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The Global Voice of the Legal Profession

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Switzerland

Matthew T. Reiter & Lorenz Naef[*]

I DIRECTORS' LIABILITY IN SWITZERLAND: THE BASIC LEGAL REGIME

[A] Introduction

The Swiss law governing directors' liability is codified in Articles 752-760 of the Swiss Code of Obligations (CO).[1] All in all, Switzerland's legal regime governing directors' liability may be described as rather strict.[2]

Several major amendments to Swiss company law have been enacted in recent years. In 2007, provisions concerning rules for the transparency of management compensation for listed companies entered into force. 2008 brought a comprehensive revision of the audit legislation as a response to a series of accounting scandals and company collapses in Switzerland and abroad. New statutory rules governing financial accounting came into force in 2013. The applicable rules are not determined by the form of the legal entity anymore, but by the commercial significance of the enterprise.

Also in 2013, the acceptance of the popular initiative against excessive remuneration for members of management led to fundamental changes in Swiss company law. As a result, the Federal Council enacted the 'Ordinance against Excessive Reimbursement in Listed Stock Companies (VegüV)', which entered into force on 1 January 2014. The VegüV is applicable only to listed stock companies and takes precedence over

* The first and second edition of this chapter were co-authored by Matthew T. Reiter and Felix R. Ehrat.

1. The relevant law relating to D&O matters applicable in Switzerland includes the Swiss Company Law as set out in Arts 552-963 CO (see, in particular, Arts 620-762 CO regarding the law on stock companies, in particular Arts 698-726 CO regarding the powers and obligations of the general meeting and the board), the Federal Council Ordinance against Excessive Reimbursement in Listed Stock Companies (VegüV), the Swiss Code of Best Practice for Corporate Governance and the Stock Exchange Act by the SWX Swiss Exchange including the Listing Rules and the Directive on Information relating to Corporate Governance. The precedents by the Swiss Federal Supreme Court are also of high practical relevance.
2. See Peter Böckli, *Schweizer Aktienrecht*, 4th ed. (Zurich, 2009), 2357.

Articles 620-762 CO; it will remain in force until the CO itself has been revised according to the guidelines set by the popular initiative. Pursuant to the VegüV, the general meeting of the shareholders shall vote annually on the salaries of the members of the board and management; moreover, the VegüV provides that certain types of remuneration, e.g., severance payments, are no longer admissible. Members of the board and management may be held criminally liable if they act contrary to the provisions contained in the VegüV (Article 24 VegüV). A breach of the provisions of the VegüV may also lead to a personal civil liability of the board members.[3] Finally, it must be mentioned that a major revision of the Swiss stock company law is still pending.

[B] Flexible One-Tier System

The board is in charge of managing the business of the corporation and it may make decisions on all matters not allocated to the general meeting by law or the articles of incorporation (Article 716(1) CO). At the same time, the ultimate supervision of the persons entrusted with the management is a non-transferable and inalienable duty of the board (Article 716a(1)(5) CO). This statutory allocation of powers is often described as a one-tier (or 'monistic') system as opposed to a dualistic system in which the management of the corporation and the supervisory responsibilities are assigned to separate corporate bodies. However, the possibility to delegate the management of the corporation's business (Article 716b(1) CO and Article 6 VegüV) allows for a fairly large degree of flexibility in structuring the organization of a Swiss corporation (see below, section I[E]).

[C] Board Structures, Chairman and CEO

The board is composed of one or more members (Article 707(1) CO); the statutory requirement that board members shall be shareholders has been abolished. In principle, the board constitutes itself. However, Articles 2(1) and 4 VegüV provide that the board's chairman shall no longer be designated by the board, but elected by the general meeting for one year. Furthermore, the general meeting is entitled to remove the chairman. The aforementioned powers are inalienable and non-transferable. Conversely, in non-listed stock companies it is still the board's authority to designate the chairman (the general meeting having no authority to remove him). However, the articles of incorporation may reserve the right to elect the chairman for the general meeting (Article 712 CO).

The CO leaves it to the board to define the chairman's responsibilities. He is usually responsible for the preparation and the chairing of the board meetings. If nothing to the contrary is provided, the chairman has a casting vote. In major

3. Peter Isler & Bertrand Schott, 'Haftung von Verwaltungsrat und Geschäftsleitung für nicht Minder-konforme Vergütungen', in *Verantwortlichkeit im Unternehmensrecht VII, EIZ 150*, ed. Rolf Sethe & Peter Isler (Zurich, 2014), 7 et seqq.

corporations the formation of executive, finance, audit, remuneration, or nominating committees is quite common, and it is a recommended practice for the boards of listed corporations to form such committees.[4] Typically, such committees will not have general decision-making powers except in case of delegation by the full board for specific cases. As to the composition of the board, the Swiss Code of Best Practice recommends that it should be:

> small enough in numbers for efficient decision-making and large enough for its members to contribute experience and know-how from different fields and to allocate management and control functions [...] among themselves.[5]

Lawyer directorship is quite widespread.

[D] Election and Removal of Directors, Nationality and Domicile Requirements

Since the acceptance of the popular initiative and the following entry into force of the VegüV, election and removal of directors in listed stock companies are fundamentally different than in non-listed stock companies. Both still have in common that the board members must be elected by the general meeting and that they may be re-elected (Articles 698(1)(2) and 710 CO). However, in non-listed stock companies the board members are elected for a term of three years, unless the articles of incorporation provide otherwise; the term of office may not exceed six years. Re-election of the board *in corpore* is permitted (Article 710(1) CO). Conversely, in listed stock companies the board members can only be elected for one year and merely individually, thus ruling out a re-election of the board *in corpore* (Article 3 VegüV). In non-listed stock companies staggering is recommended and also quite common.

A board member may be removed by the general meeting at any time (Article 705(1) CO). Directors themselves may in principle resign for any reason and at any time. If the resignation is mistimed, however, this may expose the director to liability. The former nationality requirement has been abolished. It is now sufficient that a representative, be it a director or an officer, is resident in Switzerland.

[E] Delegation

The board is in charge of managing the corporation's business 'insofar as it does not delegate it' (Article 716(2) CO). Pursuant to Article 716b(1) CO, the management function may be delegated to individual board members (managing directors) or third parties (officers), the latter also including legal entities. However, under Article 6(1)

4. See Swiss Code of Best Practice for Corporate Governance, ss 13 et seq. and 16 et seq.; see also Arts 2 and 7 VegüV which apply to listed stock companies and provide that the general meeting has the inalienable and non-transferable power to elect the members of the remuneration committee. This means that remuneration committees are not merely recommended, but required by law in listed stock companies.
5. See Swiss Code of Best Practice for Corporate Governance, s. 10.

VegüV the delegation of management to legal entities is no longer permitted. This flexibility allows for far-reaching modifications of the traditional statutory allocation of powers, ranging from the delegation of management to an Executive Committee, to the concentration of management powers and the chairman position in one person (creating a position similar to a '*Président-Directeur Géneral*' or 'Chairman and CEO'),[6] to the delegation of management of operational matters to outside officers, thus largely separating the management function from the inalienable and non-transferable supervisory duty (Article 716a(1)(5) CO) of the board. Prerequisite for a full or partial delegation is an explicit authorization in the articles of incorporation to delegate the operational management in accordance with an organizational regulation (Article 716b(1) CO and Article 12(2)(4) VegüV). Such organizational regulation must include provisions regarding the organization of management, the individual managerial positions and their responsibilities, and the reporting of the management to the board (Article 716b(2) CO). Where the delegation of managerial duties was duly authorized, board members will not be held liable for the damages caused by the delegates, provided the board members are individually able to prove that they applied the necessary care in selection, instruction, and supervision of the delegates.

Notably, certain core duties of the board are neither transferable nor otherwise alienable (see Article 716a(1) CO; see also Articles 5 and 13 VegüV). Among the inalienable duties are the ultimate management of the corporation and the giving of the necessary directives, the establishment of the organization of the corporation, the establishment of financial control mechanisms and the financial planning, the appointment and removal of the persons entrusted with the management, the ultimate supervision of management, the preparation of the year-end business report (which includes the financial statements), the preparation of the general meeting of the shareholders and – according to Articles 5 and 13 VegüV (which apply only to listed stock companies) – the preparation of the remuneration report. Particularly, the board of directors also has an inalienable duty to notify the judge in case of an insolvency respectively over-indebtedness of the corporation (Article 716a(1)(7) CO), the breach of which duty is often called upon as a ground for liability claims.

II RECENT CASES DEALING WITH DIRECTORS' LIABILITY

Directors of Swiss corporations have been confronted with liability claims more and more often in the past years. As cases of directors' liability usually involve multiple parties and are often based on complex facts, the procedures tend to be protracted and costly. Many or even most cases are thus ultimately settled. In the following we shall examine certain typical constellations and important cases.

6. See Böckli, *supra* n. 2, 1760 et seq.

[A] Claims of the Company in Good Standing

The number of claims brought by corporations in good standing or their shareholders is still rather small due to the high procedural costs and the lack of information of minority shareholders. However, the pressure has been mounting in recent years, especially on the board of listed stock companies, to evaluate taking action against board members and senior management in the aftermath of a crisis. A board can ill afford not to diligently evaluate whether board members or top management have breached their duties and whether or not there is indeed a cause of action, or its members risk to be deemed in breach of their own fiduciary duties vis-à-vis the corporation.

In a recent decision the Federal Supreme Court addressed the question of whether directors can ward off liability if they can prove that they were acting with the approval of all shareholders. The case concerned a lease agreement that was detrimental to the corporation. The agreement had been entered into by a director who at the time also was the corporation's sole shareholder. The directors' liability claim was raised by the heirs of the sole shareholder against the two other directors who had held qualifying shares in trust for the sole shareholder at the time the lease agreement was concluded. The Federal Supreme Court upheld the defence of *volenti non fit iniuria* of the two directors, arguing that the approval of the sole shareholder may be held against the corporation and the shareholders filing suit for the corporation.[7] It is to be noted that the legal situation would have been different had the corporation gone bankrupt: in the case of a bankruptcy the claims of the corporation are 'replaced' by claims of the creditors as a whole[8] with the effect that objections against the corporation as such can no longer be raised.[9]

Pursuant to Article 693(3)(4) CO, voting shares have no preferential weight in the decision of the general shareholders' meeting as to whether the corporation shall assert an action against its directors, officers, or executives. In order not to unduly impede shareholders wishing the company to take action against its directors, officers, or executives, the Federal Supreme Court held in BGE 132 III 707 that this provision – and thus the same (relaxed) majority requirement – applies also to the decision as to whether counsel for the corporation to pursue this action is elected or not.

7. See BGE 131 III 640, 644, considerations 4.2.1 and 4.2.3; confirmed in decision 4A.15/2013 of the Federal Supreme Court of 11 July 2013, consideration 4.1.
8. So-called Ansprüche der Gläubigergesamtheit.
9. See BGE 117 II 432, 440, consideration 1.b/gg; confirmed in decision 4A.425/2015 of the Federal Supreme Court of 10 December 2015, consideration 4.4; see also Matthew Reiter, 'Prozessrechtliche Probleme in Verantwortlichkeitsverfahren', in *Verantwortlichkeit im Unternehmensrecht,* ed. Rolf H. Weber (Zurich, 2003), 193. In BGE 132 III 342, 349 et seqq., consideration 4 (confirmed in BGE 136 III 322, 331 et seq., consideration 4.5), this exclusion of personal objections and restrictions in cases of derivative actions was significantly eased (see below, s. V[C]., last paragraph).

[B] Late Filing for Insolvency

By far the most directors' liability claims are raised in bankruptcy proceedings, and here the breach most commonly alleged is a late filing for insolvency. Pursuant to Article 725(2) CO, in case of a substantiated concern of over-indebtedness, the board must prepare an interim balance sheet and must submit it to the auditors for examination. If this shows that the claims of the company's creditors are covered neither if the assets are appraised at ongoing business values nor at liquidation values, then the board must notify the bankruptcy court, unless creditors of the company subordinate claims to those of all other company creditors in an amount sufficient to cover the indebtedness (Article 725(2) CO). This inalienable duty to notify the judge (Article 716a(1)(7) CO) has been the subject matter of numerous court decisions. The Swiss Federal Supreme Court has stated that the notice can be postponed as long as there are concrete chances for a successful financial restructuring and as long as there is no worsening of the financial situation that puts the claims of the creditors at risk. It further stated that the board does not act culpable if it does what can reasonably be expected from an entrepreneur in a difficult situation.[10]

[C] Liability for the Issuance of Prospectuses

Founders, board members, and all persons participating in the foundation of a corporation are liable vis-à-vis the company, the individual shareholders and the creditors for any damages caused by intentional or negligent misrepresentations of financially relevant facts in the articles of incorporation, founder's report, report on a capital increase, and so forth. Various court decisions have dealt with the question of when the damages can be deemed the consequence of incorrect or misleading information in a prospectus.

In a leading case the shareholder at issue had bought his shares one year after the subscription period for a capital increase had expired. After the corporation's bankruptcy the shareholder filed suit against three directors. The Court first held that the shareholder had no claim based on the liability for the issuance of prospectuses as there was no causal link between misleading information in the prospectus and his decision to buy the shares.[11] Second, the Court held that the shareholder had no direct damage due to the fact that the decrease in value of the shares primarily had an impact on the corporation itself and not directly on the shareholders. While the damage to the corporation was already addressed in a settlement agreement between the receiver in bankruptcy and the fallible directors, there was no possibility left for the shareholder to raise a claim on behalf of the corporation.[12]

As to the causality requirement in the liability for prospectuses, the Federal Supreme Court clarified that the necessary causality is given if the investor either directly relied on the information in the prospectus (direct causal link), or – in the

10. See BGE 116 II 533, 541, consideration 5.a.
11. See BGE 131 III 306, 309 et seq., considerations 2.2 et seq.
12. BGE 131 III 306, 312, consideration 3.2.1.

assumption respectively under the condition that an efficient market exists – if the investor relied on the investment climate, which in turn was based on the prospectus (indirect causal link). On the other hand, a causal link does not exist if the investment climate is not based on the prospectus, but on other (newer) information, such as new company data, new press reports, economic forecasts, and so forth.[13]

III STANDARDS OF JUDICIAL REVIEW

Although the business judgment rule as known in the US legal system does not exist in Switzerland, it is generally accepted in Swiss doctrine and court practice that judges should exercise restraint when scrutinizing business decisions and that a liability shall arise only where a director breaches a duty.[14]

IV CORPORATE GOVERNANCE

Also in Switzerland, there has been much debate about what constitutes good corporate governance in the past few years. There have been major legal changes regarding the remuneration of top management of listed stock companies. Three different sets of legal rules regulate corporate governance in Switzerland:

- the Swiss Company Law (Articles 552-963 CO);
- the self-regulation of the SWX Swiss Exchange;[15] and
- the Swiss Code of Best Practice for Corporate Governance. This Code was approved by 'economiesuisse' and is an act of self-regulation that contains recommendations and guidelines for good corporate governance.[16]

V LIABILITY ISSUES

[A] Grounds for Liability and Prerequisites in General

In order for a director to be held responsible, there has to be an intentional or negligent breach of a director's duty. The most essential duties are the inalienable duties enumerated in Article 716a CO, the duty of care, of loyalty and of equal treatment of shareholders (Article 717 CO). Other duties may be found in the individual articles of incorporation.[17] Furthermore, there must be an actual and legal causal link between the director's intentional or negligent breach of duty and the damages caused by such

13. BGE 132 III 715, 720 et seq., consideration 3.2.1.
14. See, e.g., Andrea Grass, 'Management-Entscheidungen vor dem Richter', in SZW [2000] (1).
15. The self-regulation of the SWX Swiss Exchange is based on the Stock Exchange Act and includes the Listing Rules and the Directive on Information relating to Corporate Governance.
16. In 2014, a revised version of the Swiss Code of Best Practice for Corporate Governance was issued to take into account recent legal changes and important developments.
17. See Peter Forstmoser, Arthur Meier-Hayoz & Peter Nobel, *Schweizerisches Aktienrecht* (Berne, 1996), § 37 N 20 et seq.

breach. According to the standard formula used by the Federal Supreme Court, legal or proximate cause is defined as a cause that:

> in the ordinary course of things and according to general life experience is suited to cause the damage in question such that the event in question can be regarded as having substantially increased the risk of occurrence of the damages.[18]

The test is not to be applied too strictly in cases of directors' liability according to the Federal Supreme Court. Also, it is sufficient if the breach constitutes a partial cause of the damages.[19]

Damages can be defined as an involuntary, actual economic loss. Under Swiss law damages are calculated as the difference between the net value of all assets and liabilities of the injured party with and without the damaging event.[20] Damages may thus consist in a decrease of assets, an increase of liabilities, or in lost profits. Breach of a duty, damages, causation, and, in principle, also fault on behalf of the director must be proven by the injured party claiming compensation. A director will generally be held to have been at fault if he cannot prove to have acted diligently in all respects.

[B] Who Can Sue?

It is important to distinguish between the damages incurred directly by the shareholders and creditors of the corporation and the damages incurred first by the corporation itself (which may indirectly lead to damages of the creditors and shareholders). Until recently, the Federal Supreme Court regarded the nature of the provision that was breached as decisive for this qualification: only if a provision of corporate law was breached, the sole purpose of which is the protection of the creditor's interest, or if the conduct could be qualified as a tort in general, were the inflicted damages qualified as direct damages of the creditor.[21] In a recent case, the Federal Supreme Court has clarified that this practice applies only where a bankrupt corporation and its creditors and shareholders have suffered (direct) damages in order to prevent the creditors and shareholders to raise their concurring claims before the bankrupt estate in a 'race against time'. Apart from such a situation the general rules apply, i.e., the decisive criterion is which party's assets have directly incurred the damages.[22]

The corporation, the individual shareholders, and the creditors of the corporation all have the right to each and individually sue directors for breaches of their duties insofar as they have each incurred immediate, direct damages. This is true regardless of whether the corporation is bankrupt or not. As to the action of the corporation itself,

18. See, e.g., decision 4C.344/1998 of the Federal Supreme Court of 24 November 2000, consideration 4.c.
19. *Ibid.*
20. See decision 4C.19/2004 of the Federal Supreme Court of 19 May 2004, consideration 1.5; confirmed in decision 4A.177/2011 of the Federal Supreme Court of 2 September 2011, consideration 4.3.
21. See, e.g., BGE 125 III 86, 88, consideration 3.a.
22. See BGE 131 III 306, 311, consideration 3.1.2; confirmed in BGE 132 III 564, 570 et seq., consideration 3.2.3; also confirmed in decision 4A.231/2011 of the Federal Supreme Court of 20 September 2011, consideration 2.

it is in principle up to the board to decide whether a liability claim against one of its members or against another executive or officer of the corporation should be pursued. The general meeting may, however, also make the decision that the corporation shall pursue an action and thus force the board to become active.

Regarding the liability in connection with the issuance of prospectuses, any purchaser of securities has a claim if he has suffered a loss due to false, misleading, or incomplete information in the prospectus or other promotional material.

[C] Derivative Actions in Particular

Special rules grant the individual shareholders' and creditors' standing to raise an action for damages suffered by the corporation. Different sets of rules apply depending on whether the corporation is in bankruptcy proceedings or not: if the corporation is solvent respectively operative, shareholders may file an action for damages caused to the corporation as long as they have not explicitly approved the yearly accounts or consented to a discharge of the board at the occasion of a general meeting, it being understood that a discharge is valid only for facts that have been disclosed. The claim of the shareholder is for compensation of the corporation. It is not necessary that the shareholder was already a shareholder at the time the corporation suffered the damages.[23]

Once bankruptcy proceedings have commenced, the receiver respectively the bankrupt estate may assert the claims of shareholders and creditors. The receiver has a duty to proceed against former directors or managers of a corporation if they are considered to be liable for losses. If the bankrupt estate waives the right to pursue the liability claims, the claims are offered to the shareholders and creditors, who may pursue the claims of the bankrupt estate in their own name. Any proceeds from such derivative action may first be used to cover the claim of the creditor filing suit, and second for the shareholders also filing suit. Any remainder would fall into the bankrupt estate and be distributed among the remaining creditors. In reality, however, creditors never sue for an amount higher than their claim as admitted in the bankruptcy proceedings.[24] The concept of the creditor suing for the benefit of the bankrupt estate has remained theory.

The Federal Supreme Court decided that a director who is held liable vis-à-vis the company may set off claims against the company if the claims existed at the time the company was declared bankrupt.[25] With this clarification the court substantially narrowed its rule established in previous case law, according to which directors were generally excluded with personal defences vis-à-vis the company. The exclusion of personal defences and exceptions of the director is now explicitly restricted to such

23. See BGE 131 III 640, 643, consideration 4.1.
24. See Reiter, *supra* n. 9, 194 et seq.
25. BGE 132 III 342, 349 et seqq., consideration 4; confirmed in BGE 136 III 322, 331 et seq., consideration 4.5.

'defenses which are not justified vis-à-vis the debtors', namely to such defences and exceptions that do not concern the decision-making process of the company.[26]

[D] Who Can Be Sued?

Actions against directors, officers, or other corporate executives may be brought based upon the following grounds:

- Anyone having intentionally or negligently contributed to the issuance of a prospectus containing incorrect or misleading statements can be held liable for the damages such caused to the purchaser of the security (liability for the issuance of a prospectus (Article 752 CO)).
- Founders, board members, and generally all persons participating in the incorporation of the company or a capital increase may be held liable for incorrect or false representations with regard to contributions in kind or assets (Article 753 CO).
- Finally, the board members and all persons engaged in the management or liquidation of a corporation may be held liable for the negligent or intentional violation of their duties in the administration, management, or liquidation of the corporation (Article 754 CO).

No distinction is made between directors elected on a fiduciary basis and consultants.[27] The decisive criterion in Article 754 CO is whether a person has in fact a significant influence on the corporation's decision-making process.[28] Such a person qualifies as a de facto director or officer of the corporation and thus may be held liable like a formally appointed board member or officer.[29] Officers are generally only liable for acts or omissions within their scope of responsibility.

[E] No Thresholds and Limitations on Directors' Liability

Liability is in principle unlimited; the current statutory provisions do not contain any thresholds or limitations for claims against directors.

The statute of limitations in directors' liability is five years, calculated from the day the injured party gains knowledge of the damage and of the person liable. Claims are in any case barred after ten years. Only if the claim results from a criminal act for which the criminal law provides for a longer statute of limitations, such statute of limitation is also applicable to the damages claim.[30]

26. *Ibid.*
27. See Harald Bärtschi, *Verantwortlichkeit im Aktienrecht*, diss. (Zurich, 2001), 264 et seq.
28. See BGE 128 III 92, 93 et seq., consideration 3.a; confirmed in BGE 141 III 159, 162, consideration 1.2.2.
29. *Ibid.* See also Forstmoser, Meier-Hayoz, & Nobel, *supra* n. 17, §37 N 12 et seq.
30. Article 760(2) CO.

[F] Joint and Several Liability

Where several board members are liable for damages, each of them is jointly and severally liable, but only to the extent that the damage is the result of that member's negligence. The degree of negligence should in principle be taken into account externally, but not to such a degree that it eliminates joint and several liability by making the internal allocation of the damages the limit of the external liability vis-à-vis the injured party. There is an amendment planned that will grant the auditors exactly such a privileged position in cases of slight negligence. Despite this 'differentiated solidarity', the plaintiff has the possibility to sue several or all participants for the full amount of damages and request the judge to determine the liability of each individual defendant in the same proceeding.

[G] Class Actions

Class actions do not exist in Switzerland. However, other procedural institutions – e.g., Article 71 (voluntary joinder of actions of several plaintiffs) and Article 90 (combination of several actions of one plaintiff in one action) of the Swiss Civil Procedure Code ('CPC') – can to a certain extent compensate for the non-availability of class actions.

[H] Costs and Fees in Liability Litigations

The court charges must be paid by the losing party; if neither of the parties prevails entirely, the court costs are divided among the parties according to the extent that they have won respectively lost the case. The losing party also has to pay the prevailing party a compensation for legal costs (fee shifting). As aforementioned costs are generally fixed based on the amount in dispute, shareholders or creditors pursuing a derivative suit had to bear an overwhelming cost risk in the past. However, according to Article 107 CPC, the court may diverge from the general principles of allocation and allocate the costs at its own discretion, e.g., if a party was caused to litigate in good faith or if there are other extraordinary circumstances that would result in an allocation according to the outcome of the case being inequitable. Furthermore, according to the practice of the Federal Supreme Court, where several directors are sued for the full amount of damages, the directors are – for the purpose of determining compensation for legal costs – treated as one party provided they did not have sufficient reason to each be defended by separate counsel.[31] The cost risk of the suing shareholder or creditor who cannot or does not precisely know the contribution of each individual director or officer is thus reduced.

31. See BGE 122 III 324, 326, consideration 7.b and BGE 125 III 138, 139 et seq., consideration 2.d; both confirmed in decision 4A.603/2014 of the Federal Supreme Court of 11 November 2015, consideration 12.2.1.

VI INDEMNIFICATION

While a Swiss corporation has the possibility to purchase directors' and officers' (D&O) insurance, it is regarded as unlawful for the corporations to agree in advance on indemnifications against directors' liability claims in the articles of incorporation or in individual agreements.[32] It is, however, quite common and permissible to include indemnity clauses in contracts between shareholders and their nominees for the appointment as board member,[33] at least insofar as damages are concerned that do not arise from grossly negligent, wilful, or even criminal acts of the director or officer.[34] In addition, agreements of shareholders not to sue their directors and officers are considered binding for all consenting shareholders. Shareholders who have not consented to such agreements or creditors of the corporation will not be bound by such agreements and may still sue the directors and officers for damages.[35]

VII DIRECTORS' AND OFFICERS' INSURANCE

D&O liability insurance has become more and more widespread in Switzerland not only for directors of publicly traded companies, but also for directors of smaller and medium-sized non-listed companies. Such policies are often bought by the corporation itself. The insurance premium may be paid by the corporation; it is considered a tax-deductible expense for a corporation. Professionals who also act as directors may purchase D&O liability insurance as an extension to their professional liability insurance policy. Normally, the limits are per claim and in the annual aggregate for all claims and all directors and officers together. Intentional wrongful acts or intentional violations of the law are typically excluded from D&O liability insurance. Any indemnity may be reduced if the director acted grossly negligent.[36] Besides this, penalties, punitive damages, as well as claims for social security contributions and tax duties are equally excluded. The claims-made principle usually applies to D&O insurance policies. Such policies usually have a contract period of only one year and are not automatically renewed.[37]

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32. See Daniel Daeniker, 'Versicherung, Prozesskostenersatz und Freistellung (Indemnification) von Organpersonen', in *Neuere Tendenzen im Gesellschaftsrecht', Festschrift für Peter Forstmoser*, ed. Hans Caspar von der Crone, Rolf H. Weber, Roger Zäch, & Dieter Zobl (Zurich, 2003), 536 and 540; Bärtschi, *supra* n. 27, 45.
33. See Bärtschi, *supra* n. 27, 44.
34. See Georg Krneta, *Praxiskommentar Verwaltungsrat*, 2nd ed. (Berne, 2005), 467; Roland Müller, Lorenz Lipp, & Adrian Plüss, *Der Verwaltungsrat, Ein Handbuch für Theorie und Praxis*, 4th ed. (Zurich, 2014), 408 and 416 et seq.
35. See Daeniker, *supra* n. 32, 539 et seq.
36. See Art. 14(2) of the Federal Statute on Insurance Contracts.
37. See Thierry Luterbacher, 'Verantwortlichkeit und Versicherung', in *Aktuelle Fragen zur aktienrechtlichen* Verantwortlichkeit, ed. Charlotte Baer (Berne, 2003), 160.

VIII OTHER METHODS OF PROTECTION FOR DIRECTORS ON THE BOARD OF A SWISS CORPORATION

While it would go well beyond the scope of this publication to provide a *vade mecum* for directors of Swiss corporations to avoid liability, adhering to the following fundamental rules will help to avoid many pitfalls that can lead to liability claims:[38]

- Delegate the management of the operational business to managing directors or to officers, and make sure the statutory prerequisites for such a delegation are fulfilled. Take due care in the selection, instruction, and supervision of the delegates.
- Make sure that enough board meetings with agenda and minutes are organized. A minimum of four to six board meetings per year is advisable.[39]
- Ensure that periodical reporting to the board is guaranteed.
- Have the auditors inform you directly about their significant findings at least once a year.
- Make sure that intra-group financing techniques (such as upstream financing) are justified transactions. Directors' liability is focused on each legal entity separately and not on group structures.
- Make sure that all social security contributions are routinely and timely paid. Where the corporation fails to make its contributions, the directors are regularly held liable for the missing contributions.
- Check the content of the agreement you might have with the shareholder.
- Ask for a copy of the corporation's D&O insurance policy and find out details about the coverage, limits, deductible and exclusions on an annual basis.

38. See also Martin Kessler, Christoph Schmid, & Rolf Watter, 'Risks of Sitting on the Board of a Swiss Subsidiary', presentation given for Swiss-American Chamber of Commerce, 28 June 2005.
39. See Swiss Code of Best Practice for Corporate Governance, s. 11.