

The company law reform of 2023

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The revision of company law adopted by Parliament on 19 June 2020 and in force since 1 January 2023 changed several rules that matter for trading houses.¹ Besides the foreign currency capital mentioned above, it introduced the capital band. The band authorizes the board to increase or reduce the capital within a range of 50 per cent above and below the registered capital for up to five years. It permitted interim dividends on the basis of interim accounts and allowed general meetings to be held at several locations, abroad or in purely virtual form.² For family-owned traders whose shareholders live in Milan, London and Lugano, the virtual or hybrid general meeting has removed a practical obstacle. For houses that need to adjust their capital quickly to the requirements of banks, the capital band offers flexibility that the old authorized capital did not provide.

The reform also rewrote the rules on financial distress. The board must monitor the solvency of the company and, if insolvency threatens, take measures to secure liquidity and, where necessary, apply for a moratorium (Art. 725 CO). If there is reason to fear over-indebtedness, it must draw up interim accounts at going concern and liquidation values. It must notify the court unless creditors subordinate their claims or there is a reasonable prospect of remedying the over-indebtedness within 90 days.³ For a trader whose balance sheet consists of receivables, inventories and derivative positions that change value daily, these duties are demanding. Some directors allow a trading company to continue after it has become over-indebted, in the hope that the next cargo will restore the equity. They expose themselves to personal liability under Article 754 CO and, in serious cases, to criminal liability for mismanagement under Article 165 of the Swiss Criminal Code.⁴

1 Liability of directors and the nominee problem

Article 754 CO makes members of the board and all persons entrusted with management liable to the company, the shareholders and, in bankruptcy, the creditors for damage caused by an intentional or negligent breach of their duties. The courts apply an objective standard of care, measured by what a conscientious and reasonable person in the same position would have done. In a leading case of 1996 the court held that a person who accepts a seat on the board knowing that he cannot perform the mandate conscientiously breaches his duty of care by that acceptance alone. A director who has doubts must also seek information from persons other than the main interested party and may not remain passive.⁵ The Federal Supreme Court has also developed the business judgment rule in a form adapted to Swiss law. Courts show restraint in reviewing business decisions taken in an unbiased manner on the basis of adequate information, but they do not apply this restraint to decisions affected by conflicts of interest or taken without proper information.⁶

These principles bear directly on the nominee directors who appear on the boards of many Ticinese trading companies. A fiduciary who sits on the board to satisfy the residence requirement, without receiving information on positions and counterparties, has not performed the duties of Article 716a CO and cannot rely on the business judgment rule. In the bankruptcy of a trading company the liquidator or the creditors will usually sue all directors jointly, and the Swiss director is often the only defendant with assets in Switzerland. The professional liability of fiduciaries and of lawyers who act as directors is covered in Chapter E.III. For the present purpose it suffices that the law treats the nominee as a director with full duties, whatever his contract with the beneficial owner may say. Under Italian tax law the same arrangement may be evidence that the company is managed from Italy, as the section on Italian rules explains.

Common misconception. A widespread belief in the Ticinese fiduciary sector holds that a Swiss director who only signs on instruction of the Italian owner bears no responsibility for the trading decisions. Swiss law knows no such category. Article 716a CO assigns the ultimate direction, the organization and the supervision of management to every member of the board, and Article 754 CO makes each of them liable for negligence. The nominee who lacks the information to supervise the business is in breach of his duties for that reason alone.

2 Notes

1. Federal Act of 19 June 2020 amending the Code of Obligations (company law), in force since 1 January 2023, AS 2020 4005; 2022 109; BBl 2017 353, as cited in the amendment notes to the Merger Act at [droit-bilingue.ch](https://www.droit-bilingue.ch/fr-de/2/22/221.301-6-9.html), <https://www.droit-bilingue.ch/fr-de/2/22/221.301-6-9.html>. The entry into force is also confirmed by CMS von Erlach Partners, Revision of Corporate Law (above). ↩
2. CMS von Erlach Partners, Revision of Corporate Law (above) (capital band of plus or minus 50 per cent for at most five years; interim dividends; virtual general meetings). CO, Art. 653s para. 1–2 (authorization for at most five years; upper limit at most 150 per cent and lower limit at least 50 per cent of the registered capital), <https://www.droit-bilingue.ch/de-fr/2/22/220-653s-897.html>; Art. 675a (interim dividends on the basis of interim accounts), <https://www.droit-bilingue.ch/de-fr/2/22/220-675a-937.html>; Art. 701a para. 3 (several locations), Art. 701b (location abroad), Art. 701c (electronic exercise of rights) and Art. 701d (virtual general meeting), <https://www.droit-bilingue.ch/de-fr/2/22/220-701a-996.html>, <https://www.droit-bilingue.ch/de-fr/2/22/220-701b-997.html>, <https://www.droit-bilingue.ch/de-fr/2/22/220-701c-998.html> and <https://www.droit-bilingue.ch/de-fr/2/22/220-701d-999.html>. ↩
3. CMS von Erlach Partners, Revision of Corporate Law (above) (immediate duty to secure liquidity; waiver of notification where a remedy within 90 days is reasonably expected). CO, Art. 725 (threatened insolvency: monitoring, measures to secure liquidity, moratorium where necessary), <https://www.droit-bilingue.ch/de-fr/2/22/220-725-1035.html>; Art. 725a (capital loss), <https://www.droit-bilingue.ch/de-fr/2/22/220-725a-1036.html>; Art. 725b (over-indebtedness: interim accounts at going concern and liquidation values, notification of the court, waiver in case of subordination or a prospect of remedy within 90 days), <https://www.droit-bilingue.ch/de-fr/2/22/220-725b-1037.html>. ↩
4. CO, Art. 754 para. 1 (liability of the members of the board and of all persons engaged in management or liquidation "for any losses or damage arising from any intentional or negligent breach of their duties"), <https://lawbrary.ch/law/art/OR-v2024.01-en-art-754>. Swiss Criminal Code of 21 December 1937 (SCC), SR 311.0, Art. 165 para. 1 (mismanagement causing or aggravating over-indebtedness, punishable if bankruptcy proceedings are opened), text at [droit-](https://www.droit-bilingue.ch/de-fr/2/22/220-165-1037.html)

bilingue.ch, <https://www.droit-bilingue.ch/en-de/3/31/311.0-165-202.html>. ↩

5. Federal Supreme Court, BGE 139 III 24 of 20 November 2012, E. 3.2 (conduct compared with that "billigerweise von einer abstrakt vorgestellten, ordnungsgemäss handelnden Person in einer vergleichbaren Situation erwartet werden kann"), <https://servat.unibe.ch/dfr/bge/c3139024.html>; BGE 122 III 195 of 28 May 1996, E. 3a ("il ne suffit pas d'observer la 'diligentia quam in suis'") and E. 3b ("celui qui se déclare prêt à assumer un mandat d'administrateur tout en sachant qu'il ne peut pas le remplir consciencieusement viole son obligation de diligence"; the sole director "ne peut rester passif"), <https://servat.unibe.ch/dfr/bge/c3122195.html>. ↩
6. Federal Supreme Court, BGE 139 III 24, E. 3.2: courts must show restraint in reviewing business decisions "die in einem einwandfreien, auf einer angemessenen Informationsbasis beruhenden und von Interessenkonflikten freien Entscheidprozess zustande gekommen sind", <https://servat.unibe.ch/dfr/bge/c3139024.html>. ↩

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