# Code of Obligations

Last change: 04.05.2026

PDF generated on: 21.09.2026

ONLINE COMMENTARY
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COMMENTARY ON

# Art. 11 CO

A commentary by Susanne Brütsch

SUGGESTED CITATION

Susanne Brütsch, Kommentierung zu Art. 11 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Brütsch, N. XXX zu Art. 11 OR.

**B. Form of contracts**

**I. Formal requirements and significance in general**

**Art. 11**

[1] The validity of a contract is not subject to compliance with any particular form unless a particular form is prescribed by law.

[2] In the absence of any provision to the contrary on the significance and effect of formal requirements prescribed by law, the contract is valid only if such requirements are satisfied.

# CONTENT

## I. THE PRINCIPLE: FREEDOM OF FORM

In accordance with the general principle of freedom of contract, Art. 11 para. 1 CO establishes the freedom of form as the default rule. Contracts, therefore, only (but still) require a special form if such form is expressly required by (federal) law.[1] Contrary to its wording, the rule of Art. 11 CO not only applies to contracts but to any juridical act.[2] 1

Formal requirements have multiple purposes.[3] Foremost, they have a cautionary effect deterring parties from entering into contracts hastily.[4] Formal requirements also serve to create legal certainty and to provide clear evidence of the parties' agreement in writing. They increase transparency by embodying the legal act in a physical form, making a legal act perceptible and visible to third parties (e.g. also for registration authorities).[5] 2

If for the validity of a legal act a specific form is required, the parties have to comply with the formal requirement irrespective of whether its purpose (as described above) is otherwise guaranteed in the case at hand. Adherence to the formal requirements is to be assessed and examined separately and independently of the substantive validity of the legal act and its interpretation.[6] 3

Statutory formal requirements are to be interpreted narrowly based on the principle of *favor negotii*.[7] However, this does not change the fact that formal requirements are mandatory law and as such not subject to the parties' dispo- 4

1. Cf. BGE 132 III 549 consid. 2.1.1; cf. Bucher, p. 160 et seq, for contractual reservations see Art. 16 CO.
2. Cf. BGE 121 III 31 E. 2c; CR CO I-Xoudis, mn. 6 to Art. 11 CO; cf. also various examples in Gauch/Schluep/Schmid, mn. 572 and 572a.
3. Cf. BK OR I-Müller, mn. 46 et seq to Art. 11 CO; cf. CR CO I-Xoudis, mn. 4 et seq. to Art. 11 CO; cf. also Tercier/Pichonnaz, mn. 720 et seq.
4. Cf. BGE Pra 1997, No. 150 consid. 1b; BGE 118 II 32 consid. 3d); BGE 117 II 382 consid. 2b; BGE 112 II 330 consid. 3a.
5. Cf. BGE 82 II 48 consid. 1 on the written form requirement of an assignment, which serves to enable third parties "*to determine who is entitled to the claim on the basis of a process that has been clearly made known*"; cf. also BGE 122 III 361 consid. 4c); BGE 118 II 32 consid. 3d; BGE 140 III 200 consid. 4.2; cf. also Bucher, p. 161 et seq.
6. Cf. decision of the Federal Supreme Court 4C.110/2003 of 8 July 2003 consid. 3.1.
7. Cf. BGE 89 II 185 consid. 3; BGE 119 II 135 consid. 2b; BGE 113 II 402 consid. 3c or BGE 112 II 23 consid. 4; cf. instead of many CR CO I-Xoudis, mn. 14 to Art. 11 CO or Tercier/Pichonnaz, mn. 716.

sition.[8] Nevertheless, parties may agree on a stricter form than is provided for by law (cf. Art. 16 para. 1 CO).[9]

## II. TYPES OF FORMAL REQUIREMENTS

### A. Simple Written Form

5 Simple written form (“*einfache Schriftlichkeit*”, “*forme écrite simple*”) is the mildest of all formal requirements. It is required that the declarations of intent are made in writing on a physical object of any kind or at least that the declaration is recorded in a way that allows permanent, unchanged reproduction in the form of text.[10]

6 Further specific requirements are set out in an exhaustive manner in Art. 12-15 CO.[11] In particular, the contractual document (or object) has to be signed by each party, on whom it imposes obligations (cf. in case of an assignment agreement Art. 165 CO).

### B. Qualified Written Form

7 Qualified written form ("*qualifizierte Schriftlichkeit*", “*forme écrite qualifiée*”) necessitates to observe additional formal or contextual requirements such as the signature in manuscript of an entire text (e.g. in case of a testament, Art. 505 para. 1 CC) or the requirement to use specific forms provided by the authorities (e.g. when terminating residential or commercial leases, Art. 266l para. 2 and Art. 269d CO).[12]

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8. Cf. decision of the Federal Supreme Court 4A_420/2007 of 19 December 2007 consid. 2.4.1, where a contract in case of doubt was considered as a personal guarantee.
9. BSK OR I-Schwenzer/Fountoulakis, mn. 30 to Art. 11 CO; cf. also Art. 16 CO; the Cantons, however, are prohibited from introducing form requirements regarding legal acts, for which federal law does not provide for special form requirements (cf. BGE 99 II 159 consid. 2a).
10. Regarding the text-form requirement, cf. BK OR-Müller, mn. 95 et seq to Art. 11 CO or CR CO I-Xoudis, mn. 17a to Art. 11 CO.
11. For more examples, key points and special circumstances cf. BK OR-Müller, mn. 73-79 to Art. 11 CO; Gauch/Schluep/Schmid, mn. 505 et seq. or CR CO I-Xoudis, mn. 18 to Art. 11 CO; cf. also the commentary to Art. 13-15 CO, which discusses also the different means and new forms of communication.
12. Cf. BGE 118 II 130 consid. 2b; cf. Tercier/Pichonnaz, mn. 737; see for a compilation of examples BK OR-Müller, mn. 84-90 to Art. 11 CO; see for further literature Gauch/Schluep/Schmid, mn. 523a.

## C. Public Certification

Public certification or notarisation ("*öffentliche Beurkundung*", "*forme authentique*") is the strictest formal requirement. The parties' agreement (or the legal act) has to be recorded by a person officially entrusted with this task by the state (e.g. a judicial or administrative authority or a notary public) pursuant to the applicable procedures.[13] 8

This formal requirement usually applies whenever the legal act is the basis for a (mandatory) entry in public registers (e.g. for real estate transactions) or is particularly sensitive (e.g. for marital agreements or contracts of succession).[14] 9

It is not federal but cantonal law that regulates the manner in which public deeds are drawn up in their territory (Art. 55 para. 1 of the final title of the CC).[15] In terms of minimum standards, the notary will write down the parties' agreement truthfully and in full, read out aloud the recorded text in their presence and ask for their consent that the text reflects their agreement.[16] The notarization is completed with the sealing and signing of the deed with place and date.[17] 10

# III. EXTENT OF FORMAL REQUIREMENTS

The extent to which formal requirements apply is governed by federal law.[18] 11

Whereas the law in some cases extends the formal requirements to a specific legal act as a whole (e.g. for the sale of immovable property, which is subject to public certification pursuant to Art. 216 para. 1 CO), formal requirements may also only affect certain parts/clauses typically included in a broader contractual framework (e.g. non-competition clauses within employment con- 12

13. BGE 99 II 159 consid. 2a; cf. Bucher, p. 167 et seq.
14. Cf. BSK OR I-Schwenzer/Fountoulakis, mn 7 to Art. 11 CO; cf. a compilation of examples in BK OR-Müller, mn. 129 et seq. to Art. 11 CO.
15. Cf. instead of many CR CO I-Xoudis, mn. 20 et seq. to Art. 11 CO.
16. Cf. Gauch/Schluep/Schmid, mn. 526 with references.
17. Cf. KUKO OR-Wiegand/Hurni, mn. 5 to Art. 11 CO; note that cantonal law can also provide for the possibility of producing deeds in an (equivalent) electronic form, cf. Art. 55a of the final title of the CC as well as the regulations within the EÖBV.
18. For public certification, cf. BGE 125 III 131 consid. 4a; BGE 113 II 402 consid. 2a; whereas the procedure of public certification falls under the jurisdiction of the cantons (cf. Art. 55 of the final title of the CC, see also para II.C. above).

tracts, cf. Art. 340 para. 1 CO[19] or in case of personal suretyships, cf. Art. 493 CO).

13 That being said, only the so called *objectively* or *subjectively essential parts* of an agreement (*essentialia negotii*) are subject to formal requirements.[20] As statutory law does not provide more guidance on this distinction it is mainly case law which determines the (objectively and subjectively) essential parts of an agreement with a view to its purpose and legal nature.[21]

14 Formal requirements also apply to amendments of the main contract (cf. Art. 12 CO) and may even extend to ancillary agreements, if such agreements are linked to the main contract.[22]

## IV. LEGAL EFFECTS

### A. In General

15 Compliance with the formal requirements of simple or qualified written form does not lead to an increased probative value. No conclusions as to the accuracy of the document's content or to the authenticity of the signatures can be drawn on the basis of this circumstance alone.[23]

16 However, pursuant to Art. 9 CC, public deeds constitute full proof of the facts evidenced by them, unless their content is shown to be incorrect.[24] In addition, public deeds may, under certain conditions, be enforced like judicial decisions pursuant to Art. 347 CPC and the DEBA.[25]

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19. For case law in that regard cf. BGE 145 III 365 consid. 3.2.
20. BGE 90 II 34 consid. 2; BGE 135 III 295 consid. 3.2; BGE 125 III 131 consid. 4b; BGE 113 II 402 consid. 2a; cf. CR CO I-Xoudis, mn. 24 et seq to Art. 11 CO; cf. a compilation for formal requirements of various legal acts in BK OR-Müller, mn. 162-165 to Art. 11 CO.
21. Cf. para I above.
22. Cf. BGE 113 II 402 consid. 2a; BGE 125 III 131 consid. 4b.
23. Cf. ZK OR-Jäggi, mn. 54 to Art. 13 CO; cf. also BGE 101 II 211 consid. 4b using the example of a testament.
24. Cf. BGE 127 III 248 consid. 3c.
25. Cf. instead of many Tercier/Pichonnaz, mn. 762.

## B. In case of Failure to Comply with Form Requirements

Legal acts or contracts which fail to meet applicable formal requirements[26] are considered invalid (Art. 11 para. 2 CO).[27] 17

According to the case law of the Federal Supreme Court invalidity means nullity. Such nullity has to be taken into account *ex officio* and may be invoked at any time (without becoming time-barred) and also by third parties which are not directly involved in the invalid legal relationship.[28] On the other hand, this strict view is challenged in legal doctrine, which advocates a case-by-case assessment.[29] Still, the Federal Supreme Court saw no need to revisit its case law in a recent decision and did not address legal doctrine's critique.[30] 18

If only certain parts of a contract fail to meet formal requirements, partial nullity may be assumed in analogous application of Art. 20 para. 2 CO (except if the parties would not have entered into the agreement at all without the invalid part).[31] 19

If a contract is (irreversibly) invalid due to non-compliance with the formal requirements, no party can request performance or claim compensation (except for special cases such as *culpa in contrahendo*)[32] and the parties have to return to one another what has already been exchanged or paid pursuant to 20

26. Cf. for different types of violations Bucher, p. 168 (e.g. if an essential element has not been publicly certified or not to the necessary extent).
27. Unless there is a contrary provision, like in Art. 40d CO, where the default of formal requirements only has the effect that the deadline for revoking a contract is not yet triggered (Art. 40e CO); cf. for more examples BK OR-Müller, mn. 254 et seq. to Art. 11 CO; cf. for property purchase contracts Gauch/Schluep/Schmid, mn. 563 et seq. with many references to special literature.
28. Cf. for example BGE 137 III 243 consid. 4.4.6; BGE 112 II 330 consid. 2b; BGE 106 II 146 consid. 3; partially left open in BGE 112 II 330 consid. 2a, b.
29. Cf. Gauch/Schluep/Schmid, mn. 558 et seq. with many references in footnote 165, cf. also BK OR-Müller, mn. 184 and 207 et seq. to Art. 11 CO or CR CO I-Xoudis, mn. 42 to Art. 11 CO and Tercier/Pichonnaz, mn. 756 et seq., which, amongst many others, plead for a "*nullity sui generis*" (no absolute ex-officio nullity with possibilities to remedy the invalidity, e.g. through fulfilment of the contract); same view already Bucher, p. 169 et seq.
30. Question left open in BGE 140 III 583 consid. 3.2.2.
31. Cf. BGE 60 II 98, p. 99 et seq.; decision of the Federal Supreme Court 4C.175/2003 of 28 October 2003, consid. 5; cf. also BGE 120 II 341 consid. 5 where the non-use of the required form for the termination of a tenancy contract only led to partial nullity and not nullity of the whole tenancy; cf. for a differentiating view Gauch/Schluep/Schmid, mn. 581 et seq. or CR CO I-Xoudis, mn. 35 to Art. 11 CO.

the provisions of unjust enrichment (Art. 62 et seq. CO) or property law (*rei vindicatio*, Art. 641 para. 1 CC).[33] This principle applies even if the contract itself was completely valid (except from the formal requirement). In that case, a party can neither demand fulfilment of the contract nor claim any compensation.[34] However, in some cases the Federal Supreme Court affirms a claim for reliance damages or *culpa in contrahendo* ("*Vertrauenshaftung*").

21 However, should both parties have fulfilled their obligations under the contract despite it being invalid (and in full knowledge thereof[35]) or should one party deliberately have caused[36] the formal invalidity of the contract, the subsequent assertion of the contract's invalidity may be qualified as an abuse of rights (cf. Art. 2 para. 2 CC). Whether this is the case, needs to be assessed in light of all circumstances of the specific case, in particular the conduct of the parties at the time of and after the conclusion of the contract.[37]

22 Finally, if a formally invalid legal act meets all the requirements of another type of contract, it may, in some cases,[38] be reinterpreted as such (through "*conversion*", Art. 18 CO).[39]

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32. Cf. BGE 106 II 36 consid. 5 or decision of the Federal Supreme Court 4C.175/2003 of 28 October 2003 consid. 3.2, e.g. if a party has wilfully or fraudulently violated certain cooperation or disclosure duties before entering into a contract; cf., however, the critical view in legal doctrine in BK OR-Müller, mn 229 to Art. 11 CO; cf. for more examples Göksu, Präjudizienbuch, mn. 25 to Art. 11 CO.
33. Cf. BGE 90 II 34 consid. 5.
34. Cf. decision of the Federal Supreme Court 5C.96/2006 consid. 3.2 in fine.
35. Cf. BGE 112 II 330 consid. 2b; BGE 138 III 401 consid. 2.3.1.; cf. also decision of the Federal Supreme Court 4C.175/2003 of 28 October 2003 consid. 3.2.
36. Cf. BGE 88 II 24 consid. 5 including references; cf. also BGE 90 II 21 consid. 2c.
37. Cf. BGE 138 III 123 consid. 2.4.2; BGE 116 II 700 consid. 3b; BGE 138 III 401 consid. 2.3.1; BGE 140 III 583 consid. 3.2.4; BGE 140 III 200 consid. 4.2, for tenancy law cases cf. the summary of the principles in the decision of the Federal Supreme Court 4A_129/2011 of 28 April 2011 consid. 2.3; cf. BK OR-Müller, mn. 198 et seq. to Art. 11 CO, Göksu, Präjudizienbuch, mn. 18 to 11 CO and Gauch/Schluep/Schmid, mn. 552 et seq.; see for other examples CHK-Kut, mn. 20 to Art. 11 CO or for a more in-debt analysis CR CO I-Xoudis, mn. 36 et seq. to Art. 11 CO; cf. also Tercier/Pichonnaz, mn. 755, which point to practical difficulties.
38. Cf. BGE 93 II 439 consid. 5 (reinterpretation of a family- into a common foundation) or BGE 76 II 8 consid. 5 (conversion of a marriage- into a testamentary contract); cf. for more examples and some exceptions BK OR-Müller, mn. 240 et seq. to Art. 11 CO.
39. Cf. BGE 135 III 441 consid. 3.3; BGE 124 III 12 consid. 2b/bb; BGE 126 III 182 consid. 3b; cf. for further information BK OR-Müller, mn. 236 et seq. to Art. 11 CO; cf. for further references Gauch/Schluep/Schmid, mn. 584b.

## V. INTERNATIONAL PRIVATE LAW

Pursuant to the general rule of Art. 124 PILA,[40] contracts are valid if they meet the requirements set out in the law applicable to them or in the law of the place where they were concluded. However, special rules may apply for specific types of contracts. For instance, contracts regarding property are principally governed by the *lex rei sitae* (cf. Art. 119, para. 3, sentence 1 PILA).[41] 23

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40. Federal Act on International Private Law (SR 291).
41. Cf. instead of many and for more examples and exceptions CR CO I-Xoudis, mn. 54 to Art. 11 CO.

COMMENTARY ON

# Art. 12 CO

A commentary by Susanne Brütsch

SUGGESTED CITATION

Susanne Brütsch, Kommentierung zu Art. 12 OR, in: Christoph Hurni/Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Brütsch, N. XXX zu Art. 12 OR.

**II. Written form**

**1. Form required by law**

**a. Scope**

**Art. 12**

Where the law requires that a contract be done in writing, the requirement also applies to any amendment to the contract with the exception of supplementary collateral clauses that do not conflict with the original document.

# CONTENT

## I. PURPOSE AND SCOPE OF ART. 12 CO

Art. 12 CO is in principle a **supplement to Art. 11 CO**. Unless special provisions apply[42], Art. 12 CO extends the formal requirements of contracts and any judicial acts as defined in Art. 11 CO[43] to their amendments («*Abänderungen*», «*modifications*»). Contrary to its wording, Art. 12 CO not only applies when the law requires the simple written form for a judicial act, but also in the case of public notarization[44]. However, Art. 12 CO does not apply if the parties have agreed on a specific form (see Art. 16 CO).[45] 1

## II. AMENDING/MODIFYING AND SUPPLEMENTING A CONTRACT

Amending a contract or a specific provision therein, respectively, means either (i) **modifying** the contract or (ii) **supplementing** the contract by adding additional provisions without modifying its essential content. 2

- The *modification* of a contract means that a contractual provision is either completely deleted or replaced by another (e.g. by changing a certain deadline, by allowing installments instead of lump sum payments or by modifying the pledge[46], etc.). Art. 12 CO also applies when a contract is transferred in its entirety to a third party.[47] However, Art. 12 CO does not

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42. As in the case of apprenticeship contracts (see Art. 344a para. 1 CO, according to which an apprenticeship contract can be extended without any formal requirements); see BGE 103 II 127 consid. 2; for further examples see BK-Müller, Art. 12 OR N. 31.
43. See OK-Brütsch, Art. 11 CO.
44. BGE 95 II 419 consid. 2b with further references; BGE 123 III 97 consid. 2 (cancellation conditions for promissory notes under Art. 799 para. 2 CC); see also BK-Müller, Art. 12 OR N. 10 with many further references and examples; see also CR-Xoudis, Art. 12 OR N. 1.
45. BGE 40 II 614 consid. 1; decision of the Federal Supreme Court 4A_258/2014 of 8.7.2014 consid. 1.3; BK-Müller, Art. 12 OR N. 11 with references; BSK-Schwenzer, Art. 12 OR N. 2.
46. See BGE 95 IV 113 consid 1.
47. However, for conflicting views in legal doctrine and inconsistencies in the case law of the Federal Supreme Court see BK-Müller, Art. 12 OR footnote to N. 21; for a further explanation see also ZK-Jäggi, Art. 12 OR N. 6 et seq.

apply if the parties further describe or define already existing contractual obligations.[48] This can be done in any form.

- By *supplementing* a contract pursuant to Art. 12 CO the parties add a provision to their existing (form-requiring) contract. [49]

3 **In practice**, contracts can be amended/modified either by (i) destroying the old and issuing new contract documents/certificates, (ii) issuing separate addenda to the existing contract or (iii) correcting the relevant provision(s) by hand. However, it is not advisable to use the latter method due to the difficulty of future proofing.[50]

## III. «*SUPPLEMENTARY COLLATERAL CLAUSES*»

4 As an **exception** to the above rule, Art. 12 CO refers to «*ergänzende Nebenbestimmungen*» or «*stipulations complémentaires*», which translate into English as «*supplementary collateral clauses*» of a contract.

5 Such «*collateral clauses*», which merely specify or supplement a contract or which only affect non-essential clauses of a contract, do **not have to comply** with any specific formal requirements, unless the provision(s) is/are in conflict with the original document. However, if a «*collateral clause*» contradicts the main contract, but does not itself have to meet any specific formal requirements (i.e. if it does not contain subjectively or objectively essential points of a contract[51]), it can, according to the Federal Supreme Court and most of legal doctrine, be concluded without any formal requirements.[52]

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48. E.g. if the contractual parties agree that the execution of the agreement, which they originally agreed to be «*in the second half of 2023*», will be «*on 31 November 2023*», see ZK-Jäggi, Art. 12 OR N. 16, see also BGE 95 II 310 consid. 3.
49. E.g. when one party undertakes to pay for the storage or additional transportation costs of an object; for further examples see BK-Schmidlin, Art. 12 OR N. 17 et seq.; ZK-Jäggi, Art. 12 OR N. 8.
50. See BK-Müller, Art. 12 OR N. 23 with further references.
51. For a definition of these terms, see OK-Brütsch, Art. 11 CO.
52. BGE 123 III 97 consid. 2 (for the example of the modification of the cancellation conditions of a contract); BSK-Schwenzer, Art. 12 OR N. 5; for a contrary view, see CR-Xoudis, Art. 12 CO, N. 3.

## IV. ART. 12 CO VS. 115 CO

Art. 115 CO has similarities with Art. 12 CO. According to Art. 115 CO, no particular form is required for the **extinction of a claim by agreement** even when the obligation itself could not be assumed without satisfying certain formal requirements required by law or elected by the parties. This means that, under certain conditions, a party may extinguish a debt without complying with any particular form. 6

In order to prevent contractual parties from circumventing Art. 12 CO, legal doctrine and case law have developed certain **theories to distinguish** between the two provisions. In the case of unilateral contracts (where only one party waives a claim), Art. 115 CO is supposed to override Art. 12 CO. However, Art. 115 CO does not apply in the case of a (synallagmatic) contract, unless all obligations are completely cancelled and the contract is revoked in its entirety.[53] Therefore, the conclusion of an (out-of-court) settlement does not fall within the scope of Art. 12 CO (as it does not qualify as a «*modification*», see above section II), and can thus be concluded without any formal requirements.[54] 7

If an obligation is merely **reduced or weakened** for one party, as it is the case when only one party's obligation is cancelled or modified, Art. 12 CO remains applicable (as this is most likely to have a negative effect on the other party's obligation(s)).[55] 8

In practice, it should be noted that, especially in the case of **public notarization**, the revoked act (e.g. a real estate transaction) might still appear in the land register (on which third parties may rely on in good faith).[56] 9

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53. See BGE 95 II 523 consid. 4 with reference to BGE 75 II 146; where the parties decided not to transfer a property and no payment had to be made; the contract could be terminated without any disadvantage to either party and therefore without fulfilling any formal requirements; see also decision of the Federal Supreme Court 4A_49/2008 dated 9.4.2008 consid. 2.1; BSK-Schwenzer, Art. 12 OR N. 6; ZK-Jäggi, Art. 12 OR N. 19 et seq.
54. BGE 95 II 419 consid. 2b/c; of course, this does not apply if the parties agree on something that requires a special form (e.g. if one party undertakes to transfer a property); see CR-Xoudis, Art. 12 CO N. 7.
55. See decisions of the Federal Supreme Court 5A_251/2010 dated 19.11.2010, consid. 6.1.2 or 4A_49/2008 dated 9.4.2008, consid. 2.1 et seq.; Göksu, Präjudizienbuch, N. 3; BK-Müller, Art. 12 OR N. 33 et seq. with numerous references to other, differing and contradictory views.
56. See BK-Müller, Art. 12 OR N. 18; ZK-Jäggi, Art, 12 OR N. 9; see also OK-Brütsch, Art. 11 CO N. 9.

## V. LEGAL EFFECTS IF THE PARTIES FAIL TO COMPLY WITH ART. 12 CO

10 If the contractual parties amend their main contract without following the formal requirements, the amendment is considered **invalid**. The «*old*» contract remains in force.[57]

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57. See BK-Müller, Art. 12 OR N. 25; ZK-Jäggi, Art. 12 OR N. 14.

COMMENTARY ON

# Art. 50 CO

A commentary by Jean-Pascal Stoll

SUGGESTED CITATION

Jean-Pascal Stoll, Kommentierung zu Art. 50 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Stoll, N. XXX zu Art. 50 OR.

**VI. Multiple liable parties**

**1. In tort**

**Art. 50**

[1] Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the person suffering damage.

[2] The court determines at its discretion whether and to what extent they have right of recourse against each other.

[3] Abettors are liable in damages only to the extent that they received a share in the gains or caused damage due to their involvement.

# CONTENT

# I. GENERAL REMARKS

## A. Concept of joint and several liability

If several tortfeasors have jointly caused damage, they are jointly and severally liable to the injured party (Art. 50 para. 1 CO). This means that each tortfeasor is liable for the entire debt (Art. 143 para. 1 CO). Consequently, the injured party may recover all damages from a single tortfeasor. The injured party may also sue more than one tortfeasor or sue any or all tortfeasors for only part of the damages (Art. 144 para. 1 CO). However, their claim may only be satisfied once.[58] The relationship between the injured party on the one hand and the jointly and severally liable tortfeasors on the other is referred to as the **external relationship**.[59] 1

If a tortfeasor is held liable by the injured party for an amount that exceeds their responsibility, then they may make a claim against the other tortfeasors for the amount overpaid in the external relationship (Art. 50 para. 2 in conjunction with Art. 148 para. 2 CO). The relationship between the tortfeasors is called the **internal relationship**.[60] 2

## B. Perfect and imperfect joint and several liability

The Federal Supreme Court distinguishes between so-called **perfect and imperfect joint and several liability**.[61] Perfect joint and several liability arises if the law explicitly stipulates that it must be applied.[62] Art. 50 para. 1 CO explicitly provides for joint and several liability in the case of joint fault of the 3

58. BGE 89 II 118 consid. 5a; Brehm, Art. 50 CO mn. 31; BSK-Graber, Art. 50 CO mn. 1; CHK-Mazan, Art. 50 CO mn. 1; CR-Werro/Perritaz, Intro. to Art. 50–51 CO mn. 10; Gautschi, mn. 19; Rey/Wildhaber, mn. 1632. Cf. commentary on Art. 143 CO mn. 1 et seq. for further information.
59. Casanova, p. 13; Fellmann/Kottmann, mn. 2721; Gauch/Schluep/Emmenegger, mn. 3707; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 2.
60. Casanova, p. 13; Fellmann/Kottmann, mn. 2721; Gauch/Schluep/Emmenegger, mn. 3736; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 2.
61. BGE 139 V 176 consid. 8.5; BGE 127 III 257 consid. 6.; BGE 115 II 42 consid. 1b; BGE 104 II 225 consid. 4.
62. BGE 115 II 42 consid. 1b; CR-Werro/Perritaz, Intro. to Art. 50–51 CO mn. 39; Deschenaux/Tercier, § 34 mn. 13; Perritaz, mn. 237; Fellmann/Kottmann, mn. 2870; Oftinger/Stark, § 10 mn. 14.

parties involved. In contrast, imperfect joint and several liability exists if the law does not expressly recognise joint and several liability, but its rules are applied mutatis mutandis (joint and several liability per analogiam).[63] According to Art. 51 para. 1 CO, the right to take recourse from other tortfeasors liable for the same damage on different legal grounds as opposed to joint fault is governed by the rules of Art. 50 para. 2 CO. The possibility of a claim for damages within the internal relationship presupposes joint and several liability in the external relationship.[64]

4 The **practical significance** of the Federal Supreme Court's distinction can be seen in three cases: (1) in cases of imperfect joint and several liability in which the actions of a plaintiff that interrupt the prescriptive period against a tortfeasor according to Art. 136 para. 1 CO do not have an effect against the other tortfeasors;[65] (2) where the subrogation of the creditor's rights under Art. 149 CO only apply in the case of perfect joint and several liability;[66] and (3) in the case of imperfect joint and several liability where the Federal Supreme Court assumes that individual grounds for reduction are not excluded. Nevertheless, great restraint is called for in asserting individual grounds for reduction.[67] With the exception of the three cases mentioned, perfect and imperfect joint and several liability largely coincide in terms of their prerequisites and legal consequences,[68] especially since the Federal Supreme Court applies the provisions on (perfect) joint and several liability in Art. 143 et seq. CO analogously to its application of imperfect joint and several liability.[69]

5 Among legal scholars, the distinction meets with **criticism**.[70] The majority rejects a distinction between perfect and imperfect joint and several liability.[71]

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63. BGE 119 II 127 consid. 4b; BGE 69 II 162 consid. 1 p. 168; Fellmann/Kottmann, mn. 2870; Gautschi, mn. 114; Rey/Wildhaber, mn. 1682.
64. BGE 115 II 42 consid. 1b; BSK-Graber, Art. 51 CO mn. 2; Fellmann/Kottmann, mn. 2835; Gautschi, mn. 127; Rey/Wildhaber, mn. 1681.
65. BGE 133 III 6 consid. 5.1; BGE 127 III 257 consid. 6a; BGE 115 II 42 consid. 1b; BGE 104 II 225 consid. 4b.
66. BGE 133 III 6 consid. 5.3.3; BGE 130 III 362 consid. 5.2; BGE 127 III 257 consid. 6c; BGE 115 II 42 consid. 2a.
67. BGE 127 III 257 consid. 6b; BGE 112 II 138 consid. 4a.
68. Brehm, Art. 51 CO mn. 19; KUKO-Schönenberger, Art. 50/51 CO mn. 5; Oftinger/Stark, § 10 mn. 18.
69. BGE 141 III 112 consid. 4.5; BGE 133 III 6 consid. 5.3.4; BGE 119 II 127 consid. 4b.
70. Cf. also the Federal Supreme Court’s discussion of the criticism in BGE 115 II 42 consid. 1b and BGE 104 II 225 consid. 4.

The reasons given are that the introduction of Art. 51 CO by the legislator was rather incidental and that the comparable interests of the two types of joint and several liability would not justify a distinction. In addition, it is argued that the relevance of the different legal consequences is low and that due to an unwritten principle in tort law, joint and several liability should generally exist in the external relationship.[72] Some authors support the differentiation.[73]

## II. THE JOINT AND SEVERAL LIABILITY ACCORDING TO PARA 1

### A. Requirements

#### 1. Joint causation of damage

The joint and several liability of Art. 50 para. 1 CO requires the **cooperation of several tortfeasors** resulting in damage and the participation of each individual must be determined to be legally causational for the damage.[74] An event is legally causational if, according to the usual course of events and general experience of life, it is in itself capable of bringing about a result of the kind that occurred.[75] It is irrelevant which party has induced the *final* cause of damage.[76] 6

**Damage** within the meaning of Art. 50 CO primarily includes tortious damage, i.e. damage that arises from the violation of a legally protected right or of a provision of conduct that protects one's assets.[77] Compensation claims for 7

71. Casanova, p. 45 et seq.; CR-Werro/Perritaz, Intro. to Art. 50–51 CO mn. 69 et seq.; Deschenaux/Tercier, § 34 mn. 18; Gauch/Schluep/Emmenegger, mn. 3755; Gautschi, mn. 181 et seq.; KUKO-Schönenberger, Art. 50/51 CO mn. 4; Oftinger/Stark, § 10 mn. 18; Perritaz, mn. 415 et seq.
72. Casanova, p. 45; Oftinger/Stark, § 10 mn. 11. Cf. on the history of origins Brehm, Art. 51 CO mn. 5 and CR-Werro/Perritaz, Art. 51 CO mn. 8 et seq.
73. Brehm, Art. 51 CO mn. 23; Bucher, p. 499; Fellmann/Kottmann, mn. 2734 and 2873; Schwenzer/Fountoulakis, mn. 88.46.
74. BGE 127 III 257 consid. 5a; BGE 115 II 42 consid. 1b.
75. Instead of many BGE 145 III 72 consid. 2.3.1. In Swiss legal terminology "adäquate Kausalität", "causalité adéquate" or "causalità adeguata".
76. BGE 104 II 184 consid. 2; BSK-Graber, Art. 50 CO mn. 7; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 13.
77. Brehm, Art. 50 CO mn. 6.

personal suffering are also covered by the regulation.[78] For contractual damage, Art. 50 CO applies via Art. 99 para. 3 CO.[79]

8 **Joint causation** can, on the one hand, be achieved by a joint act of the parties involved. On the other hand, acts done separately but with a common purpose can also lead to joint and several liability. Thus, it does not benefit a group of tortfeasors if they divide their acts (in time or place) but pursue a common goal or cause uniform damage.[80]

9 Art. 50 para. 1 CO also includes **legally «joint» actions**. The culpable conduct of a governing body of a legal person obliges both the governing officer (Art. 55 para. 3 CC) and the legal person (Art. 55 para. 2 CC), giving rise to joint and several liability.[81]

10 It remains to be noted that the **failure to act** in breach of duty can also cause damages and thus contribute to joint causation.[82]

## 2. Joint fault

11 Joint and several liability under Art. 50 para. 1 CO requires **joint fault** on the part of the tortfeasors.[83] It is a prerequisite that the participants know or could know of the other's conduct in breach of duty.[84] This is the case if the participants intend the joint damage, see the joint damage merely as a means to an end, accept it in the sense of contingent intent, or do not consider the

78. BGE 131 III 26 consid. 12.1; BGE 126 III 161 consid. 5b/aa; Brehm, Art. 50 CO mn. 39; BSK-Graber, Art. 50 CO mn. 1; KUKO-Schönenberger, Art. 50/51 CO mn. 1; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 3.
79. BGE 115 II 42 consid. 1b; CR-Werro/Perritaz, Intro. to Art. 50–51 CO mn. 1; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 3; Oftinger/Stark, § 10 mn. 26.
80. Brehm, Art. 50 CO mn. 19; CHK-Mazan, Art. 50 CO mn. 6. Cf. also Fellmann/Kottmann, mn. 2764.
81. Brehm, Art. 50 CO mn. 21; Deschenaux/Tercier, § 35 mn. 7.
82. BGE 71 II 107 consid. 3 p. 113 et seq.; Brehm, Art. 50 CO mn. 22; CR-Werro/Perritaz, Art. 50 CO mn. 6; Fellmann/Kottmann, mn. 2765. Cf. BGE 112 II 439 where several people would have been obliged to cut back a tree.
83. Cf. the more precise German legal text «gemeinsam verschuldet» compared to the French or Italian text «causé ensemble» and «cagionato da più persone insieme» or compared to the English translation «together caused». BGE 115 II 42 consid. 1b; BGE 104 II 225 consid. 4; BGE 55 II 320 consid. 2; Brehm, Art. 50 CO mn. 7; BSK-Graber, Art. 50 CO mn. 9; CR-Werro/Perritaz, Art. 50 CO mn. 4; Fellmann/Kottmann, mn. 2761; KUKO-Schönenberger, Art. 50/51 CO mn. 7; Rey/Wildhaber, mn. 1672.
84. BGE 115 II 42 consid. 1b.

damage as a result of their joint carelessness in breach of duty (negligence).[85] The individual degree of fault of the participants is irrelevant for joint and several liability in the external relationship. The injured party can make a claim against all tortfeasors for the entire amount. Only in the context of the internal relationship are the respective individual faults taken into account.[86]

If the tortfeasors act independently of each other and are **not aware** of their cooperation, there is no joint fault. Therefore, perfect joint and several liability does not apply. Instead, there is a competition of claims, which is handled according to Art. 51 CO.[87] Joint fault is also denied if a tortfeasor is not at fault, as in the case of a child who may be incapable of judgement (cf. Art. 16 and 18 CC).[88] Unless liability is established, there is no joint and several liability in the external relationship.[89] 12

## 3. Types of tortfeasors

Art. 50 para. 1 CO lists the **instigator**, the **perpetrator**, and the **accomplice** as types of tortfeasors and also clarifies that these categories are irrelevant in the external relationship.[90] The degree of participation and fault are only taken into account in the internal relationship.[91] Nonetheless, not every participatory act is considered legally causational with respect the damage that has occurred, and not every act of participation that has promotional influence meets the requirement. A sufficiently close connection with the act itself is required.[92] 13

In addition to the three types mentioned in Art. 50 para. 1 CO, the **abettor** is also liable. The legal consequence is determined by para. 3.[93] 14

85. Brehm, Art. 50 CO mn. 9 et seq.; BSK-Graber, Art. 50 CO mn. 9 et seq.; CHK-Mazan, Art. 50 CO mn. 9 et seq.; Deschenaux/Tercier, § 35 mn. 4; Fellmann/Kottmann, mn. 2781.
86. BGE 104 II 225 consid. 4a; BGE 71 II 107 consid. 2 p. 112 et seq.; Brehm, Art. 50 CO mn. 14; CR-Werro/Perritaz, Art. 50 CO mn. 7.
87. BSK-Graber, Art. 50 CO mn. 11; Fellmann/Kottmann, mn. 2773; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 15.
88. Brehm, Art. 50 CO mn. 33; BSK-Graber, Art. 50 CO mn. 11.
89. BGE 133 III 6 consid. 5.2.1; BGE 130 III 362 consid. 5.2; Brehm, Art. 50 CO mn. 33; BSK-Graber, Art. 50 CO mn. 8.
90. BSK-Graber, Art. 50 CO mn. 8; CHK-Mazan, Art. 50 CO mn. 14; KUKO-Schönenberger, Art. 50/51 CO mn. 7; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 14.
91. BGE 71 II 107 consid. 2; Brehm, Art. 50 CO mn. 14; Fellmann/Kottmann, mn. 2783.
92. BGE 145 III 72 consid. 2.3.1.
93. Brehm, Art. 50 CO mn. 29.

## B. Joint and several liability as legal consequence

15 If the requirements of Art. 50 para. 1 CO are fulfilled, the tortfeasors are jointly and severally liable vis-à-vis the injured party in the external relationship. Each of them can be held individually liable for the **entire damage** (Art. 144 para. 1 CO) without being able to object that they only partially contributed to it.[94]

16 According to the case law of the Federal Supreme Court, in the external relationship, no **individual grounds for reduction**, such as minor fault according to Art. 43 para. 1 CO, can be invoked,[95] even though most legal scholars support the admissibility of individual grounds for reduction.[96] However, the legal situation is different for objections arising from the personal relationship between the joint and several debtor and the creditor, such as acquittal, deferment, or set-off (Art. 145 para. 1 var. 1 CO), which can be brought forward in the external relationship.[97] The same applies to objections based on the nature of, or collective reason for the joint and several obligation (Art. 145 para. 1 var. 2 CO). These include, among others, the creditor's own fault or other circumstances attributable to them (cf. Art. 44 para. 1 CO).[98]

# III. RECOURSE BETWEEN THE JOINT AND SEVERAL DEBTORS ACCORDING TO PARA. 2

## A. Recourse and subrogation

17 If a claim is made against a joint and several debtor by the injured party, the question arises as to whether and to what extent they can take **recourse**

94. Brehm, Art. 50 CO mn. 19; BSK-Graber, Art. 50 CO mn. 14; Casanova, p. 13; Fellmann/Kottmann, mn. 2815; Rey/Wildhaber, mn. 1667. For the concrete effects of joint and several liability, see the commentaries on Art. 144 et seq. CO.
95. BGE 127 III 257 consid. 6b; BGE 113 II 323 consid. 2b; BGE 97 II 403 consid. 7d.
96. Oftinger/Stark, § 10 mn. 33; Rey/Wildhaber, mn. 1713. Cf. commentary on Art. 145 CO mn. 4 et seq. and Brehm, Art. 50 CO mn. 41 et seq. for further references.
97. Brehm, Art. 50 CO mn. 48; BSK-Graber, Art. 50 CO mn. 20; CHK-Mazan, Art. 50 CO mn. 18; Fellmann/Kottmann, mn. 2827. Cf. commentary on Art. 145 CO mn. 2 et seq. for further examples.
98. Brehm, Art. 50 CO mn. 49; Casanova, p. 14 et seq.; CHK-Mazan, Art. 50 CO mn. 17; Deschenaux/Tercier, § 35 mn. 19; Fellmann/Kottmann, mn. 2826. Cf. commentary on Art. 145 CO mn. 8 et seq. for further information.

against the other joint and several debtors.[99] The Federal Supreme Court defines recourse as the situation in which someone who has made a payment to a beneficiary in place of a third party to take action against that third party to recover damages.[100] Even if the joint and several debtor sued by the injured party is liable externally up to the full amount of the damage, they can only be held liable internally on a pro rata basis. Art. 50 para. 2 (in conjunction with Art. 148 para. 2) CO entitles the joint and several debtor to take action against other debtors.[101] The right of recourse arises at the time of performance to the injured party.[102]

In addition to the original right of recourse under Art. 50 para. 2 in conjunc- 18
tion with Art. 148 para. 2 CO, the joint and several debtor also has the right of **subrogation** under Art. 149 CO.[103] In this case, the claim of the aggrieved creditor passes to the debtor against whom a claim has been made as an assignment by law together with the accessory rights (cf. Art. 166 and 170 CO). The debtor assumes the position of the creditor and can assert the subrogated claim, less the share to be borne by them, against the other tortfeasors.[104]

## B. Extent of the recourse

Whether and to what extent the jointly and severally liable tortfeasor can take 19
recourse against his co-tortfeasors in the internal relationship is at the **discretion of the court** (Art. 50 para. 2 CO). The court first takes into account the severity of the fault of each party, whereby a perpetrator or instigator must usually bear a greater share than an accomplice.[105] Furthermore, the potentially different interests of the participants must be taken into account.[106] Only

99. BSK-Graber, Art. 50 CO mn. 22; CHK-Mazan, Art. 50 CO mn. 20; Fellmann/Kottmann, mn. 2910; Rey/Wildhaber, mn. 1727.
10 BGE 136 V 131 consid. 3.4.
101 Casanova, p. 18 et seq.; Fellmann/Kottmann, mn. 2915 et seq.
10 Fellmann/Kottmann, mn. 2920.
10 Brehm, Art. 50 CO mn. 56; BSK-Graber, Art. 50 CO mn. 23; Casanova, p. 20; CHK-Mazan, Art. 50 CO mn. 21; Deschenaux/Tercier, § 36 mn. 17. CR-Werro/Perritaz, Intro. to Art. 50–51 CO mn. 61 and OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 20 et seq. see the subrogation under Art. 149 CO as the only ground for a claim.
10 Cf. commentary on Art. 149 CO for further information.
10 Brehm, Art. 50 CO mn. 58; BSK-Graber, Art. 50 CO mn. 25; CR-Werro/Perritaz, Art. 50 CO mn. 14; Fellmann/Kottmann, mn. 2922; KUKO-Schönenberger, Art. 50/51 CO mn. 10; Rey/Wildhaber, mn. 1747.

at this point can the joint and several tortfeasor assert individual grounds for reduction among themselves.[107]

20 The constellation of several joint tortfeasors according to Art. 50 paras. 1 and 2 CO is a legal exception to Art. 148 para. 1 CO which requires a **deviation** from the distribution according to heads.[108] In addition, there is no joint and several liability in the internal relationship between the debtors.[109] The recourse creditor can only sue the other tortfeasors in the amount of their internal share. The inability of a tortfeasor to pay is governed by Art. 148 para. 3 CO.[110]

## C. Prescription of the right of recourse

21 The relative prescription period of the right of **recourse** according to Art. 50 para. 2 CO is regulated in Art. 139 CO.[111] Accordingly, the debtor's right of recourse lapses three years after the day on which they have satisfied the injured party and are aware of their co-debtors. Most scholars also postulate a ten-year absolute period of prescription,[112] which, according to the view held in this commentary, begins at the time the injured party is satisfied by the first joint and several debtor.[113]

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10 Brehm, Art. 50 CO mn. 58; BSK-Graber, Art. 50 CO mn. 25; CR-Werro/Perritaz, Art. 50 CO mn. 14; Deschenaux/Tercier, § 36 mn. 26; Fellmann/Kottmann, mn. 2922.

107 Brehm, Art. 50 CO mn. 58; CHK-Mazan, Art. 50 CO mn. 23; CR-Werro/Perritaz, Art. 50 CO mn. 14; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 8; Rey/Wildhaber, mn. 1748.

10 Casanova, p. 18; CR-Werro/Perritaz, Art. 50 CO mn. 14; Fellmann/Kottmann, mn. 2919; KUKO-Schönenberger, Art. 50/51 CO mn. 3.

10 BGE 103 II 137 consid. 4d; Brehm, Art. 50 CO mn. 60; BSK-Graber, Art. 50 CO mn. 27; Casanova, S, 18; Deschenaux/Tercier, § 36 mn. 49; Fellmann/Kottmann, mn. 2925. According to CR-Werro/Perritaz, Intro. to Art. 50–51 CO mn. 79, there is joint and several liability in the internal relationship if the recovering debtor relies on subrogation. Cf. also commentary on Art. 148 CO mn. 10.

110 Cf. commentary on Art. 148 CO mn. 16 et seq. for further information.

111. CR-Pichonnaz, Art. 139 CO mn. 10; CR-Werro/Perritaz, Art. 50 CO mn. 13; Wildhaber/Dede, Art. 139 CO mn. 39. According to BSK-Graber, Art. 50 CO mn. 28, Art. 139 CO only applies to imperfect joint and several liability. Yet, the author transfers the rule of Art. 139 CO to recourse claims under Art. 50 para. 2 CO. Similar BSK-Däppen, Art. 139 CO mn. 3 and OFK-Schwander, Art. 139 CO mn. 2 that only want to apply the prescription according to Art. 139 CO to perfect joint and several liability if the recourse creditor can rely on Art. 148 para. 2 CO. OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 26 and Brehm, Art. 50 CO mn. 64 apply the prescription rule of Art. 67 CO analogously.

112 Cf. the references in the commentary on Art. 148 CO mn. 14.

If the debtor from whom the creditor recovers relies on **subrogation** under Art. 149 para. 1 CO, both the claim, including accessory rights, and the prescription period, which has already begun, passes to them. The starting date and duration of the period are determined by the main claim that has been transferred.[114] 22

## IV. LIABILITY OF THE ABETTOR ACCORDING TO PARA. 3

The **term** «abettor» used in the English translation of the Code of Obligations first needs to be clarified. It does not mean someone who helps or encourages the tortfeasor in causing the damage.[115] Rather, the abettor in the sense of para. 3 only acts after the damage has been done by securing the outcome that has already occurred.[116] They may, for example, act as a receiver of stolen goods[117] or money launderer.[118] Due to the lack of a legally causational link, the abettor is only liable for the consequential damage caused by their conduct (in addition to any share of the profit received) and not for the damage caused by the principal tort.[119] 23

The liability of the abettor requires **fault**, even if the law does not explicitly mention it. In contrast to the criminal offence of handling stolen goods under Art. 160 Criminal Code that requires intention, negligence is sufficient.[120] 24

Art. 50 para. 3 CO distinguishes between **two variants**. On the one hand, the abettor is liable insofar as they have received a share in the gains or otherwise benefit by saving expenses. This is the case, for example, if the abettor receives a share in the stolen goods in return for hiding them or riding in a 25

113 Cf. commentary on Art. 148 CO mn. 14 for further information. Critical Brehm, Art. 50 CO mn. 64.

114 Brehm, Art. 50 CO mn. 63; BSK-Graber, Art. 50 CO mn. 29.

115 Cf. https://dictionary.cambridge.org/dictionary/english/abettor (last visited on 12.7.2023).

116 BGE 101 II 102 consid. 4a; CR-Werro/Perritaz, Art. 50 CO mn. 15; Fellmann/Kottmann, mn. 2804.

117. Cf. also the French legal text «receleur». However, the civil and criminal elements of the offence do not coincide (BGE 77 II 301 consid. 3b).

118 BSK-Graber, Art. 50 CO mn. 30. Cf. on the money launderer Heierli, passim.

119 BGE 101 II 102 consid. 4a; CR-Werro/Perritaz, Art. 50 CO mn. 15; KUKO-Schönenberger, Art. 50/51 CO mn. 8; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 27.

12 Brehm, Art. 50 CO mn. 68; Fellmann/Kottmann, mn. 2806.

stolen car.[121] On the other hand, the abettor becomes liable for the damage they have caused: for example, the sale of a stolen item.[122]

26 The **legal consequence** of Art. 50 para. 3 CO is the joint and several liability of the abettor together with the tortfeasors according to para. 1. However, the extent of the joint and several liability is limited from the point of view of the abettor. It only extends as far as they are liable according to para. 3 and not necessarily to all damages.[123] If the abettor also acts as an accomplice before and during the causation of the damage, their joint and several liability is governed solely by para. 1.[124]

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121 BSK-Graber, Art. 50 CO mn. 31; CHK-Mazan, Art. 50 CO mn. 26.
12 Brehm, Art. 50 CO mn. 72; BSK-Graber, Art. 50 CO mn. 32; CHK-Mazan, Art. 50 CO mn. 26.
123 Brehm, Art. 50 CO mn. 73; BSK-Graber, Art. 50 CO mn. 33; CHK-Mazan, Art. 50 CO mn. 27; KUKO-Schönenberger, Art. 50/51 CO mn. 8.
12 CHK-Mazan, Art 50 CO mn. 25; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 28.

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COMMENTARY ON

# Art. 51 CO

A commentary by Jean-Pascal Stoll

SUGGESTED CITATION

Jean-Pascal Stoll, Kommentierung zu Art. 51 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Stoll, N. XXX zu Art. 51 OR.

**2. On different legal grounds**

**Art. 51**

[1] Where two or more persons are liable for the same damage on different legal grounds, whether under tort law, contract law or by statute, the provision governing recourse among persons who have jointly caused damage is applicable *mutatis mutandis*.

[2] As a rule, compensation is provided first by those who are liable in tort and last by those who are deemed liable by statutory provision without being at fault or in breach of contractual obligation.

# CONTENT

## I. GENERAL REMARKS

Art. 51 CO regulates the recourse between tortfeasors who have caused the same damage on different legal grounds (i.e., under tort or contract law or by statute) and refers to the recourse regulation in Art. 50 CO for this purpose. However, Art. 51 para. 2 CO establishes an independent liability regime.[125] Art. 51 CO primarily concerns the **internal relationship** between tortfeasors and does not explicitly mention the external relationship.[126] 1

The **scope of application** of the provision is not limited to damages caused by multiple liable tortfeasors on different legal grounds. Damages caused by multiple liable tortfeasors on the same legal ground are also litigated according to Art. 51 CO.[127] Furthermore, the provision applies to claims for compensation for personal suffering and, via Art. 99 para. 3 CO, to contractual claims for damages.[128] Outside the Code of Obligations, special laws sometimes refer to Art. 51 CO.[129] Finally, Art. 51 CO takes precedence over cantonal law that would provide for a different recourse order.[130] 2

## II. CLAIM COMPETITION IN THE EXTERNAL RELATIONSHIP

Due to the regulation of recourse among the tortfeasors stipulated in Art. 51 CO, there must be **joint and several liability** in the external relationship.[131] In this respect, each of the tortfeasors are liable for the entire damage to 3

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125 BSK-Graber, Art. 51 CO mn. 1.

12 Decision of the Federal Supreme Court 4C.27/2003 of 26.5.2003 consid. 3.4; CR-Werro/Perritaz, Art. 51 CO mn. 4; Fellmann/Kottmann, mn. 2835; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 1.

127 BGE 80 II 247 consid. 5 p. 253 et seq.; KUKO-Schönenberger, Art. 50/51 CO mn. 9.

12 BGE 115 II 42 consid. 1b; BSK-Graber, Art. 51 CO mn. 3; CR-Werro/Perritaz, Intro. to Art. 50–51 CO mn. 1; KUKO-Schönenberger, Art. 50/51 CO mn. 1 and 9; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 5; Oftinger/Stark, § 10 mn. 26.

12 Cf. for an overview Brehm, Art. 51 CO mn. 12 et seq.

13 BGE 115 II 24 consid. 2b; BGE 103 II 330 consid. 4b/dd.

131 Brehm, Art. 51 CO mn. 6; BSK-Graber, Art. 51 CO mn. 2; Fellmann/Kottmann, mn. 2835; KUKO-Schönenberger, Art. 50/51 CO mn. 2; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 2; Oftinger/Stark, § 10 mn. 13; Rey/Wildhaber, mn. 1681.

which they have contributed.[132] The injured party may decide upon the tortfeasor against whom they wish to proceed.[133]

4 Because the injured party has individual claims against each of the tortfeasors, several claims exist side by side. Given the injured party can only be satisfied once, the claims compete with each other. Thus, there is a so-called **claim competition** in the external relationship.[134] Since Art. 51 CO does not explicitly provide for joint and several liability, the relationship is also referred to as imperfect joint and several liability.[135] In general, the legal consequences of claim competition are the same as those of (perfect) joint and several liability.[136]

5 Since the tortfeasors act separately in the context of Art. 51 CO, the question arises whether one tortfeasor can claim, against the injured party, that they are only slightly at fault compared to the other tortfeasors. This could result in a reduction of liability (Art. 43 para. 1 CO). The Federal Supreme Court theoretically allows the assertion of such **individual grounds for reduction** in the external relationship. However, the application is limited to those cases in which the fault of the tortfeasor sued by the injured party is so much less and so disproportionate to the fault of another tortfeasor that it would be manifestly unjust and unacceptable to make the former liable for all damages in the external relationship.[137] The majority of legal scholars wish for a more generous leeway for the assertion of individual grounds for reduction in the external relationship.[138]

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132 BGE 133 III 6 consid. 5.3.2; BGE 130 III 591 consid. 5.5.1.

133 BGE 114 II 342 consid. 2b; BGE 112 II 143 consid. 4a; Brehm, Art. 51 CO mn. 18.

134 Cf. for a more detailed description of the distinction between joint and several liability and claim competition Casanova, p. 9; CR-Werro/Perritaz, Intro. to Art. 50–51 CO mn. 30 et seq. and Perritaz, mn. 204 et seq.

135 Cf. commentary on Art. 50 CO mn. 3 et seq. for more information,

13 BGE 112 II 138 consid. 4a. BSK-Graber, Art. 51 CO mn. 8; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 4.

137 BGE 127 III 257 consid. 6b; BGE 112 II 138 consid. 4a.

13 Casanova, p. 33; CR-Werro/Perritaz, Art. 51 CO mn. 6; Deschenaux/Tercier § 35 mn. 24; Fellmann/Kottmann, mn. 2907; Perritaz, mn. 507 et seq.; Rey/Wildhaber, mn. 1717; Schwenzer/Fountoulakis, mn. 88.19. Different opinion Brehm, Art. 51 CO mn. 29 et seq.; BSK-Graber, Art. 51 CO mn. 9; CHK-Mazan, Art. 51 CO mn. 12.

**Objections** that can be raised jointly by the tortfeasors as well as those to 6
which a tortfeasor is personally entitled are to be admitted in the external relationship without restriction.[139]

It should be noted that, according to the Federal Supreme Court, in the case 7
of imperfect joint and several liability under Art. 51 CO, actions by the creditor that **interrupt the prescription** only affect the tortfeasor or tortfeasors concerned but not the other tortfeasors (cf. Art. 136 para. 1 CO).[140]

## III. RECOURSE IN THE INTERNAL RELATIONSHIP

### A. Recourse in general

If a claim was made against a tortfeasor by the injured party, and the claim 8
amounted to more than the tortfeasor would have had to bear in the internal relationship, then a **right of recourse** against the other tortfeasors arises ex iure proprio.[141] As soon as the debtor against whom the claim has been realised has satisfied the injured party, the claim of recourse arises and becomes due,[142] including interest on the claim.[143]

An additional claim from **subrogation**, according to Art. 149 CO, does not ex- 9
ist in the case of imperfect joint and several liability.[144]

### B. Extent of the recourse

For the extent of the recourse, a distinction must be made between two con- 10
stellations. Art. 51 CO regulates the case in which several persons are liable on

13 BSK-Graber, Art. 51 CO mn. 8; CHK-Mazan, Art. 51 CO mn. 10; Fellmann/Kottmann, mn. 2893; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 10. Cf. commentary on Art. 145 CO for further information.

14 BGE 133 III 6 consid. 5.1; BGE 127 III 257 consid. 6a; BGE 115 II 42 consid. 1b; BGE 104 II 225 consid. 4b.

141 BGE 133 III 6 consid. 5.3.3; BGE 130 III 362 consid. 5.2; Brehm, Art. 51 CO mn. 45a; BSK-Graber, Art. 51 CO mn. 11; CR-Werro/Perritaz, Art. 51 CO mn. 10.

14 BGE 127 III 257 consid. 6c; BGE 115 II 42 consid. 2a; decision of the Federal Supreme Court 4A_656/2011 of 12.3.2012 consid. 4.2.

143 Decision of the Federal Supreme Court 4A_301/2016 of 15.12.2016 consid. 10.2; Brehm, Art. 51 CO mn. 48b; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 17.

different legal grounds (so-called **multi-typical joint and several liability**). In addition, there is the variant in which several persons are liable on the same legal grounds, but they cannot be accused of joint fault. This so-called **single-typical joint and several liability** is also covered, at least analogously, by Art. 51 CO.[145] The order of recourse in the case of multi-typical joint and several liability is determined by the cascade provided for in Art. 51 para. 2 CO. The extent of the recourse in the case of single-typical joint and several liability is determined by judicial discretion.[146]

11 In the internal relationship there is **no longer joint and several liability**. The tortfeasor entitled to recourse can only sue the other tortfeasors to the extent of their internal share.[147] An exception to this principle is found in the recourse of the social insurer according to Art. 72 para. 2 Federal Act of 6 October 2000 on the General Part of Social Insurance Law (SR 830.1; hereinafter: GPSL). The inability of a tortfeasor to pay is governed by Art. 148 para. 3 CO.[148]

## C. Recourse in case of multi-typical joint and several liability

### 1. Liability groups

12 Art 51 para. 2 CO distinguishes between **three types** of liability groups: liability under tort law, under contract law and by statute.

13 Tortfeasors who are liable in **tort** within the meaning of Art. 51 para. 2 CO primarily include those liable under Art. 41 CO and must be personally at fault.[149] If a person liable by statute is also at fault, they must also be assigned to this category.[150] Someone who is simultaneously liable for the same damage

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14 BGE 133 III 6 consid. 5.3.3; BGE 130 III 362 consid. 5.2; BGE 127 III 257 consid. 6c; BGE 115 II 42 consid. 2a. Special legal exceptions exist in the case of recourse by an insurer (see below mn. 29 et seq.).

145 BGE 80 II 247 consid. 5 p. 253 et seq.; Brehm, Art. 51 CO mn. 95; Deschenaux/Tercier, § 35 mn. 11; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 30; Perritaz, mn. 567; Rey/Wildhaber, mn. 1691.

14 See below mn. 12 et seq. and 21 et seq.

147 BGE 103 II 137 consid. 4d; Brehm, Art. 51 CO mn. 89; BSK-Graber, Art. 51 CO mn. 21; Casanova, S, 153 et seq.; Deschenaux/Tercier, § 36 mn. 49; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 16. Cf. commentary on Art. 148 CO mn. 10.

14 Cf. commentary on Art. 148 CO mn. 16 et seq. for further information.

14 BSK-Graber, Art. 51 CO mn. 15; Casanova, p. 143; Fellmann/Kottmann, mn. 2844; Perritaz, mn. 559.

under both contract and tort law is included as well.[151] Finally, a legal person may likewise be liable on tortious grounds because of the culpable actions of its governing bodies (Art. 55 para. 2 CC).[152]

The second group includes those liable under **contract law**. Liability under contract law includes primary obligations to perform, such as contractual obligations to assume damages or to remedy damages (e.g., guarantee agreement or indemnity bond). In addition, it includes secondary obligations to perform, such as a breach of contract according to Art. 97 et seq. CO or the liability for associates according to Art. 101 CO.[153] Meanwhile, the insurer's recourse is governed exclusively by special law. Therefore, it is excluded from the recourse order of Art. 51 para. 2 CO.[154] 14

Tortfeasors by **statutory provision** form the last group. Liability by statute consists of two types of strict liabilities: the simple objective liability and the aggravated objective liability.[155] The former comprises the legal liability standards that are linked to a breach of the duty of care or a defective condition. This includes, but is not limited to, the liability of persons lacking capacity to consent (Art. 54 CO), employers (Art. 55 CO), property owners (Art. 58 CO), the head of the family (Art. 333 CC) and landowners (Art. 679 CC). In contrast, aggravated objective liability is linked to the mere operation of a dangerous object. The basis for this can be found, for example, in Art. 58 Federal Act of 19 December 1958 on Road Traffic (SR 741.01; hereinafter: RTA) for motor vehicle owners, in Art. 64 Federal Act of 21 December 1948 on Aviation (SR 748.0) for aircraft owners, in Art. 33 Federal Act of 4 October 1963 on Pipeline Systems for the Transport of Liquid or Gaseous Combustibles and Motor Fu- 15

15 BGE 107 II 489 consid. 5b; BSK-Graber, Art. 51 CO mn. 15; CR-Werro/Perritaz, Art. 51 CO mn. 28; Fellmann/Kottmann, mn. 2941. Effectively the same Deschenaux/Tercier, § 36 mn. 39; Rey/Wildhaber, mn. 1762. Critical Casanova, p. 165 et seq.

151 BGE 120 II 58 consid. 3a; BGE 113 II 246 consid. 3; Brehm, Art. 51 CO mn. 54a; CR-Werro/Perritaz, Art. 51 CO mn. 28; Fellmann/Kottmann, mn. 2846; Perritaz, mn. 559.

152 BGE 96 II 172 consid. 3; BSK-Graber, Art. 51 CO mn. 16; Bugnon, p. 73; CR-Werro/Perritaz, Art. 51 CO mn. 28; Fellmann/Kottmann, mn. 2845; Perritaz, mn. 559.

153 Brehm, Art. 51 CO mn. 57; BSK-Graber, Art. 51 CO mn. 17 et seq.; Casanova, p. 144 et seq.; CR-Werro/Perritaz, Art. 51 CO mn. 29; Fellmann/Kottmann, mn. 2850 et seq.; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 21; Perritaz, mn. 560.

154 BSK-Graber/Casanova, Art. 95c IPA mn. 12; CR-Werro/Perritaz, Art. 51 CO mn. 57; Werro, p. 20. See below mn. 29 et seq.

155 Brehm, Art. 51 CO mn. 74 et seq.; BSK-Graber, Art. 51 CO mn. 19; Casanova, p. 148; Fellmann/Kottmann, mn. 2862; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 22.

els (SR 746.1; hereinafter: Pipelines Act) for owners of a pipeline system, or in Art. 27 Federal Act of 24 June 1902 concerning the Electrical Weak and Heavy Current Installations (SR 734.0) for owners of such an installation.[156]

16 Special mention must be made of an **employer's recourse**. Assume an employee becomes incapacitated due to a car accident. In this case, the employer has a duty to continue paying wages under Art. 324a CO. However, because they have fulfilled their statutory or contractual duty irrespective of the harmful event, the employer does not belong to any of the groups mentioned in Art. 51 para. 2 CO.[157] Nevertheless, in such a case, the Federal Supreme Court has ruled that Art. 51 para. 2 CO applies by analogy, granting the employer a right of recourse against the party liable by statute. The obligation to continue to pay wages shall not work in favour of the strictly liable party.[158] The extent of the recourse amounts to the hypothetical damage that the employee would have suffered without the employer's payments.[159]

### 2. Liability cascade

17 The three types of tortfeasors just identified above are not equally responsible for satisfying a claim. Rather, Art. 51 para. 2 CO presents a **cascade of liability,** according to which it is primarily the party liable on tortious grounds that must compensate a plaintiff for damages. Those liable on the ground of contract are liable in the second instance. Finally, those liable on statutory grounds must provide for compensation. This has the consequence that a person liable by statute, against whom the injured party has realised their claim, must proceed against a person liable in tort in order to recover damages. If there is a contractually liable party aside from the party liable in tort, the former's internal share is zero and cannot be sued by the strictly liable party. The contractually liable party only bears an internal share if there is no party liable under tort law.[160]

18 If several liable parties against whom recourse is sought are in the **same liability group**, the apportionment of the internal quota is at the discretion of

156 Cf. Brehm, Art. 51 CO mn. 74 et seq. for further examples.
157 Different opinion CHK-Mazan, Art. 51 CO mn. 16 that includes the employer among those liable by statute.
158 BGE 126 III 521 consid. 2b.
159 BGE 126 III 521 consid. 2c.

the court, in particular the personal fault of each party (Art. 50 para. 2 CO analogously).[161] The inability of a tortfeasor to pay is to be borne by the other tortfeasors in the same group, not by the tortfeasor of a more privileged group.[162]

The law describes the cascade as a rule, although **exceptions** to it are conceivable.[163] Still, the courts consider themselves very much bound by the recourse rule of Art. 51 para. 2 CO and hardly deviate from it.[164] In BGE 144 III 319, the Federal Supreme Court granted a notable exception to the rule. An employee suffered burns in a shaft as a result of a leaking gas leak because he smoked while working. At issue was the employer's contractual liability for not having banned smoking, as well as the strict liability of the owner of the pipeline system from which the gas leaked (Art. 33 Pipelines Act). According to the Federal Supreme Court, the typical operational hazard emanating from pipelines manifested itself in the air-gas mixture regardless of the breach of contract. The conduct in breach of contract had only influenced the triggering of the hazard. As a result, a deviation from the liability cascade was necessary and the damage was divided equally between the employer and the pipeline owner.[165] 19

The cascade only applies in the **internal relationship**. In the external relationship, the injured party is free to choose whether to turn to the strictly liable party or directly to the party liable in tort.[166] 20

## D. Recourse in case of single-typical joint and several liability

The recourse in the case of single-typical joint and several liability is measured at the free **discretion of the court**.[167] In the absence of different legal 21

16 Brehm, Art. 51 CO mn. 86; Casanova, p. 154; CHK-Mazan, Art. 51 CO mn. 19; Fellmann/Kottmann, mn. 2942; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 25. Different opinion Perritaz, mn. 564.

161 Brehm, Art. 51 CO mn. 92; CR-Werro/Perritaz, Art. 51 CO mn. 35; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 27.

16 Brehm, Art. 51 CO mn. 93. Differentiating Bugnon, p. 115; Casanova, p. 50.

16 Explicitly BGE 56 II 396 consid. 2 p. 400.

16 BSK-Graber, Art. 51 CO mn. 22; CR-Werro/Perritaz, Art. 51 CO mn. 25; Perritaz, mn. 566. See for an overview Brehm, Art. 51 CO mn. 80a et seq.

165 BGE 144 III 319 consid. 5.5.2 et seq. It should be noted that in casu it was not the employer directly, but the social insurers, who had entered the employer's position as a result of subrogation and wanted to take recover damages.

grounds, the application of the cascade of para. 2 is to be omitted. The distribution of the liability to pay damages is based on the following factors:

22 In the case of multiple tortfeasors **liable for separate faults**, the distribution shall be made according to the severity of the individual faults.[168] Further factors may be kinship, interest in the harmful act or additional grounds for liability.[169] In the case of equal fault, there is an equal distribution.[170] As already mentioned,[171] if the fault of governing body is attributed to the legal person, that party is tortiously liable in the external relationship. However, in the internal relationship the fault of the governing body is applied to the legal person by statute (Art. 55 para. 2 CC). This grants the legal person a full right of recourse against the culpable member of the governing body.[172]

23 If more than one party is liable under **contract law**, the distribution is again at the discretion of the court. The extent of the (contractual) fault and the special nature of the legal transaction play a role.[173] For the insurer's recourse, see below.[174]

24 If several parties liable **by statute** exist, the distribution is also at the discretion of the court, unless a special legal provision provides otherwise (cf. Art. 60 para. 2 RTA).[175] Many legal scholars postulate that those liable to pay compensation on the ground of aggravated objective liability, due to the operational risk they pose, have to bear a part of the damage in advance, provided that they compete with those liable to pay compensation on the ground of simple objective liability.[176]

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16 Brehm, Art. 51 CO mn. 47; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 25.

16 BGE 112 II 138 consid. 4a; Bugnon, p. 78; Casanova, p. 215; Deschenaux/Tercier, § 36 mn. 25; Fellmann/Kottmann, mn. 2978; Rey/Wildhaber, mn. 1774.

16 Brehm, Art. 51 CO mn. 100 et seq.; Bugnon, p. 66 et seq.; Fellmann/Kottmann, mn. 2979; Perritaz, mn. 568.

170 Fellmann/Kottmann, mn. 2978; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 32; Rey/Wildhaber, mn. 1774.

171 See above mn. 13.

172 Brehm, Art. 51 CO mn. 102; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 33.

173 Brehm, Art. 51 CO mn. 105a et seq.; Deschenaux/Tercier, § 36 mn. 29; Fellmann/Kottmann, mn. 2980; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 35; Perritaz, mn. 569; Rey/Wildhaber, mn. 1776.

174 Mn. 29 et seq.

175 Brehm, Art. 51 CO mn. 133; Fellmann/Kottmann, mn. 2985. Cf. BGE 116 II 645 consid. 3b.

176 Bugnon, p. 83; Fellmann/Kottmann, mn. 2986; Perritaz, mn. 573; Rey/Wildhaber, mn. 1779. Disapproving Casanova, p. 216. Cf. Brehm, Art. 51 CO mn. 133 et seq. for further reference.

## E. Quota priority of the injured party

It may be that the injured party cannot claim the entire damage from the li- 25
able tortfeasor. This may be due to the fact that the tortfeasor can assert a reason for reduction or is contractually liable only up to a certain amount. In this case, the question of the relationship between the injured party's residual claim and the possible recourse claim of the liable debtor arises if both want to take action against another tortfeasor. A **problem** arises if the liability quota of the recourse debtor is also to be reduced, and they do not have to answer for the entire damage. In this case, the injured party has a quota priority so that they can satisfy their residual claim before the recourse claim of the other tortfeasor.[177]

So far, case law has applied the quota priority only if the recourse claim is 26
based on **subrogation**.[178] However, legal scholars would also apply it to recourse claims under Art. 51 CO.[179] In certain special laws, the quota priority has already found its way into the codification (e.g. Art. 88 RTA or Art. 73 para. 1 GPSL).

## F. Prescription of the recourse claim

The right of recourse becomes **time-barred** within three years from the day 27
on which the injured party has been satisfied, and the tortfeasor entitled to recourse learns of their recourse claim (Art. 139 CO). Moreover, an absolute ten-year prescription period is to be assumed from the time of performance to the injured party.[180]

In addition, the Federal Supreme Court derived from Art. 2 para. 2 CC that 28
the recourse creditor must **notify** the recourse debtor (as soon as it is reasonable to do so) that they intend to make a claim against them. Otherwise, ac-

177 Brehm, Art. 51 CO mn. 135 et seq.; BSK-Graber, Art. 51 CO mn. 33; BSK-Graber/Casanova, Art. 95c IPA mn. 47; CR-Werro/Perritaz, Art. 51 CO mn. 46; Werro, p. 21.

178 BGE 134 III 636 consid. 1.3.2; BGE 60 II 178 consid. 5 p. 189.

179 Brehm, Art. 51 CO mn. 139; BSK-Graber, Art. 51 CO mn. 34; Schaer, mn. 715 et seq.

18 Cf. commentary on Art. 51 CO and on Art. 148 CO mn. 14 for further reference. Different opinion notably OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 51 regarding the case law on the old prescription law (BGE 133 III 6), according to which the ten-year period already begins at the time of the damaging event. Critical of the case law BSK-Graber, Art. 51 CO mn. 36.

cording to the Federal Supreme Court, the claim of recourse is forfeited. Under certain circumstances, the prescription period for the recourse claim may not have been prescribed yet, whilst the liability of the recourse debtor in the external relationship has already been time-barred. Without such notification, the recourse debtor runs the risk of disposing of exculpatory evidence.[181]

## IV. THE INSURER'S RECOURSE

29 According to Art. 95c para. 2 Insurance Policies Act of 2 April 1908 (SR 221.229.1; hereinafter: IPA), the **indemnity insurer** steps into the rights of the insured for the item of loss covered by it. This is a subrogation according to Art. 149 CO. The insurer can thus take recourse against all tortfeasors, regardless of whether they are liable on the ground of tort law, contract law or by statutory provision.[182] Until the entry into force of Art. 95c IPA on 1 January 2022, the provision on the insurer's recourse was governed by Art. 72 IPA. The old provision stipulated in para. 1 that the claim for compensation against third parties arising from a tortious act was transferred to the insurer. Therefore, for a long time, the Federal Supreme Court assumed that the insurer only had recourse against third parties liable in tort. There was no provision for recourse against parties liable by contract or by statute in application of the liability cascade of Art. 51 para. 2 CO.[183] In BGE 144 III 209, it changed its case law and granted the insurer the right of recourse against all those who are not contractually liable within the meaning of Art. 41 et seq. CO, thus also including persons liable by statute. Art. 51 para. 2 CO no longer applies.[184]

30 The rights of the insured are also subrogated to the **liability insurer** pursuant to Art. 95c para. 2 IPA. However, the insurer is still bound by the liability cascade of Art. 51 para. 2 CO. Otherwise, the position of the other liable parties would deteriorate.[185]

31 Art. 96 IPA applies to the **fixed sum insurer**. Under this provision, the injured party's claim against the tortfeasor is not transferred to the insurer.

181 BGE 133 III 6 consid. 5.3.5 p. 29; BGE 127 III 257 consid. 6c; disapproving Casanova, p. 132; controversial in CR-Werro/Perritaz, Art. 51 CO mn. 22.

18 CR-Perritaz, Art. 95c IPA mn. 42; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 41; Werro, p. 20.

18 BGE 137 III 352 consid. 4.1.

18 BGE 144 III 209 consid. 2.6.

Rather, there are two separate, not mutually exclusive claims against the tortfeasor as well as against the insurance company.[186]

The **social insurance institution** has an integral right of recourse according to Art. 72 GPSL. The cascade of Art. 51 para. 2 CO does not apply.[187] The claims of the insured person are subrogated up to the amount of the statutory benefits (Art. 72 para. 1 GPSL). In principle, the social insurer can fully recover from any tortfeasor and the tortfeasors are jointly and severally liable to the insurer (Art. 72 para. 2 GPSL).[188] However, Art. 75 GPSL provides for restrictions on the institution's claim in favour of spouses, relatives, employers and others. In recent Federal Supreme Court rulings, the institution's right of recourse has been further restricted. The strictly liable party, who is not privileged by Art. 75 GPSL, is only liable to the social insurer to the extent that they would have to bear the damage in the internal relationship with the liable employer of the injured party, as if the employer's privilege did not exist.[189] Subsequently, the social insurer may no longer have a claim against the strictly liable tortfeasor due to the liability cascade of Art. 51 para. 2 CO favouring the tortfeasor by statutory provision over the contractually liable employer.[190] 32

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185 BSK-Graber, Art. 51 CO mn. 28c; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 42; Werro, p. 21.

18 BGE 95 II 411 consid. 1b; Brehm, Art. 51 CO mn. 66; BSK-Graber/Casanova, Art. 96 IPA mn. 1 and 17; CR-Perritaz, Art. 96 IPA mn. 55; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 44.

187 BGE 119 II 289 consid. 5b; Brehm, Art. 51 CO mn. 67b; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 45.

18 BSK-Graber, Art. 51 CO mn. 30; CR-Werro/Perritaz, Art. 51 CO mn. 40.

18 BGE 143 III 79 consid. 6.1.3.3 and confirmed in BGE 146 III 362; BSK-Graber, Art. 51 CO mn. 30a; CR-Werro/Perritaz, Art. 51 CO mn. 45; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 46.

19 It has to remain noted that the court may deviate from the liability cascade as seen in BGE 144 III 319 (see above mn. 19).

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COMMENTARY ON

# Art. 84 CO

A commentary by Sascha Lanz

SUGGESTED CITATION

Sascha Lanz, Commentary of art. 84 CO, in: Christoph Hurni/Mirjam Eggen (eds.), Online Commentary of the Code of Obligations

Short citation: OK-Lanz, art. 84 CO N. XXX.

**D. Payment**

**I. National currency**

**Art. 84**

[1] Pecuniary debts must be discharged in legal tender of the currency in which the debt was incurred.

[2] A debt expressed in a currency other than the national currency of the place of payment may be discharged in that national currency at the rate of exchange that applies on the day it falls due, unless literal performance is required by inclusion in the contract of the expression ‘actual currency’ or words to that effect.

# CONTENT

# I. GENERAL

## A. Scope of application and regulatory content of Art. 84 CO

1 Art. 84-90 CO deal with monetary payment as a form of fulfilment under the marginalia "Payment."[191] The **scope of application** of Art. 84 CO is limited to monetary debts. However, Art. 85-90 CO, which fall under the same marginalia, also apply to other forms of fulfilment.[192]

2 **Art. 84 para. 1 CO** states that a debtor must settle his monetary debt with the legal tender of the currency owed. **Art. 84 para. 2 CO** supplements this principle by stating that a foreign currency debt may also be paid in "local currency", provided this is not excluded by a clause using the term "actual currency" (*"effektiv"*) or a similar clause.

## B. Concept of money

3 The term "money" can be found in numerous provisions,[193] yet it is not defined by law.[194] Despite extensive literature[195] no uniform definition of money has been established in theory either.[196] The distinction between "money in a narrower sense" (*"Geld im engeren Sinne"*) and "money in a broader sense" (*"Geld im weiteren Sinne"*) appears to be expedient.[197] **Money in a narrower sense** only includes legal tender, i.e. the money with which a debtor can fulfil his obligations in accordance to Art. 84 para. 1 CO.[198] In Switzerland, legal tender is defined as coins issued by the Confederation (Art. 2 lit. a CPIA), banknotes issued by the Swiss National Bank (Art. 2 lit. b CPIA)

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191 Gauch/Schluep/Schmid/Emmenegger, para. 2287; BK OR-Weber, Art. 84 N 4.

19 Insofar, the marginalia "payment" is too restrictive (see BK OR-Weber, Art. 84 N 4; BSK OR-Schroeter, Vor Art. 84-90 N 8, Art. 84 N 5).

19 Art. 312 CO, Art. 466 CO, Art. 481 CO, Art. 941 no. 2 CO, Art. 1152 CO, Art. 401 para. 1 CC and Art. 935 CC.

19 ZK OR-Schraner, Art. 84 N 4.

195 See e.g. Omlor, p. 303 et seq. with further references; Simitis, p. 406 et seq.; Vischer, p. 4 et seq.; Weber, Elektronisches Geld, p. 28 et seq.

19 BK OR-Weber, Art. 84 N 9 et seq. on the functional [*"Geld ist also, was als Geld fungiert"*, N 15] and other definitions; ZK OR-Schraner, Art. 84 N 4; BSK OR-Schroeter, Vor Art. 84-90 N 2.

197 Cf. BK OR-Weber, Art. 84 N 30; ZK OR-Schraner, Art. 84 N 6.

19 Cf. BK OR-Weber, Art. 84 N 30.

and deposits denominated in Swiss francs at the Swiss National Bank (Art. 2 lit. c CPIA). **Money in a broader sense** includes every usable form of money and thus includes all means of payment de facto used in payment transactions.[199] In addition to book money,[200] this also includes cryptocurrencies and other privately issued virtual currencies.[201] Unless stated otherwise, most provisions of the CO and the CC are based on the concept of money in a broader sense.[202]

## C. Forms of money and its legal nature

### 1. Cash

4 Cash includes domestic and foreign coins and banknotes.[203] The **legal nature of cash is a matter of dispute**. It is usually described as a liability of the central bank,[204] in favor of which is the fact that the banknotes in circulation are always accounted for by central banks on the liabilities side of the balance sheet,[205] meaning that banknotes appear as relative rights or claims against the central bank. Other academic voices, however, deny that banknotes have the character of claims,[206] as banknotes - in contrast to book money - do not contain any claim to exchange for another asset (any more).[207] The central bank owes the holders of cash nothing but cash.[208] Kumhof et al. propose qualifying central bank money therefore as a “social equity”.[209] Zellweger-

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19 BK OR-Weber, Art. 84 N 30 (*"Verkehrsgeld"*); CHK-Mercier, para. 3.

20 CHK-Mercier, para. 3; cf. BSK OR-Schroeter, Vor Art. 84-90 N 2; see also para. 5 below.

20 Cf. Piller, p. 1428; Enz, Geldrecht, p. 93. This applies in any case as long as the technical design of the virtual currency allows it to be used as a means of exchange and payment. This categorisation is also consistent with Art. 2 lit. c of the AMLO-FINMA.

20 In particular Art. 312 CO, Art. 466 CO, Art. 481 CO, Art. 941 para. 2 CO, Art. 1152 CO, Art. 401 para. 1 CC and Art. 935 CC (BK OR-Weber, Art. 84 N 31).

20 BK OR-Weber, Art. 84 N 32 and 33; ZK OR-Schraner, Art. 84 N 11.

20 Chaum/Grothoff/Moser, p. 5; Gauch/Schluep/Schmid/Emmenegger, para. 2298; Giovanoli, p. 108; Prasad, p. 197; Thiessen, p. 534; see also Reiser/Wyss, p. 171.

20 As does the SNB (see the SNB's balance sheet items, available at: https://data.snb.ch/de/topics/snb#!/cube/snbbipo, visited on 19/08/2024).

20 Bossone/Costa, p. 43 et seq.; Kumhof et al. p. 17; Vischer, p. 28 et seq.; Zellweger-Gutknecht, Landeswährung, para. 12 et seq.; Zellweger-Gutknecht Corinne, wCBDC, p. 216; NBG/WZG Komm-Zwellweger-Gutknecht, Art. 2 WZG N 5.

20 The gold standard was revoked in the course of the last century (for details, see SGK BV-Hettich, Art. 99 N 3).

20 Kumhof et al., p. 17.

20 Kumhof et al., p. 41.

Gutknecht suggests qualifying it as a form of equity of the central bank or as a type of participation right and classifies it as an absolute right,[210] which would imply respective balance sheet adjustments at the SNB.[211]

## 2. Book money

5 Book money represents a **claim of the account holder** against his account-holding bank for the surrender of national currency.[212]

6 In addition to cash, the use of book money has long been established in everyday payment transactions.[213] Nevertheless, the legislator deliberately decided against declaring bank money as legal tender.[214]

7 In contrast to the bank deposits of commercial banks, **sight deposits** denominated in Swiss francs **at the SNB** (cf. Art. 9 para. 1 lit. a NBA) are only available to a limited group of legal entities (in particular commercial banks).[215] These balances are used by account holders to comply with the statutory liquidity and minimum reserve requirements[216] as well as to access the interbank payment system (SIC).[217] Sight deposits at the SNB are not (or no longer) structured as claims.[218] The SNB can fully exempt itself by crediting sight deposits denominated in Swiss francs.[219]

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21 Zellweger-Gutknecht, Landeswährung, para. 12; Zellweger-Gutknecht, Bilanzsituation, para. 25 et seq.

211 Zellweger-Gutknecht, Bilanzsituation, para. 29.

21 Zellweger-Gutknecht, Landeswährung, para. 16; BK OR-Weber, Art. 84 N 40; see also Gauch/Schluep/Schmid/Emmenegger, para. 2313.

213 SNB, Payment method survey, 2020, June 2021, p. 16 et seq., 17, 24; cf. ZK OR-Schraner, Art. 84 N 12.

21 For details, see NBA/WZG Komm-Zwellweger-Gutknecht, Art. 2 WZG N 15 et seq.

215 NBG/WZG Komm-Zwellweger-Gutknecht, Art. 2 WZG N 6.

21 Cf. Liquidity Ordinance (LiqO; SR 952.06); Art. 4 para. 1 and 9 para. 2 lit. a and b Banking Act (BankA; SR 952.0); see also Zellweger-Gutknecht, Negativzins, para. 5 et seq.

217 SNB, Instruction Sheet, para. 2.1 For participation in the SIC payment system, each SNB giro account is linked to a clearing account, with the two accounts forming a single legal entity (SNB, Instruction Sheet, para. 2.1).

21 Zellweger-Gutknecht, Landeswährung, para. 14.

21 Zellweger-Gutknecht, Landeswährung, para. 14; NBG/WZG Komm-Zwellweger-Gutknecht, Art. 2 WZG N 6.

## 3. Further forms of money

### a. Private monetary systems

Private entities can establish payment systems.[220] These do not constitute legal tender. One notable example is the WIR money ("CHW") created by the WIR Bank Cooperative.[221] Such credit balances generally represent a **claim against the issuer** in line with commercial banks' book money. Any legal obligation to accept the private means of payment exists only for parties participating in the private payment system.[222] 8

### b. Cryptocurrencies

Since the beginning of 2009[223] cryptocurrencies and other assets based on distributed ledger technology have spread around the world. With one exception[224] cryptocurrencies are not legal tender in any country. The **legal nature** of cryptocurrencies is **controversial**.[225] Due to their special technical characteristics, cryptocurrencies such as Bitcoin and Ethereum cannot be qualified as either relative or absolute rights.[226] Nevertheless, cryptocurrencies have a measurable economic value and can be part of a transaction,[227] which is why they must at least be considered de facto assets (*"faktische Vermögenswerte"*).[228] 9

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22 ZK OR-Schraner, Art. 84 N 17.

22 In detail ZK OR-Schraner, Art. 84 N 18 et seq.; BK OR-Weber, Art. 84 N 53 et seq.

22 ZK OR-Schraner, Art. 84 N 17; regarding the fulfilment in WIR money, see BGer 4A_200/2019 of 17.06.2019 E. 5.

22 The first block of the Bitcoin blockchain was generated on 9 January 2009, making it the first cryptocurrency transaction in history. The so-called "genesis block" can be viewed on the blockchain explorer, available at: https://www.blockchain.com/de/explorer/blocks/btc/00000000839a8e6886ab5951d76f411475428afc90947ee320161bbf18eb6048, visited on 19/08/2024.

22 El Salvador became the first country in the world to declare bitcoin as legal tender in June 2021 (El Salvador becomes first country to adopt bitcoin as legal tender, Sam Jones/Bryan Avelar, The Guardian, 09/06/2021, available at https://www.theguardian.com/world/2021/jun/09/el-salvador-bitcoin-legal-tender-congress, visited on 19/08/2024).

22 See Beck, p. 581 et seq.; Omlor, p. 306 et seq.; Zogg, p. 100 et seq.; see also Eggen, Retail CBDC, p. 152.

22 For details, see Zogg, p. 100 et seq.; see also Piller, p. 1428 et seq., who argues in favour of applying the provisions of property law; regarding the legal nature of stablecoins, see Eggen, Tokenisiertes Buchgeld, p. 297 et seq.

22 Zogg, p. 110 et seq.

## c. Central Bank Digital Currency

10 Numerous central banks around the world are currently looking into the possibility of issuing central bank digital currency.[229] Central bank digital currency must in particular be distinguished from cryptocurrencies:[230] Cryptocurrencies are created by private actors whereas central bank digital currency is issued by the central bank. Within central bank digital currencies a distinction is made between a means of payment accessible to the public ("**retail CBDC**", rCDBC) and a restricted means of payment that can only be used by a certain group of financial market participants ("**wholesale CBDC**", wCBDC).[231] The SNB is currently involved in wCBDC projects.[232] The launch of an rCBDC appears to be off the cards for the SNB for the time being.[233] The legal nature of central bank digital currency will depend on its specific design.[234]

22 Zogg, p. 110. This view is also shared by the Federal Council (BBl 2020, p. 242).

22 Zellweger-Gutknecht, Landeswährung, para. 2; see Eggen, Retail CBDC, p. 147 et seq.; see also Lanz, p. 5 et seq.; a continuously updated overview of the projects can be found in the Central Bank Digital Currency Tracker of the Atlantic Council, available at: https://www.atlanticcouncil.org/cbdctracker/, visited on 19/08/2024.

23 In this regard, there have been regular confusions in the public debate (see Central bank digital currency report, p. 5); for the distinction, see also Lanz, p. 4 et seq.

231 See Zellweger-Gutknecht Corinne, wCBDC, p. 217; see also Bech/Garratt, p. 59; Digital Central Bank Money Report, p. 10; see also the SNB glossary entry (available at: https://www.snb.ch/de/services-events/digital-services/glossary#_C, visited on 19/08/2024).

23 For the project "Helvetia", see the white paper on "Phase II" of the project, available at <https://www.snb.ch/en/mmr/reference/project_helvetia_phase_II_report/source/project_helvetia_phase_II_report.en.pdf>, visited on 19/08/2024; cf. also Zellweger-Gutknecht, kryptobasierte Sichtguthaben.

23 Thomas J. Jordan, Währungen, Geld und digitale Token, Jubiläum 30 Jahre WWZ und VBÖ, University of Basel, 5 September 2019, p. 6, available at: https://www.snb.ch/de/mmr/speeches/id/ref_20190905_tjn/source/ref_20190905_tjn.de.pdf, visited on 19/08/2024; see also Central bank digital currency report, p. 39 et seq. For general information on the risks of an rCBDC for central banks, see Baeriswyl Romain/Renyard Samuel/Swoboda Alexandre, Retail CBDC Purposes and Risk Transfers to the Central Bank, SNB Working Papers 19/2021, September 2021 (available at: https://www.snb.ch/n/mmr/reference/working_paper_2021_19/source/working_paper_2021_19.n.pdf, visited on 19/08/2024).

23 Regarding wholesale CBDC (wCBDC), see Zellweger-Gutknecht Corinne, wCBDC, p. 228; regarding retail CBDC (rCBDC), see Eggen, Retail CBDC, p. 145 et seq.; see also Lanz, pp. 16, 21 et seq.

## D. Monetary constitution

Monetary policy is the responsibility of the Confederation (Art. 99 para. 1 11 Cst.).[235] The monetary policy mandate is specified in the CPIA and the NBA.[236] The Confederation has a **monopoly on coins and banknotes** (Art. 99 para. 1 Cst.). Coinage monopoly is exercised by the Confederation itself (Art. 4 CPIA).[237] The banknote monopoly is exercised by the SNB as an independent[238] central bank (Art. 7 CPIA; Art. 99 Abs. 2 Cst.).

# II. ART. 84 PARA. 1 CO

## A. Concept of a monetary debt

A monetary debt represents the obligation to pay a certain **sum of money** 12 (*"Summenschuld"*).[239] Less common, but equally permissible, is the agreement of a monetary debt as a **debt by unit**[240] (*"Stückschuld"*)[241] or as a **debt by category** (*"Gattungsschuld"*; see Art. 71 CO).[242] In the former case, the monetary denominations owed are determined individually.[243] In the latter case, the monetary denominations owed are determined by category (e.g. payment in a certain type of banknotes or in "Goldvreneli"[244]; so-called *"Geldsortenschuld"*).[245]

Only in the case of a monetary debt must default interest be paid in accor- 13 dance with Art. 104 para. 1 CO.[246]

23 For the historical development of the Swiss monetary constitution, see BK OR-Weber, Art. 84 N 102 et seq.

23 For details, see SGK BV-Hettich, Art. 99 N 10 et seq.; see also BK OR-Weber, Art. 84 N 118 et seq.

23 The official federal mint is Swissmint (more information at: https://www.swissmint.ch/swissmint/de/home.html, visited on 19/08/2024).

23 See BBl 1998, p. 4044 et seq.

23 BGer 4A_474/2009 of 25 May 2010 E. 5.2; Gauch/Schluep/Schmid/Emmenegger, para. 2289; CHK-Mercier, para. 4; OFK-Kren Kostkiewicz, para. 2; ZK OR-Schraner Art. 84 N 141.

24 Insofar, the marginalia "payment" is too restrictive (see BK OR-Weber, Art. 84 N 4; BSK OR-Schroeter, Vor Art. 84-90 N 8, Art. 84 N 5).

24 Cf. for instance BGE 80 II 49.

24 ZK OR-Schraner Art. 84 N 145 et seq., 147 et seq.

24 CHK-Mercier, para. 4; BK OR-Weber, Art. 84 N 136.

24 The "Goldvreneli" is Switzerland's best-known gold coin. It was minted from 1897 to 1949.

24 CHK-Mercier, para. 4; BK OR-Weber, Art. 84 N 139; ZK OR-Schraner, Art. 84 N 147.

14 The fulfilment of a monetary debt by sum cannot become **impossible** in a legal sense.[247] In contrast, in the case of a monetary debt by unit, the debtor is released from the obligation to fulfil, if the individually designated monetary tokens have perished.[248] In the case of a debt by category, it is also possible that the agreed category of money is no longer in circulation at the time of fulfilment and has therefore ceased to exist.[249] In this case, the debtor must generally fulfil in the new category of money which replaces the old one.[250]

15 The **amount owed** can be **determined** either **directly** (e.g. "CHF 150.00") or **indirectly** (e.g. with reference to a certain tariff of a professional association or a factual situation [e.g. price of a stock on a certain cut-off date]).[251]

## B. Value of a monetary debt (nominal value principle)

### 1. General

16 By their very nature, monetary debts are debts of value and are therefore subject to **fluctuations in value**.[252] Often there lies a certain period of time between the disposition and the executory agreement, which raises the question of the time of valuation of a monetary debt. In practice, this is particularly relevant in the context of inflation, which can lead to a shift in the balance between the reciprocal performances, especially in the case of long-term contractual obligations.[253]

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24 Gauch/Schluep/Schmid/Emmenegger, para. 2289 and 2689.

24 The principle *"Geld muss man haben"* applies (Medicus Dieter, p. 489 et seq.); BGer 4A_474/2009 of 25 May 2010 E 5.2.

24 BK OR-Weber, Art. 84 N 138 (Art. 119 para. 3 CO; Art. 185 para. 1 CO); ZK OR-Schraner, Art. 84 N 146.

24 BK OR-Weber, Art. 84 N 140.

25 As was explicitly regulated with the introduction of the euro (cf. Art. 2 and 3 of the European Community Regulation No. 1103/97 of 17 June 1997; for details see BK OR-Weber, Art. 84 N 141 and 177); cf. ZK OR-Schraner, Art. 84 N 148 (according to which the debtor of the agreed category of money is only released from his obligation to perform under Art. 119 para. 1 CO if the agreed category of money was essential in view of the purpose of the contract).

251 BK OR-Weber, Art. 84 N 152; ZK OR-Schraner, Art. 84 N 150.

25 BSK OR-Schroeter, Vor Art. 84-90 N 14 et seq.

25 Cf. BSK OR-Schroeter, Vor Art. 84-90 N 14.

## 2. Nominal value principle

According to prevailing doctrine and case law, the (non-statutory)[254] **nominal value principle** applies,[255] according to which a monetary debt remains immutable from the time of its origin - irrespective of any fluctuations in value. The amount of money owed is always the amount to which the debt was denominated from the outset *("Ein Franken bleibt ein Franken.")*.[256] The risk of currency devaluation in the period between the origin and the payment of the debt is therefore generally borne by the creditor.[257] The nominal value principle also applies to foreign currency debts.[258] 17

## 3. Exceptions to the nominal value principle

### a. Value-retaining monetary debts

Value-retaining debts do not amount to a fixed sum.[259] Instead, they are geared towards compensation (e.g. damages[260]) or the satisfaction of a specific need (e.g. alimony under family law).[261] If the value-retaining debt is specifically quantified within a court ruling, it too becomes a monetary debt subject to fluctuations in value.[262] 18

### b. Contractual value retention

In order to protect the creditor of a monetary debt against any devaluation, the parties can contractually agree to retain the value of the monetary debt, 19

25 BK OR-Weber, Art. 84 N 183; ZK OR-Schraner, Art. 84 N 77.

25 BK OR-Weber, Art. 84 N 179 et seq.; ZK OR-Schraner, Art. 84 N 73 et seq.; BSK OR-Schroeter, Vor Art. 84-90 N 15 et seq.; CHK-Mercier, para. 10 et seq.; BGE 51 II 303, 307 et seq.; BGer 4A_251/2021 of 16.07.2021 E. 2.1. The counterpart to the nominal value theory is the market value theory (valorism), according to which the monetary debt would have to be adjusted at the time of fulfilment to any fluctuation in value that may have occurred since the debt originated (see ZK OR-Schraner, Art. 84 N 79; BK OR-Weber, Art. 84 N 181).

25 ZK OR-Schraner, Art. 84 N 73; CHK-Mercier, para. 10.

25 BK OR-Weber, Art. 84 N 183; CHK-Mercier, para. 10.

25 See below para. 39; ZK OR-Schraner, Art. 84 N 78; BK OR-Weber, Art. 84 N 184, 320 et seq.

25 BK OR-Weber, Art. 84 N 197; BSK OR-Schroeter, Vor Art. 84-90 N 16.

26 In the case of a tortious act, for example, the amount of damages to be paid by the tortfeasor is only determined at the time of the judgement. Up to this point in time, the tortfeasor bears the monetary depreciation (BK OR-Weber, Art. 84 N 200; see also ZK OR-Schraner, Art. 84 N 82).

26 ZK OR-Schraner, Art. 84 N 81; BK OR-Weber, Art. 84 N 197 et seq.

which is particularly common in the case of long-term obligations.[263] The value of the monetary debt is only fixed at the time of fulfilment and corresponds to the intrinsic value of the monetary debt at the time the contract is concluded.[264] The most common of the various types of value retention clauses[265] is **indexation**,[266] whereby the value of the debt is linked to any changes in a specific index (e.g. national consumer price index)[267] and adjusted accordingly at the time of fulfilment. Value retention clauses are recognised as being valid, [268] although certain statutory provisions contain numerous explicit (e.g. Art. 269b CO) or analogous (e.g. Art. 783 para. 2 CC; Art. 794 para. 1 CC) restrictions.[269]

### c. Statutory or judicial adjustment

20 In exceptional cases, there is the possibility of a **statutory revaluation of** the Swiss franc,[270] which has only occurred once to date.[271]

21 Furthermore, in the event of a sudden collapse of a currency,[272] the application of the **clausula rebus sic stantibus** provides the possibility of a judicial revaluation of a monetary debt, if the necessary prerequisites are met.[273]

## C. Fulfilment of a monetary debt

### 1. Obligation of the debtor to fulfil in legal tender

22 According to Art. 84 para. 1 CO, monetary debts are to be paid in legal tender[274] of the currency owed. The provision applies to both contractual and

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26 ZK OR-Schraner, Art. 84 N 81.

26 BSK OR-Schroeter, Vor Art. 84-90 N 17.

26 BSK OR-Schroeter, Vor Art. 84-90 N 17.

26 In detail ZK OR-Schraner, Art. 84 N 106 et seq.

26 Gauch/Schluep/Schmid/Emmenegger, para. 2379.

26 Gauch/Schluep/Schmid/Emmenegger, para. 2379; ZK OR-Schraner, Art. 84 N 116; see BGer 4A_439/2007 of 28.02.2008 E. 3.2.

26 Gauch/Schluep/Schmid/Emmenegger, para. 2379; BK OR-Weber, Art. 84 N 255.

26 BK OR-Weber, Art. 84 N 247 et seq.

27 See ZK OR-Schraner, Art. 84 N 135; BK OR-Weber, Art. 84 N 261 et seq.

271 BK OR-Weber, Art. 84 N 261.

27 The nominal value principle is geared towards currency fluctuations and not currency collapse (ZK OR-Schraner, Art. 84 N 135, 139).

27 Cf. ZK OR-Schraner, Art. 84 N 135; BK OR-Weber, Art. 84 N 261 et seq.

27 See para. 2 above.

non-contractual monetary debts.[275] Art. 84 para. 1 CO **contains two elements regarding the fulfilment** of monetary debts by payment. On the one hand, it stipulates that monetary debts must be settled in the currency owed (*«Schuldwährung»*) and, on the other hand, that a legal tender must be used for this purpose.[276] Both elements do not constitute mandatory provisions.[277]

## 2. Obligations of the creditor

From the debtor's obligation to fulfil in national currency derives the credi- 23
tor's obligation to accept it in payment, otherwise the creditor is in default (Art. 91 CO).[278] **Banknotes** must be accepted in payment without restriction (Art. 3 para. 2 CPIA), whereas **coins** in circulation may only be accepted up to 100 pieces per monetary debt (Art. 3 para. 1 sentence 1 CPIA).

As not being legal tender, the creditor is under no obligation to accept **cash-** 24
**less payments** or book money.[279] If the contract does not contain a provision on the modality of fulfilment, it must be determined by construction whether it was in fact the presumed intention of the parties that the debt should be settled in cash.[280]

The **agreement of a cashless payment** is to be assumed if the creditor dis- 25
closes its payment details to the debtor (e.g. on the letterhead, on the invoice or in e-commerce on the website).[281] For reasons of practicability and security, it must furthermore be assumed that the debt is to be settled cashless in the case of larger sums and remote payments.[282]

Whether the mere **opening of a bank account** already constitutes tacit con- 26
sent to accept a cashless payment is debatable.[283] The Federal Supreme Court affirmed this in a ruling of 7 November 1996.[284] In view of the fact that nowadays almost all individuals in Switzerland hold a bank account, it is argued

27 Gauch/Schluep/Schmid/Emmenegger, para. 2295.
27 ZK OR-Schraner, Art. 84 N 155 et seq.
27 CHK-Mercier, para. 2.
27 Gauch/Schluep/Schmid/Emmenegger, para. 2300; BK OR-Weber, Art. 84 N 142 et seq.
27 BK OR-Weber, Art. 84 N 157; see Gauch/Schluep/Schmid/Emmenegger, para. 2315.
28 Gauch/Schluep/Schmid/Emmenegger, para. 2316.
28 BK OR-Weber, Art. 84 N 158.
28 Gauch/Schluep/Schmid/Emmenegger, para. 2316b.
28 Gauch/Schluep/Schmid/Emmenegger, para. 2316c; BK OR-Weber, Art. 84 N 158; CHK-Mercier, para. 7; ZK OR-Schraner, Art. 84 N 168; BSK OR-Schroeter, Art. 84 N 20.
28 Judgement of the Federal Supreme Court of 7 November 1996 in SemJud 1997, p. 245, p. 253.

that in this case payment in cash would have to be expressly stipulated in each transaction, which would be contrary to the provisions of Art. 84 para. 1 CO.[285] Within the scope of application of Art. 84 para. 1 CO, the mere opening or maintenance of a bank account without public disclosure of the payment details to a specific debtor can therefore not generally be interpreted as implicit and tacit consent to the acceptance of a cashless payment.

27 With regards to **sight deposits at the SNB**, creditors who have an account with the SNB are obliged to accept the credit of such deposits as payment (Art. 3 para. 3 CPIA). The public treasuries of the Confederation and the SNB are then obliged to accept regular issue coins, commemorative coins and bullion coins at nominal value without restriction (Art. 3 para. 1 sentence 2 CPIA).

28 **Other means of payment** (e.g. foreign banknotes or cryptocurrencies) do not have to be accepted by a creditor unless contractually agreed.[286]

### 3. Method of fulfilment

#### a. Cash payment

29 Cash payment is becoming increasingly less popular.[287] Nevertheless, cash payment still represents the general statutory concept of payment[288] and in view of the fact that the only legal tender available to the public are banknotes and coins, cash payment will remain the fundamental form of fulfilment of a monetary debt.

30 As **physical objects**, banknotes and coins are subject to the provisions of **property law**. The transfer of cash is effected by physical delivery, i.e. by the transfer of possession of a movable object (Art. 714 para. 1 CC).[289] The transfer of the amount of cash with the nominal value of the sum owed settles the monetary debt.[290]

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28 Gauch/Schluep/Schmid/Emmenegger, para. 2316c.

28 BK OR-Weber, Art. 84 N 143.

28 SNB, Payment method survey, p. 18 (only for transactions below CHF 5.00 cash remains the most commonly used means of payment); see also BSK OR-Schroeter, Art. 74 N 40.

28 See BSK OR-Schroeter, Vor Art. 84-90 N 20 et seq.

28 Giovanoli, p. 98; BK OR-Weber, Art. 84 N 80 f.

29 BK OR-Weber, Art. 84 N 154.

## b. Cashless payment

Most monetary debts today are settled using cashless means of payment (e.g. 31 bank transfer, credit card, Twint, etc.).[291] **The larger the transaction value, the smaller the proportion of cash payments.**[292]

Both contracting parties require a (bank-)account to process cashless transac- 32 tions. The legal basis consists of a contractual long-term agreement between the bank and the customer, which is subject to the provisions on **simple mandates** (Art. 394 et seq. CO).[293] It contains the agreement that the bank will handle any payment transactions for the contracting party.[294] The bank is obliged to execute transfer orders from the contracting party (active side of the agreement) as well as to credit transfer sums directed to the contracting partys' account (passive side of the agreement).[295]

When **processing a specific credit transfer**, this contractual level is supple- 33 mented by an instructional level.[296] The customer (instructing party) instructs his bank (instructed party) to credit a certain amount to a third party (recipient of the instruction).[297] The «hinge»[298] between the contractual and instructional levels is the payment order issued by the payment initiator, which on the one hand represents an instruction under contract law (Art. 397 para. 1 CO) from the payment initiator to his account-holding bank that specifies the existing contractual agreement and on the other hand represents an **instruction within the meaning of Art. 466 CO.**[299] The payment instruction (Art. 466 et seq. CO) does not constitute a contract.[300]

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29 SNB, Payment method survey, p. 18.

29 SNB, Payment method survey, p. 18.

29 Buis, p. 38; von der Crone, p. 53 et seq.

29 Kleiner, p. 280.

29 Buis, p. 92 et seq.; Kramer, p. 33 et seq.

29 BGE 122 III 237 E. 1b p. 240; Bettschart, p. 184 et seq.; Buis, p. 20, 46; Schmid et al., para. 2106.

29 If the account of the beneficiary of the payment instruction is held with a third-party bank, the rules of interbank transfers apply (see Gauch/Schluep/Schmid/Emmenegger, para. 2324 et seq.).

29 See Bettschart, p. 185.

29 BGE 126 III 20 E. 3a/aa S. 22; Bettschart, S. 185; Buis, S. 45. For interbank payments with SNB sight deposits see Kramer, p. 104 et seq.

30 BGE 132 III 609 E. 5.2 p. 617; BGer 4A_10/2013 of 28.05.2013 E. 3.

34 A valid cashless payment constitutes **fulfilment and not merely performance in lieu of fulfilment**.[301]

### 4. Time and place of fulfilment

35 Monetary debts are generally debts to be **paid at the creditor's domicile** (Art. 74 para. 2 no. 1 CO; *«Bringschulden»*).[302]

36 The creditor must be able to dispose of the amount owed on **the last day** of the specific payment period.[303] Furthermore, Art. 75 et seq. CO apply.

## III. ART. 84 PARA. 2 CO

### A. Concept of a foreign currency debt

37 A foreign currency debt is a monetary debt that is denominated in **foreign currency**[304] from the perspective of the place of payment.[305] The place of payment is determined in accordance with Art. 74 CO.[306] Foreign coins, banknotes or other assets expressed in foreign currency are owed.[307] This may also include a fully virtual currency.[308]

### B. Defining the foreign currency debt

38 Usually, the currency in which the monetary debt is to be fulfilled is expressly stated in the contract.[309] If the respective clause is **imprecise** (e.g. "dollar" instead of "US dollar" or "New Zealand dollar"), the contract must be **construed** in accordance with the rules of the applicable national law (see Art. 147 para. 2 PILA).[310]

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30 BSK OR-Schroeter, Art. 84 N 25; Gauch/Schluep/Schmid/Emmenegger, para. 2317.

30 BGE 119 II 232 E. 2 p. 234.

30 In detail see BK OR-Weber, Art. 84 N 172; BGE 119 II 232 E. 2 p. 234 et seq.

30 See Enz, Geldrecht, p. 129 and BSK IRPG-Dasser, Art. 147 N 6 et seq.

30 BSK OR-Schroeter, Art. 84 N 29; CHK-Mercier, para. 14.

30 BSK OR-Schroeter, Art. 84 N 29; ZK OR-Schraner, Art. 84 N 186.

30 BK OR-Weber, Art. 84 N 311.

30 For details see Bärtschi/Jacquemart/Meyer, p. 201 et seq. and BSK IPRG-Dasser, Art. 147 N 9 et seq.

30 CHK-Mercier, para. 14; BK OR-Weber, Art. 84 N 312; ZK OR-Schraner, Art. 84 N 176.

31 BK OR-Weber, Art. 84 N 312; ZK OR-Schraner, Art. 84 N 176.

Art. 84 para. 2 CO does not address the determination of the amount of the foreign currency debt, merely the question of the right of conversion. Hence, foreign currency debts are likewise subject to the **nominal value principle**.[311] 39

**Contractual claims for damages** are generally denominated in the currency of the contract.[312] In the case of **tort claims**, the currency owed must be assessed based on the specific circumstances of the individual case. As a rule, the foreign currency at the location where the damage occurred is likely to be determinant,[313] whereby this is usually the national currency at the domicile of the injured party.[314] 40

If an **unjustly enriched person** is obliged to provide reimbursement but has already exchanged the unjustly received foreign currency amount into local currency, they are not obliged to exchange it back. Instead, reimbursement may be made in local currency.[315] The amount to be reimbursed in local currency is determined by the exchange rate of the local currency and the foreign currency obtained on the date of receipt.[316] 41

## C. Right of the debtor to fulfilment in local currency

Art. 84 para. 2 CO provides the debtor of a foreign currency debt whose place of payment is in Switzerland with the right to fulfil in Swiss national currency (Swiss francs, CHF). This right of the debtor represents a statutory **alternative authorisation**.[317] Primarily, payment is owed in the foreign currency. However, the debtor is free to fulfil in local currency without the creditor's consent.[318] 42

On the other hand, **the creditor may only demand fulfilment in the foreign currency**.[319] If the creditor refuses the debtor's payment in foreign or national currency, he falls into creditor default (Art. 91 CO).[320] 43

311 BK OR-Weber, Art. 84 N 320. For the nominal value principle, see para. 17 above.
312 BGer 4C.191/2004 of 07.09.2004 E. 6; BK OR-Weber, Art. 84 N 314.
313 BK OR-Weber, Art. 84 N 318; ZK OR-Schraner, Art. 84 N 182.
314 Vetter/Züst, p. 664.
315 ZK OR-Schraner, Art. 84 N 183 with further references.
31 BK OR-Weber, Art. 84 N 319.
317 BGE 134 III 151 E. 2.2 p. 154 et seq.; Gauch/Schluep/Schmid/Emmenegger, para. 2304.
31 ZK OR-Schraner, Art. 84 N 186. Generally on the statutory alternative authorisation see BK OR-Weber, Art. 72 N 67 et seq.

44 The statutory alternative authorisation in **Art. 84 para. 2 CO does not apply**, if literal performance is required by inclusion in the contract of the expression 'actual currency' or words to that effect.[321] Furthermore, alternative fulfilment in national currency is excluded in the case of a monetary debt being defined specifically.[322] Such a debt exists, for example, if the purchase of certain foreign currency denominations have been agreed.[323]

## D. Conversion of a foreign currency debt

### 1. Applicable conversion rate

45 According to Art. 84 para. 2 CO, foreign currency debts can be settled in local currency "at the rate of exchange that applies on the day it falls due". The amount converted into Swiss francs must therefore correspond in value to the amount owed in foreign currency at the time the foreign currency debt matures (Art. 75 CO).[324] This leads to the following implications: The right of substitution pursuant to Art. 84 para. 2 CO **only applies after the due date**, as the relevant exchange rate is not known beforehand.[325] The debtor can therefore not settle the debt in local currency before the due date.[326] Secondly, the creditor bears the exchange rate risk between the due date and the debtor's default, as the debtor is only liable for exchange rate losses from the time of default (Art. 103 CO).[327] If the debtor is not immediately dunned by the creditor on the due date, this leaves the former with a certain room for speculation.[328]

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31 Gauch/Schluep/Schmid/Emmenegger, para. 2307; ZK OR-Schraner, Art. 84 N 186; BK OR-Weber, Art. 84 N 325; see BGer 4A_200/2019 of 17.06.2019 E. 5.

32 BGer 4A_391/2015 of 01.10.2015 E. 3; CHK-Mercier, para. 15; BK OR-Weber, Art. 84 N 325 with further references; ZK OR-Schraner, Art. 84 N 186 with further references.

321 Such clauses are rare in practice (BSK OR-Schroeter, Art. 84 N 33); For virtual currencies, Enz argues that the agreement to pay in Bitcoin should be qualified as an effective clause (Enz, Vollstreckung, p. 593).

32 So-called *«Geldsortenschuld»*, see para. 12 above; Gauch/Schluep/Schmid/Emmenegger, para. 2304.

32 Gauch/Schluep/Schmid/Emmenegger, para. 2304; BGE 51 II 199.

32 CHK-Mercier, para. 17.

32 This provision stands in contradiction to Art. 81 para. 1 CO (CHK-Mercier, para. 16).

32 Weber, Fremdwährungsschulden, p. 114.

32 BGE 76 II 371 E. 4a p. 375; 60 II 337 E. 2 p. 340.

32 Weber, Fremdwährungsschulden, p. 114; the alternative would be to use the exchange rate at the time of payment, as it is the case under German law (cf. BGB §244).

Locally decisive is the **exchange rate** at the statutorily given or contractually agreed place of payment.[329] Which exchange rate is to be applied (bid or ask price) depends on the specific circumstances.[330] Generally, the **asking price** is decisive, since the creditor should be able to obtain the amount of foreign currency actually owed at the time of maturity.[331] 46

### 2. Damage from exchange rate fluctuations

If the debtor is in default (Art. 102 para. 1 CO), he is liable for any damages that occur as a result of exchange rate fluctuations (Art. 103 et seq. CO).[332] If the creditor claims damages for delay in accordance to Art. 106 CO that exceed the default interest of 5% (Art. 104 CO), the **natural presumption** applies that the creditor would have changed the foreign currency received into national currency of its (domicile) country on the due date.[333] This presumption, which serves to ease the burden of proof for the creditor in the event of exchange rate losses, must also be held to its disadvantage in the event of exchange rate profits, whereby the creditor is entitled to provide evidence to the contrary.[334] 47

## E. Offsetting foreign currency debts

If no clause within the meaning of Art. 84 para. 2 CO has been agreed, the **offsetting** of monetary debts denominated in different currencies is **permissible** according to the Federal Supreme Court,[335] provided a conversion rate exists between the different currencies.[336] 48

32 BK OR-Weber, Art. 84 N 329.
33 See ZK OR-Schraner, Art. 84 N 194 et seq.
331 ZK OR-Schraner, Art. 84 N 194. Regarding the different exchange rates, see BK OR-Weber, Art. 84 N 335 as well as ZK OR-Schraner, Art. 84 N 195.
33 ZK OR-Schraner, Art. 84 N 203.
33 BGE 123 III 241 E. 3a p. 243; BGE 117 II 256 E. 2b p. 258; BGE 109 II 436 E. 2 p. 440 et seq.; CHK-Mercier, para. 16.
33 BK OR-Weber, Art. 84 N 339.
33 BGE 130 III 312 E. 6.2 p. 318; BGE 63 II 383 E. 5 p. 391 et seq.
33 BGE 130 III 312 E. 6.2 S. 318.

## F. Enforcement of a foreign currency debt

### 1. Prayer in the case of a foreign currency debt

49 A claim in a foreign currency must be filed in the agreed currency by the creditor.[337] **If the creditor files the claim in a different currency, the claim will be dismissed**, as the debtor may – according to Federal Supreme Court case law[338] – not be ordered to pay anything other than what is owed.[339] This practice is criticised in the doctrine.[340] Instead, the use of a value-based approach is proposed:[341] In an action for monetary compensation, an abstract value or a "certain measure of purchasing power"[342] is generally sought. The currency in which the monetary payment is denominated in the prayer should therefore not be decisive for the nature of the claim. Accordingly, the plaintiff would also be awarded "nothing different" (Art. 58 para. 1 CPC), if the claim is recognised in a currency other than the one claimed.[343]

50 The Federal Supreme Court is aware of the criticism of the doctrine.[344] However, it adheres to its previous rulings.[345] An action in the wrong currency therefore continues to lead to dismissal.[346] Although, the Federal Supreme Court has affirmed that an action in the wrong currency has the effect of interrupting the limitation period, even if the action itself is to be dismissed.[347] Furthermore, the dismissal of a claim that was mistakenly filed in Swiss francs does not preclude a renewed claim for payment of the foreign currency amount actually owed.[348]

33 ZK OR-Schraner, Art. 84 N 216.

33 BGE 137 III 158 E. 4.1 p. 680; BGE 134 III 151 E. 2.5 p. 156 et seq.; BGE 52 III 134; BGer 4A_455/2022 of 26.01.2023 E. 3.2; BGer 4A_251/2021 of 16.07.2021 E. 2.1; BGer 4A_200/2019 of 17.06.2019 E. 4; BGer 4A_265/2017 of 13.02.2018 E. 5.

33 CHK-Mercier, para. 19; In this case, the creditor has the option of filing a new action in the foreign currency owed (BGer 4A_206/2010 of 15.12.2010, E. 5.2.2.2; see also Schwander, p. 466 and Carr, p. 166).

34 Carr, p. 161 et seq.; Koller, para. 9 et seq.; Ollivier/Geissbühler, p. 1439 et seq.; Schwander, p. 459 et seq.

341 See Carr, p. 162 et seq.

34 Carr, p. 163.

34 Carr, p. 163.

34 BGer 4A_503/2021 of 25.04.2022 E. 4.1.2.

34 BGer 4A_503/2021 of 25.04.2022 E. 3-5.

34 On the handling of this jurisprudence in practice, see Schwander, p. 464 et seq.

34 BGer 4A_298/2021 of 08.11.2022 E. 6.

## 2. Calculation of the value in dispute for a foreign currency debt

The value in dispute is determined by the prayers for relief (Art. 91 para. 1 CPC). In the case of a foreign currency claim, a **conversion into Swiss francs** must be carried out on the date of lis pendens (Art. 61 para. 1 CPC).[349] The applicable exchange rates are regarded as known by the court and do not have to be proven.[350] 51

## 3. Debt enforcement of a foreign currency debt

Art. 67 para. 1 no. 3 DEBA requires that the amount of the claim be stated in the debt enforcement request in Swiss francs. This **conversion** is provided for reasons of expediency and does not lead to novation (Art. 116 CO); the claim is still owed in foreign currency.[351] The debtor can therefore discharge himself by paying in foreign currency until the debt enforcement proceedings are terminated. 52

The **exchange rate at the place and on the day of the request for debt enforcement** is decisive for the conversion.[352] If a request for continuation is made (see Art. 88 DEBA), the amount of the claim can once again be converted into national currency at the creditor's request at the exchange rate on the day of the request for continuation (Art. 88 para. 4 DEBA). 53

If the exchange rate changes in the course of the debt enforcement proceedings and the debtor has paid more as a result, he is entitled to **sue for recovery** (Art. 86 DEBA).[353] In the opposite case, the creditor can claim the difference by way of a **new debt enforcement procedure**.[354] 54

Literal foreign currency debts within the meaning of Art. 84 para. 2 CO as well as monetary debts determined by category (*"Geldsortenschuld"*)[355] are not en- 55

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34 BGer 4A_298/2021 of 08.11.2022 E. 5.2; BGer 4A_206/2010 of 15.12.2010 E. 5.2.2.2; ZK OR-Schraner, Art. 84 N 216.

34 Stein-Wigger, ZPO-Komm, Art. 91 N 22; BK OR-Weber, Art. 84 N 347; BGE 63 II 34, 35.

35 BGE 135 III 88 E. 4.1 S. 90 (in this judgement, the Federal Supreme Court relied on the data from the website: http://www.fxtop.com).

351 BGE 134 III 151 E. 2.3 p. 155; Penon/Wohlgemuth, SchKG-Komm, Art. 67 N 23.

35 BGE 137 III 623 E. 3. S. 624; Penon/Wohlgemuth, SchKG-Komm, Art. 67 N 23.

35 BGE 134 III 151 E. 2.3 p. 155.

35 BGE 134 III 151 E. 2.3 p. 155.

35 See para. 12 above.

forced in accordance with the provisions of the DEBA, but by way of **enforcement in accordance with Art. 335 CPC et seq.**[356]

## 4. Foreign currency debts in bankruptcy, attachment and probate

56 In the **bankruptcy petition**, the creditor must convert the claim into Swiss francs (see Art. 211 DEBA).[357] The **request for attachment** (see Art. 271 DEBA) must also be denominated in Swiss francs. If the debt enforcement proceedings have already been initiated, the conversion in accordance with the application for debt enforcement is decisive (Art. 67 para. 1 no. 3 DEBA), otherwise it is the time of the application for attachment.[358] In the case of an **ordinary debt restructuring agreement** (see Art. 314 DEBA) and a **debt restructuring agreement in bankruptcy** (see Art. 332 DEBA), no conversion is required.[359] However, in the case of a **debt restructuring agreement with assignment of assets** (see Art. 317 DEBA), a conversion must be made, whereby the conversion rate is based on the time at which the debt restructuring moratorium was granted.[360]

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35 CHK-Mercier, para. 20; Kellerhals, Art. 335 N 30.

35 BGE 110 III 105 E. 3 p. 106 et seq.; CHK-Mercier, para. 20.

35 ZK OR-Schraner, Art. 84 N 239; CHK-Mercier, para. 21.

35 BGE 50 II 31 et seq.; CHK-Mercier, para. 21; BK OR-Weber, Art. 84 N 359 et seq.

36 BK OR-Weber, Art. 84 N 361.

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COMMENTARY ON

# Art. 97 CO

A commentary by Clarisse von Wunschheim / Cristina Wullschleger

SUGGESTED CITATION

Clarisse von Wunschheim/Cristina Wullschleger, Commentary of art. 97 CO, in: Christoph Hurni/Mirjam Eggen (eds.), Online Commentary of the Code of Obligations

Short citation: OK-von Wunschheim/Wullschleger, art. 97 CO N. XXX.

**Section Two: The Consequences of Non-Performance of Obligations**

**A. Failure to perform**

**I. Obligor's duty to compensate**

**1. In general**

**Art. 97**

1 An obligor who fails to discharge an obligation at all or as required must make amends for the resulting damage unless he can prove that he was not at fault.

2 The procedure for debt enforcement is governed by the provisions of the Federal Act of 11 April 1889 on Debt Collection and Bankruptcy and the Civil Procedure Code of 19 December 2008 (CPC).

# CONTENT

## I. CONTEXT & PURPOSE

Art. 97 of the Code of Obligations ("CO") opens the Chapter on the Consequences of Non-Performance, which includes Art. 97 to Art. 109 CO. This Chapter starts with Art. 97 CO, which sets out the principle that a debtor has the duty to compensate for the damage caused by his failure to perform a specific obligation. 1

For a lay or foreign readership, the language of Art. 97 CO may be peculiar in various regards: 2

1. It refers to "an obligation" in general terms, and not to a contractual obligation specifically. This is due to the fact that Swiss private law is based on a general theory of "law of obligations", in which contracts are only one of three sources from which obligations can arise (tort [Art. 41 fol. CO] and unjust enrichment [Art. 62 CO] being the two other sources).[361] Thus, even though a reader will not find the word "contract" mentioned therein, both Art. 97 CO and the following Art. 98-109 CO directly and specifically apply to any situation of breach of contract, unless (i) the Parties have provided for a different regime of liability for breach of contract (to the extent permissible by statutory law), and/or (ii) the Code of Obligations (or an applicable international convention such as the CISG) provides for different and overriding provisions when dealing with specific types of contracts (e.g. sales contract, rental contract, agency contract, etc.) (so-called principle of "*Lex specialis derogat lex generalis*").

2. Art. 97 CO officially deals with "the consequences of a failure to perform" such obligation, but then seems to focus on only one of these potential consequences, i.e. the duty to repair any damage caused by the failure to perform. This does however not mean that the duty to compensate for a damage is the only remedy available in case of a failure to perform. In particular, the right of a creditor to request specific performance from a non-performing debtor is implicit in Art. 97 CO and widely recognized by Swiss case law.[362] Further rights are set out in the Articles following Art. 97 CO, such as the right to sub-

36 BK-Emmenegger, Introd. Art. 97-109 CO N. 4; BK-Emmenegger, Art. 97 CO N. 9; Gauch/Schluep/Emmenegger, N. 2933.

36 BK-Emmenegger, Art. 97 CO N. 7; Schmid, p. 591; Huguenin, N. 808 f.; BGE 116 II 441 consid. 2a; BGer 4A_41/2016 dated 20.6.2016 consid. 3.4.

2 stitute performance by a third party (Art. 98 CO) or the right to terminate the contract (Art. 107 fol. CO).

3. Art. 97 CO also does not specify what type of "non-performance" is meant. It is generally admitted that Art. 97 CO applies to all sorts of improper performance (so-called 'disturbed performance', *Leistungsstörungen*), including late performance (so-called 'default', *Verzug / Demeure,* see Art. 102 fol. CO), incomplete performance, defective performance or any other type of actual breach or non-compliance with specific contractual obligations ("*positive Vertragsverletzung*").[363]

4. A lay or foreign reader may further wonder why Art. 97(2) CO refers to the procedure for debt enforcement law in the midst of provisions on contract breach. The reason is that Swiss law provides for a very special mechanism of enforcement of monetary debts, which allows a creditor holding a specific title establishing a monetary claim to enforce such claim against the debtor directly through the debt enforcement procedure without having to resort necessarily to court litigation to claim damages pursuant to Art. 97 CO. Whether or not it will be necessary to first enforce the damage claim through court litigation will eventually depend on the type of title held by the creditor and on whether the debtor resists debt enforcement.[364]

3 What is further noteworthy is that Art. 97 fol. CO are, subject to very few exceptions dealt with below, not mandatory law. Parties may thus in principle deviate from the liability regime set out in these provisions.

4 In summary, Art. 97 fol. CO constitute the default provisions applicable in case of breach of contract where neither the contract itself, nor the Code of Obligations (or any applicable international Convention), provides for any other specific provision applicable to the contract at stake.

5 Art. 97 fol. CO do not directly apply to a breach of potential pre-contractual obligations, such as the duty to conduct negotiations in good faith. Pre-contractual liability, also known as "*culpa in contrahendo*" is – according to the currently predominant doctrine and case law - mainly subject to tort law, al-

36 BK-Emmenegger, Art. 97 CO N. 14; BSK-Wiegand, Art. 97 CO N. 1; Huguenin, N. 846; Gauch/Schluep/Emmenegger, N. 2616; BGer 5A_69/2018 dated 21.9.2018 consid. 3.3; BGer 4A_306/2009 dated 8.2.2010 consid. 6.1.

36 BK-Emmenegger, Art. 97 CO N. 536, 538 f.; Gauch/Schluep/Emmenegger, N. 2504; BSK-Acocella, Art. 38 SchKG N. 1, 4 ff.; BGE 143 III 173 consid. 6.

though certain provisions of the present Chapter may be applied by analogy. [365] In contrast, Art. 97 fol. CO generally apply to breaches of post-contractual obligations, which arise out of the contract and exist beyond its termination. [366]

## II. GENERAL CONTRACTUAL LIABILITY STANDARD

Under Swiss law, contractual liability, understood as the duty to compensate for a damage resulting from an improper contract performance, is subject to four basic requirements: 6

1. A non-performance of a specific contractual obligation, i.e. a breach of contract;

2. A damage;

3. A causal nexus between the non-performance and the damage;

4. A faulty behavior by the non-performing party.

### A. A Non-Performance

As mentioned above, the concept of 'non-performance' of Art. 97 CO encompasses all kinds of non-compliance with contractual standards. In other words, any deviation from any contractual duty or, failing any specific contractual duty, from any statutory duty applicable to the contract at stake qualifies as "non-performance" in the meaning of Art. 97 CO. 7

Art. 97 CO also makes no distinction as concerns the type of duty which is breached. In particular, Art. 97 CO makes no difference between so-called 'main obligations' (*Hauptpflichten / obligations principales*), which are the characteristic obligations of a specific contract (e.g. delivery of an object versus payment of its price in a sales contract, or transfer of money versus interest payment in a loan contract), and 'ancillary obligations' (*Nebenpflichten / obligations secondaires*) which surround the main obligations, such as a duty 8

36 BSK-Wiegand, Introd. Art. 97-109 CO N. 10 f.; BK-Emmenegger, Introd. Art. 97-109 CO N. 73 f., 85 ff.; BK-Emmenegger, Art. 97 CO N. 30 ff., 147 ff., Gauch/Schluep/Schmid, N. 963 ff.; BGer 4A_229/2014 dated 19.9.2014 consid. 4.1; BGE 120 II 331 consid. 5a.

36 BSK-Wiegand, Introd. Art. 97-109 CO N. 12; BK-Emmenegger, Introd. Art. 97-109 CO N. 78 ff.; Schwenzer/Fountoulakis, N. 73.11; Huguenin, N. 646; BGer 4A_398/2007 dated 23.4.2009 consid. 6.2; BGer 5A_947/2013 dated 2.4.2014 consid. 6.2.

of exclusivity, non-competition, confidentiality, etc. It also makes no distinction between duties which consist of an active behaviour (to do something) or those which consist in a passive behaviour (to tolerate or not do something). [367]

9 Art. 97 CO also does not distinguish between various degrees of breaches. Although it is common in practice for parties to attach different consequences to a breach depending on its severity, for example in case of 'material breach', Art. 97 CO does not know any such distinction. All types of failure to perform are at the outset treated in the same manner.[368] However, where a debtor is put on notice of his non-performance and refuses to remedy it within the contractual or statutory deadline (so-called 'default of the debtor', *Verzug / Demeure*), the creditor is given a broader array of choices of remedies, including a right to termination and/or additional damages (see Art. 102 fol.).

10 Further, at the stage of determining the existence of a non-performance, the actual causes of such non-performance are irrelevant. There are only two exceptions to this principle: [369]

1. **Original & Total Impossibility**: Where performance of an obligation was objectively and totally impossible from the very beginning, i.e. already at the time of conclusion of the contract, the obligation itself is invalid *ab initio* based on Art. 20 CO and no performance is due. Where performance becomes impossible only after the conclusion of the contract, Art. 20 CO does not apply. Instead, where the event causing the impossibility to perform occurs after the conclusion of the contract and is beyond the scope of influence of the debtor, Art. 119(1) CO provides that the concerned obligation extinguishes, meaning that the debtor is released from the obligation to perform and must return what he/she has already received (Art. 119(2) CO). Thus, Art. 119 CO deals with what is commonly referred to as *'Force Majeure'*, even though Art. 119 CO does not provide a specific definition thereof and instead focuses on the result: the objective impossibility to perform due to external

36 BK-Emmenegger, Art. 97 CO N. 118 ff., 132 ff., 144 ff.; BSK-Wiegand, Art. 97 CO N. 32 ff.; Huguenin, N. 852 ff.; BGer 4A_306/2009 dated 8.2.2010 consid. 6.1; BGer 4A_494/2010 dated 7.12.2010 consid. 4.

36 BSK-Wiegand, Introd. Art. 97-109 CO N. 7 f.; BK-Emmenegger, Art. 97 CO N. 118 f.; Gauch/Schluep/Emmenegger, N. 2627 ff.; BGer 4A_610/2017 dated 29.5.2018 consid. 5.2.1.

36 BK-Emmenegger, Art. 97 CO N. 50 ff.; 111 ff.; Huguenin, N. 825, 827 ff.; BGE 129 III 209 consid. 2.2; BGE 127 III 300 consid. 5b.

factors. It should be noted that Art. 119 CO is not mandatory law, and the parties may thus deviate for this rule in their contract by allocating specific risks to a party irrespective of the latter's influence on the realisation of this risk (Art. 119(3) CO)). Please refer to the commentary on Art. 119 CO for more details on the mechanism of subsequence impossibility under Swiss law. Where neither Art. 20 CO nor Art. 119 CO apply, an impossibility to perform will be dealt with as a case of non-performance under Art. 97 CO.

2. **Clausula Rebus Sic Stantibus**: Where the original situation and balance of interests underlying the contract has changed in an unforeseen way and to such an extent that a performance of a certain obligation has become unbearable for the debtor and the insistence on such performance by the creditor would create an abusive imbalance between the two performances, a debtor may be excused from his/her duty to perform. The requirements of the *Clausula Rebus* are more stringent than the doctrine of hardship under English law and require the debtor to first request a re-negotiation of the contract and, in case the creditor refuses, to enforce a contract modification before the courts. The *Clausula Rebus* does not give the debtor a direct right to refuse performance.[370]

Thus, where parties to a contract want to create exceptions to the duty to perform certain obligations in case of *Force Majeure* events or hardship, they must provide for relevant provisions in their contract and pay particular attention to the definition of such concepts and their consequences.[371] 11

In summary, all types of breaches of any type of contractual duty, whether arising out of the contract or of the law, qualify as "non-performance" under Art. 97 CO irrespective of the reason for such non-performance. Carve-outs to such a broad definition of non-performance are possible but must be provided for by the parties in their contract and are subject to certain statutory limitations (see below Art. 100 CO). 12

37 BSK-Wiegand, Art. 18 CO N. 99 ff.; BK-Emmenegger, Art. 97 CO N. 116; Gauch/Schluep/Schmid, N. 1300; Huguenin, N. 320 ff.; BGer 2C_825/2013 dated 24.3.2014 consid. 6.1; BGE 138 V 366 consid. 5.1.

371 BSK-Wiegand, Art. 18 CO N. 10 ff.; BK-Emmenegger, Introd. Art. 97-109 CO N. 21; BK-Emmenegger, Art. 97 CO N. 10; Huguenin, N. 321; BGE 135 III 1 consid. 2.5; BGE 100 II 345 consid. 2b.

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## B. A Damage

13 The definition of damage under Swiss law is very broad and encompasses any involuntary decrease of one party's assets, which may take the form of an actual reduction in the net worth of its assets or an increase in liabilities. This decrease in assets or increase in liabilities is measured as the difference between the status of assets and liabilities which would have existed without the breach
compared to their status with the breach (so-called 'difference theory'; *Differenztheorie*).[372]

14 Thus, although the definition of damage is rather broad, it focuses on damages of a financial nature. Other types of harm which do not transcribe into a clear monetary value, such as moral prejudice, reputational damage or a loss of opportunity, generally do not qualify as damages under Swiss law and may thus not be compensated.[373]

According to the general rule on the burden of proof (Art. 8 Civil Code and Art. 42 CO), it is up to the party alleging a damage to prove (i) the existence of such damage, as well as (ii) its scope (i.e. quantification).[374]

15 In this regard, Swiss law shows the following particular features:

1. As a general rule, under Swiss law all types of damages are compensable, as long as they fall under the above definition of damage. In particular, Swiss law does not limit the compensable character of a damage based on its categorization as direct or indirect, or as consequential damage. These types of damages also fall under the general definition of damage, and their compensable character will depend on whether they show an adequate causal nexus to the breach in order to be compensable (see below Section 2.3).[375]

2. The actual damage constitutes the ceiling of potential compensation. In other words, the amount of compensation due may not exceed the actual val-

37 BSK-Wiegand, Art. 97 CO N. 38, 54 f.; Huguenin, N. 867; Gauch/Schluep/Emmenegger, N. 2848; BGE 144 III 155 consid. 2.2; BGer 4A_506/2011 dated 24.11.2011 consid. 4.

37 BK-Emmenegger, Art. 97 CO N. 187 ff., 217, 236 ff.; Gauch/Schluep/Emmenegger, N. 2850 ff.; BGE 123 IV 145 consid. 4b/bb; BGE 127 III 403 consid. 4a.

37 BSK-Wiegand, Art. 97 CO N. 60; BK-Emmenegger, Art. 97 CO N. 527 f.; Huguenin, N. 1850; Gauch/Schluep/Emmenegger, N. 2653; BGE 144 III 155 consid. 2.3.

ue of the damage incurred.[376] In particular, Swiss law does not recognize the concept of 'punitive damages' as known in certain common law jurisdictions. Swiss law nevertheless allows the parties to provide for contractual 'penalty clauses' (*Vertragsstrafe | Clause pénale*), which aim at increasing the pressure for a party to perform by providing for a lump sum penalty in case of breach, thereby releasing the creditor from the burden to prove any damage at all.[377] These clauses must however be provided for in advance of any damage and may be reduced by the judge in certain circumstances, so that their nature and purpose are quite distinct from the common law concept of 'punitive damages' (see Art. 163 CO).[378]

Art. 97 CO also does not prevent parties from contractually limiting the type of damages or from setting an amount of damages lower than or different from the actual damage incurred (so-called 'agreed sums' or 'liquidated damages'). However, this constitutes a limitation of the standard liability regime established by Art. 97 CO and is thus subject to the restrictions provided in Art. 100 CO, which will be dealt with below.

3. The fact that the definition of damage is broad does not mean that a party can ask for all sorts of damages at the same time. Under Art. 97 CO, a general distinction is drawn between the so-called 'positive damage' or 'performance interest' (*positives Vertragsinteresse*, *Erfüllungsinteresse | dommage positif*) and the 'negative damage' or 'reliance interest' (*negatives Vertragsinteresse*, *Nichterfüllungsinteresse | dommage négatif*). [379]

- The **performance interest** represents the full value of the contract being properly performed. Here, the compensation aims at putting the creditor in the situation he/she would have been, had the contract been fully and properly performed. The damage is thus the difference between the status

37 BK-Emmenegger, Art. 97 CO N. 255; BGE 142 III 433 consid. 4.5; BGE 138 III 276 consid. 4; Moss, Swiss Law vs English Law on Contract Interpretation: Is Swiss law better suited to the realities of international construction contracts? In: International Construction Law Review, Part 4 October 2015 [2015] ICLR 470 (available here: https://pdf4pro.com/download/swiss-law-vs-english-law-on-contract-50811a.html).

37 BK-Emmenegger, Art. 97 CO N. 284, 343 f.; Huguenin, N. 1852.

377 BK-Emmenegger, Art. 97 CO N. 240, 476 f., 529; Gauch/Schluep/Emmenegger, N. 3788 ff.; BGE 135 III 433 consid. 3.1; BGE 122 III 420 consid. 2a.

37 BK-Emmenegger, Art. 97 CO N. 476 f.; Gauch/Schluep/Emmenegger, N. 3793 f., 3824; BGE 143 III 1 consid. 4.1; BGE 133 III 201 consid. 5.2.

37 BK-Emmenegger, Art. 97 CO N. 286; Huguenin, N. 872 ff.; BGE 144 III 155 consid. 2.2.

of the creditor's assets and liability in the breach scenario compared to what such status would have been had the contract been properly performed. This includes most importantly lost profit (*lucrum cessans*), but it may also comprise any costs which the creditor incurs due to the improper performance (*damnum emergens*), such as additional storage costs for goods, inspection costs, repair costs, destruction costs, costs of a product recall, penalties or damages due by the creditor to its own clients in relation to late deliveries, etc.[380]

- The **reliance interest** represents the actual costs and losses arising out of the improperly performed contract. Here, the compensation aims at putting the creditor in the situation he/she would have been, had the contract never been concluded. The damage is thus the difference between the status of the creditor under the breach scenario compared to its status prior to the conclusion of the contract.[381]

Under Swiss law, it is not possible to claim both the performance and the reliance interest; the creditor may only claim one of these two types of damages. As long as the contract remains in place, the creditor may only request the performance interest. Where the creditor decides to terminate the contract, he may then only claim the reliance interest (Art. 107-109 CO). [382] Thus, it is crucial for a creditor to carefully evaluate the *pros* and *cons* of a claim for performance interest vs a claim for reliance interest before exercising the specific remedies available under Art. 107 fol. CO.

## C. A Causal Nexus

16 Whereas certain legal systems require a damage to be "foreseeable", or differentiate between direct and indirect or consequential damages, Swiss law refers to the concept of "causal nexus" (*Kausalzusammenhang / lien de causalité*). For a damage to be subject to a duty to compensate, the breach and the damage claims must be in a 'cause and effect' relationship, which is assessed from two separate angles:

38 BSK-Wiegand, Art. 97 CO N. 38a; BK-Emmenegger, Art. 97 CO N. 288 f.; Gauch/Schluep/Emmenegger, N. 2898; BGer 4A_651/2015 dated 19.4.2016 consid. 4.1.

38 BK-Emmenegger, Art. 97 CO N. 291 f.; Gauch/Schluep/Emmenegger, N. 2899; Schwenzer/Fountoulakis, N. 14.31; BGer 4A_251/2010 dated 12.8.2010 consid. 2; BGE 113 II 25 consid. 2.

38 BK-Emmenegger, Art. 97 CO N. 293 f.; Huguenin, N. 874.

1. There must be a **natural** causal nexus (*natürlicher Kausalzusammenhang | lien de causalité naturelle*): the concerned behavior, which constitutes the breach of contract, must be the *conditio sine qua non* of the damage. In other words, without the breach, no damage would have occurred.[383]

Example: A pharmaceutical company used an incorrect ingredient while manufacturing a medicine. As a result, patients got sick and the seller had to recall the medicine as well as indemnify its distributors and the patients. Had the manufacturer used the right ingredient, the patient would not have become sick and no recall or indemnification would have been necessary.

2. This natural causal nexus must also be **adequate** (*adäquater Kausalzusammenhang | lien de causalité adequate*): This means that in addition to being the natural cause of the damage, "*the breaching behaviour must have been, according to the ordinary course of things and the experience of life, capable of bringing about an effect of the kind that has occurred, so that the likelihood of occurrence of this result would appear to have been generally increased by the breaching behaviour*".[384] Although conceived differently, the test of adequate causality under Swiss law is – in practice – not so different from the test of 'foreseeability' applied under CISG or other laws.[385]

Example: According to common knowledge and experience, it was to be expected that the use of the wrong ingredient in the medicine would cause patients to get sick, and thus require a product recall.

Where the breaching behaviour consists of an omission, the test of causality must be adapted. The relevant question is then whether, according to the ordinary course of things and the experience of life, the damaging result could have been avoided had the concerned party acted out the required behavior (so-called '**hypothetical** causal nexus').[386]

38 Huguenin, N. 119 f.; Schwenzer/Fountoulakis, N. 19.01; BK-Emmenegger, Art. 97 CO N. 348 f.; BGE 133 III 462 consid. 4.4.2; BGE 129 V 177 consid. 3.1.

38 BGE 129 V 177 consid. 3.2, BGE 125 V 456 consid. 5a; BGE 123 V 98 consid. 3d.

38 Huguenin, N. 2838.

38 Huguenin, N. 122; Gauch/Schluep/Emmenegger, N. 2950; BK-Emmenegger, Art. 97 CO N. 412 ff.; BGer 4A_520/2007 dated 31.3.2008 consid. 4; BGE 141 V 93 consid. 8.1.

[illegible]

## D. A Fault

17 In order to trigger a liability for damages under Art. 97 CO, a breach of contract alone is not enough. The breach must be the result of a faulty behavior by the debtor. However, Art. 97 CO establishes a presumption of fault. In other words, the creditor must only prove that a breach has occurred. This breach is then presumed to be the result of a faulty behavior and it is up to the debtor to show that no fault was attributable to him/her when committing the breach (so-called 'proof of exculpation', *Exkulpationsbeweis / Preuve exculpatoire*).[387]

18 This is a major difference compared to the standard of liability for international sales contracts under the CISG, where fault is not a requirement of liability for breach of contract.[388]

19 The concept of fault is then further addressed by Art. 99 CO.

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38 [illegible]

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Wiegand Wolfgang, Kommentierung Einleitung zu Art. 97–109 OR, in: Widmer Lüchinger Corinne/Oser David (eds.), Basler Kommentar, Obligationenrecht I, 7th Ed., Basel 2020.

COMMENTARY ON

# Art. 98 CO

A commentary by Clarisse von Wunschheim / Cristina Wullschleger

SUGGESTED CITATION

Clarisse von Wunschheim/Cristina Wullschleger, Commentary of art. 98 CO, in: Christoph Hurni/Mirjam Eggen (eds.), Online Commentary of the Code of Obligations

Short citation: OK-von Wunschheim/Wullschleger, art. 98 CO N. XXX.

**2. Obligation to act or refrain from action**

**Art. 98**

[1] Where the obligation is to take certain action, the obligee may without prejudice to his claims for damages obtain authority to perform the obligation at the obligor's expense.

[2] Where the obligation is to refrain from taking certain action, any breach of such obligation renders the obligor liable to make amends for the damage caused.

[3] In addition, the obligee may request that the situation constituting a breach of the obligation be rectified and may obtain authority to rectify it at the obligor's expense.

# CONTENT

## I. CONTEXT & PURPOSE

Whereas Art. 97 CO provides for a first remedy in case of non-performance, i.e. the duty to pay damages, Art. 98 CO provides for another type of remedy depending on the nature of the obligation at stake, i.e. whether it consists in a duty to do something (active behaviour) or to refrain from doing something (passive behaviour). 1

As concerns a breach of a duty to do something, Art. 98 (1) CO provides the creditor with the right to entrust a third party with performance of the concerned obligation on behalf of the defaulting debtor (Art. 98(1) CO, so-called 'substitute performance' (*Ersatzleistung* | *Execution par substitution*). 2

Thus, Art. 98(1) CO has the following two advantages compared to Art. 97 CO: (1) Art. 98(1) CO does not require the non-performing debtor to be at fault, and (2) the debtor can further be obliged to advance the costs of the substitute performance (Art. 98(1) CO). Thus, at first sight, Art. 98(1) CO may appear interesting because its primary purpose is to ensure due performance of the obligation at stake and to thereby prevent the occurrence of any damage in the first place. 3

However, the exercise of the right to substitute performance is subject to very strict conditions, in particular a prior judicial authorization (see below). As a result, Art. 98 CO is rarely used in practice. 4

In case of a breach of a duty to refrain from doing something, Art. 98(2) CO provides the creditor with a direct claim for damages based on the breach alone, and in Art. 98(3) with a claim for restoration of the situation as per contract. 5

Art. 98 CO is a dispositive legal provision. The parties to a contract may provide for a right to substitute performance by waiving the need for prior judicial authorization. As for duties to refrain from a certain behavior, the parties may provide for a liquidated damage clause in case of breach (see Art. 100 CO). 6

## II. PREREQUISITES OF ART. 98(1) CO – OBLIGATION OF ACTIVE BEHAVIOUR

7 An obligation to do something involves actions such as performing a specific work or storing an item.

8 In order for a creditor to make use of the right to substitute performance under Art. 98(1) CO, he/she must fulfill following requirements: [389]

1. The obligation to do something must remain unfulfilled despite the debtor's ability to perform. Contrary to Art. 97 CO, such non-performance does not need to be linked to a fault of the debtor.

2. The performance of such obligation must be due. An additional reminder is not necessary, and it is sufficient that the contractual deadline for performance has elapsed. If no deadline was set, a notice to perform is however required.

3. The performance of such obligation must be substitutable, meaning that Art. 98(1) CO does not apply in the case of highly personal services, such as artistic or scientific services, where the person of the debtor is key to the performance of the concerned obligation.

4. The creditor must have 'obtained authorization', meaning that the creditor must first obtain a legally binding judgement on performance <u>before</u> resorting to substitute performance. The substitute performance as an enforcement instrument can be ordered directly by the court of first instance (Art. 236(3) and 337(1) CPC) or later by the court of enforcement (Art. 338(1) CPC)). The ordering of substitute performance is at the discretion of the court. The interests of the parties are weighed against each other, whereby the substitute performance must not be disproportionate or constitute an abuse of rights (Art. 2 CC, BGE 130 III 302, E. 3.3).

9 In summary, Art. 98(1) CO does not provide the creditor with an autonomous right to resort to substitute performance. Instead, the creditor must first obtain a legally binding order from a court. Thus, the remedy of substitute performance under Art. 98 CO is not a real contract remedy, but rather a means of enforcement. As a result, Art. 98(1) CO is rarely used in practice. Instead, it

38 Gauch/Schluep/Emmenegger, N. 2507 ff.; BK-Emmenegger, Art. 98 CO N. 70 ff.; BGE 142 III 321 consid. 4.4.2.

is common practice for parties wishing to resort to substitute performance to waive the requirement of judicial authorization and to design the modalities of a right to substitute performance in a more practical way.

## III. PREREQUISITES OF ART. 98(2) CO – OBLIGATION OF PASSIVE BEHAVIOR

A duty to refrain from doing something is about refraining from carrying out 10
certain actions based on a legal obligation or a contractual commitment. There are various types of passive behavior, e.g. an obligation not to disclose certain information, a commitment not to assign certain rights or obligations, a commitment not to compete, duties to tolerate certain acts or behaviors of the other party or third parties such as the use of an object by a tenant, etc.

Pursuant to Art. 98(2) CO, the breach of the duty to refrain from doing some- 11
thing is *per se* sufficient for the creditor to claim for damages, without the creditor having to file first an action for injunctive relief or a request for elimination of the unlawful situation. However, the claim for damages under Art. 98(2)CO is subject to the existence of a fault by the non-performance debtor, such fault being nevertheless presumed (same as for Art. 97 CO).

## IV. PREREQUISITES FOR RESTORATION OF LAWFUL STATE (ART. 98(3) CO)

In addition to the claim for damages under Art. 98(2), Art. 98(3) CO also pro- 12
vides the creditor with a claim for removal of the unlawful situation, i.e. a claim for restoration of the contractual or legal condition. This claim can be asserted under the same requirements as under Art. 98(1) CO and does not require a faulty behaviour from the debtor.[390] If restoration is impossible, e.g. in the event of a breach of a confidentiality obligation, the creditor must demand compensation for damages instead of restoration.

Art. 98(3) provides that the debtor must bear the costs of the restoration of 13
the contractual or legal condition, such costs can also be claimed as part of

39 Schwenzer/Fountoulakis, N. 61.10; Huguenin, N. 897; BSK-Wiegand, Art. 98 CO N. 10; BK-Emmenegger, Art. 98 CO N. 135; BGE 114 II 329 consid. 2a in which the court declared that a property purchase agreement is invalid if it violates a previously made division of estates agreement and ordered a land register correction.

the performance damage under Art. 107(2) CO (applicable in case of qualified default of the debtor).[391] Yet, in such case, the non-performance must have been a faulty one.

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39 Gauch/Schluep/Emmenegger, N. 2516; BSK-Wiegand, Art. 98 CO N. 2, 8; BGE 126 III 230 consid. 7a/bb.

COMMENTARY ON

# Art. 99 CO

A commentary by Clarisse von Wunschheim / Cristina Wullschleger

SUGGESTED CITATION

Clarisse von Wunschheim/Cristina Wullschleger, Commentary of art. 99 CO, in: Christoph Hurni/Mirjam Eggen (eds.), Online Commentary of the Code of Obligations

Short citation: OK-von Wunschheim/Wullschleger, art. 99 CO N. XXX.

**II. Scope of liability and compensation**

**1. In general**

**Art. 99**

[1] The obligor is generally liable for any fault attributable to him.

[2] The scope of such liability is determined by the particular nature of the transaction and in particular is judged more leniently where the obligor does not stand to gain from the transaction.

[3] In other respects, the provisions governing liability in tort apply *mutatis mutandis* to a breach of contract.

# CONTENT

## I. CONTEXT & PURPOSE

1 Whereas Art. 97 CO established the standard of liability itself, Art. 99-101 CO concerns the scope of liability and of compensation for damages.

2 Art. 99 CO deals with the basic concept of fault, and how it impacts the scope of liability. As concerns other aspects, such as the determination of damage or the reduction of its compensation, Art. 99(3) CO contains a general reference to Art. 42-54 CO which apply in case of tort liability. In other words, the principles applicable to the determination of the damage and of the scope of compensation in tort liability (Art. 42-54 CO) apply by analogy to damage claims for breach of contract.

3 Art. 100 CO then deals with contractual limitation of liability and damages, and Art. 101 CO deals with liability for auxiliaries/delegates.

## II. LIABILITY FOR FAULT (ART. 99(1) CO)

4 Art. 99(1) CO states that "**any** fault" is sufficient to trigger liability for breach of contract, [392] without however defining the concept of fault. In fact, there is no definition of 'fault' in the Code of Obligations, but it has been defined by case law as follows: The deviation from average human behaviour ("objective side") by a person capable of judgement and responsibility ("subjective side) [393]. The concept of fault includes both willful conduct and negligence (whether light or gross).

5 Thus, Art. 99(1) CO establishes the principle that a debtor committing a breach of contract will be held liable irrespective of the degree of his/her fault, whether severe or light. Although the degree of fault is thus irrelevant when establishing liability as such, it will nevertheless play a role when determining the scope of compensation. Further, the Code of Obligations provides certain exceptions to the general liability for fault, where the degree of fault is also relevant (see e.g. Art. 248, 420(2), 454 CO). Therefore, it is still useful to distinguish between the three typical types of faults known under Swiss contract and tort law: [394]

39 BSK-Widmer Lüchinger/Wiegand, Art. 99 CO N. 4; BK-Emmenegger, Art. 99 CO N. 122; Schwenzer/Fountoulakis, N. 22.23; BGer 9C_109/2016 dated 29.6.2016 consid. 2.3.

39 [illegible] 399 CO N. 46 ff.; BGE 116 Ia 162

1. **Willful conduct** (*Vorsatz* / *Intention*): Willful conduct is given where a party intentionally commits the breach, or where it consciously accepts the possibility of such breach happening and does not care (*dolus eventualis*).

2. **Gross negligence** (*grobe Fahrlässigkeit* / *négligence grave*): Gross negligence is given where the breaching party, without wanting the breach or accepting its likelihood, disregarded the most elementary standard of diligence.

3. **Light negligence** (*leichte Fahrlässigkeit* / *négligence légère*): In doctrine and case law, light negligence is usually described as a minor deviation from the standard of care that may be expected by an average person in a comparable situation.

6 When determining the existence of a fault, courts will apply an objective assessment and rely on how an average third person would generally have behaved in similar circumstances. Thus, at that stage, individual characteristics, background or skills of the specific debtor are irrelevant, although civil capacity is a prerequisite. However, when determining the relevant standard of care applicable, the specific skills and standards of trades and professions of the debtor at stake must be considered. [395]

7 Example: An ENT doctor operated on a patient. This operation resulted in a lesion of the facial nerve and the opening of the lateral semicircular canal, which led to permanent hearing loss and dizziness even after revision surgery. In this case, the Federal Supreme Court had to examine whether the doctor could be considered as having exercised the necessary care in relation to his skills as an ENT doctor compared to what a third party doctor possessing similar specialised knowledge and skills would have done.[396]

## III. THE SCOPE OF LIABILITY (ART. 99(2) AND (3) CO)

8 The purpose of Art. 99(2) CO is not very clear when reading its wording. It refers to the 'nature of the specific transaction' and to the extent the debtor

39 Koller, N. 48.48 f., 48.52 f.; BSK-Widmer Lüchinger/Wiegand, Art. 99 CO N. 5 f.; BGE 132 III 523 consid. 4.6; BGE 117 II 563 consid. 3.

39 Gauch/Schluep/Emmenegger, N. 2984 ff.; BK-Emmenegger, Art. 99 CO N. 72 ff.; BSK-Widmer Lüchinger/Wiegand, Art. 99 CO N. 8 f.; BGE 139 III 24 consid. 3.2; BGE 137 III 539 consid. 5.2.

39 BGer 4A_499/2011 dated 20.3.2012.

was 'to gain' from such transaction. It is generally admitted that this provision aims at introducing a ground to reduce the scope of liability where the debtor did not really benefit from the transaction. The lower the gain for the debtor, the more lenient the judge may be in determining the scope of liability. Example: Where a donor offering a good for free fails to properly package such good, which then breaks during transport to the beneficiary.

Otherwise, Art. 99(3) CO simply refers to the provisions applicable in case of 9
tort liability without however directly specifying these provisions. They are Art. 42-54 CO except for Art. 52 CO,[397] some of which are however more relevant than others in the context of contractual liability.

We will give a brief overview of the purpose and scope of these provisions 10
and otherwise refer to the commentary of such provisions themselves:

1. **Art. 42 CO** deals with the burden of proof with regard to the damage.[398] Art. 42(1) CO states that it is the burden of the damaged party to prove its damage. This is a mere application of the general principle of burden of proof set out in Art. 8 CC. The proof of the damage refers to both its existence and its scope (quantification). Art. 42(2) CO then introduces an exception as concerns the scope of the damage, providing that "*where the exact value of the damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the person suffering damage*". In other words, Art. 42(2) CO seems to state that where a damage cannot be quantified by the debtor him/herself, the court may assess and determine such damage directly. Unfortunately, this provision is very seldom applied in practice, the main reason being that the standard for establishing the unquantifiable nature of the damage is very high. [399]

2. **Art. 43 CO** sets out the general principle that the scope of compensation to be awarded should be assessed based on the specific circumstance and the degree of culpability, i.e. of fault.[400] This, however, does not mean that a damage caused by light negligence will automatically lead to a reduction of the

39 Brunner, Die Anwendung deliktsrechtlicher Regeln auf die Vertragshaftung, N. 116; BSK-Widmer Lüchinger/Wiegand, Art. 99 CO N. 15 ff.; BK-Emmenegger, Art. 99 CO N. 187 ff.

39 Huguenin, N. 1850; BK-Emmenegger, Art. 99 CO N. 208; BGer 4A_399/2012 dated 3.12.2012 consid. 2.1.3.

39 BGE 134 III 306 consid. 4.3 f.; BGer 4A_154/2009 dated 8.9.2009 consid. 6; BGer 4C. 55/2006 dated 12.5.2006 consid. 6; BSK-Kessler, Art. 42 CO N. 10b.

40 Huguenin, N. 1886 f.; BSK-Kessler, Art. 43 CO N. 1; BGE 127 III 453 consid. 8c.

scope of compensation (see however Art. 44(2) CO). Instead, the underlying rationale of this provision is that the judge may reduce compensation where the damage is disproportionate to the degree of fault involved.[401] Equally, the judge may not increase the compensation beyond the amount of actual damage, even in case of very severe wilful behaviour (see above Art. 97 CO). By law the maximum compensation is always the actual damage, except where the parties have contractually provided for a penalty clause (see Art. 163 CO) or fixed liquidated damages (see below Art. 100 CO).

3. **Art. 44 CO** then provides for two specific grounds for reduction of compensation: (i) in case of contributory fault or consent, i.e. where the harmed party has either by fault or by consent contributed to causing the damage, and (ii) in case of light negligence, provided a full compensation would put the debtor in a situation of financial hardship.[402]

4. **Art. 45 to Art. 49 CO** then deal with damages for homicide, personal injury and infringement of personality rights. These provisions have limited practical relevance in the context of contractual liability[403] and we therefore refer to the commentary on Art. 45-49 CO for further details.

5. **Art. 50 and Art. 51 CO** deal with the situation where several debtors have jointly caused the damage, either by tort and/or by contract breach. The principle is that these debtors are jointly and severally liable towards the creditor (see Art. 143(2) CO), and that – among themselves – the debtor liable by tort or by willful breach of law has to provide compensation first, followed by the debtors having contributed to the damage through a breach of contract or by an unfaulty breach of the law. There are some limited exceptions to this principle handled very cautiously by the Federal Supreme Court.[404]

6. **Art. 53** and **Art. 54 CO** deal with the issue of lacking capacity to judge (*Urteilsfähigkeit* / *imputabilité*). First, Art. 53 CO establishes that the concept of capacity to judge in civil law is independent from the same concept in

40 Huguenin, N. 1888 ff.; BK- Emmenegger, Art. 99 CO N. 217 ff., BGE 127 III 446 consid. 4b; BGE 104 II 184 consid. 3a.

40 Huguenin, N. 1889 f., 1895 f.; Schwenzer/Fountoulakis, N. 16.14, 16.25; BSK-Widmer Lüchinger/Wiegand, Art. 99 CO N. 19; BGE 112 II 347 consid. 3b; BGer 4C.103/2005 dated 1.6.2005 consid. 6.

40 BGE 137 III 303 consid. 2.2.2; BGE 116 II 519 consid. 2c.

40 Huguenin, N. 2014 ff.; BSK-Graber, Art. 51 CO N. 11 ff.; BGE 115 II 42 consid. 1; BGE 144 III 319 consid. 5.2 f.

criminal law. Then Art. 54 CO establishes an exception to the principle of liability for fault. As mentioned above, liability requires fault and fault presupposes civil capacity. Capacity to judge is one aspect of civil capacity. Thus, someone lacking the capacity to judge is in principle not subject to civil liability. Art. 54 CO establishes an exception to such principle by allowing the judge to order partial or total compensation where equity so commands. These provisions have very little practical relevance in the context of contractual liability, and we therefore refer to the commentary of these provisions for further details.

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COMMENTARY ON

# Art. 100 CO

A commentary by Clarisse von Wunschheim / Cristina Wullschleger

SUGGESTED CITATION

Clarisse von Wunschheim/Cristina Wullschleger, Commentary of art. 100 CO, in: Christoph Hurni/Mirjam Eggen (eds.), Online Commentary of the Code of Obligations

Short citation: OK-von Wunschheim/Wullschleger, art. 100 CO N. XXX.

**2. Exclusion of liability**

**Art. 100**

[1] Any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void.

[2] At the discretion of the court, an advance exclusion of liability for minor negligence may be deemed void provided the party excluding liability was in the other party's service at the time the waiver was made or the liability arises in connection with commercial activities conducted under official licence.

[3] The specific provisions governing insurance policies are unaffected.

# CONTENT

## I. CONTEXT & SCOPE

As mentioned above, whereas Art. 97 CO establishes the general standard of liability itself, Art. 99-101 CO deal with the scope of the liability and of compensation for damages. In this context, Art. 100 CO deals with the parties' right to deviate from the general liability standard set out in Art. 97 and 99 CO by limiting their contractual liability. 1

The right to tailor one's contractual liability derives from the general principle of freedom of contract. However, this right is not unlimited and may be restrained by law (see. Art. 19 and 20 CO). Art. 100 CO constitutes such statutory limitation and refrains the parties' freedom to contractually limit their liability, where the damage was caused by willful intent or gross negligence. 2

In other words, Art. 100 CO does not distinguish between various types of liability limitations, and instead relies exclusively on the degree of fault. Thus, pursuant to Art. 100 CO, a limitation of liability (of whatever type) is only possible as long as the damage was caused by light negligence only (see OK-von Wunschheim/Wullschleger, art. 99 CO). Where a damage is caused by gross negligence or willful conduct, liability may not be limited (in any way). 3

It should, however, be noted that Art. 100 CO applies only to contractual limitations agreed upon by the parties prior to the occurrence of the damage. Once a damage has occurred, the restrictions of Art. 100 CO do not apply and the parties are free to agree on the compensation of such damage, which then qualifies as debt waiver in the meaning of Art. 115 CO.[405] 4

It is further noteworthy that, according to the principle of the freedom of contract, which includes the freedom of form, contractual liability limitations are – by law – not subject to any specific form requirement. 5

## II. TYPES OF LIABILITY LIMITATIONS IN PRACTICE

In practice, there are many ways to limit contractual liability. The most common types are the following: 6

40 Gauch/Schluep/Emmenegger, N. 3083; BSK-Widmer Lüchinger/Wiegand, Art. 100 CO N. 2; BK-Weber Art. 100 CO N. 6; BGer 4A_25/2014 dated 7.4.2014 consid. 7.1; BGer 4C.411/1999 dated 4.2.2000 consid. 2b.

5.

(1) Limitations on the scope of liability itself or its full exclusion (so-called "liability limitations" or "exemption clauses"; *Haftungsbegrenzung | limitation de responsabilité*); or

(2) Limitations on the scope of damage compensation (so-called "limitations on damages"; *Begrenzung der Schadenersatzpflicht | limitation du dommage reparable* ); or

(3) Limitations by way of changing the statutory modalities of a liability claim, for example by a shortening of the statutory limitation periods or a shifting of the burden of proof.

## A. Liability Limitations *stricto sensu*

7 Based on the principle of freedom of contract, it is possible for the parties to exempt certain behaviours or events from any liability. In such cases, even though a damage may occur, liability is excluded from the outset.

8 Here one has to distinguish between a contractual risk allocation, which transfers a risk to a certain party and is not subject to the limitations of Art. 100 CO, and a limitation of liability on a risk belonging to a specific party, which is subject to Art. 100 CO.

For example:

- Parties to an international sale of goods contract (not subject to CISG) agree that the seller shall incur no liability in case the local authorities refuse to grant an export license. In this case, the risk of not obtaining the necessary export license is specifically allocated to the buyer. The parties are free to do so under the principle of freedom of contract and such a risk allocation is not considered a limitation of liability.
- Parties to a sale of a car agree that the car is sold "as is", i.e. that the seller is not liable for any default or problem the car may have. Here the risk of providing a functional car remains on the seller, but his liability in case the risk materializes is limited.
- Parties to a sales or service contract may provide that a party shall only be liable in case of "material breach" and then define in the contract what constitutes such material breach (considering that Swiss law does not distinguish between immaterial and material breaches (see OK-von Wun-

schheim/Wullschleger, art. 97 CO)). There is no re-allocation of contract risks. The risk of a breach remains with the breaching party, but the scope of its liability is limited to material breaches.

- Parties to an M&A transaction agree that a warranty shall only be triggered where the damage incurred exceeds a certain threshold (so-called "de minimis" clauses). Again, the risk of a warranty breach remains with the party breaching the warranty, but the liability is only triggered by breaches having a minimum impact.

To the extent the last three examples above limit a party's general liability on 9
a risk which is allocated to them, such limitative clauses are subject to the limits set forth by Art. 100(1) CO (see below).

## B. Limitations on Damages

In practice, parties often limit the scope of their liability either by excluding 10
certain types of damages or by determining a certain amount of compensable damage.

### 1. Exclusion of certain categories of damages

As mentioned above, Swiss law does not limit the compensable character of a 11
damage based on its categorization. Instead, the relevant question is whether such damage shows an adequate causal nexus to the breach.

Parties may however contractually exclude certain categories of damages 12
from their scope of liability, such as indirect damages, consequential damages or more specifically lost profits, or legal fees, etc. Such exclusions are however subject to the limits set forth by Art. 100(1) CO (see below). Further, it is generally admitted that parties may not exclude damage arising out of personal injury even in cases of light negligence.[406]

In contrast, it is often neglected in practice that, based on the principle of 13
freedom of contract, the parties are free to extend the statutory definition of damage to include categories of damages which are not recognized under Swiss law. Art. 100(1) CO does not limit the parties' freedom to extend liability. It only limits the parties' freedom to restrict it.[407] Thus, for example, although

40 See a specific case of application of this principle in Art. 16 of the Swiss Law on Package Travel.

Swiss law does not recognize the loss of opportunity or reputational damage as a compensable damage (see above Art. 97 CO), the parties may very well provide in their contract for a compensation of reputational damage or loss of opportunity. When doing so, it will be very important to carefully define such damage and subject it to a liquidated damage clause in order to avoid practical issues when attempting to prove and quantify a damage, which is usually not recognized under Swiss statutory law.

### 2. Liquidated Damages, Agreed Sums, Lump-sum Indemnities and the like

14 Although the Code of Obligations does not expressly deal with the concept of "liquidated damages", it is common in practice for parties to fix in advance a specific amount of damages to be paid in case of contract breach and the Federal Tribunal has recognized the admissibility of such practice (subject to the limits of Art. 100(1) CO).[408] This sort of arrangements referred to as 'lump-sum indemnities' or 'agreed sums payable' (*pauschalierter Schadenersatz / indemnité forfaitaire*) are, however, somewhat different from the "liquidated damages" known in common law jurisdiction.

15 Under Swiss law, there are different ways to design clauses on 'agreed sums payable' depending on whether the lump-sum at stake is a fixed amount, a maximum amount, or a minimum amount, and on how such arrangement impacts the burden of proof:[409]

1. **Fixed agreed sum / lump-sum**: Parties may determine, in advance, a fixed amount considered to be representative of the damage caused by the concerned breach. They can do this by excluding the parties' possibility to increase or reduce this amount. In other words, whatever the effective damage, the amount of compensation due will be the fixed lump-sum amount (so-called 'absolute fixed lump-sum'). Alternatively, the parties may provide that the agreed amount may be increased or reduced depending on specific circumstances, such as the scope of effective damage or other mitigating factors,

40 Gauch/Schluep/Emmenegger, N. 3078; BSK-Widmer Lüchinger/Wiegand, Art. 100 CO N. 1; BK-Weber Art. 100 CO N. 12; Tolou, para. 95.

40 Huguenin, N. 1256; BK-Weber Art. 100 CO N. 68; BGE 29 II 273 consid.6, BGE 83 III 525 consid. 3; Couchepin, SJ 2009, p. 1, 3; Tolou, para. 70.

40 Tercier/Pichonnaz, N. 1343 f.; Gauch/Schluep/Emmenegger, N. 3079; Emmenegger/Jegher/Graf, FS Koller, p. 180 f.; Tolou, paras 15-105; Couchepin, SJ 2009, p. 1, 11-14.

whereby the existence of such circumstances and their impact on the agreed sum must be proven by the party requesting an increase or reduction (so-called 'relative fixed lump-sum') (see Art. 42 fol. CO). Thus, whereas the fixed lump-sum puts a limit to the amount claimable, the relative fixed lump-sum is a mere arrangement regarding the allocation of the the burden of proof of the damage, and not a real limitation of the actual amount of damages claimable.

2. **Maximum agreed sum / lump-sum**: The parties may further agree on a maximum amount of compensation, which can only be reduced where the party claiming reduction proves that the actual damage was actually smaller than the agreed sum.

The difference between such maximum lump-sum and a relative fixed lump-sum is that it only allows for a reduction of the lump-sum, and not for an increase. Thus, even though the actual damage may be higher than the lump-sum, the creditor does not have the possibility to claim an increase.

3. **Minimum agreed sum / lump-sum**: The parties may also agree on a minimum amount of compensation, which can only be increased where the party claiming compensation proves that the actual damage was superior to the agreed sum.

The difference between such minimum lump-sum and a relative fixed lump-sum is that it only allows for an increase of the lump-sum, and not for a reduction. Thus, even though the actual damage may be smaller than the lump-sum, the debtor does not have the possibility to claim a reduction.

## 3. Difference with Penalty Clause

Under Swiss law, one must distinguish between 'agreed sums payable' and 'penalty clauses' (Art. 160-163 CO), as they have different purposes and work differently in practice:[410] 16

1. **Different Purpose**: The purpose of 'agreed sums payable' arrangements is to facilitate the claim for compensation of damage by exempting the creditor from its general duty to prove the actual existence and scope of its damage. Indeed, proving the scope of a damage is often a major hurdle in practice.

41 Koller, N. 82.10 f.; Gauch/Schluep/Emmenegger, N. 3851; BK-Emmenegger, Art. 97 CO N. 476 f.; BGE 140 III 200 consid. 5.3; BGE 109 II 462 consid. 4a. Couchepin, La Clause pénale, N. 1206 ff.; Tolou, la forfaitisation du dommage, para. 18.87 f.; Couchepin, SJ 2009, p. 1,5-25.

Thus, [0]agreed sums payable' are not primarily meant to punish a breach, although it is evident that the existence of an 'agreed sums' clause will have a positive impact on the debtor's incentive not to breach the contract. Instead, 'agreed sums' clauses serve both the interest of the creditor, whose burden of proving its damage is alleviated, and the interest of the debtor, who is able to quantify in advance its potential damage liability.

In contrast, the penalty clause has a primary repressive function and thus primarily serve the interest of the creditor.

2. **Modalities**: Under an 'agreed sums' clause, the party claiming the agreed lump-sum is exempted from proving the scope of the effective damage (as long as it does not claim a reduction or increase of the lump-sum), and thus only needs to prove a faulty breach by the debtor and a causal nexus between the breach and the damage. In contrast, the contractual penalty is triggered by the mere breach of contract, irrespective of the existence of a fault, an actual damage or a causal nexus. [411]

3. **Reduction by the Judge**: In case of a contractual penalty, the creditor keeps the right to claim more than the mere penalty if he/her can prove that his/her actual damage exceeds the penalty (Art. 161(2) CO). In contrast, in case of 'agreed sums clause' there is in principle no room for a judge to intervene by reducing or modifying the parties' agreement, except in very limited circumstances such as a case of *Clausula Rebus Sic Stantibus*.[412] In practice, however, where the agreed sum is far superior to the effective damage, to such extent that it deploys a punitive effect, an agreed sum clause may be deemed to be, in essence, a penalty clause and thus be subjected to the reduction possibility of Art. 161(2) CO. This will however depend on the interpretation of the agreed sum clause pursuant to the general principles of contract interpretation (Art. 18 CO).

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411 Koller, N. 81.08, 82.10; Gauch/Schluep/Emmenegger, N. 3782; Huguenin, N. 1259 ff.; BSK-Widmer Widmer/Costantini/Ehrat, Art. 160 CO N. 1, 12, 14 f.; BGE 144 III 327 consid. 5.2.1; BGE 135 III 433 consid. 3.1; BGer 4C.241/2005 dated 25.10.2005 consid. 3.2; Couchepin, SJ 2009 II, p. 1, 24.

41 Schwenzer/Fountoulakis, N. 73.17; Gauch/Schluep/Emmenegger, N. 3816 ff., 3851; Huguenin, N. 1267; BK-Emmenegger, Art. 97 CO N. 476 f.; BGer 4A_601/2015 dated 19.4.2016 consid. 2.3.3; BGE 83 II 525 consid. 3; Couchepin, SJ 2009 II, p. 1, 24.

## C. Other Limitations

Limitations on liability itself and damages are not the only ways to limit the 17
scope of a party's liability.

For example:[413] 18

- Parties may agree to shorten statutory notice periods or time limitation periods.
- Parties may provide for additional or stricter requirements to trigger liability, such as requesting that certain notices be done in a certain form, not required by law.
- Parties may diverge from the presumption of fault established under Art. 97(1) CO and require that the party claiming the breach also bears the burden of proving the existence of a fault by the debtor.

All these limitations are subject to Art. 100(1) CO and thus only valid where 19
the damage was not caused by gross negligence or willful conduct.

# III. EXTENDED APPLICATION TO TORT LAW

Although partially controversial, it is widely admitted that contractual liability 20
limitations do not only apply to damages arising out of contract breaches, but also extend to damages caused by tort as long as the tortuous behavior occurred in connexion with the contract performance.[414]

# IV. CONSEQUENCES OF EXCESSIVE LIABILITY LIMITATIONS

In principle, any limitation exceeding this limit set out in Art. 100 CO is null 21
and void.[415] The question is then whether the nullity applies only to the excessive part of the limitation ('partial invalidity'), or whether it has the effect of invalidating the limitation as a whole ('total invalidity').

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413 BK-Weber Art. 100 CO N. 70; see also BGE 115 II 474 consid. 2d.

41 BK-Weber Art. 100 CO N. 49.

415 BK-Weber Art. 100 CO N. 61, 135 ff.; Gauch/Schluep/Emmenegger, N. 3802 ff.; BGE 115 II 474 consid. 2d; BGE 102 II 256 consid. 4.

4.

22 Generally speaking, in commercial transactions, the courts in Switzerland follow the first approach, i.e. partial invalidity, and will simply reduce the scope of an excessive limitation to what is admissible. As concerns consumer transactions, the situation is less clear and some courts have opted for a total invalidation. [416]

## V. EXCEPTIONS / SPECIAL CASES

### A. Special Cases (Art. 100(2) and 100(3) CO)

23 Art. 100(2) CO brings an exception to the principle of Art. 100(1) CO and provides that a limitation of liability may be invalidated also in case of light negligence. This exception applies to specific relationships, where one party is at the service of the other, or in case of activities which are subject to regulatory authorizations.

24 The most common examples of such relationships are employment relationships, banking relationships, transport companies such as railways or aerial cableways, water, electricity or nuclear power plants, trade in salt or alcohol, insurance agencies, lottery and gambling businesses.[417]

25 As concerns insurance contracts, Art. 100(3) CO provides that provisions governing insurance policies are unaffected. This is an implicit reference to Art. 14 and 98 of the Swiss Law on Insurance Contracts ("LIC"). These provisions establish that, although an insurance may reduce the scope of coverage of an insured damage where such damage was partly cause by wilful intent or gross negligence of the insured person, the insurance may not exclude or reduce the insurance payment in case of light negligence of the insured person.

26 Technically speaking Art. 14 LIC does not constitute a limitation of liability. Instead, it defines the scope of a contractual obligation, i.e. the scope of insurance coverage. Yet, the same principles as set out in Art. 100(2) apply.

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41 Schwenzer/Fountoulakis, N. 46.03 ff., 71.16; BK-Weber Art. 100 CO N. 153b.

417 BK-Weber Art. 100 CO N. 113 f.

## B. Limitations of Liability in General Terms & Conditions

It is very common in practice to include limitation of liability clauses in General Terms & Conditions ("GT&C"). 27

Compared to EU law, Swiss law adopts a rather liberal stance towards GT&C and the inclusion therein of limitation of liability clauses is subject only to the following limitations:[418] 28

1. Art. 100 CO;

2. The doctrine of "unusual clauses" (*Ungewöhnlichkeitsregel / clauses insolites*). According to well-established case law of the Swiss Federal Tribunal, the general acceptance of GT&C does not cover so-called "unusual clauses", which are atypical in the concerned industry and/or to usual business practices and which the contract partner could therefore not reasonably excpect to be included in GT&C. Such clauses must be specifically drawn to the attention of the contractual partner, otherwise they are not enforceable. While limitation of liability clauses are nowadays common practice and would therefore, in principle, rarely qualify as "unusual" in the context of common business transactions between parties of equal standing, the question must be assessed on a case by case basis. A clause that is customary in a particular sector of the economy may be unusual for someone who does not operate in that sector. Further, the degree in which the clause affects the legal position of one party, compared to the other is also relevant. The more a clause affects the legal position of the contractual partner, the more likely it is to be considered unusual.[419]

3. Art. 8 of the Swiss Law on Unfair Competition ("SLUC") as concerns consumer contracts. Art. 8 SLUC prohibits unfair business practices which create a considerable and unjustified imbalance between contractual rights and contractual obligations to the prejudice of consumers. Thus, depending on the scope of limitation of liability, the nature of the transaction and the balance of rights and obligations between the consumer and the business, certain limitations of liability may be deemed to be "unfair" in the meaning of Art. 8 of the SLUC and thus be subject to invalidation. [420]

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41 Gauch/Schluep/Schmid, N. 1118 ff.; Tolou, para. 82.

41 BGer 4A_372/2022 dated 11.07.2023, consid. 3.3 and 3.6.

9.

## C. Limitations of Liability in Sales Contract (Art. 199 CO)

29 Art. 199 CO, applicable to contracts for sale of goods, provides that "*any agreement to exclude or limit the warranty obligation is void if the seller has fraudulently concealed the failure to comply with warranty from the buyer*". This provision concerns the situation where a seller, who is aware of certain defects affecting the good to be sold wilfully conceals such defects to the buyer, so as to lead the latter to conclude the sale. In such case, any exclusion or limitation of warranty obligations by the seller will be null and void.[421]

30 The question of the relationship between Art. 199 CO and Art. 100 CO is controversial. Some authors consider Art. 199 CO to be a *lex specialis* to Art. 100 CO and thus to prevail over it. Others consider that the two provisions complement each other, whereby Art. 199 CO merely aims at regulating the effects of a dissimulation of defects by the seller on the warranty regime, and Art. 100 CO prevents the seller more broadly from limiting his/her liability. The Swiss Federal Tribunal has not yet ruled over this controversy.[422]

## D. Other Statutory Exceptions

31 There exist further mandatory provisions excluding a liquidated damage clause in specific contracts (e.g. Art. 267(2) and 299(4) in case of rental contract, Art. 842(2) CO in case of exit of a partner from a cooperative company, art. 404 CO in case of untimely termination of the mandate). We refer, for further details, to the commentary on these provisions.

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42 Probst, Art. 8 N. 477, 492; BK/UWG-Thouvenin, Art. 8 N. 36.

42 Tercier/Bieri/Carron, N. 826.

42 BK-Weber Art. 100 CO N. 38 f.; Tercier/Bieri/Carron, N. 826.

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COMMENTARY ON

# Art. 143 CO

A commentary by Jean-Pascal Stoll

SUGGESTED CITATION

Jean-Pascal Stoll, Kommentierung zu Art. 143 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Stoll, N. XXX zu Art. 143 OR.

**Title Four: Special Relationships relating to Obligations**

**Section One: Joint and Several Obligations**

**A. Joint and several debtors**

**I. Requirement**

**Art. 143**

1 Debtors become jointly and severally liable for a debt by stating that each of them wishes to be individually liable for performance of the entire obligation.

2 Without such a statement of intent, debtors are joint and severally liable only in the cases specified by law.

# CONTENT

## I. DEFINITION OF THE JOINT AND SEVERAL OBLIGATION

A joint and several obligation comprises at least two joint and several debtors on the debtors' side.[423] The creditor can request not only partial performance of an obligation but also full performance of the entire debt of each individual joint and several debtor (Art. 144 para. 1 CO). All debtors remain under the obligation until the entire claim has been redeemed (Art. 144 para. 2 CO). It is at the creditor's discretion against which debtor and to what extent he or she chooses to claim.[424] The internal compensation among the joint and several debtors does not affect the creditor's claim.[425] However, the creditor may not be satisfied to more than full performance in total. The creditor's full or partial satisfaction by one joint and several debtor discharges the others to the same extent (Art. 147 CO). 1

The creditor may simultaneously claim full performance from each joint and several debtor. Therefore, multiple individual claims against each debtor exist.[426] Due to the aforementioned principle that the creditor may not be satisfied to more than full performance, the claims compete against each other ("claim competition").[427] Despite the multitude of claims, they effectively only figure as a single item in the creditor's assets.[428] This competition among the claims does not hinder the creditor from disposing of each claim against each joint and several debtor individually. The creditor may cede a claim, remit the debt of or grant deferment to a single joint and several debtor at his or her discretion.[429] A payment reminder and default only affect the addressed joint and several debtor.[430] Each claim has its own legal fate.[431] 2

42 Gautschi, mn. 11; Weiss, p. 10.
42 Tercier/Pichonnaz, mn. 1750; ZK-Krauskopf, mn. 2 to Art. 143 CO.
42 BGE 93 II 329 consid. 3a.; Bucher, p. 491.
42 BGE 94 II 313 consid. 4.; BGE 93 II 329 consid. 3b; CR-Romy, mn. 3 to Art. 143 CO; Gautschi, mn. 13.
42 In German «Anspruchskonkurrenz», in French «concours d'actions». Perritaz, mn. 23 et seq.; ZK-Krauskopf, mn. 38 to Art. 143 CO.
42 Gautschi, mn. 19; KUKO OR-Jung, mn. 4 to Art. 143 CO; Schwenzer, mn. 88.18; von Tuhr/Escher, p. 297.
42 BGE 129 III 702 consid. 2.1; decision of the Federal Supreme Court 4A_599/2010 of 14 February 2011 consid. 4.2; BSK-Graber, mn. 1 to Art. 143 CO; Gauch/Schluep/Emmenegger, mn. 3735.
43 Bucher, p. 494 et seq.; Gautschi, mn. 14; von Tuhr/Escher, p. 297 et seq.
431 CR-Romy, mn. 3 to Art. 143 CO; ZK-Krauskopf, mn. 8 to Art. 143 CO.

3 Regarding the differentiation between perfect and imperfect joint and several liability by the Federal Supreme Court,[432] Art. 143 et seq. CO only govern the perfect joint and several liability in which two or more persons have collectively caused a damage and consequently are jointly and severally liable (Art. 50 CO). By analogy, most of the regulations of Art. 143 et seq. CO are also applicable to cases in which several debtors are liable for the same damage but on different legal grounds (imperfect joint and several liability, Art. 51 CO).
[433]

## II. DIFFERENTIATION

4 It is necessary to distinguish the joint and several obligation from other legal relationships with multiple debtors.

5 In a group of **partial debtors**, only partial performance can be requested from each debtor. Unlike with a joint and several obligation, the creditor may not claim full performance of a single partial debtor but only the individually owed partial performance of said debtor.[434]

6 With a **contract of suretyship** (Art. 492 et seq. CO), the creditor faces a principal debtor and a surety. While the principal debtor promises to perform his or her obligation, the surety is only liable if the principal debtor is either declared bankrupt, obtains a debt restructuring moratorium or is the object of debt enforcement proceedings by the creditor that have resulted in the issue of a definitive certificate of loss (simple suretyship, Art. 495 CO). With the phrase "joint and several" or an equivalent phrase, a person may enter a joint and several suretyship. The creditor may already resort to the surety before the principal debtor is declared bankrupt. The surety is liable for full performance if the principal debtor has defaulted in his or her debt and has been issued with payment reminders (Art. 496 CO). Contrary to the joint and several obligation, the suretyship is therefore only subsidiary to the principal obliga-

43 BGE 130 III 591 consid. 5.5.1; BGE 127 III 257 consid. 6. Cf. commentary on Art. 50 CO for further reference.

43 BGE 133 III 6 consid. 5.3.4; decision of the Federal Supreme Court 4C.27/2003 of 26 May 2003 consid. 3.4; BSK-Graber, mn. 3 to Art. 143 CO. Cf. commentary on Art. 51 CO for the exceptions.

43 Gauch/Schluep/Emmenegger, mn. 3686; Schwenzer, mn. 88.03; Tercier/Pichonnaz, mn. 1728.

tion.[435] Another difference lies in the accessoriness of the suretyship. Any abolition of the principal obligation such as an acquittal also eliminates the suretyship.[436]

If somebody **guarantees a performance by a third party**, he or she is liable 7
in damages for the non-performance by said third party (Art. 111 CO). In contrast to a contract of surety, the guarantee is not accessory to the main debt. Unlike the joint and several obligation, the non-performance of the main debtor only leads to the creditor's claim for damages against the guarantee and not to a claim for full performance of the original obligation.[437]

## III. ORIGIN

### A. By statement of intent

A joint and several obligation can arise by statement of intent. In this regard, 8
each debtor promises the creditor to perform the full debt individually (Art. 143 para. 1 CO). The statement of intent may be declared explicitly by stating each debtor to be liable to the full performance (e.g. "débiteurs solidaires"[438], "débiteurs pour le tout"[439] or "einer für alle, alle für einen"[440]).[441] It is not subject to a particular form (cf. Art. 11 para. 1 CO).[442]

Under certain circumstances, a conduct implying such a statement of intent 9
may likewise form a joint and several obligation under the principle of reliance.[443] The sole fact that a group of debtors collectively concluded a contract does not assume a joint and several obligation by itself.[444] However, in practice, the joint signing of a contract is a considerable indication.[445] In case of doubt, partial obligation is assumed instead.[446] Thus, the burden of proof

43 BSK-Pestalozzi, mn. 1 to Art. 495 CO.

43 BGE 113 II 434 consid. 2b; BSK-Pestalozzi, mn. 13 to Art. 492 CO; Bucher, p. 492; Weiss, p. 48 et seq.

43 Gauch/Schluep/Emmenegger, mn. 3920; Schwenzer, mn. 86.28; Tercier/Pichonnaz, mn. 1119.

43 BGE 111 II 284 consid. 2.

43 CR-Romy, mn. 6 to Art. 143 CO.

44 BK-Kratz, mn. 164 to Art. 143 CO.

44 BK-Kratz, mn. 163 et seq. to Art. 143 CO; BSK-Graber, mn. 5 to Art. 143 CO; CR-Romy, mn. 6 to Art. 143 CO; Weiss, p. 39 et seq.; Zahnd, p. 23.

44 BK-Kratz, mn. 182 to Art. 143 CO; Gautschi, mn. 82; Weiss, p. 41 et seq.; ZK-Krauskopf, mn. 87 to Art. 143 CO.

44 BK-Kratz, mn. 164 to Art. 143 CO; Tercier/Pichonnaz, mn. 1744.

lies upon the creditor if he or she claims full performance of an alleged joint and several debtor (cf. Art. 8 CC).[447] Case law examples where joint and several liability was presumed by the court include the simultaneous and joint sale of an unspecified block of shares by several shareholders,[448] the joint purchase of real estate for co-ownership at an auction[449] or the unreserved signing of a lease contract by three persons as tenants.[450]

10 Finally, a joint and several obligation can also be entered retroactively by a cumulative assumption of a debt. A second debtor obligates him- or herself towards the creditor by taking on an additional, independent commitment which arises next to the original commitment of the first main debtor.[451]

## B. By law

11 The cases in which the law specifies joint and several liability are manifold. The grounds for such specifications by law lie notably in contract law, tort law, company law, law on securities, the Civil Code or the Civil Procedure Code.[452]

12 The Code of Obligations states various circumstances under which joint and several obligations by statement of intent are either statutorily presumed (e.g. Art. 70 para. 2, Art. 544 para. 3 CO) or even stipulated (e.g. Art. 308, Art. 403, Art. 478 CO).[453] In such circumstances in which a statutory provision dictates the joint and several obligation among the parties of a contract, it is essentially a contractual claim of the creditor nonetheless.[454] This is relevant to the de-

44 BGE 116 II 707 consid. 3.; decision of the Federal Supreme Court 4A_599/2010 of 14 February 2011 consid. 3.2; CR-Romy, mn. 7 to Art. 143 CO. Cf. decision of the Federal Supreme Court 4A_461/2018 of 20 March 2019 consid. 4 on the exception under Art. 403 CO.

44 Huguenin, mn. 2301; Schwenzer, mn. 88.15; ZK-Krauskopf, mn. 89 to Art. 143 CO.

44 Bucher, p. 493; Gauch/Schluep/Emmenegger, mn. 3686; Huguenin, mn. 2282; Schwenzer, mn. 88.05.

44 BSK-Graber, mn. 6 to Art. 143 CO.

44 BGE 116 II 707 consid. 3.

44 BGE 47 III 213 consid. 2.

45 Decision of the Obergericht Lucerne OG 1992 15 of 9 July 1992, publ. in: Luzerner Gerichts- und Verwaltungsentscheide (LGVE) 1992 I Nr. 15.

451 CR-Romy, mn. 8 to Art. 143 CO; Schwenzer, mn. 91.33 et seq.; Tercier/Pichonnaz, mn. 1905; Weiss, p. 47; ZK-Krauskopf, mn. 93 et seq. to Art. 143 CO.

45 Cf. BK-Kratz, mn. 191 et seq. to Art. 143 CO and ZK-Krauskopf, mn. 96 et seq. to Art. 143 CO for further reference.

45 ZK-Krauskopf, mn. 90 to Art. 143 CO.

termination of the compensation according to the recourse cascade in Art. 51 para. 2 CO.

Joint and several obligations based on liability law may be formed mainly by 13
Art. 50 et seq. CO. Various special laws such as Art. 60 para. 1, Art. 61 para. 3 and Art. 75 para. 1 of the Road Traffic Act or Art. 7 of the Product Liability Act explicitly state a joint and several obligation.[455]

The Civil Code notably dictates the heirs to be jointly and severally liable for 14
the debts of the deceased (Art. 603 para. 1 CC). Further examples can be found in Art. 121 para. 2, Art. 342 para. 2 or Art. 639 CC. In case of multiple persons participating in the proceedings of a civil lawsuit, the court may hold the parties jointly and severally liable for the procedural costs (Art. 106 para. 3 CPC).

Finally, joint and several obligations can also be found in public law. In partic- 15
ular, the Federal Act on Direct Federal Tax prescribes in Art. 13 the joint and several obligation for married couples for their tax debt. Art. 143 et seq. CO are used analogously in situations where the federal public law does not itself govern the specifications of the internal recourse among the joint and several debtors.[456]

## IV. CONSEQUENCES

The legal consequences of a joint and several debt arising from statement of 16
intent or legal provision are regulated in Art. 144 et seq. CO. The external relationship between the creditor and the joint and several debtor is governed in Art. 144 - 147 CO. The internal relationship among the joint and several debtors is governed in Art. 148 - 149 CO. The provisions of Art. 144 - 149 CO are not legally binding. Different terms may be agreed upon by means of a contractual agreement.[457]

45 Cf. BSK-Graber, mn. 19 to Art. 51 CO; Zahnd, p. 24 et seq.

45 Cf. commentary on Art. 51 CO for further reference.

45 BGE 108 II 490 consid. 6. et seq.; KUKO OR-Jung, mn. 9 to Art. 143 CO.

45 BSK-Graber, mn. 9 to Art. 143 CO; CR-Romy, mn. 11 to Art. 143 CO; cf. BGE 116 II 512 consid. 2.

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COMMENTARY ON

# Art. 144 CO

A commentary by Jean-Pascal Stoll

SUGGESTED CITATION

Jean-Pascal Stoll, Kommentierung zu Art. 144 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Stoll, N. XXX zu Art. 144 OR.

**II. Relationship between creditor and debtor**

**1. Effect**

**a. Liability of the debtors**

**Art. 144**

[1] A creditor may at his discretion request partial performance of the obligation from each joint and several debtor or else full performance from any one of them.

[2] All the debtors remain under the obligation until the entire claim has been redeemed.

# CONTENT

# I. OBLIGATION OF EACH JOINT AND SEVERAL DEBTOR

## A. General remarks

The creditor is in the comfortable position to claim either partial or full performance of the individual joint and several debtors (Art. 144 para. 1 CO). It is at the creditor's discretion against which debtor they choose to proceed.[458] The fact that a group of debtors are jointly and severally liable does not impair the single debtor's duty to perform their obligation.[459] Usually, the creditor proceeds against the most solvent debtor or the debtor against whom the prosecution takes the least effort.[460] Neither the internal compensation among the joint and several debtors nor the solvency of the individual debtors affect the creditor's claim in any way.[461] 1

However, there are certain restrictions on the creditor's right to choose against whom they want to proceed. Apart from contractual agreements that may restrict the creditor's choice,[462] some legal provisions dictate from whom the creditor must claim first. If a debt of one joint and several debtor is not due yet, the creditor has to turn to a debtor whose debt is due.[463] The jointly and severally liable partners are only liable subsidiarily in relation to the general partnership itself (Art. 568 para. 3 CO).[464] The creditor of an indivisible performance can naturally not claim partial performance of a joint and several debtor (cf. Art. 70 para. 2 CO).[465] 2

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45 Cf. BGE 114 II 342 consid. 2b; BK-Kratz, mn. 12 to Art. 144 CO; CR-Romy, mn. 1 to Art. 144 CO; KUKO-Jung, mn. 1 to Art. 144 CO; Perritaz, mn. 120; Tercier/Pichonnaz, mn. 1750; ZK-Krauskopf, mn. 3 et seq. to Art. 144 CO.

45 BGE 114 II 342 consid. 2b; BGE 93 II 317 consid. 2e. Cf. BGE 115 Ib 274 consid. 19a.

46 BK-Kratz, mn. 12 to Art. 144 CO; Geissbühler, mn. 1230; OFK-Müller, mn. 1 to Art. 144 CO. Cf. ZK-Krauskopf, mn. 344 to Art. 144 CO.

46 BGE 114 II 342 consid. 2b; BGE 112 II 138 consid. 4a; BGE 93 II 329 consid. 3a.; decision of the Federal Supreme Court 4C.269/2003 of 15 December 2004 consid. 2.2.1.; BK-Kratz, mn. 13 to Art. 144 CO.

46 Bucher, p. 494; KUKO-Jung, mn. 3 to Art. 144 CO; ZK-Krauskopf, mn. 19 to Art. 144 CO.

46 Gauch/Schluep/Emmenegger, mn. 3708; ZK-Krauskopf, mn. 25 to Art. 144 CO.

46 Cf. similar provisions for limited partnerships in Art. 604 CO and for cooperatives in Art. 869 et seq. CO. ZK-Krauskopf, mn. 28 et seq. to Art. 144 CO.

46 BK-Kratz, mn. 18 to Art. 144 CO; ZK-Krauskopf, mn. 31 to Art. 144 CO.

## B. Partial joint and several liability

3 Generally, each joint and several debtor is liable for the same amount. Due to contractual agreement or individual grounds for reduction,[466] the individually-owed amount of each joint and several debtor may differ.[467]

4 The claim for full performance against a debtor is limited to their individual obligation towards the creditor. Subsequently, the joint and several obligation only consists up to the individually-owed amount of the claimed debtor.[468] This is referred to as partial joint and several liability. The debtors are only jointly and severally liable for the common debt. In such cases, the joint and several debtor of a smaller amount can only be claimed up to the amount owed by him or her. They are not liable for a higher obligation by another joint and several debtor. However, the claimed debtor is not discharged from their obligation if another debtor has not yet entirely performed their owed obligation (cf. Art. 85 para. 2 CO analogously). As long as the creditor has not received the individual full performance of a joint and several debtor, the creditor may proceed against any joint and several debtor up to the outstanding amount.[469] Ultimately, joint and several liability aims to strengthen the position of the creditor in any form.[470]

5 Example: The full performance amounts to 200. The joint and several debtors are A, B and C. A owes the full amount of 200, while B and C only owe 150 and 100, respectively. The creditor may not be satisfied to more than 200 and the partial joint and several liability among the debtors is limited to 100. If A performs 180, he or she primarily pays the individually exceeding amount of 50 that is not covered by B's debt of 150 compared to A's debt of 200. Thereafter, the remaining 130 is counted towards the joint and several obligation owed by B and C. B's obligation of 150 is reduced by 130. Hence, B still owes

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46 Cf. commentary on Art. 145 CO for further reference.

46 BSK-Graber, mn. 6 to Art. 144 CO; CHK-Mazan, mn. 5 to Art. 144 CO; Gauch/Schluep/Emmenegger, mn. 3710.

46 BGE 106 II 250 consid. 3.; BSK-Graber, mn. 6 to Art. 144 CO; von Tuhr/Escher, p. 298; ZK-Krauskopf, mn. 9 to Art. 143 CO.

46 BSK-Graber, mn. 7 to Art. 144 CO; ZK-Krauskopf, mn. 316 to Art. 144 CO. Different opinion: KUKO-Jung, mn. 1 to Art. 144 CO; von Tuhr/Escher, p. 298 fn. 13.

47 BGE 93 II 317 consid. 2e.

20. C is completely discharged due to the partial joint and several liability only being 100.[471]

It is important to distinguish the partial joint and several liability from the in- 6
ternal compensation among the joint and several debtors. The former concerns the amount that the creditor may claim from all debtors regardless of their internal compensation. The latter regulates the recourse claim's amount of the debtor that paid more than their fair share.

## II. CIVIL PROCEDURE AND DEBT ENFORCEMENT

### A. Civil procedure

While a creditor may claim full performance of one joint and several debtor, 7
the creditor may also split up the performance among the debtors and proceed simultaneously or consecutively against all debtors.[472] In either way, the defendant may resort to a third party action to assess the internal recourse claims among the joint and several debtors in the same proceedings if the requirements of Art. 81 CPC are fulfilled.[473] It should be noted that the court ruling only binds the debtors being party in the proceedings. The decision does not extend to the joint and several debtors against whom the creditor did not file a lawsuit.[474] Finally, the creditor may sue all joint and several debtors collectively in one lawsuit (voluntary joinder, Art. 71 CPC).[475]

### B. Debt enforcement and bankruptcy

The creditor may also enforce the claim by means of the Federal Act on Debt 8
Enforcement and Bankruptcy (DEBA). As in the case of civil procedure, the creditor can pursue all joint and several debtors simultaneously or consecu-

471 Cf. ZK-Krauskopf, mn. 319 to Art. 144 CO.

47 BGE 125 III 257 consid. 2b; BK-Kratz, mn. 19 to Art. 144 CO; BSK-Graber, mn. 3 to Art. 144 CO; Bucher, p. 494; Gauch/Schluep/Emmenegger, mn. 3708; Gautschi, mn. 288; Huguenin, mn. 2303; von Tuhr/Escher, p. 304.

47 BK-Kratz, mn. 42 to Art. 144 CO; CR-Romy, mn. 1 to Art. 144 CO; von Tuhr/Escher, p. 304; ZK-Krauskopf, mn. 400 to Art. 144 CO.

47 BGE 93 II 329 consid. 3b; Gautschi, mn. 299. Cf. BK-Kratz, mn. 412 et seq. to Art. 143 CO for further reference.

47 BGE 93 II 239 consid. 3a; BK-Kratz, mn. 398 et seq. to Art. 143 CO; KUKO-Jung, mn. 2 to Art. 144 CO; ZK-Krauskopf, mn. 334 to Art. 144 CO. Cf. Dispatch of the Swiss Civil Procedure Code (CPC), p. 7281.

tively for the full amount.[476] Should the creditor already be fully or partially satisfied, the debtor may raise the corresponding objection in the proceedings for clearance to proceed the debt enforcement (Art. 81 para. 1 and Art. 82 para. 2 DEBA).[477] On the same premise, the debtor may file a motion to revoke or suspense the debt enforcement proceedings according to Art. 85 et seq. DEBA.[478]

9 If multiple joint and several debtors are declared bankrupt, the creditor may file for the full amount in each bankruptcy proceedings (Art. 216 para. 1 DEBA).[479] If the allocations from the different bankruptcy estates exceed the amount of the creditor's entire claim, the surplus is reverted to the estates in accordance with the rights of recourse existing among the joint and several debtors (Art. 216 para. 2 DEBA).[480] Furthermore, if only one joint and several debtor is subject to bankruptcy, the creditor may file for the full amount even if partial payment has already been made (Art. 217 para. 1 DEBA).[481] Nonetheless, the creditor is obliged to declare the already-received partial payment with the effect that the creditor may not be satisfied to more than full performance according to Art. 147 para 1 CO.[482] Any surplus is reverted to the remaining joint and several debtors as recourse (Art. 217 para. 3 DEBA).[483]

## III. DURATION OF THE OBLIGATION

10 Art. 144 para. 2 CO states that all of the debtors remain under the obligation until the entire claim has been redeemed.[484] Partial performance by one debtor reduces the joint and several owed debt to the same extent (Art 147 para. 1 CO).[485] However, a creditor's partial satisfaction by a debtor does not

47 BK-Kratz, mn. 46 to Art. 144 CO; BSK-Graber, mn. 2 to Art. 144; CR-Romy, mn. 2 to Art. 144 CO. Cf. decision of the Federal Supreme Court 7B.27/2001 of 7 January 2001 consid. 2b.

47 BSK-Graber, mn. 2 to Art. 144 CO; CHK-Mazan, mn. 3 to Art. 144 CO. Cf. decision of the Federal Supreme Court 6B_1091/2009 of 11 March 2010 consid. 5.2.2.

47 CR-Romy, mn. 2 to Art. 144 CO; von Tuhr/Escher, p. 304; ZK-Krauskopf, mn. 444 to Art. 144 CO.

47 BGE 113 III 128 consid. 3b; BK-Kratz, mn. 48 to Art. 144 CO; CHK-Mazan, mn. 3 to Art. 144 CO; CR-Romy, mn. 2 to Art. 144 CO; Gautschi, mn. 324; ZK-Krauskopf, mn. 458 to Art. 144 CO.

48 Cf. BGE 113 III 128 consid. 3b.

48 BSK-Graber, mn. 4 to Art. 144 CO.

48 Gautschi, mn. 328; ZK-Krauskopf, mn. 455 to Art. 144 CO.

48 BK-Kratz, mn. 48 to Art. 144 CO; Gautschi, mn. 324.

48 BGE 114 II 342 consid. 2b.

hinder the creditor to proceed against the same debtor again. This applies even if the debtor's performance meets or exceeds the amount of the internal compensation among the joint and several debtors.[486]

Only effective payments or surrogate performances[487] lead to the discharge 11
according to Art. 147 para. 1 CO. A court decision solely obliging a joint and several debtor to pay or the clearance to proceed the debt enforcement by a court (Art. 80 et seq. DEBA) do not discharge the other joint and several debtors.[488]

If the performance is rendered impossible by circumstances not attributable 12
to any of the joint and several debtors, the obligation is deemed extinguished (Art. 119 para. 1 CO).[489]

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48 Gauch/Schluep/Emmenegger, mn. 3716; Geissbühler, mn. 1234.
48 BK-Kratz, mn. 16 to Art. 144 CO; Geissbühler, mn. 1234.
48 Cf. commentary on Art. 147 CO.
48 BGE 79 II 382 consid. 2.; BK-Kratz, mn. 37 to Art. 144 CO; BSK-Graber, mn. 7 to Art. 144 CO; CHK-Mazan, mn. 8 to Art. 144 CO; von Tuhr/Escher, p. 305.
48 BSK-Graber, mn. 8 to Art. 144 CO; CHK-Mazan, mn. 8 to Art. 144 CO.

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COMMENTARY ON

# Art. 145 CO

A commentary by Jean-Pascal Stoll

SUGGESTED CITATION

Jean-Pascal Stoll, Kommentierung zu Art. 145 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Stoll, N. XXX zu Art. 145 OR.

**b. Objections by the debtors**

**Art. 145**

[1] A joint and several debtor may raise against the creditor only those objections that are based either on his personal relationship with the creditor or on the nature of or collective reason for the joint and several obligation.

[2] Each joint and several debtor is liable to the others if he fails to raise the objections which all of them are entitled to raise.

# CONTENT

## I. THE TERM OF THE OBJECTION IN ART. 145 CO

The term "objection" in Art. 145 CO includes objections in the technical sense 1
that permanently or temporarily prevent the enforcement of a right (e.g. statute of limitations, deferment). Furthermore, it also covers defences, i.e. asserted facts that oppose the existence of the right maintained by the creditor (e.g. set-off, nullity of the contract, error).[490]

## II. PERSONAL OBJECTIONS

### A. General remarks

A joint and several debtor can only – but still – oppose the creditor with 2
those objections that stem from their personal relationship with the creditor (Art. 145 para. 1 CO). Since the relationship between the creditor and the various joint and several debtors may be different, a joint and several debtor may also be entitled to personal objections that are withheld from the others.[491] For example, a creditor may defer or even waive his claim against only one joint and several debtor. The corresponding objection of deferment or acquittal is therefore only available to the debtor in question and not the others.[492] Other possible personal objections are the debtor's lack of capacity to act or the existence of a defect in consent.[493]

Raising objections that a joint and several debtor has against one of its co- 3
debtors is not possible in the external relationship.[494]

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49 BGE 63 II 133 consid. 2.; BK-Kratz, mn. 12 et seq. to Art. 145 CO; BSK-Graber, mn. 1 to Art. 145 CO; CHK-Mazan, mn. 1 to Art. 145 CO; CR-Romy, mn. 2 to Art. 145 CO; Perritaz, mn. 121; von Tuhr/Escher, p. 305; ZK-Krauskopf, mn. 5 to Art. 145 CO.

49 BK-Kratz, mn. 29 et seq. to Art. 145 CO; CR-Romy, mn. 3 to Art. 145 CO; Gauch/Schluep/Emmenegger, mn. 3713; Geissbühler, mn. 1239; Perritaz, mn. 127; Schwenzer/Fountoulakis, mn. 88.20; ZK-Krauskopf, mn. 21 to Art. 145 CO.

49 BSK-Graber, mn. 4 to Art. 145 CO; Bucher, p. 494 fn. 39; CHK-Mazan, mn. 4 to Art. 145 CO; Tercier/Pichonnaz, mn. 1758; von Tuhr/Escher, p. 306. Cf. decision of the Federal Supreme Court 4P.155/2003 of 19 December 2003 consid. 5.

49 Cf. BK-Kratz, mn. 31 et seq. to Art. 145 CO and ZK-Krauskopf, mn. 15 to Art. 145 CO for further reference.

49 BGE 124 III 305 consid. 2a; CHK-Mazan, mn. 5 to Art. 145 CO; CR-Romy, mn. 5 to Art. 145 CO; Huguenin, mn. 2304; ZK-Krauskopf, mn. 26 to Art. 145 CO.

## B. Individual grounds for reduction

4 If the joint and several obligation is a claim for damages,[495] the question arises whether a joint and several debtor can invoke the individual grounds for reduction under Art. 43 para. 1 and Art. 44 para. 2 CO. The court may reduce the obligation to pay compensation in the case of a low degree of culpability or financial hardship of the tortfeasor. However, these grounds for reduction are opposed by the premise of Art 144 para. 1 CO that the creditor may generally demand the whole from any joint and several debtor.[496]

5 The Federal Supreme Court is extremely conservative when applying individual reasons for reduction in situations of jointly and severally liable debtors. In cases of perfect joint and several liability, the sole nature of the joint and several obligation forbids the weakening of the creditor's position by limiting their claim.[497] The application of Art. 43 et seq. CO is only possible – with great restraint[498] – in cases of imperfect joint and several liability in which the chain of causation between the action of the claimed wrongdoer is broken by an action of another wrongdoer.[499] However, the Federal Supreme Court merely describes this as a theoretical eventuality.[500]

6 The majority of the legal doctrine is of the opinion that individual grounds for reduction are to be admitted as objections in the external relationship.[501]

## C. Liability under corporation law

7 Art. 752 et seq. CO regulate the liability of persons towards the corporation.[502] According to Art. 759 para. 1 CO, in the case of multiple jointly and severally

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49 The claim for damages may have its origin in tort law or contract law (cf. Art. 99 para. 3 CO).

49 Cf. BK-Kratz, mn. 74 to Art. 145 CO; CHK-Mazan, mn. 2 to Art. 145 CO; Gautschi, mn. 227; Körner, mn. 467.

49 BGE 127 III 257 consid. 6b.; BGE 113 II 323 consid. 2b.; BGE 62 II 307 consid. 1.

49 BGE 93 II 317 consid. 2e/bb.

49 Decision of the Federal Supreme Court 6S.346/2005 of 2 February 2006 consid. 2.1; BGE 127 III 257 consid. 6b.; BGE 93 II 317 consid. 2e.

50 BGE 112 II 138 consid. 4a: «l'éventualité théorique».

50 Bucher, p. 492; Casanova, p. 39 et seq.; Gauch/Schluep/Emmenegger, mn. 3728; Huguenin, mn. 2307; Körner, mn. 464; Schwenzer/Fountoulakis, mn. 88.19. Different opinion BSK-Graber, mn. 9 to Art. 51 CO; CR-Romy, mn. 6 to Art. 144 CO; Gautschi, mn. 218; Perritaz, mn. 130. Cf. also BK-Kratz, mn. 78 et seq. to Art. 145 CO and ZK-Krauskopf, mn. 197 et seq. to Art. 144 CO for further reference.

liable persons, each individual is only liable to pay compensation to the extent that the damage is personally attributable to them due to their own fault and the circumstances (so-called “differentiated joint and several liability”).[503] In the external relationship, the individual person should not be liable for more than they would have to bear as the sole responsible person just because multiple persons are liable.[504] The law therefore explicitly allows individual grounds for reduction in the external relationship according to Art. 43 para. 1 and Art. 44 para. 2 CO.[505]

## III. COLLECTIVE OBJECTIONS

### A. In principle

A joint and several debtor may raise all those objections that arise from the 8
nature of or the collective reason for the joint and several obligation (Art. 145 para. 1 CO). These are therefore objections to which all joint and several debtors are entitled.[506] They include formal or substantive defects of the contract (Art. 12 et seq. or Art. 19 et seq. CO), missing prerequisites based on the claim (e.g. lack of damage), circumstances attributable to the creditor (Art. 44 para. 1 CO)[507] or the already-effected performance by a joint and several debtor (Art. 508 para. 2 analogously; cf. Art. 147 para. 1 CO).[508]

If a joint and several debtor has already unsuccessfully raised a collective ob- 9
jection against the creditor earlier in a lawsuit, the same objection remains open to the remaining joint and several debtors.[509] The ruling and thus also

50 Namely the members of the board of directors or the executive board and the external auditors.

50 BK-Kratz, mn. 166 to Art. 145 CO; Böckli, § 18 mn. 486; BSK-Graber, mn. 1 to Art. 144 CO; Hablützel, p. 50.

50 BGE 127 III 453 consid. 8b; Böckli, § 18 mn. 491.

50 BGE 132 III 564 consid. 7.; BGE 127 III 453 consid. 8b; decision of the Federal Supreme Court 4A_468/2011 of 4 January 2012 consid. 1.3.; Böckli, § 18 N 489. Criticising Hablützel, p. 153 et seq.

50 BSK-Graber, mn. 2 to Art. 145 CO; Casanova, p. 14; Tercier/Pichonnaz, mn. 1757; ZK-Krauskopf, mn. 31 to Art. 145 CO.

50 BGE 130 III 591 consid. 5.5.1; BGE 98 II 102 consid. 4.

50 BK-Kratz, mn. 112 et seq. to Art. 145 CO; CHK-Mazan, mn. 6 to Art. 145 CO; CR-Romy, mn. 4 to Art. 145 CO; ZK-Krauskopf, mn. 32 to Art. 145 CO.

50 BK-Kratz, mn. 151 to Art. 145 CO; BSK-Graber, mn. 6 to Art. 145 CO; KUKO-Jung, mn. 3 to Art. 145 CO; ZK-Krauskopf, mn. 139 to Art. 145 CO.

the court's assessment of the raised objection only binds the parties to the proceedings and not a joint and several debtor who was not involved in the proceedings. The risk that contradictory rulings may occur is explicitly accepted.[510] Furthermore, a joint and several debtor can also raise the same collective objections against the joint and several debtor taking recourse in the recourse proceedings.[511]

## B. Liability for failure to raise the objection

10 If a joint and several debtor claimed by the creditor does not raise an objection even though it would have been available to all debtors collectively, they are liable to the other joint and several debtors (Art. 145 para. 2 CO). The consequence is a total or partial loss of the right of recourse.[512] The extent of the loss is determined by that part of the claim that the joint and several debtor could have denied to the creditor if the objection had been raised.[513]

11 Analogous to Art. 502 para. 3 CO, it is required that the debtor in question is at least negligent in failing to raise the collective objection. Ignorance of a collective objection through no fault of the debtor is not detrimental in the context of the compensation claim.[514]

12 Ultimately, a joint and several debtor can be held liable if they satisfy the creditor in whole or part and subsequently fails to inform their co-debtors. If they pay the creditor again and the latter ultimately receives more than they are entitled to, the right of recourse of the first-performing joint and several debtor lapses (Art. 508 para. 2 CO analogously).[515]

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51 BGE 93 II 329 consid. 3b.; BSK-Graber, mn. 6 to Art. 145 CO; CHK-Mazan, mn. 9 to Art. 145 CO; CR-Romy, mn. 6 to Art. 145 CO. The same applies to collective objections raised in recourse proceedings between the joint and several debtors; BGE 57 II 518 consid. 1.

511 BK-Kratz, mn. 151 to Art. 145 CO; BSK-Graber, mn. 6 to Art. 145 CO; CHK-Mazan, mn. 9 to Art. 145 CO; CR-Romy, mn. 6 to Art. 145 CO; ZK-Krauskopf, mn. 139 to Art. 145 CO.

512 BSK-Graber, mn. 5 to Art. 145 CO; Bucher, p. 494; CHK-Mazan, mn. 7 to Art. 145 CO; CR-Romy, mn. 5 to Art. 145 CO; Gauch/Schluep/Emmenegger, mn. 3748; Geissbühler, mn. 1241; Huguenin, mn. 2304; Perritaz, mn. 135; Tercier/Pichonnaz, mn. 1757.

513 BSK-Graber, mn. 5 to Art. 145 CO; von Tuhr/Escher, p. 306; ZK-Krauskopf, mn. 125 to Art. 145 CO.

514 BGE 57 II 518 consid. 4.; cf. also BGE 108 II 490 consid. 3.; BK-Kratz, mn. 149 to Art. 145 CO; BSK-Graber, mn. 5 to Art. 145 CO; CR-Romy, mn. 5 to Art. 145 CO; KUKO-Jung, mn. 2 to Art. 145 CO; von Tuhr/Escher, p. 306; ZK-Krauskopf, mn. 124 to Art. 145 CO.

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515 BSK-Graber, mn. 5 to Art. 145 CO; CHK-Mazan, mn. 8 to Art. 145 CO; Gauch/Schluep/Emmenegger, mn. 3748; Huguenin, mn. 2312; KUKO-Jung, mn. 2 to Art. 147 CO; von Tuhr/Escher, p. 306 fn. 67. Different opinion ZK-Krauskopf, mn. 134 et seq. to Art. 145 CO.

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COMMENTARY ON

# Art. 146 CO

A commentary by Jean-Pascal Stoll

SUGGESTED CITATION

Jean-Pascal Stoll, Kommentierung zu Art. 146 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Stoll, N. XXX zu Art. 146 OR.

**c. Action taken by individual debtors**

**Art. 146**

Unless otherwise provided, a joint and several debtor must not take any action which might impair the position of his fellows.

# CONTENT

## I. PRINCIPLE OF INDIVIDUAL EFFECT

In virtue of Art. 146 CO, individual acts of a joint and several debtor cannot 1
impair the position of the other joint and several debtors.[516] Accordingly, this means that the actions of a joint and several debtor generally only affect themselves. Only they have to answer to the creditor.[517]

As an individual action that solely affects the joint and several debtor con- 2
cerned, the debtor's default (Art. 102 CO) comes into consideration first. If a joint debtor does not perform despite the due date and is formally reminded by the creditor, only they are in default. Correspondingly, the consequences of default apply to them exclusively, such as liability for accidental damage, default interest and excess damages (cf. Art. 103 et seq. CO).[518] Contrariwise, the creditor must also formally remind all joint and several debtors individually if they want to put all of the debtors in default.[519] Finally, the creditor only has the right of withdrawal according to Art. 107 et seq. CO if all joint and several debtors are in default.[520]

The principle of individual effect also applies to a positive breach of contract 3
in the form of poor performance, a breach of an accessory obligation or a breach of a duty to refrain.[521] Merely the joint and several debtor who is responsible for the improper performance is liable for the resulting damage. The others remain obliged to perform, should the performance still be owed.[522] If

516 BSK-Graber, mn. 1 to Art. 146 CO; Bucher, p. 494; CR-Romy, mn. 1 to Art. 146 CO; Schwenzer/Fountoulakis, mn. 88.21; Tercier/Pichonnaz, mn. 1755; von Tuhr/Escher, p. 306. While the unofficial English translation of the Code of Obligation says “must not”, it is the understanding that a joint and several debtor cannot impair the position of his fellow debtors (cf. the German wording “kann nicht”).

517 BK-Kratz, mn. 49 to Art. 146 CO; ZK-Krauskopf, mn. 15 to Art. 146 CO. Cf. decision of the Federal Supreme Court 4C.103/2006 of 3 July 2006 consid. 4.1.

518 BK-Kratz, mn. 31 to Art. 146 CO; BSK-Graber, mn. 2 to Art. 146 CO; Bucher, p. 494 et seq.; CR-Romy, mn. 2 to Art. 146 CO; Perritaz, mn. 139; ZK-Krauskopf, mn. 16 to Art. 146 CO.

519 BGE 129 III 702 consid. 2.1; decision of the Federal Supreme Court 4C.154/2002 of 10/17 December 2002 consid. 3.1; ZK-Krauskopf, mn. 79 to Art. 146 CO.

52 BSK-Graber, mn. 3 to Art. 146 CO; CHK-Mazan, mn. 4 to Art. 146 CO; CR-Romy, mn. 2 to Art. 146 CO; Gauch/Schluep/Emmenegger, mn. 3725; Huguenin, mn. 2305. Different opinion ZK-Krauskopf, mn. 87 to Art. 146 CO.

521 Cf. Gauch/Schluep/Emmenegger, mn. 2625 et seq.; Schwenzer/Fountoulakis, mn. 67.01.

52 BSK-Graber, mn. 4 to Art. 146 CO; CHK-Mazan, mn. 3 to Art. 146 CO; CR-Romy, mn. 3 to Art. 146 CO; ZK-Krauskopf, mn. 28 to Art. 146 CO.

performance becomes impossible due to the fault of a joint and several debtor, that debtor is liable under Art. 97 CO exclusively.[523] The other joint and several debtors who are not responsible for the impossibility are discharged in accordance with Art. 119 CO.[524]

4 Should the joint and several obligation be a continuing obligation that can be dissolved by termination, a notice of termination by the creditor solely affects the addressed joint and several debtor.[525] Similarly, a termination by an individual joint and several debtor only affects their own relationship with the creditor.[526]

5 A joint and several debtor can interrupt the prescriptive period by acknowledging the creditor's claim only for themselves (Art. 136 para. 1 CO e contrario)[527] and the waiver of the prescription defence also affects only them (Art. 141 para. 2 CO).[528]

6 According to Art. 146 CO, individual contractual agreements between the creditor and a joint and several debtor do not bind the uninvolved joint and several debtors. This includes – for example – an extension of liability or the stipulation of a penalty clause.[529]

## II. EXCEPTIONS

7 As Art. 146 CO explicitly indicates, there are also exceptions to the principle of individual effect.[530] First, Art. 146 CO is dispositive in nature. This means

52 Decision of the Federal Supreme Court 4C.103/2006 of 3 July 2006 consid. 4.1; Bucher, p. 495; Gauch/Schluep/Emmenegger, mn. 3726.

52 BK-Kratz, mn. 24 to Art. 146 CO; BSK-Graber, mn. 5 to Art. 146 CO; CHK-Mazan, mn. 5 to Art. 146 CO; CR-Romy, mn, 3 to Art. 146 CO; Huguenin, mn. 2305; KUKO-Jung, mn. 2 to Art. 146 CO; ZK-Krauskopf, mn. 25 to Art. 146 CO. Cf. also the decision of the Federal Supreme Court 4A_562/2011 of 16 January 2012 consid. 4.3.

52 ZK-Krauskopf, mn. 87 to Art. 146 CO. Cf. BGE 15 I 282 consid. 4.

52 BSK-Graber, mn. 6 to Art. 146 CO; CHK-Mazan, mn. 6 to Art. 146 CO; Gauch/Schluep/Emmenegger, mn. 3727; Huguenin, mn. 2305; von Tuhr/Escher, p. 308. Cf. ZK-Krauskopf, mn. 58 et seq. to Art. 146 CO for further reference.

52 Cf. Weiss, p. 104 et seq. for the legal situation before 1 January 2020.

52 BK-Kratz, mn. 38 to Art. 146 CO; CHK-Mazan, mn. 7 to Art. 146 CO; CR-Romy, mn. 5 to Art. 146 CO; Schwenzer/Fountoulakis, mn. 88.22; Weiss, p. 115.

that it can be contractually agreed upon that each joint and several debtor is liable for the fault of the others.[531]

Second, in addition to a stipulated aggravation of liability, a joint and several debtor may also be regarded as a vicarious agent of the other as a result of Art. 101 CO, provided that the joint and several debtors are jointly obligated based on a common contractual obligation.[532] Any fault of a joint and several debtor acting as a vicarious agent is thus imputed to the joint and several debtor who has involved them.[533] This implied involvement of a joint debtor as a vicarious agent is particularly to be assumed in cases in which simple partners have contracted jointly pursuant to Art. 544 para. 3 CO.[534] 8

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52 BK-Kratz, mn. 37 to Art. 146 CO; BSK-Graber, mn. 1 to Art. 146 CO; Bucher, p. 494; CHK-Mazan, mn. 2 to Art. 146 CO; CR-Romy, mn. 1 to Art. 146 CO; Huguenin, mn. 2305; KUKO-Jung, mn. 1 to Art. 146 CO; Schwenzer/Fountoulakis, mn. 88.21; Tercier/Pichonnaz, mn. 1755; von Tuhr/Escher, p. 306 et seq.; ZK-Krauskopf, mn. 168 to Art. 146 CO.

531 BGE 116 II 512 consid. 2.; BK-Kratz, mn. 54 to Art. 146 CO; BSK-Graber, mn. 7 to Art. 146 CO; Huguenin, mn. 2305; KUKO-Jung, mn. 3 to Art. 146 CO; Perritaz, mn. 140; ZK-Krauskopf, mn. 74 to Art. 146 CO.

53 BGE 116 II 512 consid. 2.; BGE 82 II 525 consid. 5.; decision of the Federal Supreme Court 4C.103/2006 of 3 July 2006 consid. 4.2; BSK-Graber, mn. 8 to Art. 146 CO; CR-Romy, mn. 3 to Art. 146 CO; Schwenzer/Fountoulakis, mn. 88.21; ZK-Krauskopf, mn. 9 to Art. 146 CO.

53 BK-Kratz, mn. 56 et seq. to Art. 146 CO; CHK-Mazan, mn. 8 to Art. 146 CO.

53 KUKO-Jung, mn. 2 to Art. 146 CO; von Tuhr/Escher, p. 308 fn. 75; ZK-Krauskopf, mn. 34 et seq. to Art. 146 CO. Cf. also BK-Kratz, mn. 88 to Art. 146 CO.

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COMMENTARY ON

# Art. 147 CO

A commentary by Jean-Pascal Stoll

SUGGESTED CITATION

Jean-Pascal Stoll, Kommentierung zu Art. 147 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Stoll, N. XXX zu Art. 147 OR.

**2. Extinction of the joint and several obligation**

**Art. 147**

[1] Where one joint and several debtor satisfies the creditor by payment or set-off, the others are discharged to that extent.

[2] Where one joint and several debtor is released from liability without satisfaction of the creditor, such release does not benefit the others save to the extent justified by the circumstances or the nature of the obligation.

# CONTENT

# I. EFFECT OF THE CREDITOR'S SATISFACTION

1 When a joint and several debtor satisfies the creditor in full or part, the other joint and several debtors are discharged to the same extent pursuant to Art. 147 para. 1 CO (overall effect of debtor discharge).[535] The law specifically lists (monetary) payment and set-off as discharging acts. Not explicitly listed – but nevertheless with the same effect – is the provision of goods or services by a joint and several debtor. Ultimately, it depends on which contractual performance is owed.[536]

2 Further redemption options that result in the satisfaction of the creditor represent surrogate performances. In this case, a joint and several debtor does not perform the owed obligation, but with an equivalent substitute.[537] As already mentioned, the law provides the set-off in particular (Art. 120 et seq. CO). It is irrelevant if a joint and several debtor or the creditor declares the set-off.[538] Disputed claims may also be brought for offsetting.[539] However, it is not possible for a joint and several debtor to declare a set-off in relation to a claim to which another joint and several debtor is entitled.[540] In addition, performance in lieu or deposit are possible surrogate performances.[541]

3 In the event of only partial satisfaction by a joint and several debtor, the creditor's claim shall be reduced to the corresponding extent.[542]

4 Art. 147 para. 1 CO then only regulates the external relationship between the creditor and the joint and several debtors. Any rights of recourse among the

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53 ZK-Krauskopf, mn. 5 to Art. 147 CO.

53 BK-Kratz, mn. 26 to Art. 147 CO; Bugnon, p. 25; ZK-Krauskopf, mn. 5 to Art. 147 CO.

53 ZK-Krauskopf, mn. 21 to Art. 147 CO.

53 BK-Kratz, mn. 29 to Art. 147 CO; ZK-Krauskopf, mn. 33 to Art. 147 CO. Cf. decision of the Federal Supreme Court 4A_82/2009 of 7 April 2009 consid. 4.2.

53 Decisions of the Federal Supreme Court 4A_536/2017 of 3 July 2018 consid. 7.3. and 4A_500/2013 of 19 March 2014 consid. 6.1; BSK-Graber, mn. 1 to Art. 147 CO.

54 Decision of the Federal Supreme Court 4P.155/2003 of 19 December 2004 consid. 5.; Schwenzer/Fountoulakis, mn. 88.24.

541 BK-Kratz, mn. 30 et seq. to Art. 147 CO; BSK-Graber, mn. 1 to Art. 147 CO; Bugnon, p. 25 et seq.; CHK-Mazan, mn. 1 to Art. 147 CO; CR-Romy, mn. 2 to Art. 147 CO; Gauch/Schluep/Emmenegger, mn. 3717; Huguenin, mn. 2308,; KUKO-Jung, mn. 2 to Art. 147 CO; Schwenzer/Fountoulakis, mn. 88.24; Tercier/Pichonnaz, mn. 1753.

joint and several debtors remain unaffected. The creditor's claim is not truly extinguished but passes to the performing debtor within the framework of subrogation according to Art. 149 CO.[543]

## II. DISCHARGE WITHOUT THE CREDITOR'S SATISFACTION

5 According to Art. 147 para. 2 CO, the discharge of a joint and several debtor without satisfaction of the creditor only affects the other joint and several debtors if justified by the circumstances or the nature of the obligation. In contrast to para. 1, para. 2 governs the principle of individual discharge.[544] The burden of proof concerning whether a discharge of an individual joint and several debtor has an overall effect lies with the joint and several debtor invoking it.[545]

### A. Discharge by legal acts

6 Legal acts generally only affect the creditor and the joint and several debtor involved. They include the acquittal (Art. 115 CO), the settlement and the novation (Art. 116 CO).

7 The acquittal or the settlement only release the joint and several debtor involved and only in the external relationship vis-à-vis the creditor. In the internal relationship, the other joint and several debtors may still take recourse against the exempted debtor.[546] If the creditor wishes the joint and several debtor to benefit from the acquittal or the settlement to the same extent in the internal relationship, they must grant the acquittal or conclude the settlement with discharging effect for all joint and several debtors together.[547]

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54 Cf. commentary on Art. 144 CO. BSK-Graber, mn. 3 to Art. 147 CO; Bucher, p. 495; CHK-Mazan, mn. 2 to Art. 147 CO; Geissbühler, mn. 1234; Schwenzer/Fountoulakis, mn. 88.24; von Tuhr/Escher, p. 309; ZK-Krauskopf, mn. 21 et seq. to Art. 147 CO.

54 BK-Kratz, mn. 22 to Art. 147 CO; BSK-Graber, mn. 2 to Art. 147 CO; CHK-Mazan, mn. 1 to Art. 147 CO; KUKO-Jung, mn. 2 to Art. 147 CO.

54 BSK-Graber, mn. 4 to Art. 147 CO; ZK-Krauskopf, mn. 47 to Art. 147 CO.

54 Decisions of the Federal Supreme Court 4A_428/2014 of 12 January 2015 consid. 4.5. and 4C. 27/2003 of 26 May 2003 consid. 3.5.2; BK-Kratz, mn. 43 and 45 to Art. 147 CO; BSK-Graber, mn. 4 to Art. 147 CO; CR-Romy, mn. 4 to Art. 147 CO; ZK-Krauskopf, mn. 123 to Art. 147 CO.

54 BK-Kratz, mn. 67 to Art. 147 CO; CR-Romy, mn. 6 to Art. 147 CO; Gautschi, mn. 188; Geissbühler, mn. 1235; Perritaz, mn. 146; Stuber, mn. 203.

54 Perritaz, mn. 150; ZK-Krauskopf, mn. 55 to Art. 147 CO.

Based on an explicit or implicit agreement, the effect can be extended to the other joint and several debtors. Whether this is presumed in an individual case depends on the intention of the parties and the interpretation of the contract.[548] An overall effect is indicated if the creditor receives a benefit from the settlement,[549] if the creditor issues a receipt[550] or if they return the borrower's note.[551] Another aspect taken into account is whether the creditor is aware that the other joint and several debtors can take recourse against the debtor involved in the settlement. The settlement concluded in favour of the contracting joint and several debtor would become illusory if the debtor were to be subject to the full compensation in the internal relationship.[552] 8

It is argued that a partial or full discharge of the debtor by the creditor should be interpreted as a duty of the creditor to treat the joint and several debt merely as a partial debt from thereon. The creditor may only claim the other joint and several debtors to the extent of their internal quotas. This would omit any recourse among the debtors.[553] 9

Finally, if the old debt is extinguished by the creation of a new debt (novation; Art. 116 CO), only the joint and several debtor who consents to the novation is discharged. Any different intention by the joint and several debtor involved and the creditor is reserved.[554] 10

54 BGE 133 III 116 consid. 4.2; BGE 107 II 226 consid. 3. BSK-Graber, mn. 5 to Art. 147 CO; Bucher, p. 495; Gauch/Schluep/Emmenegger, mn. 3719a; Gautschi, mn. 185.

54 Decision of the Federal Supreme Court 4A_500/2013 of 19 March 2014 consid. 6.1 (unpublished consideration of BGE 140 III 344).

55 Decision of the Federal Supreme Court 4C.27/2003 of 26 May 2003 consid. 3.5.4.

551 BK-Kratz, mn. 77 to Art. 147 CO; BSK-Graber, mn. 5 to Art. 147 CO; CHK-Mazan, mn. 5 to Art. 147 CO; CR-Romy, mn. 4 to Art. 147 CO; Stuber, mn. 201; von Tuhr/Escher, p. 310; ZK-Krauskopf, mn. 73 et seq. to Art. 147 CO.

55 BGE 133 III 116 consid. 4.3; BGE 107 II 226 consid. 3b; BGE 34 II 80 consid. 5.; decision of the Federal Supreme Court 4C.27/2003 of 26 May 2003 consid. 3.6; BSK-Graber, mn. 5 to Art. 147 CO; CHK-Mazan, mn. 6 to Art. 147 CO; ZK-Krauskopf, mn. 110 et seq. to Art. 147 CO.

55 Decision of the Federal Supreme Court 4C.358/2005 of 12 February 2007 consid. 4.6 (unpublished consideration of BGE 133 II 116); KUKO-Jung, mn. 4 to Art. 147 CO; Perritaz, mn. 148; von Tuhr/Escher, p. 313 fn. 125. Cf. also Bucher, p. 497.

55 BGE 126 III 375 consid. 2f; BK-Kratz, mn. 80 to Art. 147 CO; BSK-Graber, mn. 6 to Art. 147 CO; Bugnon, p. 28; Stuber, mn. 218; von Tuhr/Escher, p. 310; ZK-Krauskopf, mn. 84 to Art. 147 CO.

## B. Discharge without legal acts

11 If the creditor assigns a claim against one of the joint and several debtors to the same debtor, the obligation is deemed extinguished by merger as the debtor acquired a claim against him- or herself (Art. 118 CO).[555]

12 The impossibility of a performance by circumstances not attributable to the debtors releases all joint debtors in the external relationship as they can no longer perform (cf. Art. 119 CO).[556] However, if other joint and several debtors are still able to perform in their capacity, they are not released but still have to fulfil their obligation to perform. Accordingly, there is still a claim for compensation in the internal relationship.[557]

13 If the creditor refuses without good cause to accept the performance of a joint and several debtor, they are in creditor default (Art. 91 CO). The effects of the creditor's default under Art. 92 et seq. CO benefit all joint and several debtors. In particular, the depositing joint and several debtor releases the other debtors equally.[558]

14 The prescription as well as the forfeiture of a claim only have an effect in relation to the debtor concerned as these periods run separately for each joint and several debtor. The creditor’s claims against the other joint and several debtors are not affected.[559] By contrast, the interruption of the prescriptive period – if due to an act by the creditor – affects all joint and several debtors (Art. 136 para. 1 CO).[560]

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55 BSK-Graber, mn. 9 to Art. 147 CO; Bucher, p. 496; Bugnon, p. 27 et seq.; Tercier/Pichonnaz, mn. 1758. Differentiating BK-Kratz, mn. 84 et seq. to Art. 147 CO; Stuber, mn. 261 et seq.; ZK-Krauskopf, mn. 87 et seq. to Art. 147 CO.

55 Gauch/Schluep/Emmenegger, mn. 3717; Stuber, mn. 267.

55 BSK-Graber, mn. 7 to Art. 147 CO; CHK-Mazan, mn. 7 to Art. 147 CO; Stuber, mn. 269; ZK-Krauskopf, mn. 91 to Art. 147 CO.

55 BK-Kratz, mn. 97 to Art. 147 CO; BSK-Graber, mn. 12 to Art. 147 CO; CHK-Mazan, mn. 9 to Art. 147 CO; Stuber, mn. 286; von Tuhr/Escher, p. 311; ZK-Krauskopf, mn. 157 et seq. to Art. 146 CO.

55 Decision of the Obergericht Lucerne 1B 11 38 of 20 December 2011 consid. 6.1.2., publ. in: Luzerner Gerichts- und Verwaltungsentscheide (LGVE) 2012 I Nr. 16. Cf. BGE 130 III 362 consid. 5.2; BK-Kratz, mn. 90 et seq. to Art. 147 CO; BSK-Graber, mn. 11 to Art. 147 CO; CHK-Mazan, mn. 8 to Art. 147 CO; CR-Romy, mn. 5 to Art. 147 CO; Huguenin, mn. 2308. Cf. ZK-Krauskopf, mn. 92 et seq. to Art. 147 CO for the resulting problem of the internal recourse among the debtors.

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56 BSK-Graber, mn. 11 to Art. 147 CO; CR-Romy, mn. 5 to Art. 147 CO; Gauch/Schluep/Emmenegger, mn. 3721.

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COMMENTARY ON

# Art. 148 CO

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SUGGESTED CITATION

Jean-Pascal Stoll, Kommentierung zu Art. 148 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Stoll, N. XXX zu Art. 148 OR.

**III. Relationship between joint and several debtors**

**1. Participation**

**Art. 148**

[1] Unless the legal relationship between the joint and several debtors indicates otherwise, each of them assumes an equal share of the payment made to the creditor.

[2] A joint and several debtor who pays more than his fair share has recourse against the others for the excess.

[3] Amounts that cannot be recovered from one joint and several debtor must be borne in equal shares by the others.

# CONTENT

# I. GENERAL REMARKS

Art. 148 and Art. 149 CO regulate the internal relationship of the joint and several liability. The legal consequence in the internal relationship – the right of recourse – occurs if the joint and several debtor claimed by the creditor has borne more in the external relationship than their liability quota in the internal relationship (Art. 148 para. 2 CO).[561] The creditor's rights are also transferred to the joint and several debtor within the framework of subrogation according to Art. 149 CO.[562] 1

# II. INTERNAL LIABILITY QUOTA OF THE JOINT AND SEVERAL DEBTORS

## A. Principal of equal distribution

Art. 148 para. 1 CO presumes that all joint and several debtors have to bear the debt in equal quotas. Therefore, there is a reciprocal right of recourse for the joint and several debtor that has paid more than the amount of the joint and several debt divided by the number of co-debtors.[563] 2

Anyone who wishes to deviate from the legal principle of equal distribution and derive rights from it accordingly must prove this in accordance with the general distribution of the burden of proof in Art. 8 CC.[564] 3

## B. Exceptions

The legislator was aware that there may be legal relationships that impose a deviation from the principle of equal quota. In reality, unequal liability quotas are more common than an equal distribution.[565] By means of a contractual 4

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561 CR-Romy, mn. 1 to Art. 148 CO; Perritaz, mn. 184; ZK-Krauskopf, mn. 4 to Art. 148/149 CO.

56 BSK-Graber, mn. 1 to Art. 148 CO; CHK-Mazan, mn. 1 to Art. 148 CO; ZK-Krauskopf, mn. 167 to Art. 148/149 CO. Cf. commentary on Art. 149 CO for further reference.

56 BGE 53 II 25 consid. 2.; decision of the Federal Supreme Court 4A_582/2008 of 27 February 2009 consid. 4.2; BSK-Graber, mn. 2 to Art. 148 CO; Gautschi, mn. 156; Geissbühler, mn. 1247; KUKO-Jung, mn. 1 to Art. 148 CO; Perritaz, mn. 185; Tercier/Pichonnaz, mn. 1767; ZK-Krauskopf, mn. 62 to Art. 148/149 CO.

56 BGE 53 II 25 consid. 2; decision of the Federal Supreme Court 5A_672/2012 of 3 April 2013 consid. 8.3.2; BSK-Graber, mn. 3 to Art. 148 CO; CR-Romy, mn. 2 to Art. 148 CO; Gautschi, mn. 156.

agreement between the joint and several debtors, for example, deviating internal liability quotas may be agreed upon (e.g. in the case of a simple partnership pursuant to Art. 533 CO).[566]

5 Aside from contractual clauses, the law provides for an exception to the equal quota in numerous places. First and foremost, Art. 50 et seq. CO should be mentioned. Whether at all and – if so – to what extent a liable tortfeasor can take recourse against the other persons involved is determined by judicial discretion (Art. 50 para. 1 CO). If several tortfeasors are liable on different legal grounds, liability is determined by the liability cascade according to Art. 51 para. 2 CO.[567]

6 Further deviations by law can be found in Art. 759 para. 3 CO on liability under corporation law, in Art. 640 para. 3 CC on recourse to co-heirs for debts of the deceased[568] and in Art. 649 CC on the bearing of costs and expenses among co-owners.[569]

7 Finally, constellations are conceivable in which a deviation of the legal principle is also to be pleaded due to the concrete circumstances. If two spouses jointly take out a loan to finance the husband's hobby, the wife should be granted a full right of recourse against her husband.[570]

## III. RECOURSE

### A. Requirements and extent

8 The right of recourse of the jointly and severally liable debtor presupposes that the debtor has actually performed to the creditor.[571] A mere court ruling

56 Schwenzer/Fountoulakis, mn. 88.29; ZK-Krauskopf, mn. 69 to Art. 148/149 CO.

56 BGE 133 III 6 consid. 5.3.3; BGE 116 II 316 consid. 2b; decision of the Federal Supreme Court 5A_672/2012 of 3 April 2013 consid. 8.3.2; BK-Kratz, mn. 240 to Art. 148 CO; BSK-Graber, mn. 3 to Art. 148 CO; CR-Romy, mn. 3 to Art. 148 CO; Gautschi, mn. 154; KUKO-Jung, mn. 1 to Art. 148 CO; Perritaz, mn. 186; von Tuhr/Escher, p. 312; ZK-Krauskopf, mn. 57 to Art. 148/149 CO.

56 BK-Kratz, mn. 234 et seq. to Art. 148 CO; Bucher, p. 496; CR-Romy, mn. 4 to Art. 148 CO; Gauch/Schluep/Emmenegger, mn. 3738; Gautschi, mn. 159; Huguenin, mn. 2309; Schwenzer/Fountoulakis, mn. 88.31 et seq.; Tercier/Pichonnaz, mn. 1767; ZK-Krauskopf, mn. 75 et seq. to Art. 148/149 CO. Cf. commentary on Art. 50 and 51 CO for further reference.

56 Cf. decision of the Federal Supreme Court 5P.134/2002 of 5 September 2002 consid. 2.2.

56 Cf. BK-Kratz, mn. 243 et seq. to Art. 148 CO and ZK-Krauskopf, mn. 70 to Art. 148/149 CO for further references.

obliging the performance is not sufficient. In addition, the debtor must have performed more than their internal quota.[572] Both requirements must be proven by the joint and several debtor taking recourse.[573]

Consequently, Art. 148 para. 2 CO gives rise to an autonomous right of re- 9
course that exists independently of the legal relationship between the joint and several debtors.[574] The joint and several debtor that has been prosecuted by the creditor can take recourse against the other joint and several debtors for the amount exceeding their fair share. This right of recourse is always a monetary debt. This means that a performance in kind or service must be converted into a monetary amount, if necessary.[575]

Finally, joint and several liability among the debtors only comprises in the ex- 10
ternal relationship with the creditor. The debtors are not jointly and severally liable to each other when facing a recourse claim of one of their co-debtors. Each debtor is only liable for their internal share.[576] An acquittal granted by the creditor to only one of the debtors does not affect the right of recourse in the internal relationship.[577]

## B. Interest and legal costs

The claim for recourse becomes due once the prosecuted joint and several 11
debtor has paid more than their fair share to the creditor (cf. Art. 75 CO). Interest is owed on the recourse claim;[578] except as otherwise provided, the interest rate accounts for 5% p.a. (Art. 73 para. 1 CO).[579]

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57 Schwenzer/Fountoulakis, mn. 88.34.

57 BGE 115 Ib 274 consid. 19b; BK-Kratz, mn. 57 and 65 to Art. 148 CO; CHK-Mazan, mn. 2 to Art. 148 CO; CR-Romy, mn. 9 to Art. 148 CO; Tercier/Pichonnaz, mn. 1764 et seq.; ZK-Krauskopf, mn. 35 et seq. to Art. 148/149 CO.

57 Decision of the Federal Supreme Court 4A_73/2014 of 19 June 2014 consid. 3; BSK-Graber, mn. 5 to Art. 148 CO; CHK-Mazan, mn. 4 to Art. 148 CO.

57 BK-Kratz, mn. 29 to Art. 148 CO; ZK-Krauskopf, mn. 12 et seq. to Art. 148/149 CO.

57 ZK-Krauskopf, mn. 41 and 67 to Art. 148/149 CO.

57 BGE 103 II 137 consid. 4d; decision of the Federal Supreme Court 2A.252/2002 of 4 November 2002 consid. 3.2.2.2; BK-Kratz, mn. 91 to Art. 148 CO; BSK-Graber, mn. 7 to Art. 148 CO; Bucher, p. 496 et seq.; CHK-Mazan, mn. 7 to Art. 148 CO; Gauch/Schluep/Emmenegger, mn. 3741; Geissbühler, mn. 1250; Huguenin, mn. 23 11; KUKO-Jung, mn. 2 to Art. 148 CO; Tercier/Pichonnaz, mn. 1770; von Tuhr/Escher, p. 316; ZK-Krauskopf, mn. 64 to Art. 148/149 CO.

577 Cf. commentary on Art. 147 CO for further reference.

57 BGE 57 II 324 consid. 4.; BK-Kratz, mn. 82 to Art. 148 CO; BSK-Graber, mn. 6 to Art. 148 CO; Bucher, mn. 497; KUKO-Jung, mn. 2 to Art. 148 CO.

12 If a joint and several debtor defends him- or herself in a lawsuit against the creditor's claim, they may take recourse to the other joint and several debtors for the legal costs incurred. The prerequisite for this is that a victory in the civil action would have led to the release of all joint and several debtors and that the contestation of the claim has not been deemed hopeless.[580]

## C. Prescription

13 The relative prescription period of the recourse claim lasts three years. It begins as soon as the joint and several debtor against whom recourse is sought has performed to the creditor and gained knowledge of the other joint and several debtors (Art. 139 CO). This requires cumulatively that the joint and several debtor entitled to recourse has concrete knowledge of the co-debtors and is also aware of all of the facts that establish the liability of the other party and thus enable legal action to be taken against them.[581]

14 Even if Art. 139 CO does not provide for an explicit absolute prescription period, an absolute ten-year period should be assumed by analogy with Art. 60 para. 1, Art. 67 para. 1 and Art. 127 para. 1 CO.[582] However, part of the doctrine rejects an absolute prescription period. The main point of criticism is that if an absolute time limit is affirmed from the time of the damaging event, the right of recourse could become time-barred even before it arises.[583] However, if the beginning of the limitation period is to be set at the time of performance of the debtor to the creditor – as is advocated here – the aforementioned concern is without cause and the application of an absolute prescription period may be approved.[584]

15 Art. 139 CO is applicable to cases of both perfect and imperfect joint and several liability.[585] The law then provides for its own prescription rules for nu-

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57 Bugnon, p. 99; ZK-Krauskopf, mn. 71 to Art. 148/149 CO.

58 BGE 69 II 150 consid. 4d; BK-Kratz, mn. 84 et seq. to Art. 148 CO; BSK-Graber, mn. 6 to Art. 148 CO; Bucher, p. 497; Bugnon, p. 97; CHK-Mazan, mn. 3 to Art. 148 CO; CR-Romy, mn. 21 to Art. 148 CO; Gauch/Schluep/Emmenegger, mn. 3743; KUKO-Jung, mn. 2 to Art. 148 CO; von Tuhr/Escher, p. 314. Different opinion ZK-Krauskopf, mn. 72 to Art. 148/149 CO.

581 BSK-Däppen, mn. 5 to Art. 139 CO; CR-Pichonnaz, mn. 20 to Art. 139 CO; Huguenin, mn. 2314a.

58 Before the statute of limitations for the right of recourse was regulated by law, the Federal Supreme Court ruled in favour of the existence of an absolute statute of limitations (BGE 133 III 6 consid. 5.4).

merous special-law liability provisions that must be observed.[586] These provisions take precedence over the general rule of Art. 139 CO.[587]

## IV. IRRECOVERABLE RECOURSE CLAIM

If a joint and several debtor's internal quota can no longer be obtained in its 16
entirety, the shortfall is to be borne equally by all of the joint and several debtors (Art. 148 para. 3 CO). This is the case if the debtor in question is insolvent, the costs of recourse proceedings would be disproportionate to the internal share or if the co-debtor is at an unknown domicile.[588]

If there should be an allocation formula that deviates from the principle stated 17
in Art. 148 para. 1 CO based on a contractual agreement or the law, the shortfall of a joint and several debtor shall also be borne in accordance with this uneven allocation. Otherwise, the distribution is made according to heads.[589]

The law provides in Art. 51 CO for a cascade that determines the liability 18
among imperfect joint and several debtors. In this case, the bearing of the shortfall is also determined according to this cascade. There is therefore no apportionment if the joint and several debtors are on different levels of the cascade.[590]

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58 BSK-Däppen, mn. 6 to Art. 139 CO; Fellmann, p. 217; Rothenberger, p. 98.

58 Cf. BK-Kratz, mn. 160 et seq. to Art. 148 CO and ZK-Krauskopf, mn. 131 et seq. to Art. 148/149 CO for further references.

58 ZK-Krauskopf, mn. 130 et seq. to Art. 148/149 CO.

58 BK-Kratz, mn. 280 to Art. 148 CO; BSK-Graber, mn. 9 to Art. 148 CO; CHK-Mazan, mn. 10 to Art. 148 CO; CR-Romy, mn. 20 to Art. 148 CO; Geissbühler, mn. 1256; Huguenin, mn. 2311; ZK-Krauskopf, mn. 158 to Art. 148/149 CO.

58 BK-Kratz, mn. 278 to Art. 148 CO; BSK-Graber, mn. 8 to Art. 148 CO; Bugnon, p. 115; CR-Romy, mn. 19 to Art. 148 CO; Gauch/Schluep/Emmenegger, mn. 3741; Geissbühler, mn. 1258; Schwenzer/Fountoulakis, mn. 88.36. Different opinion CHK-Mazan, mn. 9 to Art. 148 CO; KUKO-Jung, mn. 3 to Art. 148 CO; von Tuhr/Escher, p. 316.

59 BK-Kratz, mn. 278 to Art. 148 CO; BSK-Graber, mn. 8 to Art. 148 CO; Bugnon, p. 115; ZK-Krauskopf, mn. 160 to Art. 148/149 CO.

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COMMENTARY ON

# Art. 149 CO

A commentary by Jean-Pascal Stoll

SUGGESTED CITATION

Jean-Pascal Stoll, Kommentierung zu Art. 149 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Stoll, N. XXX zu Art. 149 OR.

**2. Subrogation**

**Art. 149**

[1] A joint and several debtor with right of recourse against his fellow debtors is subrogated to the rights of the creditor to the extent the latter has been satisfied.

[2] The creditor is liable if he favours the legal position of one joint and several debtor to the detriment of the others.

# CONTENT

# I. THE SUBROGATION

## A. Automatic transfer of the creditor’s rights

As per Art. 149 para. 1 CO, the creditor's rights automatically pass from the 1
creditor to the debtor by operation of law to the extent that the debtor has satisfied the creditor. This is an assignment by law according to Art. 166 CO.[591] Subrogation presupposes that the debtor has an independent right of recourse according to Art. 148 para. 2 CO.[592] Subsequently, the debtor entitled to recourse disposes of two parallel remedies that compete with each other: the right of recourse according to Art. 148 para. 2 CO and the subrogated creditor’s rights pursuant to Art. 149 CO.[593] The subrogated claim serves to facilitate and secure the recourse.[594] The claim of the joint and several debtor against his co-debtor resulting from subrogation only exists to the extent of the right of recourse according to Art. 148 CO, i.e. the amount exceeding their internal liability quota.[595]

If applicable, it is necessary to convert the subrogated claim into a monetary 2
claim if the debtor has provided a performance in kind or service to the creditor.[596]

The subrogation according to Art. 149 CO only applies in the case of perfect 3
joint and several liability, not in the case of imperfect joint and several liability.[597]

591 BK-Kratz, mn. 7 to Art. 149 CO; Bugnon, p. 89; CHK-Mazan, mn. 2 to Art. 149 CO; Perritaz, mn. 188; Schwenzer/Fountoulakis, mn. 88.40; ZK-Krauskopf, mn. 167 to Art. 148/149 CO.

59 BK-Kratz, mn. 36 to Art. 149 CO; BSK-Graber, mn. 4 to Art. 149 CO; CR-Romy, mn. 2 to Art. 149 CO; ZK-Krauskopf, mn. 194 to Art. 148/149 CO.

59 BK-Kratz, mn. 36 to Art. 149 CO; Gautschi, mn. 151; Huguenin, mn. 2313; Tercier/Pichonnaz, mn. 1773; ZK-Krauskopf, mn. 188 to Art. 148/149 CO.

59 BGE 89 II 415 consid. 2; BGE 53 II 25 consid. 1.; Huguenin, mn. 2313; Perritaz, mn. 189; ZK-Krauskopf, mn. 168 to Art. 148/149 CO.

59 BGE 103 II 137 consid. 4d; BSK-Graber, mn. 4 to Art. 149 CO; CR-Romy, mn. 2 to Art. 149 CO; von Tuhr/Escher, p. 316; ZK-Krauskopf, mn. 176 to Art. 148/149 CO.

59 BK-Kratz, mn. 24 to Art. 149 CO; BSK-Graber, mn. 1 to Art. 149 CO.

59 BGE 133 III 6 consid. 5.3.3; BGE 130 III 362 consid. 5.2; BGE 115 II 42 consid. 2a; BK-Kratz, mn. 40 to Art. 149 CO; BSK-Graber, mn. 3 to Art. 149 CO; Bugnon, p. 89 et seq.; CHK-Mazan, mn. 1 to Art. 149 CO; CR-Romy, mn. 1 to Art. 149 CO; Gauch/Schluep/Emmenegger, mn. 3754; von Tuhr/Escher, p. 320. Different opinion Gautschi, mn. 179 et seq.; ZK-Krauskopf, mn. 191 to Art. 148/149 CO.

## B. EFFECT OF THE SUBROGATION

4 The difference compared to the independent right of recourse under Art. 148 para. 2 CO is that – on the one hand – all ancillary rights transfer to the debtor with the subrogation in addition to the main claim (cf. Art. 170 CO). The joint and several debtor can now benefit from any securities such as liens or guarantees, as they also pass on to them.[598]

5 On the other hand, the claim is transferred together with all objections against the creditor. In other words, the other joint and several debtors may then raise all objections in the internal relationship that would have also been open to them against the creditor, namely individual acquittals on the part of the creditor (Art. 507 para. 3 CO analogously).[599] The current prescription period is also continued without interruption. This may result in the subrogation claim becoming time-barred before the recourse claim or – if the debtor pays an already time-barred debt to the creditor – that the subrogated claim continues to be time-barred and therefore remains unenforceable.[600]

6 The other co-debtors are not jointly and severally liable to the entitled debtor. They are only liable for their individual quota in their internal relationship.[601]

## II. CREDITOR'S LIABILITY

7 Although the creditor is principally free to choose how much they claim from which joint debtor,[602] the creditor is nevertheless under a duty not to improve

59 BK-Kratz, mn. 25 to Art. 149 CO; BSK-Graber, mn. 2 to Art. 149 CO; Bugnon, p. 92; CHK-Mazan, mn. 3 to Art. 149 CO; CR-Romy, mn. 2 to Art. 149 CO; Huguenin, mn. 2313; Schwenzer/Fountoulakis, mn. 88.40; Tercier/Pichonnaz, mn. 1773; von Tuhr/Escher, p. 317; ZK-Krauskopf, mn. 179 to Art. 148/149 CO.

59 BK-Kratz, mn. 26 to Art. 149 CO; BSK-Graber, mn. 4 to Art. 149 CO; Bugnon, p. 91 et seq.; Gauch/Schluep/Emmenegger, mn. 3747; KUKO-Jung, mn. 1 to Art. 149 CO; von Tuhr/Escher, p. 317.

60 BSK-Graber, mn. 6 to Art. 149 CO; Huguenin, mn. 2313; KUKO-Jung, mn. 1 to Art. 149 CO; Schwenzer/Fountoulakis, mn. 88.40; ZK-Krauskopf, mn. 181 et seq. to Art. 148/149 CO. Different opinion BK-Kratz, mn. 27 to Art. 149 CO.

60 BSK-Graber, mn. 4 to Art. 149 CO; von Tuhr/Escher, p. 318; ZK-Krauskopf, mn. 173 to Art. 148/149 CO. Different opinion Perritaz, mn. 200.

60 Cf. commentary on Art. 144 CO.

the legal position of one joint and several debtor to the detriment of the others (Art. 149 para. 2 CO). If this duty is not fulfilled, they are responsible for the damage caused accordingly.[603]

Cases of application arise when the creditor releases securities such as a lien 8
and the joint and several debtor to whom the subrogation claim is transferred falls short because they were not sufficiently satisfied in the internal relationship (in the absence of a realisable lien).[604] The same applies if the creditor does not hand over the promissory letter or other evidence pertaining to the debt (cf. Art. 170 para. 2 CO).[605]

A unilateral acquittal by the creditor in favour of a joint and several debtor is 9
not a case of application of this favourable treatment within the meaning of Art. 149 para. 2 CO. The joint and several debtor taking recourse is still entitled to the undiminished recourse according to Art. 148 para. 2 CO against their co-debtors, as the acquittal generally has no effect in the internal relationship.[606]

The legal consequence of this breach of duty is a claim for damages under Art. 10
149 para. 2 CO by the debtor against the creditor. This can be asserted against the creditor either by way of an objection or by means of a lawsuit.[607]

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60 BK-Kratz, mn. 59 to Art. 149 CO; BSK-Graber, mn. 8 to Art. 149 CO; CR-Romy, mn. 6 to Art. 149 CO.

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COMMENTARY ON

# Art. 150 CO

A commentary by Jean-Pascal Stoll

SUGGESTED CITATION

Jean-Pascal Stoll, Kommentierung zu Art. 150 OR, in: Christoph Hurni / Mirjam Eggen (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Stoll, N. XXX zu Art. 150 OR.

**B. Joint and several creditors**

**Art. 150**

1 Multiple creditors become joint and several creditors where the debtor states that he wishes to grant each of them the right to receive full performance of the debt and in the cases prescribed by law.

2 Performance made to one joint and several creditor discharges the debtor as against all of them.

3 The debtor may choose which joint and several creditor he makes the payment to, provided none of them has initiated legal proceedings against him.

# CONTENT

## I. DEFINITION AND DIFFERENTIATION

In the case of joint and several creditors, multiple creditors stand against one debtor. Each creditor has its own independent claim to fulfilment of the entire performance.[608] Accordingly, there are several claims of a single owed performance.[609] This is the inversion of the joint and several obligation.[610] The debtor in turn is fully discharged vis-à-vis the other creditors by the full performance to only one joint and several creditor (Art. 150 para. 2 CO).[611] 1

The joint and several creditorship must be distinguished from other constellations in which a debtor faces several creditors. In the case of collective creditors,[612] the creditors are entitled to the entire claim undividedly. They can only assert the claim collectively. At the same time, the debtor can only discharge him- or herself by performing collectively to all of the creditors.[613] In the case of partial creditorship, each creditor can act alone but can only claim the part of the claim to which they are entitled. The partial claims finally form the owed whole.[614] In the case of creditor cumulation, the debtor owes the same performance to several creditors. The creditors can be completely independent of each other. Whether the creditor can satisfy all creditors by a single performance depends on the nature of the contract.[615] The type of creditorship in the individual case depends on the contractual agreement with the debtor.[616] 2

60 Cf. BGE 118 II 168 consid. 2b; Bucher, p. 500; CHK-Mazan, mn. 2 to Art. 150 CO; Geissbühler, mn. 1268; Schwenzer/Fountoulakis, mn. 89.10.

60 Baumgartner, p. 17.

61 KUKO-Jung, mn. 1 to Art. 150 CO. Cf. commentary on Art. 143 CO.

611 BK-Kratz, mn. 13 to Art. 150 CO; BSK-Graber, mn. 1 to Art. 150 CO; CHK-Mazan, mn. 2 to Art. 150 CO; CR-Romy, mn. 1 to Art. 150 CO; Gauch/Schluep/Emmenegger, mn. 3663; Tercier/Pichonnaz, mn. 1781.

61 Examples are the community of heirs (Art. 602 para. 2 CC) or the simple partnership (Art. 544 para. 1 CO). BK-Kratz, mn. 44 to Art. 150 CO; Tercier/Pichonnaz, mn. 1779.

61 BGE 140 III 150 consid. 2.2.2; Gauch/Schluep/Emmenegger, mn. 3672; Huguenin, mn. 2324; Schwenzer/Fountoulakis, mn. 89.06 et seq.; Tercier/Pichonnaz, mn. 1780; ZK-Krauskopf, mn. 22 to Art. 150 CO.

61 BGE 140 III 150 consid. 2.2.3; Gauch/Schluep/Emmenegger, mn. 3659; Huguenin, mn. 2319; ZK-Krauskopf, mn. 19 to Art. 150 CO.

615 ZK-Krauskopf, mn. 27 to Art. 150 CO.

61 BGE 140 III 150 consid. 2.3.

## II. ORIGIN

### A. By statement of intent

3 As Art. 150 para. 1 CO states, joint and several creditorship may arise if the debtor declares that they intend to entitle each creditor to the entire claim. Without such a declaration, only partial creditorship applies among the creditors, provided that the performance is divisible.[617] However, the sole circumstance that several persons enter into a contract together does not establish joint and several creditorship by itself.[618] The declaration of intent may be expressed explicitly[619] or implied.[620] It is not subject to any particular form (cf. Art. 11 para. 1 CO).[621]

4 Practical examples of joint and several creditorships are the joint account ("compte-joint") with several individual signatories,[622] the joint deposit ("dépôt conjoint")[623] or the joint tenancy agreement of spouses.[624]

### B. By law

5 Even though Swiss civil law does not explicitly provide for joint and several creditors, there are a few individual legal provisions that do so implicitly. Thus, in the case of a majority of donors, each donor alone may demand the fulfilment of a provisio from the recipient (Art. 246 para. 1 CO),[625] the landlord and the tenant may both demand of the subtenant alone that they do not use

617 BGE 140 III 150 consid. 2.2.3; BGE 94 II 313 consid. 4.; BSK-Graber, mn. 3 to Art. 150 CO; CHK-Mazan, mn. 3 to Art. 150 CO; Schwenzer/Fountoulakis, mn. 89.05.

61 Tercier/Pichonnaz, mn. 1780. Cf. Bron, p. 31.

61 Cf. BGE 94 II 313 consid. 4. «déposants solidaires» and «solidairement titulaires».

62 BSK-Graber, mn. 3 to Art. 150 CO; CHK-Mazan, mn. 3 to Art. 150 CO; CR-Romy, mn. 3 to Art. 150 CO.

62 BK-Kratz, mn. 62 to Art. 150 CO; ZK-Krauskopf, mn. 29 to Art. 150 CO.

62 BGE 140 III 150 consid. 2.2.1; BGE 112 III 90 consid. 5.; BGE 110 III 24 consid. 3.; BGE 94 II 313 consid. 4.; BGE 94 II 167 consid. 3.; decision of the Federal Supreme Court 4A_630/2020 of 24 March 2022 consid. 5. (intended for publication). Cf. Baumgartner, p. 28 et seq., BK-Kratz, mn. 65 et seq. and Bron, p. 41 et seq. for further reference.

62 BGE 101 II 117 consid. 5.

62 BGE 118 II 168 consid. 2b.

62 Baumgartner, p. 21; CR-Romy, mn. 3 to Art. 150 CO; ZK-Krauskopf, mn. 34 to Art. 150 CO. Different opinion BK-Kratz, mn 111 to Art. 150 CO.

the property in a manner that differs from that permitted to the tenant him- or herself (Art. 262 para. 3 CO; analogously in the case of usufructuary lease, Art 291 para. 3 CO).[626] Furthermore, the principal may assert the claims to which the agent is entitled against a substitute directly against the latter (Art. 399 para. 3 CO).[627] Art. 70 para. 1 CO provides for a joint and several creditorship in the case of indivisible performance owed to several creditors. The performance can be claimed by each creditor alone.[628] According to Art. 482 para. 1 CC, any interested party may demand the fulfilment of burdens and conditions of a testamentary disposition.[629]

## III. EXTERNAL RELATIONSHIP

6 If the debtor performs to a joint and several creditor, they are also discharged regarding the other creditors (Art. 150 para. 2 CO). Surrogate performances – including deposit or set-off – are equivalent to actual performance.[630] As already mentioned, each individual creditor may also demand performance as a whole or may dispose of it at their discretion. Acts of disposition only affect the claim of the individual creditor against the debtor. Acquittal, deferment, assignment, debt enforcement or lawsuits by a creditor have no influence on the claims of the other creditors.[631] Thus, the debtor can also only raise those objections against a creditor that concern the relationship between the two of them.[632] Finally, each claim may also have its own due date and a notice of default also only affects the relationship between the debtor and the acting joint and several creditor.[633]

7 A creditor may not aggravate the position of the other joint and several creditors by their personal actions (Art. 146 CO analogously). An acceptance in lieu

62 Baumgartner, p. 20 et seq.; BSK-Graber, mn. 4 to Art. 150 CO; CHK-Mazan, mn. 4 to Art. 150 CO; CR-Romy, mn. 3 to Art. 150 CO; ZK-Krauskopf, mn. 35 to Art. 150 CO. Different opinion BK-Kratz, mn. 92 to Art. 150 CO.

62 Baumgartner, p.21 et seq.; BK-Kratz, mn. 94 et seq. to Art. 150 CO; Bucher, p. 499 fn. 72; CHK-Mazan, mn. 4 to Art. 150 CO; Schwenzer/Fountoulakis, mn. 89.11; ZK-Krauskopf, mn. 36 to Art. 150 CO.

62 Gauch/Schluep/Emmenegger, mn. 3683; Geissbühler, mn. 1272; Huguenin, mn. 2326; Tercier/Pichonnaz, mn. 1786; ZK-Krauskopf, mn. 37 to Art. 150 CO.

62 BSK-Graber, mn. 4 to Art. 150 CO; Bucher, p. 499 fn. 72; KUKO-Jung, mn. 2 to Art. 150 CO.

63 Decision of the Federal Supreme Court 4C.4/2004 of 20 April 2004 consid. 4.; Baumgartner, p. 17; BSK-Graber, mn. 6 to Art. 150 CO; ZK-Krauskopf, mn. 75 et seq. to Art. 150 CO.

63 BK-Kratz, mn. 146 to Art. 150 CO; CR-Romy, mn. 5 to Art. 150 CO; von Tuhr/Escher, p. 322.

63 BSK-Graber, mn. 7 to Art. 150 CO; ZK-Krauskopf, mn. 39 to Art. 150 CO.

of performance, a novation or the acceptance of a change of debtor does not release the debtor in regard to the other joint and several creditors.[634] However, if a joint and several creditor is in defaults of acceptance, the co-creditors are also affected by it. The debtor is not restricted by one creditor's default in his right to choose to which creditor they want to perform. If necessary, they may resort to a deposit according to Art. 92 CO (cf. Art. 150 para. 3 CO).[635]

8 In principle, the debtor is free to choose to which creditor they want to perform.[636] However, this right of choice is suspended if the debtor has already been subjected to legal proceedings by a joint and several creditor (Art. 150 para. 3 CO). In this case, the debtor can only pay with discharging effect to the creditor who has raised a debt enforcement or a lawsuit.[637] A mere written demand for payment or a transfer order in case of a joint account[638] is not sufficient to give effect to Art. 150 para. 3 CO.[639] The debtor's right of choice is revived if the lawsuit of the one creditor suing is dismissed. If the debtor is subject to debt enforcement by a joint and several creditor, the debtor's right of choice is restored as of the time when the debtor filed an objection according to Art. 74 DEBA. If the creditor subsequently initiates clearance to proceed, the debtor's right to choose is again restricted.[640]

## IV. INTERNAL RELATIONSHIP

9 The law does not state how the internal relationship between the joint and several creditors is regulated if a joint and several creditor has received more

63 ZK-Krauskopf, mn. 59 to Art. 150 CO. Different opinion Bucher, p. 500.

63 BK-Kratz, mn. 150 to Art. 150 CO; BSK-Graber, mn. 7 to Art. 150 CO; KUKO-Jung, mn. 3 to Art. 150 CO; von Tuhr/Escher, p. 323; ZK-Krauskopf, mn. 89 to Art. 150 CO.

63 BSK-Graber, mn. 8 to Art. 150 CO; KUKO-Jung, mn. 4 to Art. 150 CO; ZK-Krauskopf, mn. 72 to Art. 150 CO. Different opinion von Tuhr/Escher, p. 322.

63 BK-Kratz, mn. 126 to Art. 150 CO; Bron, p. 37; BSK-Graber, mn. 8 to Art. 150 CO; CR-Romy, mn. 7 to Art. 150 CO; Huguenin, mn. 2322.

63 BGE 94 II 313 consid. 6; BK-Kratz, mn. 129 to Art. 150 CO; Bron, p. 37; BSK-Graber, mn. 8 to Art. 150 CO; CR-Romy, mn. 7 to Art. 150 CO; Schwenzer/Fountoulakis, mn. 89.12. Cf. ZK-Krauskopf, mn. 63 et seq. to Art. 150 CO, who differentiates between debt enforcement and lawsuit.

63 Decision of the Federal Supreme Court 4A_630/2020 of 24 March 2022 consid. 7. (intended for publication).

63 BGE 94 II 313 consid. 6.; BK-Kratz, mn. 129 to Art. 150 CO; CR-Romy, mn. 7 to Art. 150 CO; KUKO-Jung, mn. 4 to Art. 150 CO.

than they are entitled to. The rights of recourse among the joint and several creditors are therefore governed by the underlying relationship according to which the joint and several creditorship was established.[641] The nature of legal relationship among the joint and several creditors or the internal division of the claim cannot be inferred from the joint and several creditorship.[642] Particularly in the case of indivisible performance, the satisfied creditor has a duty to compensate the other joint and several creditors. If no specific quotas can be determined in the absence of an agreement, or if the circumstances justify it, an equal apportionment is made (Art. 148 para. 1 CO analogously).[643]

If damage occurs due to a default in acceptance for which a joint and several creditor is responsible, such damage shall be compensated internally.[644] 10

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64 BK-Kratz, mn. 169 to Art. 150 CO; CR-Romy, mn. 9 to Art. 150 CO; Geissbühler, mn. 1270; Schwenzer/Fountoulakis, mn. 89.13; Tercier/Pichonnaz, mn. 1787; von Tuhr/Escher, p. 324. Cf. Baumgartner, p. 33 et seq. for further reference.

64 Cf. BGE 110 III 24 consid. 3.; BGE 94 II 313 consid. 4b; decision of the Federal Supreme Court 4A_630/2020 of 24 March 2022 consid. 5. (intended for publication).

64 BK-Kratz, mn. 179 to Art. 150 CO; BSK-Graber, mn. 10 to Art. 150 CO; ZK-Krauskopf, mn. 101 to Art. 150 CO. Different opinion Gauch/Schluep/Emmenegger, mn. 3667.

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COMMENTARY ON

# Art. 633 CO

A commentary by Tamara Teves / David Meirich

SUGGESTED CITATION

Tamara Teves/David Meirich, Commentary of art. 633 CO, in: Lukas Müller (ed.), Online Commentary of the Code of Obligations

Short citation: OK-Teves/Meirich, art. 633 CO N. XXX.

**2. Payment of contributions**

**a. Money contributions**

**Art. 633**

1 Money contributions must be deposited in a bank as defined in Article 1 paragraph 1 of the Banking Act of 8 November 1934 for the exclusive use of the company.

2 The bank may release the money only when the company has been entered in the commercial register.

3 Money contributions are payments in the currency of the share capital and payments in freely convertible currencies that are different from that of the share capital.

# CONTENT

# I. INTRODUCTION

## A. General

The present Art. 633 CO deals with the payment of contributions, provided that these are made **in cash**, and in particular with the deposit thereof. Art. 633 CO is of practical relevance in the case of “**partial or full cash payment** of the share capital on **incorporation** and, in accordance with the reference in Art. 652*c* CO, also in the case of **ordinary and authorized capital increases**”. 1

“The aim is to ensure that the founders actually fulfill their payment promises.” One of the most important principles of stock corporation law is **capital protection**, “which, particularly in the case of formation and capital increases, means that the company's equity capital disclosed to economic operators in the articles of association and in the commercial register is actually made available in full.” 2

## B. Revision of stock corporation law

The provision of Art. 633 para. 1 and 2 CO was amended with the **revision of stock corporation law on January 1, 2023**, in that the terminology was adapted to the terminology of the Banking Act (BankG; SR 952.0). There, the general term “bank” is to be used instead of “institution.” However, the change should not have any material effects. 3

Since the revision of the Swiss Code of Obligations on January 1, 2023, Art. 633 para. 3 CO has contained various aspects relating to cash formation and payment: According to the first half of the sentence, contributions in cash are payments in the currency in which the share capital is denominated, e.g., the payment of share capital in euros using this currency. According to the second half of the sentence, payments in other currencies that are freely convertible into share capital are also considered cash contributions. Such a situation arises, for example, when share capital in Swiss francs is paid up in US dollars and euros. With regard to the ratio of foreign currency to share capital in Swiss francs, this has been the practice of the commercial register authorities since 1999. 4

5 The preliminary draft contained a further sentence stating that cash contributions must cover the issue price at the time of the resolution. There is no need to repeat this reference. Within the framework of the **deed of incorporation**, the founders must state in accordance with Art. 629 para. 2 no. 3 CO that the statutory and legal requirements for the contributions made are met at the time of the deed of incorporation. In the case of contributions in a currency other than that in which the share capital is denominated, they must therefore determine that, taking into account the current exchange rate, these contributions cover at least the amount of the contributions to be made. Payment in foreign currency must be distinguished from the new option of share capital in foreign currency.

## II. PAYMENT OF THE (CASH) CONTRIBUTION

### A. Payment

#### 1. Amount of capital to be deposited

6 There has long been controversy in legal doctrine as to whether the deposit requirement applies only to the par value of the subscribed shares or to the entire issue amount (par value plus premium):

7 According to the stricter doctrine and also the Federal Supreme Court, the wording of Art. 633 para. 1 CO refers to all cash contributions and **not just contributions at par value**. The subject of the payment is therefore both the par value and the premium, and the capital contribution confirmation must refer to the entire issue amount accordingly.

8 However, prevailing doctrine and commercial register practice allow the deposit of the nominal value to suffice. This seems more appropriate, as only the nominal amount is published in the commercial register and it is also in line with commercial register practice that only the deposit of the nominal value is checked during registration. Ultimately, the deposit serves to protect third parties who do not expect payments in excess of the nominal capital entered in the commercial register. The fact that it is more advantageous for the company to have direct access to money rather than only to a claim that may not be fully recoverable does not change this, as this is a problem of the deferrable maturity of the premium and not of the payment into a blocked account.

It is possible to declare the premium due at a later date in the publicly notarized deed of incorporation. In this case, it only has to be paid when it becomes due. However, according to some legal scholars, the premium paid retrospectively must also be paid into a blocked bank account, whereby the bank must issue a capital payment confirmation for the amount of the premium paid retrospectively. As long as the premium has not been paid in full, the provisions on partially paid-up shares must be observed. 9

## 2. Deposits that do not qualify as cash deposits

**Cryptocurrencies or payment tokens** such as Bitcoin (BTC) or Ether (ETH) or stablecoins such as USD Coin (USDC) are not considered legal tender or legal currencies in Switzerland. As a result, payment in cryptocurrencies or stablecoins by way of cash deposit is not possible. Accordingly, under current law, a stock corporation cannot form share capital denominated in cryptocurrencies (payment tokens) or stablecoins. 10

However, it is possible to pay up share capital **as a contribution in kind** using **cryptocurrencies** or **payment tokens** such as **stablecoins**, provided that the relevant requirements are met in each individual case. 11

In 2018, due to the sharp increase in requests for supervision in connection with initial coin offerings (ICOs) at that time, FINMA stated that it pursues an approach based on economic function **when categorizing tokens**. According to FINMA, the "category **'payment tokens'** (synonymous with **pure 'cryptocurrencies'**)" includes "tokens that are actually or, according to the organizer's intention, are intended to be accepted as a means of payment for the purchase of goods or services or to serve as a means of transferring money and value." The most common **well-known examples** of payment tokens or cryptocurrencies are **Bitcoin** (BTC) and **Ether** (ETH). 12

FINMA has also commented on the legal classification and, in particular, the risks and requirements associated with stablecoins on several occasions. Stablecoins differ from other tokens in that they use a "stabilization mechanism in the sense of a link to one or more underlying assets, such as government currencies." If they serve a purpose as a means of payment that is customary in practice, stablecoins qualify as payment tokens. The best-known **examples** of such US dollar-denominated stablecoins are **Tether** (USDT) and **USD Coin** (USDC). 13

## 3. Deposit

### a. Banks and fintech institutions

14 Even before the revision of stock corporation law on January 1, 2023, the majority opinion that the deposit must be made with an institution that has a banking license in accordance with the Banking Act was relatively undisputed. The wording applicable from January 1, 2019, until the revision of stock corporation law in 2023 included not only banks but also **persons pursuant to Art. 1*b* of the Banking Act** (so-called **fintech institutions**). Until December 31, 2022, the wording of Art. 633 aOR applied, which referred to "an institution subject to the Banking Act of November 8, 1934," which would also have allowed capital payment confirmations from fintech institutions pursuant to Art. 1*b* BankG. The majority of legal scholars (continued to) assume that deposits could only be made to an account with a bank; the relevant commercial register practice was inconsistent.

15 The revision of stock corporation law on January 1, 2023, reinforced this (majority) opinion by amending Art. 633 para. 1 CO, whereby the new wording was formulated as follows: "at a bank in accordance with Article 1 para. 1 of the Banking Act of November 8, 1934." According to the dispatch, this amendment to the previous wording, which referred to "institutions subject to the Banking Act of November 8, 1934," should **have no material impact**. According to a grammatical interpretation, fintech companies are not banks under Art. 1*b* BankG and therefore cannot be subsumed under Art. 633 para. 1 CO.

16 The message on the amendment to the Banking Act of September 6, 2023, is intended to provide greater legal certainty with regard to the introduction of state liquidity protection in this area by means of a legislative amendment and proposes an amendment to Art. 633 para. 1 CO and Art. 653e para. 2 CO. According to Art. 633 para. 1 CO, capital contributions should be able to be deposited with a "bank pursuant to Article 1*a* of the Banking Act of November 8, 1934 (BankG) or with a person pursuant to Article 1*b* BankG." Since a **person under Art. 1*b* BankG** can already provide banking services to companies and there is no material barrier to accepting deposits within the meaning of Art. 633 CO, it should be clarified to avoid any ambiguity that this task can be performed not only by a bank in the narrow sense, but also by persons under Art. 1*b* BankG. Following the same logic, a reference to these persons in connec-

tion with the payment of deposits in the event of an increase in conditional capital should be included in Art. 653e para. 2 CO.

In its practice notice of November 30, 2023, the Federal Commercial Registry Office ("EHRA") confirmed, even before the above-mentioned planned amendment to the law, that "capital contribution confirmations **from fintech institutions must be accepted** by the commercial registry authorities." 17

It is insufficient, for example, to deposit the cash contribution with an organ of the company being formed or in a client account of a notary or in the account of a bank abroad that does not have a license from FINMA. 18

On October 22, 2025, the Federal Council announced that amendments to the FinIA are intended to strengthen the framework conditions for innovative financial technologies – particularly in the areas of cryptocurrencies, stablecoins, and payment services – while at the same time ensuring customer, investor, and market protection. This means that the "fintech license" under Art. 1*b* BankG will be transferred to the FinIA and replaced by the license category "**payment institution**." It is further stated that, against this background, it should be justified to **be able to** deposit funds in accordance with Art. 633 and Art. 653e CO not only with banks, but also with payment institutions. The draft is part of the consultation process, which runs until February 6, 2026. 19

A payment institution within the meaning of Art. 2 para. 1 lit. f. VE-FinIA in conjunction with **Art. 51*a* para. 1 VE-FinIA**, a payment institution is defined as "any entity that, without holding a banking license within the meaning of the BankG, is primarily active in the financial sector and accepts customer funds on a commercial basis or publicly advertises such services, but does not pay interest on these funds and only invests them as provided for in Article 51i." 20

## b. FINMA-authorized banks or fintech institutions

The reference in Art. 633 para. 1 CO, according to which the payment into a capital contribution account must be made at a bank (or fintech institution) in accordance with the Banking Act, gives rise to the requirement to deposit the funds with an **institution domiciled in Switzerland in accordance with the Banking Act**. This also includes "foreign banks in Switzerland" within the meaning of the Ordinance of the Swiss Financial Market Supervisory Authority on Foreign Banks in Switzerland (Foreign Banks Ordinance-FINMA; SR 21

952.111), as long as they have a FINMA license as a branch within the meaning of Art. 4 ABV-FINMA.

22 In summary, capital deposits can be made with:

- either a bank based and licensed in **Switzerland** or a fintech institution based and licensed in **Switzerland**; or
- a foreign bank based abroad via its branch based in Switzerland and licensed by FINMA.

23 Capital contributions are **not eligible** under Art. 633 CO if they are made to:

- foreign banks;
- Swiss representatives of foreign banks; or
- other Swiss financial institutions governed by financial market laws other than the Banking Act.

24 **To verify in practice** whether an institution meets the requirements of Art. 633 para. 1 CO, the public **lists of FINMA** can be consulted:

- FINMA list of "Authorized banks and securities firms," which also includes branches of foreign banks (representations within the meaning of Art. 14 ABV-FINMA are not listed, however);
- List of persons authorized by FINMA pursuant to Art. 1*b* BankG (so-called fintech license).

25 The two official **lists of FINMA** – "Authorized banks and securities firms" and "Persons authorized by FINMA pursuant to Art. 1*b* BankG (fintech license)" – are continuously updated by FINMA as necessary and when there are changes in the authorization status. In practice, the easiest way to find these lists is to use the **search function on the FINMA website**, entering the
terms "List of banks" or "List of fintech companies." Both lists are available **to the public** in PDF and Excel format for viewing and downloading.

26 It is **not necessary** for the deposit to be made with a bank or fintech institution whose registered office or branch is located in the same place or canton as the registered office of the newly founded company. For practical reasons, newly founded companies usually choose an institution for the capital deposit through which they would later also like to process payment transactions or

obtain other banking services relevant to them. There is **no obligation or restriction** in this regard. However, this has the advantage that the account opening process only has to be completed at one institution rather than two.

#### c. Fee models

In practice, banks and fintech institutions tend to use different **pricing models** for capital deposit accounts: 27

- **Banks** (at least currently) tend to charge percentage fees of 0.1-0.5% of the capital paid in, with minimum fees of CHF 200-300 and maximum fees of CHF 2,000-5,000 (with exceptions from individual banks that provide capital deposit accounts free of charge);
- **Fintech institutions** that offer capital deposit accounts tend to have different approaches, with offers ranging from fixed fees of CHF 249 to free offers (when opening additional accounts).

## B. Release of the deposit

### 1. (Minimum) content of the deposit confirmation

After the deposit has been made, the bank or fintech institution issues a formal certificate, known as a deposit confirmation. For the purposes of capital protection, this deposit confirmation must contain the following (minimum) information: 28

- "the company to be founded must be **clearly identified**;
- the **deposited amount** must be stated (in the case of payment in foreign currencies, with the equivalent value in Swiss francs); and
- it must be expressly stated that the amount is deposited in a **blocked account in favor of the company**."

### 2. Practice

"Art. 633 para. 2 CO stipulates that the payment amount may only be released once the company has been **entered** in the commercial register. The same applies to capital increases." 29

In practice, the **release** of the amount pursuant to Art. 633 para. 2 CO usually takes place before the entry is published in the Swiss Commercial Gazette 30

(SHAB), namely after presentation of the **daily register extract** available from the cantonal commercial register office and after confirmation by the EHRA that there are no obstacles to registration. Upon request, the cantonal commercial register office informs the persons who submitted the application as soon as the entry has been approved by the EHRA.

31 Most banks also accept daily register extracts certified by the cantonal commercial register office prior to publication in the SHAB and transfer to the main register. This information is disclosed on request to the persons who submitted the relevant commercial register application in accordance with Art. 34 CRO as soon as the EHRA has approved the entry. In accordance with Art. 11 para. 2 CRO, these daily register extracts bear the note "EHRA approval" and are also sent by the competent commercial register offices as PDF scans by e-mail for an additional fee.

### 3. Repayment of the deposited capital if the formation or capital increase does not take place

32 There is no legal provision for cases where, after the deposit has been made at the exclusive disposal of the company, the formation does not take place. In practice, the bank or fintech institution should release the amounts back to the depositors as soon as it has received a statement from the authorized certifying officer confirming the **failure of the formation**.

33 However, the certifying officer can only issue a corresponding statement to the bank or fintech institution if only one original capital deposit confirmation is actually available. If the depositor has an additional original, the bank or fintech institution bears the risk that a company has been fraudulently established in the meantime when making a repayment. To counteract this risk, a bank or fintech institution usually issues the deposit confirmation once in the original and specifies a period of validity.

34 There is also no uniform notarial practice according to which only capital deposit confirmations that are no older than three months, for example, are to be accepted. The bank or fintech institution may therefore block the money for a longer period of time, i.e., until the risk of repayment can be assessed as acceptable based on the statements of the depositor.

## C. Deposits in foreign currencies

### 1. Codification of practice

The new provision in Art. 633 para. 3 CO codifies the previous practice of the EHRA, according to which not only deposits in the currency in which the share capital is denominated are considered cash deposits, but also currencies that are **freely convertible** into the share capital. The payment therefore does not have to be made in a currency that is essential for business activities or in a currency approved by the Federal Council for the nominal capital in accordance with Art. 621 para. 2 CO. Payment in foreign currencies has been established practice since 2004. According to the message on the revision of stock corporation law dated January 1, 2023, this has been the practice of the commercial register authorities since 1999. 35

The currencies that are eligible as **share capital** are listed in Annex 3 of the Commercial Register Ordinance. These are currently the following: 36

- British pound / GBP;
- Euro / EUR;
- US dollar / USD;
- Japanese yen / JPY.

The following currencies are generally considered to be **fully convertible**: 37

- US dollar / USD;
- Euro / EUR;
- Swiss franc / CHF;
- British pound / GBP;
- Japanese yen / JPY;
- Canadian dollar / CAD;
- Australian dollar / AUD;
- New Zealand dollar / NZD;
- Norwegian krone / NOK;
- Swedish krona / SEK;

- Danish krone / DKK;
- Singapore dollar / SGD;
- Hong Kong dollar / HKD;
- South Korean won / KRW.

### 2. Compliance with the minimum equivalent value of CHF 100,000

38 The preliminary draft of the dispatch contained a further sentence stating that the cash deposits must cover the issue amount **at the time of the determination decision**. There is no need to repeat this information. The dispatch further states that, within the framework of the deed of incorporation, the founders must state in accordance with Art. 629 para. 2 no. 3 CO that the statutory and legal requirements for the contributions made are met **at the time of the deed of incorporation**. This means that for contributions in a currency other than that in which the share capital is denominated, they must determine that these contributions cover at least the amount of the contributions to be made, taking into account the current exchange rate.

39 In practice, when payments are made in foreign currencies, there may be cases where the “correction of the exchange rate by the safety margin” results in a higher value than the issue amount being paid into the capital contribution account. The situation is similar if the foreign currency continues to appreciate in value until the date of registration. According to older doctrine, the “excess” should flow into the hidden reserves as a premium and remain in the company. According to more recent practice, however, any excess amount should be allocated to the statutory capital reserve.

### 3. Cryptocurrencies are not foreign currencies

40 Cryptocurrencies are not considered cash or cash deposits, but can be contributed by means of a **contribution in kind**.

## D. Registration with the commercial register

41 When registering a company with the commercial register, numerous documents must be submitted. One such document is the deposit confirmation or certificate from the institution. However, this does not need to be submitted if the institution is mentioned in the articles of association.

*Acknowledgements*

*Special thanks go to Gilles Quetting for his valuable support in researching this article.*

*This publication reflects solely the personal opinions of the authors and is not binding on FINMA.*

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COMMENTARY ON

# Art. 701 CO

A commentary by Daniel Brugger

SUGGESTED CITATION

Daniel Brugger, Kommentierung zu Art. 701 OR, Onlinekommentar zum Obligationenrecht

Short citation: OK-Brugger, N XXX zu Art. 701 OR.

**3. Universal meeting**

**Art. 701**

[1] The owners or representatives of all the company's shares may, if no objection is raised, hold a general meeting without complying with the formal requirements for convening meetings.

[2] This meeting may hold validly discuss and pass binding resolutions on all matters within the remit of the general meeting, provided that the owners or representatives of all the shares are present.

# CONTENT

# I. INTRODUCTION

## A. Concept of a universal meeting

In principle, the shareholders must be formally invited to the general meeting of a joint-stock company, subject to a notice period and with a binding indication of the items to be discussed (see Art. 700 CO). These convening formalities serve to protect shareholders and ensure that shareholders have the opportunity to exercise their participation rights at the general meeting. Among other things, this ensures that shareholders are not caught off guard at the meeting by unexpected items on the agenda and tempted to make rash decisions. 1

The law provides for an exception in Art. 701 CO, according to which a general meeting may be held without complying with the regulations prescribed for the convocation. The margin refers to this general meeting as a "universal meeting". The meeting is universal insofar as the shareholders of the partners or their representatives are comprehensively present at the meeting. It is therefore a general meeting of shareholders (or their representatives). In the French and Italian marginalia, the universal meeting is accordingly referred to as "réunion de tous les actionnaires" and "riunione di tutti gli azionisti". However, the fact that all shares of the company are present or represented is not sufficient for the meeting to be "universal" within the meaning of Art. 701 CO. Art. 701 CO also requires that the shareholders or their representatives be present without contradiction (for details on the requirements see below n. 11 ff.). A universal meeting is therefore a general meeting at which all shareholders of the company (or their representatives) are present without contradiction. 2

If this is the case, the general meeting may be held without the rules prescribed for convening it (art. 701 para. 1 CO; see below n. 28). The universal meeting may validly discuss and pass resolutions on all matters falling within the scope of business of the general meeting (art. 701 para. 2 CO). The universal meeting thus has all the powers of a general meeting (art. 698 para. 2 items 1 - 6 CO). Both the ordinary and the extraordinary general meeting may be held as a universal meeting. 3

## B. Purpose of the universal meeting

4 The purpose of the universal meeting is "practical": the universal meeting is intended to enable shareholders to hold a general meeting at short notice and without major organisational hassle in terms of convening. This simplifies the convening of the general meeting and facilitates the holding of general meetings.

5 If all shareholders (or their representatives) are present without contradiction, i.e. agree to the holding of the general meeting without observing the convening formalities, insisting on the convening regulations would not make sense either. On the contrary, it would be objectionable and contrary to the requirement of acting in good faith (Art. 2 para. 1 CC) if a shareholder (or representative) present without objection were in a position to subsequently question the validity of the general meeting resolutions due to convocation errors.

6 At the universal meeting, shareholder protection is rather ensured in another way: The shareholder or his representative has to protect himself from possible overreaching (see above n. 1). If he does not agree with the conduct of the general meeting or needs more time to prepare an item for discussion, he may not participate in the meeting, leave it at any time or object to the handling of individual agenda items (see below n. 15 ff. and n. 20 ff.). Each shareholder thus has a veto right against the conduct of the general meeting as a universal meeting.

7 Due to this right of veto, the holding of a universal general meeting is not recommended if resolutions are to be passed on issues that are fundamentally opposed by individual shareholders. Similarly, a universal meeting is not recommended if the shareholders are divided or if disruptive or delaying manoeuvres are to be expected.

## C. Practical significance of the universal meeting

8 In practice, single-member companies, companies with a small shareholder base and group subcompanies with a 100 per cent shareholding usually hold their general meetings as universal meetings.

9 In companies with a broad shareholder base, on the other hand, it is generally not possible to gather all shares in one meeting. Accordingly, it is practically impossible to hold a universal meeting for such companies.

Likewise, due to the legal protection provisions in favour of the participants, the holding of a universal meeting is generally not possible if the company has issued participation capital. 10

## II. PREREQUISITES FOR A UNIVERSAL ASSEMBLY

According to Art. 701, para. 1 CO, two things are necessary for a valid universal meeting: 11

- All shareholders of the company are continuously present or legally represented.
- No shareholder or representative objects to the holding of the universal meeting.

## A. Presence or representation of all shares

### 1. continuous presence of all shares

For a legally valid universal meeting, it is firstly required that all shareholders are continuously present or legally represented. The universal meeting is therefore only valid if all shares are represented. An exception to this is made for treasury shares, as the voting right is suspended for these shares (art. 659a para. 1 CO). 12

If all shares are represented in the hands of one shareholder, it is thus sufficient for a universal meeting in the extreme case that only one shareholder or only one representative is present and conducts the meeting. 13

Only the presence of the shareholder or his representative is required. Active participation in the meeting, for example by voting, is not required for a valid universal meeting. In other words, abstention from voting is permitted at the universal meeting. 14

### 2. Leaving the meeting

The presence of all shares is required for the entire duration of the universal meeting. If a shareholder or his representative leaves the meeting, the universal meeting is immediately terminated. However, the departure of a shareholder shall not affect resolutions already adopted. Resolutions passed previously shall in principle remain legally valid. Exceptionally, they may be invalid 15 if it is obvious that they would never have been passed or would have been pointless without the resolutions provided for later.

16 After the departure, the meeting of the remaining shareholders may continue to hold non-binding negotiations. However, resolutions of the general meeting can no longer be validly passed (on the consequences see below n. 33 ff.).

17 If not all shares are represented at the beginning of the meeting (or if a shareholder leaves the meeting), the meeting may (again) be conducted as a universal meeting after the arrival or return of the last shareholder. By virtue of the fact that the shares are (again) fully represented at the meeting, subsequent resolutions may be passed as a universal meeting. In contrast, the resolutions passed previously, when the shareholders were not fully represented, are not cured. However, if all shareholders (or their representatives) are present, the resolutions on the agenda items already passed may be repeated.

### 3. Written consent?

18 An absent shareholder cannot consent in writing in advance or afterwards to the resolutions of a universal meeting, although this is often attempted in practice. Such consent is invalid unless it could be interpreted as a power of attorney to represent the shares. If the shareholder does not wish to attend the meeting but does not wish to prevent the universal meeting from taking place, it makes sense for him to appoint a representative in advance who can represent his shares at the meeting.

### 4. Presence of the board of directors?

19 Only the presence of all shareholders (or their representatives) is necessary for the validity of the universal meeting, but not the presence of the members of the board of directors, even if they are entitled to participate in the meeting and to submit motions according to art. 702a CO. Members of the board of directors may also not prevent the universal meeting by objecting to it. In the revised company law, a tightening of the wording of Art. 702a CO clarifies that neither board members nor members of the executive board have a legally enforceable right to participate.

## B. No objection

At the universal meeting, shareholders waive the observance of convening formalities. However, no shareholder has to put up with a general meeting being held as a universal meeting (so-called veto right of the shareholder; see above n. 6). Secondly, a valid universal meeting requires that all shareholders (or their representatives) expressly or tacitly agree to the holding of the general meeting as a universal meeting. Conversely, it is required that no shareholder (or his representative) objects to the universal meeting. 20

### 1. Form of the objection

The objection of the shareholder or his representative is not bound by any form. However, the shareholder (or representative) shall express the objection clearly and unambiguously. In particular, the objection must be distinguished from a mere abstention from voting, which is permissible at a universal meeting (see above, n. 14). 21

### 2. Content of the objection

The objection of the shareholder (or his representative) may be directed against the holding of the universal meeting or against the passing of a resolution on a specific agenda item. The latter for the very reason that a shareholder (or his representative) may legitimately take the view that different items of business are ready for resolution in different ways. Moreover, the shareholders could break off a first universal meeting and immediately thereafter meet for a new universal meeting without the disputed agenda item. Therefore, it does not make sense to break off the universal meeting just because a shareholder (or his representative) objects to an item on the agenda. Rather, the universal meeting is held without the disputed agenda item. 22

On the other hand, an objection to individual motions on an agenda item is inadmissible. In case of doubt, such an objection must be interpreted as an objection to the entire agenda item (see below, n. 40). 23

Nor is it permissible to declare an objection conditionally. For example, a shareholder may not make the waiver of an objection to an item on the agenda conditional on the outcome of the vote. 24

### 3. Timing of the objection

25 The shareholder's (or proxy's) objection may be made before or during the meeting.

26 If the objection was raised before the meeting but the shareholder or his representative attends the meeting, he must repeat his objection. Otherwise, the shareholder's attendance without objection shall, in principle, be deemed to constitute a waiver of objection.

27 During the meeting, the shareholder or his representative may record his objection. If the shareholder (or his representative) raises an objection after the beginning of the meeting, such objection may only relate to matters to be decided. An objection against resolutions already passed is not possible and the resolutions passed until then remain valid (see above n. 15). The objection therefore has no retroactive effect, but only for the future.

## III. CONSEQUENCES

### A. Waiver of convening formalities

28 If the above two conditions for holding a universal meeting are met, the general meeting may be held without the formalities prescribed for convening it (Art. 701, para. 1 CO). However, the formal facilitations of the universal meeting are limited only to the legal and statutory convening requirements. For example, no actual convocation is required for a universal meeting and the agenda items can be changed as desired.

29 Moreover, the legal and statutory provisions applicable to the general meeting must also be complied with without restriction for the universal meeting. In particular, the legal and statutory quorums (Art. 703 et seq. CO) must be observed. Accordingly, unanimity is not required at the universal meeting, but as a rule the majority of the share votes decides (art. 703 CO). The provision on the recording of the meeting (art. 702 para. 2 CO) also applies without restriction to the universal meeting (see below n. 38 ff.).

30 If the legal requirements of Art. 701 para. 1 CO are met, any meeting of shareholders (or their representatives) may in principle be declared a general meeting. For example, a joint meeting of all shareholders may be expanded into a

universal meeting and the resolutions reserved for the general meeting may be passed at this meeting.

However, not every informal meeting of all shareholders of the company constitutes a universal meeting without further ado. For example, an informal meal together at the lunch table in a family company is generally not a general meeting, even though all shareholders would be represented at the meeting. For a valid universal meeting, the shareholders must be aware that they are forming a general meeting with a quorum and they must want to do so. In addition, it must be remembered that (apart from the invitation formalities) the other requirements for a general meeting must be complied with, in particular minutes must be kept (see above n. 29). 31

## B. Cure of Convening Deficiencies

If an "ordinary" general meeting was convened, but the convening was defective, for example because the notice period was not observed or the agenda items were not stated in a legally adequate manner, the convening defects are cured with the holding of a universal meeting. 32

# IV. PREREQUISITES NOT MET

## A. Nullity

According to the case law of the Federal Supreme Court, resolutions passed at a "universal meeting", even though not all shares were present or represented at the meeting, suffer from a serious formal defect and are null and void (Art. 706b No. 1 CO). It is irrelevant whether the shareholder who was not present could have prevented the resolution with his voting power. 33

The nullity of a resolution must be established ex officio by the court at any time. This also means that anyone (i.e. also non-shareholders, such as creditors) can in principle invoke a null and void general meeting resolution at any time. Nevertheless, it is required that there is an interest worthy of protection in the determination of the nullity of the general meeting resolution (Art. 59 para. 2 lit. a CCP). 34

The nullity can also be established in appeal proceedings, namely also by the Federal Supreme Court. However, the Federal Supreme Court judges the nullity of a general meeting resolution as a legal transaction under private law 35 only insofar as the nullity can be based on the facts established by the lower court or a legally sufficient supplementation of the facts is required.

## B. Conversion to an ordinary general meeting of shareholders

36 If a shareholder or his representative leaves the meeting, it may be converted into an "ordinary" general meeting. However, such a conversion will usually fail because the convening rules have not been complied with. If, on the other hand, the convening rules have been observed, the meeting can continue as an "ordinary" general meeting after a shareholder has left.

37 The change from a universal meeting to an "ordinary" general meeting must be recorded in the minutes of the meeting. If the meeting continues as an "ordinary" general meeting, the ordinary convening rules shall apply. In particular, the items of business on which the general meeting may decide are limited to those mentioned in the notice of meeting.

# V. MINUTES AND CONDUCT OF PROCEEDINGS

38 The fact that all shareholders or their representatives are present and that no one objects shall be recorded in the minutes of the universal meeting. Under certain circumstances it may also be appropriate to record that all shareholders or their representatives were present until the end of the meeting and to have the minutes signed by all those present.

39 If objections were raised against the universal meeting as a whole or against individual agenda items, this shall be recorded in the minutes. The chairperson of the universal meeting shall be advised to clarify any ambiguities regarding the objection and to ensure legal clarity. If the shareholder's statement is not clear, the chairman should ask the shareholder or his representative whether he objects and if so, against what exactly (against the universal meeting as a whole or against which specific agenda item).

40 If a shareholder raises an inadmissible objection to a motion (see n. 23 above), it is also up to the chairperson to inform the shareholder and ask whether the objection is directed against the entire agenda item. If this is the case, the hearing must be held without the disputed agenda item (see above n. 22). If the shareholder withdraws his objection, the universal meeting shall be continued without further ado. If, on the other hand, the shareholder or representative (inadmissibly) maintains his objection to an individual proposal, the

statement is to be interpreted as an objection to the entire agenda item. Accordingly, the hearing is to be conducted without this item. In such situations, it is recommended that the individual statements be recorded (verbatim).

## VI. OUTLOOK ON THE REVISED COMPANY LAW

The revised Companies Act 2020 does not change the substance of the previous norm of Art. 701 para. 1 and 2 CO. Paragraph 1 of the revised Art. 701 CO merely clarifies the terminology by replacing the term "formal requirements" with "regulations". This is against the background that the universal assembly can not only deviate from formal requirements, but also from other regulations, for example with regard to convocation deadlines. Art. 701 para. 2 CO is adapted to the newly envisaged possibility of using electronic means. "Be present" is therefore replaced by the term "participate". This expresses that a physical presence of the shareholder or his representative is not mandatory. 41

On the other hand, paragraph 3 of Art. 701 CO is new. Under the current law there is no possibility to hold a general meeting in absentia, circular resolutions are inadmissible. In the new company law, more room for manoeuvre is granted. Art. 701 para. 3 revOR provides that resolutions of the general meeting may also be passed in writing (on paper) or electronically. For this type of resolution, all shareholders or representatives must give their consent. 42

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COMMENTARY ON

# Art. 713 CO

A commentary by Roman Aus der Au / Tina Hediger

SUGGESTED CITATION

Roman Aus der Au/Tina Hediger, Commentary of art. 713 CO, in: Lukas Müller (ed.), Online Commentary of the Code of Obligations

Short citation: OK-Aus der Au/Hediger, art. 713 CO N. XXX.

**2. Resolutions**

**Art. 713**

[1] Resolutions of the board of directors are passed by a majority of the votes cast. The chairman has a casting vote, unless the articles of association provide otherwise.

[2] The board of directors may pass its resolutions:

at a meeting that has a physical venue;
by using electronic means, applying Articles 701*c*–701*e mutatis mutandis*;
in writing on paper or electronically, unless a member requests that it be debated orally. If the resolution is passed electronically, no signature is required, unless the board of directors specify a different requirement in writing.

[3] Minutes shall be kept of the board's discussions and resolutions; these shall be signed by the chair and by the minute-taker.

# CONTENT

# I. GENERAL PROVISIONS

1 Article 713 of the Swiss Code of Obligations (CO) governs the adoption and documentation of resolutions by the Board of Directors ("BoD"). It thereby establishes the rules governing the decision-making process of the BoD, understood as a corporate body. Where the BoD has established committees, the provisions of Article 713 CO are often applied by analogy to such committees as well.

2 As part of the **revision of the Swiss Companies Act of June 19, 2020** (effective as of January 1, 2023), paragraph 2 in particular, concerning the possible methods of decision-making, was revised. The use of electronic means of communication to hold meetings is now explicitly permitted, as is the adoption of resolutions without oral deliberation in writing in electronic form—and, if necessary, even without a signature. Furthermore, paragraph 3 reflects the abolition of the formal position of the secretary of the board of directors, which was implemented with the revision of the Stock Corporation Act, by now referring to the minute-taker. Of course, the board of directors is free to establish a secretariat.

3 The recording of a Board resolution in minutes is **not a requirement for validity**, which is why the absence of proper minutes does not a priori render the resolution null and void. However, a Board that fails to record its resolutions commits a breach of duty with corresponding liability consequences for resulting damages. Even a **single-member Board** must therefore record its resolutions.

4 The Board minutes must be drafted in the **language** in which the meeting was held; circular resolutions may be drafted in languages that all Board members are proficient in. It should be noted that foreign-language minutes intended to serve as evidence for the commercial register must, if necessary, be translated into the language required by the competent cantonal commercial register.

## II. QUORUM (PARA. 1)

### A. Decision-Making Quorum

The Board of Directors makes its decisions as a body by majority vote (so-called decision-making quorum). Each Board member has one vote, and—subject to any contrary provisions in the Articles of Association or bylaws—the **majority of the votes cast decides**. The votes of Board members who abstain (whether required to do so or by choice) do not count toward the resolution quorum. A qualified resolution quorum analogous to that of the General Meeting (“GM”) is not provided for, but may be stipulated in the Articles of Association or in the organizational regulations. 5

The chairperson of the respective Board meeting has the **casting vote** unless the Articles of Association provide otherwise. By virtue of this prerogative, the chairperson may, in the event of a tie, determine that the Board pass a resolution even though the resolution did not receive a majority of votes among the Board members due to the deadlock. The legislature thereby facilitates the adoption of resolutions compared to a strict majority principle, under which a decision can only be made if the majority of Board members vote in favor of a resolution and under which a tie does not constitute a resolution. It is common to encounter articles of association that grant the casting vote to the Chair (or Co-Chair) of the Board. This leads to ambiguities if the Chair of the Board of Directors is not presiding over a Board meeting. 6

### B. Attendance Quorum

It is permissible, but not necessary, to stipulate in the articles of association or in the organizational regulations that the Board of Directors is only quorate if a certain number of members participate in the decision-making process (so-called attendance quorum). In such cases, a valid resolution requires the **participation** of the required number of members. If a quorum of members present is to be provided for, it is advisable to include an explicit provision on how to proceed with Board members who recuse themselves during a vote. 7

With regard to **declarations** by the Board of Directors in connection with capital increases or reductions that require public certification, it seems reasonable for the articles of association or the organizational regulations to provide that the presence of just one Board member is sufficient. 8

9 According to prevailing doctrine, **proxy voting** on the Board of Directors—even by another Board member—is considered impermissible because the duties of the Board are deemed strictly personal and non-transferable. Board resolutions that are adopted solely through proxy voting could thus be deemed null and void. Nevertheless, numerous authors advocate for the admissibility of representation within narrow limits. Given the now-simple possibilities for electronic decision-making (see N. 21 below), the question arises as to whether representation is even necessary anymore. One possible solution would be to first hold a board meeting without the participation of the "represented" board member, with the formal resolution being adopted subsequently by circular resolution. The discussion held during the board meeting could then be made available to all board members as minutes and an appendix to the circular resolution to be adopted.

## III. FORM OF RESOLUTION (PARA. 2)

10 Resolutions of the Board of Directors may be adopted at physical and/or virtual (i.e., held using electronic means) meetings, as well as through circular resolutions on paper or in electronic form. These **forms of resolution** are considered equivalent. It is customary for larger companies to specify the form of resolution for the Board of Directors in greater detail in their organizational regulations.

### A. In a meeting with a physical venue (no. 1)

11 In the traditional format of a physical meeting, in which the Board members participate in person, the oral discussion of the agenda items is followed by a vote. While this method of decision-making affords the Board members less geographical flexibility, However, the **physical presence** of the meeting participants also has advantages, as it enables a direct exchange of views during the meeting as well as direct contact before and after the meeting, which can be particularly helpful in reaching a consensus on sensitive matters. In this scenario, an absent board member is not permitted to submit their vote in writing in advance or to be represented at the meeting. The principle of immediacy applies.

## B. Using electronic means (no. 2)

Board meetings using electronic means, which have long been standard practice, particularly for internationally active companies, are now explicitly provided for by law. The new Art. 713 para. 2 CO refers in this regard to the provisions on the use of electronic means in the general meeting in Art. 701c–701e CO, which apply mutatis mutandis. Thus, both **hybrid meetings**, in which participants are present at a physical location as well as those connected electronically, and **meetings held entirely virtually** are possible. The law is formulated in a technology-neutral manner, so that various platforms may be used, such as Zoom, Microsoft Teams, or group calls via WhatsApp or Threema. It is advisable to specify the electronic means used in the minutes. It is essential that the resolution be a decision made within the framework of an immediate oral deliberation. Even with this option, it is not permissible for a board member to submit their vote in writing in advance or to be represented (*digital* immediacy must be ensured; see N. 11 above). 12

It can be inferred from the reference to Art. 701c CO that a **Board resolution regarding** the **admissibility** of this type of meeting is required, whether on an ad hoc basis prior to the meeting, in organizational regulations, or in other regulations. 13

As with the general meeting, the formation of will and **resolution-making** must also be **protected** in accordance with Art. 701e para. 2 CO when conducting a board meeting using electronic means. Thus, the identity of the participating board members must be verified, although identification is simpler here than in a virtual general meeting due to the smaller number of participants and the known group of attendees. Furthermore, remarks must be transmitted in real time, and it must be ensured that every member can submit motions and participate in the discussion. To this end, it is also required that every member has access to any meeting documents provided and can follow presentations by meeting participants. Finally, it must be ensured that the voting results cannot be falsified. 14

If **technical problems** (malfunctions or failure of electronic equipment) arise during a virtual or hybrid board meeting, such that the meeting can no longer be conducted properly, the meeting must be suspended or terminated. The portion affected by the technical disruption must be repeated. Resolutions that were properly placed on the agenda, discussed, and adopted prior to the 15 technical disruption remain valid. Compared to a virtual general meeting, virtual board meetings have lower thresholds for what constitutes a "technical problem" (e.g., whether it must fall within the company's sphere of responsibility or regarding how many shareholders must be affected). According to legal doctrine, a relevant technical problem is deemed to exist in Board meetings if a Board member is prevented from participating, regardless of whose area of responsibility the problem falls under. However, this cannot be interpreted as a free pass to wilfully terminate an unwelcome Board meeting, for example by intentionally interrupting the internet connection. Such conduct violates the duty of loyalty of the board members and, as a manifest abuse of rights, is not protected by law. In unclear situations, it may be helpful for the board members remaining in the meeting to resolve whether the member who is no longer participating is to be considered as intentionally absent from the meeting and whether the meeting should continue.

## C. By Written Procedure (No. 3)

16 Ch. 16 governs the adoption of resolutions by the Board of Directors through written procedure (so-called **circular resolution**). This method of resolution-making is equivalent to resolution-making in a (physical, virtual, or hybrid) meeting. Subject to any deviating provisions in the articles of association or organizational regulations, the normal attendance and voting quorums apply to resolutions passed in writing (see, however, below regarding the right to oral deliberation).

17 The distinctive feature of this type of resolution is that no discussion is provided for within the framework of a meeting. The motion to the Board members should therefore be worded in such a way that it can be answered with a simple "Yes," "No," or "Abstain." In practice, the resolution is typically phrased in the affirmative, and all Board members sign this resolution. However, every individual board member has the **right** to demand an **oral discussion**—without giving reasons. Conversely, an explicit request is required. De facto, there is a requirement for unanimity or a right of veto regarding the method of decision-making (not to be confused with a potential decision-making quorum). However, the duty of care of the individual board member may, under certain circumstances, imply an obligation to request an oral consultation for complex matters with far-reaching consequences, provided that more detailed in-

formation or a more in-depth exchange is necessary for the decision-making process.

The decision-making process is initiated by **sending** the relevant **motion** to the board members, typically by the Chairman of the Board. Board members are required to provide feedback in two respects: 1. Approval of the method of decision-making (or a request for an oral consultation) and 2. Approval, rejection, or abstention regarding the content of the resolution. It is recommended that a deadline for response be set for the Board members. It makes sense to generally define this deadline in organizational regulations, although deviations appropriate to individual cases should be permitted. For non-urgent matters, five business days should suffice. If no such deadline is set, Art. 5 para. 1 of the Swiss CO shall apply. 18

The question arises as to how to proceed if a **Board member does not respond** to the motion. If a motion was verifiably delivered to a Board member via a standard channel and that Board member does not respond within the set deadline, this may be interpreted as implied consent to the manner of decision-making, as the law stipulates that an oral deliberation must be *requested*. Regarding the content of the resolution, silence is presumed to constitute an abstention (with the corresponding consequences regarding the normally applicable attendance and voting quorums). It makes sense to provide for this in the motion itself. Even after the required majority has been reached, the circular resolution remains subject to a suspensive condition until the deadline expires, as a member may still request an oral deliberation. If a member does not respond, a formal confirmation of the resolution by the Chairman of the Board of Directors or the Board member who sent the motion appears necessary. Böckli then advises that circular resolutions be submitted for approval at the following meeting. 19

It is advisable to set forth the procedure and details regarding decision-making by written means in a practical and concrete manner in an **organizational regulation**. 20

In the course of the revision of the Stock Corporation Act, circular resolutions by written means in electronic form were explicitly declared permissible. **Electronic** means, for example, the exchange of emails or the use of electronic board portals. Statements via messaging services such as WhatsApp or Threema may also suffice for this purpose, provided that the expression of in- 21 tent is clear and unambiguous and the senders are clearly identified. A signature by the board member on the circular resolution is therefore not required, unless this is stipulated in writing by the board. A qualified electronic signature or a PDF copy of the signed motion may also be dispensed with. It is still common practice for each board member to sign the circular resolution document, scan it, and return it. There is still no objection to this practice. In connection with circular resolutions made in writing, particularly in electronic form, the requirements of Art. 23 of the CRO must be observed. For example, for the purposes of the Commercial Register, a so-called certification record must be prepared for a Board resolution adopted electronically, which must be signed by at least one Board member authorized to represent the company. This record should reasonably include the procedure for the written resolution as well as the voting results.

22 Regarding the impermissible **combination** of resolution-making at a meeting and a circular resolution, see N. 11 above.

## IV. MINUTES (PARA. 3)

23 Unlike at the general meeting, the board minutes must be drafted as **deliberation minutes** (also referred to as proceedings or discussion minutes). A record in **text form** is required. Video or audio recordings cannot be considered minutes. If the minutes directly refer to supplementary documents or slides presented, it is appropriate to attach these as an appendix to the minutes. In the case of resolutions recorded in a public notarial act, however, only the resolutions themselves are the subject of the notarial recording.

24 The minutes of the meeting must reflect the **resolutions** adopted (including voting results, unless unanimous) as well as the key arguments and positions expressed during the meeting in **summary form**. Board members may, however, request that individual statements made by them be recorded verbatim in the minutes. Taking minutes of board meetings is therefore very demanding. In practice, the following structure is recommended: *1. Background, 2. Discussion, and 3. Resolution*. Furthermore, it is advisable to formulate resolutions clearly as such and to highlight them graphically, as well as to clearly assign pending matters.

25 Otherwise, the law does not specify clear requirements for the general **content of the minutes**, which is independent of the specific agenda item. Ref-

erence can be made to the templates of some commercial registry offices (e.g., the Canton of Zurich) or practical literature. In addition to the proceedings and resolutions, the company name, the format or location, the date, the time (start and end), as well as the participants and guests of the meeting are essential.

Finally, the minutes must be **signed** by the **chairperson** and the **minute-taker** of the respective meeting (in wet ink or via qualified electronic signature) as soon as they have agreed on the content. Subsequent approval of the minutes by the Board of Directors, as is often provided for, is not legally required but is recommended, as it strengthens the presumption of accuracy. It should also be noted that the keeping of minutes is an obligation of the Board of Directors as a body. 26

The minute-taker is free to use **technical aids** for speech recognition or automated summarization via artificial intelligence, but remains responsible for the content, including under criminal law. 27

## V. FURTHER NOTES

If a Board resolution results in a fact that is entered in the **Commercial Register**, the original Board minutes, or an extract thereof, or a circular resolution must be submitted to the Commercial Register Office as supporting documentation. If a resolution is subject to notarization, the notarized document must be submitted as supporting documentation. 28

Whether a board resolution must be adopted by **public notarization** is governed by law (e.g., when the articles of association are amended pursuant to Art. 647 CO). Board resolutions adopted in a virtual or hybrid meeting may be publicly notarized if there is a continuous video and audio transmission between the notary and the chairperson. In practice, it is often required that the notary be in the same room as the chairperson. Circular resolutions may be notarized by having the notary personally participate in the counting of the votes received and verify the organization of the circular procedure. The voting result and the declaration that the resolution has been passed are then recorded in the public document (so-called certification protocol). In the case of virtual board meetings, the certification required by the notary public—confirming that certain supporting documents were available to the board members—should not pose any significant problems: Either the documents 29 are prepared in duplicate, or certified copies are made. While the notary has the originals in front of them, the board members have either additional originals or certified copies and hold these up to the camera to confirm their availability. If, on the other hand, the resolution is passed by circular resolution, the requirement is likely met only if the presence of a single board member is deemed sufficient for board resolutions subject to notarization in the context of a capital increase; otherwise, a (physical or virtual) board meeting cannot be dispensed with.

30 If a resolution requiring notarization is adopted at a **meeting abroad**, the document must first be super-certified or provided with an apostille to be admissible for entry in the Commercial Register. Furthermore, the Commercial Register Office may require proof that the foreign notarization procedure is equivalent to the public notarization procedure in Switzerland and may request an expert opinion for this purpose and designate the expert.

31 Under certain circumstances, board minutes may qualify as **declarations of intent** by the board members present.

32 Particularly with regard to **liability or reimbursement proceedings** against board members, it should be noted that board minutes constitute admissible **evidence** (document pursuant to Art. 177 of the Swiss CPC, or public document pursuant to Art. 9 of the Swiss CC and Art. 179 of the Swiss CPC). They can be used to demonstrate due diligence. Accordingly, board members are well advised to request copies of the minutes.

33 There is no analogous provision regarding the keeping of minutes for the management of a **GmbH**, although it is recommended. In the case of a **cooperative**, the administration is responsible for ensuring that its minutes are kept. The relevant literature, but not the law, refers to Art. 713 CO regarding stock corporation law.

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COMMENTARY ON

# Art. 715 CO

A commentary by Nicolas Facincani / Lukas Gayler

SUGGESTED CITATION

Nicolas Facincani/Lukas Gayler, Commentary of art. 715 CO, in: Lukas Müller (ed.), Online Commentary of the Code of Obligations

Short citation: OK-Facincani/Gayler, art. 715 CO N. XXX.

**4. Right to convene meetings**

**Art. 715**

Any member of the board of directors may request that the chair convene a meeting without delay, but must state the reasons for his request.

# CONTENT

# I. INTRODUCTION

## A. General

The Swiss Code of Obligations does not provide for any regulation as to when and where meetings of the Board of Directors must be convened and whether deadlines must be observed in this context. In principle, the full Board of Directors would be responsible for the decision to meet on a certain day, at a certain time and at a certain place, as the law does not contain any other provision. According to doctrine and practice, however, the Chairman of the Board of Directors is granted independent discretion to decide whether to convene a meeting. 1

Art. 715 CO enshrines the individual right of the member of the Board of Directors to convene a meeting of the Board of Directors without delay. This individual right is directly related to the individual duty of care and loyalty pursuant to Art. 717 CO and the responsibility for proper management pursuant to Art. 754 CO. However, with the rudimentary regulation in Art. 715 CO, the legislator has left the concrete form of this individual right to practice and the judge. Art. 715 CO, on the other hand, does not grant the member of the Board of Directors the right to conduct a circular resolution procedure. 2

## B. Revisions to company law

The provision of Art. 715 CO was amended with the 1991 reform of company law to the extent that the written form requirement was waived. It was also clarified that a meeting must be convened immediately upon request. In addition, the Council of States added the obligation to state reasons. 3

The provision of Art. 715 CO was not under discussion as part of the 2020 reform of company law and therefore remained unchanged. 4

## C. Statutory regulation and modifications

Each individual member of the Board of Directors has the right to request that a meeting of the Board of Directors be convened. This individual right cannot be withdrawn or restricted. The Chairman of the Board of Directors may only reject a request if the request is an abuse of rights or is made with clearly objectionable intent. 5

6 Art. 715 CO does not grant an individual right to a direct convocation of the Board of Directors. Such a right only exists if it is provided for in the articles of association or the organizational regulations of the company limited by shares.

7 The right to convene a meeting of the Board of Directors is of a mandatory nature. It can therefore neither be restricted nor completely excluded in the articles of association or the organizational regulations of a public limited company.

8 Provisions deviating from Art. 715 CO must be set out in the organizational regulations, as the right to convene a meeting is an inalienable individual right of the Board of Directors, which falls within the core competence of the Board of Directors pursuant to Art. 716a para. 1 no. 2 CO (determination of the organization). This inalienable and non-transferable competence of the Board of Directors is beyond the control of the General Meeting.

9 Statutory provisions that withdraw or restrict the authority to convene a meeting of the Board of Directors in accordance with Art. 715 CO are null and void within the meaning of Art. 706b CO. Any regulatory provisions are null and void within the meaning of Art. 714 CO in conjunction with Art. 706b CO.

10 By contrast, the modalities for exercising the right to convene a meeting of the Board of Directors are dispositive in nature. These include, in particular, the modalities listed below:

- The form in which the request must be submitted;
- The deadline to be met with regard to convening the meeting;
- The person to whom the request is to be addressed.
- For example, the request may be prescribed in writing or the deadline may be specified in the context of the term "without undue delay", for example within three days of receipt of the request.

11 Furthermore, provisions at the level of the organizational regulations that extend the right to convene a meeting are permissible. Examples of such provisions are listed below:

- a provision that grants each individual member of the Board of Directors the right to directly convene a meeting of the Board of Directors;

- a provision that enables the member of the Board of Directors to address the request to convene a meeting of the Board of Directors directly to the member responsible for convening the meeting in accordance with the company's rules of procedure;
- an extension of the authority to convene meetings to other persons (e.g. to the secretary of the Board of Directors);
- a provision stating that a request to convene a meeting of the Board of Directors is also permissible without stating reasons.

## II. THE REQUEST TO CONVENE A MEETING OF THE BOARD OF DIRECTORS

### A. Formal requirements

The request to convene a meeting of the Board of Directors is not subject to 12
any special formal requirements. The requirement of written form was waived with the 1991 reform of company law.

The request to convene a meeting of the Board of Directors may be submitted 13
verbally, by telephone or by electronic means of communication. Written submissions are of course also possible.

The organizational regulations may stipulate that the request must be submit- 14
ted in writing. Such a provision is recommended in any case, on the one hand for reasons of proof, but also with regard to the traceability of the application by the other members of the Board of Directors.

### B. Duty to state reasons

The request is subject to a general obligation to state reasons. This follows 15
from the wording of the law and applies regardless of the form in which the request is made or submitted.

The duty to state reasons is not subject to stringent requirements. Neither the 16
formulation of an agenda item or several agenda items nor the submission of motions with regard to an agenda item or several agenda items is required.

The request to convene a meeting must generally describe the topic to be dis- 17
cussed so that the Chairman of the Board of Directors can convene the meet-

ing and the other members of the Board of Directors can prepare for the meeting. However, it must not be inferred from the obligation to state reasons that the right to request the convening of a meeting of the Board of Directors only exists in justified cases.

### C. Addressee

18 It is clear from the wording of the law that the request must be submitted to the Chairman of the Board of Directors. This requirement remains in place even if the organizational regulations assign the responsibility for convening a meeting of the Board of Directors to another person.

## III. CONVENING THE MEETING OF THE BOARD OF DIRECTORS

### A. Authority to convene a meeting

19 In principle, the convening of a meeting of the Board of Directors is the responsibility of the Chairman of the Board of Directors. If this authority is assigned to another person (e.g. the Delegate of the Board of Directors), the Chairman must ensure that this person performs his duties, if necessary. If the Articles of Association or the Organizational Regulations indicate that another member is responsible for convening a meeting, this member must consult with the Chairman.

### B. Form of convocation and time of the meeting

20 Subject to statutory or regulatory provisions, the meeting of the Board of Directors may be convened in any form, whereby at least the time and place must be stated. For reasons of proof, however, a written invitation is also recommended in this context, as resolutions passed at meetings to which not all members of the Board of Directors have been invited are null and void in accordance with Art. 714 CO. The meeting of the Board of Directors must be scheduled in such a way that the members of the Board of Directors with the necessary good will are able to attend.

# IV. JUDICIAL ENFORCEMENT

## A. Admissibility of an action for performance

Art. 715 CO does not stipulate that the judge can order the convening of a meeting of the Board of Directors upon request in the event of a refusal. This is in contrast to the shareholder's right to convene a general meeting in accordance with Art. 699 CO. Paragraph 5 of this article expressly states that the shareholder may appeal to the judge. As far as can be seen, however, the doctrine almost unanimously assumes that the petitioner is also entitled to a corresponding action for performance based on Art. 715 CO, as the Federal Supreme Court has now ruled in BGE 144 III 100 E. 5.2.2 in connection with the right to information of the members of the Board of Directors. Based on such an action, the judge can order the convening of a meeting of the Board of Directors or convene it himself. 21

## B. Active and passive legitimation

A member of the Board of Directors whose request to convene a meeting of the Board of Directors has been rejected or whose request has not been acted upon has the right to bring an action for performance. 22

The company has no right of action. 23

The question of standing as a defendant is less clear. In principle, the company or the chairman of the board of directors can be considered as defendants. In contrast to Art. 699 CO, Art. 715 CO does not entrust the Board of Directors as a whole, but rather the Chairman of the Board of Directors directly with the task of convening a meeting of the Board of Directors. Therefore, there is no need to ask whether all members of the Board of Directors have the right to act as a passive shareholder. 24

With regard to Art. 715 CO, it should be noted that the company is ultimately responsible for the duty to convene meetings of the Board of Directors. It is only exercised by its executive bodies. Based on this, the passive legitimation of the company must be affirmed. 25

There is controversy among scholars as to whether the Chairman of the Board of Directors also has passive legitimacy. In our opinion, there is a strong argument in favor of a corresponding passive legitimation, which arises direct- 26 ly from the legal text. For example, Art. 715 CO expressly assigns the duty to a specific board member, namely the Chairman of the Board of Directors. However, the relevant question has not been clarified by the highest court.

27 The value in dispute of the action for performance to convene a meeting of the board of directors is not easy to determine and can be determined or estimated on the basis of the decisions that should be taken at the meeting or the steps that they could entail

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COMMENTARY ON

# Art. 715a CO

A commentary by Nicolas Facincani / Lukas Gayler / Seline Wissler

SUGGESTED CITATION

Nicolas Facincani/Lukas Gayler/Seline Wissler, Kommentierung zu Art. 715a OR, in: Lukas Müller (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Facincani/Gayler/Wissler, N. XXX zu Art. 715a OR.

**5. Right to information and of inspection**

**Art. 715a**

1 Any member of the board of directors may request information on any company business.

2 At meetings, all members of the board of directors and all persons entrusted with managing the company's business are obliged to give information.

3 Outside meetings, any member may request information from the persons entrusted with managing the company's business concerning the company's business performance and, with the chair's authorisation, specific transactions.

4 Where required for the performance of their duties, any member may request the chair to have books of account and documents made available to them for inspection.

5 If the chair refuses a request for information, a request to be heard or an application to inspect documents, the board of directors shall rule on the matter.

6 Rulings or resolutions of the board of directors conferring on the directors more extensive rights to obtain information or inspect documents are reserved.

# CONTENT

# I. INTRODUCTION

1 The right of members of the board of directors to information and inspection has been governed by a separate provision in Art. 715a CO since the 1991 revision of company law. This provision remained unchanged under the 2020 Company Law Reform, although the regulation of the shareholder's rights to information was changed.

2 Art. 715a para. 1 CO sets out the principle of the unrestricted right to information. Paragraph 2 in turn specifies the requests for information during board meetings. For requests for information outside board meetings, paragraph 3 partially restricts the right to information. The right to inspect books and records is regulated in paragraph 4. Paragraph 5 contains a procedural provision if the chairman of the board of directors rejects a request for information, hearing or inspection. Finally, paragraph 6 clarifies that regulations and resolutions of the board of directors which extend the right to information or inspection of the members of the board of directors are permissible. Thus, the rights contained in paragraphs 1 to 4 can be qualified as inalienable or as a mandatory minimum standard. On the other hand, the restrictions set out in paragraphs 3 and 4 can also be completely removed or the circle of those obliged to provide information can be extended.

3 Members of the board of directors may request information during meetings of the board of directors from the other members of the board of directors and any other persons present who are entrusted with the management of the company. Outside of meetings of the Board of Directors, a member of the Board of Directors may request information on individual transactions only with the authorisation of the Chairman. The consent of the Chairman of the Board of Directors is also required for the inspection of books and files.

4 The right of inspection and information is caught between the board's need for information and its improper use. The responsibility of the board of directors for breaches of duty presupposes a comprehensive level of knowledge and consequently also corresponding access to information. On the other hand, there is the urgent need of the company to prevent possible abuses by individual members of the board of directors.

5 On the one hand, an act of abuse may exist if information is used in the self-interest of a member of the board of directors, whereby it is assumed that

such self-interest is contrary to the interests of the company and that the member of the board of directors would therefore have to resign. On the other hand, abuse can also occur in the case of the disclosure of business secrets. Accordingly, it is disputed in the doctrine whether the company's interest in secrecy conflicts with the board member's need for information or can limit it.

## II. THE GROUP OF PERSONS OBLIGED TO PROVIDE INFORMATION

It already follows from the wording of the law that the members of the board 6 of directors and the persons entrusted with the management of the company are obliged to provide information (Art. 715a para. 2 CO). Accordingly, the duty to provide information also extends to delegates, directors, authorised signatories, agents and employees who, under the supervision of the management, perform management tasks independently as well as in their own authority. Thus, silent and de facto members of the board of directors as well as substitutes are also subject to the duty of disclosure. Only employees and auxiliary persons who are not authorised to sign are exempt from the duty to provide information.

## III. EXERCISING THE RIGHT TO INFORMATION AND INSPECTION: THE "CHAIN OF COMMAND

The "chain of authorities" for the assertion of the right to information and in- 7 spection is structured as follows:

- Requests for information must in principle be addressed to the Chairman of the Board of Directors.
- During meetings of the Board of Directors, requests may be made directly to all persons obliged to provide information (cf. n. 3). In this context, no authorisation of the Chairman or the entire Board of Directors is required.
- Outside of meetings of the board of directors, the ordinary "chain of command" must be observed unless otherwise provided for in organisational regulations. This is important in view of the fact that equal information of all members of the board of directors must be ensured. The chairman of the board of directors must therefore be informed of the request for information and its response in order to be able to inform the other members of

the board of directors if necessary. If the Chairman has to decide on a request for information or inspection, he must make his decision according to due discretion and a weighing of interests. The president must give reasons for the rejection of a request within the meaning of art. 715a paras. 3 and 4 CO. If the request is rejected by the chairman, the member of the board of directors concerned may appeal to the full board of directors, whose decision is final subject to judicial review (cf. n. 23 ff.). The board of directors has to decide according to the same criteria as the chairman. In our opinion, the member making the request must abstain from the decision of the full board of directors, as he or she is likely to be in a conflict of interest.

8 Questions about the course of business are exempt from the right of appeal. The report on the course of business shall bring to the attention of the individual member of the Board of Directors the fulfilment or non-fulfilment of the business prospects in the last period of time as well as special events.

9 If the board of directors has formed committees which are not chaired by the chairman of the board of directors, a different "chain of command" results. Members of the Board of Directors who do not belong to these committees must inquire directly with the chairperson of the committee. Furthermore, the committee must be able to obtain information directly from members of the Executive Board in the course of its work.

## IV. THE SCOPE OF INFORMATION RIGHTS

## A. The comprehensive right to information during board meetings

10 According to Art. 715a para. 1 and 2 CO, the right to information during board meetings is comprehensive. Comprehensive means that the board of directors is entitled to information on all matters concerning the company. This includes both a right to information on the general course of business and a right to detailed information on individual factual transactions. The only prerequisite is that there is a certain connection between the board mandate and the information. Even if the right to information is primarily limited to transactions within the company itself, the right to information of a member of the board of directors at a parent company also extends to transactions concern-

ing the subsidiary. Excluded from the right to information is information concerning the private affairs of employees or information that serves to satisfy the private interests of the members of the board of directors.

All members of the board of directors and the persons entrusted with the management of the company have an unlimited duty to provide information. This means more than just answering questions posed. Rather, the designated persons are also obliged to report spontaneously on matters of importance to the board of directors. Finally, only an informed board of directors can also ask the right questions. 11

The chairman must ensure that questions can be asked and also answered by the appropriate person. In this context, he must either invite the relevant persons to the meeting or collect written documents. However, it cannot be demanded of the persons obliged to provide information that they are always available for spontaneous enquiries. Rather, in such a case, the information must be provided as soon as practically possible. 12

## B. The unrestricted right to information on the course of business outside board meetings

As a correlate to the personal responsibility of the board of directors, it has an unlimited right to information about the course of business also outside meetings of the board of directors. With the approval of the Chairman, the Board of Directors may also request information on individual transactions. The authorisation by the Chairman of the Board of Directors shall be granted in principle. The authorisation may only be refused within the limits already described (cf. in particular the cases of abuse listed under n. 5), whereby the principle of proportionality must always be observed. The principle of proportionality may also lead to a request for information being granted only in part. 13

## C. The right to timely and complete submission of documents before the board meeting

As part of the right to information, the members of the board of directors are entitled to the timely and complete submission of documents prior to the respective meeting. The scope of the relevant documents depends on the agenda and the topics to be discussed. In other words, there is a right to compre- 14 hensive information prior to a Board meeting. The law does not specifically regulate the information to be provided in preparation for a board meeting. The Chairman of the Board of Directors is responsible for preparing and chairing the meeting. According to the Swiss Code of Best Practice 2023, the chairman of the board of directors is the guarantor of information. In cooperation with the executive board, he must ensure that the members of the board of directors are informed in a timely manner about all aspects of the company that are relevant for the formation of the will and the supervision. In connection with the right to timely and complete submission of documents prior to the board meeting, the Swiss Code speaks of "clearly prepared and comprehensible documents" which must be made available to the board members. In our opinion, this formulation is convincing from a factual point of view, which is why the Swiss Code can be used as an interpretation aid in practice.

15 The members of the board of directors should, as far as possible, receive the clearly prepared documents prior to the meeting, whereby the delivery can be made both by post and electronically, regardless of whether the meeting takes place physically, electronically or virtually afterwards. Otherwise, the Chairman shall arrange for the documents to be made available for study with sufficient time before the meeting. This ensures that all Board members can form an informed opinion with regard to decisions.

16 The documents for a Board meeting must be available in good time. If this is not the case, the Board members must take action. If necessary, they must move at the meeting to reject or postpone the business. What period of time is still considered reasonable must be assessed on a case-by-case basis.

## V. THE RIGHT TO INSPECT BOOKS AND RECORDS

17 The members of the board of directors have an individual right to inspect books and records both inside and outside board meetings. The terms are to be interpreted broadly to include all corporate records recorded on written or electronic media to which the company has access. In particular, members have a right to the minutes of meetings and the corresponding documentation, unless there is a case of abuse (cf. n. 5). This also applies to members who are in recusal.

18 The term "books" includes the actual business books within the meaning of Art. 957 ff. CO as well as correspondence. However, this does not include the

share register, as each member of the board of directors has an unrestricted right of inspection in this respect, as he or she shares responsibility for it. Finally, each member of the Board of Directors has free access to the files of the Board of Directors, its committees and in particular the Chairman's Committee. The term "files" basically includes all documents relating to the activities of the company, in particular also all relevant computer data.

The right of inspection does not include the unconditional right to make 19
copies of the documents and to take them away. However, the president may permit copying of relevant parts of the internal documentation in the interest of the company. The right of inspection must be exercised in person, whereby the member of the Board of Directors who inspects the documents may submit a request to the President to be accompanied by a competent expert.

The right of inspection according to art. 715a para. 4 CO is most restricted by 20
law. Thus, the books and records may only be inspected "to the extent necessary for the performance of a task". Whether this requirement is fulfilled thus depends primarily on the organisation of the corporation in question. The member of the board of directors requesting inspection must indicate to the chairman of the board of directors how the inspection is relevant to the performance of his duties. Whether the request for inspection (or also for information requests) to the chairman of the board of directors may be made in writing is disputed in the doctrine. For evidentiary reasons, the written form for the request (and possibly the answer to it) may be necessary. In our opinion, the written form can be required and results from the right and duty of the board of directors to organise itself. However, the requirements for the form should not be set too high in any case: A request for inspection by e-mail should be considered sufficient in any case, even if the organisational regulations require it to be in writing. The chairman decides whether the board member is granted access.

## VI. THE TEMPORAL ASPECT OF THE RIGHT TO INFORMATION UNDER ART. 715A CO

The right to information begins with the election as a member of the board of 21
directors and ends with his or her departure through the end of the term of office, resignation or being voted out of office. After resignation as a member of the board of directors, he or she becomes either an ordinary shareholder or

an outside third party who has no right to additional information. In principle, this also applies if the request for information concerns circumstances or documents dating back to the period of activity of the board of directors. This is justified by the lack of interest of a former member of the board of directors in asserting the right to information and inspection. If a member of the board of directors is threatened with dismissal, for example because his dismissal is on the agenda of the upcoming general meeting, it is conceivable in principle to apply to the competent court for precautionary measures (also superprovisional). However, such measures are only granted under substantially increased requirements.

22 Only if a former member of the board of directors is dependent on access to the required information during the former term of office due to a legal dispute - in particular due to liability or fee claims - is there a corresponding claim against the company even after leaving office.

## VII. THE JUDICIAL ENFORCEMENT OF THE RIGHT TO INFORMATION AND INSPECTION

23 For a long time, the question of the judicial enforceability of the right to information of members of the board of directors pursuant to Art. 715a CO by means of an action for performance was highly controversial in the doctrine. The law does not explicitly provide for the possibility of an action. In 2018, the Federal Supreme Court ruled in favour of the admissibility of an action for performance. Accordingly, the right to information can also be enforced in court outside of board meetings. After a detailed discussion of doctrinal opinions and an interpretation of the relevant provision, the Federal Supreme Court came to the conclusion that the purpose of Art. 715a CO is to ensure that the board of directors can effectively and efficiently perform its duties as a management and supervisory body. If the legislator therefore assumed that the information rights protected by Art. 715a CO were necessary for the effective fulfilment of the aforementioned tasks, this purpose in particular spoke in favour of the possibility to sue. Moreover, the knowledge that information rights are not actionable could unjustifiably give impetus to a refusal of information by the board of directors. In this regard, an action for nullity of the board of directors' resolution would not remedy the situation if it did not result in the granting of information. However, the court must always examine in each individual case whether the requested information is necessary to ful-

fil the mandate of the board of directors or whether the inspection would be contrary to the overriding interests of the company.

The decision of the Federal Supreme Court may have to be upheld, as the rights to information and inspection of the members of the board of directors set forth in Art. 715a CO are a fundamental prerequisite for their dutiful performance of their duties pursuant to Art. 717 CO. Such an action for performance falls within the scope of summary proceedings. 24

The claim under Art. 715a CO is personal in nature and cannot be assigned. As information is to be made available by means of an action for performance, which is intended to serve the performance of the statutory duties, only the person who is still a member of the board of directors not only when the action is initiated, but also when the judgement is rendered, is in principle entitled to take action. An exception has to be made in the aforementioned example of the former member of the board of directors who is dependent on the information in the context of a lawsuit (cf. n. 22). It is not the chairman of the board of directors or the board of directors as a whole who has the right to sue, but the company. 25

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COMMENTARY ON

# Art. 734f CO

A commentary by Lucas Forrer / Matthias Müller

SUGGESTED CITATION

Lucas Forrer / Matthias Müller, Kommentierung zu Art. 734f OR, in: Lukas Müller (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Forrer / Müller, N. XXX zu Art. 734f OR.

**VII. Gender representation of on the board of directors and in the executive board**

**Art. 734f**

Unless each gender makes up at least 30 per cent of the board of directors and 20 per cent of the executive board, the following must be indicated in the remuneration report of companies that exceed the thresholds in Article 727 paragraph 1 number 2:

the reasons why genders are not represented as required; and
the measures being taken to increase representation of the less well represented gender.

# CONTENT

# I. INTRODUCTION

## A. Overview of the content and background of the provision

1 Art. 734f CO anchors binding gender benchmarks in Swiss company law for the first time. Accordingly, if the statutory benchmarks are not met, the companies covered by the norm must report on the reasons for this under-representation and on the measures taken to promote the under-represented gender. In everyday political life, the term "gender benchmarks" is also referred to by the catchy but not very precise buzzword "women's quota". Even a glance at this legal mechanism reveals that it is not a real quota, but only (but nevertheless) a guideline with binding force of a "lesser degree". This peculiarity will be discussed in detail later. In contrast to many foreign counterparts, Art. 734f CO is characterised by the much-vaunted Helvetic ("friendly federal") inclination towards compromise and moderation.

2 Art. 734f CO is a genuinely socio-politically (and thus legally) motivated provision. It is an expression of the trend of our time, in which the private and the public are becoming increasingly intertwined. The "advancement of women" is no longer just a matter for the state (the public), but also for private companies. It is therefore not surprising that the amendment to the Stock Corporation Act of 2020 threatened to fail because of this one provision, which is hardly decisive in view of the whole - so much did it heat up political tempers! In any case, in the literature on company law, concerns have rightly been raised that company law, despite its outstanding importance for economic life, is not the appropriate place for the realisation of socio-political desiderata. Gender equality is an issue for society as a whole and for the economy as a whole; an internal, close, exclusive connection with company law is alien to it. The aim of company law (company law in general) is rather to ensure the functioning of the organisation under company law in the interests of the economic "owners" of the company (i.e. in the case of the public limited company, the shareholders); public limited companies, even those listed on the stock exchange, are not part of the (political) public, but subjects of the private legal order in the service of their owners (shareholders). Of course, the legislator, in its plenitude of power, does not need to concern itself with such systematic and theoretical considerations of principle.

## B. Purpose of the Norm

The purpose of Art. 734f CO is to realise the constitutional mandate given to the legislature to ensure the actual equality of men and women at work (Art. 8 para. 3 sentence 2 BV). Although the wording of the provision does not refer to a specific gender and is therefore formulated neutrally, it is clear from the legal situation and the history of the provision that the aim of the provision is to increase the proportion of women in management. According to the Federal Council's message, the provision is intended to send a clear signal to the business community to "intensify efforts to actively and comprehensively promote women in management, the gender that is still significantly underrepresented in top management". However, the provision does not seek to impose a specific gender ratio in management by force; it only seeks to work towards this by means of mandatory reporting. 3

## C. Legal situation; comparison with other countries

Empirically, it is clear that women are less strongly represented than men on the management floors of large (mostly listed) companies in Switzerland. However, for some time now there has been a discernible trend towards a balanced representation of both genders both on the boards of directors and on the executive boards of such companies. Not only is it sometimes declared in the media that it wants to significantly increase the proportion of women in the most important management positions in the coming years. Since 2012, investors have even shown a clear preference for female board members - even though gender guidelines were only officially included in the revision of company law at the end of 2014. According to the Schilling Report 2022, the proportion of women on the boards of the 100 most important Swiss companies is now 26 per cent (2010: 10 per cent), and 17 per cent (2005: 4 per cent) on the executive boards. The proportion of women on the boards of SMI-listed companies is somewhat higher: 30 percent (2010: 11 percent), and 19 percent (2010: 5 percent) on the executive boards. According to the European Women on Boards network, Switzerland ranks 15th out of 19 in terms of the proportion of women on boards of directors and 14th in terms of management boards. The (current) gap compared to the European countries can probably be explained by the fact that efforts have been underway there for years to significantly increase the proportion of women in management, namely by means of binding gender quotas. 4

## D. Constitutional starting position

5 The constitutional issues associated with the introduction of gender benchmarks cannot and should not be discussed in detail here. Art. 734f CO interferes with the economic freedom protected by constitutional law, which includes, among other things, the right of men to free access to private-sector gainful employment and business activities, as well as the right of private companies to freely choose their labour relations and to freely organise themselves (freedom to determine the composition of their own management bodies).

6 However, the literature here, citing Art. 8 para. 3 sentence 2 of the Federal Constitution, is of the opinion that the gender benchmarks and the chosen comply-or-explain approach, as comparatively "mild" measures, are within the legal requirements; they are ultimately proportionate and constitutional encroachments on the affected fundamental rights. In its message on the new company law, the Federal Council also stated that in view of the obligation to only have to declare non-compliance with the gender benchmarks, the restriction of economic freedom was proportionate. The justification for the state intervention was Article 8 para. 3 sentence 2 of the Federal Constitution, according to which the law must ensure the legal and actual equality of men and women, especially at work; this also included measures to compensate for the under-representation of women in the management bodies of private companies or the specification of target figures.

7 This justification by the Federal Council and the literature has rightly been criticised in the literature: The empirically established under-representation of women in management bodies does not necessarily lead to the conclusion that there is a lack of equality (discrimination). On the contrary, the Federal Supreme Court has clearly rejected equality of outcome in this sense. Regardless of this, there should ultimately be no constitutional concerns that would make the gender benchmarks appear unconstitutional. Admittedly, with or despite the affirmation of the constitutional admissibility of gender benchmarks, the legal-political question of whether it makes sense to introduce them in the private sector remains unanswered. The focus of gender benchmarks solely on the balanced representation of both genders in the top management of large companies here could distract from the actual challenges for gender equality, which lie, for example, in the area of creating conditions for better reconciliation of family and work.

# II. HISTORY OF ORIGINS

## A. Legal situation prior to the 2020 amendment to the Companies Act

### 1. Law

#### a. At board level

Until now, legally binding quotas or benchmarks for gender representation were alien to Swiss company law. Prior to the entry into force of Art. 734f CO as of 1 January 2021, the general meeting of shareholders was free to introduce an eligibility requirement in the articles of association with effect for the board of directors, which aimed at ensuring a certain (percentage) minimum gender representation. The question of the admissibility of a gender-based eligibility requirement has so far been discussed only cursorily in the legal literature. As an objection against the admissibility of a statutory regulation concerning gender representation, the protection of personality and the principle of equal treatment have been asserted in particular. However, this view cannot be accepted. It is not clear why the consideration of other personal characteristics such as age or nationality should be permissible in the articles of association, but not gender. The general meeting (of a listed company) therefore already had the possibility under the old law to regulate gender at the level of the board of directors. 8

#### b. At the executive board level

The general meeting of shareholders may limit the delegation competence of the board of directors by way of a provision in the articles of association (Art. 627 No. 12 CO or, in future, Art. 716b para. 1 revOR). Thus, both before and after the entry into force of Art. 734f CO, not only statutory provisions on the appropriate representation of the sexes, but also percentage quotas in the executive board are to be regarded as permissible. 9

### 2. Self-regulation

For a long time, the Swiss Code of Best Practice for Corporate Governance (Swiss Code) did not contain any regulation regarding gender representation in management bodies. Against the backdrop of the political discussion sur- 10 rounding the demand for a stronger representation of women in management bodies, the Swiss Code in the revised version of 2014 recommends under section 12 ("Composition of the board of directors and executive board") that the board of directors should include both male and female members, combined with the obligation to "comply or explain". At the same time, however, it is emphasised that candidates of both genders must have the necessary skills to form their own opinions in order to ensure a critical exchange of ideas with the executive board.

## B. Course of the legislative work

11 Neither the 2005 preliminary draft nor the 2007 draft of the new company law included provisions on the composition of the board of directors or the executive board. Nor were transparency provisions for gender diversity in corporate governance included. It was not until the preliminary draft of 28 November 2014 that the Federal Council submitted a proposal for a legal provision regarding gender diversity, which was almost identical to the current provision of Art. 734f CO ("guideline values for the representation of both genders on the board of directors and executive board" of larger listed companies).

12 During the consultation process, the goal of better representation of women on the board of directors and executive board of listed companies was generally considered desirable. However, the opinions on the concrete implementation were controversial. Business associations and bourgeois parties demanded that a legal norm be dispensed with. A diametrically opposed position was taken by various women's rights organisations and parties belonging to the social democratic spectrum, which welcomed the regulation and sometimes called for more effective control mechanisms and sanctions.

13 Despite this initial situation, the Federal Council maintained its original proposal from 2014 in the 2016 draft, whereby, in contrast to the 30 per cent of women on executive boards required in the 2014 preliminary draft, it should now be just 20 per cent, and this after a longer transition period of ten years instead of five. For members of the board of directors, the proposal of the 2014 preliminary draft remained unchanged.

14 The National Council approved the regulation proposed by the Federal Council in the 2016 draft in the 2018 summer session after heated discussions -

with a majority of one vote. On 19 June 2019, the Council of States joined the National Council by 27 votes to 13.

## C. Entry into force

The revision of company law was adopted on 16 June 2020. Unlike the other adjustments, the introduction of the gender guidelines did not require any implementing provisions. At its meeting on 11 September 2020, the Federal Council therefore enacted the corresponding provisions on gender benchmarks with effect from 1 January 2021. 15

# III. LEGAL SYSTEM AND LEGAL NATURE

## A. Systematic position in the law

Art. 734f CO will in future be found in the fourth section concerning the remuneration of listed companies (Art. 732 et seq. revOR), which was included in the course of the revision of company law in the summer of 2020 for the purpose of transferring the OaEC into the CO and will enter into force in its entirety with effect from 1 January 2023, and will in future, according to its marginal note, be included in the provisions on the remuneration report (Art. 734 et seq. revOR). However, there is no dogmatic or even thematic connection between regulations governing the remuneration of management and those governing gender benchmarks. The only commonality is that they both serve the realisation of socio-political desires: in the former, the prevention of "rip-offs" by management, in the latter, the creation of "equality" in management. The Federal Council has justified the legal-systematic link to the remuneration report on the grounds that this would avoid the establishment of a new instrument in company law. Although for reasons of dogmatic-systematic "purity" it would have been preferable to include the provisions on gender benchmarks in the provisions on the composition of the board of directors (Art. 707 et seq. CO), the Federal Council's pragmatic argumentation is certainly in keeping with the Swiss penchant for practicability. 16

## B. General Character of the Norm

### 1. Mandatory Norm

17 Art. 734f CO is mandatory law. Although this is not readily apparent from the wording of the provision, the interpretation, in particular in view of the purpose of the provision, does not reasonably allow for any other conclusion. If the company were able to waive the provisions on gender standards, for example in its articles of association, the intention of the legislator would be reduced to absurdity. Legal policy concerns of all kinds that are elevated to the status of law must, as a rule, be of a mandatory nature. The "degree of compulsion" of Art. 734f CO is, however, reduced due to the special legal nature of this norm.

### 2. Lex specialis

18 Art. 734f CO is a lex specialis. This characterisation is of course not very meaningful as long as it is not explained to what extent the scope of application of this lex specialis extends and what its relationship is to the lex generalis. The rule "lex specialis derogat legi generali" is a purely formal and therefore not very productive rule, which only gains significance through the interpretation of the lex specialis, whereby above all teleology plays an important role. With regard to Art. 734f CO, the following can be said: If all the constituent elements of this norm are fulfilled, then it displaces (derogates) Art. 698 para. 2 no. 2 CO concerning the free right of the general meeting to elect the members of the board of directors and Art. 716b para. 1 CO concerning the power of the board of directors to freely select those persons to whom it intends to transfer the management. However, derogation only occurs to the extent of the scope of application of Art. 734f CO and the legal consequences ordered by this norm. Specifically: Since the legal consequence of Art. 734f CO - namely: obligation to give reasons - is not in irreconcilable conflict with the legal consequences of Art. 698 para. 2 no. 2 CO or Art. 716b para. 1 CO - namely: legal effectiveness of the act of election or transfer - these legal consequences are not superseded by that legal consequence. Although Art. 734f CO is a lex specialis vis-à-vis these two provisions, its scope of application is limited and its legal consequences are only added to those ordered by these leges generales without displacing (derogating) them.

## 3. Atypical comply-or-explain rule

### a. Norm-theoretical classification; typical and atypical norms

If a company does not meet the benchmarks pursuant to Art. 734f CO, it must explain in the remuneration report the reasons why the gender is not represented in the board of directors or in the executive board in the proportion provided for in this provision and what measures it intends to take to promote this gender. In contrast to other countries - such as Germany or Norway - there is no binding quota in Switzerland, the violation of which would result in "severe" legal sanctions (such as nullity of the election act or even a fine). The legal consequence is rather the obligation to justify "norm-compliant" behaviour. This technical legal method is called "comply or explain". Due to this obligation to give reasons, Art. 734f CO is not a lex imperfecta (a norm whose violation does not provide for a legal consequence); an actual lex minus quam perfecta (a norm whose violation does not result in the nullity of the legal act, but does result in a sanction) is also unlikely to exist. Ultimately, Art. 734f CO is somewhere in the middle. 19

The comply-or-explain technique originates from the Anglo-Saxon legal sphere. In Switzerland it is mainly used in self-regulation (cf. e.g. Art. 7 DCG and the preamble of the Swiss Code); however, it was foreign to the Code of Obligations - at least until Art. 734f CO came into force. A comply-or-explain provision is characterised by a reduction of its normative effect (its degree of binding force, its "degree of compulsion") compared to "ordinary" norms. It allows the norm addressee to evade the "command" of the law by justifying non-compliance. This regulatory technique thus creates leeway for the objectively appropriate coverage of special cases (discretion) and thus also increases the (political) acceptance of the provision - which is not to be neglected, especially in the case of such strongly socio-politically motivated provisions as Art. 734f CO. 20

In the light of these considerations, however, Art. 734f CO proves to be an atypical form of a comply-or-explain provision. In its typical, "pure" form, a comply-or-explain provision first states a duty in its facts ("if") and then determines in its legal consequence ("then") how the breach of this duty is to be justified. Art. 734f CO deviates from this scheme insofar as, strictly speaking, there is no duty in the facts: A duty in the sense of a minimum quota for a certain gender ratio does not exist from the outset (the wording does not even 21 speak of a "guideline value", although the Federal Council's message uses this term on various occasions). Consequently, the law does not require any exculpation on the part of society in the case of "non-compliance", but only a justification for the underrepresentation of gender. The view expressed in the doctrine that "explain" cannot be a substitute for "comply" in view of the purpose of Art. 734f CO and thus anchors a real duty to observe the benchmark in the law fails to recognise the atypical character of this norm, according to the view represented here. While it is undoubtedly true that the legislator wanted to promote gender equality with Art. 734f CO, it deliberately chose (also in the sense of a political compromise) the atypical variant of the comply-or-explain technique. This fundamental decision of the legislator may not be pushed aside with a mere reference to the (supposed) purpose of the norm.

### b. Criticism of the comply-or-explain concept

22 In the absence of the threat of "severe" (civil, let alone criminal) sanctions, the effect of the comply-or-explain concept has been called into question in the doctrine on various occasions. It is true that companies are free to decide whether or not they want to comply with the benchmarks provided for in Art. 734f CO; they are not "compulsory quotas". However, they are compulsory with regard to the reporting obligation. The resulting (essentially correct) conclusion that Art. 734f CO is most likely a transparency provision must, however, be tempered. For reasons of reputation and "political correctness", a de facto or social or economic compulsion to "voluntarily" comply with the gender guidelines will probably arise. The legislator has left it to the self-regulatory power of the capital markets to exert a disciplinary or even sanctioning effect on the companies concerned. However, this effect can only occur if Art. 734f CO is accepted by the participants of the capital market and can therefore be enforced - which, in view of the omnipresent ESG trend, can be assumed at least among the relevant institutional investors. Furthermore, Art. 734f CO should also have a self-disciplining effect on the boards of directors of listed companies, as they are required by law to deal with "gender policy" on a regular basis. "Out of sight, out of mind - this will no longer be possible in the future." Against the background of these considerations, Art. 734f CO should certainly prove to be a suitable instrument for promoting the cause of gender equality, without unduly restricting the leeway of companies that is necessary in economic practice.

# IV. FACTS

## A. Personal scope of application

### 1. Personal and spatial scope of application

#### a. Incorporation in Switzerland; stock exchange listing; double threshold value

Because of the principle of incorporation, Art. 734f CO applies first of all only to companies with their registered office in Switzerland (cf. Art. 154 para. 1 IPRG, furthermore Art. 640 CO). Then the personal scope of Art. 734f CO is limited on the one hand by Art. 732 para. 1 revOR and on the other hand - by virtue of the reference in Art. 734f CO - by Art. 727 para. 1 item 2 CO. Art. 732 para. 1 revOR stipulates that the provisions of the fourth section (which includes Art. 734f CO) apply to companies whose shares are (at least partially) listed on a stock exchange. Art. 727 para. 1 subpara. 2 CO stipulates three different thresholds (a. balance sheet total of CHF 20 million; b. turnover of CHF 40 million; c. 250 full-time employees on an annual average) and requires at least two of these thresholds to be exceeded in two consecutive business years for the company to be obliged to undergo an ordinary audit. Art. 734f CO therefore only applies if these requirements are met. In summary, Art. 734f CO only applies to domestic listed companies with a certain economic significance. The norm does not apply to companies established in accordance with Art. 763 CO (companies and institutions established by special cantonal laws and administered with the participation of public authorities) or which have only participation certificates, dividend-right certificates or bonds listed on the stock exchange (see also Art. 732 para. 1 revOR e contrario). However, it is irrelevant whether the domestic company has had its shares listed in Switzerland or abroad, whether its shares have restricted transferability or whether they are bearer or registered shares. 23

The legislator has deliberately limited the personal scope of Art. 734f CO compared to the general scope of Art. 732 ff. CO by basing it on the additional criterion of economic significance. The Federal Council argued that smaller listed companies, especially those not listed on the Main Standard of the SIX Exchange, should not fall within the scope of Art. 734f CO. In the literature, this limitation is considered sensible. The owners and employees of such 24 small and medium-sized enterprises (SMEs) are often connected through personal and family relationships. Gender guidelines are not always compatible with the personalistic structures of these companies.

25 However, there has been criticism in the doctrine that Art. 734f CO only applies to listed companies. While the economic significance of the company determined on the basis of the threshold values of Art. 727 Para. 1 No. 2 CO is a factual criterion in the interest of protecting SMEs, it is questionable with regard to the principle of "substance over form" why non-listed companies are exempt from the scope of Art. 734f CO, especially since the vast majority of companies here are not listed. The legal form of a company should not be the decisive factor; rather, the economic significance of a company should be the only decisive factor, irrespective of its legal form. Although this criticism is not without some justification, the criteria of the legal form of the public limited company and the stock exchange listing at least ensure that only the very largest Swiss companies are affected by Art. 734f CO. The norm is therefore deliberately very targeted.

### b. "Opt-in

26 Although unlisted public limited companies do not fall within the scope of Art. 734f CO, they may, according to Art. 732, para. 2 revOR, declare the provisions of the fourth section to be partially or fully applicable by means of a provision in their articles of association (so-called opt-in). Such companies may therefore declare Art. 734f CO to be applicable to them. The opt-in requires a basis in the articles of association according to an express statutory order; dogmatically, this opt-in is thus a so-called conditionally necessary content of the articles of association. These are provisions that require inclusion in the articles of association in order to be binding (cf. Art. 627 CO). A non-listed public limited company may therefore declare Art. 734f CO to be applicable. It may also amend the content of this provision, although this does not follow directly from Art. 732 para. 2 revOR. It could be argued that "in part or in full" can only mean that a company declares some or all of the provisions of the fourth section to be applicable and has no power to "cherry-pick", but the argumentum a fortiori speaks against this view: Instead of opting in, companies could simply include freely drafted clauses on gender guidelines concerning the board of directors in their articles of association, as was permissi-

ble under previous law and continues to be permissible - albeit only to a limited extent for listed companies.

### 2. Personal and material scope of application

According to the wording of Art. 734f CO ("[s]ofern"), it only applies to companies that do not meet the gender benchmarks set out therein. In other words, all companies that reach these benchmarks do not have to include the information required therein (justification and promotion measures) in their remuneration report; by law, they do not even have to state in it that they reach the gender benchmarks. Art. 734f CO simply does not apply to these companies. However, such companies are at liberty to make a statement on this issue, for example to promote their reputation. 27

### 3. Addressees of the norm

The question of the addressees of Art. 734f CO must be distinguished from the personal scope of application. The wording of the provision provides clear information on this question: it concerns the board of directors and the management of those companies that fall within the personal scope of Art. 734f CO. The board of directors is the highest executive body regulated in Art. 707 ff. CO. The board of directors is the highest executive body of the company. The executive board consists of the third parties to whom the board of directors has delegated the management in whole or in part pursuant to Art. 716b para. 1 CO. These "third parties" are also referred to as directors (cf. art. 718 para. 2 CO), and several of them together form the "executive board". The inclusion of the executive board in the circle of norm addressees of Art. 734f CO goes beyond the "international consensus" and is in this respect a Swiss specificity ("Swiss finish"). This is probably due to the fact that the proportion of women on management boards is generally still far lower than on boards of directors. 28

## B. Level and assessment of the benchmarks

### 1. Level

The benchmark for the board of directors is 30 per cent, that for the executive board - in contrast to the preliminary draft 2014 - only 20 per cent. According to the Federal Council, the reason for the difference in the bench- 29 marks is that, on the one hand, particular specific expertise and industry knowledge is required in the executive board and, on the other hand, (future) members of the executive board are often promoted within the company and, on average, are only promoted to this position after about 13 years. A differentiation between the board of directors and the executive board, which is also reflected in the different transition periods, is therefore justified. In combination with the ten-year transition period, the lower guideline value of 20 percent is intended to ensure the flexibility of corporate personnel policy and its diversity (industry knowledge, professional experience, international background, etc.). Finally, since membership of the executive board - unlike membership of the board of directors - is generally a full-time occupation, the time available to candidates also plays a role.

## 2. Basis of assessment; calculation

30 Art. 734f CO does not define the concept of gender. Implicitly, however, the provision undoubtedly assumes the duality of the sexes (men and women) that underlies the applicable law. A logical thought experiment supports this assumption: if one were to assume a number of genders greater than 3 or 5, percentages of 30 or 20 would make it impossible to meet the benchmarks (with four or six different genders, the sum would be 120 percent - a mathematical impossibility). If the number of genders may not exceed 3 or 5, it would be arbitrary and therefore lacking in logic to assume a lower number (but more than 2). The spirit of the age, however, goes in a different direction and demands that a person may profess a third gender. Two postulates adopted by the National Council also correspond to this demand. The Federal Council's report on this is still pending. If a change in the legal system to this effect were to occur in the future, there would probably also be a need to amend Art. 734f CO - possibly even before the transitional periods expire!

31 It should therefore be noted: De lege lata, Art. 734f CO is based on the duality of the sexes. The decisive factor for the assignment to the male or female gender is the gender entered in the civil register (cf. Art. 8 lit. d ZStV). The Federal Council submitted a draft amendment to the CC to Parliament at the end of 2019, which was elevated to the status of law by the Federal Assembly in resolutions of 18 December 2020. The provision entered into force on 1 January 2022. According to Art. 30b para. 1 CC, any person may declare to the civil registrar that he or she wishes to have the entry in the civil register concern-

ing his or her gender changed. However, this new provision does not change the duality of the sexes or the unambiguity of the assignment to one of the two sexes under civil status law; it merely brings about a legal simplification of the change of sex.

Finally, the question of rounding when calculating the gender reference values requires explanation. If, for example, the board of directors of a company consists of seven members, the standard value according to Art. 734f CO requires that 2.1 members each should be male and female. From a mathematical point of view, it is not far-fetched to round this quota down to 2. German law, for example, provides for rounding according to mathematical rules (rounding down to and including decimal place 4, rounding up from decimal place 5) (see § 96 para. 2 sentence 5 AktG concerning the supervisory board). However, such a solution is to be rejected for the law here. From the word "at least" in Art. 734f CO it follows that the percentage guideline value is to be reached in any case; in other words, in the sense of "minimum values", it is always to be rounded up to the next whole number of persons (1, 2, 3, etc.). In the above example, the benchmark would only be reached if and when the board has three women. 32

### 3. Practical implementation

Finally, the question arises as to how Art. 734f CO should be implemented in practice. Basically, the company has two options: They can either increase the number of members of their boards of directors and executive boards (which in the former case would generally require an amendment to the articles of association) and fill the newly created positions with members of the underrepresented sex (i.e. as a rule with women), or they can replace (mostly male) members who have left the board with (female) members without increasing the number of members. At this point, however, it is important to remember that the company does not have to comply with the guidelines of Art. 734f CO at all (there is no obligation to "comply"); instead, it can decide to take the path of reporting ("explain"). 33

## C. Temporal scope of application (transitional period)

Art. 4 OBest. CO provides for transitional periods for the application of Art. 734f CO. The reporting obligation applies with respect to the board of directors at the latest as of the business year that begins five years after the new 34 company law enters into force (para. 1), and with respect to the executive board at the latest as of the business year that begins ten years thereafter (para. 2). Art. 734f CO and Art. 4 ÜBest. CO have entered into force with effect from 1 January 2021 (in contrast to most other new provisions of company law). The longer transitional period for the executive board serves to provide sufficient time for the company's internal talent recruiting (from which its members often emerge).

35 As a rule, the financial year coincides with the calendar year (although this is not mandatory). For most companies, Art. 734f CO should therefore be applicable with respect to the board of directors as of 1 January 2026 and with respect to the executive board as of 1 January 2031. The word "at the latest" in Art. 4 ÜBest. OR proves to be misleading: the law states that a norm is either applicable or not applicable. The word "at the latest" must be understood to mean that the legislator wanted to give companies the option of complying with the reporting obligation earlier.

## V. LEGAL CONSEQUENCES

### A. Comply or explain

36 While Art. 734f CO is a quite usual legal norm with regard to the facts, a deviation from the usual norm structure can be observed with regard to the legal consequences. It has already been explained and should be recalled again here that the fulfilment of the facts of Art. 734f CO does not result in the nullity of an electoral act or any other "severe" sanction (such as a fine) (as is peculiar to most legal norms), but only has the effect that the company must report on certain aspects. This unusual type of legal consequence is referred to, in keeping with the spirit of the times, by the English expression "comply or explain".

### B. Duty to report

#### 1. Vessel for the report: remuneration report

37 Although quite doubtful from a dogmatic-systematic point of view, the legislator has chosen the compensation report as the "vessel" for the report required under Art. 734f CO for pragmatic reasons. Pursuant to Art. 13 para. 1 VegüV (as of 1 January 2023: Art. 734 para. 1 revOR), the remuneration report is prepared

by the board of directors; it is a non-transferable and inalienable duty of the board of directors (Art. 13 para. 1 VegüV; as of 1 January 2023: Art. 716a para. 1 item 8 revOR). The board of directors may not delegate this duty to an individual member of the board, to a committee from among its members, to the executive board or to anyone else. However, it may delegate the preparation, execution and supervision of the preparation of the report to individual members of the board or to a committee; in all cases, however, the board of directors in corpore must retain the responsibility for the adoption of the report.

## 2. Content and density of the report

Pursuant to Art. 734f CO, the remuneration report must provide information (report content) on the reasons why the genders are not represented in the board of directors or in the executive board in the proportion provided for by this provision (para. 1) and on the measures taken to promote the less strongly represented gender (para. 2). The specific reasons for under-representation are likely to vary considerably from one sector and company to another, and it is not uncommon for the board of directors itself to have difficulty in clearly identifying these reasons. With regard to the promotion measures, the law does not provide the board of directors with any requirements as to content (what?), manner (how?) and extent (how much?), and the legal objective (promotion) also lacks any claim to binding force, since the law does not require the board of directors to actually take promotion measures - rather, it merely instructs it to report on whether and which measures it intends to take. The board of directors is therefore to be granted considerable, almost unrestricted discretion with regard to both aspects. 38

Art. 734f CO is silent on the substantive requirements of the justification and incentive measures that the remuneration report must meet (report density). In the consultation on the preliminary draft 2014, the fear was expressed that the justifications required from the companies pursuant to Art. 734f CO would be highly standardised (so-called "boilerplate") and would therefore (at least to a large extent) be devoid of any meaningfulness. These concerns cannot be dismissed out of hand. In the search for suitable indications for determining the required reporting density, one can profitably refer to the SIX Directive on Information Relating to Corporate Governance, especially since this Directive, as can be seen from its preamble, is committed to the comply-or-explain concept. According to Art. 5 para. 1 of this Directive, key information 39 must follow the principles of materiality and clarity; it must be limited to what is essential for investors and be relevant and understandable. These terms are all too vague to be able to infer concrete "instructions" as to content, especially since the Directive, as an act of private self-regulation, lacks any general legally binding force. Nevertheless, the outward, formal form of the report will have to comply with these principles: The content of the report must be formulated in such a way that the average capital market participant is able to understand it (clarity), and the report must also not be "flooded" with such a wealth of information that this participant no longer sees "the wood for the trees" (materiality). The remuneration report, of which this report is an integral part, must be written in one of the Swiss national languages (German, French, Italian or Romansh) or in English in analogous application of art. 958d par. 4.

40 With regard to the breadth and depth of detail, Art. 734f CO leaves the board of directors largely free to design the report, and the provision also does not prevent standardised statements. An exemplary company that is internally committed to the objective of Art. 734f CO (or merely opportunistic for reputational reasons) could provide full details of the recruitment processes and the candidates that were available for selection, as well as measures already taken and planned to promote the underrepresented gender. In business practice, however, the standardised statements already mentioned seem much more likely than this ideal. A company could also fundamentally oppose the objective underlying Art. 734f CO and, for example, simply state in the report that its shareholders oppose the participation of one gender in its management and that the company will consequently not take any promotion measures in favour of that gender. The only thing prohibited by Art. 734f CO is complete silence on the part of the company. In other words, Art. 734f CO instructs companies to speak out at all, but does not impose any requirements on them in terms of content. The (formal) requirement of materiality is also to be understood only in a negative sense, i.e. that the remuneration report may not contain an excess of information.

41 The opinion found in the literature, according to which general and sweeping statements are not compatible with Art. 734f CO, must be rejected. First of all, the law does not require that companies (or their shareholders and management) internally share the goals of the legislator. The law obliges them to comply with it alone, without regard to subjective motives. Even fundamental

opposition to the legislative goal is therefore permitted, as long as only the legal mandate to report is complied with. Furthermore, the law does not impose any requirements on the companies regarding the content of the report. It is entirely up to the board of directors to determine how and to what extent it wishes to identify the reasons for the under-representation of one gender and to put them into words in the report, and it is also entirely up to the board of directors to determine the company's policy on gender diversity. Finally, the view that general or sweeping statements are absolutely inadmissible also misses the point of economic reality, whose natural inclination is to increase efficiency and in which a tendency towards standardised statements will consequently be unavoidable.

### 3. Audit by the auditors

Art. 17 VegüV (as of 1 January 2023: Art. 728a para. 1 item 4 revOR) provides that the remuneration report of companies whose shares are listed on the stock exchange is subject to audit by the auditors. Consequently, all companies that are obliged to report in accordance with Art. 734f CO fall within the scope of Art. 17 VegüV or Art. 728a para. 1 item 4 revOR. By inserting the latter provision, Art. 17 VegüV has been incorporated into the law without any material changes, which is why reference can be made to the literature on Art. 17 VegüV for its interpretation. Pursuant to Art. 728a Para. 1 No. 4 revOR, the standard of review will be the law and the company's articles of association. The question now arises as to whether and to what extent the auditors must subject the remuneration report to an audit with regard to compliance with Art. 734f CO. The obvious problem: the extremely sparse content requirements of the law for the "diversity report", the resulting considerable discretion of the board of directors and the question of the suitability of the auditors to audit this report. 42

In order for legal provisions to be suitable as a benchmark for the audit at all, they must, in accordance with the nature of the audit, have a reference to accounting (bookkeeping, annual financial statements, proposal for the appropriation of profits) or to the remuneration of the board of directors, executive board and advisory board. In other words, it is about "figures". On the other hand, the audit is not a "general legality audit". Art. 734f CO has no substantive connection with the remuneration of the management, even though the provision, systematically-dogmatically questionable, is classified in the legal pro- 43 visions on remuneration. Moreover, personnel policy is not a matter of accounting or remuneration, but of management, which is expressly excluded from the audit by the auditors by Art. 728a para. 3 CO. Therefore, as far as the appointment of the executive board by the board of directors is concerned, Art. 728a para. 3 CO also precludes an audit of the remuneration report by the auditors with regard to Art. 734f CO. This must apply all the more a fortiori to the election of the board of directors by the general meeting - which is, after all, the supreme body of the company (Art. 698 para. 1 CO).

44 It must therefore be noted: If the auditors prepare to audit the remuneration report, they must exercise the greatest restraint. The Swiss Chamber of Certified Accountants and Tax Experts - the professional association of those who are professionally involved in auditing - already came to this conclusion during the consultation on the preliminary draft in 2014. The individual opinion to the contrary found in the literature has no support in the law and must therefore be rejected. The auditors may not agree with the board of directors' reasoning, but they are certainly not entitled to substitute their assessment for that of the board of directors. Intervention by the auditors is only conceivable and legally justifiable in one single case (although it seems justifiable to disagree on this point as well): namely, if the board of directors does not comment at all on Art. 734f CO in the remuneration report, even though the company does not comply with the benchmarks provided for therein (which - it should be recalled - it is not obliged to do). The auditors must point out obvious violations of the law even if they are outside their audit mandate. Such a violation of the law is likely to occur if the board of directors of a company that does not meet the benchmarks set out in Art. 734f CO remains completely silent in the remuneration report. However, the auditors' "measure" is likely to be limited to a mere reference in the audit report to the remuneration report; a recommendation by the auditors to the general meeting is not required, as the remuneration report does not require its approval. Finally, it is conceivable that a complete silence of the board of directors triggers the auditor's duty of disclosure pursuant to Art. 728c CO, in particular vis-à-vis the general meeting (para. 2) - vis-à-vis the board of directors (para. 1) it will hardly be of importance, since the latter is itself the author of the violation of the law. Admittedly, this is likely to remain a rather theoretical consideration.

# VI. ENFORCEMENT

## A. Instruments of the shareholder

### 1. Overview

If the auditors are neither suited nor entitled to monitor compliance with the board of directors' reporting obligations, then this task can only fall to the company's shareholders. This "monitoring" can be done from two sides: on the one hand, by obtaining information, on the other hand, by imposing liability. Against this background, the instrument of the right to information and inspection (N. 46 f.) and that of liability under company law (N. 48 ff.) will be discussed below, whereby the explanations will be limited to the essential prerequisites with regard to the interest of knowledge. It should first be noted that the first instrument in particular has undergone some changes in the course of the amendment to the Companies Act of 2020; in contrast to the previous law, there is no longer any difference de lege lata between the right to information and the right to inspection in terms of the substantive requirements. 45

### 2. Right to information and inspection

Art. 697 para. 4 and Art. 697a para. 3 revOR will set a double limit to the shareholder's right to information or inspection: On the one hand, the information or the inspection must be necessary for the exercise of the shareholder's rights; thus, there must be a factual connection between the information to which the request for information or inspection relates and the exercise of the shareholder's membership rights. As a rule, such a connection exists if the information is necessary for the exercise of voting rights in elections. The company's personnel policy may be the subject of a request. A shareholder who wishes to have both sexes represented on the board of directors and in the management of "his" company in the proportion provided for by Art. 734f CO has an interest in receiving information on the recruitment processes within the company, on the criteria for selecting candidates and on the promotion measures planned and already taken by the board of directors. Either he wants to elect or not elect certain members of the board of directors on the occasion of the general meeting in the knowledge of this information, or he wants to indirectly influence the composition of the executive board 46 through this election or non-election. The factual connection required by law should therefore generally be given.

47 Secondly, the information or inspection must not endanger any business secrets or other interests of the company that are worthy of protection. The reason for this danger is the shareholders' lack of fiduciary duty towards the company. Therefore, a balancing of the company's interest in secrecy and the shareholder's interest in information is required in each individual case. However, secrecy obligations that are contractually imposed on the company are not subject to consideration from the outset. Since recruitment processes always involve individual people who are thoroughly "screened" in the course of these processes, especially when filling management positions, the general right of personality (Art. 28 of the Civil Code) is also likely to draw a line. Candidates may also want to protect themselves contractually from having information about them disclosed. Apart from these cases, the assessment of the top management may be of such importance that it justifies a rejection of the request, also with regard to the shareholder's interest in information. A way out could be to make the information anonymous, but in this case it would be questionable what value it would still have. As a result, it must be noted that the company will have to carefully weigh the conflicting interests with regard to the specific individual case. Nevertheless, the shareholder's interest is likely to prevail as a rule as far as general information (i.e. not related to specific persons) is concerned, for example with regard to the company's gender policy and its promotion measures.

### 3. Liability under company law

48 Liability of the board of directors under company law pursuant to Art. 754 para. 1 CO first requires a breach of duty. The duty of care (Art. 717 para. 1 CO) requires members of the board of directors to be law-abiding, especially in the case of mandatory standards. Art. 734f CO is mandatory law. If the board of directors remains completely silent with regard to Art. 734f CO, it commits a breach of duty. A breach of duty also occurs if the content of the remuneration report does not correspond to the truth; active lying is not compatible with the duty of care. A breach of duty, on the other hand, is excluded in the absence of content requirements if the board of directors merely makes use of general or standardised statements in the remuneration report or even expresses its fundamental rejection of the gender guidelines.

Liability under company law then requires damage. If the breach of duty comes to the attention of the public and the stock market price of the share falls as a result of the impaired reputation, this could be seen as damage. However, in the absence of an adverse effect on the company's assets, this does not constitute a (direct) damage to the company, nor are the shareholders entitled to damages, since they are not entitled to a high stock exchange price and Art. 717 para. 1 CO does not have the character of a protective norm in this respect. A direct damage to the shareholder is at least conceivable if his investment decision is based on an untrue statement regarding the gender benchmarks in the remuneration report and the shareholder resells his shares acquired as a result of the board of directors' breach of duty at a lower price. In this case, the shareholder is likely to have a claim against the members of the board of directors under Art. 41 CO. In conjunction with Art. 717 para. 1 CO, Art. 734f CO has a protective normative effect in this respect. 49

There must be a natural and adequate causal connection between the breach of duty and the damage. The (directly injured) shareholder must succeed in proving that his investment decision is connected with the board of directors' untrue statement on gender guidelines in the remuneration report. The assumption that the "gender policy" in the management of a company is not likely to be material for the formation of the will of most investors (in contrast to professional experience, for example) is not far-fetched, so that this proof will only rarely be successful. Nevertheless, it is not impossible, especially since in times of ESG "diversity" issues are gaining more and more weight. 50

## B. Claim to "attitude"?

It is at least conceivable that a candidate who was not considered for appointment to the board of directors or the executive board would have a claim for "recruitment" (or more precisely: for the creation of a relationship with a governing body). Such a claim must be rejected. It would completely ignore the object and purpose of Art. 734f CO. This norm is based on the idea of transparency and does not provide for any "hard" legal consequences in the event of the realisation of its facts, but only for a duty to state reasons. A fortiori, it would be utterly absurd to want to construct a claim of the kind described here that could be enforced by legal action. Even Art. 5 para. 2 GlG excludes a legal claim of the discriminated person for employment in the case of a refusal of employment or in the case of termination of an employment relation- 51 ship according to the Code of Obligations and only grants this person a claim for monetary compensation.

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COMMENTARY ON

# Art. 785 CO

A commentary by Anne Mirjam Schneuwly

SUGGESTED CITATION

Anne Mirjam Schneuwly, Kommentierung zu Art. 785 OR, in: Lukas Müller (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Schneuwly, N. XXX zu Art. 785 OR.

**II. Transfer**

**1. Assignment**

**a. Form**

**Art. 785**

[1] The assignment of a capital contribution as well as an obligation to assign must be done in writing.

[2] The contract of assignment must contain the same information on rights and obligations under the articles of association as the document on subscription to the capital contribution, unless the acquirer is already a member.

# CONTENT

## I. ASSIGNMENT

As a rule, the assignment of shares is established by purchase, exchange, gift or takeover of the business or the limited liability company - with the exception of acquisition by inheritance, division of an estate, matrimonial property law or compulsory execution, which is dealt with separately under Art. 788 CO. The assignment presupposes that the alienating person basically has the power of disposal. 1

In the case of assignment under Art. 785, para. 1 CO, a distinction is made between an obligation and a disposal transaction, even if both usually coincide in time and are drawn up in the same document. Assignment agreements pursuant to Art. 164 et seq. CO and the obligation to conclude an assignment agreement are deemed to be disposal transactions. In the case of transfers of ordinary shares, the obligation transaction is often concluded separately from the assignment contract (disposal transaction) in order to maintain discretion about the purchase price and, for example, to avoid the publicity effect. The reason for this is that the purchase agreement is to be submitted upon registration in the commercial register and this document can then be viewed by the public. Thus, if the purchase price is not agreed separately, the purchase price can be inspected without any proof of interest in the commercial register. 2

### A. Form

Although an ordinary share in the form of a registered share is a security (Art. 965 et seq. CO), a written declaration of assignment is required in the case of an assignment (Art. 967 CO in conjunction with Art. 164 et seq. CO). A valid assignment agreement requires the obligation to assign (obligation transaction) as well as the assignment based on it (disposal transaction). In contrast to the assignment of claims (Art. 165 CO), both the obligation and the disposal transaction must be in writing (Art. 12 et seq. CO) and both contracting parties must sign the assignment agreement in their own hand, since the acquiring person assumes not only rights but also obligations. 3

Prior to the revision of the law governing limited liability companies, which came into force on 1 January 2008, the transfer of ordinary shares required 4 public notarisation. The requirement of public certification became obsolete after the aforementioned revision of the law.

5 The consequence of a lack of form of the obligation and disposal transactions is the invalidity or nullity of the assignment. If the obligation transaction and the disposal transaction differ in time and only the obligation transaction shows a lack of form - e.g. due to oral conclusion - the defect can be cured by a written disposal transaction. This cure is valid at least if comprehensive, essential elements of the obligation transaction were recorded in writing in the disposal transaction.

## B. Content

6 In addition to the clear intention to transfer, the assignment agreement must also contain details of the purchase price, the shares and the contracting parties. In practice, however, the purchase price is often not quantified, but reference is made to the fact that this is recorded in a separate deed or is the subject of another agreement - this in particular in order to protect the parties from the publicity effect. In order to ensure the protection of the market, it is also crucial that the acquiring person is made aware of any non-competition obligations for partners, additional contributions and ancillary obligations (Art. 785 para. 2 in conjunction with 777a para. 2 CO), which may have drastic consequences for the partners.

## C. Effect

7 In order to obtain shareholder rights, the acquiring or selling person must notify the company of the assignment of the ordinary shares. The assignment becomes legally effective after approval by the general meeting of shareholders (art. 786, para. 1 CO) - unless the articles of association have waived the requirement of approval at the time of assignment (art. 786, para. 2, item 1 CO) - or if there is no rejection six months after receipt of the request (art. 787 CO). In the meantime the effect of the assignment remains in abeyance.

8 The management must then enter the new shareholder's name, domicile and place of residence as well as the number and nominal value of his or her ordinary shares in the GmbH's share register (Art. 790 Para. 1 and 2 CO) and notify the commercial register of the transfer of the ordinary shares for non-constitutive entry (Art. 791 CO, Art. 82 HRegV). The Registrar of Companies exam-

ines the assignment agreement in the context of the registration of the acquiring person as a partner (Art. 82 HRegV). If the requirements are not met, registration is refused - unless the transfer of shares in the company was acquired by inheritance, division of an estate, matrimonial property rights or compulsory execution (Art. 788 CO).

## II. REFERENCE TO STATUTORY RIGHTS AND OBLIGATIONS IN THE TRANSFER AGREEMENT

If possible, the person acquiring ordinary shares should be informed of statutory obligations to which he or she is subject as a partner. Art. 785 para. 2 CO - as well as Art. 784 para. 2 CO - require that the references to statutory rights and obligations of the partners listed in Art. 777a para. 2 CO are included in the assignment agreement (additional and ancillary obligations, possible non-competition clauses for the partners, pre-emption rights or contractual penalties). 9

If these legal minimum requirements are not met, the assignment agreement is invalid according to part of the doctrine and nullity follows (Art. 20 CO), as this norm is of a mandatory nature. According to Keller/Jegher/Vasella and Küng/Camp, only a regulatory provision is violated and only a lack of will is presumed. 10

A special reference to the statutory rights and obligations is not necessary if the acquiring person is already a shareholder of the GmbH - as he or she should already be informed of the statutory content - or if the ordinary shares were transferred by special types of acquisition (Art. 788 CO). 11

## SAMPLE DOCUMENTS

Cf. the original German version of the commentary.

## MATERIALS

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COMMENTARY ON

# Art. 786 CO

A commentary by Anne Mirjam Schneuwly

SUGGESTED CITATION

Anne Mirjam Schneuwly, Kommentierung zu Art. 786 OR, in: Lukas Müller (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Schneuwly, N XXX zu Art. 786 OR.

**b. Consent requirements**

**Art. 786**

[1] An assignment of a capital contribution requires the consent of the members general meeting. The members general meeting may refuse consent without stating its reasons.

[2] The articles of association made deviate from the foregoing by:

waiving the requirement of consent to the assignment;
stating the grounds justifying refusal of consent to the assignment;
providing that consent to the assignment may be refused if the company offers to acquire the capital contribution from the seller at its true value;
prohibiting any assignment;
providing that consent to the assignment may be refused if there is doubt that obligations under the articles of association to make

additional financial or material contributions will be fulfilled and security requested by the company is not provided.

[3] Where the articles of association prohibit assignment or the members general meeting refuses to consent to the assignment, the right to resign for good cause is reserved.

# CONTENT

# I. CONSENT

## A. Legal transfer restrictions

1 In contrast to a joint-stock company, which follows the principle of free transferability - with the exception of statutory restrictions - the transfer of voting shares of a limited liability company is subject to statutory transfer restrictions. Art. 786 para. 1 CO requires the consent of the shareholders' meeting for the transfer of ordinary shares. The consent may be refused without giving reasons, without the need for a specification in the articles of association.

2 The composition of the group of shareholders can be influenced by the transfer restrictions; the personal element of the GmbH is taken into account. Unwanted acquirers of ordinary shares can be kept out in the interest of the company.

## B. Notification

3 In order for the transfer of the ordinary shares to be approved, the company (i.c. the management) must be informed of the transfer. Both the transferor and the transferee may notify the company of the transfer of the ordinary shares without the involvement of the other person, unless there is a special provision in the articles of association as to who is to make the notification.

4 If the acquiring person notifies the transfer and requests the company's approval of the said transfer, he or she shall enclose the transfer agreement with the request so that the legal validity of the transfer can be verified. If the transferor submits the request to the company, it is not required that the assignment agreement be attached.

## C. Jurisdiction

5 If the request for approval of the assignment has been submitted or delivered to the company, the management must convene a general meeting of shareholders. The directors are neither obliged nor entitled to put the consent on the agenda if no request has been received.

The consent to the assignment of the ordinary shares is given by the general meeting of shareholders and not by the management, i.e. the competence cannot be delegated (Art. 804 CO). Accordingly, an ordinary or extraordinary general meeting of shareholders must be convened by the management (Art. 805 para. 1 and 2 CO) and the consent to the assignment must be included on the agenda - unless it is a universal meeting (Art. 805 para. 3 last sentence CO). 6

## D. Consent resolution

A qualified majority of two-thirds of the votes represented and an absolute majority of the total share capital is required for approval of the assignment of shares or recognition as a shareholder with voting rights (Art. 808b para. 1 item 4 CO). The resolution cannot be transferred to the management (art. 804 para. 2 item 8 CO), as it is considered a non-transferable competence of the shareholders' meeting. With regard to Art. 808b para. 2 CO, it should be noted that the requirements for passing resolutions may be increased, but not reduced; in other words, the quorum cannot be reduced to a simple majority. 7

The law does not comment on the formal requirements for a resolution of approval or rejection by the shareholders' meeting. The resolution may be passed in writing, provided that no oral discussion has been requested by the shareholder or shareholders (Art. 805 para. 4 CO). As a rule, it is recorded in writing in the ordinary minutes. If the shareholder or shareholders are listed by name in the articles of association - as was necessary before the revision of the law on limited liability companies in 2008 - an amendment to the articles of association must also be made when the ordinary shares are transferred, which requires public certification. 8

Consent is usually given at a shareholders' meeting; instead of passing a resolution at the shareholders' meeting, consent may also be given by circular resolution - provided this form of resolution has not been excluded by the articles of association (Art. 805 para. 4 CO). 9

## E. Practical advice

The person selling the ordinary shares may attend the shareholders' meeting and vote in favour of the assignment (Art. 806a CO). However, it may not take any precautions to impede or prevent the transfer. 10

11 The acquiring person may only participate in the shareholders' meeting or take the place of the selling person (the assigning person) after a positive resolution on the assignment. Siffert/Fischer/Petrin support the possibility for the selling person to be represented by the acquiring person at the shareholders' meeting and to vote in favour of the transfer. However, this requires that the articles of association permit the representation of shareholders by third parties. If all the ordinary shares are held by one person and also sold to a single person, the approval of the general meeting of shareholders is formally required; however, the approval can be decided at the same time as the transfer by universal meeting (art. 805 para. 3 CO).

## II. STATUTORY DEVIATIONS

12 The articles of association may deviate from the consent requirement of Art. 786 para. 1 CO. According to Art. 786 para. 2 CO, a deviating order can also be made in the articles of association, whereby the list of possibilities is exhaustive; a combination of the individual variants is possible. The regulations in the articles of association may go beyond the statutory transfer restriction and make the transfer more difficult or even impossible (art. 786 para. 2 no. 4 CO).

### A. Abolition of the requirement for consent (No. 1)

13 The shareholders have the option of repealing the legal restriction on transferability in the articles (Art. 786 para. 2 item 1 CO) and thus providing for the free transferability of ordinary shares. In practice, this regulation is chosen for companies with many shareholders or if the composition of the shareholder group is not particularly significant. Accordingly, the capitalistic element is accorded greater importance than the personal element of membership in the GmbH.

14 It can be stipulated in the articles that consent may only be withheld for important reasons, thus introducing a quasi abolition of the consent requirement.

### B. Deviations (No. 2)

15 Pursuant to Art. 786, para. 2, subpara. 2 CO, the articles themselves may specify the reasons justifying the refusal of consent to the transfer of ordinary shares. Important reasons may be listed, but trivial reasons may also be stipu-

lated in the articles if they are related to the composition of the circle of shareholders, such as the family clause.

The restrictions on the transfer of shares pursuant to para. 2 apply not only to a transfer to a new shareholder, but also to existing shareholders, because the balance of power may change. 16

## C. Takeover at real value (section 3)

The shareholders' meeting may refuse to approve the transfer if it is stated in the articles that the company offers the transferor the transfer at the real value (Art. 786, para. 2, item 3 CO). The real value is not defined by law and must be determined as the total value at going concern values taking into account the net asset value and the capitalised earnings value. Furthermore, it is expedient to determine the valuation by taking into account cash flows (especially the discounted cash flow method), the determination of value added contributions or residual profit figures (e.g. the economic value added method). In any case, it makes sense to use a combination of different valuation methods. It also makes sense to determine the value based on the opinion of an independent expert. 17

With this provision (escape clause), the shareholder willing to sell is guaranteed a right of withdrawal and corresponds to the provision for unlisted registered shares in the case of a public limited company (Art. 685b para. 1 CO). The ordinary shares may be acquired either for the account of the company (acquisition of own ordinary shares, art. 783 and 806a para. 2 CO), the individual shareholders or third parties. 18

## D. Prohibition of transfer (No. 4)

The articles of association may provide for a prohibition of transfer. This provision is very similar to the transferability of membership rights in partnerships. The prohibition of transfer is generally used in corporate joint ventures, because the purpose of the company can only be achieved through the personal characteristics of the partners. 19

The prohibition of transfer implies a right of withdrawal for good cause for the shareholder (Art. 786 para. 3 in connection with Art. 822 CO). The prohibition of transfer also excludes the creation of a usufruct or a lien on the shares (Art. 789a para. 2 and Art. 789b para. 2 CO). 20

### E. Doubts about the assignee's liquidity (para. 5)

21 As a last resort, the shareholders' meeting can adjust the approval requirements in the articles of association according to section 5 if the fulfilment of statutory obligations to make additional contributions (Art. 795 CO) or ancillary services (Art. 796 CO) is doubtful and a security demanded by the company is not provided. The so-called credit rating restriction is only valid if both conditions are met cumulatively. It corresponds to the transfer restriction for registered shares that are not fully paid up (Art. 685 CO).

22 The company may only demand security if the solvency of the acquiring person cannot be made credible. However, the requested security may be provided by the selling person, the acquiring person or by third parties and its form (real and personal securities) may not be prescribed by the company. The amount of the security is determined by the uncovered portion of the additional or ancillary payment obligations.

23 This provision is in conflict with the principle that the general meeting of shareholders may refuse consent without stating reasons. Indeed, para. 5 only makes sense if the dispositive legal restriction on transferability of Art. 786 para. 1 CO has been excluded in advance.

## III. Legal Consequences of Refusal of Consent

24 If the required majority is not reached at the shareholders' meeting when voting on consent, consent is deemed to be refused. If the general meeting of shareholders refuses to give its consent to the transfer, the transfer transaction remains ineffective and a reversal of the transaction must take place. The person selling the shares remains a shareholder - unless the company takes over the ordinary shares at their real value (art. 786 para. 2 item 3 CO).

25 By restricting the transferability of shares, the company can protect itself from undesirable acquirers; however, it can also impair the interests of the shareholders who wish to withdraw. In order to counteract the drastic consequences of making a change of membership more difficult, Art. 786, para. 3 CO provides that in the case of a statutory prohibition of transfer and in the case of a refusal to consent to the transfer of an ordinary share, the right to resign for good cause (Art. 822 CO) is reserved.

A statutory prohibition of transfer constitutes good cause for withdrawal, but it remains to be examined whether the continuation of the corporate relationship is unreasonable in the individual case. If the company refuses its consent without good cause and thus acts abusively, resignation for good cause or even dissolution for good cause (Art. 821 para. 3 CO) may be justified. 26

Whether the right to resign can also be exercised in the case of a non-abusive refusal of consent is not entirely clear, but it does not seem to have been the legislator's intention to protect shareholders willing to sell so comprehensively. 27

## SAMPLE DOCUMENTS

Cf. the original German version of the commentary.

## MATERIALS

Botschaft zur Revision des Obligationenrechts (GmbH-Recht sowie Anpassungen im Aktien-, Genossenschafts-, Handelsregister- und Firmenrecht) vom 19. Dezember 2001, BBl 2002 S. 3148 ff., abrufbar unter https://www.fedlex.admin.ch/eli/fga/2002/443/de besucht am 24. Juni 2022 (zit. Botschaft GmbH 2002).

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COMMENTARY ON

# Art. 787 CO

A commentary by Anne Mirjam Schneuwly

SUGGESTED CITATION

Anne Mirjam Schneuwly, Kommentierung zu Art. 787 OR, in: Lukas Müller (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Schneuwly, N. XXX zu Art. 787 OR.

**c. Transfer of rights**

**Art. 787**

1 Where the consent of the members' general meeting is required for the assignment of capital contributions, assignment becomes legally effective only when this consent is granted.

2 If the members' general meeting fails to refuse consent to the assignment within six months of its receipt, consent is deemed to have been granted.

# CONTENT

## I. TIME OF THE TRANSFER OF RIGHTS

If the requirements for the acquisition of the ordinary shares are fulfilled (Art. 785 CO), the rights and obligations do not pass to the acquiring person with its transfer, but only after the shareholders' meeting has given its consent - provided that the requirement has not been repealed by the articles (Art. 786 para. 2 item 1 CO). Consequently, the transfer is subject to a suspensive condition (Art. 151 et seq. CO) and remains in abeyance until the shareholders' meeting has given its consent. Accordingly, the assignment of ordinary shares behaves like the transfer of registered shares not listed on the stock exchange (art. 685c CO). 1

Only upon approval is the acquiring person granted the full membership rights (voting rights, veto rights, etc.) and obligations as a partner. Until then, the alienating person alone remains entitled to exercise the membership rights; however, it is possible for the acquiring person to vote at the shareholders' meeting by means of a proxy of the alienating person. 2

If the assignment is approved, the legal effects do not take effect retroactively to the moment of acquisition, but ex nunc with the passing of the resolution. Also, it is not the entry in the commercial register that is constitutive, but the time of the resolution. If the requirement of consent was excluded by the articles of association (Art. 786 para. 2 item 1 CO), the rights and obligations are transferred to the acquiring person with the transfer. 3

If consent to the transfer is refused, the transfer is ineffective and lapses ex tunc. If the ordinary share certificates have already been handed over to the acquiring person, the contract of sale or donation must be reversed (Art. 109 CO). 4

## II. TIME LIMIT FOR GRANTING CONSENT

The general meeting of shareholders has a period of six months to approve the transfer of the ordinary shares (Art. 787 para. 2 CO). Even though the six-month period is explicitly provided for consent, it is practically a time limit within which the partners' meeting must act if it does not wish to admit the acquiring person as a partner. If the general meeting of shareholders does not 5 refuse within this period, consent is deemed to have been given by way of fiction.

6 During these six months the shareholders may make inquiries regarding the acquiring person. In doing so, their creditworthiness may be checked if, within the framework of a statutory regulation pursuant to Art. 786 Ab. 2 No. 5 CO, consent to the assignment may be refused if the fulfilment of statutory obligations to make additional or ancillary contributions is doubtful and a security demanded by the company is not provided.

## A. Calculation of time limits

7 The time limit begins to run on the day after the request for approval of the assignment of the ordinary shares has been received by the company or has come into its power. The six-month period may be shortened by the articles of association, but not extended, in order to protect the interests of the acquiring persons.

## B. Effect on expiry of the time limit

8 If the company fails to reject the request for approval of the assignment or to take a decision in general within the time limit, approval is irrefutably presumed. A belated rejection by the general meeting of shareholders shall have no effect.

9 If the request has been rejected without justification - e.g. if the acquiring person fulfils the requirements of the statutory transfer restriction according to Art. 786 para. 2 item 2 CO or the credit rating restriction according to Art. 786 para. 2 item 5 CO and is nevertheless denied consent - and if the decision is challenged in court, the approval takes effect at the time the declaratory judgement becomes final.

## C. Acknowledgement of the decision

10 No reasons need to be given for the rejection decision (cf. Art. 786 para. 1 CO) - unless a duty to state reasons has been included in the articles of association. However, the applicant must be informed about the decision of the shareholders' meeting. If he or she is not present at the shareholders' meeting, e.g. as a representative of the person selling, and the company rejects the

transfer of the ordinary shares, the resolution must reach the applicant before the expiry of the six-month period.

The form in which the notification must be made is not regulated in the law. 11
The articles of association of the company must regulate this form (art. 776 no. 4 CO). If the notice is sent in writing by post or by e-mail, the date of receipt applies and it is not necessary that the applicant has actually taken notice of the company's refusal. Thus, caution is advised if the shareholders' meeting is scheduled for the last day of the six-month period and the rejection decision is still to be communicated.

## SAMPLE DOCUMENTS

Cf. the original German version of the commentary.

## MATERIALS

Botschaft zur Revision des Obligationenrechts (GmbH-Recht sowie Anpassungen im Aktien-, Genossenschafts-, Handelsregister- und Firmenrecht) vom 19. Dezember 2001, BBl 2002 S. 3148 ff., abrufbar unter https://www.fedlex.admin.ch/eli/fga/2002/443/de besucht am 24. Juni 2022 (zit. Botschaft GmbH 2002).

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COMMENTARY ON

# Art. 788 CO

A commentary by Anne Mirjam Schneuwly

SUGGESTED CITATION

Anne Mirjam Schneuwly, Kommentierung zu Art. 788 OR, in: Lukas Müller (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Schneuwly, N. XXX zu Art. 788 OR.

**2. Special forms of acquisition**

**Art. 788**

1 Where capital contributions are acquired through inheritance, distribution of an estate, matrimonial property law or enforcement proceedings, all related rights and obligations are transferred to the acquirer without requiring the consent of the members' general meeting.

2 In order to exercise voting rights and related rights, however, the acquirer requires the recognition of the members' general meeting as a company member who is eligible to vote.

3 The members' general meeting may refuse such recognition only if the company offers to acquire the capital contributions from the acquirer at their true value. The offer may be made for the company's own account or for the account of other company members or third parties. Unless

the acquirer rejects the offer within a month of receiving notice of the true value, the offer is deemed to be accepted.

[4] Unless the members' general meeting rejects the request for recognition within six months of its receipt, recognition is deemed to be granted.

[5] The articles of association may waive the requirement of recognition.

# CONTENT

# I. TRANSFER OF RIGHTS AND OBLIGATIONS

## A. Forms of transfer

1 Where shares are acquired by inheritance (Art. 537 et seq. CC), division of an estate (Art. 602 et seq. CC), matrimonial property rights (Art. 181 et seq. CC) or compulsory execution (under the Swiss Code of Obligations), the rights and obligations are immediately transferred to the acquiring person and the general rules on consent requirements (Art. 786 CO) and transfer of rights (Art. 787 CO) do not apply.

2 The list of types of acquisition was conceived by the legislator as being exhaustive, but Art. 788 CO applies by analogy to similar types of acquisition, provided the circumstances and interests correspond to the cases listed in para. 1. Thus, other forms of universal succession are recognised, such as the acquisition of ordinary shares by an acquiring company in the course of a merger or demerger. In this case, the ordinary shares are transferred on the date of entry in the commercial register (Art. 22, 52 and 73 Merger Act), irrespective of Art. 788 CO.

## B. Effect

3 Notwithstanding any transfer restrictions, on acquisition of the ordinary shares in one of the above ways, all rights and obligations associated with the ordinary shares are transferred to the acquiring person without the consent of the general meeting of shareholders. The transfer of rights as such never requires the consent of the general meeting of shareholders. This ensures the legal succession of the withdrawn shareholder and prevents the rights and obligations associated with the ordinary shares from becoming ownerless.

4 However, the voting right and the associated rights are suspended until they are recognised by the shareholders' meeting (Art. 788 para. 2 CO). The effect of the statutory transfer restriction is limited to the recognition as a shareholder with voting rights. In other words, the decision of the shareholders' meeting acts as a suspensive condition for the exercise of voting rights. It is therefore not possible for the general meeting of shareholders to refuse to admit a new shareholder; however, it can at least prevent an undesirable acquiring person from participating in the formation of the company's will.

# II. RECOGNITION OF THE GENERAL MEETING

## A. Request for recognition

The acquiring person must apply to the company for recognition as a shareholder with voting rights. The law has not set a deadline for the application and therefore allows non-voting ordinary shares for acquiring persons under Art. 788 para. 1 CO. 5

## B. Recognition resolution

As in the case of a legal transfer, the general meeting of shareholders is responsible for the recognition of voting rights under Art. 788 para. 2 CO. Thus, the same requirements for passing resolutions apply as with Art. 786 CO. A qualified majority of two thirds of the votes represented as well as an absolute majority of the total share capital is required for recognition as a shareholder with voting rights (Art. 808b para. 1 item 4 CO). The resolution cannot be transferred to the management (art. 804 para. 2 item 8 CO), as it is considered a non-transferable competence of the shareholders' meeting. With regard to Art. 808 para. 2 CO, it should be noted that the requirements for passing resolutions may be increased, but not reduced; in other words, the quorum may not be reduced to a simple majority. 6

The law does not specify the formal requirements for the recognition resolution. The resolution may be passed in writing, provided no oral discussion has been requested by the shareholders (Art. 805 para. 4 CO). As a rule, it is recorded in writing as part of the ordinary record keeping. If the names of the partners are listed in the articles of association, an amendment to the articles of association must also be made when the ordinary shares are transferred, which requires public certification. Instead of passing a resolution at the shareholders' meeting, consent may also be given by circular resolution - provided this form of resolution has not been excluded by the articles (Art. 805 para. 4 CO). 7

Irrespective of whether or not the new shareholder is recognised as having voting rights, he or she must be entered in the commercial register (Art. 82 para. 1 HRegV). Every transfer of an ordinary share as well as other changes of facts (e.g. change of name, domicile, place of residence, number and nominal value) must be entered in the share register (art. 791 para. 1 CO). Shareholders 8 who have no voting rights as long as the company has not given its consent to the acquisition must also be entered. Such a case may arise, for example, if the shareholding was acquired on the basis of Art. 788 CO (inheritance, division of an estate, matrimonial property law or compulsory execution). It should also be noted that proof of inheritance must be submitted to the Commercial Register Office, either in the original or as a certified copy, whereby foreign documents must be translated accordingly and provided with the necessary certifications (apostille; over-certification). If a community of heirs has inherited shares and only some of the heirs are subsequently registered as partners, the assignment agreement must be drafted accordingly. The requirements for proving that minors have legal power of representation, if any, should not be too high.

## C. Legal position of the acquiring person until the resolution is passed

9 Until the acquiring person is definitively recognised as a shareholder with voting rights, he or she is prohibited from exercising voting rights and the rights associated with them, such as the right to make a motion (Art. 805 para. 5 item 2 and Art. 699 para. 3 CO) or the right to information or inspection (Art. 802 CO). Thus, it can be said that a division of rights is provided for and that these are in a state of suspension until they are recognised by the shareholders' meeting - unless recognition by the shareholders' meeting has been waived in the articles (Art. 788 para. 5 CO).

## D. Time limit

10 If recognition is not refused by the general meeting within 6 months of receipt of the application, recognition is deemed to have been granted (Art. 788 para. 4 CO). The time limit begins to run on the day after the request for approval of the assignment of the ordinary shares has been received by the company or has come into its power. The six-month period may be shortened by the articles of association, but not extended in order to protect the interests of the acquiring person.

11 If the company fails to reject the request for approval of the assignment or to take a decision in general in due time, the approval is irrefutably presumed. A belated rejection by the general meeting of shareholders remains without effect.

## III. ASSUMPTION OF ORDINARY SHARES AT REAL VALUE

The general meeting of shareholders is not actually free to decide on the recognition, because it can only refuse it if it offers the acquiring person the takeover of the ordinary shares at the real value (Art. 789 CO). Since the ordinary shares have already been validly transferred, the shareholders' meeting merely decides whether to buy out the legal successor and make him or her a takeover offer. This provision is identical to the escape clause for unlisted registered shares in public limited companies (Art. 685b para. 1 CO). The ordinary shares may be acquired either for the account of the company (acquisition of own ordinary shares, Art. 783 and 806a para. 2 CO), of the individual shareholder or of third parties. 12

The company shall notify the acquiring person that the general meeting of shareholders has refused recognition and wishes to acquire the ordinary shares at their real value. The acquiring person shall be free to reject the acquisition at actual value and remain a non-voting shareholder. In this case, the acquiring person has a one-month period to reject the takeover offer, otherwise the offer is deemed to be accepted. If the acquiring person disputes the value of the ordinary shares as calculated by the company, the one-month period for rejection shall run only from the time of agreement between the parties on the amount of the real value or from the time the court judgment becomes final. 13

## IV. LEGAL CONSEQUENCES OF REFUSAL OF CONSENT

If the general meeting refuses to recognise the acquiring person as a shareholder with voting rights, he or she remains entitled to be entered in the share register as a shareholder without voting rights (Art. 791, para. 3 CO) and to exercise the property rights of the ordinary shares. 14

If the acquiring person does not receive notification within the six-month period that the general meeting of shareholders has refused recognition and that he or she wishes to acquire the ordinary shares at their real value, recognition is irrefutably presumed (Art. 788, para. 3 CO). 15

## V. WAIVER OF RECOGNITION REQUIREMENT

16 The shareholders have the option of waiving the legal requirement of recognition of the acquiring person as a shareholder with voting rights in the articles (Art. 788 para. 5 CO). The articles may also provide that only certain types of acquisitions are subject to the recognition requirement.

17 If the requirement for consent in the case of a transfer of assets has been waived in the articles (art. 786, para. 2, item 1 CO), the transfer restriction for special types of acquisitions under art. 788 CO is also deemed to have been waived.

## SAMPLE DOCUMENTS

Cf. the original German version of the commentary.

## MATERIALS

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COMMENTARY ON

# Art. 808c CO

A commentary by Jan Heller

SUGGESTED CITATION

Jan Heller, Commentary of art. 808c CO, in: Lukas Müller (ed.), Online Commentary of the Code of Obligations

Short citation: OK-Heller, Art. 808c OR N. XXX.

**VI. Contesting resolutions of the members' general meeting**

**Art. 808*c***

The relevant provisions on companies limited by shares apply to the contesting of resolutions of the members' general meeting.

# CONTENT

## I. INTRODUCTION

Art. 808c CO refers to the provisions of company law for the contestation of resolutions of the shareholders' meeting of a limited liability company. Contrary to the narrow wording, the reference in Art. 808c CO includes not only the provisions of company law on avoidance but also those on nullity. Art. 808c CO refers to Art. 689f, Art. 691 para. 3, Art. 706-706b and Art. 731 para. 3 CO. For reasons of readability, "Art. 808c in conjunction with" is not added before these standards in this commentary. has been added. 1

The resolutions of the management cannot be contested. It is possible that their resolutions are null and void. With regard to the nullity of management resolutions, Art. 816 CO - like its counterpart under company law (Art. 714 CO) - refers to Art. 706b CO.

The provisions of company law apply "accordingly". The special features of the legal form of the GmbH must be taken into account. Insofar as these special features do not result in any deviations, the doctrine and case law of the provisions of stock corporation law can generally be taken into account. This commentary uses the literature and case law on stock corporation law without indicating that it is not literature or case law on the GmbH. 2

There was a controversy in the doctrine as to whether the references to the provisions of stock corporation law in the law governing limited liability companies are of a static or dynamic nature. In the materials of the partial revision of the law on limited liability companies, which came into force on January 1, 2008, the legislator clarified that these are dynamic references. In the course of the revision of company law, the legislator reaffirmed the dynamic references. This means that the current provisions of company law are applicable in each case. 3

Although the action for avoidance and the action for annulment differ in terms of their legal structure (see n. 83 f. and n. 130 below), in practice both actions aim to secure in court that a resolution of the shareholders' meeting is not implemented or is not (no longer) applicable. Before the action for rescission and the action for annulment are discussed, a chapter first explains the resolution of the shareholders' meeting and its consequences (see N. 5 et seq. below). This is followed by the chapters on the action for avoidance (n. 19 et seq. below) and the action for annulment (n. 99 et seq. below). Subsequently, a 4 chapter discusses the relationship between actions for avoidance and actions for annulment and other actions under corporate law (n. 136 et seq. below). The procedural aspects are explained below in N. 143 et seq. Finally, smaller chapters on the reversal of the resolutions (below n. 200 et seq.) and the Covid-19 pandemic (below n. 205) follow.

## II. RESOLUTION OF THE SHAREHOLDERS' MEETING AND RESOLUTIONS

### A. Concept of resolution and terminology in connection with resolutions

5 According to some scholars, resolutions are sui generis legal transactions and according to another view, they are multilateral legal transactions. Since a resolution generally requires more than one declaration of intent, it is considered a multilateral legal transaction according to the view expressed here. If the shareholders' meeting consists of only one person, it is also referred to as a resolution.

6 The resolution comes into effect when the chairman or chairwoman announces it at the shareholders' meeting. In my opinion, the announcement of the voting result is constitutive for reasons of legal certainty. The voting process only needs to be taken into account if no announcement is made. Pursuant to Art. 805 para. 5 no. 5 in conjunction with Art. 701 para. 3 CO. Art. 701 para. 3 CO, resolutions can be passed in writing unless a shareholder requests an oral discussion (so-called ballot vote). In the case of a ballot vote, the chairman or chairwoman must pass a formal resolution after receiving the votes of the shareholders.

7 Various terms are used inconsistently in connection with resolutions of the shareholders' meeting. At this point, some of these terms, which are also used in the further course of the commentary, are briefly presented as pairs of opposites.

The terms "sham resolution" and "non-resolution" are not discussed in detail (see also n. 100 below).

## 1. Contestable vs. null and void

A resolution of the shareholders' meeting is void if there are serious defects (see Art. 706b CO; see below N. 106 et seq.). The other defects lead to the resolution being voidable and must be asserted within two months of the meeting by means of an action for rescission (see Art. 706a para. 1 CO; n. 85 et seq. below). In contrast, mere administrative offenses are legally irrelevant. This includes, for example, compliance with the six-month deadline for holding the ordinary shareholders' meeting pursuant to Art. 805 para. 2 CO. 8

In connection with the legal validity of resolutions, Dubs deals with the concept of prerequisites for resolutions. Genuine resolution requirements are content-related factual elements that form the prerequisites for the legal validity of a resolution. While the qualified genuine prerequisites for a resolution must already exist at the time the resolution is passed, simple genuine prerequisites for a resolution can only occur after the resolution has been passed. In contrast, the non-genuine prerequisites for a resolution are not part of the legal facts of the resolution and therefore have no effect on the legal validity of the resolution. According to Dubs, the genuine prerequisites for a resolution are a question of existence prior to contestation and nullity. If a genuine resolution requirement is not met, there is no resolution at all. The legal consequences of a breach of non-genuine resolution requirements must be determined on a case-by-case basis according to the nature of the breached standard. This may involve contestability. 9

According to the view expressed here, an upstream question of existence is not necessary. The absence of genuine prerequisites for a resolution can be directly attributed to nullity. In the event of a breach of non-genuine prerequisites for a resolution, contestability may be given, depending on the standard breached.

## 2. Valifffd vs. Invalid

The resolution that can serve as the object of a challenge must be valid at the outset. Only when the resolution is annulled as a result of an approved action for annulment is there a retroactive change from a valid to an invalid resolution (see n. 96 below). 10

A void resolution is invalid ab initio. For this reason, no action for annulment is required. The invalidity must be asserted by means of an action for declara- 11 tory judgment or by way of objection (see N. 99 et seq. below). The invalidity of a resolution must be observed ex officio.

12 In contrast to an invalid resolution, a valid resolution must be observed by the company. This means that the management must in principle implement the resolution passed (see Art. 810 para. 1 no. 6 CO; also n. 179 and n. 203 below).

13 The Commercial Register Office must take the nullity into account ex officio as part of its cognizance. Accordingly, a clearly null and void resolution is not to be registered. However, the other resolutions (including contestable resolutions) must be entered - subject to a court block on the commercial register (see n. 188 et seq. below).

### 3. Defective vs. free of defects

14 A resolution is defective if it violates the law and/or the articles of association (see Art. 706 para. 1 CO). Defect-free resolutions are (at least initially) valid (but see n. 160 f. below). Defective resolutions can be either valid or invalid. If a defective resolution is valid at the beginning, it is contestable. In all other cases, the resolution is void.

15 A distinction can be made between formal and material defects. Formal defects (procedural defects) relate to errors in the procedure for adopting the resolution (regarding contestability, see n. 47 et seq. below; regarding nullity, see n. 109 et seq. below). Material defects (defects in content) exist if the content of the resolution violates the law and/or the articles of association (regarding contestability, see N. 77 et seq. below; regarding nullity, see N. 122 et seq. below).

### 4. Pending vs. final

16 Void resolutions are already definitively invalid from the outset. Invalidity is always final because an invalid resolution cannot become valid. Contestable resolutions are pendingly valid. The resolution only becomes definitively invalid once the action for annulment has been (formally legally) approved (see n. 10 above). Prior to this, there is a state of suspension. This lasts for at least two months (see Art. 706a para. 1 CO) and is extended when an action for avoidance is raised. Within this state of suspension, the resolution of the shareholders' meeting is resolutively conditionally valid. The approving rescission judgment constitutes the resolutive condition. If the two-month

contestation period expires unused, any defect is remedied and the resolution becomes finally valid.

## B. Resolutions

The resolution of the shareholders' meeting constitutes the legal basis (causa) for the subsequent resolutions. The resolutions are of particular importance for the shareholders. An action under company law in connection with a resolution of the shareholders' meeting generally has the actual aim of preventing certain resolutions from being passed. For example, the increase in the share capital or the participation of an elected managing director in the management of the GmbH in question should be prevented. 17

If the resolution of the shareholders' meeting is void, there is no legal basis for the corresponding resolutions ab initio. Contestable resolutions initially form the legal basis for the consequences of the resolutions. However, if the action for annulment is upheld, the resolution lapses with effect ex tunc (see n. 96 below). Thus, from the outset, there was no valid legal basis for the corresponding resolutions (on the reversal of the resolutions, see n. 200 et seq. below). 18

# III. ACTION FOR RESCISSION

## A. Active legitimation

Every shareholder and every partner (N. 20 et seq.) and the management in corpore (N. 28 et seq. below) has the right to bring an action. The auditors do not have the right to take action. It is not possible to restrict or extend the circle of persons with the right to act in accordance with the articles of association. Third parties such as creditors therefore have no right of challenge even if they have a corresponding interest. 19

### 1. Shareholders

In principle, every shareholder has the right to challenge a resolution of the shareholders' meeting. Shareholders who were not present at the shareholders' meeting or who merely abstained from voting on the resolution also have the right to challenge the resolution. An exception to this principle is made for shareholders who have approved the resolution. In the sense of a counter-ex- 20 ception, these shareholders also have the option of filing an action for rescission if they are subject to a lack of will. The time limit for asserting this claim is not the one-year period from knowledge of the lack of will pursuant to Art. 31 para. 1 CO, but the forfeiture period under company law of two months from the date of the resolution (Art. 706a para. 1 CO; on the time limit, see n. 85 et seq. below).

21 In order to assess the shareholder status, the transfer of the ordinary share in the correct form (Art. 785 CO) and, if necessary in the company concerned, the recognition of the acquirer by the shareholders' meeting (cf. Art. 786 CO) are important, which may arise as preliminary questions in the avoidance proceedings. In contrast, the entry in the share register and in the commercial register are only of declaratory significance.

22 Active legitimacy must exist at the time the action is filed and at the time of the judgment. New shareholders joining the company in the event of a capital increase cannot challenge the capital increase resolution. However, they may challenge subsequent resolutions on which they are entitled to vote.

23 After the sale of the ordinary shares, the acquirer is entitled to bring an action for rescission or to continue the proceedings (Art. 83 para. 1 CPC). As an intervening party, the acquirer is liable for all legal costs (Art. 83 para. 2 CPC). If the approval of the shareholders' meeting is required, the assignment of the ordinary shares only becomes legally effective with the approval of the shareholders' meeting (Art. 787 para. 1 CO). In my opinion, the right of avoidance is not one of the rights associated with the right to vote within the meaning of Art. 788 para. 2 CO. For this reason, in the case of special types of acquisition (inheritance, division of an estate, matrimonial property law, compulsory execution, acquisition of ordinary shares by the acquiring company in the event of a merger and other circumstances under the Merger Act), the right of avoidance is transferred to the acquirer without the consent of the shareholders' meeting (Art. 788 para. 1 CO). This is particularly important because otherwise the (negative) resolution of the shareholders' meeting regarding recognition as a member with voting rights could not be contested by the acquirer, which would lead to an unjustified gap in legal protection.

24 If several persons are entitled to an ordinary share (cf. Art. 792 CO), they form a necessary joint venture for the purpose of contesting the resolution (cf. Art. 70 CPC). It is also possible to initiate an action for avoidance through a jointly

appointed representative (see Art. 792 para. 1 CO). On the other hand, it is not possible to include the other jointly entitled parties as defendants. At most, an exception could be granted in cases of urgency. In this case, the other entitled parties would have to subsequently consent to the action for avoidance and join the proceedings.

Parties with independent rights of action can conduct the avoidance proceedings as simple joint litigants (see Art. 71 CPC).

In the case of usufruct of an ordinary share, the usufructuary is entitled to voting rights and the associated rights (Art. 806b para. 1 CO). It is disputed to what extent usufruct has an effect on the entitlement to assets. Some scholars do not grant usufructuaries a right of avoidance. As the interests of the shareholder and the usufructuary do not always coincide, other doctrinal voices believe that both have the right to bring an action. 25

According to some doctrine, the holders of profit participation certificates (Art. 774a in conjunction with Art. 657 CO) are only entitled to challenge the company if this is granted to them in the articles of association. According to another view, holders of profit participation certificates are also entitled to take legal action if they are affected by the resolution as shareholders in the company. Since holders of profit participation certificates should not be denied legal protection either, the latter view must be accepted. 26

Pledgees of pledged ordinary shares are not entitled to take legal action (see Art. 905 para. 2 CC). 27

## 2. Management

As an executive body, the management also has the right to take legal action. Accordingly, individual managing directors who are not shareholders cannot sue personally. Although the management is not mentioned in Art. 691 para. 3 CO, it also has the right to sue in these cases. A corresponding resolution of the managing directors is required to file an action. As long as there is only one managing director, he or she alone decides on the filing of an action. Unless otherwise stipulated in the articles of association, the managing directors decide by a majority of the votes cast (Art. 809 para. 4 CO). This resolution cannot be subject to the reservation of approval within the meaning of Art. 811 CO, because otherwise the same majority that obtained the resolution of the shareholders' meeting to be challenged could thwart the challenge of this very 28 resolution. A reservation of approval would also make it more difficult to file an action within the deadline (see n. 85 et seq. below for the deadline).

29 In principle, the management can leave it to the losing shareholders to challenge the resolution of the shareholders' meeting. If a resolution of the shareholders' meeting thwarts the functioning or the performance of core duties by the management or seriously violates public law or criminal law, a duty to contest may be derived from Art. 810 para. 2 no. 6 and Art. 812 para. 1 CO.

30 The shareholders' meeting can dismiss managing directors it has elected at any time (Art. 805 para. 1 CO). The majority at the shareholders' meeting can therefore dismiss the managing directors and elect managing directors who withdraw an action for avoidance. For this reason, shareholders must consider whether they do not wish to bring an action themselves - with the corresponding risk.

### 3. Interest in avoidance

31 The action for avoidance requires an interest worthy of protection (Art. 59 para. 2 lit. a CPC). The specific form of this interest in avoidance is controversial. In an officially published decision, the Federal Supreme Court considered that - subject to the prohibition of abuse of rights - the intention to safeguard the interests of the company is sufficient. It is also necessary that the legal position of the contesting shareholder is affected by an approving judgment. In unpublished case law, the Federal Supreme Court went even further and demanded that the legal position of the contesting shareholder be effectively changed ("effectivement modifié") by an approving judgment and that this judgment benefits him personally ("doit lui être utile"). A later officially published Federal Supreme Court decision only states the principle that the approval of the action for annulment must have a positive effect on the legal situation of the plaintiff. This decision also states that the assessment of the interest in legal protection must be based on the assumption that the facts of the case and the legal opinion of the plaintiff are correct. The prevailing doctrine, on the other hand, is more generous and affirms the interest in contesting the decision if the action is brought to protect the interests of the company.

The correctness of the resolutions of the shareholders' meeting is in the interests of the company. If the management raises the action for avoidance (see n.

28 et seq. above), it is also protecting the interests of third parties. Every shareholder should therefore also have the opportunity to challenge a resolution of the shareholders' meeting regardless of whether their legal position is affected or not. Otherwise, it may be impossible for a shareholder to enforce a resolution that complies with the law and the articles of association.

The interest in legal protection generally lapses retrospectively if the company passes the resolution with the same content a second time because the first resolution suffered from a formal defect. As a rule, the resolution only takes effect from the second resolution (ex nunc effect). An action for rescission with effect ex tunc is still possible within the two-month contestation period (see N. 85 below). This requires an interest worthy of protection in the annulment of the decision with effect ex tunc. 32

There is no interest in rescission if the action for rescission is abused. This is the case if the plaintiff's or claimant's sole aim is to damage the company or if he or she wishes to have the right of avoidance bought off. 33

For the causality requirement as part of the interest worthy of protection: see n. 48 f. below. 34

## B. Passive legitimation

The company adopting the resolution (Art. 706 para. 1 CO: "against the company") is the party with passive legitimacy. As a rule, the company is represented by the management (see Art. 706a para. 2 CO; on representation in legal proceedings, see n. 153 et seq. below). 35

If the company has been deleted from the commercial register, it must be re-registered for the proceedings (see Art. 935 para. 2 no. 2 CO). Parallel to the re-registration proceedings, an action for avoidance must be filed in order to comply with the forfeiture period (see n. 85 et seq. below). The avoidance proceedings must be suspended in view of the outcome of the re-registration proceedings (see Art. 126 para. 1 CPC). 36

If the company is declared bankrupt, Art. 207 SchKG applies to the avoidance proceedings. Accordingly, with the exception of urgent cases, civil proceedings in which the debtor is a party and which affect the bankruptcy estate are discontinued (Art. 207 para. 1 SchKG). A discontinuation is therefore conceivable if the company's assets are affected (e.g. if a dividend resolution is an- 37 nulled). It is also conceivable that, as a rule, there is no longer any interest in contesting the annulment of the resolution due to the lack of continuation of the company (generally on the interest in contesting the resolution, see n. 31 et seq. above).

## C. Object of the avoidance

38 Only resolutions of the shareholders' meeting can be considered as objects of avoidance. Both a positive resolution (acceptance of a motion) and a negative resolution (rejection of a motion) can be the subject of an action for avoidance. As a rule, there is only an interest in challenging a negative resolution (n. 31 et seq. above) if the resolution becomes a positive resolution as a result of the approval of the action for annulment (see n. 71 et seq. and n. 95 below regarding the action for positive determination of a resolution). In contrast, the resolutions of the management can only be null and void (Art. 816 in conjunction with Art. 706b CO) and an action for rescission is excluded. Even if the resolution has been declared incontestable by the shareholders' meeting, this does not preclude an action for rescission.

39 Unless otherwise stipulated in the articles of association, the shareholders exercise the management of the company jointly (Art. 809 para. 1 CO). If the concept of self-organization provided for by law is retained, it may be unclear in which function the shareholders have acted. Whether the shareholders are acting as a shareholders' meeting or as management is important, for example, when it comes to casting votes and the question of whether the corresponding resolution can be contested at all (n. 1 above). The shareholders' meeting passes almost ordinary resolutions with an absolute majority of the votes represented, unless a different legal or statutory provision exists (see Art. 808 and Art. 808b CO). Voting rights are normally based on the nominal value of a shareholder's ordinary shares (Art. 806 para. 1 CO). However, unless otherwise stipulated in the articles of association, the management decides by a majority of the votes cast (Art. 809 para. 4 CO).

40 A resolution of the shareholders' meeting exists if the resolution falls within the scope of the non-transferable powers of the shareholders' meeting within the meaning of Art. 804 para. 2 CO. According to Art. 810 para. 1 CO, the managing directors are responsible for all resolutions that are not assigned to the shareholders' meeting by law or the articles of association. In this context, it is also important whether the shareholders are aware that they are passing a

resolution as a shareholders' meeting. In the case of a universal meeting, the shareholders must expressly or tacitly agree to the holding of a shareholders' meeting.

## D. Grounds for contestation

In the sense of a general clause, Art. 706 para. 1 CO states that the resolution can be contested in the event of a breach of the law or the articles of association. The law primarily includes company law. This also includes unwritten rules such as the principle of the careful exercise of rights and the principle of proportionality. 41

In Art. 706 para. 2 CO, the legislator explicitly lists a number of facts. This list is not exhaustive. Art. 706 para. 2 no. 1 CO (withdrawal or restriction of shareholders' rights due to violation of the law or articles of association) is already contained in the general clause and therefore has no independent significance. The other clauses in Art. 706 para. 2 CO codify principles that also apply in the GmbH and thereby specify Art. 706 para. 1 CO. 42

A resolution of the shareholders' meeting that contradicts provisions of the articles of association is contestable - provided that the corresponding causality exists in the case of formal grounds for contestation (see n. 48 f. below) - if this resolution does not itself relate to an amendment of the provision of the articles of association. An example of such a resolution is the election of a managing director who does not fulfill a clearly formulated statutory eligibility requirement. 43

Resolutions that violate the company's regulations can also be contested. According to Schott, this does not include regulations or rules of procedure relating to the preparation and conduct of the shareholders' meeting.

A breach of observance (customary law within the association) can also lead to contestability.

A resolution to introduce a provision in the articles of association that could potentially be misinterpreted (virtual violation of the articles of association) cannot be challenged.

The action for avoidance does not serve to assess the discretion of the majority of shareholders. The appropriateness or expediency of a resolution of the 44 shareholders' meeting cannot be judicially reviewed by means of an action for avoidance.

45 If a resolution of the shareholders' meeting disregards provisions of a shareholders' agreement - such as voting commitments - this resolution cannot be challenged due to the purely contractual effect of the shareholders' agreement.

46 The following section is dedicated to the formal grounds for avoidance (N. 47 et seq.) and one section to the substantive grounds for avoidance (N. 77 et seq.).

### 1. Formal grounds for avoidance (procedural defects)

47 Formal grounds for avoidance exist in the event of defects in the resolution procedure. A formal ground for avoidance may arise from a violation of the law and/or the articles of association (Art. 706 para. 1 CO). Art. 706 para. 2 CO does not mention formal defects.

48 When contesting formal defects, the requirement of causality must be observed. The Federal Supreme Court requires that a formal defect must also have affected the adoption of the resolution. The causality requirement can be derived from Art. 691 para. 3 CO, which also applies to limited liability companies (see N. 1 above). As a subset of the action for avoidance, Art. 691 para. 3 CO provides that a resolution can be contested if unauthorized persons participate (negative action for voting rights), unless the company proves that this participation had no influence. It is recognized that such an action is also possible if an authorized person was wrongfully excluded from the shareholders' meeting (positive action for voting rights). The burden of proof regarding the lack of causality lies with the defendant company in accordance with Art. 691 para. 3 CO. According to the prevailing view, the causality requirement is part of the interest worthy of protection (on the interest in rescission, see n. 31 et seq. above).

49 The scope of application or the specific application of the causality requirement is disputed. In the case of an incorrect resolution (e.g. by applying an incorrect quorum or incorrect counting of votes), the actual causality of the result applies. The resolution of the shareholders' meeting can only be contested if the result of the resolution would have been different without the relevant defect. If there are defects that impair the decision-making of the share-

holders (violation of participation, involvement and information rights), contestability should be affirmed if there is a connection between this defect and the voting behavior of an objectively judging shareholder (normative causality). Such an understanding of causality would not leave the minority shareholders at the mercy of the majority and at the same time prevent avoidance actions that merely allege defects of minor relevance. Schenker rejects the extension of the causality requirement to other procedural provisions. Schenker's radical view cannot be accepted. With the understanding of causality just described (coined by Schott), the minority shareholders can be sufficiently taken into account.

In connection with avoidance, the question of whether there is an obligation 50
to give notice of defects to the detriment of the shareholder who is contesting, according to which he or she must give notice of the formal defects at the shareholders' meeting, is rarely discussed. In an action for avoidance under association law, the Federal Supreme Court held that, based on Art. 2 para. 2 of the Swiss Civil Code, the principle applies that formal defects must be notified before the resolution is passed, provided that they can be identified and rectified in good time, otherwise the right of avoidance is forfeited. At this point, the Federal Supreme Court referred to Riemer, who does not differentiate between the various corporate bodies under Swiss law with regard to the obligation to give notice of defects. The majority of the doctrine on stock corporation law that is relevant for the GmbH (see above N. 2) rejects such an obligation to give notice of defects - subject to abusive behavior. In the absence of a legal basis for an obligation to give notice of defects, this view is correct in my opinion.

The following are examples of formal deficiencies. It is not possible to address 51
all formal defects in this commentary. In this regard, reference is made to the specialist literature and the commentaries on the respective breached standards.

The following description is based on three sections, which are oriented towards the chronological sequence (defects in the convening [N. 52 ff.], the conduct [N. 61 ff.] and the voting [N. 71 ff.] of the shareholders' meeting). Only in the case of defects in connection with the vote should the actual causality of the result be applied (cf. n. 49 above). In the case of defects in connection with the convening and conduct of the shareholders' meeting, normative causality applies according to the view expressed here (see n. 49 above).

### a. Formal defects in the convening of the shareholders' meeting

52 The violation of formal requirements when convening the shareholders' meeting generally leads to the subsequent resolutions being voidable. These defects become irrelevant if the requirements for a universal meeting are met (see Art. 805 para. 5 no. 5 in conjunction with Art. 701 para. 1 and para. 2 CO).

53 The shareholders' meeting must be scheduled no later than twenty days before the date of the meeting, whereby a statutory shortening to ten days is possible (Art. 805 para. 3 CO). In my opinion, the unintentional minor non-compliance with this deadline only leads to contestability (regarding nullity below n. 114).

54 The items on the agenda must be specified in the notice convening the meeting (Art. 805 para. 5 no. 3 in conjunction with Art. 700 para. 2 no. 2 CO). Apart from certain exceptions, no resolutions can be passed on motions relating to agenda items that have not been duly announced (Art. 805 para. 5 no. 3 in conjunction with Art. 704b CO). Violation of this rule leads to contestability. The excessively narrow wording of an agenda item also leads to contestability, as this violates the shareholders' individual right to propose motions at the shareholders' meeting.

55 The motions of the management and the shareholders must also be included in the notice convening the meeting (Art. 805 para. 5 no. 4 in conjunction with Art. 700 para. 2 no. 3 and no. 4 CO). If an item for discussion is published in the notice convening the meeting without a corresponding motion, it is also contestable.

56 In principle, the determination of the place of the meeting must not make it unreasonably difficult for any shareholder to exercise his or her rights in connection with the shareholders' meeting (Art. 805 para. 5 no. 2bis in conjunction with Art. 701a para. 2 CO). As a rule, a breach of this provision is contestable. According to the view expressed here, normative causality is a prerequisite for this defect (cf. n. 49 above).

57 A challenge is also possible if the principle of unity of the subject matter is violated (Art. 805 para. 5 no. 2 in conjunction with Art. 700 para. 3 CO). This principle is violated if elements of different core resolutions are combined. This prevents shareholders from approving a proposal even though they only partially agree with it. This would be the case, for example, if several manag-

ing directors can only be elected at the same time, although one shareholder demands individual elections. According to Müller, in order to enforce the principle of unity of the subject matter, it is necessary for a shareholder to work towards compliance with the principle of unity of the subject matter at the meeting by requesting a separate vote. In the absence of a legal basis, there is, in my opinion, no reason to make an exception to the principle that there is no obligation to give notice of defects in the case of formal defects (cf. n. 50 above).

The management must send the annual report and, if there is no opting-out, the audit report to the shareholders at the latest together with the invitation to the ordinary shareholders' meeting (Art. 801a para. 1 CO). If this is done late, it is contestable. In serious cases, nullity is also conceivable. 58

If the shareholders' meeting is convened in the form prescribed by the articles of association, resolutions cannot be contested if a shareholder fails to take note of the notice of meeting through no fault of his or her own. 59

For nullity in the event of formal defects in the convening of the shareholders' meeting: see N. 109 et seq. below. 60

### b. Formal defects in the conduct of the shareholders' meeting

Each shareholder has the right to submit motions within the scope of the items on the agenda (Art. 805 para. 5 no. 4 in conjunction with Art. 699b para. 5 CO). If the chairman or chairwoman passes over or does not allow a motion by a shareholder on an item on the agenda, this leads to the resolution of the shareholders' meeting under this agenda item being contestable. 61

The Articles of Association may stipulate attendance quorums for the shareholders' meeting. If such an attendance quorum is violated, in my opinion it is contestable because only a provision of the articles of association has been violated (see n. 43 above). 62

A resolution in which persons who are not authorized to participate in the shareholders' meeting have participated is contestable. Mere presence is not sufficient. What is required is that the unauthorized participant has influenced the meeting, for example by voting. The right of challenge within the meaning of Art. 691 para. 3 CO does not require an objection pursuant to Art. 691 para. 2 CO at the shareholders' meeting. 63

64 With regard to the representation of shareholders at the shareholders' meeting, the corresponding provisions of company law apply (Art. 805 para. 5 no. 8 CO). With regard to proxy voting, Art. 689f CO provides for contestability in two cases. If independent proxies, proxies for corporate bodies and proxies for deposited shares do not disclose to the company the number, nominal value and category of the ordinary shares they represent, the resolutions of the shareholders' meeting may be contested under the same conditions as in the case of unauthorized participation in the shareholders' meeting within the meaning of Art. 691 para. 3 CO (Art. 689f para. 1 CO). Resolutions of the shareholders' meeting can also be contested if the chairman or chairwoman fails to provide the shareholders' meeting with all the information for each type of representation, even though a shareholder has requested this (Art. 689f para. 2 CO). It is striking that only Art. 689f para. 1 CO refers to Art. 691 CO. According to the prevailing view, causality must also be taken into account in the event of a challenge based on Art. 689f para. 2 CO.

65 If an independent proxy should have been designated for a virtual shareholders' meeting (see Art. 805 para. 5 no. 2bis in conjunction with Art. 701d CO), the lack of an independent proxy means that the resolutions passed at this virtual shareholders' meeting can be challenged.

In my opinion, a lack of a statutory basis for holding a virtual shareholders' meeting also leads to contestability (Art. 805 para. 5 no. 2bis in conjunction with Art. 701d para. 1 CO). Failure to comply with the statutory requirements for holding a virtual shareholders' meeting also leads to contestability.

According to the opinion expressed here, technical problems also only lead to the contestability of the resolutions (see n. 119 below).

66 In the case of hybrid and virtual shareholders' meetings, the management determines the identity of the participants (Art. 805 para. 5 no. 2bis in conjunction with Art. 701e para. 2 no. 1 CO). If unauthorized participants sneak into the hybrid or virtual shareholders' meeting, a challenge based on Art. 691 para. 3 CO is possible (see above n. 63 and below n. 72 and n. 95).

67 The shareholders' meeting may only be held at a foreign venue without independent proxy voting if all shareholders agree to this (Art. 701b para. 2 CO). If this provision is disregarded, any resolution of the shareholders' meeting is contestable. In my opinion, contestability also exists if there is no statutory

basis for holding the shareholders' meeting at a foreign venue (see Art. 701b para. 1 CO).

Resolutions on the approval of the annual and consolidated financial statements and the appropriation of the balance sheet profit can also be contested if the auditors are absent in violation of the regulations (Art. 731 para. 3 CO). The auditors are required by law to be present if an ordinary audit has been carried out (Art. 731 para. 2 in conjunction with Art. 818 para. 1 CO). LLCs are usually not large enough to be obliged to have an ordinary audit (see Art. 727 para. 1 in conjunction with Art. 818 para. 1 CO). An ordinary audit must be carried out if shareholders representing 10% of the share capital request such an audit (Art. 727 para. 2 in conjunction with Art. 818 para. 1 CO). A shareholder who is subject to an obligation to make additional contributions also has the right to request an ordinary audit (Art. 818 para. 2 CO). A shareholder who has left the company may also request an ordinary audit as long as his or her compensation has not been paid out in full (Art. 825a para. 4 CO). It is questionable whether the company has the right to prove a lack of causality within the meaning of Art. 691 para. 3 CO. 68

If a shareholder does not vote in the ballot within the meaning of Art. 805 para. 5 no. 5 in conjunction with Art. 701 para. 3 CO. Art. 701 para. 3 CO, a resolution passed in the ballot vote can be contested. Von der Crone, on the other hand, argues for nullity. 69

According to the prevailing opinion, there is no defective resolution if the minutes are incorrectly recorded or if there are no minutes at all. The minutes are important in connection with the application to the commercial register office (cf. Art. 23 HRegV) and the presentation of evidence (see N. 168 below). If the articles of association provide for minutes or specific provisions on minutes, their violation - provided there are no other indications in the articles of association - merely constitutes a legally irrelevant administrative offense (see also n. 8 above). 70

## c. Formal defects in connection with the vote

The result of the resolution may be falsified and therefore contestable if the votes are counted incorrectly, if the quorum is applied incorrectly (see Art. 808 and Art. 808b CO) or if the chairman or chairwoman announces the resolution incorrectly. In these cases, the incorrect resolution can be replaced by 71 the correct resolution by means of an action for positive determination of the resolution (see n. 95 below).

72 Defects in the vote may be caused by the participation of an unauthorized person (Art. 691 para. 3 CO). Shareholders who have not fulfilled their duty of notification pursuant to Art. 790a CO are also deemed to be unauthorized participants (see Art. 790a para. 5 in conjunction with Art. 697m para. 1 CO). If, as provided for in Art. 808 CO, the resolution is based on the votes represented, an unauthorized participant is already involved by the fact that he or she is represented at the shareholders' meeting with a certain number of alleged votes. In this respect too, the incorrect resolution can be replaced by the correct resolution by means of an action for positive determination of the resolution (see n. 95 below).

73 In the case of resolutions on the discharge of the managing directors, persons who have participated in the management of the company in any way do not have the right to vote (Art. 806a para. 1 CO). If they nevertheless participate in the vote, this is generally voidable.

If all shareholders participate in the management of the company, a discharge resolution is excluded from the outset. If in such situations only contestability were assumed, the resolution would be finally valid after the expiry of the two-month forfeiture period within the meaning of Art. 706a para. 1 CO. This is likely to be the case on a regular basis because the shareholders involved in the management of the company have an interest in this discharge resolution. In bankruptcy, the discharge resolution cannot be held against the claim of the entire body of creditors. Since there are therefore no creditors who have an interest in the nullity, in my opinion the legal consequence in this constellation is also the contestability of the resolution.

74 A limited liability company may acquire its own ordinary shares within narrow limits (Art. 783 CO). The voting rights and the associated rights of these ordinary shares are suspended (Art. 783 para. 4 in conjunction with Art. 659a para. 1 CO). A resolution passed in violation of this provision is contestable (see Art. 783 para. 4 in conjunction with Art. 659a para. 3 in conjunction with Art. 691 para. 3 CO). The shareholder who assigns the ordinary shares to the company has no voting rights (Art. 806a para. 2 CO) for resolutions on the acquisition of own ordinary shares (see Art. 804 para. 2 no. 11 CO). Disregarding this provision also leads to contestability.

In the case of resolutions on the approval of shareholder activities that violate the duty of loyalty or the non-competition clause (see Art. 804 para. 2 no. 13 CO), the shareholder concerned has no voting rights (Art. 806a para. 3 CO). A resolution that is passed in violation of this provision is contestable. 75

According to the prevailing opinion, votes cast by the representative in breach of instructions and votes cast by shareholders bound by a voting agreement in breach of contract are not relevant in connection with the contestation. However, some scholars do not recognize the proxy effect if the company is aware of the conduct contrary to instructions. 76

## 2. Material grounds for avoidance (defects in content)

The substantive grounds for avoidance relate to the content of the resolution. Some cases of contestability are explained below on the basis of the numbers given in Art. 706 para. 2 CO. The list is not exhaustive. For certain individual cases, it is advisable to consult the specialist literature on the relevant topic as well as the commentaries on the relevant standards. 77

### a. Restriction or withdrawal of shareholders' rights in violation of the law or the articles of association

Resolutions that restrict or withdraw the rights of shareholders in violation of the law or the articles of association are contestable (Art. 706 para. 2 no. 1 CO). In connection with Art. 706 Para. 2 No. 1 CO, it is usually a question of restrictions in individual cases. The enactment of general abstract rules in the articles of association should generally lead to nullity (see below n. 124 f.). For example, a provision in the articles of association that allows shareholders' meetings to be convened in less than ten days would be null and void (see Art. 805 para. 3 CO). 78

### b. Restriction or withdrawal of shareholder rights in an unobjective manner

Resolutions of the shareholders' meeting may also be contested if they restrict or deprive shareholders of their rights in an improper manner (Art. 706 para. 2 no. 2 CO). This situation is difficult to distinguish from the inadmissible review of the appropriateness and expediency of a resolution (n. 44 above). It applies if no specific legal or statutory provision is violated, but the restriction is made in an unobjective manner. Among other things, a resolution is deemed 79 to be unobjective if it is not intended to promote the interests of the company. The principle of proportionality and the principle of the careful exercise of rights must also be observed (see n. 41 above). The interests of the minority must not be unnecessarily impaired in relation to the interests of the company. Resolutions are only rarely qualified as not being in the interests of the company.

80 A majority decision is an abuse of rights if it cannot be justified by reasonable economic reasons, obviously impairs the interests of the minority and favors the special interests of the majority for no reason. A resolution is contestable if the rights of the shareholders are restricted or withdrawn in order to pursue the personal objectives of the majority. Particular attention must be paid to this, especially if unpopular minority shareholders are to be forced out of the company. This may be the case, for example, if the majority does not distribute dividends and this cannot be justified on economic grounds because the retained funds are neither invested nor necessary as security for the future. However, the challenge merely leads to the annulment of the resolution and not to the award of an appropriate dividend.

### c. Unjustified unequal treatment or discrimination of the shareholders

81 Pursuant to Art. 706 para. 2 no. 3 CO, a resolution that causes unequal treatment or discrimination of the shareholders that is not justified by the purpose of the company is contestable. The purpose of the company within the meaning of Art. 706 para. 2 no. 3 CO means the interests of the company. Relative equal treatment is required. Differentiation according to capital share is possible (see Art. 798 in conjunction with Art. 661, Art. 806 para. 1 and Art. 826 para. 1 CO). In contrast, absolute equal treatment generally applies to information rights.

Some doctrine allows unequal treatment - without giving specific examples - more generously than in the case of a public limited company due to the personalistic structures of the GmbH. Pursuant to Art. 808c CO, the provisions relating to a public limited company apply "accordingly" (see n. 2 above). Thus, when applying the prohibition of unjustified unequal treatment or discrimination of shareholders within the meaning of Art. 706 para. 2 no. 3 CO, the special features of the GmbH must be taken into account. This applies, for example, to the approval by the shareholders' meeting of a certain activity that violates the duty of loyalty or the non-competition clause (see Art. 808b para. 1 no. 7 CO). If the company refuses consent to one shareholder to carry out such an activity but grants it to another, a challenge should only be possible in obvious cases of abuse. In this regard, it should be noted that, due to the cassatory nature of the rescission judgment, in principle only the granting of consent can be rescinded and the refusal cannot be turned into consent (see n. 94 below). Nonetheless, Art. 706 para. 2 no. 3 CO is also generally applicable to the GmbH. The extent to which the special features of the GmbH can be taken into account depends on the individual case.

### d. Cancellation of the profit motive

The profit motive can only be revoked with the consent of all shareholders and not just those represented (Art. 706 para. 2 no. 4 CO). Otherwise, the resolution of the shareholders' meeting is contestable. This provision concerns the determination of a charitable purpose. The annual resolution on the appropriation of profits is not covered by this provision. This provision does not apply if only an increase in the share capital, which would be necessary to generate profits, is rejected. 82

## E. Legal nature of the action

The action for rescission is an action for formulation (Art. 87 CPC). The action for rescission changes the legal situation by rescinding the resolution passed by the shareholders' meeting. The action for positive determination of a resolution (see Art. 691 para. 3 CO; see N. 95 below) is also an action to determine the legal situation despite the misleading name. 83

The challenge of a resolution of the shareholders' meeting cannot be asserted as a defense. If the two-month period has not yet expired, it is possible to assert the avoidance by way of counterclaim. 84

## F. Contestation/forfeiture period

The action for avoidance is forfeited if the action is not brought within two months of the holding of the shareholders' meeting or the written vote (in the case of a ballot) (Art. 706a para. 1 CO). The court examines compliance with this forfeiture period ex officio. According to the case law of the Federal Supreme Court, the grounds for contestation must also be submitted within this period. The Federal Supreme Court acknowledges that it can be difficult 85 to define the grounds for avoidance in individual cases. In any case, two different grounds for contestation exist if they are not only based on different legal arguments, but also on different facts. Caution is also required in connection with the approval of the annual financial statements (see Art. 804 para. 2 no. 5 CO; see above n. 68). In this respect, according to the Federal Supreme Court, it is not possible to justify a challenge on the basis of the incorrectness of a balance sheet item that already resulted from earlier, unchallenged approval resolutions of the shareholders' meeting.

86 Irrespective of attendance at the meeting, the time limit begins to run on the day after the shareholders' meeting. Art. 77 and Art. 78 para. 1 CO are decisive for the calculation of the time limit. In application of Art. 77 para. 1 no. 3 CO, the action must be brought no later than the day of the second month bearing the same number as the day of the shareholders' meeting and, if this day is missing in this month, on the last day of this month. Pursuant to Art. 78 para. 1 CO, the deadline is extended to the next working day if the last day falls on a Saturday, Sunday or a public holiday (at the place of the competent court).

87 In the case of a ballot vote, the time limit begins to run from the announcement of the result. It is disputed whether, if the result is announced to the shareholders by post, the day following the date of posting constitutes the first day of the time limit or whether the time limit only begins to run once the shareholder has actual knowledge of the result. With the exception of association law, an objective point in time is generally used to calculate the deadline (Art. 706a para. 1 and Art. 891 para. 2 CO). In association law, the possibility of knowledge is taken into account. In order for all shareholders to be able to recognize when the resolution becomes definitively valid (see n. 16 above), the first view must be accepted. The shareholders of the GmbH are responsible for taking note of the resolution in good time.

88 The deadline is observed in accordance with Art. 64 para. 2 in conjunction with Art. 62 para. 1 CPC. Art. 62 para. 1 CPCwith the posting of the request for arbitration or the action in the event of a waiver of the arbitration procedure (see Art. 199 para. 1; see n. 151 below) as well as in the case of subject matter jurisdiction of the commercial court (see Art. 198 lit. f CPC; see n. 147 et seq. below).

89 Some of the literature grants plaintiffs an extension of the deadline in certain situations. Such a situation is conceivable if the company holds out the

prospect of revoking the resolution or if the plaintiff has been misled about the possibility of a challenge, for example by a declaration of incontestability. In my opinion, extending the pending status due to such circumstances is only justified in extreme individual cases for reasons of legal certainty. After expiry of the two-month period, the resolution should generally become definitively valid in the absence of a challenge (see n. 16 above). As a precautionary measure, a request for arbitration or an action should therefore be filed within two months.

It is disputed whether the two-month forfeiture period must also be observed when asserting defects of will. Based on Art. 31 para. 1 CO, some doctrine is of the opinion that a shareholder can declare his or her vote invalid within one year of the shareholders' meeting by means of a simple declaration to the company or assert this by means of an action for rescission. In the interests of legal certainty, the forfeiture period of two months must also be strictly adhered to when asserting defects of will. The two-month period is to be regarded as lex specialis compared to the one-year period pursuant to Art. 31 para. 1 CO. Even in the event of a lack of will, the interest of legal transactions in clarity as to whether a resolution is valid or not prevails. Accordingly, there is no justification for a longer period for contesting a resolution. A declaration to the company is not sufficient. A timely action for avoidance is required. For a successful challenge, it is required that the resolution would have been different without this defect (on the actual causality of the result, see n. 49 above). Depending on the applicable quorum, the corresponding votes are deemed not cast or not represented (see Art. 808 and Art. 808b CO).

If the shareholders' meeting unjustifiably refuses to provide information or in- 90
spection, the court can provide this information (Art. 802 para. 4 CO). This action, which is also at least indirectly directed against a resolution of the shareholders' meeting, is not subject to any time limit. The summary procedure applies (Art. 250 lit. c no. 7 CPC).

## G. Consequences of the judgment of avoidance

### 1. Dismissal of the action for avoidance

The dismissal of the action for avoidance is only effective inter partes and 91
therefore has no effect on the actions for avoidance of other plaintiff shareholders. The judgment of a dismissed avoidance action is a declaratory judg-

ment because it does not change the legal situation. The grounds for the judgment state that the resolution is free of defects, which results in the dismissal of the action (n. 14 above).

## 2. Approval of the action for annulment

92 If an action for avoidance is upheld, a substantive judgment is issued. The invalidation of the resolution of the shareholders' meeting constitutes the formative effect. For this to occur, the decision must become formally legally binding.

93 The effects of a judgment approving an avoidance action are briefly described below in terms of substance (N. 94 f.), time (N. 96) and personality (N. 97 f.).

### a. Effect of the judgment from a factual point of view

94 A favorable judgment annuls the decision (see Art. 706 para. 5 CO). As a rule, the respective judgment has exclusively cassatory effect. The court cannot - with the exception of the positive action for the adoption of a resolution (see n. 95 below) - amend or replace the resolution of the shareholders' meeting. If only individual parts of the resolution are defective, the court can only partially approve the action for annulment (Art. 20 para. 2 CO by analogy).

95 After the prevailing doctrine recognized the positive action to determine a resolution, the Federal Supreme Court recently followed suit. According to the Federal Supreme Court, an action for positive determination of a resolution is admissible if, due to the counting of inadmissible votes, a proposed resolution that should have been deemed to have been adopted was recorded as rejected. The action for a declaratory judgment therefore enables the court to replace the incorrect result with the correct result. Without an action for a declaratory judgment, there would be a lack of legal protection. The plaintiff could only have the effect that a decision that wrongly rejects an application is annulled, but this would not help the plaintiff. According to the Federal Supreme Court, this is tantamount to thwarting the right to vote. This view must be endorsed.

### b. Effect of the judgment in terms of time

96 According to unanimous doctrine and case law, the resolution of the shareholders' meeting lapses with effect ex tunc. The invalidity of the resolution

therefore relates back to the resolution passed at the shareholders' meeting. This also applies accordingly in the case of an action for positive determination of a resolution (see n. 95 above).

### c. Effect of the judgment in personal terms

Pursuant to Art. 706 para. 5 CO, the judgment is effective for and against all shareholders. It is questionable and hardly discussed whether this refers to the formative effect and/or the substantive legal force. According to the opinion expressed here, the shareholders are also affected by the substantive legal force in addition to the formative effect. Without the inclusion of substantive res judicata, the judgment approving the challenge would not be binding for the other shareholders in a subsequent lawsuit. This could lead to a splitting of the legal consequences for the individual shareholders, which would result in almost insoluble problems with the simultaneous (non-)implementation of the resolution. 97

If a dividend resolution is declared invalid due to a challenge, the entitlement to payment of the dividend lapses. Any payment would be based on Art. 800 i.V.m. Art. 678 para. 1 CO (see n. 138 f. below). If the shareholder is not affected by the substantive legal force, he or she could argue in court that the annulment of the resolution in the rescission judgment was unjustified. In the worst case scenario, the successfully contesting shareholder would ultimately be the only one who would have to repay the dividend received, which cannot be considered a desirable goal.

Third parties are also affected by the judgment approving the avoidance - at least in terms of the structuring effect. In principle, the judgment means that all parties involved are in the same position as if the resolution had never been passed. 98

## IV. ACTION FOR ANNULMENT

Resolutions of the shareholders' meeting with serious defects are already invalid from the outset and do not only become invalid with effect ex tunc through an approved action for annulment (see above N. 10 and N. 96). However, an action for annulment as an action for a declaratory judgment can be used to demand a judicial declaration that a resolution of the shareholders' meeting is null and void. 99

100 In the doctrine, a distinction is sometimes made between sham resolutions and non-resolutions (see n. 7 above). Since the legal consequence of sham resolutions and non-resolutions is also nullity, this commentary does not make this distinction.

## A. Active legitimation

101 Anyone who has an interest worthy of protection in the determination of the nullity of a resolution of the shareholders' meeting has the right to bring an action. In contrast to an action for rescission, third parties - such as creditors - may also have standing. The management also has standing. In contrast to the action for avoidance, however, each managing director alone has the right to bring an action if there is an interest worthy of protection (see n. 28 above).

102 A sufficient interest in a declaratory judgment is a prerequisite. This must be current and practical. Such an interest may exist, for example, if the legal position or interests of a person affected are directly impaired or if the bounds of morality or public order have been violated. The intention to protect the interests of society is sufficient in this case. For creditors, such an interest exists, among other things, if the prohibition of restitution of deposits has been violated (see Art. 793 para. 2 CO).

As this is an action for a declaratory judgment, it is a prerequisite that the plaintiff is faced with uncertainty about his or her legal position, the continuation of which is unreasonable and cannot be remedied in any other way - in particular by an immediate action for performance or an action to determine the form of the claim (subsidiarity; see the examples below in N. 137 and N. 139).

## B. Passive legitimation

103 The company has passive legitimacy.

104 For representation in proceedings, see below: N 153 et seq.

105 For the company deleted from the commercial register, see above: N. 36.

## C. Grounds for nullity

106 For a resolution to be null and void, there must be a qualified defect. The list of such defects in Art. 706b CO is not exhaustive. However, caution is re-

quired when assuming nullity. Nullity poses a risk to legal transactions. The principle of subsidiarity of nullity applies. It is the exception as opposed to voidability as a rule. Accordingly, a resolution is only null and void if contestability is not a sufficient legal consequence. The violation of a provision of the articles of association that does not also constitute a violation of the law only leads to voidability.

Art. 706b CO is not an exclusive special provision. This means that a resolu- 107
tion with an impossible or immoral content is void on the basis of Art. 20 para. 1 CO (cf. Art. 7 CC). Resolutions that cause excessive binding of the members are subject to the legal consequences of Art. 27 para. 2 CC. In my opinion, this includes, for example, a waiver to dissolve the company for an indefinite period of time.

The grounds for nullity can be divided into formal (N. 109 et seq.) and sub- 108
stantive grounds (N. 122 et seq.). It should be noted that the distinction is sometimes fluid. However, since the invalidity of formal grounds does not depend on a causality requirement as is the case with avoidance (see n. 109 below), the division into formal or substantive grounds for invalidity is of merely theoretical significance. Art. 706b CO primarily expressly mentions substantive grounds for nullity.

## 1. Formal grounds for nullity (procedural defects)

Formal defects that lead to the nullity of a resolution of the shareholders' 109
meeting may arise in the resolution procedure. A serious and obvious formal defect is required. It is disputed whether there is also a causality requirement for void resolutions of the shareholders' meeting (see above n. 48 f. on causality in the case of rescission). The Federal Supreme Court rejected the existence of a causality requirement with regard to the non-invitation to a meeting. In contrast, it affirmed the causality requirement in connection with joint representation within the meaning of Art. 690 CO, considering that in the case of defects relating to joint representation, the decisive factor was whether these had an effect on the result of the resolution. Formally incorrect procedures in these constellations - without influencing the result of the resolution - are therefore not decisive when calculating the votes. The Federal Supreme Court later considered that the decision regarding the non-invitation to a meeting was a special case. Otherwise, the causality requirement must also be met in the case of formal grounds for nullity.

Some scholars are in favor of a causality requirement (in part with reference to the case law just cited). Other voices rightly deny a causality requirement. In the case of a serious defect, a corresponding exoneration of the company is not justified.

Joint representation is an upstream problem of the exercise of voting rights on shares or ordinary shares of jointly entitled persons and not a direct defect on the occasion of the shareholders' meeting. The Federal Supreme Court merely considered that the incorrect handling of voting rights in joint authorization should only be taken into account if the result of the resolution is also affected. Accordingly, it should not necessarily be inferred from the case law cited above that a causality requirement is necessary. In BGer 4A_141/2020 of September 4, 2020 E. 3.2, the Federal Supreme Court only made a brief statement in a three-judge panel.

110 These formal deficiencies are presented below by way of example. Not all constellations can be dealt with in this commentary. In this regard, reference is made to the specialist literature and the commentaries on the respective violated standards.

The following description is based on two sections, which are oriented towards the chronological sequence (defects in convening [N. 111 ff.] and holding [N. 117 ff.] the shareholders' meeting).

### a. Formal defects in the convening of the shareholders' meeting

111 Invalidity of shareholders' meeting resolutions exists, among other things, if the meeting cannot be said to have been convened at all. Such a case exists, for example, if an incompetent body has convened the shareholders' meeting. This also includes the unauthorized convening of a shareholders' meeting by an individual managing director without a corresponding resolution by the management.

112 If some of the shareholders were not invited, this generally constitutes nullity. Some doctrine restricts this principle. Riemer requires the culpable failure to convene individual shareholders. Schott postulates the legal consequence of nullity only in those cases where the company knew or should have known about it. The extent to which the Federal Supreme Court will allow such restrictions is not yet entirely clear.

113 A notice of meeting on which the place, time or items to be discussed are missing also leads to the nullity of the subsequent resolutions of the shareholders' meeting.

114 There is controversy in the literature regarding the question of the cases in which non-compliance with the notice period pursuant to Art. 805 para. 3 CO leads to nullity (see above n. 53 regarding contestability). Part of the doctrine is in favor of the nullity consequence if the deadline was missed by several days. For Handschin/Truniger, nullity exists in the case of clear non-compliance. Another view argues for nullity only if the managing directors have obviously and intentionally violated the deadline for convening the meeting. In my opinion, nullity should be limited to blatant cases. The complexity of the business on the agenda should also be taken into account with regard to failure to meet the deadline for convening the meeting. The more complex, the more serious the failure to comply with the notice period.

115 The form in which the meeting is convened is determined by the articles of association (Art. 805 para. 5 no. 1 in conjunction with Art. 626 para. 1 no. 7 CO). If the meeting is convened in a different form and, for this reason, some of the shareholders are not aware of it, it is null and void.

116 In the event of incorrect or inadequate convocation, the universal general meeting ("without observing the formal requirements prescribed for the convocation"; Art. 805 para. 5 no. 5 in conjunction with Art. 701 para. 1 and Art. 701 para. 2 CO) remains reserved. Art. 701 para. 1 and para. 2 CO).

### b. Formal deficiencies in the conduct of the shareholders' meeting

117 A serious defect that leads to nullity is the deliberate or culpable non-admission of shareholders entitled to participate in the shareholders' meeting.

118 Resolutions of universal meetings (Art. 805 para. 5 no. 5 CO in conjunction with Art. 701 para. 1 and para. 2) at which not all shareholders were present or left prematurely are null and void.

119 According to a currently still predominant part of the doctrine, technical problems during the shareholders' meeting, so that it cannot be conducted properly (Art. 805 para. 5 no. 2bis in conjunction with Art. 701f para. 1 CO), are provided as a formal reason for nullity. In principle, this only includes technical disruptions on the part of the company and not the shareholders.

However, this does not apply to a virtual universal meeting because in this case not all shareholders or their representatives participate (see Art. 805 para. 5 no. 5 in conjunction with Art. 701 para. 2 CO). An exception exists, for example, in the event of the failure of a major telecommunications company. However, Jutzi/Yousef rightly argue that in such a case only contestability exists. These authors argue, among other things, that voidability is the rule in the event of irregularities at the shareholders' meeting. The assumption of nullity would jeopardize legal certainty too much and the shareholders would be sufficiently protected by contestability. Some scholars would like to determine whether contestability or nullity exists based on the specific circumstances.

According to the view expressed here, there is no causality requirement, irrespective of the question of whether nullity or voidability exists. Some scholars are in favor of a causality requirement because otherwise the risk of repeating a virtual shareholders' meeting is too great. However, the shareholders have a legal right to a proper implementation. Extreme constellations in which a repetition would be a pure waste of time can be remedied with the prohibition of abuse of rights (Art. 2 para. 2 CC).

In these cases, the legislator provides for a repetition of the shareholders' meeting. The claim for repetition can be combined with the application for rescission or nullity within the meaning of Art. 90 CPC. The resolutions passed by the shareholders' meeting before the technical problems arose remain valid (Art. 805 para. 5 no. 2bis in conjunction with Art. 701f para. 2 CO). Of course, other grounds for nullity or contestation remain reserved.

If the agenda is not supplemented, the meeting may be repeated without observing the notice period, unless the majority of shareholders are excluded from participation from the outset.

120 According to Art. 731 para. 3 CO, resolutions on the approval of the annual financial statements and the appropriation of the balance sheet profit are null and void without the required audit report. If an opting-out has taken place, no audit report is required for these resolutions (see Art. 818 para. 1 in conjunction with Art. 727a para. 2 CO). If the audit report is deficient, not all deficiencies lead to the resolutions being null and void. Nullity exists if only a limited audit was carried out instead of an ordinary audit. If no audit was carried out at all, nullity must also be assumed. Furthermore, nullity exists if an audit report is not sent to the shareholders at the latest with the invitation to the

ordinary shareholders' meeting (see Art. 801a para. 1 CO). A void resolution of the shareholders' meeting cannot be cured by a subsequently submitted audit report.

Certain resolutions of the shareholders' meeting must be notarized by law (e.g. 121
amendments to the articles of association [Art. 780 CO], capital increase resolution [Art. 781 para. 5 no. 1 in conjunction with Art. 650 para. 2 CO and Art. 75 para. 1 HRegV], capital reduction resolution [Art. 782 para. 4 in conjunction with Art. 653n CO] and the dissolution resolution [Art. 821 para. 2 CO]). This requires the notary to be present at the shareholders' meeting. Furthermore, the correct dating, i.e. neither pre-dating nor post-dating, as well as the correct indication of the place is required. If the resolutions are not properly notarized, they are null and void and therefore legally non-existent (see also Art. 11 para. 2 CO). According to Haefliger, only contestability exists if a public notarization is merely required by the articles of association. In view of Art. 16 para. 1 CO, according to which parties do not wish to be bound beforehand by an agreed formal reservation, it may also be possible to justify the nullity of such a resolution (cf. Art. 7 CC). The statutory basis forms the formal reservation. Since a breach of the articles of association only leads to voidability, it should also be assumed that a public notarization required by the articles of association is only voidable (in general, regarding the breach of the articles of association, see n. 43 above).

## 2. Substantive grounds for nullity (defects in content)

In general, a substantive ground for nullity exists if general abstract provisions 122
are introduced by means of provisions in the articles of association that contradict mandatory law. The legal consequence of nullity thus prevents shareholders from anchoring unlawful provisions in the articles of association by failing to challenge them. Contestability generally exists in the case of individual violations. This includes, for example, a resolution that improperly rejects a dividend distribution in favor of the shareholders (see n. 80 above).

The cases listed in the non-exhaustive Art. 706b CO are briefly explained be- 123
low (see n. 106 above).

### a. Right to participate in the shareholders' meeting and minimum voting rights

124 Pursuant to Art. 706b para. 1 CO, resolutions that generally restrict the right to participate in the shareholders' meeting are null and void. The revocation of the minimum voting right pursuant to Art. 806 para. 1 sentence 2 CO constitutes grounds for nullity. This also includes the revocation of the right of representation (see Art. 805 para. 5 no. 8 in conjunction with Art. 689b et seq. CO). The introduction of a provision in the articles of association according to which the shareholders' meeting may only pass a resolution at the request of the management or may only increase the share capital to the extent proposed by the management would also be null and void. Other general restrictions on the shareholders' right to propose resolutions would also be null and void.

### b. Rights of action and other mandatory rights granted to shareholders

125 The shareholders' meeting may also not generally and permanently restrict or withdraw the rights of action and other rights granted to the shareholders (Art. 706b para. 1 CO). A resolution that would permanently exclude the personal liability of the management would be null and void (see Art. 827 in conjunction with Art. 753 et seq. CO). The personal and irrevocable rights of the shareholders pursuant to Art. 706b para. 1 CO in fine are a general clause for other cases not explicitly mentioned in the law.

### c. Control rights of the shareholders

126 Resolutions that introduce provisions in the articles of association restricting the shareholders' rights of control are null and void (Art. 706b para. 2 CO). The rights of control include the right to disclosure of the annual and audit reports (Art. 801a CO) and the right to information and inspection (Art. 802 CO).

### d. Basic structures of the GmbH

127 The term "basic structures" is illustrated in the doctrine by means of examples. In general, these include the constitutive features of the GmbH as a legal institution. A resolution that transfers the management of the company to the shareholders' meeting would be null and void (see Art. 810 para. 2 CO: "non-transferable and irrevocable duties"). The introduction of no-par value ordi-

nary shares is also not possible (see Art. 774 para. 1 CO). The creation of an ordinary share without entitlement to dividends and a liquidation share would also be null and void.

### e. Provisions on capital protection

The capital protection mentioned in Art. 706b para. 3 CO is an example of an 128
important basic structure of the GmbH as a corporation (cf. Art. 772 para. 1 CO). This includes, for example, the issue of ordinary shares below par (see Art. 774 para. 2 CO). It also includes a resolution that would provide for the payment of interest on the capital contributions (see Art. 798 in conjunction with Art. 675 para. 1 CO). Resolutions that violate the capital protection provisions in individual cases are also null and void. This includes, for example, a resolution on the (partial) repayment of share capital (see Art. 793 para. 2 CO). Furthermore, resolutions that provide for capital repayments in disregard of the prescribed capital reduction procedure are null and void (Art. 782 in conjunction with Art. 653j et seq. CO). Profit distributions that violate the blocking ratios (share capital and statutory reserves) are null and void (see Art. 798 in conjunction with Art. 675 ff. and Art. 801 in conjunction with Art. 671 ff. CO).

On the auditors and the audit report, see above: N. 58, N. 68 and N. 120. 129

## D. Legal nature of the action

The nullity of a resolution of the shareholders' meeting is asserted by means 130
of an action for declaratory judgment. It is also possible to assert the nullity by way of defense or counterclaim.

On the interest in declaratory judgment above: N. 101 f. 131

## E. Time limitation

In contrast to an action for rescission, there is no forfeiture period for an ac- 132
tion for annulment (n. 85 et seq. above). Since it is often difficult to assess whether a defect leads to the nullity or only to the contestability of a resolution, it is advisable to file the action for nullity within two months and, if necessary, to assert the contestability of the resolution (see n. 163 below).

133 However, the barrier of abuse of rights can lead to a time limit in individual cases (see Art. 2 para. 2 CC). Such a case exists, among other things, if the action was delayed for a longer period of time despite the execution of the invalid decision.

### F. Effects of the nullity judgment

134 A declaratory judgment approving the nullity has an effect - based on an analogous application of Art. 706 para. 5 CO - erga omnes vis-à-vis all shareholders (see n. 97 et seq. above regarding the challenge). Third parties are also covered by the effect. In its judgment, the court states that the resolution of the shareholders' meeting is invalid ex tunc due to the nullity. The court can also declare only part of the resolution null and void (Art. 20 para. 2 CO analogously; on the challenge, see n. 94 above).

135 A judgment rejecting a resolution is only effective between the parties.

## V. DIFFERENTIATION AND RELATIONSHIP TO OTHER CORPORATE ACTIONS

### A. Liability action (Art. 827 in conjunction with Art. 753 to Art. 760 CO)

136 The Federal Supreme Court has already dealt with the relationship between the action for avoidance and the action for liability on several occasions. In older decisions, the Federal Supreme Court considered that the action for avoidance is inadmissible if it is based on facts that can form the subject of an action for liability against the company bodies. More recent rulings leave the continuation of this case law open. The theory of subsidiarity advocated by the Federal Supreme Court (at least in the older case law) should no longer be upheld. The action for liability differs fundamentally from the action for rescission. The action for liability is directed against a member of a corporate body who is at fault and demands compensation. The action for avoidance is directed against the company and seeks the retroactive annulment of a resolution of the shareholders' meeting (see above N. 35 and N. 10 as well as N. 96). The action for avoidance and the action for liability should be possible at the same time if the respective requirements are met.

137 The action for a declaratory judgment by a creditor for the nullity of a resolution of the shareholders' meeting is available in addition to the action for liability and can be asserted in parallel. If the action for annulment is merely intended to simplify a later action for liability, it is not to be accepted due to a lack of interest in a declaratory judgment (cf. n. 101 f. above).

## B. Action for restitution (Art. 800 in conjunction with Art. 678 CO)

138 If an unjustified payment is based on a contestable resolution of the shareholders' meeting, this must first be contested within two months (see Art. 706a para. 1 CO; n. 85 et seq. above). Reimbursement can only be demanded after a successful challenge. As the action for restitution may already be time-barred three years after the shareholder or the company becomes aware of it (cf. Art. 678a para. 1 CO), it must be initiated if the contestation process drags on. If necessary, these proceedings can be suspended (see Art. 126 para. 1 CPC).

139 However, if the corresponding resolution of the shareholders' meeting is null and void, the action for restitution can be initiated directly. A void resolution exists, among other things, if mandatory distribution restrictions were not observed (see above n. 128). In such cases, the interest in a declaratory judgment may often be lacking because the action for restitution can be brought as an action for performance (see n. 101 f. above).

## C. Action for dissolution

140 Pursuant to Art. 821 para. 3 CO, any shareholder may request the court to dissolve the company for good cause. As the action for dissolution is subsidiary to other less drastic legal remedies, the action for rescission and the action for annulment generally take precedence. However, the action for rescission or annulment must be able to remedy the grievance in the long term.

## D. Avoidance pursuant to Art. 106 f. FusG

141 Restructuring law allows the GmbH to participate in mergers, demergers, conversions and asset transfers (see Art. 2 lit. c, Art. 4 para. 1, Art. 30, Art. 54 para. 1 and Art. 69 para. 1 FusG). If provisions of the FusG are violated, shareholders (see Art. 2 lit. f FusG) of the participating legal entities who have not approved the resolution may challenge it (Art. 106 para. 1 FusG). The manage-

ment is not entitled to contest the resolution pursuant to Art. 106 f. FusG (Art. 106 para. 1 FusG e contrario). Whether a challenge is possible in the case of a transfer of assets is the subject of controversial debate among scholars. According to the prevailing doctrine, the action for avoidance pursuant to Art. 106 et seq. FusG takes precedence over the ordinary action for avoidance as lex specialis. What the FusG permits cannot constitute a ground for avoidance pursuant to Art. 808c in conjunction with Art. 706 CO. Art. 706 CO.

142 It should be noted that the two-month period for the ordinary action for avoidance generally runs from the adoption of the resolution (Art. 706a para. 1 CO; detailed above n. 85 et seq.), while the action for avoidance pursuant to Art. 106 et seq. FusG does not have to be filed until two months after publication in the SOGC (Art. 106 para. 1 FusG). If no publication in the SOGC is required, the time limit begins at the time the resolution is passed (Art. 106 para. 1 last sentence FusG).

## VI. PROCEDURAL MATTERS

### A. Jurisdiction

#### 1. Local jurisdiction

143 The court at the registered office of the GmbH has jurisdiction for both the action for rescission and the action for annulment (Art. 10 para. 1 lit. b CPC). The registered office of the GmbH is determined by the articles of association and the entry in the commercial register (Art. 776 para. 1 CO and Art. 73 para. 1 lit. c HRegV). As the entry of the transfer of the registered office has a constitutive effect, the registered office entered in the commercial register (at the time the application or action is filed) is decisive.

144 The place of jurisdiction for the registered office is not mandatory. An agreement on the place of jurisdiction in the articles of association is primarily binding on the founding members and the company. New shareholders are bound by the agreement on the place of jurisdiction in the articles of association by signing the articles of association or by a declaration of accession expressly recognizing the articles of association. Art. 17 para. 2 CPC provides for a written form or another form that enables proof by text as a formal requirement.

145 A change of registered office of the company - during the current contestation period - may be an abuse of rights and would therefore have no effect with regard to the contestation. A change of registered office after the action for avoidance has become lis pendens does not affect the local jurisdiction (Art. 64 para. 1 lit. b CPC; perpetuatio fori).

## 2. Subject matter jurisdiction

146 Pursuant to Art. 6 para. 4 lit. b CPC, the cantons may declare the commercial court to have jurisdiction for disputes arising from the law of commercial companies and cooperatives. All commercial court cantons have made use of this option. In the cantons of Aargau and St. Gallen, actions for rescission and nullity of a resolution of the shareholders' meeting must be submitted to the commercial court regardless of the amount in dispute (Section 12 para. 1 lit. a EG CPC AG and Art. 11 para. 1 lit. b EG CPC SG). In the cantons of Bern and Zurich, the commercial court has jurisdiction if the relevant amount in dispute exceeds CHF 30,000 (Art. 7 para. 2 EG ZSJ BE and Art. 44 lit. b GOG ZH; on the amount in dispute, see n. 174 below).

147 According to the Federal Supreme Court, a commercial register entry of the parties is not relevant for the jurisdiction of the Commercial Court pursuant to Art. 6 para. 4 lit. b CPC. The subject matter jurisdiction established in accordance with Art. 6 para. 4 CPC is mandatory and, consequently, a cantonal limitation of the scope of application in accordance with Art. 6 para. 2 and para. 3 CPC is not permissible. Consequently, the plaintiff's right of choice within the meaning of Art. 6 para. 3 CPC, which is tailored to the plaintiff's lack of entry in the commercial register, does not apply either. The assignment of the action for rescission or nullity to the Commercial Court is therefore mandatory - apart from the permissible introduction of a limit on the amount in dispute (n. 146 above).

148 The Commercial Court also has jurisdiction for precautionary measures before and after lis pendens (see Art. 6 para. 5 CPC). See below on precautionary measures: N. 179 et seq.

149 In the other cantons, courts of first instance first deal with actions for rescission and nullity. This may be followed by cantonal appeal proceedings (see N. 178 below).

## B. Conciliation proceedings

150 If the commercial court has jurisdiction, the conciliation procedure is not required according to Art. 198 lit. f CPC (see above N. 146 ff.). Furthermore, no conciliation proceedings are required if a forfeiture period has been set (see n. 180 below). The forfeiture period of the action for rescission is not such a period (cf. n. 85 et seq. above). In other cases, conciliation proceedings are generally required (see Art. 197 CPC). However, an acknowledgement of the claim and a settlement are only permissible to a limited extent (see N. 170 et seq. below). On the other hand, it is permissible to settle the avoidance proceedings by withdrawing the action.

151 Pursuant to Art. 199 para. 1 CPC, the parties may jointly waive arbitration proceedings if the amount in dispute is at least CHF 100,000. If the shareholders' meeting is not willing to approve an acknowledgment of claim or a settlement, the arbitration proceedings should be waived in order to avoid unnecessary idle time and to provide clarity about the final validity of the resolution more quickly. In addition, the possibility of a direct action in agreement with the defendant before the higher court of the canton concerned in accordance with Art. 8 ZPO should also be considered. This can also help to clarify the final validity of a resolution of the shareholders' meeting more quickly (see n. 16 above).

152 If no agreement can be reached, the arbitration authority will grant the plaintiff for avoidance or nullity the authorization to file suit (Art. 209 para. 1 lit. b CPC). The plaintiff then has three months to file an action (Art. 209 para. 3 CPC). The period of two months within the meaning of Art. 706a para. 1 CO does not apply. This time limit is suspended during court vacations (Art. 145 para. 1 CPC).

## C. Representation of the GmbH

### 1. Management

153 In the event of an action for rescission and/or nullity, the company is represented as the defendant by the management (see Art. 706a para. 2 CO e contrario). If only individual members of the management as shareholders contest the resolution, the company is represented by the rest of the management. The shareholders bringing the action must recuse themselves.

In some cases, the question arose as to how to proceed if the subject of the proceedings is the validity of an election resolution. The plaintiff shareholder argues that the member of the management representing the company in the civil proceedings was not validly (re-)elected. It is now questionable whether the disputed validly (re-)elected member of the management of the defendant GmbH can validly represent the company or validly authorize a lawyer to represent it. In such a situation, the plaintiff shareholder could object, among other things, that the company's response and any duplicate response cannot be relied upon. 154

The capacity to sue is the procedural correlate to the capacity to act under civil law (Art. 67 para. 1 CPC). Legal entities have the capacity to act and therefore the capacity to institute legal proceedings as soon as the bodies required by law and the articles of association have been appointed (Art. 54 CC). In the case of an action for rescission and/or nullity regarding the validity of an election resolution or several election resolutions, the question of capacity to sue cannot be answered without an assessment of the substantive law.

Such a situation was resolved by the Commercial Court of the Canton of Berne by applying the concept of doubly relevant facts. Doubly relevant facts are those that are relevant to both the admissibility and the substantive merits of an action. If such facts are disputed, they must be assumed to be true for the purpose of assessing the admissibility of the action. They are only examined at the time of the substantive examination of the claim and any objections raised by the opposing party in this regard are irrelevant in the context of the admissibility examination. If there are doubly relevant facts in connection with the capacity to sue, the capacity to sue must be assumed in the proceedings. For this reason, the court can dispense with examining the validity of the election resolution of the defendant company when examining admissibility. This also renders the appointment of a representative for the company in analogous application of Art. 706a para. 2 CO unnecessary. In organizational deficiency proceedings, the High Court of the Canton of Zug upheld the reasoning of the lower court, according to which, until the material examination of the organizational deficiency of the absence of a prescribed body (board of directors) within the meaning of Art. 731b para. 1 no. 1 CO, the defendant legal entity's capacity to institute proceedings in the sense of a double-relevant fact was to be assumed.

## 2. Representation within the meaning of Art. 706a para. 2 CO

155 If the management brings an action as an executive body (n. 28 et seq. and n. 101 above), the court must appoint a representative for the defendant company in accordance with Art. 706a para. 2 CO. If all members of the management bring an action in their capacity as shareholders, representation must also be appointed (on the withdrawal of the shareholders bringing the action, see n. 153 above).

156 Pursuant to Art. 250 lit. c no. 10 CPC, representation is appointed in summary proceedings. In my opinion, this is an interim decision that has an influence on the proceedings. According to another view, this is a matter of voluntary jurisdiction. According to Art. 19 CPC, the court at the registered office of the company has mandatory jurisdiction. Since the place of jurisdiction for actions for rescission and nullity is not mandatory (see n. 144 above) and jurisdiction for the appointment of a representative should lie at the place of the main proceedings, it is impracticable to classify this as a matter of voluntary jurisdiction.

157 According to Schenker, representation is determined by the court of first instance after receipt of the action. According to Hüsser, the management of the company concerned must submit an application. If a commercial court has jurisdiction, this decision falls within its competence.

As representation may show that the action would be futile, it is desirable for the company to be represented within the meaning of Art. 706a para. 2 CO during the arbitration proceedings. In these cases, the management must turn to the court because the conciliation proceedings are not required in summary proceedings (see Art. 198 lit. a CPC). In my opinion, the conciliation authority is not authorized to appoint a representative in accordance with Art. 706a para. 2 CO. Court practice has forwarded arbitration requests from the executive body regarding actions for avoidance to the court of first instance for reasons of jurisdiction.

158 The task of representation is to defend the interests of the company. The representation must be independent of the company's executive bodies. The management is not authorized to issue instructions to the representative. In my opinion, the representative has a sui generis relationship with the company and may therefore be liable to the company for any damage caused.

According to doctrine, the management of the company must provide the 159
representative with the requested documents and information. This duty to hand over has its roots in substantive law. For this reason, it is sufficient if the representative credibly demonstrates that it needs the information and documents for the proper defense of the company as defendant. The duty of disclosure can be enforced in court. The court can also oblige the company to pay the representative an appropriate advance payment. In my opinion, summary proceedings should be applied in both cases (Art. 250 lit. c Ziff. 10 CPC analogously).

## D. Procedural maxims

### 1. Maxim of negotiation or investigation?

In an earlier decision, the Federal Supreme Court dealt with the question of 160
whether the facts of the case had to be clarified ex officio in avoidance proceedings. The Federal Supreme Court considered that the facts of the case do not have to be clarified ex officio so that the management does not act in favor of the contesting shareholder. It is true that the Federal Supreme Court considers the investigation maxim to be justified due to the interests of parties not involved in the proceedings. However, the law does not provide for such an obligation (see also Art. 55 para. 2 CPC). The other shareholders may have to defend themselves by means of an intervening party (see below n. 171 et seq.). The negotiation maxim therefore applies. As a consequence of the negotiation maxim, it is conceivable that the management, as the representative of the company, does not dispute the assertions of the plaintiff and thus implicitly acknowledges them. As a result, the court may have to assume a defect in the resolution of the shareholders' meeting, although it would actually be free of defects (see Art. 222 para. 2 CPC). According to Böckli's earlier opinion, the court has the option and duty to deviate from the negotiation maxim in individual cases if it is obvious that a materially expedient judgment is being thwarted. In my opinion, such a deviation is only possible in accordance with the taking of evidence ex officio within the meaning of Art. 153 para. 2 CPC. Recently, Böckli rejects this view because the CPC does not provide for a statutory provision according to which the maxim of investigation should apply (cf. also Art. 55 para. 2 CPC). In this regard, von der Crone points out the risk of liability if members of the board of directors improperly influence the process.

161 The negotiation maxim also applies to actions for annulment. The circumstances giving rise to the nullity must be alleged by the plaintiff and, if disputed, proven (see Art. 150 para. 1 and Art. 221 para. 1 lit. d CPC; on the burden of proof below n. 167).

### 2. Disposition or official maxim?

162 Since there is no statutory provision stating that the court is not bound by the parties' submissions, the disposition maxim applies in rescission and nullity proceedings (see Art. 58 para. 2 CPC).

163 The plaintiff must therefore specify the decisions that he or she is contesting in the legal request (see Art. 58 para. 1 CPC). As it is difficult to distinguish between nullity and voidness, a combination of main and contingent claims is recommended. However, the nullity of a resolution can also be established ex officio if the relevant resolution of the shareholders' meeting is the subject of the proceedings and the relevant facts have been introduced into the proceedings. This is important, for example, if the deadline for contesting a resolution has been missed.

164 With regard to the acknowledgement of the claim and the settlement: see n. 170 below.

## E. Right of proof

165 In the absence of a deviating provision, Art. 8 CC applies with regard to the burden of proof. The plaintiff in the avoidance action bears the burden of proof for legitimacy (n. 19 et seq. above), the violation of the law and/or the articles of association (n. 41 et seq. above) and compliance with the forfeiture period (n. 85 et seq. above). The plaintiff also bears the burden of proof for any lack of intent (see n. 20 and n. 89 above). The consent of the plaintiff in avoidance, which excludes any right to bring an action, must be proven by the defendant company as a fact preventing the right to bring an action (see n. 20 above).

If the plaintiff proves unequal treatment, the company bears the burden of proof for the justification. The management must therefore prove that the unequal treatment is in the interests of the company. The resolution may also be contestable if the plaintiff succeeds in proving that the interests of the company could also have been achieved by a resolution that respects equal treatment.

The lack of actual causality of the result (n. 49 and n. 51 above) must be proven by the defendant company (Art. 691 para. 3 CO). In contrast, normative causality (n. 49 and n. 51 above) must be proven by the plaintiff or the claimant. 166

The plaintiff in an action for nullity generally bears the burden of proof for the facts leading to nullity. In principle, the presumption applies that defective resolutions of the shareholders' meeting are only contestable. It is also incumbent on the plaintiff to prove his or her interest in a declaratory judgment. 167

In connection with the burden of proof, the minutes of the shareholders' meeting may be of great importance (Art. 805 para. 5 no. 7 in conjunction with Art. 702 CO). If the minutes are kept correctly, relevant technical problems are listed therein, among other things (see Art. 702 para. 2 no. 6 CO). The Federal Supreme Court rejects the assumption of a lack of evidence and an associated reduction in the standard of proof in the case of improperly prepared minutes. 168

Shareholders may request that the minutes be made available to them within thirty days of the shareholders' meeting (Art. 805 para. 5 no. 7 in conjunction with Art. 702 para. 4 CO). However, there is no entitlement to a copy of the minutes. A shareholder may obtain knowledge of the content of the minutes either in the proceedings for taking evidence in the action for avoidance by means of documentary evidence or as an auxiliary request in the context of a step-by-step action.

In the proceedings for taking evidence on the action for avoidance, the minutes must be handed over by the defendant company and not only made accessible within the meaning of Art. 702 para. 4 CO (see Art. 160 para. 1 lit. b CPC) if corresponding requests for evidence are made and approved by the court. However, such a request for the disclosure of the minutes in civil proceedings generally requires assertions as to which facts the minutes in question should prove (see Art. 221 para. 1 lit. d and lit. e CPC). If the defendant refuses to produce the minutes, this will be taken into account when assessing the evidence (see Art. 164 CPC). If the plaintiff has not attended the shareholders' meeting or was unable to attend due to refusal to participate, for example, it is not possible for him or her to state the exact legal claim. In this constellation, it is initially justified to allow an indeterminate form of action. The plaintiff only has to specify the resolutions that are the subject of the action for annulment once he or she is aware of the minutes.

A step action is an objective accumulation of actions within the meaning of Art. 90 CPC. Among other things, the same type of proceedings is required (see Art. 90 lit. b CPC). Actions for rescission and nullity take place either in ordinary or simplified proceedings (see Art. 219 and Art. 243 para. 1 CPC). It is questionable whether the right of inspection is asserted in summary proceedings. In the canton of Zurich, summary proceedings were conducted in one such case. On the one hand, the non-exhaustive list in Art. 250 CPC ("in particular") speaks in favor of this type of procedure and, on the other hand, even further-reaching information claims such as Art. 802 CO are assigned to summary proceedings in accordance with Art. 250 lit. c no. 7 CPC (argumentum a maiore ad minus). Due to the extensive and non-exhaustive list and the many conceivable constellations, the absence of Art. 702 para. 4 CO in the list in Art. 250 CPC does not imply a qualified silence on the part of the legislator. For this reason, it is advisable to assert the right of inspection as explained in the previous section as a precaution in the course of the evidentiary proceedings. Otherwise, parallel summary proceedings would have to be initiated, whereby the two-month forfeiture period must be observed with regard to the action for rescission (Art. 706a para. 1 CO; n. 85 et seq. above).

It should also be noted that, according to the Federal Supreme Court, the grounds for avoidance must also be submitted within the two-month forfeiture period (n. 85 above). If these grounds can only be stated with the minutes of the shareholders' meeting, an exception to this case law should be granted, according to which the initiation of the action for avoidance is sufficient for the time being.

169 If a public deed was issued for the shareholders' meeting, this provides full proof of the facts it attests to as long as the incorrectness of its content is not proven (Art. 9 Para. 1 CC and Art. 179 CPC). Furthermore, the notary is an impartial witness with regard to the notarized events. The parties to the proceedings may have the notary questioned as a witness. The parties may release the notary from the duty of confidentiality or the supervisory authority may waive it. In this case, the notary is generally obliged to testify. The notary cannot invoke a comprehensive right under professional law to refuse to testi-

fy, as is the case with lawyers (Art. 166 para. 1 lit. b CPC and Art. 13 para. 1 BGFA).

## F. Admission of the claim and settlement

According to Art. 241 para. 2 CPC, an acknowledgment of claim or a settlement has the same effect as a legally binding decision. Such a procedure can be useful for the company in hopeless situations, for example, in order to avoid further costs. It is questionable to what extent an action for avoidance can be recognized by the company as the defendant. It is clear that the company represented by the management (Art. 706a para. 2 CO) is not authorized to recognize the action for avoidance without further ado. The management is not authorized to dispose of the object of the dispute. However, an acknowledgment of the action or an approved settlement approved by the shareholders' meeting would be possible according to the opinion expressed here. This approval can solve the problem of competence, according to which the management is not competent in matters of the shareholders' meeting (see Art. 804 para. 2 CO). In order to obtain the approval of the shareholders' meeting, the proceedings can be suspended (see Art. 126 para. 1 ZPO) 170

## G. Intervention

Anyone who can credibly demonstrate a legal interest in having pending proceedings decided in favor of one party may intervene as an intervening party at any time (Art. 74 CPC). A shareholder has such a legal interest because he or she would also be affected by the favorable judgment (n. 97 and n. 134 above). 171

The procedural acts of the intervening person that contradict those of the main party are generally irrelevant in the proceedings (Art. 76 para. 2 CPC). According to the Federal Supreme Court, this does not apply in the case of a contentious intervening party. This is the case if the substantive law has direct effects not only between the main parties, but also vis-à-vis the intervening parties. The case before the Federal Supreme Court concerned organizational deficiency proceedings within the meaning of Art. 731b CO. According to Art. 819 CO, this standard is also applicable to the GmbH. As the Federal Supreme Court also mentions the action for avoidance in the same breath, it can be assumed that shareholders as intervening parties are not restricted by Art. 76 para. 2 CPC in such proceedings either. If, for example, the management does 172 not contest or insufficiently contests the facts presented by the plaintiff in the action for avoidance, other shareholders can introduce factual assertions into the proceedings in their place and contest the factual assertions of the plaintiff in the action for avoidance (see also n. 160 f. above).

173 It is questionable whether the other shareholders must be informed of the proceedings by the court or the company. There is no explicit legal basis for this. Some scholars derive a duty of the court to provide information from the right to be heard (see Art. 29 para. 2 BV and Art. 6 no. 1 ECHR). For another part of the doctrine, there is no such right to information. Under German and Austrian law, the board of directors of the defendant company has a duty of disclosure, whereby according to the German Federal Supreme Court, the court must also ensure that it is heard.

In organizational deficiency proceedings - the decision of which also has an effect on the other shareholders - according to the Federal Supreme Court, the other shareholders are not granted ex officio party status or the right to be heard. It can therefore be concluded that the Federal Supreme Court would probably also deny such a right to information in actions for annulment and rescission.

The new company law requires a company, if an arbitration tribunal is provided for corporate law disputes, to ensure that the articles of association provide that those directly affected by the legal effects of the arbitration award are informed of the initiation and termination of the proceedings and can participate in the proceedings as interveners when the arbitration tribunal is appointed (Art. 797a in conjunction with Art. 697n para. 3 CO). This is intended to ensure the procedural guarantees of the rule of law. As these guarantees also apply in state court proceedings, the new company law is, in my opinion, all the more in favor of notifying the other shareholders. However, a legal basis has not been introduced.

## H. Litigation costs

174 The amount in dispute is of great importance for determining the costs of proceedings and the type of proceedings. The value in dispute of an action for avoidance is based on the overall interest of the company. In the case of a capital increase, this is the amount of the capital increase. For many minority shareholders, the amount in dispute therefore exceeds the significance of

their shareholding, which means that it is often too risky for them to take legal action.

Based on Art. 107 para. 1 lit. f CPC, the court can pass on a portion of the costs 175
to the company if it prevails and there are special circumstances that make an allocation based on the outcome of the proceedings appear inequitable. However, the courts rarely make use of this option. A deviation is also possible if a shareholder was induced to conduct the proceedings in good faith (Art. 107 para. 1 lit. b CPC).

An action for avoidance can also be raised if a shareholder has been subject to 176
a lack of good faith (see n. 20, n. 89 and n. 165 above). In contract law, Art. 26 para. 1 CO stipulates that the party in error, who does not accept the contract and is responsible for the error due to his own negligence, is obliged to compensate the damage resulting from the failure of the contract. In my opinion, this idea is to be applied analogously to the action for avoidance insofar as a negligently mistaken shareholder must also bear the costs incurred in this regard (see Art. 107 para. 1 lit. f CPC).

According to Art. 108 CPC, unnecessary costs must be paid by the person who 177
caused them. Based on this provision, costs can also be imposed on third parties who are not parties to the proceedings. An outsider who convenes a shareholders' meeting may be ordered to pay the costs of the subsequent proceedings. The Commercial Court of the Canton of Zurich imposed the costs on two members of the Board of Directors who, contrary to Art. 695 CO, did not abstain from voting on the discharge, although the plaintiff pointed this out.

## I. Legal remedies

The decisions of the Commercial Court may be appealed to the Federal 178
Supreme Court in civil matters. In other cases, an appeal against the decision of the court of first instance is possible from an amount in dispute of CHF 10,000 (see Art. 308 para. 2 CPC). In the rare cases of an amount in dispute of less than CHF 10,000, an appeal is only possible to the higher cantonal court (see Art. 319 lit. a CPC). An appeal against the decision of the second instance is then possible under the conditions of Art. 72 ff. BGG, an appeal in civil matters may be lodged with the Federal Supreme Court.

## J. Precautionary measures

179 Resolutions of the shareholders' meeting can take effect even before they are contested. By means of precautionary measures, a plaintiff can prevent the execution of a resolution of the shareholders' meeting by the management (see Art. 810 para. 2 no. 6 CO; see above n. 12 and below n. 203). To ensure that a plaintiff is not faced with a fait accompli, he or she should in most cases attempt to obtain precautionary measures (on the reversal of resolutions, see n. 200 et seq. below).

180 As a rule, a request for measures does not affect the expiry of the two-month forfeiture period within the meaning of Art. 706a para. 1 CO (see n. 85 et seq. above). If the action is not yet pending in the main proceedings, the court should take into account the forfeiture period pursuant to Art. 706a para. 1 CO when setting the deadline for the action pursuant to Art. 263 CPC, because otherwise the action has no prospect of success anyway. The action for avoidance must in any case be abandoned before the expiry of the forfeiture period. If the applications in the avoidance proceedings and the grounds for avoidance are already contained in the application for measures, it would be conceivable to comply with the forfeiture period. This would include a provisional declaration of invalidity of the decision.

In contrast, there is generally no time limit for an action for annulment (see n. 132 f. above). However, in order to quickly clarify the validity of the decision, the court must also set a prosequencing period that is not too long in the case of an action for annulment.

In addition, the setting of such a prosequencing period means that the conciliation procedure is no longer necessary (Art. 198 lit. h CPC; on the conciliation procedure, see n. 150 et seq. above).

181 Pursuant to Art. 264 para. 2 CPC, the plaintiff is liable for the damage resulting from an unjustified precautionary measure. If the plaintiff proves that the application was made in good faith, the court may reduce the obligation to pay compensation or release it entirely (Art. 264 para. 2 CPC). The plaintiff in the action for annulment may therefore be subject to a high cost risk. If, for example, the implementation of an increase in the share capital is prevented, the plaintiff in avoidance owes compensation for the damage that may result, for example, from the raising of outside capital.

## 1. General requirements for an order

Pursuant to Art. 261 para. 1 CPC, the prerequisites are, on the one hand, that the action for rescission is likely to be successful (lit. a; claim for injunction; N. 183) and, on the other hand, that the implementation of the contested resolution cannot be reversed without further ado (lit. b; reason for injunction; N. 184). Furthermore, the order requires urgency (n. 185 f.) and proportionality (n. 187). The applicant must substantiate these requirements (see Art. 261 para. 1 CPC. 182

### a. Entitlement to an injunction (main issue prognosis)

The petitioner must be able to credibly demonstrate that the order suffers from a defect that leads to invalidity by means of an action for annulment or that the order is even null and void. It must be noted here that the terms "improper" and "unjustified" in Art. 706 para. 2 no. 2 and no. 3 are to be interpreted by the court in the main proceedings and that there is a certain (judicial) margin of discretion. It is therefore sufficient if a ground for contestation appears plausible. 183

### b. Reason for the injunction (prognosis of disadvantages)

In order for the court to approve the application for a measure, the applicant must be threatened with a disadvantage that cannot be easily remedied if the precautionary measure is not ordered. This is always the case if a resolution is to be entered in the commercial register with constitutive effect. A declaratory entry in the commercial register entails the effects provided for in Art. 936b CO and can therefore also be of significance. 184

### c. Urgency

Furthermore, the ordering of a precautionary measure requires urgency. Urgency exists, for example, if a resolution is to be entered in the commercial register with constitutive effect. There is a lack of urgency if the same objective can be achieved by the decision in the main proceedings. 185

In cases of particular urgency, especially if there is a risk of frustration, the court may order the measure immediately and without hearing the other party (Art. 265 para. 1 CPC). The applicant must explicitly apply for a super-provi- 186 sional measure. If there is a delay of several days, the special urgency can regularly be denied.

### d. Proportionality

187 Proportionality as a further requirement can be implicitly inferred from Art. 262 CPC ("suitable"). A measure is proportionate if it is suitable and necessary and if a weighing of the relevant interests speaks in favor of ordering it.

## 2. Judicial blocking of the commercial register

188 Of central importance as a precautionary measure is the blocking of the commercial register by the court (Art. 262 lit. c CPC). The commercial register block, which could be obtained directly by filing a written objection with the Commercial Register Office, has no longer existed since January 1, 2021 (see Art. 162 f. aHRegV). This is a (super-provisional) precautionary measure for instructing a register authority within the meaning of Art. 262 lit. c CPC. Since the EHRA (due to the approval of the applications entered in the cantonal daily register) and SECO (due to the publication in the SOGC) are also involved in the commercial register registration process, it is also advisable to apply for a corresponding instruction to these authorities. The purpose of a court order to block the commercial register is to ensure that the disputed resolution of the shareholders' meeting is not entered in the commercial register as a precautionary measure and therefore is not published in the SOGC. The commercial register block secures the status quo. A judicial commercial register block is possible for entries with constitutive as well as declaratory effect.

189 Since the filing and entry of a resolution of the shareholders' meeting can be carried out quickly with appropriate preparation in advance, it is advisable to apply for the blocking of the commercial register on a super-provisional basis (see Art. 265 para. 1 CPC; also n. 186 above). In the case of a constitutive entry, this urgency is given per se. In the case of declaratory entries, the particular urgency should also be justified. For example, there is no disadvantage in registering a new member of the management if another member of the management with sole signature could grant the new member of the management a special power of attorney at any time anyway.

190 To ensure that an application is not registered by the Commercial Register Office, it is advisable for the applicant and/or the court to inform the Com-

mercial Register Office of the super-provisional measure application by telephone or email upon receipt of the application. In addition to the (electronically submitted) application, the applicant should also inform the court by e-mail or telephone of the super-provisional court order to block the commercial register so that the court can take the proceedings with the necessary urgency. The court should inform the cantonal commercial register office, the EHRA and, if applicable, SECO in advance by telephone or e-mail.

191 A commercial register block can be annoying for the company. A company can defend itself preventively against a commercial register block by filing a protective letter with the court (see Art. 270 CPC).

192 In connection with the entry in the commercial register, Müller proposes the "protective writ" in proceedings before the commercial register office. This author explains that a protective letter or a preventive statement can be submitted to the cantonal commercial register office in order to influence the one-party procedure for entry in the commercial register. This should set out the facts of the case or the position of a shareholder in order to prevent the potential entry in the commercial register. This is intended to prevent an entry being made that is based on materially incorrect facts (see Art. 929 para. 1 CO). As the persons who submit a protective letter to the commercial register office cannot rely on the protective letter or a preventive statement preventing an entry in the commercial register, it is also advisable to initiate parallel proceedings to obtain the court order blocking the commercial register as described above.

## 3. Prohibition

193 Another precautionary measure that can be considered is an interdict (Art. 262 lit. a CPC). It would be conceivable, for example, to prohibit the company from implementing a contested resolution. A prohibition can be linked to the threat of punishment under Art. 292 StGB. As the company as a legal entity is not covered by Art. 292 StGB, the prohibition must be directed against the executive bodies. The relevant persons must be informed of the prohibition so that a penalty can be imposed if the prohibition is violated.

## 4. Appeals against decisions on measures

194 Decisions of the court of first instance on precautionary measures may be appealed if the value in dispute exceeds CHF 10,000 (Art. 308 para. 1 lit. b and

para. 2 CPC). Otherwise, an appeal is possible. In both cases, the appeal period is ten days (Art. 314 para. 1 and Art. 321 para. 2 CPC). An appeal has no suspensive effect as long as the appellate instance does not grant it (Art. 315 para. 4 lit. b and para. 5 as well as Art. 325 CPC).

195 An appeal in civil matters to the Federal Supreme Court is only admissible against decisions on interim measures of a commercial court or appeal decisions of the higher cantonal court if the decision may cause a disadvantage within the meaning of Art. 93 para. 1 lit. a BGG that cannot be easily remedied. This disadvantage must be set out in the notice of appeal. The appeal may only allege a violation of constitutional rights (Art. 98 BGG).

## K. Arbitration

196 Since the revision of company law came into force on January 1, 2023, Art. 797a CO refers to Art. 697n CO with regard to statutory arbitration clauses. Accordingly, an arbitral tribunal with its seat in Switzerland can be provided for in the articles of association for actions for avoidance and nullity (Art. 697n para. 1 CO). A qualified quorum is required for the introduction of an arbitration clause in the articles of association (Art. 808b para. 1 no. 10bis CO). Art. 697n para. 2 CO refers to Art. 353 et seq. CPC and the applicability of Art. 176 et seq. IPRG is excluded.

197 The arbitral tribunal hearing the action for avoidance may also appoint the legal representative within the meaning of Art. 706a para. 2 CO (see n. 155 et seq. above). When formulating the arbitration clause in the articles of association, it is advisable to explicitly cover matters of voluntary jurisdiction such as the appointment of legal representation.

198 The arbitral tribunal is also authorized - unless otherwise agreed by the parties - to issue interim measures (Art. 374 para. 1 CPC). Although not explicitly mentioned in Art. 374 CPC, an arbitral tribunal can also take superprovisional measures. In my opinion, the court-ordered blocking of the commercial register can also be ordered by an arbitral tribunal if this is possible in terms of time (e.g. by an emergency arbitrator). If a person concerned does not voluntarily submit to a measure ordered by the arbitral tribunal, the state court must make the necessary orders at the request of the arbitral tribunal or a party (Art. 374 para. 2 CPC).

Pursuant to Art. 697n para. 3 CO, the articles of association must ensure that persons who may be affected by the legal effect of the arbitral award (see Art. 706 para. 5 CO; see above n. 97 f. and n. 134 as well as above n. 171 ff. on intervening parties) are informed of the initiation and termination of the proceedings and may participate in the appointment of the arbitral tribunal and as interveners in the proceedings. 199

## VII. REVERSAL OF THE DECISIONS

It is questionable how to deal with resolutions whose legal basis either never existed in the first place (in the case of the nullity of a resolution of the shareholders' meeting; n. 11 and n. 134 above) or whose legal basis has subsequently ceased to exist ex tunc (in the case of the successful challenge of a resolution of the shareholders' meeting; n. 10 and n. 96 above). Such a situation may arise, for example, if new ordinary shares were subscribed based on a void or contestable capital increase resolution and a corresponding entry was made in the commercial register. This problem can also arise in the case of void or voidable resolutions on the election of members of the management. In order not to go beyond the scope of this commentary, this section merely describes a few points of reference on this topic. 200

In the event of a successful challenge, a judgment is issued which retroactively revokes the resolution of the shareholders' meeting, rendering this resolution ex tunc invalid (n. 10 and n. 96 above). If an action for annulment is upheld, the court declares the resolution ex tunc invalid in the declaratory judgment (n. 11 and n. 134 above). Both declaratory and declaratory judgments are not subject to enforcement. However, subsequent actions may be necessary after the judgment which are not of an enforcement nature. This includes the reversal of the individual orders (see n. 17 f. above). The order itself does not require reversal. If the plaintiff or the claimant succeeds in preventing the occurrence of certain consequences of the decision by means of precautionary measures, reversal can be avoided. 201

A distinction can be made between rescission in the narrow sense and rescission in the broad sense. Reversal in the narrow sense leads to the situation being created as if the resolution of the shareholders' meeting had never been passed. In most situations, however, there is a barrier that prevents a reversal in the narrow sense. The judgment in an action for rescission that is upheld and the declaratory judgment in an action for annulment that is upheld are 202 also effective against shareholders and third parties who are not involved in the proceedings (see n. 97 f. and n. 134 ff. above). Their trust in the validity of the resolution of the shareholders' meeting is often protected by the legal system (e.g. curative effect of the entry in the commercial register [Art. 779 para. 2 CO by analogy] as well as the public faith of the commercial register [Art. 936b para. 3 CO]). Such barriers prevent a reversal in the narrower sense from being possible. In these cases, only a reversal in the broad sense is possible. In this case, the resolutions are only rescinded with effect ex nunc. This type of reversal is carried out by means of a mirror-image measure (contrarius actus). A capital increase would therefore have to be reversed by means of a capital reduction. If the company is unwilling to reverse the transaction, the shareholders should be given the opportunity to sue for rescission (so-called rescission action). The judgment in an action for rescission should also be able to contain certain instructions to the commercial register office (see also n. 204 below).

203 According to Art. 810 para. 2 no. 6 CO, the management must implement the resolutions of the shareholders' meeting. The doctrine derives from this competence that the management is also responsible for restoring the situation that would have existed if the invalidity of the resolution had been observed from the outset. In doing so, the management is bound by the legal justification of the judgment. The management must therefore also determine whether a reversal in the narrow sense is possible. If a reversal in the narrow sense is not possible, the management must convene a shareholders' meeting for the mirror-image measure, such as a capital reduction (on reversal in the broad sense, see n. 202 above).

204 It is fundamentally questionable to what extent courts and commercial register offices are involved in the reversal with regard to the effects under commercial register law. For example, it is unclear whether the court must forward a judgment that approves the action for rescission or nullity to the commercial register office or whether certain instructions can be issued to the commercial register office. Pursuant to Art. 240 CPC, the judgment is notified to the authorities and third parties concerned if there is a legal basis for this or if the notification serves the purpose of enforcement. There is no legal basis for this. In addition, judgments of configuration and declaratory judgments do not require enforcement (see n. 201 above). Thus, in the opinion of the commentator, an instruction to the cantonal commercial register office is not possible.

The Commercial Court of the Canton of Bern has communicated a corresponding judgment to the Bernese Commercial Register Office - without issuing specific instructions - and mentioned that this will have the same effect as a formal instruction. The Commercial Court of the Canton of Zurich states that the action for annulment has a direct legal effect, which is why there is no need to instruct the Commercial Register Office. Therefore, the judgment only needs to be communicated. In another case, the Commercial Court of the Canton of Zurich mentioned that the corresponding judgment will be communicated to the Commercial Register Office after the expiry of the appeal period, subject to a suspensive effect of the appeal to the Federal Supreme Court (Art. 103 para. 2 lit. a or para. 3 BGG) due to a commercial register block. These judgments are in principle contrary to Art. 19 para. 1 HRegV, according to which the court must submit a judgment to the commercial register office if it orders the entry of certain facts. It is problematic that the case law leaves the consequences under commercial register law to the commercial register office and does not provide for a court order. It should also be noted that commercial register offices are law-enforcing authorities. They can only register legal transactions that are clearly and unambiguously documented. To claim otherwise would thwart the function of the commercial register, which is precisely that any person can inspect the corresponding entries and supporting documents for each commercial register entry at the commercial register office without having to provide special proof of interest (Art. 936 CO and Art. 11 para. 1 and Art. 12 HRegV). Finally, it should be noted that if a legal transaction is finally to be taken into account in the commercial register - several years later - once a dispute has been finally resolved, other resolutions may have rendered the earlier dispute obsolete in the meantime.

On the basis of the disposition maxim (n. 162 f. above), the plaintiff or the claimant should, if a notification to the commercial register office is permissible at all - as in the aforementioned decision - submit a corresponding request. According to the view expressed here, the plaintiff itself would have to notify the Commercial Register Office of the judgment because notification by the court is not possible. In the case of such a notification, the judgment does not contain any specific instructions to the Commercial Register Office. The commercial register office finds itself in an uncomfortable situation (for reasons of state liability law, among others) because the disputing shareholders may not agree on the consequences of the judgment in the commercial register. De lege ferenda, the legislator should provide clarity in this regard.

The commercial register office must take the nullity into account ex officio as part of its cognizance (see n. 13 above). Accordingly, the Commercial Register Office can only intervene in cases where mandatory legal provisions must be observed that have been established in the public interest or for the protection of third parties. The interpretation of the law is generally left to the court. The Commercial Register Office therefore only has to intervene ex officio in exceptional cases.

## VIII. CONTESTABILITY AND NULLITY IN CONNECTION WITH THE COVID-19 PANDEMIC

205 The special regulations on meetings under company law due to the Covid-19 pandemic were in force until December 31, 2022. The corresponding standards must be observed in proceedings based on resolutions passed at shareholders' meetings during this period (see Art. 1 para. 1 SchlT CC). Pursuant to Art. 8 aCovid-19 Act, the Federal Council could, if necessary, issue deviating provisions for the exercise of rights in company meetings regarding the exercise of rights in writing or in electronic form (lit. a) or by an independent proxy (lit. b). In Art. 27 para. 1 aCovid-19 Ordinance 3, the Federal Council stipulated that the organizer of shareholders' meetings may provide that the shareholders may exercise their rights in writing or electronically (lit. a) or through an independent proxy designated by the organizer (lit. b), irrespective of the expected number of participants. This instruction must be communicated in writing or published electronically no later than four days before the shareholders' meeting (Art. 27 para. 2 aCovid-19 Ordinance 3). The relevant date is the date of posting as for the regular convocation period (see above n. 87). This date, as well as the date of the shareholders' meeting, should not be counted (see n. 87 above). Temporarily, a restriction of the shareholders' right to participate was therefore permissible. However, access to a virtual shareholders' meeting could not be denied or made disproportionately difficult. Depending on the degree of severity, nullity or voidability existed. With the notice period of four days, in my opinion, unintentionally missing the deadline by one day should only lead to contestability (see n. 53 and n. 114 above regarding the notice period). According to the Federal Supreme Court, the refusal to admit a motion when holding a written general meeting is contestable. In this context, normative causality is a prerequisite for the formal grounds for contestation (n. 48 f. above).

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COMMENTARY ON

# Transitional provisions to the revision of the Stock Corporation Act of June 19, 2020

A commentary by Roman Aus der Au / Patric Brand / Jan Heller

SUGGESTED CITATION

Roman Aus der Au/Patric Brand/Jan Heller, Kommentierung zu den Übergangsbestimmungen zur Aktienrechtsrevision vom 19. Juni 2020, in: Lukas Müller (Hrsg.), Onlinekommentar zum Obligationenrecht

Short citation: OK-Aus der Au/Brand/Heller, N. XXX zu Übest Aktienrechtsrevision vom 19. Juni 2020.

**Transitional Provision to the Amendment of 19 June 2020**

**Art. 1**

[1] Articles 1–4 of the Final Title to the Civil Code apply to die Amendment of 19 June 2020, unless the following provisions provide otherwise.

2 The provisions of the new law become applicable to existing companies when it comes into force.

**B. Amendment of articles of association and regulations**

**Art. 2**

1 Companies that are entered in the commercial register at the time that the new law comes into force but which are not in compliance with the new rules must adapt their articles of association and regulations to the new provisions within two years.

2 Provisions of the articles of association and regulations that are not compatible with the new law remain in force until they are amended, but for no longer than two years after the new law comes into force.

**C. Approved capital increases and capital increases from contingent capital**

**Art. 3**

The previous law applies to approved capital increases and capital increases from contingent capital for which a resolution was passed before the new law comes into force. The resolutions of the general meeting may no longer be extended or amended.

**D. Gender representation**

**Art. 4**

1 The obligation to report in the remuneration report in accordance with Article 734*f* applies to the board of directors at the latest from the financial year that begins five years after the new law comes into force.

2 The obligation to report in the remuneration report in accordance with Article 734*f* applies to the executive board at the latest from the financial year that begins ten years after the new law comes into force.

**E. Stay of bankruptcy**

**Art. 5**

A stay of bankruptcy that was granted before the new law comes into force shall until its conclusion be governed by the previous law.

**F. Amendment of contracts under the previous law**

**Art. 6**

Contracts existing at the time that the new law comes into force shall be adapted to the new law within two years of it coming into force. On expiry of this period, the rules of the new law apply to all contracts.

**G. Transparency in raw material companies**

**Art. 7**

Articles 964*d*–964*h* apply for the first time to the financial year that begins one year after the new law comes into force.

**Transitional provision to the Amendment of 19 June 2020**

The provisions of Section 6 and Section 8 of Title 32 apply for the first time to the financial year that begins one year after the Amendment of 19 June 2020 comes into force.

# CONTENT

# I. INTRODUCTION

1 Most of the provisions of the new Stock Corporation Act entered into force on January 1, 2023. Some provisions already entered into force on January 1, 2021 (below n. 88 and n. 101). With regard to the transition from the old to the new Stock Corporation Law, the "Transitional Provisions to the Amendment of June 19, 2020" are of central importance. These provisions are also relevant for other corporate forms such as the GmbH and the cooperative. As so-called intertemporal law, they are dedicated to the delimitation of successive stock corporation law systems. The term transitional law is used synonymously. Intertemporal law determines whether the old or the new stock corporation law applies to a particular set of facts.

2 In this Commentary, "Art. x ÜBest" is used to refer to corresponding norms of the transitional law commented on here. Art. x aOR" is used for references to stock corporation law prior to January 1, 2023. The new stock corporation law is referenced with "Art. x nOR" (as are provisions that have been amended in other laws). Reference is made to a norm of the CO without prefixing an "a" or "n" if both old and new law are covered.

3 If no reference is made to special features of the GmbH or the cooperative, the norms of stock corporation law are stated in each case without additionally referring to their counterparts in the GmbH as well as in the cooperative law.

# II. HISTORY OF THE ÜBEST

4 As a rule, the transitional provisions of a draft law are neither the focus of parliament nor of public perception. This was also the case with the revision of the Stock Corporation Act of June 19, 2020. Parliament minimally adjusted the transitional provisions provided for in the draft law only in two respects: First, Art. 3 ÜBest speaks of "capital increase from conditional capital" whereas the draft spoke of "conditional capital increase" (cf. Art. 3 E-ÜBest). On the other hand, the Parliament extended Art. 6 ÜBest from "adaptation of old-law employment contracts" to "adaptation of old-law contracts" (cf. Art. 6 ÜBest). This intervention is welcome because the norm thus also covers other contractual relationships such as assignment or subordination (cf. below n. 97 and n. 99). Regarding Art. 4 ÜBest, amendments to the draft law were discussed

(shorter transition periods; automatic abrogation after ten years [sunset clause]).

The formation of a cooperative and the amendment of its articles of associa- 5
tion now require - as with the AG and the GmbH - a public certification (Art. 830 and Art. 838a nOR; "level playing field"). The possibility of a simplified formation could not be accepted in parliament. For this reason, Parliament also deleted Art. 7 ÜBest, which provided for a simplified (simple) written amendment of the articles of association for cooperatives for two years. Thus, the Parliament renounced a transitional relief.

## III. GENERAL TRANSITIONAL RULES OF THE ÜBEST (ART. 1 ÜBEST)

The effects of a new or revised law on existing legal positions are an essential 6
aspect of transitional provisions. The transitional provisions of the stock corporation law revision of June 19, 2020, are aimed at companies originating from an old legal system, i.e. formed before January 1, 2023. On the one hand, they are intended to ensure that these companies adapt to the new legal system within a reasonable period of time so that it can be applied without restriction. On the other hand, legal relationships established under an old legal system must be protected and transferred to the new legal system in good faith. In order for the legislator to achieve its legislative goals as efficiently as possible, an orientation towards the effects on those subject to the law is crucial. Undesirable side effects must be minimized. The legislature may therefore be required to legislate appropriate transitional provisions - even though federal laws that contradict these principles remain applicable on the basis of Art. 190 FC. If several interpretations of the transitional provisions are possible, the one that best meets the constitutional requirements must be chosen. However, such an interpretation is limited by the clear wording of a transitional provision.

The transitional law to the new company law is introduced with a basic rule. 7
According to Art. 1 para. 1 ÜBest, Art. 1 to Art. 4 SchlT ZGB apply in principle. These provisions apply insofar as the other ÜBest "do not provide otherwise" (see below n. 24 ff.). This is the general part of Swiss intertemporal law (margin under Art. 1 SchlT ZGB: "General provisions"). In intertemporal law, Art. 1 to Art. 4 SchlT ZGB form the general part. They are consulted if special

intertemporal provisions are missing (used to fill gaps) or if special intertemporal provisions are unclear (used for interpretation). Even without this legal reference, Art. 1 to Art. 4 SchlT ZGB would apply if no special intertemporal provisions exist. The reference in Art. 1 para. 1 ÜBest is therefore of a declaratory nature. Art. 2 to Art. 7 ÜBest take precedence over Art. 1 to Art. 4 SchlT ZGB as special provisions. As special transitional law, however, they are to be interpreted with the help of Art. 1 to Art. 4 SchlT ZGB.

8 Anyone who invokes old law bears the burden of proof for the relevant facts or factual assertions. The presumption of the exclusivity of the new law applies.

9 According to the correct view, intertemporal law - unless a statutory exception exists - is mandatory law. Accordingly, an intertemporal choice of law is not possible. However, terminated or conditional amendments to the articles of association are possible, which are often also discussed in connection with the intertemporal choice of law (see below n. 59). Since the effect of the new law by operation of law can only take effect from January 1, 2023, scheduled or conditional amendments to the articles of association are not an intertemporal choice of law. The new law could not be applied by the General Assembly before January 1, 2023.

## A. Meaning of Art. 1 to Art. 4 SchlT ZGB (Art. 1 para. 1 ÜBest)

10 Art. 1 SchlT ZGB states the rule of non-retroactivity in the objective version. This is a rigid formula without consideration of certain valuations. However, values are added by Art. 2 to Art. 4 SchlT ZGB, which constitute the rule of non-retroactivity in the subjective version. Art. 2 to Art. 4 SchlT ZGB regulate the exceptions to the basic principle of non-retroactivity in the sense of Art. 1 SchlT ZGB.

### 1. Principle of non-retroactivity (Art. 1 SchlT ZGB)

11 The principle of non-retroactivity contained in Art. 1 SchlT ZGB generally provides that new provisions are not applied to facts that occurred before their entry into force. Art. 1 para. 1 SchlT ZGB states with regard to facts under old law that these must continue to be judged under old law after the new law comes into force. The principle of "old fact - old law" applies.

The term "fact" is controversial. The prevailing doctrine understands "fact" to mean any event that entails a legal effect. A legal effect means the establishment, modification or cancellation of a legal relationship. Another view subsumes under "facts" all circumstances of the sensory world. The "facts" understood in this way can be divided into old-law or new-law facts. 12

The principle of non-retroactivity applies only to completed facts. Facts that begin under old law and continue under new law are not covered by it (so-called permanent facts). These include, among other things, the organization of a company and the legal status of the persons involved in it. In these cases, the new law applies from the time of entry into force (cf. also Art. 3 SchlT ZGB). 13

Acts within the meaning of Art. 1 para. 2 SchlT ZGB are those facts which are dependent on the will of a person. This is a subtype of facts. Those facts which materialize independently of the human will are called events. In this respect, Art. 1 para. 2 SchlT ZGB merely repeats the statement of Art. 1 para. 1 SchlT ZGB explicitly for acts under the old law (cf. above n. 11). 14

Art. 1 para. 3 SchlT ZGB states the principle that facts under new law are judged according to new law (lex posterior derogat legi priori). Exceptions are reserved. These include leges speciales and the cases of Art. 1 para. 1 and para. 2 SchlT ZGB. A fact under new law which is merely the basis of a fact under old law which is subject to a dependent change or a loss is also subject to old law. According to the Federal Supreme Court, this includes the exercise of an old-law right of sale after the new law has come into force. According to the Federal Supreme Court, this case was governed by the old law. 2. 15

## 2. The exceptions to the principle of non-retroactivity within the meaning of Art. 1 SchlT ZGB according to Art. 2 to Art. 4 SchlT ZGB

The principle of non-retroactivity just described does not apply if one of the exceptions set out in Art. 2 to Art. 4 SchlT ZGB applies. Art. 2 SchlT ZGB concerns matters of public order and morality (below n. 17 f.). Art. 3 f. SchlT ZGB concern the protection of certain positions of trust. These facts are either independent (Art. 3 SchlT ZGB) or dependent on the will of the parties involved (Art. 4 SchlT ZGB). Art. 3 and Art. 4 SchlT ZGB are a uniform concept, which is why they are treated together below (below n. 19 ff.). 16

### a. Retroactivity in favor of public order and morality (ordre public; Art. 2 SchlT ZGB)

17 Art. 2 SchlT ZGB grants a special status to provisions that are established for the sake of public order and morality. According to Art. 2 SchlT ZGB, retroactivity is permissible in these areas. Whether it is such a norm is a question of interpreting the legal policy motives that led to the revision of the law. The mere fact that a new provision constitutes mandatory law is not sufficient.

18 The revision of the law on stock corporations was mainly intended to modernize the institute of the stock corporation (and to some extent also of the limited liability company and the cooperative) and to adapt it to economic needs. The dispatch contains no indication that the new regulations were enacted on the basis of public policy and morality. If the new law merely codifies a federal court practice, the latter is (still) directly applicable.

### b. Protection of Certain Positions of Trust (Art. 3 and Art. 4 SchlT ZGB)

19 Art. 3 and Art. 4 SchlT ZGB protect certain positions of trust. Art. 3 SchlT ZGB applies if the legal relationship does not depend on the will of the parties. In contrast, the will of the parties is decisive for the application of Art. 4 SchlT ZGB.

20 If the content of a legal relationship is circumscribed by law, it does not depend on the will of the parties. The assessment is made on the basis of the new law in accordance with Art. 3 SchlT ZGB. The rule of non-retroactivity applies only to the acquisition or creation of legal relationships. However, the content of these rights is subject to future law, insofar as mandatory law is in question. Companies, among others, are covered by this rule. Unless otherwise provided, mandatory corporate law shall apply as of its entry into force. Thus, as of January 1, 2023, the relationship between the shareholder and the company is in principle governed by the new mandatory law, even if the shareholder position was established before January 1, 2023 (already above n. 13; see also Art. 1 para. 2 ÜBest). The special ÜBest remain reserved, including, for example, the provisions in Art. 2 and Art. 6 ÜBest regarding the continued validity of old-law articles of association, regulations or contracts for a period of two years (regarding articles of association and regulations below n. 25 ff. and regarding contracts below n. 97 ff.).

Art. 4 SchlT ZGB provides that rights which have not been acquired are not to be protected in the event of a change of law. If facts that occurred under the old law have not yet created subjective legal positions, their effects are assessed according to the new law. Conversely, this provision means that vested rights are protected from retroactivity. 21

## B. Application to existing companies (Art. 1 para. 2 ÜBest)

Art. 1 para. 2 ÜBest states that the provisions of the new law shall become applicable to existing companies on 1 January 2023. Their articles of association and regulations often contain some provisions of the old law. In this respect, however, an exception applies on the basis of Art. 2 ÜBest (for more details see below n. 25 et seq.). Existing companies are those which have acquired legal personality by 31 December 2022 at the latest, i.e. have been entered in the Commercial Register (cf. Art. 643 para. 1, Art. 779 para. 1 and Art. 838 para. 1 CO). 22

What is mentioned in Art. 1 para. 2 ÜBest, according to which the new law applies to existing companies from 1 January 2023, already applies on the basis of the general transitional provisions. The organization of the company as well as the legal status of the parties involved in it is a permanent matter to which the rule of non-retroactivity does not apply (see above n. 13). Furthermore, Art. 3 SchlT ZGB stipulates that the content of the legal relationships, which is circumscribed by the law irrespective of the will of the parties involved, is to be assessed by the new law after the entry into force (cf. above n. 20). For legal entities, this results further specifically from Art. 6b para. 3 SchlT ZGB, which represents an application of the generally held Art. 3 SchlT ZGB. 23

# IV. THE INDIVIDUAL TRANSITIONAL PROVISIONS OF THE STOCK CORPORATION LAW REVISION

This chapter deals with the explicitly regulated subject areas of the ÜBest. 24

## A. Amendment of Articles of Association and Regulations (Art. 2 ÜBest)

### 1. Initial Situation and Review

25 Art. 2 ÜBest is a classic of corporate law revisions. As will be shown chronologically below, various intertemporal norms of previous revisions already knew similar provisions to Art. 2 ÜBest. It is noticeable that the more recent transitional provisions are located higher up in the systematics of the CO than the first two mentioned, which does not correspond to the chronological sequence of transitional provisions in the CO.

**Final and Transitional Provisions on Titles XXIV-XXXIII**

B. Adaptation of old companies to the new law I. In general

**Art. 2**

1 Joint-stock companies, limited partnerships and cooperatives which are registered in the Commercial Register at the time of the entry into force of this Act but which do not comply with the legal provisions shall adapt their articles of association to the new provisions within a period of five years.

2 During this period they shall be subject to the previous law insofar as their articles of association conflict with the new provisions.

3 If the companies do not comply with this provision, they shall be declared dissolved ex officio by the Registrar of Companies after the expiry of the period.

4 (...)

**Final Provisions to Title XXVI**

B. Adaptation to the new law I. In general

**Art. 2**

1 Joint-stock companies and limited partnerships which are registered in the Commercial Register at the time of the entry into force of this Act but which do not comply with the new legal provisions must adapt their articles of association to the new provisions within five years.

2 (...)

[3] Other provisions of the Articles of Incorporation that are incompatible with the new law shall remain in force until they have been adapted, but for no longer than five years.

**Transitional Provisions of the Amendment of December 16, 2005**

B. Adaptation period

Art. 2

[1] Limited liability companies that are registered in the Commercial Register at the time this Act enters into force but that do not comply with the new provisions must adapt their articles of association and regulations to the new provisions within two years.

[2] Provisions of the articles of association and regulations that are incompatible with the new law shall remain in force until they have been adapted, but for no longer than two years.

[3] (...)

[4] (...)

**Transitional provision of the amendment of December 12, 2014**

B. Adaptation of Articles of Association and Regulations

**Art. 2**

[1] Companies that are registered in the Commercial Register at the time the amendment of December 12, 2014 enters into force but do not comply with the new provisions must adapt their Articles of Association and regulations to the new provisions within two years.

[2] Provisions of the Articles of Association and regulations that are not compatible with the new law shall remain in force until they have been adapted, but for no longer than two years.

While the first two revisions provided for transition periods of five years, a two-year transition period corresponds to current best practice in corporate law. The new accounting law and Art. 28 VegüV also provided for a two-year transition period. According to Forstmoser/Küchler, the five-year transition period of the revision of October 4, 1991, which came into force on July 1, 1992, proved to be unnecessarily long. It should also be borne in mind that 26 there is an increasing cadence of legislative changes in stock corporation law, which would be complicated by excessively long transition periods. Moreover, longer transition periods are more quickly forgotten.

27 Irrespective of this, a transition period of even ten years was also discussed in the most recent revision of stock corporation law. This was envisaged by Romano in his unsuccessful proposal to adapt the French and Italian terms for stock corporations. In favor of preserving the financial center, he requested the deletion of the part indicating anonymization (from "société anonyme" to "société par actions" and from "società anonima" to "società per azioni"). The abbreviation would have remained "SA".

28 Due to the (functional) similarity of the present provision with Art. 2 ÜBest of the last revisions, the literature issued at that time can also be taken into account in the present case of Art. 2 ÜBest. The mechanism is the same; in part, the wording differs minimally: Thus, earlier transitional provisions still spoke of "incompatible" while more recent transitional provisions speak of "incompatible".

## 2. Scope of application of Art. 2 ÜBest

### a. Personal scope of application

29 Art. 2 ÜBest applies to companies that were registered in the Commercial Register on January 1, 2023. These are the existing companies within the meaning of Art. 1 para. 2 ÜBest (see above n. 22). Already in other transitional provisions, Art. 1 para. 2 spoke of existing companies and Art. 2 para. 1 of companies registered in the Commercial Register at the time of entry into force. There are no indications that a differentiation from existing companies within the meaning of Art. 1 para. 2 ÜBest is intended.

30 It follows from Art. 2 ÜBest e contrario that for companies incorporated after January 1, 2023, only the new company law shall apply. The entry in the daily register of the commercial register is decisive, even if the public certification should have taken place beforehand. The same already follows from Art. 1 para. 1 ÜBest in conjunction with Art. 4 SchlT ZGB. Art. 4 SchlT ZGB. If no stock corporation existed at all before January 1, 2023, the old law cannot be applied (cf. above n. 21).

### b. Material scope of application

It can already be inferred from the marginal note that Art. 2 ÜBest refers to articles of association and regulations. The statutes set out those norms which govern the company in addition to the statutory provisions. The articles of association are accessible as documents on the Internet free of charge (cf. Art. 936 para. 1 and para. 2 CO as well as Art. 22 para. 3 and Art. 43 para. 2 lit. b HRegV). Regulations include, among others, the widely used organizational regulations. In addition, other regulations such as compensation or registration regulations may also be affected by changes. As a rule, such regulations exist in the case of listed companies, whereas in the case of SMEs often only organizational regulations are issued, if such exist at all. 31

## 3. Transition period

### a. Basic Mechanism

Art. 2 para. 1 ÜBest provides that companies that are registered in the Commercial Register on January 1, 2023, but do not comply with the new provisions, must adapt their articles of association and regulations to the new provisions within two years. This provision is formulated as a clear instruction or command. According to Art. 2 para. 2 ÜBest, articles of association and regulations that are not compatible with the new law shall remain in force until they are adapted, but no later than December 31, 2024. On January 1, 2025, the provisions that conflict with the new law shall automatically cease to apply. The provisions contradicting the new law are thus deemed not to have been written. This is a partial nullity analogous to Art. 20 para. 2 OR. This automatism leads to the fact that the companies are in principle not forced to amend their articles of association. The wording of Art. 2 para. 1 ÜBest therefore sounds too imperative. Accordingly, there is regularly no compelling need for the companies to amend their articles of association (for more details see below n. 48 et seq.). Nevertheless, in many cases it may be advisable to adapt the articles of association to the new law, either in order to make use of new possibilities under the revised law (e.g. virtual general meeting, nominal values smaller than one centime or capital band), or simply in order not to contradict the applicable law and not to create unnecessary legal uncertainties in the day-to-day handling of corporate law documents. 32

33 With regard to amendments to the articles of association and regulations, the legislator provides for a "one-way street". Only amendments to comply with the new law are permitted, and this already before the expiry of the two-year transition period. The reintroduction of a regulation permitted under the previous law is not permitted after January 1, 2023 - regardless of the transition period.

### b. Reproduction in the Articles of Association of (mandatory) provisions under the old law

34 The articles of incorporation of numerous companies reproduce individual statutory provisions one-to-one. These are optional contents of the articles of association. For example, the powers of the general meeting of shareholders within the meaning of Art. 698 para. 2 aOR and of the board of directors within the meaning of Art. 716a para. 1 aOR are often reproduced in a catalog similar to the law. Thresholds for convening and setting the agenda at the General Meeting of Shareholders pursuant to Art. 699 para. 3 aOR are also regularly set out in the Articles of Association, as is a catalog of resolutions for which a qualified quorum within the meaning of Art. 704 para. 1 aOR is mandatory. This representation in the articles of association is particularly appreciated by international investors who are not familiar with Swiss law (see, however, n. 38 and n. 50 below regarding the example of Art. 699 para. 3 aOR, according to which reliance on the articles of association is not mandatory).

35 The non-transferable powers within the meaning of Art. 698 para. 2 and Art. 716a para. 1 CO are mandatory powers from which a company may not deviate by virtue of its articles of association. The requirements of the right to convene meetings and to set agendas can only be facilitated by the articles of association, but not made more difficult.

36 In this context, it is questionable whether the statutory illustrations of mandatory old statutory law that contradicts new mandatory statutory law - as provided for by the basic mechanism of Art. 2 para. 2 ÜBest - will remain in force for two years, i.e. until December 31, 2024, or whether they will be derogated from by new mandatory statutory law. In this or a similar context, various views are expressed. Since similar questions have already arisen in previous revisions of corporate law, the doctrine at that time can also be taken into account (cf. n. 25 above).

Some voices assume that the provisions of the Articles of Association reflecting the old regime will remain in force at the latest until December 31, 2024. Accordingly, the new thresholds and quorums would not apply until a reaction is made by means of an (early) amendment to the Articles of Association. According to the dispatch, the direct applicability of the revised standards is subject to transitional law, whose Art. 2 para. 2 ÜBest can be regarded as lex specialis. E contrario, it can thus be argued that during the two-year transitional period, the provisions of the Articles of Association remain in force and thus applicable. This position is based on the legal wording of Art. 2 para. 2 ÜBest. From a practical point of view, the argument is that shareholders may rely on the relevant provisions of the Articles of Association. For example, the articles of association are examined before a share purchase as part of legal due diligence. 37

However, any such confidence can also be shaken, as the following example shows: The Federal Supreme Court held, in line with the prevailing doctrine, that shareholders with an interest of at least 10% of the share capital also have a right to request the inclusion of items on the agenda. Furthermore, part of the doctrine states that shareholders with shares with a nominal value of CHF 1 million also have the right to convene a meeting. The thresholds would therefore - contrary to the overly restrictive wording of Art. 699 para. 3 aOR - apply alternatively in both directions. 38

In the revision of company law of October 4, 1991, which came into force on July 1, 1992, Art. 6 of the associated transitional provisions stipulated that a company which, by merely reproducing provisions of the previous law, had adopted provisions on qualified majorities for certain resolutions in its articles of association may, within one year of the entry into force, resolve to adapt to the new law by an absolute majority of all share votes represented at a general meeting. This provision also applied to the attendance quorums enshrined in the law at the time. Without this provision, corresponding provisions of the Articles of Incorporation would continue to apply unchanged as statutory law even after the revision of stock corporation law at that time. In the case of larger companies, it would have been difficult to adapt to the new law, because otherwise the quorum to be eliminated would have had to be observed. These were quorum provisions that were accessible to statutory regulations (cf. Art. 627 no. 11 aOR; see on statutory accessibility below n. 41). 39

40 In earlier revisions, Jäggi and Rapp took the view that provisions of the Articles of Association that merely reproduce the previous text of the law automatically lapse if it can be shown that, at the time they were enacted, the intention was to reproduce the respective text of the law. Jäggi thereby required that the founders had addressed these circumstances. According to him, the mere adoption of the wording of the law was not sufficient. According to Jäggi, if new shareholders joined, the old law applied on the basis of the principle of trust. Capitaine assumed that, in the absence of proof of a contrary intention, a provision in the articles of incorporation which merely reproduced the wording of the old law was irrelevant. All these views seem to be hardly practicable.

41 Böckli, Forstmoser, Stauffer and Vischer commented on earlier revisions to the effect that the mandatory provisions of the new stock corporation law took precedence if the articles of incorporation merely reproduced the mandatory provisions of the old law. Accordingly, the Articles of Incorporation should not take precedence in matters which they do not have to regulate at all. According to this view, the new law applied immediately if the reason for its application lay not in the articles of incorporation but in the law (e.g. Art. 698 para. 2 and Art. 716a para. 1 CO [see above n. 35]). Hürlimann criticized Stauffer's view of the revision of December 18, 1936, which came into force on July 1, 1937. On the one hand, he considered it difficult to determine those areas whose ground of validity lies in the law. This can be countered by the fact that (at least nowadays) it is usually clear whether a corporate law norm is mandatory or dispositive. On the other hand, Hürlimann criticized the lack of a legal basis for this differentiation. It can be countered that the legal basis results from the teleological interpretation of the transitional provision.

42 The central question is therefore whether the grammatical element dominates in the interpretation of Art. 2 para. 2 ÜBest and one concludes that the two-year period also applies to the statutory reproduction of mandatory statutory law or whether teleological arguments prevail and one assumes that mandatory statutory law is applicable immediately, i.e. as of January 1, 2023.

43 The following arguments suggest that the second view can probably be justified more soundly. It has already been shown in the first view that shareholders cannot fully rely on the relevant provisions of the Articles of Association or their wording, inter alia because of case law (see above n. 38). Moreover, the Articles of Association cannot be used to create an order which the legis-

lator reserves for itself. Furthermore, this view is consistent with the basic idea of Art. 3 SchlT ZGB, which is to be used for interpretation (see the declaratory reference in Art. 1 para. 1 ÜBest [see above n. 7]). Art. 3 SchlT ZGB provides that the mandatory provisions of the new law concerning the content of a legal relationship are applicable immediately upon entry into force. This also applies, inter alia, to companies (see also Art. 6b para. 3 SchlT ZGB and above n. 20 and n. 23).

The Federal Supreme Court ruled with regard to the special audit, which was 44
introduced in the revision of 4 October 1991 and entered into force on 1 July 1992, that it applies to the investigation of facts prior to its entry into force. Since this is a legally guaranteed right to information, it is not subject to restrictions or deviating regulations by the Articles of Association. For this reason, the Federal Court did not accept the objection that the transitional provision concerning the provisions of the Articles of Association applied. However, the legal assessment of the facts is subject to the old law due to the principle of non-retroactivity. This decision of the Federal Supreme Court also speaks in favor of the second view.

According to Forstmoser, the five-year transitional provision of the revision of 45
October 4, 1991, which came into force on July 1, 1992, applied to the absolute and conditional content of the articles of incorporation. Such content under the old law is derived from Art. 626 f. aOR. Art. 626 aOR exhaustively listed the minimum content of the articles of association. The list in Art. 627 aOR was not exhaustive. The topics of the required content of the articles of association not covered by Art. 627 aOR are also covered by the two-year transition period. Art. 627 aOR was repealed because it was incomplete and its completion appeared too cumbersome. However, as under the old law, the conditionally necessary content of the articles of association results from the relevant provisions of the law.

If the articles of association refer to the law, it can be assumed that the mere 46
reference of a provision of the articles of association to the law is deemed to be a reference to the respectively applicable legal system (so-called dynamic reference). In this respect, there is a priori no reliance on the existence of a specific legal system under company law. In this respect, it is recommended for reasons of transparency to refer directly to company law in the articles of association in future instead of copying it (at least in terms of content) one-to-one.

47 Furthermore, it can be argued that the anchoring of Art. 698, Art. 704 and Art. 716a aOR in the articles of association is not conclusive and can be supplemented by new law at any time.

## 4. Articles of association

### a. Need for amendments

48 As already mentioned above, the revision of the company law is not intended to trigger any compulsion to amend the articles of association (cf. n. 32 above). This is a relief especially for SMEs or group companies, because an amendment of the articles of association requires not only a resolution of the general meeting but also a public certification (cf. Art. 647 and Art. 698 para. 2 no. 1 CO). For reasons of legal certainty and clarity, however, an amendment is generally recommended. In doing so, one can be guided by the various templates of the cantonal commercial registry offices. There are, however, the following exceptions to the principle of unconstrained amendment of the articles of association:

49 Art. 626 para. 2 no. 1 nOR requires that the articles of association of listed companies contain provisions on the number of activities that members of the board of directors, the executive board and the advisory board may perform in comparable functions at other companies with an economic purpose (so-called "third-party mandates"). Mandates in the management of other companies are now also covered (cf. still Art. 12 para. 1 no. 1 VegüV: "in the highest management or administrative bodies"). For this purpose, there is a restriction to mandates with an "economic purpose" (Art. 626 para. 2 no. 1 nOR). In our opinion, the provisions of Art. 626 para. 2 no. 1 CO must be adapted within the two-year transition period pursuant to Art. 2 ÜBest, i.e. by January 1, 2025. Furthermore, a member of the board of directors who prevents the articles of incorporation from containing appropriate provisions within the meaning of Art. 626 para. 2 no. 1 CO is liable to prosecution (Art. 154 para. 2 lit. c nStGB). Direct intent is required; contingent intent is not sufficient (see Art. 154 para. 3 CC). Since direct intent is rarely fulfilled here, it remains to be seen whether this element of the offense is not a dead letter.

50 Pursuant to Art. 10 and Art. 26 LR SIX and No. 4.1 and No. 19.1 LR BX, a listing on the SIX Swiss Exchange or the BX Swiss, as the case may be, as well as its maintenance, requires that, among other things, the articles of association of

the listed companies comply with the national law to which the issuer is subject. The listing law of the stock exchanges in Switzerland aims, among other things, at transparency with regard to the quality of the issuer (Art. 1 LR SIX and no. 1.1 LR BX). For this reason, in our opinion, listed companies should be required to ensure that their articles of association do not contain any invalid provisions. The same should apply to companies supervised by other authorities, e.g. FINMA. This protects, among others, foreign investors who are not very familiar with Swiss stock corporation law. The spirit of the stock corporation law revision - according to which the companies are not forced to make any changes to the articles of association (cf. n. 32 above) - does not change this view either, because the listing law pursues its own purposes. A correction of the articles of association is therefore necessary. The above-mentioned case law and doctrine on Art. 699 para. 3 aOR was not reflected in the Articles of Association by various listed companies (cf. above n. 38). This is probably an indication that the stock exchanges will not check with all consistency whether the articles of association comply with the new law. In our opinion, it is to be expected that most listed companies will amend their Articles of Association at the Annual General Meeting in 2023 or 2024. For some companies, it is important to have articles of association that comply with the new law already in 2023. Other companies are waiting to see what other companies do first.

Furthermore, both unlisted and listed companies will have to amend their articles of incorporation if they wish to make use of one of the options offered by the new law and if this requires a basis in the articles of incorporation. The two-year transitional period does not apply here, because the new law will in principle apply from January 1, 2023 and these are new possibilities - without a basis in the previous law (cf. also Art. 1 para. 2 ÜBest). 51

The possibilities of the new law include: 52

- Reduction of the minimum par value below one centime (Art. 622 para. 4 nOR);
- Share capital in a foreign currency (Art. 621 para. 2 and Art. 626 para. 1 no. 3 CO);
- Introduction of a capital band (Art. 653s para. 1 nOR);
- Introduction of an arbitration clause in the Articles of Association (Art. 697n nOR);

- Foreign venue for a general meeting (Art. 701b para. 1 nOR);
- Virtual general meeting (if necessary without independent proxy; Art. 701d nOR).

53 The new law may also require immediate intervention. Pursuant to Art. 716b para. 1 nOR, the board of directors may - unless the articles of association provide otherwise - delegate the management of the company in whole or in part to individual members or third parties in accordance with organizational regulations (Art. 716b para. 1 nOR). In contrast, a statutory basis was previously required for the transfer of management (Art. 716b para. 1 aOR). The dispositive law was thus reversed. If a transfer of management is not desired as of January 1, 2023, a corresponding prohibitive provision in the articles of association must be proactively enacted.

54 The old Stock Corporation Act permitted representation at the General Meeting exclusively by other shareholders only if there was a corresponding provision in the Articles of Association (cf. Art. 627 para. 10 and Art. 689 para. 2 aOR). In the case of such a provision in the Articles of Association of a non-listed company, it is now required that the Board of Directors designates an independent proxy or a proxy for corporate bodies upon request of a shareholder (Art. 689d para. 2 nOR). The details are regulated in the Articles of Incorporation (Art. 689d para. 3 nOR in fine). Accordingly, the new law requires a corresponding amendment of the Articles of Association. Since this does not involve the replacement of old mandatory law by new mandatory law, but rather a new regulation which the old law did not provide for, the two-year transitional period within the meaning of Art. 2 para. 2 ÜBest applies in this respect (see above n. 32 ff.).

55 As of January 1, 2023, certain remunerations without a statutory basis will be inadmissible because the catalog of inadmissible remunerations of Art. 735c nOR now also covers certain remunerations to former members of the Board of Directors or the Executive Board as well as persons closely related to them (cf. on remuneration law also N. 127 et seq.). In this respect, an amendment to the Articles of Association may be necessary.

56 An authorized capital increase within the meaning of Art. 651 et seq. aOR is only possible after January 1, 2023 if the corresponding resolution to amend the Articles of Association was passed before January 1, 2023 (cf. Art. 3 ÜBest; see below n. 81).

For arbitration clauses contained in the Articles of Association prior to January 1, 2023, cf. n. 194 below. 57

## b. Expiry of amendments to the Articles of Association

If the company or its board of directors identifies a need for amendments, the articles of association will be amended by resolution of the general meeting (cf. Art. 698 para. 2 lit. a CO). In doing so, the Board of Directors will prepare the draft and convene the corresponding General Meeting (cf. Art. 699 para. 1 and Art. 716a para. 1 no. 6 CO). The resolution of the general meeting must be publicly certified and the new date of the articles of association must be entered in the commercial register (cf. Art. 647 CO and Art. 22 para. 1 lit. b HRegV; on the articles of association as supporting documents above n. 31). In this respect, the general meeting, if it takes place after January 1, 2023, is subject to the new law as a new fact (Art. 1 para. 3 SchlT ZGB; cf. above n. 15). Mandatory legal provisions on the general meeting cannot be disregarded on the basis of provisions of the articles of association which contain the old mandatory law (cf. above n. 34 ff.). A convocation before January 1, 2023 for a general meeting after January 1, 2023 is, in our opinion, governed by Art. 700 aOR. Convocations of listed companies are therefore not required to contain a brief explanation of the motions of the Board of Directors (cf. Art. 700 para. 2 no. 3 nOR). 58

The EHRA published a practice note regarding amendments to the articles of association in view of the entry into force of the revision of the company law. This deals with the question of the extent to which amendments to the articles of association could be adopted and entered in the commercial register before January 1, 2023 in view of the new law. A distinction is made between scheduled and conditional amendments to the articles of association. Insofar as facts not subject to publication are concerned, these could be resolved on a scheduled basis. Such provisions of the Articles of Association could be filed with the Commercial Register Office for entry in the Commercial Register since the adoption of the definitive text of the nHRegV, i.e. since February 2, 2022. In the case of a stock corporation, the facts subject to publication are derived from Art. 45 nHRegV. The scheduled amendments to the Articles of Incorporation include, among others, a provision regarding the virtual General Meeting (cf. Art. 701d nOR) as well as, for unlisted companies, certain provisions regarding compensation law in Art. 732 et seq. nOR (cf. Art. 732 para. 2 59 nOR). The articles of incorporation must clearly indicate which provision applies and when. In contrast, amendments to the Articles of Association requiring publication could not be filed with the Commercial Register Office before January 1, 2023. Before January 1, 2023, however, a conditional resolution to amend the Articles of Association was possible subject to the condition precedent that the revision of the Stock Corporation Act enters into force. The date of the resolution and not the date on which the new law enters into force, i.e. January 1, 2023, or the date of the filing with the Commercial Register is deemed to be the date of the amendment of the Articles of Association (cf. Art. 22 para. 1 lit. b HRegV). The following amendments to the Articles of Association are included:

- Reduction of the nominal value below one centime, whereby the nominal value must be greater than zero (Art. 622 para. 4 nOR and Art. 45 para. 1 lit. h nHRegV);
- Capital in foreign currency (Art. 621 para. 2 and para. 3, Art. 629 para. 3 and Art. 632 para. 2 nOR and Art. 45 para. 1 lit. h nHRegV);
- Introduction of a listed participation capital in accordance with the revised provisions (Art. 656b para. 1 nOR and Art. 45 para. 1 lit. j nHRegV);
- Capital band (Art. 653s et seq. nOR and Art. 59a para. 2 nHRegV);
- Arbitration clause (Art. 697n nOR and Art. 45 para. 1 lit. u nHRegV).

60 For the adjustment of the par value, reference can be made to the amendment of the law of May 1, 2001, according to which the par value of a share must be greater than one centime (Art. 622 para. 4 aOR). In this respect, it was also possible to pass a conditional resolution to amend the Articles of Association with regard to the reduction of the par value prior to May 1, 2001. According to the EHRA, an unconditional resolution was void because it would have been contrary to the law applicable at the time. The occurrence of the condition, i.e. the entry into force of the amendment, is deemed to be generally known due to the publication in the Official Gazette and therefore does not have to be established by public certification. The considerations of the EHRA at that time regarding nullity as well as public certification can tel quel be transferred to the Practice Note EHRA 1/22.

61 In connection with the convening of the general meeting of shareholders, the board of directors must ensure that the items on the agenda preserve the uni-

ty of the matter (Art. 700 para. 3 nOR). This principle, which is also known in constitutional law, already applied in the old corporation law. The principle of unity of matter must be observed in particular in the case of amendments to the articles of association. According to Müller, it is violated if elements of different core resolutions are linked. This prevents shareholders from approving a proposal even though they only partially agree with it. Shareholders should be able to form and communicate their will freely and without distortion. It is therefore a prerequisite that the individual components of an agenda item are closely related. The unity of the matter also applies to the motions. Accordingly, it is not permissible to force the shareholders to agree to one part of the proposal against their will only so that they can accept the second part of the proposal.

A distinction is made between partial and total revision of the articles of association. In the case of a total revision, the commercial registry offices require that all provisions comply with the new law. In contrast, in the case of a partial revision, only the amended or newly added provisions of the articles of association are examined. In a partial revision of the Articles of Incorporation, subject blocks can be formed for discussion and voting, which may also depend on each other in terms of content. Each of these blocks of topics must be discussed and voted on separately, in accordance with the principle of unity of the subject matter. The Board of Directors has a certain degree of discretion in the composition of the subject blocks. The requirement of unity of matter should not be interpreted too narrowly. The legislator does not intend any improper fragmentation of the agenda items. 62

The following subject blocks are conceivable: 63

- Provisions on compensation law (cf. Art. 626 para. 2 nOR);
- Provisions on a capital band (cf. Art. 653s et seq. nOR);
- Provisions on the General Meeting of Shareholders;
- Provisions on the Board of Directors;
- Provisions on the auditors.

Basic resolutions such as the restriction of voting rights or the transferability of registered shares (restriction of transferability; Art. 685a et seq. CO) should be passed separately in each case. An amendment or correction of provisions of the Articles of Association which merely reflect mandatory law can be 64 structured as a single block of issues, since the shareholders cannot dispose of these issues in deviation from the law via the Articles of Association anyway (cf. above n. 41 et seq.). Thus, there is no need to vote separately on each individual adjustment. It is merely up to them to decide whether or not the Articles of Association reflect the "incorrect" mandatory statutory law (see above n. 34 ff.). Since the revision of the company law is not intended to lead to any mandatory amendments to the articles of incorporation (cf. n. 32 above), in our opinion the commercial registry offices may not additionally demand that a formal clean-up be carried out in general in the case of individual amendments to the articles of incorporation.

65 The principle of unity of matter does not, however, require that in the case of a total revision of the articles of association each provision must be voted on individually. With the principle of the unity of the matter, the legislator does not intend to introduce a "bazaar on each individual provision of the articles of association". Of course, a shareholder is free to reject the proposal as a whole. In addition, shareholders may submit corresponding motions on each provision (Art. 700 para. 4 aOR or Art. 699b para. 5 nOR). In the case of controversial issues, it may make sense to vote on them separately and then subject the result to an overall vote.

66 The principle of unity of matter may not be circumvented by carrying out a partial revision under the title of a total revision. In this context, we can speak of formal and substantive total revision. A formal total revision exists if the old version of the Articles of Association is fully replaced by a new version. In the case of a considerable number of provisions of the Articles of Incorporation that have been materially amended, there is also a material total revision. According to Müller, the limit of materiality is between five and ten individual votes, with the limit increasing depending on the scope of the Articles of Association. Hubacher/Sieber/Vogel/Baumberger also state ten amendments as a "rule of thumb".

67 Whether a resolution is to be passed on a topic in a single vote or whether several topics are to be combined into a block depends on various considerations. On the one hand, the topics should be combined in such a way that the will of the General Assembly can be expressed as undistortedly as possible. This means that a possibly controversial issue should not be voted on together with uncontroversial issues. Otherwise, there is a risk that the entire block of topics will be rejected. On the other hand, the required quorum for resolu-

tions must be observed. A single vote is recommended if a qualified quorum is required for a resolution. Otherwise, the qualified quorum applies to the entire subject block, although only part of the subject block would be subject to it.

If the unity of the matter is violated, the corresponding resolution of the general meeting may be challenged (Art. 706 f. CO). According to Müller, in order to enforce the principle of the unity of the subject matter, a shareholder must work towards compliance with it at the general meeting of shareholders by requesting a separate vote. In our opinion, in the absence of a legal basis, there is no reason for an exception to the principle according to which there is no obligation to give notice of defects in the case of formal defects in stock corporation law - subject to abusive conduct. 68

The Commercial Register Office is only required to register contestable resolutions, also subject to other defects. Accordingly, resolutions concerning provisions of the articles of association that violate the unity of the matter must be entered in the commercial register. Preventive measures leading to a blocking of the register are reserved (cf. Art. 261 et seq. CPC). 69

## 5. Regulations

### a. Need for adaptation

The same mechanism applies to regulations as to the articles of association. According to Art. 2 para. 2 ÜBest, provisions that conflict with the new law on 1 January 2025 automatically cease to apply (cf. n. 32). Although, in contrast to the Articles of Association, Parliament did not explicitly comment on this, it can be assumed that amendments to the Articles of Association are also not mandatory. 70

It was explained in n. 50 that listed companies must amend their articles of association on the basis of the listing regulations. Analogous provisions, according to which regulations must comply with Swiss law, are not found (cf. Art. 10 and Art. 26 LR SIX as well as No. 4.1 and No. 19.1 LR BX). However, many listed companies voluntarily publish the Organizational Regulations online as a minimum, which is why an adaptation is recommended in these cases as well. 71

First and foremost, the frequently existing organizational regulations must be examined for the need for adaptation. In these, the board of directors essen- 72 tially regulates the delegation of management from the board of directors to an executive board (Art. 716b para. 1 nOR). Furthermore, the meetings and resolutions of the board of directors are also regularly regulated there. The working methods and competences of any existing committees of the board of directors are also frequently defined there, although separate regulations (committee charters) are also frequently found.

73 If necessary, it may be necessary to amend the regulations. This is primarily the case if the regulations refer to adapted provisions of the articles of association or the law. However, independent amendments may also be appropriate, as the following examples show.

74 Pursuant to Art. 701e para. 1 nOR, the board of directors regulates the use of electronic means in the general meeting. This is particularly relevant when holding a virtual, hybrid or multilocal general meeting. It is recommended to regulate this in the organizational regulations or in a separate set of regulations or instructions. It is also recommended that provisions on electronic decision-making by the board of directors be included in the organizational regulations.

75 It is also conceivable that the board of directors may feel compelled to deviate from these provisions in the organizational regulations due to a dispositive legal provision that is unsuitable for it. According to Art. 713 para. 2 no. 3 of the Swiss Code of Obligations, no signature is required for electronic circular resolutions unless the board of directors has stipulated otherwise in writing. In order to deviate from this, the board of directors must - if it does not already exist - include a corresponding passage, for example in the organizational regulations.

76 With regard to conflicts of interest, Art. 717a nOR enters into force as a rudimentary regulation with the revision of company law. According to Art. 717a para. 2 nOR, the board of directors must take measures to safeguard the interests of the company in the event of conflicts of interest. Corresponding regulations can be provided for in the organizational regulations if they do not already exist. However, this is not mandatory. Measures in individual cases are sufficient, precisely because Art. 716b para. 2 no. 4 E-OR, according to which the organizational regulations regulate the handling of conflicts of interest, was not adopted by Parliament.

If available, amendments to the registration regulations may also be advisable. According to Art. 685d para. 2 nOR, the company of listed registered shares may reject acquirers if they do not declare upon request that they have acquired the shares in their own name and for their own account, that there is no agreement on the redemption or return of corresponding shares and that they bear the economic risk associated with the shares. This is an optional provision. A corresponding provision is therefore not required. Nevertheless, as a defensive measure, it may be advisable to reflect this innovation in the registration regulations, if necessary also in the articles of association. 77

Pursuant to Art. 686 para. 2bis of the Swiss Code of Obligations, listed companies must ensure that the owners or usufructuaries can submit the application for entry in the share register electronically. The registration regulations must therefore be examined in this respect. 78

### b. Procedure for amending the regulations

If a need for amendment is identified, the relevant regulations must be amended. The board of directors is responsible for this, since the determination of the company's organization is a non-transferable and irrevocable responsibility of the board of directors (cf. Art. 716a para. 1 no. 2 CO). Accordingly, the General Meeting of Shareholders cannot and may not decide on any adjustment in this respect. 79

## B. Authorized Capital Increase and Capital Increase from Conditional Capital (Art. 3 ÜBest)

Art. 3 ÜBest regulates the transitional legal treatment of the authorized capital increase (below n. 81 ff.) and the capital increase from conditional capital (below n. 86 f.). 80

### 1. Authorized Capital Increase

The capital band pursuant to Art. 653s et seq. nOR replaces the old-law authorized capital increase pursuant to Art. 651 et seq. aOR. For an authorized capital increase resolved before January 1, 2023, the previous law applies (Art. 3 ÜBest). In this context, Art. 3 ÜBest is based on the date of the resolution ("were resolved"). Accordingly, registration of a resolved authorized capital in January 2023 is also conceivable. The authorization resolution must be regis- 81 tered with the Commercial Register Office as soon as possible. An authorized capital increase is possible for a period of up to two years (Art. 651 para. 1 aOR). This period only starts to run from the date of entry in the Commercial Register. In practice, however, a relevant end date has regularly been included in the articles of association.

82 Extensions and amendments of the authorized capital increase after January 1, 2023 are no longer possible (cf. Art. 3 ÜBest in fine; see also no. 2.1 Annex DCG). Corresponding remnants of the authorized capital increase are to be deleted from the Articles of Association by the Board of Directors (cf. Art. 651a para. 2 aOR).

83 For reasons of practicability, it should, in our opinion, be permissible in the event of a total revision of the Articles of Association after January 1, 2023, to postpone the provision regarding authorized capital or to include it again in the Articles of Association. In doing so, the article number may change or the provision may be included again in the same article. However, the provision may not be changed either formally or materially (cf. above n. 82). To be on the safe side, the corresponding procedure should first be discussed with the competent commercial registry office. If this procedure were not permissible, a comprehensive partial revision of the articles of association would have to be adopted and notified to the Commercial Register Office, which would involve a significantly higher administrative effort.

84 If a capital band is adopted, then the continuation of an already adopted authorized capital according to Forstmoser/Küchler takes place under the regime of the capital band. In contrast, the EHRA, in line with Büchler, von der Crone/Dazio and Gericke/Lambert, demands that the provision in the articles of association concerning authorized capital be formally repealed. A coexistence of the two instruments is not foreseen, especially since the capital band replaces the authorized capital increase (see above n. 82). In our opinion, a formal repeal is certainly advisable already for editorial reasons.

85 At SIX Swiss Exchange, the new Art. 14 RLAE applies mutatis mutandis to authorized capital increases (Art. 26 para. 2 RLAE). The regulation remains the same. An additional global certificate for the amount by which the capital has been increased must be issued and submitted to the collective depository with which the previous global certificate was deposited. A similar regulation

for authorized capital increase is provided for in Art. 16a para. 2 RLRMP and Art. 24 para. 2 RLVB.

### 2. Conditional Capital Increase

The content of the conditional capital increase remains largely unchanged. However, the scope of application of the conditional capital in Art. 653 para. 1 nOR has been extended due to the needs of practice. The board of directors may now delete the provisions on conditional capital from the articles of association if no such capital has been issued (Art. 653i para. 1 no. 2 nOR). Since hardly anything has changed, Art. 3 ÜBest concerning conditional capital is of little significance. In any case, conditional capital existing after January 1, 2023 may only be changed and also cancelled under the conditions of the new law. A resolution of the General Meeting of Shareholders before January 1, 2023 with conditional capital under the new law is also possible, provided that the effectiveness of the provision in the Articles of Association is scheduled for January 1, 2023 (see also above n. 59). 86

For the regulations of the SIX Swiss Exchange, see the relevant standards above in n. 85. 87

## C. Gender Representation (Art. 4 ÜBest)

734f nOR concerning gender representation on the Board of Directors and Executive Board has already entered into force on 1 January 2021 together with Art. 4 ÜBest. Art. 734f nOR requires listed companies that exceed the thresholds within the meaning of Art. 727 para. 1 no. 2 CO and do not meet the gender benchmarks to state in the remuneration report why each gender is not represented by at least 30% on the board of directors and at least 20% on the executive board and to publish measures to promote the less strongly represented gender (comply or explain approach). 88

Art. 4 ÜBest contains long transition periods: 89

- Regarding gender representation on the board of directors, a five-year transition period is provided for. Accordingly, the reporting obligation applies for the first time to the financial year beginning on or after January 1, 2026. The corresponding publications will therefore be made from the first half of 2027.

- With regard to gender representation on the Executive Board, a ten-year transition period is even provided for. Accordingly, the reporting obligation will apply for the first time to the financial year beginning on or after January 1, 2031. The corresponding publications will therefore be made from the first semester of 2032.
- However, it can be observed that individual companies are already complying with this reporting requirement earlier, either voluntarily or as a result of pressure from the capital market (in particular proxy advisors).

90 The transition periods allow the gender benchmarks to be achieved via natural attrition and avoid hasty new appointments. The transition period for the executive board is twice as long because recruitment is more difficult and the requirements for industry knowledge are often higher than for the board of directors.

91 Art. 734f nOR assumes two, i.e. male and female, genders. Two postulates submitted to the National Council called for the introduction of a third gender, but this was rejected by the Federal Council. If the legal situation changes in the future, there may be a need to adapt Art. 734f nOR and, if necessary, also Art. 4 ÜBest before the expiry of the transitional periods pursuant to Art. 4 ÜBest.

92 In the DCG, which has been adapted due to the revision of the Stock Corporation Act, the SIX Swiss Exchange declares the gender guidelines and the disclosure requirements in the compensation report (comply or explain approach) to be applicable also for foreign issuers (no. 3.8 and no. 4.5 Annex DCG). The DCG also takes into account the longer transitional provisions of Art. 4 ÜBest and thus creates equal conditions for Swiss and foreign issuers (level playing field). Pursuant to Art. 11 para. 7 DCG, Section 3.8 Annex DCG concerning the Board of Directors applies for the first time to the reporting period beginning on or after January 1, 2026. Section 4.5 Annex DCG concerning the Executive Committee applies for the first time to the reporting period beginning on or after January 1, 2031 (Art. 11 para. 7 DCG; cf. above n. 89 concerning the same deadlines for domestic issuers).

## D. Deferral of Bankruptcy (Art. 5 ÜBest)

93 Pursuant to Art. 725a para. 1 aOR, the court could, at the request of the board of directors or a creditor, postpone the opening of bankruptcy proceedings if

there was a prospect of reorganization. In this case, the court took measures to preserve the assets. Furthermore, the court could appoint a custodian and deprive the board of directors of its power of disposal or make its decisions dependent on the consent of the custodian (Art. 725a para. 2 aOR). The stay of bankruptcy proceedings only had to be published if this was necessary to protect third parties (Art. 725a para. 3 aOR).

The revision of stock corporation law allowed the postponement of bank- 94
ruptcy to be included in the composition proceedings. The advantages of the bankruptcy moratorium were integrated into the composition proceedings pursuant to Art. 293 et seq. SchKG. The previous law applies to a bankruptcy moratorium granted before January 1, 2023 until its conclusion (so-called "grandfathering"; Art. 5 ÜBest). It is also possible to extend the bankruptcy moratorium or to transfer the pending proceedings to debt-restructuring moratorium proceedings, provided that the conditions for such proceedings are met. The same applies to debt-restructuring moratoria (ÜBest SchKG on the amendment of June 19, 2020).

An amendment to Art. 293a para. 2 SchKG concerning provisional debt-re- 95
structuring moratorium was also adopted with the revision of company law. In justified cases, the provisional moratorium may be extended by a maximum of four months at the request of the administrator or, if none has been appointed, of the debtor. Due to the Covid 19 pandemic, the provision was already put into effect on October 20, 2020. Experience has shown that the four months of the old law were not always sufficient for a successful reorganization. Provisional forbearances approved prior to October 20, 2020, also benefited from the new extension option.

For further reorganization law issues, see below n. 155 et seq. 96

## E. Adjustment of old-law contracts (Art. 6 ÜBest)

Art. 6 ÜBest is similar to Art. 28 VegüV, but covers all contracts (see above n. 97
4). In contrast, Art. 28 VegüV only covers employment contracts and thus, inter alia, not mandate and consultancy contracts. In particular, contracts with members of the board of directors often do not constitute an employment contract. In the case of mandates, however, no problem should have arisen because these can be terminated at any time (cf. Art. 404 CO).

98 Art. 6 ÜBest is likely to be relevant in particular with regard to the duration of contracts (or notice periods) with members of the board of directors or the executive board concerning their remuneration pursuant to Art. 735b nOR, because Art. 12 para. 1 no. 2 VegüV, which has been transferred into law, has been kept somewhat more detailed and slightly adapted. For members of the Board of Directors, a maximum contract period of one term of office now applies and not one year as in Art. 12 para. 1 no. 2 VegüV (Art. 735b para. 1 nOR). However, the period between two general meetings was already subsumed under this norm. In this respect, a clarification in the Articles of Association was recommended. After expiry of the two-year period provided for in Art. 6 ÜBest, the statutory provisions apply directly to unlawful clauses.

99 Although Art. 6 ÜBest was created for compensation law, it can be applied to other contracts. An example of this is the subordination agreement (see Art. 725b para. 4 no. 1 nOR). During a transitional period of two years, it is permissible for the subordination agreement not to provide for subordination with regard to interest. However, as of January 1, 2025, the agreement must also subordinate the interest accruing as of that date during the over-indebtedness. Without Art. 6 ÜBest as lex specialis, the subordination would have had to comply with the requirements of Art. 725b para. 4 no. 1 nOR as of January 1, 2023 (cf. Art. 1 para. 2 ÜBest). For their own risk considerations, auditors may require an adjustment of the subordination already before January 1, 2025. For this reason, part of the doctrine recommends an immediate adjustment.

100 In the case of over-indebtedness, it is a matter of permanent fact which will be assessed in principle in accordance with the new law as of January 1, 2023 (cf. above n. 13 and below n. 162). If no adjustment is made, the subordination is no longer sufficient to avoid notification of the court pursuant to Art. 725b para. 4 no. 1 nOR.

## F. Transparency in Commodity Companies (Art. 7 ÜBest)

101 The regulations on transparency in commodity companies were originally located in Art. 964a to Art. 964f nOR and already entered into force on January 1, 2021. With the entry into force of the indirect counter-proposal to the corporate responsibility initiative on January 1, 2022, the corresponding regulations in Art. 964d to Art. 964i nOR were shifted (cf. below n. 102 et seq.). Pursuant to Art. 7 ÜBest, these regulations will apply for the first time to the financial year beginning on or after January 1, 2022. The first reports on pay-

ments to government entities are therefore expected in the first semester of 2023 (cf. Art. 964g para. 1 nOR). Accordingly, the companies concerned already had to have provided the necessary information for the 2022 financial year.

## G. Transitional provision on transparency on non-financial matters and due diligence and transparency regarding minerals and metals from conflict areas and child labor (indirect counter-proposal to the Corporate Responsibility Initiative)

The counter-proposal to the Corporate Responsibility Initiative introduces 102
reporting on non-financial matters and due diligence and reporting obligations regarding minerals and metals from conflict areas and child labor (Art. 964a et seq. nOR). The due diligence and reporting obligations regarding minerals and metals from conflict and high-risk areas and child labor (Art. 964j-964l CO) are specified in the Ordinance on Due diligence and Transparency regarding Minerals and Metals from Conflict Areas and Child Labor (VSoTr). These provisions entered into force on January 1, 2022. Reporting on non-financial matters sometimes refers to environmental matters (Art. 964b para. 1 nOR). One aspect of environmental matters is climate matters, which are specified in the Ordinance on Reporting on Climate Matters. This ordinance will enter into force on January 1, 2024.

Transitionally, it is envisaged that these new transparency regulations will ap- 103
ply to the fiscal year starting one year after entry into force, i.e. fiscal year 2023 (reporting period). The first reports are therefore expected in the first half of 2024. There is no explicit deadline for publication of the report on non-financial matters - in contrast to the report on payments to government bodies and the reports on minerals and metals from conflict areas and child labor. These reports must be published electronically within six months of the end of the financial year (Art. 964g para. 1 and Art. 964l para. 3 no. 1 nOR). In contrast, the report on non-financial matters must be approved by the General Meeting of Shareholders (Art. 964c para. 1 nOR). The report must then be published immediately by the Board of Directors (Art. 964c para. 2 no. 1 nOR). Since the General Meeting of Shareholders should take place no later than six months after the end of the financial year (Art. 699 para. 2 CO), the period should be only slightly longer than six months. If approval is refused, the deadline may not be met.

104 However, it must already be ensured in the 2023 financial year that the information required for reporting is available. Since the regulation on reporting on climate issues comes into force on January 1, 2024 - i.e., after the first reporting period has already been completed - we believe that this regulation only needs to be observed for fiscal year 2024 (reporting period) and thus only applies to the report on climate issues to be published in the first semester of 2025. Since the report on non-financial matters - including the report on climate issues - on the 2023 financial year will already be published in the first half of 2024, it could be argued that the regulation on reporting on climate issues must already be complied with at this time. However, anyone who follows this understanding must bear in mind that the necessary data for climate reporting must already be collected in the reporting period - for most companies in the 2023 financial year - i.e. before the regulation on reporting on climate issues comes into force. In our opinion, however, it should not be assumed that this regulation will have an advance effect. Requirements that arise only from the ordinance and not directly from the law can only take effect from January 1, 2024 (reporting period) and thus for reporting in 2025. Transitional provisions in this regard are missing. Nevertheless, Art. 4 para. 2 of the Ordinance on Reporting on Climate Issues stipulates that electronic publication within the meaning of Art. 964c para. 2 no. 1 CO must be made at least in one internationally disseminated electronic format that is readable by humans and one that is readable by machines, and according to the transitional provision in Art. 5, this obligation must not be fulfilled until one year after the entry into force, i.e. on 1 January 2025.

105 For foreign issuers, unless they prepare an equivalent report under foreign law, SIX Swiss Exchange also requires a report on non-financial matters analogous to Art. 964b CO (Art. 11 para. 7 and no. 7a Annex DCG) for the reporting period beginning on or after 1 January 2023. In contrast, the SIX Swiss Exchange does not require any reporting regarding payments to government agencies for commodity companies and minerals and metals from conflict areas and child labor.

106 Changes could already occur in this area in the medium term. The European Union may be planning to introduce civil liability for companies. On March 10, 2021, the European Parliament passed a resolution regarding a draft directive on corporate due diligence and accountability. Subsequently, on February 23, 2022, the European Commission issued a proposal for a directive on cor-

porate due diligence for sustainability. Article 22 thereof provides for civil liability.

## V. TRANSITIONAL LEGAL ISSUES THAT HAVE NOT BEEN EXPLICITLY LEGALIZED

The individual transitional provisions presented above do not regulate all 107
transitional law aspects. For this reason, further areas are examined below from an intertemporal perspective. The general part of transitional law, i.e. Art. 1 to Art. 4 SchlT ZGB, must be taken into account (Art. 1 para. 1 ÜBest; above n. 6 ff.). The corresponding questions must be deciphered by means of these formulas or mechanisms.

### A. Formation and amendment of the articles of association of a cooperative

According to Art. 830 nOR, public certification is required for the formation 108
of a cooperative under the new law. Previously, the written form was sufficient (cf. Art. 834 para. 1 CO). All amendments to the articles of association are also subject to public certification (Art. 838a CO). In these areas, the law of the cooperative has been harmonized with the law of the stock corporation and limited liability company (cf. Art. 629 para. 1, Art. 647, Art. 777 and Art. 780 CO). Furthermore, the resolution to dissolve a cooperative - in contrast to the public limited company and private limited company (Art. 736 para. 1 no. 2 and Art. 821 para. 2 CO) - does not have to be publicly certified (cf. Art. 911 no. 2 CO).

No transitional periods are provided for the formation and amendments to the 109
articles of association (cf. also n. 5 above). Accordingly, the question arises as to what happens in the case of incorporations and amendments to the articles of association that were resolved before January 1, 2023, but whose filing or registration does not take place until after January 1, 2023.

According to the EHRA, the date of the adoption of the resolution is correctly 110
decisive. If the resolution was adopted before January 1, 2023, a filing or registration after January 1, 2023 does not lead to a subsequent certification requirement. The opinion of the EHRA can be justified by the fact that with regard to formal requirements, the law at the time of the conclusion of the legal transaction applies (tempus regit actum quoad formam). Art. 50 SchlT ZGB

explicitly states this principle for contracts. This norm thus implements the principle of non-retroactivity within the meaning of Art. 1 SchlT ZGB. The same should therefore also apply to foundations and amendments to the articles of association of cooperatives. This also corresponds to the possibility of decomposing individual steps of a transaction, as advocated below in n. 118 ff.

111 The following opposite view would also be conceivable: the cooperative comes into existence upon entry in the commercial register (Art. 838 para. 1 CO). This is based on the date of entry in the daily register (cf. Art. 8 para. 3 lit. b HRegV). If the articles of association were drawn up in writing before January 1, 2023, but the application is made at a time when entry in the daily register is no longer possible in terms of time before January 1, 2023, it cannot be relied upon that the formal requirements of the formation have been complied with. The reason for this is that the written form itself does not yet lead to the formation of the cooperative (cf. Art. 838 para. 1 CO), consequently no right or legal relationship - prior to the entry into force of the revision of the company law on 1 January 2023 - has yet been acquired (cf. Art. 4 SchlT ZGB). However, this view does not even correspond to the organic view rejected here (cf. below n. 118 ff.). In the case of the uniform connection of the entire set of facts, only the old law comes into consideration. Otherwise, the principle of non-retroactivity would be violated (see below n. 118). In our opinion, the first view, which is also held by the EHRA, is to be followed (see above n. 110).

## B. Acquisitions in Kind

112 In the new Stock Corporation Act, the provisions on acquisitions of assets are abolished (see, inter alia, Art. 628, Art. 629 para. 2 no. 4, Art. 631 para. 2 no. 6, Art. 635 no. 1, Art. 642, Art. 650 para. 2 no. 5 aOR). However, the acquisition in kind must still be stated in the case of a mixed contribution in kind and acquisition in kind (cf. Art. 634 para. 4 and Art. 650 para. 2 no. 4 CO: "any further consideration").

113 For facts relevant under stock corporation law that occurred before January 1, 2023, the old law shall continue to apply after that date (principle of non-retroactivity). Accordingly, the violation of the acquisition-in-kind provisions committed under the previous law will not be cured by the entry into force of the revision of the Stock Corporation Act (cf. Art. 1 para. 1 ÜBest in conjunction with Art. 1 para. 2 SchlT ZGB).

In our opinion, the general meeting of shareholders can only repeal provisions in the articles of incorporation originating from the old law after ten years or in the event of a definitive renunciation of the acquisition of assets (Art. 628 para. 4 aOR). In contrast, the EHRA is of the opinion that a cancellation as a result of the repeal of Art. 628 aOR is already possible before the expiry of ten years. 114

## C. Share Capital in Foreign Currency

As of January 1, 2023, share capital in the foreign currency material to the business activity is also permissible (Art. 621 para. 2 nOR). The permissible currencies are GBP, EUR, USD and JPY (Art. 45a and Annex 3 HRegV). After incorporation, the general meeting of shareholders may resolve to change the currency with a qualified quorum (Art. 621 para. 3 and Art. 704 para. 1 no. 9 nOR). According to the dispatch, the change takes place either retroactively to the beginning of the current financial year or prospectively to the beginning of the future financial year. In our opinion, if the financial year does not coincide with the calendar year, a retroactive currency change to a date prior to January 1, 2023 cannot be decided. In principle, the new law will only apply as of its entry into force (cf. Art. 1 para. 2 ÜBest). The principle of non-retroactivity fundamentally prohibits the application of the new law to a date prior to its entry into force. There are no indications that the retroactive effect mentioned in the dispatch has a transitional character. 115

## D. Subsequent Publicity of the Articles of Association

The revised law now provides that offsetting liabilities (debt-equity swaps) must be reflected in the articles of incorporation (Art. 634a para. 3 nOR). It is questionable whether this new disclosure in the articles of incorporation also applies to circumstances that occurred before January 1, 2023. With reference to the principle of non-retroactivity, this must be answered in the negative. Also in view of the risk of false certification, retrospective publication of the articles of association would not be justifiable in these cases. 116

Likewise, capital increases carried out before January 1, 2023 by conversion of freely usable equity capital (so-called increase from equity capital; Art. 652d nOR) do not have to be subsequently reflected in the articles of association. 117

## E. Capital Transactions

118 The share capital can be increased or decreased in various procedures. These transactions can be divided into individual steps or resolutions. These steps include: Resolutions of the general meeting and/or the board of directors, share subscription, payment, capital increase report, audit confirmation, preparation of interim financial statements, debt call and the commercial register filing. These steps can take place both before and after January 1, 2023. It is now questionable whether the old or the new law should be applied. A transitional link to the respective individual step is also a possibility. Traditionally, the totality of the facts upon the occurrence of which the legal consequence is to occur is referred to as the facts of the case. It is now possible to break down the facts into their individual components (atomistic conception). Also conceivable is a uniform connection of the entire set of facts (organic conception). In the organic view, only the old law can be applied, because otherwise the principle of non-retroactivity would be violated. The simplicity and practicability of the organic approach speak in favor of it.

119 Since Art. 1 para. 1 SchlT ZGB speaks of "facts", this means that the intertemporal legislator allows the decomposition into the individual facts, i.e. a split. In principle, the new law should be applied as soon as possible (Art. 1 para. 2 ÜBest). The principle of non-retroactivity does not apply to permanent facts (see above n. 13). In our view, it is therefore not acceptable - in the absence of a special intertemporal provision - to subject the entire transaction to the old law simply because the first step took place before 1 January 2023.

120 In our opinion, it therefore applies in principle that the respective steps after January 1, 2023 are subject to the new stock corporation law. Consequently, the capital transactions will be split into their individual steps (atomistic view). The validity of those steps that took place before January 1, 2023, continues to be assessed according to the old law. These are facts that occurred already before the entry into force of the new company law, i.e. until December 31, 2022. Steps taken as of January 1, 2023 are judged according to the new law (cf. Art. 1 para. 3 SchlT ZGB).

### 1. Capital increase

121 The new company law provides for a six-month period for registering the capital increase with the Commercial Register Office (Art. 650 para. 3 nOR).

The old law only provided for a three-month period for registering the capital increase with the Commercial Register Office (Art. 650 para. 3 aOR). Although the wording speaks of "registering", there was general agreement that registration with the Commercial Register Office was sufficient. These are forfeiture deadlines. The question thus arises as to which time limit applies if the resolution of the General Meeting of Shareholders was adopted before January 1, 2023. Since the special transitional provisions do not provide an answer, Art. 49 SchlT ZGB must be applied.

In its current form, Art. 49 SchlT CC was enacted on January 1, 2020, on the occasion of the revision of the statute of limitations. Although the marginal title of Art. 49 SchlT CC speaks only of "limitation", this norm also applies to intertemporal problems of forfeiture periods. The former Art. 49 para. 2 SchlT ZGB explicitly mentions "forfeiture". Art. 49 SchlT ZGB applies with regard to time limits in each case if no independent intertemporal provision exists in the corresponding area of law. Art. 49 SchlT ZGB is a lex specialis in relation to the general principles according to Art. 1 to Art. 4 SchlT ZGB. 122

According to Art. 49 para. 1 SchlT CC, the new law applies if its term is longer than the term of the previous law and the statute of limitations or forfeiture under the previous law has not yet occurred. What is time-barred or forfeited remains time-barred or forfeited. However, the commencement of an ongoing limitation or forfeiture period does not affect the entry into force of the new law (Art. 49 para. 3 SchlT ZGB). In the present case, the period for registering the capital increase is longer. If an ordinary capital increase was resolved before January 1, 2023 and the three-month registration period has not yet expired on January 1, 2023, the new six-month period will apply in our opinion. However, the six-month period starts at the time of the resolution of the general meeting of shareholders passed before January 1, 2023 (Art. 49 para. 3 SchlT ZGB). According to the EHRA, in the case of a capital increase resolved by the general meeting in 2022, only the three-month period applies. 123

Regarding the transitional legal issues in connection with the acquisition of assets, the offsetting liberalization, share capital in foreign currency and the increase from equity, see above n. 112 et seq. 124

## 2. Capital reduction

125 The debt call has been modified in the new Stock Corporation Act. Now, a one-time debt call in the SOGC is sufficient (Art. 653k para. 1 nOR). In contrast, the old law required three debt calls (Art. 733 aOR). Creditors now also have thirty days after publication in the SOGC to request security for their claims (Art. 653k para. 2 CO). Previously, this could be done within two months after the third publication in the SOGC. A right to security now exists only to the extent of the reduction of the previous coverage (Art. 653k para. 2 nOR). According to the new law, the notification must be made in writing, stating the amount and the legal grounds of the claim (Art. 653k para. 1 nOR). Furthermore, the obligation to provide security now no longer applies if the fulfillment of a claim is not jeopardized by the reduction (Art. 653k para. 3 nOR). If the audit confirmation is available, it is presumed that the fulfillment of the claim is not jeopardized (Art. 653k para. 3 nOR).

126 The debt call of a capital reduction resolved prior to January 1, 2023 is, in our opinion, governed by the law at the time of publication in the SOGC. At this point in time, the corresponding "fact" is realized with transitional legal effect. According to Art. 1 para. 1 SchlT ZGB, the legal effects of the debt call are therefore still determined according to the old stock corporation law. In case of a publication in the SOGC after January 1, 2023, on the other hand, the new company law applies to its modalities. In contrast, according to the EHRA, if the general meeting has resolved the capital reduction in 2022, the old law also applies to the debt call. The EHRA thus follows, without explicitly addressing this, the organic view (see above n. 118).

# F. Compensation Law

127 Apart from Art. 6 ÜBest, there are no special transitional provisions for the remuneration law, which has been taken over from the VegüV with a few adjustments. In connection with the remuneration law, there are also some questions that have not been explicitly legislated.

128 Regarding the need for adjustments in the Articles of Association, see above n. 48 et seqq, in particular n. 49 and n. 55.

129 Regarding the adaptation of old-law contracts, see above N. 97 ff. on Art. 6 ÜBest.

## 1. Compensation report

The articles of incorporation of listed companies must contain provisions on 130 the number of activities that members of the board of directors, the executive board and the advisory board may perform in comparable functions at other companies with an economic purpose (Art. 626 para. 2 no. 1 nOR; see above n. 49). Although a similar provision was already provided for in Art. 12 para. 1 no. 1 VegüV, it is now based on the economic purpose of the other company and no longer on its entry in the commercial register.

The specific situation of these activities at other companies (third-party man- 131 dates) must be reported in the compensation report. The compensation report must disclose the functions of the members of the board of directors, the executive board and the advisory board in other companies pursuant to Art. 626 para. 2 no. 1 nOR (Art. 734e para. 1 nOR). The information must include the name of the member, the name of the company and the function exercised (Art. 734e para. 2 nOR).

This transparency requirement is new or was not included in the OaEC. 132 Therefore, the intertemporal question arises whether these newly required disclosures must already be made in the remuneration report even if Art. 626 para. 2 no. 1 CO has not yet been incorporated in the articles of association in the newly required form - i.e. with reference to the economic purpose - due to the two-year transition period (see above n. 49).

The rule in Art. 734e para. 1 NOR refers directly to the content of the articles 133 of association required by Art. 626 para. 2 no. 1 NOR. Two argumentations are thus conceivable. Either one argues that the compensation report does not have to show the corresponding content until the articles of association have been amended - admittedly within the two-year transitional period (Art. 2 ÜBest; above n. 25 et seq.). Alternatively, the transparency provision may be considered independent of the actual content of the articles of incorporation by virtue of a direct reference to the law. The first argumentation is to be preferred in order to establish coherence between the articles of association and the compensation report as well as for reasons of practicability in favor of the company.

## 2. Prospective vote on variable compensation

134 Art. 735 nOR standardizes the votes of the general meeting of listed companies on compensation. In terms of content, Art. 18 VegüV was largely transferred into statutory law. New is Art. 735 para. 3 no. 4 nOR according to which, if variable compensation is voted on prospectively, the compensation report must be submitted to the general meeting of shareholders in the following year for a consultative vote.

135 Whereas Art. 31 VegüV provided for intertemporal provisions on the compensation report and votes on compensation, no such provision exists with respect to Art. 735 nOR. The advisory vote on the compensation report in the case of prior prospective votes on variable compensation is mandatory and applies as mandatory law even without inclusion in the Articles of Association. This means that as of January 1, 2023, the compensation report must mandatorily be subject to a consultative vote by the General Meeting of Shareholders in case of a prospective vote on variable compensation (cf. Art. 1 para. 3 SchlT CC and Art. 1 para. 2 ÜBest). Since this corresponds to the previous best practice under the VegüV, not too much should change for practice.

136 As a slightly modified successor to Art. 24 para. 2 no. 3 lit. b VegüV, Art. 154 para. 2 lit. c no. 3 SCC provides for the punishment of members of the board of directors who prevent the general meeting of shareholders from voting on the compensation determined by the board of directors for itself, the executive board and the advisory board. Thus, the prevention of the aforementioned consultative vote is now also covered by this criminal offense.

## 3. Additional amount

137 In the event that the General Meeting of Shareholders votes prospectively on the compensation of the Executive Board, the Articles of Association may provide for an additional amount for the compensation of persons who are newly appointed as members of the Executive Board after the vote. The additional amount may now only be used for compensation of the new members of the Executive Board and not, as previously, also for internal promotions (cf. Art. 19 para. 1 VegüV and Art. 735a para. 1 nOR). However, corresponding provisions of the Articles of Association remain in force for two years, i.e. until December 31, 2024 (Art. 2 para. 2 ÜBest). The two-year transitional period applies here because this is an area which was amenable to statutory regula-

tion prior to January 1, 2023 (cf. in detail above n. 32 ff.). Accordingly, from January 1, 2025 onwards, no remuneration may definitely be paid from the additional amount for promotions.

### 4. Duration of Contracts for Remuneration

Pursuant to Art. 735b para. 1 NOR, the duration of the contracts on which the 138
remuneration of the members of the Board of Directors is based may not exceed the term of office - in concreto one year in each case. The duration of fixed-term contracts and the notice period of indefinite contracts underlying the remuneration of members of the Executive Board and the Advisory Board may not exceed one year (Art. 735b para. 2 nOR). Contracts with members of the Board of Directors concerning compensation can thus only be validly concluded from one General Meeting of Shareholders to the next, as is the case with the term of office. Each re-election triggers this period anew. In terms of transitional law, this means two things. First, contradictory provisions of the Articles of Association must be amended within a period of two years, otherwise they automatically cease to apply (cf. Art. 2 para. 2 ÜBest; see above n. 32). Secondly, already existing contracts that contradict this must also be amended within two years of the entry into force of the new law. If the company wishes to avoid being bound by contracts which contradict the articles of association, the two points mentioned must be reconciled. After the expiry of this two-year period, the provisions of the new law are applicable to all contracts (Art. 6 ÜBest). This means that the aforementioned time limits become mandatory law which takes precedence over the corresponding contracts (cf. Art. 20 para. 2 CO). If one would like to avoid this interference in the contracts, a prior adjustment of the contract is necessary.

## G. Right of information and inspection and special investigation

There have also been changes to the right to information and inspection as 139
well as to the special investigation (e.g. new thresholds). It is questionable whether these modifications also apply to facts that occurred before January 1, 2023. This is to be affirmed. The Federal Court ruling mentioned above in n. 44 applies, according to which the special audit at that time also applied to facts that had occurred before July 1, 1992. However, the legal assessment of these facts is based on old law due to the principle of non-retroactivity.

## H. Place of meeting abroad

140 Prior to January 1, 2023, a general meeting of shareholders could be held abroad without a provision in the Articles of Association - within the limits of the prohibition of abuse of rights. Since January 1, 2023, this requires a mandatory basis in the articles of association as well as the designation of an independent proxy in the notice of the meeting (Art. 701b para. 1 nOR). The introduction of this provision in the Articles of Association requires a qualified quorum (Art. 704 para. 1 no. 11 CO).

141 This raises the question of whether companies (on the basis of Art. 2 para. 2 ÜBest) may continue to hold general meetings abroad without a statutory basis and without independent proxy voting for a period of two years. In principle, the new law applies to existing companies as of January 1, 2023 (Art. 1 para. 2 ÜBest; above n. 22 f.). The corresponding exception in Art. 2 ÜBest applies only to articles of association and regulations (see above n. 31). A practice of the Company under the old law of holding the General Meeting at a foreign venue without an independent proxy can therefore no longer be maintained as of January 1, 2023 - without a basis in the Articles of Association. A resolution which violates the requirements of the new law is contestable (Art. 706 para. 1 CO). Thus, the Commercial Register Office must register a resolution of a general meeting with a foreign venue - subject to a block on the register (see above n. 69).

142 The question also arises as to whether old-law provisions of the articles of association relating to a foreign venue that were introduced before January 1, 2023 with a simple quorum are sufficient. Due to the principle of non-retroactivity, such a provision in the Articles of Association is sufficient as of January 1, 2023.

## I. Casting vote at the General Meeting

143 Pursuant to Art. 703 para. 2 of the Swiss Code of Obligations, the Articles of Association may provide that, in the event of a tie, the chairperson has the casting vote. A corresponding provision in the articles of association must be introduced with the qualified quorum (Art. 704 para. 1 no. 10 nOR). Already under the old law, the chairperson could in principle be given the casting vote in the event of a tie. A corresponding provision in the articles of association

could - in contrast to the new law - be introduced by means of a simple quorum (Art. 704 aOR e contrario).

In connection with the casting vote, the question arises as to whether provi- 144
sions of the Articles of Association included prior to January 1, 2023 are valid after January 1, 2023 with regard to the casting vote if they have only been introduced by means of a simple quorum. Due to the principle of non-retroactivity, the provision in the Articles of Association remains valid after January 1, 2023 if it was adopted with a simple quorum before that date.

As before, the casting vote is also not possible under the new law if the capi- 145
tal-based assessment of voting rights is mandatory (cf. Art. 693 para. 3 and Art. 704 CO). This results, among other things, from the fact that the legal basis was introduced in para. 2 of Art. 703 CO, which regulates the simple quorum. Art. 703 para. 2 nOR was only introduced by the parliament. A corresponding discussion on the relativization of the casting vote with regard to the mandatory capital-based measurement of voting rights did not take place in the Councils.

In the case of the GmbH, no transitional legal problems arise in this context. 146
Already under the old law, the casting vote was permissible in the shareholders' meeting (Art. 808a OR). As in the case of a stock corporation, however, the casting vote does not apply to the mandatory capital-based assessment of voting rights (cf. Art. 806 para. 3 and Art. 808b CO). The introduction of the casting vote does not require a qualified quorum under the new law either (cf. Art. 808b nOR). In our opinion, this discrepancy with company law is not justified.

## J. Interim financial statements

The purpose of Art. 960f nOR is to achieve a certain uniformity for interim fi- 147
nancial statements in company law. Scattered special provisions were repealed in the same course (e.g. Art. 11 para. 2, Art. 35 para. 2 and Art. 58 para. 2 aFusG). However, the legal regulation cannot list every special feature of the interim financial statements that results from the reason for preparation and the purpose of use. In practice, this will be taken into account on a case-by-case basis.

148 Interim financial statements may be necessary in the following constellations, for example:

- Capital reduction (Art. 653l nOR);
- Payment of an interim dividend (Art. 675a CO);
- Merger (Art. 11 para. 1, Art. 80 and Art. 89 FusG);
- Demerger (Art. 35 para. 1 FusG);
- transformation (Art. 58 para. 1 FusG);
- Overindebtedness (Art. 725b nOR).

149 Art. 960f para. 1 nOR stipulates that interim financial statements must be prepared in accordance with the provisions governing annual financial statements. Accordingly, simplified interim financial statements are no longer possible - despite the simplifications and abbreviations within the meaning of Art. 960f para. 2 nOR.

150 In terms of timing, the question arises as to when interim financial statements must be prepared in accordance with Art. 960f nOR. For situations that occur after January 1, 2023 and require interim financial statements, Art. 960f nOR clearly applies (cf. Art. 1 para. 2 ÜBest). For situations that already began before January 1, 2023, we believe that what has already been said with regard to capital transactions also applies, according to which a breakdown into individual steps can be made (atomistic view; in detail above n. 118 ff.). The decisive factor is the signing of the interim financial statements by the chairman of the highest management and administrative body and the person responsible for the interim financial statements within the company (cf. Art. 960f para. 3 nOR). The audit of the interim financial statements is again a new step that is not relevant for the determination of the applicable law of the interim financial statements in transitional law terms.

151 An old-law interim financial statement or interim financial statement prepared or signed before January 1, 2023 (above n. 150) remains valid. In our opinion, the Commercial Register Office should accept such interim financial statements in the case of capital reductions and restructurings even in the case of filings or registrations after January 1, 2023.

152 Overindebtedness is a permanent fact (above n. 99 and below n. 162). Thus, in principle, the new law applies (above n. 13). However, in the case of over-in-

debtedness, action must be taken with due haste (Art. 725b para. 6 nOR). Therefore, it would be impractical to require a new interim financial statement pursuant to Art. 960f nOR, which would still have to be audited (cf. Art. 725b para. 2 nOR). In our opinion, an old-law interim financial statement is sufficient.

## K. Creation of Reserves and Dividends

New provisions on the formation of reserves and the declaration of dividends 153
apply without restriction from January 1, 2023, i.e. in particular also to the annual result for 2022 (Art. 1 para. 2 ÜBest; cf: Art. 671 et seq., Art. 674, Art. 675 para. 3 nOR).

Thus, a second allocation to the legal reserve is no longer necessary for the 154
profit generated in the 2022 financial year, even if a dividend of 5% has been distributed as a share of profit (see Art. 671 para. 2 no. 3 aOR).

## L. Restructuring right

As of January 1, 2023, the new reorganization law pursuant to Art. 725 et seq. 155
aOR shall apply in principle (cf. Art. 1 para. 2 ÜBest). Only in the case of a stay of bankruptcy within the meaning of Art. 725a aOR does Art. 5 ÜBest provide for a rule which allows the old law to prevail even after 1 January 2023 (see above n. 93 ff.).

### 1. imminent insolvency

Under both the old and the new law, the board of directors has the duty to 156
plan, manage and monitor the liquidity and solvency of the company (cf. Art. 716a para. 1 no. 3 CO/nOR). In contrast, the facts of imminent insolvency according to Art. 725 nOR are now explicitly listed in the law, thus underlining the importance of liquidity or solvency. If the company threatens to become insolvent, the Board of Directors shall take measures to ensure solvency (Art. 725 para. 2 nOR). To the extent necessary, it shall take further measures to reorganize the company or shall propose such measures to the General Meeting of Shareholders to the extent that they fall within the latter's competence. If necessary, it shall submit an application for a debt-restructuring moratorium (Art. 725 para. 2 nOR). This obligation also exists if the impending insolvency occurs as a result of facts that took place before January 1, 2023 and are con-

tinuing. The imminent insolvency is a permanent fact which is assessed according to the new law as of January 1, 2023 (cf. n. 13 above).

## 2. Loss of capital

157 The loss of capital is now governed by Art. 725a nOR. Compared to the old law, the calculation basis has been explicitly reduced to the non-distributable part of the legal reserves (cf. Art. 725a nOR). Under the old law, the prevailing doctrine and practice held the view that the entire general reserve, including its distributable portion, is decisive. Although the wording of the law bases the determination of the capital loss on the last annual financial statements, the prevailing view is that the capital loss can also occur during the financial year or must be determined by the board of directors. If prior to January 1, 2023 a capital loss existed according to the calculation on the entire general reserve, i.e. according to part of the doctrine on Art. 725 para. 1 aOR, the new calculation basis will certainly apply as of January 1, 2023. If there is no capital loss with the new calculation, the Board of Directors will not incur any obligations due to a capital loss.

158 The new law no longer provides for a mandatory convocation of a general meeting (cf. Art. 725a para. 1 nOR). A general meeting of shareholders is only to be held if the measures to remedy the loss of capital fall within its competence (Art. 725a para. 1 nOR in fine).

159 If a loss of capital occurred shortly before January 1, 2023, it is in our opinion no longer mandatory to convene a general meeting after January 1, 2023. In our view, the existence of a capital loss is a permanent fact which will be assessed under the new law as of January 1, 2023 (cf. above n. 13).

160 In the event of a capital loss, the new law requires that, even in the event of an opting-out, the last annual financial statements be subjected to a limited audit by a licensed auditor prior to their approval by the general meeting of shareholders (Art. 725a para. 2 nOR). If the board of directors submits an application for a moratorium, this obligation does not apply (Art. 725a para. 3 nOR). In our opinion, this also applies to the annual financial statements for the financial year 2022 because, as mentioned above, the capital loss constitutes a permanent fact (cf. above n. 159).

## 3. Overindebtedness

The new law regulates overindebtedness in Art. 725b nOR. The concept and facts of overindebtedness remain unchanged. However, Art. 725 para. 4 no. 2 CO now expressly provides for silent reorganization. The notification of the court may be omitted as long as there is a reasonable prospect (i) that the over-indebtedness can be remedied within a reasonable period of time, but no later than ninety days after the presentation of the audited interim financial statements, and (ii) that the claims of the creditors are not additionally jeopardized. 161

Overindebtedness is a permanent situation. Thus, in principle, the new law applies as of January 1, 2023 (see above n. 13 and n. 99 [on the special rule for subordination]). The maximum period of ninety days therefore also applies to overindebtedness that occurred before January 1, 2023. However, days of said period accrued before January 1, 2023 are to be taken into account. Firstly, the facts of the case cannot be broken down into individual steps, which is why a uniform connection to the new law is required from an intertemporal point of view (cf. on the breakdown into individual steps above n. 118 ff.). Secondly, this result is reached by means of a teleological element of interpretation. The protection of creditors in the event of over-indebtedness of the company dictates that they should not wait any longer by not including the days accrued before January 1, 2023 in the calculation of the ninety-day maximum period within the meaning of Art. 725 para. 4 no. 2 nOR. 162

Under the old law, court practice in granting a tolerance period was more flexible and in some cases more generous than the current rule in Art. 725 para. 4 no. 2 CO with a ninety-day maximum period. In a complex case, the Commercial Court of the Canton of Zurich even granted a tolerance period of eight months. The doctrine considers the ninety-day maximum period to be too short for complex cases. In the context of transitional law, it is questionable how to deal with complex cases whose over-indebtedness occurs before January 1, 2023 and continues under the new law. Since there is no transitional law exception for this, the ninety-day maximum period of the new law applies in principle. As already stated in n. 162, over-indebtedness is a permanent situation, for the assessment of which the new law applies (see also above n. 13 and n. 99). 163

## M. Actions under Stock Corporation Law

164 Corporate law provides for various actions. These serve either to remedy unlawful conditions or to obtain restitution of benefits or compensation for damages. From the perspective of transitional law, the primary interest is in matters that arose prior to January 1, 2023, and thus under the old law, but which are not brought before the courts until after that date, i.e., under the new law, and are therefore judged by the courts.

165 Material aspects of these actions are presented below. In the absence of special rules, the general rules pursuant to Art. 1 to Art. 4 SchlT ZGB are to be consulted in order to resolve the questions of transitional law (cf. Art. 1 para. 1 ÜBest; above n. 7 ff.). However, these norms do not apply to procedural law. In civil procedural law, pending proceedings are continued under the old procedural law at the instance concerned and the new procedural law is applied in any appeal proceedings (cf. Art. 404 f. CPC). In the following, aspects of substantive law are presented in each case for which the transitional provisions of the CPC do not apply. The revision of the Stock Corporation Act only led to minor changes in the CPC (cf. Art. 5 para. 1 lit. g and Art. 250 lit. c nZPO). For this reason, the transitional provisions of the CPC are not likely to play a major role in the present case.

### 1. Action for restitution

166 The revision of the Stock Corporation Act leads to changes in the action for restitution, which raises the following transitional questions:

167 The personal scope or the passive legitimacy of the action for restitution is considerably extended. Pursuant to Art. 678 para. 1 nOR, the action for restitution now also covers the members of the management, the advisory board as well as material and de facto bodies ("persons involved with the management"). Unjustified repayments of statutory capital reserves and retained earnings as well as of inadmissible remuneration are now covered by the material scope of the action for restitution (cf. Art. 678 para. 1 nOR). The principle of non-retroactivity within the meaning of Art. 1 para. 1 SchlT ZGB means that the extended personal and material scope of application only applies to benefits from 1 January 2023 (cf. also Art. 1 para. 2 ÜBest). In our opinion, there is also no exception pursuant to Art. 2 SchlT ZGB from the principle of non-retroactivity because the new Stock Corporation Act does not contain any

provisions that have been established for the sake of public order and morality (cf. above n. 18).

From a material point of view, the new law waives the requirement of bad faith (cf. Art. 678 para. 1 aOR). However, Art. 678 para. 3 nOR refers to Art. 64 CO. According to Art. 64 CO, the defendant can object to the restitution by pleading that at the time of the restitution there was no longer any enrichment unless the alienation was not made in good faith or the restitution could not be expected. The circumstance of the lack of enrichment must be proven by the person potentially liable for restitution (Art. 678 para. 3 nOR in conjunction with Art. 64 OR: "demonstrable enrichment"). Art. 64 CO: "demonstrably no longer enriched at the time of the recovery"). In contrast, the good faith of the person liable for restitution is presumed (Art. 3 para. 1 CC). Accordingly, under the new law, any person who is still enriched at the time of recovery - regardless of whether in good or bad faith - is liable for restitution. 168

Furthermore, the obvious disproportion to the economic situation of the company is now no longer a constituent element (cf. Art. 678 para. 2 aOR and Art. 678 para. 2 nOR). 169

For benefits received before January 1, 2023, the old law applies with regard to the requirement of bad faith (n. 168 above) and the economic situation of the company (n. 169 above). This results from the principle of non-retroactivity (Art. 1 para. 1 SchlT ZGB; generally above n. 11 ff.). Art. 678 OR speaks of reference. In terms of transitional law, therefore, it is the receipt of the benefit that is the decisive fact and not any obligation transaction. The obligation transaction usually does not come about in any case due to the lack of authority to represent or would otherwise be null and void. 170

A different view could be reached if the enrichment leading to restitution were qualified as a permanent fact. In the case of permanent facts, the new law applies from the time it comes into force (cf. n. 13 above). However, the enrichment has occurred at the time of the reference, the corresponding fact has therefore been realized or completed at this time. Accordingly, in our opinion, there is no permanent fact. 171

The General Meeting of Shareholders may decide that the company bring an action for restitution (Art. 678 para. 5 sentence 1 nOR). In doing so, it may entrust the board of directors or a representative with the conduct of the proceedings (Art. 678 para. 5 sentence 2 nOR). A comparable procedural mecha- 172 nism can be seen in the special audit. After the introduction of the special audit at that time, the Federal Supreme Court decided that it also applies to facts before its entry into force (above n. 44). By analogy, it can therefore be argued that the General Assembly is also entitled to this competence for actions for restitution concerning facts that materialized before January 1, 2023. However, the substantive requirements of the action for restitution are assessed according to the old law due to the principle of non-retroactivity (cf. Art. 1 para. 1 SchlT ZGB; see also above n. 44). A different result could be reached by arguing that the persons liable for restitution trusted that they could only be sued by the company if the board of directors decided so itself (cf. Art. 678 para. 3 CO). Such trust had not been protected by the Federal Supreme Court in similar constellations. Thus, as already mentioned, a factual situation that had occurred before the special audit at that time came into force could be investigated by means of a special audit (above n. 44).

173 The new law now regulates the statute of limitations more comprehensively and in line with the new statute of limitations in Art. 678a nOR. The old law provided for a period of five years from receipt of performance in any case (Art. 678 para. 4 aOR). There is now a relative time limit of three years from knowledge. A ten-year absolute time limit is provided for from the date on which the claim for restitution arises (Art. 678a para. 1 nOR). In Art. 678a para. 2 CO, the statute of limitations is coordinated with the criminal statute of limitations, as is customary in statute of limitations law.

174 For intertemporal questions relating to the statute of limitations, Art. 49 SchlT ZGB applies as lex specialis (see above n. 121 ff.). With the relative three-year period, the new law introduced a shorter period than the previous law. In contrast, the absolute ten-year period is a longer period than that of the previous law. With regard to the shorter three-year period, the previous law applies (Art. 49 para. 2 SchlT ZGB). Thus, the relative three-year period only applies to unjustified benefits received from January 1, 2023, because the five-year period under Art. 678 para. 4 aOR is longer. Art. 49 para. 1 SchlT ZGB is decisive for the longer ten-year period and, if applicable, a longer period due to a criminal act. Insofar as the five-year limitation period within the meaning of Art. 678 para. 4 aOR has not yet come into force, the above-mentioned periods of the new law shall apply in this respect. Otherwise, the entry into force of the new limitation periods does not affect the commencement of the current limitation period (cf. Art. 49 para. 3 SchlT ZGB; cf. also n. 123 above).

175 The limitation period is suspended during the proceedings for the ordering of a special investigation and its execution (Art. 678a para. 1 nOR in fine). This standstill is neither specifically regulated by transitional law nor covered by Art. 49 SchlT ZGB. Pursuant to Art. 49 para. 4 SchlT ZGB, unless specifically regulated, the new law applies from the time of entry into force (cf. also Art. 1 para. 2 ÜBest; cf. above n. 22 f.). In our view, the suspension of the time limit therefore also applies from 1 January 2023 if the special investigation was ordered or its implementation commenced before 1 January 2023 (cf. also on the similar constellation in the action for liability below n. 181). Due to the principle of non-retroactivity, the standstill in proceedings or a special investigation initiated before January 1, 2023 certainly does not occur before January 1, 2023 (Art. 1 para. 1 SchlT ZGB). Furthermore, this is also a permanent matter, which is why the new law applies in principle from 1 January 2023 and the principle of non-retroactivity is irrelevant (cf. n. 13 above).

176 In the event of the company's bankruptcy, Art. 757 CO applies mutatis mutandis (Art. 678 para. 6 CO). This provision facilitates the acquisition of the right of action by company creditors. A request for assignment, a resolution of the second creditors' meeting and an assignment order of the bankruptcy administration are not required. The content is the same as that of an action based on assignment within the meaning of Art. 260 SchKG. It is necessary that the bankruptcy administration waives the assertion of the claim and that the claim of the corporate creditor is collocated. Furthermore, Art. 678 para. 6 nOR means that in future shareholders can also bring an action for restitution if the bankruptcy administration waives this right. Art. 678 para. 6 nOR or its reference to Art. 757 CO is a procedural mode which will also apply from January 1, 2023 for payments which occurred before January 1, 2023. The substantive assessment is based on old law due to the principle of non-retroactivity (cf. Art. 1 para. 1 SchlT ZGB; see above n. 172).

## 2. Liability action

177 From the perspective of transitional law, liability actions are to be examined essentially with a view to the statute of limitations. Liability under company law, namely founders' liability (Art. 753 CO), liability for administration, management and liquidation (Art. 754 CO) and auditors' liability (Art. 755 CO) are subject to the common provision of Art. 760 nOR on limitation. This article underwent two adjustments.

178 The relative limitation period was reduced from five to three years. Accordingly, the claim for damages against the responsible persons lapses in three years from the day on which the injured party or parties became aware of the damage and of the person liable to pay compensation (Art. 760 para. 1 nOR). The dispatch explains this adjustment with reasons of standardization and simplification as well as the adjustment to the concept of the current revision of the statute of limitations law, which is why the same relative statute of limitations period as for the action for restitution (cf. above n. 173) as well as the liability actions in the cooperative law (Art. 919 para. 1 nOR) would last three years. In the case of a limited liability company, the liability under stock corporation law applies due to the reference in Art. 827 CO. This is a dynamic reference to the applicable law.

179 In the case of limitation periods - in the absence of a special provision under transitional law - Art. 49 SchlT ZGB applies (cf. already above n. 121 f.). If the new law stipulates a shorter period, the previous law applies in accordance with Art. 49 para. 2 SchlT ZGB. The revision of the corporation law shortened the relative limitation period. Thus, the five-year period continues to apply to old-law cases. In our opinion, old-law cases exist for facts that materialized before January 1, 2023. This applies regardless of whether the injured party becomes aware of the facts before or after January 1, 2023. The principle of "lex mitior" within the meaning of Art. 2 para. 2 and Art. 389 StGB, which is familiar from criminal law, does not apply in liability law. Thus, a tortfeasor cannot claim to benefit from the shorter limitation period from 1 January 2023.

180 The absolute limitation period of ten years, calculated from the day on which the harmful conduct occurred or ceased, remains unchanged (Art. 760 para. 1 CO). Also unchanged is the special provision on the limitation period if the damaging conduct constitutes a criminal act (Art. 760 para. 2 CO). Accordingly, no transitional questions arise in this context.

181 Furthermore, a suspension of the limitation period is now provided for during proceedings for the ordering of a special investigation and during its conduct (Art. 758 para. 2 in fine and Art. 760 para. 1 nOR in fine). This applies both with regard to the forfeiture of the right of action following the discharge decision (Décharge) and with regard to the statute of limitations. This suspension of the time limit is not specifically regulated by transitional law. Pursuant to Art. 49 para. 4 SchlT ZGB, unless specifically regulated, the new law applies

from the time of entry into force (cf. also Art. 1 para. 2 ÜBest; cf. above n. 22 f.). In our opinion, the suspension of the time limit also applies from 1 January 2023 if the special investigation was ordered or commenced before 1 January 2023 (cf. also on the similar constellation in the restitution action above n. 175). Accordingly, in the case of proceedings or a special investigation initiated before 1 January 2023, the standstill does not occur before 1 January 2023 (cf. Art. 1 para. 1 SchlT ZGB). Moreover, the special investigation is a permanent matter to which the new law applies from 1 January 2023 and the principle of non-retroactivity is not to be observed (cf. n. 13 above).

According to previous case law of the Federal Supreme Court, subordinations 182
are not to be taken into account in the calculation of indirect damage. Thus, claims subject to subordination were also included in the corporate loss. Due to criticism of this case law, the legislator adopted Art. 757 para. 4 nOR, according to which claims of corporate creditors that have subordinated behind all other creditors are now no longer to be included in the calculation of the corporate loss.

However, due to the principle of non-retroactivity, this provision only applies 183
to subordinations after January 1, 2023 (cf. Art. 1 para. 1 SchlT ZGB). Incidentally, injurers cannot invoke the criminal law principle of the "lex mitior" here either (cf. n. 179 above).

## 3. Action for annulment and rescission

The regime of actions for rescission and nullity in the case of resolutions of 184
the general meeting of shareholders and nullity in the case of resolutions of the board of directors was not changed in the revision of the Stock Corporation Act (cf. Art. 706 et seq. CO).

Due to the principle of non-retroactivity, the voidability or invalidity of reso- 185
lutions passed before January 1, 2023 can only be justified by means of the old law (cf. Art. 1 para. 1 SchlT ZGB). After January 1, 2023, voidability or nullity may only be based on the old law if the transaction is still subject to the old law. In our opinion, the violation of transitional law may also lead to voidability or nullity.

Questions regarding voidability and nullity are also likely to arise in connec- 186
tion with the new instruments of the revised Stock Corporation Act, such as the capital band and the digital forms of the General Meeting. However, these

are not intertemporal issues, but rather the legal consequences of new provisions of stock corporation law.

### 4. Action for dissolution

187 As of January 1, 2023, shareholders with 10% of the votes are also entitled to file an action for dissolution (Art. 736 para. 1 no. 4 nOR). The plaintiffs no longer have to represent 10% of the share capital in every case, as was previously the case (cf. Art. 736 no. 4 aOR). The capacity to sue must already exist at the time of filing the action for dissolution. Thus, a shareholder cannot invoke the new threshold if he or she has filed the action for dissolution before January 1, 2023.

188 Art. 659 para. 3 of the Swiss Code of Obligations now provides that, in the case of the acquisition of treasury shares, the maximum threshold, also in connection with an action for dissolution, is 20% of the share capital entered in the Commercial Register. Shares acquired in excess of 10% must be sold within two years or cancelled by means of a capital reduction (Art. 659 para. 3 nOR). This increases the scope of action for the court and the board of directors. In our opinion, the important reason that leads to an action for dissolution is a permanent fact (cf. n. 13 above). Accordingly, Art. 659 para. 3 nOR can also be applied to an action for dissolution initiated before January 1, 2023.

## N. Arbitration

189 Pursuant to Art. 697n para. 1 nOR, the articles of association may provide that disputes under company law shall be adjudicated by an arbitral tribunal having its seat in Switzerland (so-called statutory arbitration clause). The arbitration clause has the same legal effects as the other provisions of the articles of association. This means that all shareholders and corporate bodies bound by the Articles of Association are also covered by the statutory arbitration clause. This also applies to new shareholders. However, the subjective scope of the statutory arbitration clause can be limited by the articles of association (cf. Art. 697n para. 1 sentence 2 nOR). In addition, contractual arbitration clauses are possible (also in the articles of association). Only the consenting shareholders and corporate officers and their legal successors are bound by these.

190 Art. 697n nOR applies accordingly to the GmbH (Art. 797a nOR). In the case of other entities such as associations and cooperatives, there is no correspond-

ing provision, as arbitration was already deemed permissible under the previous law.

A statutory arbitration clause becomes effective upon entry in the Commercial Register (see Art. 45 para. 1 lit. h and Art. 73 para. 1 lit. v nHRegV). Since the statutory arbitration clause within the meaning of Art. 697n nOR is a new option for the revision of the company law, no transitional periods need to be observed. 191

It is questionable whether a statutory arbitration clause also applies to the adjudication of disputes that arose prior to the effectiveness of the arbitration clause (thus partly also prior to January 1, 2023). According to Vogt/Hirsiger-Meier/Hofer, the statutory arbitration clause applies to all disputes under corporate law which are brought before the courts after the effectiveness of the statutory arbitration clause (see above n. 191). Allemann and Meier limit the effect to future disputes. Allemann bases his view on the wording of Art. 697n para. 1 nOR, which speaks of "arbitration clause". Traditionally (especially in the then KSG), a distinction was made between "arbitration agreements" for existing disputes and "arbitration clauses" for future disputes. Meier has procedural and constitutional concerns about such broad temporal application. According to Meier, an effect for disputes that arose prior to the effectiveness of the arbitration clause is only permissible if the privatautonome freedom of decision and action of the persons bound by it was taken into account. Whether the legislator was aware of the distinction between arbitration agreements and arbitration clauses when creating Art. 697n nOR may be doubted. The term "arbitration clause" was much more likely to be used because it is a clause in the articles of association and it is much more common than the term "arbitration agreement". Against Meier's view speaks the fact that the legislator did not consider intertemporal reservations in Art. 697n nOR. The legislator merely installed the protective mechanism of the qualified quorum (Art. 704 para. 1 no. 2 nOR). If necessary, shareholders must defend themselves by means of an action for rescission or nullity (Art. 706 et seq. CO). Thus, the admissibility for already existing disputes is to be assumed. Whether the procedural risk is worth it based on the divided views in the doctrine is questionable. 192

It is questionable whether the arbitration clause also affects state court proceedings already pending before January 1, 2023. According to Allemann, an arbitration clause introduced after January 1, 2023, does not confer jurisdic- 193 tion on an arbitral tribunal. Legitimate reliance on state jurisdiction as a dispute resolution mechanism should be protected, he said. Moreover, such a deprivation of the state court and the resulting restart of law enforcement would be abusive of law. Allemann's view is to be agreed with. The principle of non-retroactivity protects against a deprivation of the state court by a newly introduced arbitration clause. In this respect, the plaintiff shareholder has a trust that the initiated (state) dispute resolution mechanism will be applied. This is an already acquired position of trust to which the old law applies (Art. 4 SchlT ZGB e contrario; above n. 19 ff.). The blocking effect pursuant to Art. 64 para. 1 lit. a CPC also speaks in favour of the continuation of the state proceedings.

194 From a transitional law perspective, it is questionable whether Art. 697n nOR applies to already existing (statutory) arbitration clauses. Even after January 1, 2023, arbitration clauses in the articles of association can be qualified as arbitration clauses with a contractual character. This qualification means that only (written) consenting persons are bound by them. However, only a few articles of association are likely to contain arbitration clauses with a contractual character, because the commercial registry offices have regularly refused to register such (spurious) provisions in the articles of association. If one assumes, in line with a large part of the doctrine and the older case law of the Federal Supreme Court, that arbitration clauses in the articles of association exist, there may be a contradiction with the current rule. This is due to the fact that today's rule requires specific requirements (qualified quorum for introduction, applicability of Art. 353 et seq. CPC, seat of the arbitral tribunal in Switzerland, guarantee of special procedural rights and reference to the arbitration clause in the commercial register entry). If the existing provision of the Articles of Association does not meet these requirements, it must be amended within two years (Art. 2 para. 1 ÜBest). Otherwise, it automatically ceases to have effect (Art. 2 para. 2 ÜBest; in general, above n. 32 et seq.). Meier points out that arbitration clauses that were in the Articles of Association prior to January 1, 2023, are only valid if sufficient procedural legal protection is observed, which does not exceed the requirements of Art. 697n E-OR 2016. It is disputed whether it is sufficient if the simple quorum at that time was complied with or whether a confirmation under a qualified quorum is required. According to Vogt/Hirsiger-Meier/Hofer, the qualified quorum is a requirement based in substantive law to justify the waiver of state jurisdiction as well as the corporate effect vis-à-vis all shareholders. Meier argues against this on

the basis of the prohibition of retroactivity and thus considers an arbitration clause introduced under the then valid simple quorum to be valid in principle. The second view is probably the correct one because it respects intertemporal principles - such as the principle of non-retroactivity. However, in order to avoid risks, it is recommended to have the arbitration clause confirmed by the general meeting (with the qualified quorum).

In the law governing limited liability companies, the arbitration clause is said 195
to have been permissible even before January 1, 2023, because statutory obligations can be imposed on the shareholders (cf. Art. 796 CO). Since Art. 797a nOR refers to stock corporation law, the arbitration clause must comply with the new law in the future, i.e. within two years (cf. Art. 2 ÜBest; above n. 32 ff.) (see above n. 194).

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