal framework and sustain the legal consequences it entails in that specific situation. The court has refused a differentiated application of the legal provisions to the "reality types" – thus essentially refuting to recognize them as legal types. As one example we may cite BGE 88 II 98 *et seq.* (Knie) where the Supreme Court explicitly recognized it dealt with a 'family corporation' only to say this was not susceptible to change the lawfulness of the sale of a company-held block of shares to one shareholder who thereby, taken together with other shareholders, gained voting control in the company. In accordance with the general legal situation under the 1936 Code it didn't matter to the court the sale consisted a grossly unequal treatment of shareholders in advantage to

38 Swiss legal literature in german language speaks of *"schwache Typbindung"* of the corporation; the german doctrine of *"Typengesetzlichkeit"* was never adopted in Switzerland (see FORSTMOSER, Peter / MEIER-HAYOZ, Arthur / NOBEL, Peter, *Schweizerisches Aktienrecht*, Bern 1996, § 2 n 3, and n 69/79).

39 Illustrative of the 'elasticity' of Swiss corporation law is art. 621 (3) CO which allows a corporation to be formed "... for other than business purposes."

40 The latter type was the only to be at least mentioned (without being recognized a s 'type') in the 1936 Code. In connection with the requirement that the majority of board members be Swiss-based and of Swiss citizens and domiciled in Switzerland, art. 711 (2) of the 1936 CO provided for the possibility that the Federal Council to grant exceptions. This provision remained essentially unchanged. Renumbered art. 708 (1) CO it now contains a definition of a holding company ("company whose principal purpose consists in holding participations in other enterprises").

others[41], regardless of the fact that all involved parties were 'family shareholders'.

With the substantial overhaul of the corporations section in 1991 the Code itself, by distinguishing selectively between corporations whose shares are not listed on a stock exchange and corporations whose shares are, started to integrate such differentiations into positive[42] law[43]. Since the enactment of the Stock Exchange and Securities Trading Act (SESTA)[44] and a series of implementing provisions[45] that contain a whole body of additional rules of partly private law character concerning only listed corporations[46], and in view of the fact that these rules are strongly intertwined with 'traditional' corporate law contained in the CO, it is fair to say that the traditional doctrine of unity of corporate law is obsolete and that two different statutory types of corporations are to be distinguished in Swiss law: The 'ordinary' corporation on one hand and the 'listed corporation' on the other.

41 The 1991 Code has substantially changed the situation. A new art. 717 (2) CO dealing with "duty of care and loyalty" owed by board members to the shareholders reads: "Circumstances being equal, they shall give equal treatment to shareholders." The provision is mandatory and potentially far-reaching; it remains to be seen how the imperative of evenhandedness will unfold in court practice.

42 With "positive law" we address that part of the law which is contained on a "safe ground" basis, i.e. in a readily discernible manner, in statutory provisions. As is known, art. 1 (2) CC openly recognizes the incompleteness of written code law and the existence of judge-made law, at the same time giving an indication on how such law is to be created by the judiciary. Obviously there is often a very fine line between merely expounding a statutory provision by interpretation and creating 'new' law.

43 Back in 1881 and 1936 the idea of the shares being traded and quoted on a stock exchange was not felt to be necessarily or even typically associated and thus considered of no material importance for corporate law purposes. Until the federal legislature enacted the SESTA in 1995 stock exchange legislation was a matter of cantonal public law and thus not susceptible to have any bearing upon private law relationships of shareholders between themselves or vis-à-vis other persons, e.g. offerors in a public tender offer.

44 French: *Loi fédérale sur les bourses et le commerce des valeurs mobilières du 24 mars 1995;* german: *Bundesgesetz über die Börsen und den Effektenhandel vom 24. März 1995* (SR 954.1).

45 These are: *December 2,1996 Stock Exchanges and Securities Trading Ordinance* (SESTO) (SR 954.1); *June 25, 1997 Swiss Banking Commission Stock Exchanges and Securities Trading Ordinance* (SBC-SESTO) (SR 954.193); *July 21, 1997 Takeover Board Ordinance on Public Takeover Offers* (O-TB) (SR 954.195.1); *July 21, 1997 Regulations of the Takeover Board* (R-TB) (SR 954.195.2), and the *January 4, 1996 Listing Regulations (LR) of the Swiss Stock Exchange (SWX).*

46 The body of rules contained in the SESTA and its implementing provisions are increasingly referred to as "listed companies corporation law" (german: *Börsengesellschaftsrecht*).

III. Implementation and Enforcement of Swiss Corporate Law

A. Government Offices, Agencies, and Commissions

1. The Commercial Registries

a) Mission and modus operandi *of the Commercial Registries*

According to art. 927 (1) CO a Commercial Registry ('registry') shall be kept in each canton. The registry for the canton (or districts of the same) is kept by a Commercial Registry Office headed by a Registrar[47]. The primary purpose of this registry is to make known to the general public (Art. 930 CO) legally relevant facts on "firms", including, amongst other, corporations. By virtue of art. 940 (1) CO ("The Registrar has the duty to examine whether all conditions for registration as prescribed by law have been complied with"), a 'secondary' but important purpose of the registry system is to ensure that mandatory provisions of corporate law be respected[48]. It is this secondary purpose to which we shall turn our attention.

Typically the Registrar operates by reacting to applications for the registration of facts submitted to him or her[49], either by accepting or rejecting them. This characterizes the primary mechanism of operation of the Registrar as reactive in nature[50]. The effect of the entering of a fact into

47 According to art. 4 (1) of the *June 7, 1937 Federal Ordinance on the Commercial Register* (FOCR) [SR 221.411] the cantonal offices operate under the supervision of the Federal Justice Department which in turn acts through the Federal Office of the Commercial Register (german: *Eidgenössisches Handelsregisteramt*), a federal administrative agency empowered to issue directives, rulings, and instructions in matters concerning the register [for a recent circular letter on capital protection issues see III.A.1.d) *infra*].

48 KÜNG, Manfred, in: *Berner Kommentar zum Schweizerischen Privatrecht – Obligationenrecht*, Bern 2001, N 16 ad Art. 927 OR. At N 26 – 28 ad Art. 940 OR this author criticizes the underlying basic decision made by the legislature in the thirties as being neither in line with the traditional (purely) declaratory function of the institution of commercial registries nor being an efficient means to ensure lawfulness. *De lege ferenda* he proposes to simply exonerate the registrars from the lawfulness control function.

49 REBSAMEN, Karl, *Das Handelsregister*, 2. Aufl., Zürich 1999, n. 34.

50 In some situations the Registrar has to act *sua sponte*, assuming a proactive role in correcting situations not in compliance with the law. Thus, art. 708 (4) CO empowers the Registrar to simply dissolve and delete from the registry a company the board of which is not in compliance with the mandatory nationality and domicile prescriptions of same article. Art. 88a and 89 FOCR enable the Registrar to do the same if the corporation has lost its legal domicile or when he or she "obtains knowledge" of the fact that the corporation no longer has "realizable assets". These examples alone illustrate how far-reaching the powers of the Registrar can be when it comes to enforce mandatory corporate law. In all other cases the power to order the sanction of a dissolution of the corporation against the will of the majority of shareholders is reserved to the judiciary, acting by way of a bankruptcy decree [art. 725a (1) CO/art. 171 of the *Federal Act on Debt Execution and Bankruptcy* (SR 281.1)], or because minority shareholders get through with their request for dissolution (art. 736 para. 4 CO), or because the corporation serves an illegal or immoral purpose [art. 57 (3) CC].

The Registrar may also respond to an objection to an entry based on private law under art. 32 (1) and (2) FOCR. Under thie latter provision, any "third party" can temporarily stall the completion of

the registry with regard to the legal status of such fact can be twofold – declaratory or constitutive[51]. In the latter case the described mechanism of operation amounts to a preventive control of lawfulness by the Registrar, a sort of 'filter' through which all content of submitted documents required as a basis for any sort of record to be made in the register has to pass[52].

After a discussion of the pivotal question for the ambit of the Registrar's examination function we will turn to a couple specific areas in which the Registrars' screening function is particularly important.

b) The scope of the Registrar's examination power

Art. 940 (2) CO circumscribes the duty of the Registrar when entering legal entities. Examination is to be made " ... namely as to whether the articles of incorporation of the legal entity contradict any mandatory legal provisions and whether they contain the clauses required by law". While this wording doesn't contain any limitation of the scope of the Registrar's examination[53] of the content of articles of incorporation (and other documents substantiating the existence of the fact to be entered into the register) the Supreme Court has for long held there is such a limitation. In a recent (1995) decision the court again expounded that wherever not 'registry law' (i.e. formal provisions) but substantive law is at issue the scope of the Registrar's examination is limited and that he has only to ensure compliance with mandatory provisions of the law serving the public interest or the interests of third parties[54] while the involved parties, to enforce non-mandatory rules or rules involving exclusively private interests (even if these rules are mandatory), will have to take recourse to

an applied-for entry by the mere allegation that his or her rights are violated. The Registrar has to set a deadline to such "third party" for obtaining a preliminary injunction from a judge to perpetuate the pending status of the application. The party objecting will then have to follow up on the injunction by instituting a lawsuit aiming at the elimination of the legal acts based on which the application had originally been asked to effectuate the entry. Obviously, the plaintiff will often be a shareholder asking the court to set aside a shareholder resolution in violation of his or her rights (see B.2. *infra*). Art. 32 (2) FOCR has been criticised for its 'nuisance value' but appears to be a rather well-balanced procedural device to provide efficient protection to individual shareholders (KUSTER, Matthias, "Die Einsprache nach Art. 32 Abs. 2 HRegV" in: Jahrbuch des Handelsregisters 1997, Zürich 1997, 105 *et seq.*, at 125).

51 See REBSAMEN, Karl, *Das Handelsregister*, 2. Aufl., Zürich 1999, n. 7.

52 The Registrar's rejections can be appealed to cantonal courts and are ultimately subjct to review by the Supreme Court, but for time reasons applicants choose this way only if the *desideratum* cannot otherwise be had. The better option is often – and if mere formalities and procedural questions are at issue: always – to try to comply with the requirements the Registrar regards as conditions prescribed by law and resubmit a modified application.

53 With 'scope of examination' we refer to what in german is called *Kognitionsbefugnis*, i.e. 'what may (or may not) be perceived'. KÜNG, Manfred, (fn. 49 *supra*, at N 30 – 31 ad Art. 927 OR) appears to consider the Supreme Court's limitation of the Registrar's scope of examination to be *contra legem*.

54 To denote the character of these provisions the term "qualified mandatory" has been coined, see KÜNG, Manfred, (fn. 48 *supra*, N 37 ad art. 927 OR)

the judge in civil matters[55]. The court has put a further limitation on the scope of the Registrar's examination by saying that where violations of the law by the content of substantiating documents and namely articles of incorporation are obvious and where a provision lends itself to different interpretations it is for the courts to decide the issue[56] – under the condition it is requested to do so by an interested party. If the applicant can invoke an arguably correct (albeit not the only possible) interpretation of the provision whose violation is at issue, then the applied-for entry has to be effectuated.

From the language in which the Supreme Court has couched its 'formulas' concerning the scope of the Registrar's examination one would expect the task of the Registrar to be the elimination of only the serious and obvious cases of unlawfulness. However, a couple of rather recent Supreme Court precedents is far from consistent with those formulas and, taken as a whole, have watered down the limitations on the scope of the Registrar's examination considerably. KÜNG[57] summarizes the current situation by outlining a four-pronged test to be applied by a Registrar considering to reject an application: First, he must decide whether a mandatory provision would be violated, second, whether such provision is intended to protect third parties or the general public. Third, he must weigh different possible interpretations of the provision against each other in order to decide whether the interpretation invoked by the applicant appears to be "sustainable". Finally, in cases where "simple" (as opposed to "qualified") mandatory rules are at issue, he has to make a judgment on the likelihood of a (later) motion to the court by one of the involved parties that might redress the unlawfulness; if this appears unlikely (and the unlawfulness would foreseeably be perpetuated over a prolonged period of time), the application must be rejected and the sought-for entry refused[58].

The practitioner's bottomline of all this is that the Registrar will almost invariably enforce any and all mandatory corporate law, "simple" or "qualified", by screening articles of incorporation or other documents submitted to him or her as basis for an entry to be made in the registry and rejecting the application if he finds content not complying with mandatory corporate law.

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55 See BGE 121 III 368 et seq, at 370 / 371 (in french language).

56 See BGE 114 II 70 (1988) and BGE 107 II 247/48 (1981).

57 Fn. 48 *supra*, N 55 ad art. 927 OR.

58 This fourth prong of the test was introduced in an unpublished Supreme Court decision dated August 27, 1975 (T. vs. Direktion der Justiz des Kantons Zürich) and has shown up again in the recent landmark decision BGE 125 III 18 concerning the 'direct' transformation of a LLC into a corporation (i.e. without previous liquidation of the LLC).

c) The assurance of a basic structural homogeneity of corporations

Art. 620 (1) CO gives a basic definition of the corporation, the essence of which is that the corporation is a legal entity[59] necessarily to be entered in the commercial register[60], the liabilities of which are covered only by its own assets, has a predetermined capital (share capital) divided into shares. This definition, in conjunction with art. 626 CO, providing for a required minimum content of articles of incorporation and presupposing a given structure of corporate bodies[61] guarantees a minimum structural homogeneity of all Swiss corporations. The three corporate bodies are the shareholder meeting[62], the board of directors[63], and the auditors[64] [65]. This tripartite structure of the corporation is mandatory. The lawmakers have rejected to give corporations an option to formally provide their 'executive branch' with a two-layer structure similar to the german model with a supervisory body *(Aufsichtsrat)* and an executive body *(Vorstand)*, each of them with clearly defined tasks. Mandatory Swiss corporate law prescribes a monistic, instead of a dualistic system. 'Law in action' looks slightly different: The broad powers statutorily allotted to the board, including the power to delegate management on the basis of an organizational regulation [Art. 716b (1) CO; french: *règlement d'organisation;* german: *Organisationsreglement*] have led some, primarily exchange listed, Swiss companies to largely "emulate" the dualistic system within the mandatory framework prescribing the basic structure[66]. At the same time the working modus of the board of directors is often modified to approach the US-american "board system", distinguishing "inside" and "outside" directors, the latter forming committees [art. 716a (2) CO] with a special focus, such as finance, audit, and compensation committees. While this adaptability is certainly "enabling" it has its limits, though. A possibly resulting, partial *de facto* delegation of the essential, inalienable core responsibilities enumerated in art. 716a (1) CO, namely those for financial affairs and the

59 A general set of rules for all legal entities is provided by Art. 52 – 59 CC.

60 The registration in the commercial register is mandatory [Art. 640 (1) CO] and an outright prerequisite for the coming into being of the corporation as a legal entity.

61 Throughout this paper "corporate body" will be used to denote what in french is called *organe*, in german *Organ*. This use of "corporate body" deviates from that in the context of US law where the term denotes the "body corporate", i.e. the corporation as a whole (see e.g. *Black's Law Dictionary*, 5th ed., St. Paul, Minn. 1979, 306).

62 Art. 696 – 706b CO (french: *conseil d'administration;* german: *Generalversammlung*).

63 Art. 707 – 726 CO (french: *assemblée générale;* german: *Verwaltungsrat*).

64 Art. 727 – 731 CO (french: *organe de révision;* german: *Revisionsstelle*).

65 Further elements mentioned in art. 626 CO are the "purpose", to be understood as a general description of the business activity the corporation is intended to deploy (roughly corresponding to the "objects" in sec. 2 (1) (c) of the British 1985 Companies Act), the fixation of a seat, and the way notice to the public is given and shareholder meetings are called.

66 See BÖCKLI, Peter, *Schweizer Aktienrecht*, 2. Aufl., Zürich 1996, Rz 1758.

establishment of an adequate organization of the corporate business (so-called "financial and organizational responsibility", an outgrowth of the board's inalienable "ultimate management" duty) will not be mirrored by the pertinent provision on director's liability (art. 754 CO). Modifications of the type described expose directors to an increased risk of liability for mishaps in the corporate life even less commensurate with their limited power to micromanage or precondition[67] executive decisionmaking. Thus, a narrower look unveils that the mandatory nucleus of structurally relevant provisions is quite 'resilient' and the 'emulation' of other structures made possible by the exhaustion of the potential of non-mandatory rules endangers those who make a lawful use of the options the law offers.

Similarly, the Code does not allow for a formal re-allotment of statutorily defined functions between corporate bodies. Namely, it is not possible to move away from the board of directors to the shareholders meeting any of the abovementioned essential, inalienable core responsibilities. The 1991 amendments to the CO have thus rendered impossible the heretofore quite widespread practice to have the shareholders meeting deal with and take resolutions on these crucial issues of often "strategic" nature[68]. Attempts to perpetuate the old pattern by getting articles of incorporation with conflicting content through the "filter" of the register of commerce would be futile, as resolutions taken by an inappropriate corporate body, by virtue of art. 706b (3) CO, are not only avoidable, but null and void, i.e. legally inexistent.

d) Protection of the (initial) capital base of the corporation

One of the cornerstones of Swiss corporate law is the idea that a corporation have a specifically, formally defined amount of own capital at its disposition and that there is also a minimum capital required for the corporate ship to sail the waters of business[69]. The legal provisions aiming at protecting the capital base (provided on occasion of the company's foundation or in the ambit of a capital increase) are typically regarded as "qualified mandatory". According to art. 626 (3) CO the declaration of the share capital is part of the minimum content of the articles of

67 This is a corollary of the board's limited – or at least not guaranteed – access to all essential information under art. 715a CO; see BÖCKLI, Peter, *Schweizer Aktienrecht*, 2. Aufl., Zürich 1996, Rz 1729.

68 See BÖCKLI, Peter, *Die unentziehbaren Kernkompetenzen des Verwaltungsrates*, Zürich 1994, 21.

69 According to art. 621 CO the share capital must be at least CHF 100 000 (at the time of the writing of this paper roughly 70 000 EUR), of which at least CHF 50 000 must be paid-in to allow for incorporation [art. 632 (2) CO]. According to special legislation, banks and insurance companies must have a much higher, fully paid-up minimum share capital; for banks the amount is CHF 10 million [Federal Bank Act, art. 3 (2) lit. b in conjunction with Federal Bank Ordinance, art. 4 (1)], for insurance companies it depends on the type of insurance the company is selling.

incorporation, the minimum initial contribution must be paid into escrow before incorporation [art. 633 CO]. If the initial contribution per share has been fixed below its nominal value the shareholder has an obligation to pay up the the difference [art. 630 (2) CO], solely and exclusively upon a resolution by the board of directors to call the outstanding amount [art. 634a (1) CO]. This mandatory statutory pattern of capital raising may have been commensurate with the static perception of typical business development when the 1936 Code was enacted. But the way new – particularly technology-based – businesses are founded (and funded) has considerably changed. The Swiss corporate law framework in this respect hardly lives up to all legitimate expectations investors may have. It is certainly not suitable to 'venture capitalists' who want to make their commitments to a start-up or a 'first stage' company in the form of equity capital and be at the same time able to make further financing dependent upon the meeting by management of certain targets ("milestones") at predefined points of time[70]. As a shareholder's obligation to pay the issue price at which the subscription of shares has occurred cannot be conditioned upon some other future event than the mentioned board of directors' resolution this framework proves to be an unnecessary straitjacket that could be thrown away without sacrifying any of the general public's (future creditor's) interests.

If a contribution in kind is made its valuation must be declared to be accurate in a special report by the incorporators [art. 635 (1) CO], this report be confirmed by an auditor [art. 635a CO] and then be declared in the articles of incorporation [art. 628 (1) and (2) CO].

All these rules obviously not only (or not even primarily) serve the interest of shareholders, but supposedly those of third parties, namely potential future creditors of the corporation. Against this background it is commonly accepted that registrars check the contents of all the resulting documents submitted in order to obtain registration of the corporation. A recent written communication by the Federal Office for the Commercial Register dealing with the potential contribution in kind nature of soccer players' transfer sums, of transfer sums owed according to the Swiss ice

[70] It appears to be doubtful whether a board of directors, to whom the general meeting of shareholders in the ambit of a capital increase under art. 650 (2) (3) CO has delegated the power to freely determine the issue price of the new shares by providing for an *agio* (mark-up) can later reduce such (still unpaid) *agio* by taking an appropriate board resolution to reduce (adjust to circumstances) the amount of *agio*. Once the articles of incorporation that contained the capital increase (and mention the amount of the *agio*) have been filed with the Registrar the latter – mindful of his ore her duty to see the general public's interest (creditors) involved – could even be tempted to refuse to register new articles of incorporation containing the reduction of the *agio* or an amendment to the effect that no more *agio* is to be paid if the amendment is based only on an additional board resolution, without further payments be made. A proper understanding of the limited scope of the Registrar's examination power must, however, lead to registration.

hockey national league regulations, or again of internet domain names, has generally restated the function of the Registrars in this field[71].

e) The function of prohibiting and eliminating clauses aiming at contributions of personal services, financing, a.s.o. by shareholders from articles of incorporation

The almost unanimous view in legal literature[72] and the position of the Supreme Court are that Swiss corporate law makes it impossible to burden a shareholder with any personal duties apart from providing full payment or other valuable contribution of the issue price of the shares subscribed to. The word "more" in the governing provision of Art. 680 (1) CO ("A shareholder may not be obligated, even by the articles of incorporation, to contribute more for a share than the amount fixed at the time of issue")[73] is thus understood to say "more or other". To bind a shareholder by a provision in the articles of incorporation to finance the company in another than this specific way (e.g. by providing loans or free services in the future) is therefore impossible, and the same goes for clauses forbidding the single shareholders to compete with the corporation's business. Articles of incorporation with such provisions hardly pass muster with any registrar and if they do, it will ultimately be the courts that will strike down such provisions upon an interested shareholder's motion[74]. Apart from the choice of the LLC as an alternative form of incorporation perfectly suited in this respect[75], only a shareholder agreement may do the job – within the limits inherent to this device[76].

71 *"Mitteilung an die kantonalen Handelsregisterbehörden betreffend Sacheinlage und Sachübernahme vom 15. August 2001"*, in: REPRAX 2/01, 59 *et seq.*

72 See e.g. FORSTMOSER, Peter / MEIER-HAYOZ, Arthur / NOBEL, Peter, *Schweizerisches Aktienrecht*, Bern 1996, § 42, n. 8.

73 For a subscription to be valid, Art. 630 nr. 2 CO requires an unconditional commitment to make a contribution equal to the issue price.

74 In some occasions, an interpretive twist, the so-called conversion (of the basically invalid clause into an agreement) may help not the corporation as such, but the other shareholders whose interests are served by the clause not to compete. This is the case if they are considered to be parties to a negative covenant between themselves and the single shareholder. See FORSTMOSER, Peter / MEIER-HAYOZ, Arthur / NOBEL, Peter, *supra*, § 44 n 268, with reference to ATF 25 II 14 (20).

75 For the LLC, art. 777 CO lists possible items of content in the articles of incorporation of a LLC, amongst other: "The basis of the obligation of the partners to make supplementary capital contributions, or other performances in excess of their company capital contribution, with the possibility to specify the nature and scope of such performances by separate regulation."

76 For the role and scope of shareholder agreements see III.A.4. *infra*.

f) The function of controlling share transfer restriction clauses (german: Vinkulierungsbestimmungen*) in the articles of incorporation*

Unlike the corporation laws of some other countries under which the free transferability of interests is to be regarded as a corporate characteristic the 1936 Code allowed corporations to completely exclude the transferability of their shares by a pertinent clause in the articles of incorporation[77]. They also could adopt a blank clause in the articles of incorporation allowing the board to refuse to recognize a buyer of shares as shareholder an enter him or her into the share ledger. The board could do so "... without disclosure for the reasons therefor"[78]; the system practically impaired minority shareholders' right to sell their shares and deprived them continuously of the full value of their interest in a company[79].

The 1991 Code has largely done away[80] with the old order and by a whole complex of *ius cogens* provisions reinstated the principle (with exceptions) of the free transferability of registered shares[81]. For shares of both listed and non-listed companies, there is one single *ex lege* transfer restriction – the one for not fully paid-in shares[82]. Furtherly, and exclusively under the condition there are pertinent clauses in the articles of incorporation, a listed company may "refuse" a shareholder if the transfer would entail an inability of the corporation to evidence the composition of its shareholder base as required by federal statute[83], or if such shareholder acquires more than a defined percentage limit of all shares (in which case the refusal can be made only with respect to the exceeding percentage). In spite of its wording art. 685d (1) CO does not really restrict the share transfer: A refusal by the listed company only suspends the voting right

77 Art. 627 (8) of the 1936 CO.

78 If a shareholder tried to challenge the refusal of the board by saying there were no reasons at all for the refusal it was sufficient for the latter to invoke any reason whatsoever to win the case as long as the refusal did not appear to be a mere abuse of law and thus violative of art. 2 (2) CC.

79 KLÄY, Hanspeter, *Die Vinkulierung*, Basel / Frankfurt a.M. 1997, 100.

80 Art. 685a (1) CO conveys the mistaken impression of the old order being perpetuated.

81 Under art. 622 (1) CO shares are issued either in the name of a holder or to bearer. The former are commonly referred to as 'registered shares', as the persons holding them appear as registered shareholders in the shareholders' ledger. Bearer shares (they are nowadays clearly the exception) cannot be subject to transfer restrictions as the bearer by law enjoys full title to all rights associated with the share.

82 Art. 685 CO, designed to protect the company against a new shareholder whose solvency is questionable.

83 Art. 4 of the final provisions of the October 4, 1991 Federal Act amending the Code of Obligations (The Corporation), entered into force on July 1, 1992. Systematically, the provision could have been integrated into art. 685d CO. The background of this provision is federal legislation discriminating foreigners under certain circumstances, e.g. in the areas of real estate property, banking, shipping, aviation, and in connection with the avoidance of double taxation on the international level. For a comprehensive list of legislation and discussion see KLÄY (fn. 79 *supra*), 243 – 258.

and "rights connected with the voting right" of the shares in question, while the exercise of any of the other rights[84] is not restricted [art. 685f (2) CO]. Thus, full beneficial ownership in the shares of the listed company is acquired[85] and the buyer must be entered into the share register as 'shareholder without voting rights' [art. 685f (3) CO]. In practice, the possibility to refuse a shareholder depends very much on the language in which the clauses in the articles of incorporation are couched. Generally, a broad definition of 'shareholder' (by use of a 'related group' clause) in connection with the percentage limitation appears to be almost unanimously accepted in legal literature and is also vindicated by a Supreme Court decision[86] but a clause stating a presumption for coordinated behaviour of (existing or potential new) shareholders are certainly inadmissible. Similarly, vague and unspecified language or blank referrals to federal legislation that might (possibly) require control of the shareholder base tends to be qualified as insufficient and thus invalid[87].

Under art. Art. 685b (1) CO a corporation not listed on a stock exchange may refuse a shareholder (and thus jeopardize a share transfer) by either availing itself of a "valid reason" that must be mentioned in the articles of incorporation or by offering "... to take over the shares for its own account or for the account of other shareholders or for the account of third parties at the real value at the time of the request". The latter option - seen from the perspective of the corporation - is an "escape clause"[88], but amounts to an "exit" scenario from the perspective of the shareholder, in its result similar to the "appraisal rights" contained in the US Model Business Corporation Act (MBCA) and provided for in all US states' corporation laws[89]. This mandatory statutory escape clause cannot be 'neutralized' by any provision in the articles of incorporation. As for the former option – implying a flatout prohibition of a transfer – art. 685b (2) CO defines in general terms a limited number of "valid reasons" that may be legitimate grounds for refusal: "Composition of the shareholders' circle which justify the refusal in view of the company's purpose or of the economic independence of the enterprise." While it is generally recognized that having the articles of incorporation simply mirror the wording of the statute will not provide a basis for a refusal there is much uncertainty about

84 E.g. the right to a dividend, and the 'preemptive right' under art. 652b (1) CO [right to subscribe to a proportionate part of newly issued shares, essentially an anti-dilution protection].

85 See BÖCKLI, Peter, *Schweizer Aktienrecht*, 2. Aufl., Zürich 1996, Rz 647.

86 BGE 117 II 308 et seq. (*Canes ca. Nestlé*).

87 See BÖCKLI, Peter, *Schweizer Aktienrecht*, 2. Aufl., Zürich 1996, Rz 628 – 632 a.

88 In swiss legal literature the provision is generally dubbed "escape clause", see e.g. BÖCKLI (fn. 85 *supra* and KLÄY, fn. 79 supra).

89 KUNZ, Peter V., *Der Minderheitenschutz im schweizerischen Aktienrecht*, Bern 2001, p. 325.

the degree of concreteness in which the 'evil' against which the transfer restriction should work must be addressed. At all events it is clear that the line between admissibility and unlawfulness of transfer restriction clauses in the articles of incorporation is often a fine one. The limited scope of the Registrar's control therefore will enable him or her to sift out only the gross cases of unlawfulness, leaving the bulk of the clauses to the courts to decide upon in cases where shareholders are unwilling to accept refusals based on such clauses[90].

g) The function of protecting minimum voting power of shareholders

Art.692 (2) CO grants each shareholder at least one vote, "...even if he owns only one share", that can be cast on each agenda item in the shareholders' meeting. Against the background of an 'one share one vote' system art. 693 (1) CO allows the creation of classes of shares with different par value, resulting in a privileged (heightened, and not commensurate with the capital contribution) voting power of the shares with lower par value. Art. 693 (2) CO limits what is viewed as a 'discrimination potential' by not allowing the lower (lowest) par value of shares to be less than one tenth of the higher (highest) par value. The Registrars will not tolerate deviations from these mandatory provisions and their power to do so has been vindicated by a recent Supreme Court decision[91].

2. The Federal Banking Commission (FBC) / Takeover Board on Public Takeover Offers / Stock Exchanges (SROs)

As has been said earlier, SESTA and its implementing provisions – apart from the regulatory framework embodied in its administrative law rules – contain additional, complementary provisions of 'listed companies corporation law' designed to protect both existing shareholders and potential investors[92]. Most important is the obligation of an offeror holding

90 SUTER, Benedikt A., *"Kognition des Handelsregisterführers in Bezug auf statutarische Übertragungsbeschränkungen für Namenaktien nach neuem Aktienrecht"*, in: *Jahrbuch des Handelsregisters*, Zürich 1993, 55 et seq., 65 – 67.

91 BGE docket nr. 4A.12/1997, dated February 12, 1998, reported in *Neue Zürcher Zeitung*, May 14, 1998, nr. 110, p. 25 (not published in the official collection of Supreme Court decisions) upheld a decision by the Registrar not to register an unanimously resolved bank's share split transaction creating two classes of shares with 24 times lower par value difference. The fact that pre-1992 share capital structures in conflict with Art. 693 (2) CO had been grandfathered by the 1991 Code was of no relevance to the Court.

92 Not of this strain is art. 33 SESTA, a basis for a "squeeze-out" of the last two percent of holders of equity securities after completion of a tender offer. Upon action commenced by the offeror against the company the court cancels the outstanding securities and the company then reissues them to the offeror, at the same time indemnifying the holders of the cancelled securities by paying them the offer price.

one third of the voting rights of a listed company to make a tender offer for all listed shares of that company, i.e. to contract with all other shareholders of the company to buy their shares at a price at least as high as the stock exchange price [art. 32 (1) and (4) SESTA]. By virtue of art. 32 (2) SESTA, art. 32 (2) SESTA is a non-mandatory rule[93]. In order to further transparency in the ambit of a tender offer, art. 24 (1) SESTA obliges the offeror to publish his offer in a "true and complete" prospectus. Art. 31 (1) SESTA requires any shareholder to notify both the Takeover Board and the involved stock exchange on an ongoing basis about all and any acquisition or sale of shares of the target as soon as the offeror's holdings exceed five percent of the target's voting rights (regardless of a possible suspension of the voting rights of such shares). Outside a public takeover offer situation, pursuant to art. 20 (1) SESTA, important shareholders must notify both the company and the stock exchange as soon as his or her holdings exceed certain threshold percentages[94] and art. 21 SESTA provides for the dissemination by the company of the information so gathered. Both articles obviously buttress art. 663c (1) CO which is neither reliably enhancing transparency[95] nor guaranteeing any minimum degree of timeliness of the information (the information interval is from annual report to annual report). As for the listed companies themselves, art. 72 (1) of the Listing Regulations (LR) of the Swiss Stock Exchange (SWX) imposes an *ad-hoc* publicity duty on them under which they have to timely communicate to the "market" (i.e. the interested general public) all new and nonpublic facts that may have a substantial influence on the share price. Inasmuch as the above – mandatory – provisions [including art. 72 (1) LR] are recognized to be of protective nature with regard to both the shareholders and investors generally (i.e. designed to protect their assets) they are a possible, but not uncontested, basis for liability claims by the latter against parties that have been neglecting their duties.

A statutorily preconditioned, sometimes intricate, interplay between the FBC (federal regulatory agency acting as supervisory authority), the Takeover Board (a commission appointed by the former), the stock exchanges (currently essentially SWX) conceived as SROs,and shareholders and investors pushes the market participants addressed by the

93 Art. 32 (2) SESTA does not apply if the company, through an appropriate provision in its articles of incorporation, has opted up (fixed the threshold percentage higher than one third, but lower or equal to 49%) or opted out altogether (i.e. exempted its shareholders) from the statutory standard regime of such offers. In March 2002, about 20 companies listed on the Swiss Stock Exchange (SWX) have opted up, and about 70 have opted out.

94 Art. 20 (1) SESTA reporting thresholds are 5, 10, 20, 33 1/3, 50, and 66 2/3 %.

95 FORSTMOSER, Peter, "OR 663c – ein wenig transparentes Transparenzgebot", in: *Aspekte des Wirtschaftsrechts, Festgabe zum Schweizerischen Juristentag 1994*, Zürich 1994, 69 et seq., at 79/80.

pertinent provisions to comply with the law. Apart from the instrumentality of administrative constraint and criminal sanctions there also exist instances where recourse to the courts not only by shareholders, but also by governmental 'players' is possible[96].

B. Shareholders

1. General remarks

Shareholders are rightly regarded as the most directly concerned and legitimate 'players' in the process of enforcement of (mandatory or non-mandatory) corporate law. They exert their power primarily by partaking in the process of corporate decisionmaking on the shareholder meeting level. The individual shareholder who has no controlling interest in the company is protected against the 'majority' by provisions in the Code which are generally referred to as 'minority rights'. This is not the place to expound on the multifarious aspects of this protection[97]. We shall just briefly mention the main types of suits or causes of action the individual shareholder is able to bring when he or she deems these rights violated by either a resolution of the general meeting of shareholders or certain acts of the board.

2. Shareholder Suits to have the Court Set aside Shareholder Meeting Resolutions

The set-aside suits (german: *Anfechtungsklagen*) are mentioned in art. 706 CO. The cause of action may be a qualified unlawfulness of the challenged resolution (with necessarily a mandatory rule involved), in which case a judgment in favour of the plaintiff will declare the resolution null and void. More often, the cause of action is a simple unlawfulness, including the violation of a provision in the articles of incorporation; in this case the rule involved may be either mandatory or non-mandatory. The possibility to bring such suits is "a fundamental right of any shareholder", as the Supreme Court put it in BGE 116 II 716 (1990). Under the 1991 Code it has been recognized as mandatory and can be done away

96 For instance art. 32 (7) SESTA provides: "At the request of the Supervisory Authority, the offeree company, or one of its shareholders, the court may by way of an interim relief suspend the voting rights of any person who is in breach of the obligation to make an offer."

97 Over the years, this traditional darling topic of Swiss corporate lawyers has spawned a plethora of learned writing. A most recent, all-encompassing publication with far over one thousand pages is that of KUNZ (fn. 89 *supra*).

neither by provisions in the articles of incorporation, nor by an exclusionary wording of the shareholder resolution itself or through an *ex ante* waiver by the shareholder[98]

3. Shareholders' Liability Suits

The liability suits (french: *actions en responsabilité;* german: *Verantwortlichkeitsklagen*) constitute a mediate mechanism of ensuring compliance with a set of exclusively mandatory corporate law rules. All of the general and specific legal duties board members, managers, incorporators, and auditors have towards shareholders and third parties (creditors)[99] are mandatory law. Again, the duty of care standard for board members and persons engaged in the mangement under art. 754 (1) CO or for incorporators (art. 753) cannot be lowered or even contracted away to the detriment of the shareholders within the articles of incorporation: Intentional or negligent behavior unavoidably entails liability for damage caused by such behaviour.

4. Shareholder Agreements

a) Shareholder agreements as instruments for conditioning the reality of corporate life

Over many decades, shareholder agreements in their various forms have been used by shareholders (and non-shareholders) to make up for what they considered to be deficiencies of general corporate law. The agreements mostly aim at correcting the consistently capital-oriented statutory structure of the corporation, at personalizing the corporate vehicle by tailoring it to the needs of specific shareholders. Shareholder agreements are of immense practical importance, the "dark side of the moon" in Swiss corporate life, and are even considered to be the 'enabling' factor which allowed the corporation to become the *factotum* in swiss company and partnership law[100]. Summarizing what legal literature and practice have been developing over the years as core elements of such agreements, HINTZ-BÜHLER defines them widely as "Contractual

98 RIEMER, Hans Michael, *Anfechtungs- und Nichtigkeitsklage im schweizerischen Gesellschaftsrecht*, Bern 1998, n. 2.

99 Under the governing art. 757 (1) CO the creditor's standing to sue (german: *Aktivlegitimation*) depends on the corporation having been declared bankrupt and the bankruptcy administrator having forgone to sue.

100 FORSTMOSER, Peter / MEIER-HAYOZ, Arthur / NOBEL, Peter, *Schweizerisches Aktienrecht*, Bern 1996, § 2 n 48.

agreements between two or more parties concerning rights and duties in connection with the shareholder quality of one or several of the contracting parties with respect to a specific corporation"[101].

Shareholder agreements are designed to realize certain objectives the contracting parties could not otherwise – i.e. by using and exhausting the possibilities and options of general corporate law – achieve. This inevitably raises the question whether there is any room at all for such agreements completing and supplementing the corporate law framework the lawmakers basically conceived to be a comprehensive one. As the above remarks imply, this question is to be answered in the affirmative. Indeed, the lawfulness of the shareholder agreement device as such has never been put in question, despite of the fact that general corporate law for decades didn't even mention them[102]. Only since the revised Code came into force in 1992 positive law for the first time recognized the agreements indirectly by referring to "groups of shareholders related to each other through their voting rights". A similar pattern followed in art. 20 (3) SESTA which obligates "a group organized pursuant to an agreement ... " to notify both an exchange-listed company and the stock exchange on which its shares are listed if it (the group as a whole) " ... attains, falls below or exceeds one of the threshold percentages .." mentioned in art. 20 (1) SESTA.

b) Nature and types of shareholder agreements

Unlike in general corporate law where the general framework is largely conditioned by mandatory statutory law in the area of shareholder agreements, freedom of contract reigns supreme[103].Since shareholder agreements are neither explicitly mentioned in the second division of the CO dealing with individual types of contracts nor in statutory corporate law, but only indirectly referred to[104] in the latter, the question after their legal qualification is an old one. The prevailing view today has the answer depend on what the main objective of the shareholder agreement in question is. Very often, the essence of the shareholder agreement is to be seen in a pooling of interests. If this is the case, the generally accepted

101 HINTZ-BÜHLER, Monika, *Begriff, Ziel und Inhalt von Aktionärsbindungsverträgen*, Bern 2001, 6/7 (citation translated from the german original by the authors of this paper).

102 Similarly – again in striking contrast to the practical importance of shareholder agreements – court decisions dealing with them are a rarity. This is due to the often preeminent needs for a discreet handling of matters common to all parties involved (not rarely members of the same family) and the agreements typically containing an arbitration clause; see APPENZELLER, Hansjürg, *Stimmbindungsabsprachen in Kapitalgesellschaften*, Zürich 1996, 15.

103 As has been said earlier, art. 19 (1) CO guarantees freedom of contract "within the limits of the law". For a brief discussion of these limits see I.C.2. *supra*.

104 See art. 663c (2) CO and art. 20 (3) (c) SESTA.

qualification has come to be that of a simple partnership[105], statutorily characterized as "... a contractual relationship between two or more persons to attain a joint purpose with joint endeavours or means" [Art. 530 (1) CO]. On other occasions the mutual exchange between the parties to the shareholder agreement of performances having something to do with the corporation in question may be the primary purpose of the contract – here the qualification is that of a contract innominate[106].

All shareholder agreements falling into one of these two main categories have a contract purpose, be it "joint" or not. There are a couple of common types of such purposes from which the respective shareholder agreements draw their name. There are vote pooling or vote binding agreements, share sale restricting agreements with mutually granted rights of first refusal, agreements guaranteeing election to the board, agreements imposing financing[107] or other duties onto the parties.

c) Enforceability and status vis-à-vis the articles of incorporation

The touchstone of the effectiveness of shareholder agreements is, of course, their enforceability. There are two viewpoints – that of corporate law and that of general contract law.

The statutory recognitions of shareholder agreements in the CO and the SESTA mentioned above are characterized by a certain reticence towards the device. Obviously they are not aimed at favouring the use or even enforcement of shareholder (vote pooling) agreements, but designed to inure to the benefit of other shareholders and the public (potential investors) in general by constraining the corporation to disclose the aggregate voting power of the shareholder group in question. The law maintains at best an ambivalent stance towards the agreements. Their content is typically not susceptible to be validly integrated into the articles of incorporation. Namely, it is not possible to render their content enforceable on that level by referring to them in the articles of incorporation, thereby making them a mediate source of the articles' content. A first corollary of this is that a vote in the general meeting of shareholders not in accordance with a vote binding agreement as a matter of corporate law is fully valid. A resolution thus passed can not be successfully challenged by the other parties on the ground that it would "... violate the law

105 Art. 530 – 551 CO (french: *société simple;* german: *einfache Gesellschaft).*

106 A contract innominate (french: *contrat innommé;* german: *Innominatkontrakt*) is a *contractus sui generis* to be understood and construed in the light of its own spirit, if possible by taking recourse to and applying *per analogiam* provisions governing statutory contract types contained in the second division of the CO.

107 E.g. a duty to provide a shareholder loan up to a certain amount and at defined (often preferential) conditions, or to post a security for debts of the corporations, a.s.o..

or the articles of incorporation" [art. 706 (1) CO]. The same goes for a sale of shares to a third party occurring in violation of a right of first refusal: The sale is valid and the buyer is entitled to be registered as shareholder, provided no transfer restrictions apply[108].

As they cannot be enforced by the instrumentalities of corporate law, the effectiveness of shareholder agreements is fully dependent on the remedies available under general contract law. The first point to make is that, in the absence of further safeguards, the *desideratum* of specific performance with respect to the duties of the parties to shareholder agreements typically cannot be had once the vote or transaction in breach of a shareholder agreement has been consummated. Except in the rare nullity cases there is no way for a shareholder whose rights were not respected to "turn the clock back" and obtain *ex post facto* judicial avoidance of the act in question. What remains is the remedy of damages from breach of contract.

On the other side plaintiffs have succeeded in obtaining judicial relief by petitioning the court to preliminary enjoin a party to vote in accordance with its contractual duties under a shareholder agreement[109], and there is no reason why this remedy should not be available to block an impending sale of shares until final decision of a court on, e.g. the existence of a right of first refusal in favour of the plaintiff shareholder.

There are also a number of preventive safeguards against breach of shareholder agreements which in practice ensure compliance indirectly. Very common is the stipulation of liquidated damages pursuant to art. 161 (1) CO, in an often very substantial amount[110] which constitutes a serious disincentive for shareholders inclined to breach the agreement. The transfer of all shares of the contracting shareholders to a trustee who then has to vote the shares in accordance with what is provided for in the agreement is another option to buttress vote pooling agreements and prevent 'unauthorized' sales of shares. Still another device is the joint escrow account into which all shares of the involved shareholders go and over which only a third person is entitled to dispose, in accordance with (necessarily identical) instructions by all shareholders[111].

All this boils down to the bottomline that shareholder agreements are non-mandatory law devices complementing corporate law, having

108 FORSTMOSER, Peter / MEIER-HAYOZ, Arthur / NOBEL, Peter (fn. 38 supra), § 39 n 193/194.

109 Zurich *Kassationsgericht* in ZR 1984 Nr. 53, 159 et seq.

110 Mindful of the fact that the remedy of specific performance is not available the Supreme Court is willing to uphold even very high liquidated damages with substantial punitive elements; see BGE 88 II 172 *et seq.*.

111 For a list and discussion of these and other methods see HINTZ-BÜHLER (fn 101 supra), 226 – 230.

considerable 'enabling' potential while not undercutting the foundations of Swiss corporate law.

C. The Board of Directors

It would be futile to expound on all the single duties and tasks of the board of directors in connection with the implementation of corporate law rules, mandatory and non-mandatory alike. It is a general duty of the board to act lawfully and apply all rules of corporate law when taking " ... decisions on all matters which by law or the articles of incorporation are not allocated to the general meeting of shareholders", as art 716 (1) CO puts it. This involves compliance with the multifarious formalities in connection with registering relevant facts with the Commercial Registry, preparing and calling of shareholder meetings, of the annual accounts and the general administration of the corporate legal entity. But the board's role goes even further: Under art. 706 CO (set aside suits) the board has standing like an individual shareholder to challenge a shareholder resolution that is unlawful or contrary to the articles of incorporation. Generally, it can be said that the primary responsibility for the implementation of Swiss corporate law is that of the board, with a secondary (or subsidiary) responsibility lying with one of the other 'players', primarily the Registry of Commerce, the auditors, and the shareholders, each of them acting by the appropriate legal means at their disposition.

D. The Auditors

The auditors, in their quality as a corporate body, have a limited, but important role, designed to protect shareholders, creditors, and the general public as a whole. According to art. 728 (1) CO it is their primary role to "... examine whether the bookkeeping and the annual accounts, as well as the proposal concerning the use of the balance sheet profit, comply with the law and the articles of incorporation." In this function they ensure compliance with mandatory statutory law as contained in art. 662 – 677 CO, with rules designed by the corporation itself and incorporated into the articles of incorporation (non-mandatory by their nature). It is noteworthy that in the ambit of their task they are increasingly called upon ensuring the corporations' compliance with "soft law" namely in the form of FER or IAS, either because these sets of rules are a company specific implementation of art. 662a CO ("Proper rendering of accounts") provided

for in the articles of incorporation, or because one or the other set of rules is directly binding on a corporation by virtue of the listing of its shares on a stock exchange (art. 67 / 69 SWX-LR). In the latter case we may speak of joint enforcement of mandatory corporate law rules by an SRO and a corporation's auditors[112].

A secondary task of the auditors is to avoid negative consequences in case of a board's idleness with respect to the duty to notify the judge in case of overindebtedness of the company [art 725 (2) CO] or the duty to call an annual general meeting [art 699 (1) CO].

E. 'Self-executing' Provisions ('Enforcement' by Operation of Law) and 'Dead-letter' Mandatory Rules in Corporate Law

There exists a phenomenon known in all areas of private law, but which is of special importance in corporate law, thus deserving to be explicitly mentioned: Legal provisions that are 'self-executing' in the sense that their non-observance *eo ipso* entails the inexistence of certain intended legal consequences. These are typically provisions which do not prohibit a certain result but mandatorily require a pre-defined way or method to be followed in order to obtain the desired result. The primary examples are listed in art. 627 (1) – (13) CO, containing a series of (non-mandatory) provisions that necessarily have to be integrated into the articles of incorporation in order to acquire legal effect.

The opposite phenomenon are what we call 'dead-letter' provisions, i.e. those – formally mandatory – corporate law rules whose normative 'quality' is either zero because they are *leges imperfectae* (nobody cares for them and there is no sanction for not doing so) or very low because they can be formally complied with quite easily with the 'real' legal situation being altogether different from the appearances. The classical example is the requirement that there be three shareholders [art. 625 (1) CO]. In practice, a very substantial percentage of Swiss corporations are owned by one, or maybe two people, regardless of the fact that the law threatens these corporations with the dissolution sanction "at the request of a shareholder or obligee" and "unless the company reestablishes the legally required situation within a reasonable period of time" [art. 625 (2) CO]. Another example is the requirement that board members be shareholders

[112] See III.A.2. *supra*.

[art. 707 (1) CO]. In practice, the transfer of a 'token share' from a (often controlling) shareholder not willing to act as board member to a person acting as a board member who then holds that one share on an fiduciary basis on behalf of the 'true' shareholder is the generally accepted (and lawful) pattern of coping with this formality[113].

IV. Some Final Remarks

While we do not advocate Switzerland engaging into a „race of laxity"[114] with other, namely european, countries we would nevertheless think that some constraints upon companies could be removed without running the risk of undermining the protection of any legitimate interest. Foremost we think the 'dead-letter' provisions mentioned in the preceding section could be abolished without running the danger of losing any beneficial effects for whomsoever. Obviously, we think the same of the nationality and domicile requirements of art. 708 (1) CO. We also consider as utterly unwarranted the queer tenacity with which the Swiss federal legislature up to the present day has clung to the *tres faciunt collegium* principle inherited from roman law to 'justify' the funding and existence of a corporation; it is also clearly superfluous and does not serve any discernible interest worth of protection.

Furthermore, we would advocate more flexibility in the allocation of powers between the corporate bodies, namely the shareholder meeting and the board of directors. The current mandatory law straitjacket doesn't even allow for the shareholders meeting to retain the ultimate decisionmaking power vis-à-vis the board of directors in certain important matters, to mention just one of the disadvantages.

Finally, in our view, the Commercial Registrar's duties tend to be overreaching. The boilerplate reference to the "public interest" and "third party interests" in registry practice and the element of "if otherwise no private party would sue" in Supreme Court precedents on the scope of the registrar's examination are *indicia* of a disquieting paternalistic and illiberal undercurrent in the reality of Swiss corporate law. Both the liberal roots of the Swiss private law codifications and the fact that Switzerland

113 See e.g. REYMOND, Jacques-André, "Réflexions sur le mythe de l'administrateur omniscient", in: HERTIG, Gérard (ed.), Le fonctionnement des sociétés et le respect des règles, Zürich 1996, p. 58.

114 As US Supreme Court Justice Brandeis, with respect to the aim of the various US states' legislatures when enacting corporation codes, put it in his famous dissent in Liggett Co. v. Lee 288 U.S. 517 (1933).

has to regard its corporate law body as a 'product' to be 'sold' in a competitive environment on the world market[115] would indicate a different stance.

115 See VON DER CRONE, Hans Caspar, "Ein Aktienrecht für das 21. Jahrhundert", in: SZW 1998, 157 *et seq.*