December 1993 Vol 21 No 11 pp 497–544

INTERNATIONAL BUSINESS LAWYER

Journal of the Section on Business Law of the International Bar Association

SBL Published by the Section on Business Law of the International Bar Association

Making the Debtor Pay: Financial Liability and Claims in the Polish Law

Jolanta Redo *Barrister, Toruń* [1]

Slawomir Redo *United Nations Crime Prevention and Criminal Justice Branch, Vienna* [2]

Introduction

This article reviews major issues in the financial liability of companies including consequences of possible insolvency, in light of the Trade Code of 1934, which is still in force (Journal of Laws No 57, pos 502 of 27 June 1934 with later amendments). In particular, the article discusses three aspects: (a) company type (limited liability company and joint stock company);[3] (b) liability (civil or/and tax) or responsibility (criminal); and (c) execution of creditor's claims (legal or paralegal). In conclusion, the article describes proposals for revising the company and criminal law.

Substantive background

One of the effects of a rapid internationalisation of national economies is the high number of joint ventures established in Poland with the participation of investors from 60 countries. On average, on every day in the years 1990–1992 there were 53 new companies registered, out of which nine had foreign capital. Out of a total of 57,821 such companies they were 10,131 companies with foreign capital. Fragmentary data for mid-1992 showed that they were at least 1,516 joint ventures created with German capital, 436 with American capital, 369 with Swedish, 345 with Austrian and 306 with Dutch capital.[4]

In the conditions of an emerging market economy with a multitude of foreign partners, each one having its own perceptions of their legal situation in Poland and facing a sizeable number of Polish companies, business operations have had to be conducted in an environment which is not yet fully understood. On the side of the Polish companies, be they independent or prospective partners of foreign investors, this may entail a variety of actions which have to be assessed by the foreign investor from various viewpoints.

For instance, the operations may involve excessively risky ventures, that is ventures proposed by the Polish limited liability companies with a low capital fund (the minimum amounting to the equivalent of about US$2,400 at the current exchange rate), cash transactions instead of non-cash transactions — resulting from the lack of a fully operational modern non-cash banking system, dealing with companies with immature internal structures where often the members of the company board are also its partners[5] and last but not least, possible disregard of liquidation procedures that jeopardise creditors' rights.

All these facts and practices have an impact on satisfying financial claims which may arise during business operations in Poland. In addition, there is not sufficient contemporary experience and legal practice, in either civil or criminal law, to respond to problems relating to financial liability and claims, even though the Polish legal system is equipped with the provisions of the Trade Code which, for the time being, appear rather satisfactory.

Scope of statutory functions and tasks in the company

A prerequisite for determining the extent of financial liability are the statutory functions and tasks of company representatives. Those functions and tasks may be either performed on behalf of a company vis à vis third parties and/or internally. External functions and tasks of the directors' board can only be changed by the law (ie the Code or any equivalent legislative act). Should internal provisions seek to extend or restrict the external functions and tasks they are *ipso iure* invalid and, indeed, may entail a compensation claim against the board member.

Internal functions and tasks are regulated either by the law and/or the company's deed and/or the resolution of its partners, unless the latter possibility is excluded by the deed (art 200 concerning limited liability companies and art 371 concerning joint stock companies). However, neither the deed nor the resolution may restrict the functions and tasks performed by the management board in the 'public interest'. This notion covers: court registration of the revision of the company's deed, merger of companies, registration of a company with a relevant ministry, notification of bankruptcy etc). As far as the supervisory and/or auditing boards of the company are concerned, the Code stipulates that their functions and tasks may only be extended in the company's deed or its statute (art 213i, 214 §3, and arts 384i and 385 §3, respectively). They cannot be restricted but if so, they would be regarded as invalid.

Scope of liable persons

At the time of drafting the Trade Code, the implications of the conduct of board members were considered in the light of two models of liability, ie the Swiss model providing for an individual liability of the members of the board vis à vis its partners and creditors, and the German-Austrian model providing a corporate liability of those members vis à vis the company (so as to guarantee the right of compensation to third parties). The Code opted for the latter model of liability of the legal person. However, and additionally, under certain conditions, the Code allows for making direct claims against natural persons; the board members of a limited liability company. When a partner is a member of the directors' board, as often happens in practice, this distinction is somewhat blurred.

Starting with legal persons, liability of a company (limited liability and joint stock companies) represented by the directors' board takes place when through activities contrary to its statute or deed, the company inflicts financial damage. This corporate liability extends to the absent board members or members who expressed a different opinion unless it can be in both cases documented that the damage was not inflicted by his/her fault.

Practically, individual liability of members of the directors' board or the supervisory or auditors' board (arts 195 and 206 §2 and arts 366 and 377 of the Trade Code, respectively), starts after their recall from those positions. Generally, compensation claims may be directed not only against those three types of members but also against the company's attorney empowered to represent the joint venture in case of contracts concluded between the joint venture and members of its board as well as disputes with them and, finally, in disputes concerning invalidation of resolution of shareholders (arts 203 and 292, and arts 374 and 474, respectively).

The claim may be made either against one member or, when the damage was inflicted by two or more members — against all those members following the principle of a joint (several) liability. In both cases formal (ie by deed, statute or resolution) delineation of liability as opposed to informal division of labour among company members, is important (arts 293 and 476 of the Trade Code).

Procedural and financial violations

The Trade Code lists a number of violations arising either out of omission to comply with procedural requirements or improper financial action. This involves: an omission to register the joint venture, or any change in it, in the commercial register (arts 165, 168, 254 §3, 258 §1, 261 §1; and arts 329, 332, 431 §2, 439 §1, 443 §1, respectively); omission to submit to the relevant ministry a copy of a deed or statute and not indicating the court in which the registration took place (art 170 and art 334, respectively); omission to submit to those organs the balance sheet and/or copies of resolutions of the general meeting (art 252 §1 and art 428 §2, respectively); omission to convene the meeting of shareholders as required (arts 223, 226 §2, 227 §1 and arts 390, 393–395, respectively); and omission to enforce outstanding payments (art 186 and art 343, respectively).

Improper conduct of financial business of the joint venture is additionally regulated by the Trade Code in several other provisions (arts 179, 189–192 and arts 353–356, respectively). Those provisions are basically addressed to the members of the directors' board and the supervisory board. Members of the auditors' board are excluded unless they were entrusted with a permanent supervision of the company (art 214 §3 and art 385 §3, respectively). The forms of that improper conduct include returning of cash or in kind deposits, paying undue net profit, effecting payment of any interest collected on shares and several other practices. It is irrelevant whether such actions deplete the capital stock or share capital.

Types of liability: ex-contractu and ex-delicto

Substantively, members of those boards (but also the liquidator) shall be responsible to the company for any damage inflicted by an act violating the law or the provisions of the deed of company formation or provisions of the articles of the joint stock company (art 292 §1 or art 474 §1, respectively). In both cases, the actions of those individuals in performing their duties should be conducted with 'due diligence of the honest trader' that is higher than according to the principle '*diligentia, quam in suis rebus*'.[6] Basically, any claim arising out lack of such diligence may be sued *ex-contractu* (art 471 of the Civil Code of 1964).

Ex-contractu liability involves either the company or its partners (shareholders), if the company does not sue within one year after the damages were incurred (art 294 §1 and art 477 §1, respectively). In either case the compensation claim may only be made on behalf of a company and not on behalf of another plaintiff. The court adjudicates compensation for the company.

In the case of a limited liability company, the partners who did not receive any payments may be brought to subsidiary liability. Moreover, liability takes place regardless of good faith on the part of the partner who effected the payment and the person who received it, unless it involved a shareholder who in good faith received the interest collected on the shares. Where a non-cash contribution has been accepted at an excessive price, as compared to its real value when executing the deed of formation of the limited liability company, the partner who made such contribution and the members of the directors' board who knew about it (ie wilfully), are both severally liable to compensate the missing value to the company (art 176).

In the case of a joint stock company making such a non-cash contribution or increasing the share capital of that company, the range of liable individuals covers not only members of the board of directors but all others taking part in the formation of the company including the shareholders who made those excessive contributions in kind (art 472). The improper business conduct of the directors' board, supervisory board or, whenever applicable, auditors' board of the joint venture should lead to a resolution of a general meeting of company's shareholders rejecting the implementation report. If, however, a conspiracy of the majority of shareholders prevented that resolution, it may be contested as invalid before the court as conflicting with commercial integrity (art 240 §1 and art 414, respectively).

It may be added, however, that the board members will not be held liable for their improper actions if those actions

stemmed from the resolution of the general meeting which, in turn, was adopted in implementation of the company's deed or statute. This interpretation gives an initial impression that a company may be formed for outright criminal purposes but the notary public, the court and the relevant ministry (ie the parties involved in validating the deed and the statute) have all the obligation to review the legality of such documents before they take their respective actions. Such a resolution of the general meeting can be contested by the court even if the claimant voted for it. That action by the claimant (plaintiff) automatically invalidates the resolution (art 295 and art 478, respectively).

Ex-delicto liability before the other partners (shareholders) arises only when the infringment of provisions directly affects the personal assets of a particular partner or any other person related with the company. This may, for instance, involve inciting the partner to enter into an unfavourable transaction with the company, refusal to pay due profit or exploiting a partner's difficult position so as to induce the partner to dispose of his/her assets. If a resolution conflicts with the deed or statute, the above board members will be held liable according to the civil law and criminally responsible according to the criminal law.

Extent of liability

The above brings us to review the question of the extent of liability. Basically, by definition any financial damages incurred by an improper conduct of the board members are limited to the assets owned by the joint venture (that is to the registered capital fund and acquired assets). However, before registration of a joint venture (equivalent of a German 'Vorgesellschaft') the individuals involved in its formation who inflicted financial damages are held liable for that with their personal assets. After registration of a limited liability company, personal financial liability of the members of the board may only come into the picture if an execution conducted against the company does not yield satisfactory results (art 298 of the Trade Code).

In contrast with the board members of a limited liability company, the board members of a joint stock company are held liable only to the level of contributions they have made to the company's assets.

Tax liability

The financial liability of a joint venture extends also to its obligation to pay taxes. Two issues, however, make this obligation different from the civil obligation, if not also controversial. First, there is only one plaintiff — the State Treasury. Secondly, as in other legal systems, the very concept of a limited liability or joint stock company principally restricts that liability to the registered company's capital, including the assets acquired during its functioning.

The recession brought up, however, a wave of bankruptcies and a dramatic decline in tax revenues.[7] Therefore, the parliament discussed in 1993 the issue of making the partners in a limited liability company liable with their personal assets to meet financial obligations vis à vis the State Treasury. Before that discussion, the Supreme Court emphasised that the execution of financial obligations of the State Treasury against limited liability companies may only be satisfied with the company's assets, for, by their very nature, voluntary civil obligations differ from involuntary tax obligations and, therefore, the latter bear this limitation (III CZP 46/91).

The newly amended tax law in art 47 provides that a partner (who may not necessarily be a board member) is liable with all his personal assets for the tax obligations of that company, but only to the extent proportional to his/her right to share in its profits. In the absence of a written reference to several liability, which would have otherwise been explicitly required by the Civil Code (art 369), this means that the partner bears accessory liability which comes into picture only when tax obligations cannot be satisfied from the company's assets. As such liability is not dependent on partner's fault — it is enough to indicate violation of company's statutory obligations — there is a reason to think that such a regulation may discourage foreign investors and that, perhaps, a better legal construction is needed to bring tax liability only to those who are actually at fault.[8]

Criminal responsibility

The civil procedure to settle the claims may be supplemented by a criminal procedure. The Trade Code has an array of parallel criminal provisions which may enable charges against the debtor. In a case of intentional falsification of data which, as mentioned earlier, may be sued for on the basis of arts 290 and 470, any person obliged to provide the data for official purposes stated in the Code, shall also be liable to deprivation of liberty for up to two years, or a fine (between 500 thousand and 250 million Plz), or both (art 302 §1 and art 484 §1, respectively).

A public official or any other person authorised to issue a document who certifies therein false particulars of legal importance is liable to the penalty of deprivation of liberty from six months to five years (art 266 §1 of the Criminal Code of 1969).

The same penalty and a fine is imposed by the court on any person who, while taking part in the formation of a company or being a member of the company bodies or a liquidator, acts to the detriment of the company (art 300 §1 and 482 §1, respectively). This is *lex specialis* to the general provision of the Criminal Code (art 205) which extends its disposition to anyone obliged to deal with the financial matters of another person and leads to the detriment of those financial interests. A difference between 'acting' (which also includes omission) and 'leading' (*damnum emergens*) is here very crucial, as in the former case lack of damage does not relinquish criminal responsibility of the perpetrator. A number of deceptive behaviours ('con games') would qualify under the latter provision. There is no doubt that this provision may increasingly be used by those unsatisfied with the limits of criminal responsibility under the Trade Code.[9]

Returning to it, the Trade Code provides for a fine (up to 450,000 Plz) in cases of failure to comply with most of the procedural violations listed above, and also for the failure of not having a supervisory body for a period longer than three months (art 306 and art 490, respectively). However, failure by a member of the board of directors or a liquidator of a company to declare its bankruptcy, in

spite of the circumstances calling to do so, is sanctioned by six months of imprisonment or a fine (up to 250 million Plz) or both (art 301 and art 483, respectively). The same length of imprisonment or a fine will be imposed for allowing the company acquisition of its own shares or taking them on pledge (art 303 and art 487, respectively).

It goes without saying that the criminal provisions have rather a general deterrent nature and, specifically, are employed rarely even though the prosecutor is bound to initiate *ex-officio* the criminal proceedings. There is a number of criminal policy arguments for and against that trend. However, from the perspective of attorney representing the creditor, a legal threat of criminal sanction and attorney's motions regarding continuation of those proceedings may be a viable instrument in executing creditor's rights. Regardless of the type of court sanction, insistence may be important to obtain a conviction. As the criminal record disqualifies the accused in the business sphere, it may exert on the accused a tremendous psychological pressure to conform with the interest of the creditor.

Regular execution of financial obligations

As noted above, the State Treasury has two recourse procedures: civil and tax procedure. Any other plaintiff has only a civil procedure which is basically limited to a company's assets. The defendant shall not be liable for *ex-contractu* claims involving a limited liability company, if he/she proves before the court that: (a) the company's bankruptcy was declared or actions preventing bankruptcy (arrangement proceedings) were initiated in due time; or (b) although such procedures did not take place, he/she has no fault in this; or (c) in spite of the lack of such procedures, the creditor suffered no damage (art 298 §2). However, according to §3 of that article, the member of such directors' board may be still liable for the damages *ex-delicto*.

Should the court adjudicate compensation for the damages, determining the moment when the execution of claim is ineffective. Formally speaking, this only happens when the court executive officer issues a decision to that effect based on a review of all company assets (art 824 of the Code of Civil Procedure of 1964). By the very nature of that decision (which invalidates the adjudication), it is made slowly and reluctantly. Unfortunately, this gives time to the debtor to hide his personal assets and makes it difficult for the creditor to satisfy his claims from those assets before the debtor manages to hide them.

Two approaches may, therefore, be recommended which help to mitigate the above consequences. First, as a compromise approach, it is pointed out that ineffectiveness of execution may be determined by the court on the basis of collected evidence, including on-going liquidation of the company in question or a sister company and, definitely, upon initiation of bankruptcy proceedings.[10]

Secondly, an approach which makes the time factor irrelevant and court execution more viable involves seizure of debtor's claims.[11] This requires the collaboration of a company which maintains good trade relationships with the debtor to other claims who otherwise runs business operations. At the request of the creditor that front company may order with his debtor articles the value of which is equivalent to the claim. Upon receipt of the articles, the front company advises the creditor of delivery of those articles. The creditor, who is also a client of the court executor, advises him that assets of the debtor may be seized. The executor orders the front company to make the payment for the articles to the court deposit and not to the debtors account. Finally, the executor delivers to the debtor the decision on seizure of his claims. Any financial satisfaction resulting from the execution procedure belongs to the joint venture, even though both the company as a legal person and the partner (shareholder) are entitled to sue the defendant (debtor) at the same time.

Simplified and paralegal execution of financial claims

Aware of the deficiencies, the slowness and also the high financial cost of legal action by the attorney, the court and the court's executor (in some cases their fees were altogether even as high as 30 per cent of the value of the claim), creditors have developed interest in resorting to simplified and paralegal execution of their claims.

There are two types of simplified execution of claims and at least three types of paralegal execution. In accordance with the Code of Civil Procedure (arts 485–497) the simplified execution involves payments unquestionably attested and results in issuance of a writ of payment. The court registration fee is only a quarter of the regular court fee which may reach up to 8 per cent depending on the value of the claim). The proceedings may be initiated at the request of the plaintiff and are based only on documentary evidence. The payment in question may involve either money and/or other exchangable things, provided that the value of both is expressed in Polish zlotys.

Validity of the attestation is best proven by the debtor's statement of recognition of the debt and other original documents justifying the claim. Because of the latter condition of originality of the document, in practice a cheque or a bill of exchange serves this purpose most accurately. However, a copy of an invoice signed and stamped by the debtor would also be sufficient. The debtor may attempt to slow down execution of the writ but a court recourse to that effect requires payment of a half of the regular registration fee–enough to discourage him from resorting to this type of action.

Another kind of simplified proceedings is offered by the Banking Law of 31 January 1989 (Journal of Laws of 1992, No 72, pos 359 with later amendments).[12] In accordance with arts 49 and 53, and as confirmed by the Supreme Court (III CZP 20/92), banks which have their savings deposits guaranteed by the State Treasury may agree to a cession of contract under which the bank accepts for a certain time a transfer of a claim which belongs to the creditor, in accordance with arts 509–518 of the Civil Code (so-called 'trusteeship cessation of a claim'). The rights of the creditor may be represented by a private agency which has an account with that bank. As in the case above, first, the claim must be unquestionably attested and, secondly, the contract between original parties must not contain any reservations as to the way of execution of the claim.

Collecting evidence concerning the attestation may be a task for the private agency entrusted with it by the claimant.[13] Should that condition be fulfilled, the bank

produces the excerpt from its account documenting existence of the debt and a statement that the claim has a writ of execution.

As provided under the Banking Law, the writ has the same binding force as a writ issued by the court, however the court is not involved in this proceeding. The proceedings bypass that stage and go directly into the execution stage by the court's executor. Here again, a private agency may assist in collecting the evidence of the existing debtor's assets, including their location (the correct address is important because the execution becomes ineffective if assets are not found where they are said to be). After expiration of a cessation contract with a private agency, the creditor may state in that contract that he transfers his right to a claim to the bank itself. This may not happen as the statement to that effect alone may be threatening enough to get the debt paid beforehand.

Principally, the fee for these proceedings is usually half of court costs, ie half or a quarter of the costs required in proceedings for issuance of a court writ of payment, or half of the regular court costs if the claim is not unquestionably attested. Commission for the bank and private agency is a subject to separate negotiations.

Another possibility for satisfying financial claims lies with paralegal execution. This may involve auctioning the claim, the starting price of which will be determined by the organisers of the auction. The buyer of the claim may set it against his obligations towards the seller or indirectly purchase some of the products of the seller at a reduced price. Practically, the claim is offered at a price lower by 10–20 per cent of its nominal value and the transaction cost is between 2–8 per cent.

The claim may be executed through credit protection agencies. These private entities, some of which are internationally renowned, collect intelligence data on the business record of the companies and may vindicate the claim on behalf of an unsuccessful creditor. With a variety of techniques, including causing a possible lost of credibility in business circles, the company may exert pressure on the debtor to pay the debt before that record is entered onto his business record. The fee ranges between 5–20 per cent of the claim. Some companies claim that their service is effective in up to 80 per cent of all accepted claims, while others are less optimistic in their assessment.

Finally, the claim may also be bought by a private agency. Practically, its value should exceed 5,000,000 Plz. The commission ranges between 5–10 per cent. The efficiency of this type of paralegal execution is debatable.

Conclusion

The emerging new Polish economic and legal system is caught in a classical bind of an early capitalism. On the one side it requires investments and encourages business risk and, therefore, supports limited liability of businessmen, on the other side the safety of transactions requires that the extent of liability be broadened. The 1991 World Bank Development Report rightly observes in this context that '[o]nly after markets become established, transactions become regular and competition increases, do traders have an incentive to establish and maintain their reputation. Traders in industrial market economies are more honest not only because sanctions are administered more efficiently, but also because a good reputation reduces transaction costs'.[14]

The above article shows, however, that safety of transactions may be increased or compensated with a host of legal and paralegal instruments which do allow for a foreign investor taking a business risk in Poland. As the market situation evolves, both legal and paralegal instruments will likely adapt to the changes. For example, time will show whether new lower court fees will make legal execution more viable than before.

Along with improved economic performance, the Polish legal system will further evolve and become more similar to the legal systems of the European Community. Revisions of the company law and criminal law are underway and will be probably be approved by the new parliament that was elected in September 1993.

With regard to company law, it may be expected that the capital investment fund in limited liability companies and joint stock companies will be increased, probably tenfold. This would improve the chances to satisfy claims from the capital fund, but it would also be necessary for the elimination in this process of an inconsistency of paying low notary and fiscal fees for a current minimum capital level of equivalent of US$2,400 for a limited liability company and increasing the capital later for fees lower than would have been the case if the originally registered capital level were higher. Also the fines provided by the Trade Code will be increased.

Secondly, there may be changes in legal construction of a limited liability company, so as to allow for a single person company. Thirdly, revisions may include new ways and means of assessing non-cash contributions the value of which is too often found questionable.

With regard to criminal law, more differentiated sanctions are envisaged for anyone who with an intent to obtain a financial profit induces another person to dispose of his or her assets. Pending enactment of a new criminal code, this and other issues may be regulated by a law on protection of economic activities, approved by the first chamber of the parliament before its disbandment in May 1993. As, however, the entire draft appears to be of rather a low merit and contentious among lawyers, criminal and civil alike, there are strong doubts concerning its possible utility and ultimate fate. Consequently, and in a longer perspective, it will be a draft criminal code which will penalise some forms of business misconduct. In the aforementioned case of criminal inducement to dispose of assets, the draft criminal code envisages the sanction of deprivation of liberty of between three months and five years. In minor cases it may be up to one year or be a penalty of restricted liberty. If the value of financial assets is significant (that is one hundred times more than the minimum monthly salary), the penalty may be six months to eight years of deprivation of liberty. The same penalty may be meted out in cases of commission of such an offence, if the perpetrator is liable for management of assets or their protection (art 292 of the draft Criminal Code).[15]

Notes

1 Registered with the Supreme Council of the Bar in Poland, member of the International Bar Association, living in Vienna. Address for correspondence: Schwemmäckergasse 54, 1210 Vienna, Austria.

2 PhD in criminal law and criminology (Nicolas Copernicus University, Toruń, Poland), Crime Prevention and Criminal Justice Officer, United Nations Office at Vienna, Austria. The views expressed in this article are those of the authors only.

3 As the article covers the issues relating to both limited liability and joint stock companies, references to provisions of the Trade Code include first limited liability companies (arts 158–306), and, secondly, joint stock companies (arts 307–497).

4 Data and information in this article was largely drawn from 'Rzeczpospolita' daily, and, in particular, from a series of articles by Stanisław Gurgul on financial liability of companies. For a more detailed treatment of the topic see also his article 'Odpowiedzialność członków spółek kapitałowych' (*Liability of members of capital companies*), Państwo i Prawo 3/1991, pp 50–56; K J Kmieciak, M Parszewski, 'Odpowiedzialność spółek, wspólników i zrządów' (*Liability of companies, partners and management boards*), Wydawnictwo 'Kontrakt', Szczecin 1991, and M E Wetzler (ed), Joint ventures and other financing techniques in Poland, Hungary, Czechoslovakia, and Romania, Practising Law Institute, New York 1992. Unless otherwise specified, the information in this article reflects the legal status as of 1 July 1993.

5 The market lacks also more sophisticated forms of financial participation like convertible bonds which extend financial liability of a joint stock company to the would be shareholders.

6 T Dziurzyński, D Fenichel, M Honzatko, Kodeks Handlowy, Komentarz (*The Trade Code, Commentary*), Łódzka Agencja Informacyjna, Łódź 1992, p 322.

7 In the years 1991–1992 infringements of tax law increased from 41.2 to 72.5 per cent of lost tax revenues. See further 'Gazeta Bankowa' No 9 of 16 February 1993.

8 See further, G Bieniek, Spółki w orzecznictwie Sądu Najwyższego (*Companies in the light of decisions of the Supreme Court*), Biblioteczka Służby Pracowniczej, Bydgoszcz 1993, p 72–76.

9 First symptoms of internationalisation of business crime have already emerged. See further: J Redo, S Redo, Internationalisation of Crime in Poland: Are Effective Defences Available in Extradition Cases? *International Legal Practitioner* (1993) Vol 18 No 3.

10 See further M Tomczyk, W sprawie spółek nieodpowiedzialnych (*Regarding nonliable companies*), Rzeczpospolita No 8 (3046) of 10 January 1992.

11 See further, Jeśli kontrahent nie płaci (*If contracting party does not pay*), (ed) INFO-TRADE, Gdańsk 1992, pp 12–13.

12 See further, A Biały, Rozterki wierzycieli. Co zrobic z długiem? (*Anguish of creditors. What to do with the debt?*), 'Rzeczpospolita' No 51 (3359) of 2 March 1993.

13 The legal status of a Polish private agency is generally regulated in the Law on Economic Activity of 23 December 1988 (Journal of Laws No 41, pos 324 with later amendments) and for a foreign investor in the aforementioned Law on Economic Activity with Participation of Foreign Parties.

14 World Bank Development Report 1992, Oxford University Press 1991, p 135.

15 Komisja do Spraw Reformy Prawa Karnego, Zespół Prawa Karnego Materialnego i Wojskowego, Projekt Kodeksu Karnego (*Draft Criminal Code* of February 1993), Warszawa 1993.

BUSINESS ORGANISATIONS

Amended Swiss Corporation Law

Peter Mathys *Wenger Mathys Plattner, Basle*

Introduction

After nearly 30 years of preparation, the Swiss Parliament revised Title 26 on Corporations of the Swiss Code of Obligations on 4 October 1991. In the Report of the Swiss Federal Council of 23 February 1983, five goals were emphasised:

- to increase public disclosure;
- to enhance stockholder's protection;
- to improve the structure and functions of the corporation;
- to make equity financing easier;
- to prevent abuses.

The revision has partly accomplished its goals. By imposing stricter disclosure requirements and improving stockholders' information rights, it will enable both creditors and stockholders to gain a clearer insight into the corporation in which they have invested. The duties and responsibilities of the board of directors are defined in greater detail. Important additional auditing and reporting obligations have been imposed on the auditors, and the legal capital has been doubled, measures designed to improve protection against fraudulent practices. New forms of raising capital and a modern concept of 'participation certificates' as non-voting shares provide more flexibility, but the procedure for raising new capital has become more complicated. The major changes affecting capital structure will benefit primarily the few thousand large Swiss corporations, while the new rules governing the board of directors will, in some cases, burden many of the some 150,000 small and medium-size corporations with extra administrative work.

The ten outstanding features of the revision are summarised below:

- new legal capital is 100,000 Swiss francs; new minimum per value per share or participation certificate is 10 Swiss francs;
- corporation allowed to have treasury stock;
- modern methods of raising corporate capital, but more complicated procedures;
- limitation of the restricted transfer of registered shares;
- more stringent requirements for the board of directors;
- stringent organisation regulations;
- higher qualifications required for auditors; auditing and reporting duties extended;
- new rules for presentation of annual financial statements; consolidated financial statements mandatory in certain cases;
- compromise on hidden reserves;
- extension of stockholder's information and participation rights.