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Veröffentlichungen des Schweizerischen Instituts für Rechtsvergleichung
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Lukas Heckendorn Urscheler (éd.)

Rapports suisses présentés au XIXe Congrès international de droit comparé

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1. Introduction

Switzerland is well known abroad for its flexible and non-mandatory corporate law provided for in the Swiss Code of Obligations (CO)[1]. Nowadays, *two company forms* dominate Switzerland's corporate landscape: on one side, the Companies limited by Shares according to articles 620 *et seq.* CO[2], on the other side, the Limited Liability Companies (LLCs) in accordance with articles 772 *et seq.* CO[3]. In the following, the focus will be on *Swiss LLCs*.

The main attention by the public and by the media (and by the politicians) is paid to Companies limited by Shares, in particular, to *corporations with listed shares*, e.g. Nestlé, UBS, Credit Suisse, Novartis, Roche[4]; legislative proposals almost exclusively cover listed companies[5]. For various reasons[6], however, LLCs ought not to be ignored.

This publication is the undersigned's *Swiss Country Report* for future discussions on «The Law of Close Corporations» at the World Congress in Vienna 2014 of the International Academy of Comparative Law; this Report shall assist the General Reporter to draft his General Report regarding the LLCs corporate law matters. Since there will be foreign readers unfamiliar with Switzerland's laws, the Swiss Country Report has no academic goals[7].

2. General Information on Close Corporations

2.1. History

The first statutory rules concerning Swiss corporations on the *federal level* came into effect in the year 1883. Prior to that year, corporate matters remained within the legislative powers of the 26 states of Switzerland. The *CO 1883* contained regulations for *Companies limited by Shares* but not for LLCs. At the end of the 19th century, many countries legally distinguished between corporate entities for «big»

1 Formally, the CO represents an amendment to the Swiss Civil Code, i.e. its «Part Five».
2 German: Aktiengesellschaften (AG).
3 German: Gesellschaften mit beschränkter Haftung (GmbH).
4 This was true, for example, in recent political debates on the so-called «Rip-off Initiative» (German: «Abzocker»-Initiative) regarding excessive directors' and managers' remuneration («fat cats' payments»); the popular initiative was accepted by the Swiss people in the year 2013.
5 Shares of LLCs cannot be listed at the two (equity) Stock Exchanges in Zurich and in Bern.
6 See below 2.2.
7 Footnotes and references to literature are kept to an absolute minimum; the undersigned is in the process of writing the «Berner Kommentar» on LLCs (an academic commentary).

corporations (Company limited by Shares, AG or SA) and for «small» corporations (LLC, GmbH or SARL).

Switzerland acknowledged this legislative gap in its corporate law but closed it only half a century after the CO 1883[8]. Thus, the *LLC* was introduced with the *CO 1936*. Due to this rather late start of the Swiss LLCs, the Companies limited by Shares enjoyed a considerable lead in the business community for many decades (until the 1990s)[9]. The statutory framework on LLCs in the CO 1936 was inspired by corporate developments and by regulations abroad, in particular, by respective laws in *France* and in *Germany*.

2.2. Statistics

With respect to the *number* of Swiss corporations, the Company limited by Shares is (and will be for the foreseeable future) the «number 1» in Switzerland with presently more than 200,000 companies[10]. Moreover, *all listed companies* are organized as Companies limited by Shares. Overall, the Company limited by Shares also remains the predominant choice for most *non-listed, economically important* corporations and for groups of corporations[11].

Since the 1990s[12], the *number of LLCs* has grown considerably due to the fact that the capital requirements for Companies limited by Shares became more rigorous. Some 150,000 companies are organized as LLCs[13], i.e. «number 2». Although LLCs *cannot be listed*, they represent the backbone of the Swiss economy which is dominated by small or medium-sized enterprises and family companies[14]. The LLC would be an ideal form for groups of companies[15] and for «Joint Ventures»[16]; interestingly, not a single *Swiss bank* is structured as a LLC[17].

8 Regarding the history of LLCs in Switzerland (and in Europe), see, AESCHLIMANN, Zur Entstehung und Entwicklung der schweizerischen GmbH, p. 28 *et seq*.

9 Because of the low capital requirements (see below 3.1), in addition, the LLCs suffered from a bad image as being the so-called *«poor man's corporation»* in Switzerland.

10 End of 2013: 202,183; end of 2012: 198,432; end of 2011: 194,289.

11 For some of the most important *groups of companies* («Konzerne»), though, neither the LLC nor the Company limited by Shares is the predominant company form but the *Cooperative* according to articles 828 *et seq.* CO («Genossenschaft»); famous «cooperative groups» («Genossenschaftskonzerne») may be detected, among others, in the retail business (Coop and Migros) and in some areas of the financial industry (Raiffeisen, a banking group, and Mobiliar, an insurance group).

12 For the developments of the LLCs in Switzerland, see, KUNZ, Rundflug, p. 96 *et seq.*

13 End of 2013: 149,725; end of 2012: 140,895; end of 2011: 133,104; for a comparison between Companies limited by Shares and LLCs, see, *inter alia*, MÜLLER/KÖNIG, GmbH und AG, p. 2 *et seq.*

14 See, *inter alia*, PREMAND, Les sociétés de famille, *passim*.

15 See, HANDSCHIN, Gesellschaftsanteile und Gesellschafterversammlung, p. 114 *et seq.*

Formerly, the LLC as corporate entity was considered an «unloved adopted child»[18] and an «artificially produced baby»[19]. But times have changed, at least over the last two decades. In the future, in the undersigned's view, the LLCs will make a *competitive run for «number 1»* among the Swiss company forms regarding small and medium-size enterprises[20]. In fact, LLCs combine legal elements from both *partnerships* and *corporations*.

2.3. Legislative Amendment(s)

It seems fair to say that the most important part of Swiss corporate law is the law on Companies limited by Shares according to articles 620 *et seq.* CO. Sometimes, the *law on LLCs refers* to these provisions (e.g. articles 774*a*, 777*c* para. 2, 781 para. 3 and para 4, 782 para. 4 CO) with the legal result that said rules are *analogous applicable* to LLCs.

In accordance with the majority view of erudite commentaries, the LLCs law contains so-called *«dynamic references»* to articles 620 *et seq.* CO. Therefore, whenever the law on Companies limited by Shares is amended, the new rule *automatically applies to LLCs*, too[21]. Such an «indirect amendment» of the LLCs law took place in the year 1993.

After the introduction in 1936[22], the law on LLCs only saw one *formal amendment* in the year 2008[23]. With this legislative amendment, however, the LLCs regulation came closer to the rules on Companies limited by Shares[24]. Thus, seventy years after the CO 1936, the two major corporation forms are not «legislative cousins» any longer but rather *«legislative siblings»*.

3. Formation of Close Corporations

3.1. Cornerstones

Formerly, at least *two shareholders* were needed for the formation of LLCs (and also for the corporate existence thereafter). Today, however, the LLC is a corpo-

16 BRECHBÜHL/EMCH, Die neue GmbH, p. 271 *et seq.*
17 Prior to the LLCs law amendment in the year 2008 (see below 2.3), this was legally impossible due to a statutory maximum capital for LLCs: see below 3.1.
18 PLÜSS, Verantwortlichkeit, p. 121.
19 See, *inter alia*, FORSTMOSER/PEYER/SCHOTT, Das neue Recht, para. 6.
20 In general, HERREN, Die Entwicklung, *passim*.
21 See, KUNZ, Grosse GmbH-Reform, para 3 *et seq.*
22 See above 2.1.
23 For overviews, *inter alia*, see, BÖCKLI, Das neue schweizerische GmbH-Recht, p. 1 *et seq.*; FORSTMOSER, Das neue Schweizer GmbH-Recht, p. 29 *et seq.*; KUNZ, Recht der KMU, p. 25 *et seq.*
24 See, *inter alia*, KUNZ, Rundflug, p. 92.

ration «in which one or more persons or commercial enterprises» may participate (article 772 para. 1 CO)[25], thus, a so-called *«One person LLC»* is feasible[26]. The new legislation – also applicable to Companies limited by Shares – was primarily inspired by European Union legislation[27].

In Switzerland, each LLC has a mandatory *equity nominal capital* («Stammkapital») which needs to be specified in the company's articles of association. The statutory provisions regarding the nominal capital for LLCs were partially amended in the year 2008:

On one side, Swiss corporate law does not provide a *maximum* nominal capital for LLCs any longer[28]. On the other side, the *minimum* nominal capital remained unchanged[29] despite the fact that this minimal requirement was never amended after the year 1936 (hence, discounting the inflation over more than seven decades): «The nominal capital must amount to at least *20,000* [Swiss] francs» (article 773 CO)[30]. Various proposals to double the minimum capital requirement to 40,000 Swiss francs were rejected.

In accordance with article 774 CO, the *nominal value* of the shares («Stammanteile») must be at least 100 Swiss francs, and the respective capital contribution has to be paid up to at least their nominal value. Article 777*c* para. 1 CO provides: «On foundation, a cash deposit corresponding to the full issue price must be made for each capital contribution»; until the legislation amendment of the year 2008, a partial payment («Teilliberierung») was legal[31].

3.2. Protective Procedure

For *non-money contributions* – i.e. for contributions in kind («Sacheinlagen») or for acquisitions in kind («Sachübernahmen») – and for *special privileges* («Gründervorteile»), the LLCs law specifically refers to the detailed provisions on Companies limited by Shares (article 777*c* para. 2 CO). Therefore, *safeguarding measures* apply; in case of a *contribution in kind*, for example, the aricles of association must

[25] This is also repeated in *article 775 CO* as follows: «A limited liability company may be established by one or more natural persons or legal entities or other commercial enterprises».

[26] Prior to the LLC law amendment in the year 2008, the LLC had to have at least *two shareholders*: KUNZ, Recht der KMU, p. 26 *et seq.*; MEIER-HAYOZ/FORSTMOSER, Schweizerisches Gesellschaftsrecht, § 1 para. 6 *et seq.*

[27] KUNZ, Grosse GmbH-Reform, para. 22 footnote 55.

[28] The CO 1936 provided for a *maximum nominal capital* in the amount of *2 mio. Swiss francs*; see, KUNZ, Grosse GmbH-Reform, para. 24.

[29] See, KUNZ, Recht der KMU, p. 27 *et seq.*

[30] Today, the minimum nominal capital for Companies limited by Shares is *100,000 Swiss francs* (article 621 CO).

[31] See, KUNZ, Recht der KMU, p. 28 *et seq.*; BÖCKLI, Das neue schweizerische GmbH-Recht, p. 9.

indicate its nature and value, the name of the contributor and the respective shares allocated (article 628 para. 1 CO)[32].

A *notary public* has to be hired, and the founders declare in a *public deed* («öffentliche Urkunde»)[33] that the LLC is established[34]; furthermore, they lay down the articles of association[35] and appoint the management (article 777 CO). The money contributions must be deposited with a *Swiss bank* for the exclusive use of the LLC to be established (e.g. article 633 CO)[36]. According to article 778 CO, finally, the LLC has to be entered in the *commercial register* («Handelsregister») at the place where it has its seat[37].

4. Private Ordering

4.1. Articles of Association

The *articles of association* («Statuten») are mandatory for all LLCs, thus, no articles, no company. The content of the articles of association *prescribed by law* is provided for in article 776 CO: the business name and the seat of the LLC, the objects of the company, the amount of nominal capital and of the number and nominal value of the capital contributions as well as the form of the LLC's external communication.

Certain corporate matters *must be included* in the articles of association *in order to be binding* («bedingt notwendiger Statuteninhalt»); examples[38]: veto right (article 807 CO)[39], approval by the general meeting for certain decisions of the managing directors (article 811 CO)[40], prohibition of competition clauses (article 776*a* para.

[32] Essentially, the same rule is applicable to *acquisitions in kind* (article 628 para. 2 CO) and to *special privileges* (article 628 para. 3 CO); in addition, written contracts for contributions in kind and for acquisitions in kind must be *appended to the deed of incorporation* (article 631 para. 2 CO), the founding shareholders have to provide a written report on, among others, the contributions in kind (article 635 CO), and said report needs a verification by a licensed auditor (article 635*a* CO).

[33] The notary public has to specify, for example, the foundation documents in the certificate of incorporation (article 777*b* para. 1 CO).

[34] In the certificate of incorporation, the founding shareholders subscribe for the capital contribution and provide some statements regarding their subscription (article 777 para. 2 CO).

[35] See below 4.1.

[36] This statutory provision for Companies limited by Shares also applies to LLCs by means of a reference in article 777*c* para. 2 al. 3 CO.

[37] The LLC acquires *legal personality* by entry in the commercial register (article 779 para. 1 CO).

[38] The main legal basis is article 776*a* CO but conditional requirements as to content in the articles of associations are provided for, e.g., in article 786 para. 2 CO.

[39] See below 5.1.1.

[40] See below 5.1.1.

4 al. 8 CO)[41], and obligations for additional financial and material contributions (article 776*a* para. 1 al. 1 CO)[42].

4.2. Shareholders' Agreements

Swiss law is governed by the *freedom of contract* according to article 19 para. 1 CO: «The terms of a contract may be freely determined within the limits of the law». This general rule also applies to relations between shareholders (it is under dispute, however, whether or not the company may be party to such contract). The *Shareholders' Agreement* is legal even though not specifically provided for by the law («Innominatkontrakt»).

Shareholders' Agreements play a more important role with *Companies limited by Shares* than with LLCs[43]. Nevertheless, shareholders of LLCs may contract in Shareholders' Agreements, for example, on *voting coordination* («Stimmbindungsabsprachen») or on *purchase rights* («Erwerbsrecht»), e.g. first option or pre-emption. Finally, shareholders may agree to increase their *obligations to make additional* financial and material contributions.

5. Internal Governance

5.1. Shareholders

5.1.1. Rights

Shareholders are publicly known[44]. In accordance with articles 784 *et seq.* CO, shareholders of LLCs have a *variety of rights*, for example, the right to the transfer of shares (articles 785 *et seq.* CO)[45], the right for dividends (article 798 CO)[46], the right to information and to inspect documents (article 802 CO)[47], and finally, the

[41] See below 5.1.2 regarding article 803 para. 2 CO.

[42] See below 5.1.2 regarding articles 795 *et seq.* CO.

[43] Due to *article 680 para. 1 CO* (i.e. «A shareholder may not be required, even under the articles of association, to contribute more than the amount fixed for subscription of a share on issue»), shareholders of Companies limited by Shares, for instance, have neither by law nor by the articles of association any obligations to make additional financial or material contributions, yet, they *may agree by contract*.

[44] This disclosure represents a major difference from the Company limited by Shares; article 791 para. 1 CO provides: «The name, address and place of origin of company members, together with the number and the nominal value of their capital contributions must be entered in the commercial register».

[45] See below 6.

[46] However, *no interests* may be paid to the shareholders on the nominal capital and on additional financial contributions made (article 798*a* para. 1 CO).

[47] These rights depend on the LLC having an *external auditor* or not (article 802 para. 2 CO).

voting rights (articles 806 *et seq.* CO)[48]. These shareholders' rights are provided by *statutory law*.

In addition, the *articles of association* may add to these statutory rights, which shall be exemplified with two (new) corporate issues: on one side, the shareholders of LLCs may be granted a *right of veto* regarding certain resolutions of the general meeting («Vetorecht»: article 807 para 1. CO)[49]; on the other side, the managing directors may be forced *to submit to the general meeting* both certain decisions and individual matters within the responsibilities of the management board («Genehmigungsvorbehalt»: article 811 para. 1 CO)[50].

5.1.2. Obligations

There is *no longer a statutory liability* of shareholders[51]. Article 772 para. 1 CO provides for LLCs' debts: «A limited liability company (...) is liable for its obligations to the extent of the company assets»; this legal statement is repeated in article 794 CO. The articles of association may include the grounds and terms for making additional *financial contributions* («Nachschusspflichten»)[52] and *material contributions* («Nebenleistungspflichten»):

Regarding the obligation to make additional financial contributions, the additional capital required must not exceed *twice the nominal value* of the capital contribution (article 795 para. 2 CO), and the shareholders are liable only for such contributions to be made on their own capital contribution (article 795 para. 3 CO)[53]. The additional financial contributions may be called in only for specific reasons, e.g., if the company is unable to continue its business in proper matter without additional funds (article 795*a* para. 2 CO).

48 The *voting rights* are executed in the general meeting: see below 5.2.1.

49 See, *inter alia*, BÖCKLI, Das neue schweizerische GmbH-Recht, p. 28; HANDSCHIN Gesellschaftsanteile und Gesellschafterversammlung, p. 93; the articles of association must detail the decisions to which the right of veto applies (article 807 para. 1 CO).

50 Yet, the approval by the general meeting does *not restrict the liability* of the managing directors' (article 811 para. 2 CO); see, in general, MEIER, Kompetenztransfer oder Vetorecht, p. 297 *et seq.*

51 Prior to the legislation amendment in the year 2008 (see above 2.3), Swiss corporate law provided for a *personal liability of the shareholders* of LLCs if the shares were not paid up to the full issue price of the shares («Teilliberierung»): KUNZ, Recht der KMU, p. 29 *et seq.*

52 See, e.g., CHAPPUIS, Die Erweiterung der Einsatzmöglichkeiten, p. 85 *et seq.*

53 Shareholders subject to an obligation to make additional financial contributions may request an *ordinary audit* of the annual accounts (article 818 para. 2 CO): see below 5.2.3; shareholders resigning from the LLC remain subject to this obligation for three more years (article 795*d* para. 1 CO).

The articles of association may require shareholders to make further *material contributions* to the LLC – e.g. providing specific services[54] – «if this serves the objects of the company, the maintenance of its independence or the preservation of the composition of the groups of shareholders» (article 796 para. 2 CO); object and extent and other essential points must be specified in the articles of association (article 796 para. 3 CO).

Unlike shareholders of Companies limited by Shares, shareholders of LLCs have a *duty of loyalty* («Treuepflicht»)[55] in accordance with article 803 CO. Shareholders must, among others, safeguard business secrets and, in case of a respective provision in the articles of association, have to respect a *prohibition of competition* with the LLC (article 803 para. 2 CO)[56]. Shareholders may carry on activities contrary to the duty of loyalty or the prohibition of competition only if *all other shareholders consent* in writing (article 803 para. 3 CO).

5.2. Governing Bodies

5.2.1. General Meetings

Shareholders enjoy a variety of rights[57]. The so-called *general meeting*, where shareholders regularly meet face to face, is the LLC's «supreme governing body» (article 804 para. 1 CO). Various *checks and balances* between general meetings on one side and managing directors on the other side safeguard a reasonable corporate governance for LLCs[58]; if provided by the articles of association, for example, general meetings may intervene in managing directors' responsibilities (e.g. article 807 CO and article 811 CO)[59].

According to article 804 CO, the general meeting has *inalienable powers*, e.g., to amend the articles of association, to appoint and remove the managing directors and the external auditors, to approve the management report and the annual accounts, to determine the fees paid to managing directors, to discharge the mana-

[54] Obligations *to pay money or provide other assets* are subject to the provisions on additional financial contributions according to articles 795 *et seq.* CO (article 796 para. 4 CO).

[55] Article 803 para. 1 CO provides that shareholders «must refrain from doing anything detrimental to the interests of the company. In particular, they may not carry on business that brings them a special advantage but which adversely affects the objects of the company».

[56] For more details, see, *inter alia*, CHAPPUIS, Les prohibitions, p. 339 *et seq.*; BLANC, Das Konkurrenzverbot, *passim*; BLANC, Das statutarische Konkurrenzverbot der GmbH-Gesellschafter, p. 12 *et seq.*; KUNZ, Recht der KMU, p. 30.

[57] See above 5.1.1.

[58] In general, OLIVAR PASCUAL/ROTH, Organisation der GmbH, p. 470 *et seq.*

[59] See above 5.1.1; *inter alia*, FORSTMOSER/PEYER, Einwirkung der Gesellschafterversammlung, p. 397 *et seq.* and p. 429 *et seq.*

ging directors, and to exclude a shareholder on grounds provided for in the articles of association[60].

The *voting rights* in general meetings[61] are determined by the nominal value of their capital contribution[62], and each shareholder has at least one vote (article 806 para. 1 CO). In certain cases, laid out in article 806*a* CO, there is an *exclusion* of the right to vote[63]. Generally, resolutions are passed by the absolute majority of the votes represented (article 808 CO), but article 808*a* CO provides: «The *chair* of the shareholders' general meeting has the *casting vote* [«Stichentscheid»]. The articles of association may provide otherwise».

5.2.2. Managing Directors and Management Board

The *shareholders* of LLCs are *jointly responsible* for the management of the company (article 809 para. 1 CO)[64]; this statutory rule shows a «partnership element» of the LLC. According to article 809 para. 2 CO, the general meeting[65] appoints the so-called *managing directors* of the company («Geschäftsführer») who must be natural persons. When the LLC has two or more managing directors, they decide by a majority of the votes cast, and the chairman of the management board has the *casting vote* (article 809 para. 4 CO)[66].

The *strong position* of the management directors within the LLCs' checks and balances is described in article 810 para. 1 CO: «The managing directors are responsible *for all matters not assigned* by law or the articles of association to the shareholders' general meeting». Managing directors have a variety of *inalienable and irrevocable duties* (article 810 para. 2 CO)[67], and the chairman has a further set of duties (article 810 para. 3 CO)[68].

[60] See below 7.1.1.

[61] NATER, Die Willensbildung, *passim*.

[62] According to article 806 para. 2 CO, however, the *articles of association* may specify that the shareholders' voting rights are not dependent on nominal value but on the number of shares, i.e. with the result that *each share carries one vote* («one share, one vote»).

[63] For example, in case of resolutions on the *discharge* of the managing directors, persons who have *participated in managment* in any way are not permitted to vote (article 806*a* para. 1 CO).

[64] See, in general, SENTI, Die Geschäftsführung bei der GmbH, p. 18 *et seq.*

[65] See above 5.2.1.

[66] In any case, the *chairman of the managing directors* must be appointed by the *general meeting* of the shareholders (article 809 para. 3 CO).

[67] E.g., overall management («Oberleitung») of the company, issuing the required directives, determining the organisation of the LLC, or preparation of the general meetings.

[68] Among others, the chairman of the management board has to chair the general meeting.

Article 812 para. 2 CO provides: «The managing directors (…) must carry out their duties with all due care and safeguard the interests of the company in good faith». In addition to these two *duties of care and of loyalty*, there is an *obligation for equal treatment*: «The managing directors (…) must treat company members equally under the same circumstances» (article 813 CO). By law, they must also respect a *prohibition of competition* (article 812 para. 3 CO).

As a core element of checks and balances, managing directors may be *removed by the general meeting* at any time (article 815 para. 1 CO)[69]. In addition to this general meeting's power, and in accordance with article 815 para. 2 CO, any *shareholder* «may request the court to revoke or restrict the right of a managing director to manage or represent the company where there is *good cause*, and in particular if the person concerned has seriously breached his obligations or is no longer able to manage the company competently».

5.2.3. External Auditors

The third governing body is the so-called *external auditor* («Revisionsstelle») according to articles 727 *et seq.* CO[70]. The auditing law was in large parts amended some years ago[71]. The annual accounts of LLCs must be reviewed either by an auditor in an *ordinary audit* («full audit»: article 727 CO) or in a *limited audit* («review»: article 727*a* CO). Generally, the «bigger» the company, the «fuller» the audit[72]; listed companies' accounts, for instance, must always be reviewed in an ordinary audit by a state supervised audit company.

Small(est) companies, however, may waive the limited audit – i.e. not the ordinary audit – of their annual accounts («opting out») if certain size criterias are fulfilled: «With the *consent of all* the shareholders, a limited audit may be dispensed with if the company does not have more than *ten full-time employees* on annual average» (article 727*a* para. 2 CO). In Switzerland's business practice, this is often the case

[69] See, *inter alia*, ANDERMATT, Beschränkung der Geschäftsführung,*ST* 2009, p. 470 *et seq.*

[70] The law on LLCs refers to the law on Companies limited by Shares (article 818 para. 1 CO).

[71] The *new auditors' law* (as part of the law on Companies limited by Shares) went into effect in the year 2008 – slightly amended in the year 2012 – and also applies to LLCs and other companies' forms; formerly, the external auditor was voluntary for the LLCs, today, auditing the LLC is *mandatory* (as a general rule); see, *inter alia*, KUNZ, Grosse GmbH-Reform, para. 33 *et seq.*

[72] Shareholders of LLCs subject to an obligation to make *additional financial contributions* (see above 5.1.2) may request an *ordinary audit* of the annual accounts (article 818 para. 2 CO).

with *LLCs* which represent the predominant corporate form for small (and medium-sized) enterprises[73].

6. Transfer of Shares

6.1. Assignment

The *transferability* of shares was *generally improved* with the legislative amendment in the year 2008[74]. Where an official document is issued regarding the shares, this may only take the form of either a *document in proof* or a *registered share* (article 784 para. 1 CO)[75], i.e. bearer securities («Inhaberpapiere») are not allowed for shares of LLCs[76].

The assignment of LLCs' shares as well as the obligation to assign must be done *in writing* (article 785 para. 1 CO)[77]; unlike the law prior to said legislative amendment, however, a notary public is not necessarily involved today. The particular *information* to be contained in the *contract of assignment* is provided for in article 785 para. 2 CO.

6.2. Restrictions

By law, the assignment of shares calls for the *consent of the general meeting* (article 786 para. 1 CO). This consent requirement may be amended by the articles of association; for example, the articles of association may waive the requirement of consent, or state the grounds justifying the refusal of consent, or prohibit any assignment (article 786 para. 2 CO).

Thus, the statutory «exit» from LLCs is *not as easy* as from Companies limited by shares. Where the articles of association prohibit the assignment or the shareholders' general meeting refuses to consent to the assignment, however, the *right to resign* for *good cause* is reserved by law (article 786 para. 3 CO). According to article 788 CO, for certain special forms of acquisitions, consent requirements do not exist[78].

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[73] See above 2.2.

[74] See above, 2.3; in general, KUNZ, Recht der KMU, p. 29.

[75] *Inter alia*, see, MEIER-HAYOZ/FORSTMOSER, Schweizerisches Gesellschaftsrecht, § 18 para. 90 *et seq.*

[76] The official document must contain the same information on rights and obligations under the articles of association as the *document on subscription* to the LLC shares (article 784 para. 2 CO).

[77] See, in general, SIFFERT, Stolpersteine, p. 76 *et seq.*

[78] Article 788 para. 1 CO provides: «Where shares are acquired through *inheritance*, distribution of an estate, matrimonial property, law or enforcement proceedings, all re-

7. Miscellaneous Shareholders' Issues

7.1. Exit from LLCs

7.1.1. Exclusions

The law on Companies limited by Shares does not allow exclusion («Ausschluss») under any circumstances. However, the «partnership element» of *exclusion* is provided for in article 823 para. 1 CO, with the LLC being the claimant: «Where there is *good cause* [«wichtige Gründe»], the company may apply to the court for the exclusion of a shareholder»[79].

Moreover, the *articles of association* of the LLC may provide that the general meeting may exclude shareholders from the company on *specific grounds* (article 823 para. 2 CO)[80]. The provision on follow-up resignations according to article 822*a* CO[81] does not apply to exclusions (article 823 para. 3 CO)[82], hence, there is *no follow-up exclusion* for shareholders.

7.1.2. Resignations

On one side, in accordance with article 822 para. 1 CO, the shareholders may apply to the court for *resignation* («Austritt») for *good cause*; if this threshold is not passed, the shareholders may not resign by law[83]. On the other side, the articles of association may grant the right to resign and make this subject to *certain conditions* (art. 822 para. 2 CO)[84].

The legislation amendment in the year 2008 introduced a new shareholders' right, i.e., the so-called *follow-up resignation* («Anschlussaustritt»)[85]; article 822*a* CO represents some kind of a «statutory take along», emphasizing the right to exit:

Where a shareholder files an action to resign for good cause or tenders his resignation based on the articles of association, the *managing directors must notify* the other shareholders without delay (article 822*a* para. 1 CO). If other shareholders file an action to resign, within three months, *all departing* shareholders *must be*

lated rights and obligations are transferred to the acquirer *without requiring the consent* of the general meeting».

[79] For details, SANWALD, Austritt und Ausschluss, p. 385 *et seq.*

[80] See, *inter alia*, SANWALD Austritt und Ausschluss, p. 397 *et seq.*

[81] See below 7.1.2.

[82] The rule of article 823 para. 3 CO applies to article 823 para. 1 and para. 2 CO.

[83] In any case, the right to resign represents an «anomaly»: SANWALD, Austritt und Ausschluss, p. 337 *et seq.*

[84] E.g. a certain duration of the shareholder's membership with the LLC; for further details, see, *inter alia*, SANWALD, Austritt und Ausschluss, p. 355 *et seq.*

[85] See, KUNZ, Recht der KMU, p. 34; FORSTMOSER/PEYER/SCHOTT, Das neue Recht, para. 81.

treated equally in proportion to the nominal value of their capital contribution (article 822*a* para. 2 CO)[86].

7.1.3. Financial Settlements

In case of leaving the LLC (i.e. by exclusion or resignation), the shareholder is entitled to a *financial settlement* («Abfindung») that reflects the *true value* of his share (article 825 para. 1 CO)[87]. In general, the compensation becomes due when the shareholder leaves provided that, e.g., the LLC has *disposable equity capital* (article 825*a* para. 1 CO).

A *licensed auditing expert* («zugelassener Revisionsexperte») must establish the extent of the disposable equity capital (article 825*a* para. 2 CO)[88]. In case of the equity capital not being sufficient, however, article 825*a* para. 3 CO provides for a *subordinated creditor's claim*: «The former shareholder holds a non-interest-bearing subordinate ranking claim in respect of any portion of the financial settlement that is not paid out».

7.2. Conflicts of Shareholders

In case of *shareholders' conflicts*, the law on LLCs provides a variety of safeguards, for instance, against oppression strategies. Even though there are many actions available for shareholders seeking relief, in business practice, *lawsuits are seldom filed* in Switzerland (e.g. for reasons of «bad publicity» or high costs for lawyers' fees). For example, *decisions* taken by *managing directors* or *general meetings* may legally be challenged:

Shareholders have *two reliefs* in this regard, i.e. first, the action to challenge resolutions of general meetings according to article 808*c* CO («Anfechtungsklage»)[89], and second, the action to void resolutions of general meetings or managing directors, respectively, in accordance with article 816 CO («Nichtigkeits-

[86] According to article 822*a* para. 2 *ad finem* CO, in case of additional financial contributions having been made, the value thereof must be added to the nominal value.

[87] SANWALD, Austritt und Ausschluss, p. 85 *et seq.* and 88 *et seq.*; regarding a particular situation, article 825 para. 2 CO provides: «Where the shareholder leaves by exercising a right of resignation under the articles of association, the articles of association may adopt different provisions on compensation».

[88] According to article 825*a* para. 2 CO, if the disposable equity capital is *insufficient* to fully pay the compensation to the leaving shareholder(s), the licensed audit expert must state in his opinion on the extent to which the nominal capital could be reduced.

[89] The rules on Companies limited by Shares are applicable (article 808*c* CO refers to articles 706 *et seq.* CO) which provides the statutory details.

klage»)[90]; for the former, the right to challenge lapses if the action is not brought to court *within two months* of the general meeting[91].

Potentially, the so-called *action for dissolution* («Auflösungsklage») is crucial to protect oppressed shareholders, and represents an additional «exit»[92]; article 821 para. 3 CO[93] provides: «Any shareholder may request the court to dissolve the company for good cause. Instead of dissolution, the court may opt for an alternative solution that is appropriate and reasonable for the persons concerned, such as the payment of a financial settlement to the shareholder requesting dissolution commensurate with the true value of his capital contribution»[94].

Persons who are involved in the establishment[95], management[96], auditing[97] or liquidation of LLCs may be hold accountable by the company and its shareholders (and sometimes its creditors), thus, they have *to pay damages*. The *liability provisions* of the Companies limited by Shares according to articles 752 *et seq.* CO apply also to LLCs (article 827 CO).

The law on Companies limited by Shares provides for a shareholder's right to instigate a so-called *special audit* of the company according to articles 697*a et seq.* CO («Sonderprüfung»). This particular right is not contained in articles 772 *et seq.* CO, and cannot be found as legislative reference. Therefore, the shareholders of LLCs have *no right for a special audit* by means of a «qualified legislative silence» («qualifiziertes Schweigen»)[98].

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[90] The rules on Companies limited by Shares are applicable (article 816 CO refers to article 706*b* CO [re general meeting] and article 714 CO [re board of directors]) which provides the statutory details.

[91] Article 706*a* para. 1 CO; on the other side, *actions for nullity* of decisions have *no time limit*.

[92] Filing such a corporate lawsuit, e.g. the *oppressed shareholder* might eventually «exit» the *oppressive LLC*: KUNZ, Zur Auflösungsklage, p. 235 *et seq.*

[93] See, KUNZ, Recht der KMU, p. 33 *et seq.*

[94] SANWALD, Austritt und Ausschluss, p. 323 *et seq.*

[95] See above 3; WERLEN, Gründungshaftung bei der GmbH, p. 403 *et seq.*

[96] See above 5.2.2.

[97] See above 5.2.3.

[98] FORSTMOSER/PEYER/SCHOTT, Das neue Recht, para. 73 footnote 105; KUNZ, Recht der KMU, p. 34 footnote 199.

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