



**Universität
Zürich** ^{UZH}

University of Zurich: Faculty of Law

Introduction to Swiss Law: Business Law

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Chair for Law & Finance

Prof. Dr. Kern Alexander



Swiss commercial law history since the 13th century (1)

- Trade fairs in Geneva
 - Bills of exchange negotiated
- Codification of Commercial Law
 - Civil Code (10 December 1907, SR210)
 - Code of Obligation (30 March 1911, SR220)
 - Banking Act (8 November 1934, SR952)
- Swiss Stock Exchange (1930)
 - Digitalised and automated trading and clearing and settlement
- Private Banking
 - 27.5% of globally managed assets in Switzerland (2018)



Swiss commercial law history since the 13th century (2)

- Cross border activities involving banking, investments and taxation affect Switzerland
- 2008 financial crisis has led to messages for greater harmonisation in regulation of financial services – more from a self regulated model to a legal regulation.
- „The danger is growing that Switzerland will become centre of dubious financial service providers who free from strict EU regulation in Switzerland. The reputation of the financial centre Switzerland could be damaged.“
- „And we, as the supervisory authority, will not be able to intervene because we do not have the appropriate regulatory bases and competences“



Swiss commercial law history since the 13th century (3)

- Stricter regulatory environment in Switzerland - moving to a legalistic framework
 - Adoption of new laws
 - Plans to repeal the fundamental law on investor protection (SESTA)
 - Plans to adopt new investor protection regulations, i.e. FinSA



Business Law: Roadmap

1) Theory of the Corporation

- I. Limited vs unlimited Liability
- II. Swiss Company Law
- III. Theory of the Firm
- IV. Externalities and the role of the Company in Society

2) Financial Markets & Banking Law

- I. Corporate Governance and Risk Culture
- II. Insider Trading and Market Abuse
- III. Money Laundering and Financial Crime
- IV. Bank Secrecy

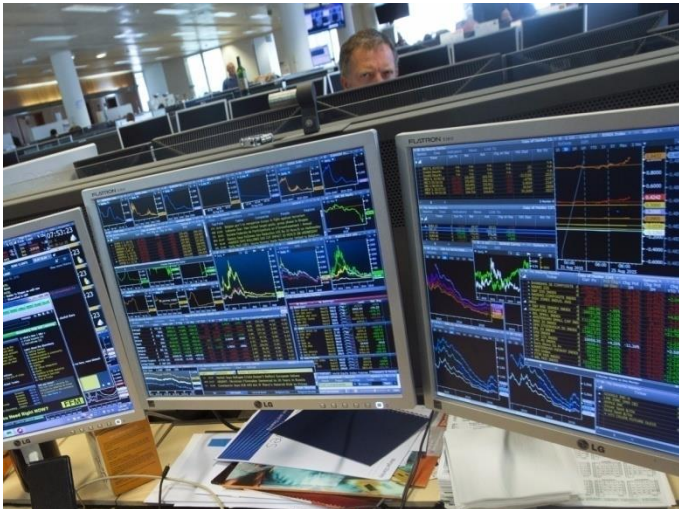


Business Law: Four Headlines with current Issues



“Era of bank secrecy ends as Swiss start sharing account data”

“HSBC's Mexico nightmare on money laundering”



“Three JPMorgan metals traders charged with market manipulation”

«Absage an das Firmen-Bashing»





Swiss Company Law



Legal doctrines: separate personality & limited liability

- Unincorporated joint stock companies
- Incorporation by registration (1844 UK Companies Act)
- Limited liability enabling & incentive to invest. Facilitate efficient management of business (1855 UK Limited Liability Act)
- Number of promotions grew substantially after 1855 in England
- US state restricted limited liability for corporations: eg., *double or triple liability of value of shares*
- US National Banking Act 1863 – *par value of share + value of investment*



Forms of the Company

Liability:

1. Limited Liability
2. Personal Liability

Limited Liability:

- Company limited by shares (Aktiengesellschaft, AG)
- Limited liability Company (Gesellschaft mit beschränkter Haftung, GmbH)

Personal Liability:

- Simple partnership (Einfache Gesellschaft)
- Commercial Partnership (Kollektivgesellschaft)

Both personal and limited liability:

- Limited Partnership (Kommanditgesellschaft)



Forms of the Company: Simple Partnership (CO Art 530ff)

1. Requirements:

- **Contract**
- **Two or more Persons**
- **Common goal**
- **Default form of partnership** („[...] any partnership that does not fulfil the distinctive criteria of any of the other types of partnership codified herein.” CO 530 II)

2. Characteristics

- **Each partner** has an **equal share in profits and losses** (unless other agreement exists) (CO 533)
- partners are **jointly and severally liable** for obligations to third parties (CO 544 IV)
- **Objects, rights in rem and claims** transferred to or **acquired for the partnership** belong jointly to the partners as stipulated in the partnership agreement.



Forms of the Company: Commercial Partnership (CO 552ff)

1. Requirements:

- **Contract**
- **Two or more Persons**
- **Common goal (generally commercial/business-oriented goal)**
- **Registered in commercial register (for commercial enterprises obligatory and of a declaratory nature, for noncommercial entities of a constitutive nature)**
- **Acting toward third parties as representative of the partnership (i.e. utilizing name of identifier of partnership)**

2. Characteristics

- **Unlimited liability of partners:** The partners are jointly and severally liable with their entire assets for all obligations of the partnership. (CO Art 568 I)
- Standard/most common form is a **commercial enterprise** with a name registered in the commercial register



Forms of the Company: Commercial Partnership (CO 552ff)

Though partnership is not a separate legal personality, it acquires a quasi-legal personality, i.e. is treated as if it had a legal personality in certain cases, such as:

- **Can deal in its own name**
- **Can act as a party in legal proceedings and sue in its own name**
- **Can become a subject of debt collection procedures („Betreibung“)**
- **Liability as an entity for actions resulting from the partners' activities in the name of the company**
- **Assets are divided from the assets of partners and in their collective ownership (does not limit liability of partners, however)**



Forms of the Company: Limited Partnership (CO 594ff)

1. **Derivative form of Commercial Partnerships (and sharing many of its general characteristics)**

2. **Characteristics**
 - **Both limited and unlimited liability of partners:**

 - **Certain partners with unlimited liability (identical to commercial partnership)**

 - **Other partners only liable** only up to the amount of their specific contributions. (CO 594 I)

 - Partners with unlimited liability must be **natural persons**, but **limited partners may also be legal entities and commercial enterprises.**

 - Standard/most common form is a **commercial enterprise** with a name registered in the commercial register (CO 594 III and 595)



Forms of the Company: Company limited by shares (CO Art 620ff)

1. Requirements:

- **Founding through public deed by founding members**
- **Articles of Association**
- **Registration in commercial register**
- **Share capital of at least CHF 100'000**



Forms of the Company: Company limited by shares (CO Art 620ff)

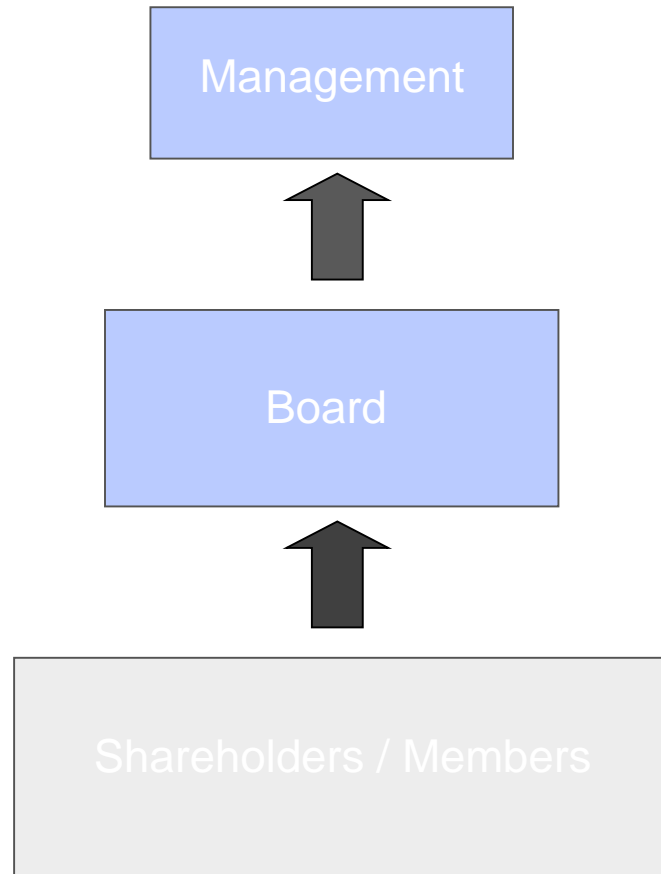
2. Characteristics

- **Limited liability of shareholders:** Shareholders are shielded from losses greater than their investment in the company
- **Name** can be chosen freely, but must indicate the legal form of the company (in one of the four languages, i.e. A.G. or S.A. in German or French)
- The company is governed by:
 1. The **General meeting of shareholders** as the supreme governing body. In Switzerland, generally the principle of „one share one vote“ is followed, but certain private (i.e. non-listed companies) can opt for other voting rights for certain classes of shareholders.
 2. The **board of directors** that leads the company. The board can delegate the leadership to individual members of the board or to third parties („Geschäftsleitung“) if provided for in the articles of association
 3. The **external auditor:** ensure and verify the accuracy of the company's financial statements and act as safeguards against fraud and other discrepancies.



Forms of the Company: Company limited by shares (CO Art 620ff)

The Company's Organs





The Articles of Association

- The function of the articles of association
 - Internal organisation
 - Division of power between the shareholders and the board
- Typical content (flexible content)
 - Procedures for convening and conducting shareholder and board meetings
 - Rules for appointing and removing directors
 - The regulation of share transfers
 - The payment of dividends
- Table A default articles
 - Gap filler
 - Transaction costs



Forms of the Company: Company limited by shares (CO Art 620ff) The Articles of Association (Switzerland, CO Art 626 lit. e. I)

“The articles of association must contain provisions concerning:

1. The business name and seat of the company;
2. The objects of the company;
3. The total share capital and the extent to which it is paid up;
4. The number, nominal value and types of shares;
5. The procedure for convening general meetings and the voting rights of shareholders;
6. The governing bodies for management and auditing;
7. The form of the company's external communications.”



Forms of the Company: Company limited by shares (CO Art 620ff)

The Articles of Association (Switzerland, CO Art 627 II)

- **“In order to be binding, provisions on the following matters must be included in the articles of association:**
1. amendment of the articles of association, where different from the statutory provisions;
 2. the payment of shares of profits paid to board members;
 3. the interest paid to shareholders until commencement of the company's operations;
 4. limitation of the company's duration;
 5. contractual penalties for failure to pay up share capital on time;
 6. capital increases from authorised capital and contingent capital increases;
 7. [2...](#)
 8. restrictions on the transferability of registered shares;
 9. the preferential rights of individual share classes, participation certificates, dividend rights certificates and the granting of special privileges;
 10. restrictions on the voting rights of shareholders and their rights to appoint representatives;
 11. cases not envisaged in law in which the general meeting may make resolutions only by qualified majority;
 12. authority to delegate management responsibilities to individual members of the board of directors or to third parties;
 13. the organisation and duties of the external auditors, where these go beyond those prescribed by law;
 14. [3](#)the possibility of converting shares issued in a specific form into another form, together with an allocation of resultant costs, where this derogates from the regulations in the Uncertificated Securities Act of 3 October 2008⁴.



Forms of the Company: Company limited by shares (CO Art 620ff)

The Articles of Association (Switzerland, CO Art 628): Contributions in kind

Relating specifically to contributions in kind, acquisitions in kind, special privileges¹

- ¹ Where a shareholder makes a contribution in kind, the articles of association must indicate its nature and value, the name of the contributor and the shares allocated to him.²
- ² Where the company acquires or intends to acquire tangible fixed assets from shareholders or close associates, the articles of association must indicate their nature, the name of the person providing them and the consideration given by the company.³
- ³ Where special privileges are accorded to founder members or other persons on establishment of the company, the persons thus privileged must be named and each privilege precisely described and valued in the articles of association.
- ⁴ After ten years the general meeting may annul provisions of the articles of association concerning contributions in kind or acquisitions in kind. Provisions on acquisitions in kind may also be annulled if the company makes a final decision not to make the acquisition in kind. ⁴⁵



Public vs Private Companies

- Listed vs unlisted
- Private Equity



Forms of the Company: The limited liability company (CO Art 772ff)

1. Requirements:

- **Founding through public deed by founding members**
- **Articles of Association**
- **Registration in commercial register (CO Art 779 I)**
- **Share capital of at least CHF 20'000 (CO Art 773)**



Forms of the Company: The limited liability company (CO Art 772ff)

2. Characteristics

- **Limited liability of members:** Members are shielded from losses greater than their investment in the company
- **Name** can be chosen freely, but must indicate the legal form of the company (in one of the four languages, i.e. GmbH or Sàrl in German and French)
- The company is governed by:
 1. The **General meeting of members** as the supreme governing body.
 2. The **management** that leads the company. Members are jointly responsible for managing the company unless the articles of association specify an alternative arrangement.
 3. The **external auditor:** ensure and verify the accuracy of the company's financial statements and act as safeguards against fraud and other discrepancies.



Forms of the Company: The limited liability company (CO Art 772ff)

3. Contrasting the limited liability company and the company limited by shares

- Conceptually similar to company limited by shares
- „Smaller“ version of company limited by shares
- Useful for setting up a regional or local companies with smaller overall footprint
- Limits liability of members
- Cheaper to set up as it requires less capital (CHF 20'000 vs CHF 100'000)



Externalities and the role of the Company in Society

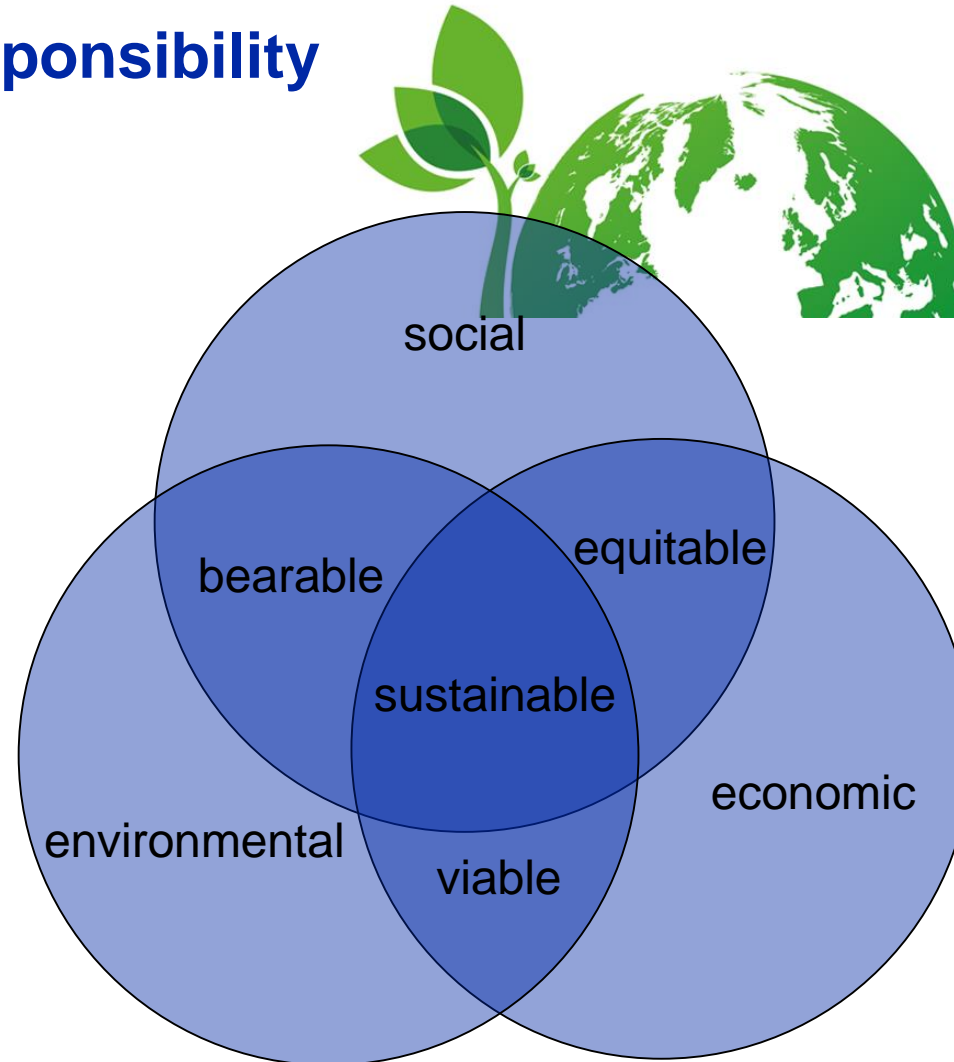


Social responsibility and political activity

- Business aims to make money – increase wealth
- Should business engage in philanthropy as well?
- Corporate Social Responsibility (CSR) – *The Halo Effect*
- Large v small companies?
- Corporation as nexus of contracts, concession or communautaire – should the state be able to impose social responsibilities?
- *A.P. Smith manufacturing Co., v Barlow*, court upheld board of directors decision to make charitable contribution to university. Court referred to old notion of incorporation to pursue only a social good, but over time the goal of private business became focused on profit. Today, ‘calls upon the corporations for reasonable philanthropic donations have come to be made with increased public support.’



Corporate Social Responsibility





Corporate Social Responsibility



Ad in the New York Times (November 2011)



Corporate Social Responsibility: The Responsible Business Initiative



Proposal of a new Art. 101a FC (Federal Constitution)

- **Mandatory due diligence** of Swiss based companies on subsidiaries based abroad (three steps):
 - Swiss parent companies must first review all their business relationships and activities with a view to **identifying potential risks** to people and the environment.
 - They must **take effective measures** to address the potentially negative impacts identified.
 - As a third step, companies are required to **report** in a transparent manner on the violations identified, as well as on the related measures taken.



Corporate Social Responsibility: The Responsible Business Initiative



Proposal of a new Art. 101a FC (Federal Constitution)

➤ Liability provisions

- Swiss based companies will be liable for human rights abuses and environmental violations caused abroad by companies under their control in front of Swiss Courts.
 - **Exemption** from liability when the company credibly demonstrates to the Court that it carried out adequate due diligence and that it took all necessary measures to prevent the violations.
- These provisions are stricter than the existing Swiss law on the liability of parent companies acting as de facto corporate organs of their subsidiaries (Art. 754 CO)

Corporate Social Responsibility: The Responsible Business Initiative



Current Developments:

- On 10 October 2016 the initiative was **submitted** with 120 418 valid signatures.
- On 11 January 2017 the Federal Council proposed to the parliament that it should **recommend to the voters to decline the initiative without any counterproposal** or alternative draft:
- The Federal Council places a high priority on the protection of human rights and the environment. The initiative is in its view, however, **too extensive in terms of the due diligence and liability provisions** that are proposed in the initiative.
- The Federal Council declared to pursue the protection of human rights and the environment **by other measures** such as **recently resolved action plans and international cooperation**.

Corporate Social Responsibility: The Responsible Business Initiative



Current Developments:

- On 15 September 2017 the Federal Council passed a dispatch in which it stated its above stated opinion and recommendation.
- **If accepted** by Swiss voters, the text of the initiative would **be implemented in the Swiss Constitution**.
- On 14 November 2017 the law commission of the Council of States proposed **a draft legislation as an alternative to the initiative**. Contrary to the initiative, the alternative draft legislation would be **implemented in a statute** if it was accepted and not in the constitution.
- **On 18 May 2018 the law commission of the National Council proposed an alternative draft legislation within the revision of the CO**



Corporate Social Responsibility: How Companies are responding



- “As an integrated technology group, Rheinmetall is a market leader in the areas of **environmentally friendly mobility and threat-appropriate security technology**. The group’s operating activities are split into the two corporate sectors, **Rheinmetall Automotive** and **Rheinmetall Defence**. In 2018, its 24,949-strong staff generated annual sales of €6,148 million.”



Corporate Social Responsibility:

- “A company can enjoy long-term success only if it integrates coordinated **economic, ecological and social factors** into business activities and creates added value for itself, its **employees and society**. It is therefore a matter of course for Rheinmetall to do everything possible to contribute to the company being economically stable and **ecologically responsible**. We accept this responsibility as a matter of course.
We always have.”

(From Rheinmetall Group Website, statement on CSR)



Corporate Social Responsibility:

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Images show some of the Products of Rheinmetall (from top to bottom): „Leopard 2“ Main Battle Tank, „Boxer“ Infantry Fighting Vehicle, and the „Panzerhaubitze 2000“ (a self-propelled howitzer).



Corporate Governance: Principles



Money Laundering and Financial Crime





Definition of financial crime and money laundering

- Money laundering
 - Action: Illicitly obtained financial assets are converted into “legally obtained”
 - Easier for prosecution to prove that individual has control over account and the money transferred to it is result of illegal act (predicate/underlying offence)
 - E.g. conviction of both tax evasion and money laundering





Why offshore entities are attractive to money launderers

- ❖ Criminal organisations take advantage of difficulties law enforcement face when international borders are crossed
- ❖ Perception of bank secrecy
- ❖ Opens the door to the utilisation of a wide variety of financial products and or services
- ❖ Tax shelters
- ❖ Banking and brokerage services
- ❖ International investments



How it works: placement, layering, and integration

1. Placement

- Introducing illegal funds into the formal financial business system
- E.g. deposit cash from drug sales into accounts, co-mingling it with business takings or using it to purchase assets

2. Layering

- Moving, dispersing, or disguising illegal funds to conceal true origins
- E.g. network of complex transactions involving multiple banks

3. Integration

- Investing in further criminal activity
- Convertible bonds



How it works: placement, layering, Integration





FATF: Role in national and EU legislation

- **EU AML Directives**
 - Fourth money laundering directive adopted order to bring EU legislation in line with 2012 FATF Recommendations (risk-based approach)
 - FATF Recommendations as aids to interpreting AML Directive (see e.g. *Safe Interwenios SA vs. Liberbank SA et al.* European Court of Justice, 10 March 2016, C-295/14 para. 102 et seq.)ECJ referred to the FATF recommendations and EU ML Directive (recital says that EU law should be in line with FATF recommendations) combating money laundering is a legitimate aim capable of justifying a barrier to the freedom to provide services



FATF: Role in national and EU legislation

- ❖ **Swiss AML/CFT law governing the combating of money laundering**
 - **Anti-Money Laundering Act:** applies to financial intermediaries and governs the combating of money laundering and terrorist financing. It ensures the exercise of due diligence in the conduct of financial transactions.
 - **Anti-Money Laundering Ordinance “Anti-Money Laundering Act:”** requirements for the professional practice of financial intermediation and the due diligence obligations and reporting duties which traders must fulfil
 - **FINMA Anti-Money Laundering Ordinance** ordinance sets out how the financial intermediaries are to implement their obligations to prevent money laundering and terrorist financing





Bank Secrecy



Source: Ft.com, 26 July 2019 <<https://www.ft.com/content/38cbad8c-afa4-11e9-8030-530adfa879c2>>

Bank Secrecy: Swiss court rules against UBS over client information



- “Switzerland’s highest court has approved **the transfer of sensitive information on tens of thousands of UBS clients to tax authorities in Paris**, in a landmark judgment likely to have significant implications for the future of the Swiss banking industry [...]”
- “Information on **the 40,000, mostly high net worth, UBS banking clients**, who are resident, or previously resident, in France will now be sent to French investigators pending finalisation of the judgment.”



Bank Secrecy: Swiss court rules against UBS over client information



„Nicht zu Unrecht herrscht tiefe Verwunderung darüber, dass das Bundesgericht in Lausanne entschieden hat, dass die Schweiz Namen und weitere Angaben zu über 40 000 UBS-Konten an die französischen Steuerbehörden herausgeben darf. **Bis anhin galten solche «Fischzüge» als unzulässig. Rechtssicherheit sieht anders aus.**“ – Peter Nobel, NZZ vom 6.8.2019



Bank Secrecy: Overview

- **Art. 47 Banking Act**
 - Disclosure of information which has been entrusted to a person in his capacity as an organ, employee, agent or liquidator of a bank or organ or employee of an audit firm is punishable with imprisonment up to three years or fine.

