The Responsible Actuary*

with special consideration of regulatory questions and those of legal liability and responsibility**

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Introductory Comments

* Responsible Authority (RA) is more usually referred to in the United Kingdom as Appointed Actuary

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With the entry into force of the new insurance supervision Act (ISA)[1] as of 1 January 2006, the majority of the preventive product supervision for insurance products ceased to apply. The controls for the setting of tariffs and insurance conditions now exist only in relation to the sectors of occupational pension schemes (group life) and in the supplementary cover for social health insurance.[2]

As a counter measure to the reduction of preventive product supervision, ISA now provides detailed provisions on the monitoring of solvency and strengthens the competence of the Federal Office for Private Insurance (FOPI) in the areas of transparency, consumer protection and corporate governance. Good corporate governance includes alongside a functioning and efficient compliance organization, the introduction of the function of a responsible actuary (RA).

The functions of the RA are defined in ISA, the insurance supervision ordinance (ISO)[3] and in the insurance supervision ordinance of FOPI (ISO-FOPI)[4],[5] and further refined in a directive of FOPI[6]. Inspite of this relatively comprehensive regulation, many questions on the duties and responsibilities and status of the RA within the company remain unanswered or at least require further detail. In the interests of a flexible, market compatible and efficient structure of the function of the RA it would however be an advantage if a comprehensive definition was not left exclusively to FOPI, but rather the possibility of self regulation was developed. Here it is the responsibility of the professional association of actuaries, the Swiss Association of Actuaries (SAA), to issue supplementary recommendations and regulations, in which case the requirement for approval from FOPI could be included in the most important areas, and this might also be combined with a statement saying it is generally binding also for non-members of the SAA.[7]

Finally, mention should be made of the current parliamentary consultations on the draft to the Act on Supervision of the Financial Market (D-FINMAA).[8] The draft Act contains predominantly organisational norms for the new financial market supervision authorities FINMA.[9] Alongside this, the intention is to substantially harmonise the particular financial market legislation. The insurance supervision law is part of this. Assuming it develops in accordance with the intention of the Federal Council, part of ISA will be revised with the FINMAA, so that for example the applicable sanctions for the RA[10], will in accordance with the present draft Act again be repealed, making room for an administrative sanction.[11]

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1 Federal Act on the Supervision of Insurance Companies dated 17 December 2004 (SR 961.01)
2 Art. 4 para. 2 Bst. r ISA
3 Ordinance on the Supervision of Private Insurance Companies dated 9 November 2005 (SR 961.011)
4 Ordinance of FOPI on the supervision of private insurance companies date 9 November 2005 (SR 961.011.1)
5 Art. 23 f. ISA, Art. 99 ISO, Art. 2 et seq. ISO-FOPI
6 Directive to the requirements on the RA dated 1 March 2006
7 A corresponding regulation already exists in the banking and stock exchange legislation, where on the one hand the duty of care of the Swiss bank association and on the other the listing provisions of the SWX Swiss Exchange, both self-regulating organisations, must be submitted to the Swiss Banking Commission (SFBC) for approval prior to entry into force.
8 Message to the Federal Act on the Swiss supervision of the financial markets, Bundesblatt 2006 (Message FINMAA), page 2829
9 Federal Act on the Swiss supervision of the financial markets (Draft), Bundesblatt 2006, page 2917
10 Art. 87 para. 1 Bst. k ISA
11 Message FINMAA, page 2913

I. Regulatory Questions

1. General

All insurance companies (IC) that are subject to ISA must appoint a RA[12]. Direct and reinsurance companies as well as captives registered in Switzerland are covered in a similar way to domestic branches of foreign ICs. Unlike with the internal monitoring of business activities, whereby FOPI in justified cases may exempt an IC from the obligation to appoint an „Inspektorat",[13] no exemptions from appointing a RA are provided for in the law.

The obligation to introduce the function of the RA is connected among others with the fact that the purpose of ISA was strongly boosted with the revision and the RA represents a key function in the fulfillment of its protective purpose. ISA has as its object the protection of the insured person from the risks of insolvency of the IC and from abuses[14]. Thereby the RA assumes an important function not only in the interest of „his" company and its insured persons, but he also serves the general interest in a strengthening of the integrity and trustworthiness of the Swiss insurance industry in general.

Inspite of this, by defining claimant group broadly in the new structure of insurance supervision the Federal Council and Parliament have decided to leave the function of the RA as self-regulated on a company level. His status in respect to the company is thereby of a purely private law nature; there is no direct legal relationship to the supervisory authorities. Therefore, the RA is neither entitled nor obliged to submit direct reports on the matters within a company to foreign supervisory authorities or to forward information to them. The information flow is to the company, specifically to the executive management and from them under certain circumstances to the supervisory authorities.

An exemption to this information flow exists only on termination and commencement of the RA's period of office ('Appointment'). According to ISO-FOPI the IC as well as the RA must independently of one another inform FOPI of the reason for any possible severance, resignation or dismissal[15] Whether there is a satisfactory rationale for this double duty to inform is at the least questionable and ISA refers exclusively to the IC's duty to inform and not also to a notification duty of the RA.[16] To infer additional duties towards FOPI out of this single duty to inform (e.g. duty to inform in the event of difficulties arising, interview with other employees to clarify the facts) would however clearly conflict with the spirit of the rule. This exists namely in keeping the RA out of a potential conflict of interests between his employer respectively mandator i.e. the IC and his duties under supervision law.

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12 IC whose insurance activities are of a limited economic importance or only relate to a limited number of insured persons, may be exempted under certain circumstances from the supervision of the supervisory authorities (Art. 2 para. 2 Bst. c ISA). Where not subject to ISA, there is also no duty to appoint a RA.

13 Art. 27 para. 2 ISA

14 Art. 1 para. 2 ISA

15 Art. 4 ISO-FOPI

16 Art. 23 para. 3 ISA

2. Legal status of the responsible actuary in the insurance company

2.1 Initial Comments

According to ISA every IC must appoint a RA and guarantee him access to all business documentation.[17] The law does not stipulate how the IC and RA should work together. The RA can be appointed so that he:

- is employed by the IC;
- undertakes the function of external service provider, in which case two possibilities may be considered, namely:
  - the granting of a mandate to an individual, who personally undertakes the function of RA or
  - the granting of a mandate to a legal entity, who delegates an employee to undertake the function of RA[18].

Under the applicable law these possible variations are equally valid. Indeed, Art. 4 ISO-FOPI talks about the termination of the RA's Appointment, however, the legislature did not intend the legally binding relationship between IC and RA to be that of an employment contract. Rather it intended to leave open the legal structure of the relationship with the general reference to cooperation. This interpretation is confirmed by the fact that in the same sentence when referring to dissolution of the legal relationship, use is not made of the term „termination" – which would be the case for an employment relationship – but rather a more open formulation of severance, resignation and dismissal is used.

In individual cases it would be sensible to combine the function of the RA with another activity. To safeguard independence, the RA may not, however, be involved in any operational business activity. On the other hand, the RA may, to the extent this is permitted by the scope of his workload, exercise the office of risk manager or finance chief and/or operate as RA for another internal group IC or even for a third party company.[19]

2.2 Employment relationship

2.2.1 Principle

With regard to large and middle sized ICs the RA is a normal employee of the IC and operates in an employment law relationship. Rights and duties of the RA towards the IC as well as his responsibilities arise out of the insurance supervision law, the Swiss Code of Obligations (CO)[20] and the IC's internal rules and regulations (Directives, Regulations, Circulars etc.).

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17 Art. 23 para. 1 ISA

18 Failing a lack of personification the representation of the function of RA by a legal entity would in contrast not be in compliance with ISA (see section 2.3.3 hereinafter).

19 See on this also the Message of the Federal Council to an Act on the Supervision of Insurance Companies, Bundesblatt 2003 (Message ISA), page 3819

20 SR 220

The legislature has also assumed this legal relationship between the IC and RA. Larger ICs possess whole teams of actuaries and their head might be the RA. Also group respectively conglomerate companies must each i.e. per IC appoint a RA for legal uniformity. Where for example an insurance group offers life and property insurance, a RA can be nominated for the group, provided he possesses the relevant technical competence in life and property insurance or a RA can be nominated for each insurance sector, in which case there is once again the possibility to assign or outsource externally both functions or one of them within the group. Although the Act does not provide for this an insurance group respectively an insurance conglomerate will want to consolidate the duties of the RA on a group level under one RA. Also in this case, the RA appointed for the group must possess the necessary technical competence and cannot rely exclusively on the reports of the IC of the individual group company. He must at least possess the technical competence to be able to assess the plausibility of the report.

2.2.2 Appointment of the responsible actuary as employee in the insurance company

ISA also does not make any stipulations with regard to the RA's Appointment. In contrast to the internal revision (Inspektorat), which must be independent from the management[21] and the external auditor, which must be independent from the IC[22], ISA does not provide any analogous provisions for the RA.

Even if there is no reference to his independence, it should be required that the RA acts independently in the exercising of his function in relation to the board of directors and the executive management. The independence of the RA is particularly important as he must also ensure in the face of resistance from the board of directors and the executive management that the solvency of the IC is at all times guaranteed. Finally, he is the guarantor for the safeguarding of the rights and interests of the group of claimants in general and the insured persons in particular.

This independence is threefold, namely financial, personal and institutional/organizational.

Financial independence means that the RA is remunerated independently of the commercial success of individually operating business units, not however, necessarily from the success of the whole business. To ensure his personal independence the RA should not also be involved in the operational business activities of the IC. The concurrent exercise of other non-operational business activities is in this regard possible, provided the demands on his time permit. In recognition of his importance the RA must finally also be correctly positioned in the IC hierarchy, i.e. he should be positioned in direct contact with the executive management and have the opportunity, in the event of escalation, to take matters up directly with executive management. For this reason, he will preferably either occupy a position in the executive management or report directly to a member of the executive management (e.g. to the Chief Risk Officer or the Finance Director). Only in this way can it be guaranteed that the information necessary for the performance of his function will be available to him at all times.

Where the RA is a member of the board of directors or the executive management, FOPI reserves the right in the interest of minimising potential conflicts of interest, to attach conditions to

[21] Art. 27 para. 1 ISA
[22] Art. 28 para. 2 Bst. b ISA

the RA's Appointment.[23] This may be achieved among others by restricting the usual scope of responsibility of members of the executive management in the case of the RA, so that among others, in relation to technical insurance questions, the RA is not bound by any internal rules. Such independence from internal directives must be stipulated in company and organisational regulations (OGR) respectively, regulations regarding competencies, that must be set out as an integral part of the business plan at the start of the RA business activity and whenever amended each change must be presented to FOPI for prior approval.[24]

The RA's Appointment and thereby his independence with regard to the IC will be strengthened on the one hand by the fact that the basis for working together must be approved by FOPI[25] and on the other by the fact that his ceasing to act as RA is to be notified with reasons to FOPI by both the IC and the RA.[26]

Strict professional standards of the self-regulating organisation would further bolster the RA. Firstly, the requirements on the RA and the duties of the RA are clarified and secondly, the danger of expectation gaps are reduced. Thirdly, such „Best Practice Standards" would have, according to the current practice of the courts, the effect of limiting liability. Where the RA acts in accordance with these standards, there will be no breach of duty and there will also be no grounds for enforcing a claim for compensatory damages. The SAA's declaration of general bindingness for RAs through FOPI could give the self-regulation additional weight. A breach of the standards could then lead to an exclusion from the SAA, which would in practical terms mean a prohibition on further professional practice.

2.3 Outsourcing of the function of the responsible actuary

2.3.1 Principle

As an alternative to what is often – in particular for smaller ICs – a too expensive employment law appointment of a RA, the issue of outsourcing the function arises. There is the reference in the Message[27] that – to the extent the scope of the activity justifies it – the actuary may undertake other duties, in relation also to other businesses. Thereby, the outsourcing of the function is explicitly mentioned and made possible.

The outsourcing may occur both internally within a business group – respectively a business conglomerate – and externally by a third party. What is however, not yet clear is the question whether the outsourcing is only possible to an individual or whether a legal entity can be mandated with the function of the RA.

2.3.2 Outsourcing to a natural person

Where the function of RA is outsourced to an individual, the supervision law and contractual rights and duties relate to the same contractual parties i.e. the IC on the one hand and the RA on

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23 Section 5 of FOPI Directive dated 1 March 2006
24 Art. 4 para. 2 Bst. b ISA; Art. 5 para. 1 ISA
25 Art. 4 Para. 2 Bst. h ISA
26 Art. 4 ISO-FOPI
27 Message ISA, page 3819

the other. An important part of such a contract is the personal performance of the function by the RA. Where personal performance is no longer possible, the IC can terminate the contract immediately without notice and must appoint a new RA.

2.3.3 Outsourcing to a legal entity

ISA does not regulate the question whether the function of the RA can be outsourced to a legal entity. According to the practice of FOPI the exercise of the function of RA by a legal entity would however conflict with both the substance and the spirit of the legislation.

In this regard, it is permissible to appoint an employee of a legal entity as RA. In this case, the IC and the legal entity are the relevant contractual parties and the contractual rights and duties would be distributed between these parties. Similar to outsourcing to an individual, the outsourcing of the function of RA exists in this case of a personal element. And here also it relates to a material part of the contract. The legal entity may not appoint just any employee, but rather only one who fulfils the supervision law requirements with regard to the qualification of RA, whereby the extent of potential "vicarious liability" is broader here than in the case of outsourcing to an individual. The legal entity must namely not appoint a specific person as the RA qualified employee, but rather just one who fulfils the provisions. Therefore it is in principle possible to rotate several actuaries with the relevant qualifications, unless otherwise agreed in the contract between the IC and the legal entity that a nominated RA exercise the function.

Finally, the question arises what information must be submitted to the supervisory authority at the start of the exercise of the function. Will information about the legal entity suffice or must FOPI be informed, in accordance with Art. 4 para. 2 Bst. h ISA, which employee will exercise the function of RA. The same question naturally arises in the event of termination of the RA's Appointment.

The RAs meet high personal and technical standards. In addition, he must enjoy a good reputation and be professionally qualified.[28] Further aspects of this are regulated by FOPI in its Notification.[29] These requirements are personal, i.e. they can only be fulfilled by an individual and not by a legal entity. Since FOPI must be able to check the statutory and regulatory requirements in relation to the person of the RA, the IC must inform the supervisory authorities of the name of the employee – not the legal entity. Accordingly, the professional declaration of FOPI must refer to the RA and be signed by him, not by his employer.

Should the IC change the legal entity mandated with the exercise of the RA function, it must inform FOPI about the reasons for the termination of the RA's Appointment. In our opinion, the same is true where within the legal entity the employee appointed for exercising the RA function is changed. In this case, FOPI must be informed of the name of the new employee and in addition the professional declaration amended and signed by the new employee.

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[28] Art. 23 para. 2 ISA

[29] See footnote 6 above

II. Questions of legal liability and responsibility

1. Introductory Comments

1.1 General

In contrast to the Federal Act on Banking and Saving Accounts[30] and the Federal Act on Investment Funds[31] there are no legislative provisions on the liability of the board of directors or auditor in ISA.[32] However, this is not necessary since Art. 7 ISA strictly requires the legal form of the corporation (AG) for the IC. The following statements relate exclusively to the legal form of the AG because the statements apply analogously to the cooperative.[33] As a result corporate law is definitive for explaining the liability issues connected with the RA. Firstly, on the one hand the questioning must be somewhat distinguished and on the other it is valid to present the principles for the answer.

1.2 Distinguishing the question

An individual can exercise the function of the RA both as an employee of the IC and also as an external third party. In both cases the RA can at the same time be a member of the board of directors or the executive management. As an external third party, a legal entity can also be appointed as RA, however in this case it is not possible for it to be a member of the board of directors or the executive management. On the appointment of a legal entity as RA it must additionally be clarified whether the delegated employee or the legal entity is liable under civil law. In total six different situations can be considered (see overview attached not attached yet!).

1.3 Corporate law basic questions

1.3.1 **Formal, substantive and de facto status of the** corporate body

The corporate law definition of corporate body[34] covers not only formal members of the board of directors, but rather all persons assigned with management of the business, i.e. the definition was extended to substantive and de facto corporate body. Substantive corporate body refers to a person appointed by an internal company resolution with mostly regulatory prescribed corporate body functions assumed through delegation, against which a de facto corporate body simply acts without the corresponding delegation of corporate body duties.[35] Corporate bodies are therefore every person who is entrusted with the management and also persons who actually take decisions reserved for corporate bodies or deal with the actual management and thereby contribute significantly to the decision-making of the company.[36] At the same time it is necessary that the respective person is self-sufficient and acts with personal responsibility. Purely assisting in the

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30 SR 952.0, Art. 39 BankA

31 SR 951.31, Art. 65 IFA

32 Criminal liability is regulated in Art. 86 f. ISA and is not discussed here.

33 Cf. e.g. on this the Basler Kommentar OR II Peter Widmer/Oliver Banz, in the following ‚BK', Art. 916 N 1 f. and N 11 as well as Art. 918

34 Art. 754 CO

35 Cf. BK, Art. 754 N 4 et seq. or Forstmoser, Peter/ Meier-Hayoz, Arthur, Nobel, Peter: Schweizerisches Aktienrecht, Bern 1996, in the following ‚Forstmoser', § 37 N 2 et seq.

36 Federal Court Decision (BGE) 117 II 442 or BGE 128 III 29, E. 3

decision-making would not be sufficient to constitute a corporate body.[37] In addition, the doctrine requires that at least a permanent competence is apparent of responsibility for certain decisions that are generally outside everyday business and have a noticeable effect on business results. The responsibility of the substantive corporate body extends however, only to the particular function or area to which it contributes.[38] That means that it is not jointly and severally liable with the formal board of directors in the sense of Art. 759 CO.

1.3.2 Delegation of competence by the board of directors (Art. 754 para. 2 CO)[39]

With the exception of the non-transferable duties[40], the board of directors may under certain formal conditions delegate competencies. Where these are formally approved, a far-reaching exemption of liability of the board of directors becomes effective. The board of directors is only liable for the required duty of care in the choice, training and supervision of the delegate. Such a delegation should also be possible for third parties who do not belong to the business,[41] independently of whether this relates to a natural or legal entity. In this regard, e.g. the ("inverse") question of liability of the legal entity is discussed, which makes use of secondment law according to Art. 707 para. 3 CO and allows election of a representative on the board of directors. In the doctrine[42] the question is answered in the way that only a seconded natural person is liable and only to the extent that the seconding company has not provided him with instructions or directions, in effect has for his part begun to behave as a de facto corporate body.

1.3.3 Requirements on the permitted delegation of competence/exemption from liability

Art. 716b CO formally requires three things for the permitted delegation of competence:

1. Resolution of the general assembly

2. Authorisation to delegate and recording of this in the articles of association

3. Organisational Regulations as a form for the analysis of the detailed content of the delegation.[43]

In addition, the board of directors must fulfil the three material requirements, namely use the required duty of care in the choice, instruction and supervision of the delegate, in order for the exemption from liability to be effective.

2. Application to the Responsible Actuary

2.1 Responsible Actuary as substantive corporate body

The duties of the RA are set out in Art. 24 ISA. The meaning of these duties is without doubt covered by the requirements on the properties of the corporate body. The RA emerges as a sub-

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37 BGE 117 II 573

38 Forstmoser, § 37 N 8

39 e.g. Forstmoser, § 30 N 22 et seq.

40 Art. 716a Para. 1 CO

41 Forstmoser, § 37 N 39, analogously Böckli, Peter: Schweizer Aktienrecht, Zürich 2004, 3.A., in the following referred to as ‚Böckli' § 18 N 131 f.

42 Forstmoser, § 37 N 15 or Böckli, § 18 N 141 et seq.

43 Forstmoser, § 29 N 24 et seq. or Böckli, § 18 N 120 et seq.

stantive corporate body in the sense of Art 754 CO, and what should be noted is that a new subcategory of substantive corporate body must be created for it because his duties are stipulated not by the company internally but rather by legislation.[44]

2.2 Delegation of competence by the board of directors

2.2.1 Duties of the board of directors

Although the RA's Appointment is prescribed by law, the question arises regarding the ability to delegate because on the one hand the duties of the board of directors should on account of their importance be something for the board of directors and on the other the RA must be ‚appointed' by the board of directors. ISA only replaces the three requirements, not however, the material requirements on the authorized delegation of Art. 716b CO. At least the first requirement - the choice - is completely applicable, and therefore the board of directors must still ensure that the authorised person fulfils all legal requirements (Art. 23 ISA). But also the other two requirements are applicable - even if limited in comparison to corporate law. Thus the RA must at least be able to fulfil his duties as referred to and set out in the company corporate organization (e.g. Art. 23 para.1 ISA). A basic supervision is necessary to ensure that he actually performs his duties in a timely manner, and to this also belongs a certain element of control of his work regarding obvious errors even if this is not referred to in ISA.

2.2.2 What happens when the board of directors overrides a decision of the responsible actuary?

The responsibility for the preparation of the financial statements is borne by the board of directors. It can overrule the decision of the RA and organise the financial statements in accordance with its own discretion. The draft ISA provided in this case for the RA to be able to inform the supervisory authorities directly.[45] This provision was however deleted following consultation because it was deemed to be problematic if an employee was by law virtually obliged to ‚stab in the back' its own superior board of directors through a notification to the supervisory authorities. This development shows that today it cannot be assumed that there is a duty to inform or a right to be informed on the part of the RA with regard to the supervisory authority. The legislature proceeds on the basis that as a rule the board of directors is formed of trustworthy persons who comply with the legislative provisions and therefore also with the decisions of the RA. What, however, are the consequences when the board of directors behaves differently?

The first thing to mention is that the board of directors in such a case of course lose their limitation of liability in the sense of Art. 716b CO. It is also possible to imagine that the auditor of the company regards this exceeding of the competence of the board of directors as a breach of the law in the sense of Art. 729b para. 1 CO and makes a corresponding notification. It is certainly not the task of the auditor to look for breaches of the law, however, the duty to notify exists when the auditor ‘in the performance of its audit ascertains breaches of the law or the articles of

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[44] The duties of the responsible actuary are naturally older than ISA and therefore the function of the actuary has existed for a long time. One could ask oneself whether the qualification of the RA as substantive corporate body is really something new. There are several arguments which support an affirmative answer: the duties of an actuary were strengthened and refined, they were in addition regulated on a legislative level and the RA was granted with significant self-sufficiency and its own competencies with regard to the board of directors. One could say that the position of the RA was materially strengthened and must therefore now be assumed to be a substantive corporate body.

[45] Message ISA, page 3801

association'. In the evaluation of the position of the RA the auditor will regularly examine the RA's reports to the board of directors and review whether the RA's instructions have been followed.[46] Since the supervisory authorities regularly demand to see the audit report, the regulator will nevertheless indirectly become aware of an exceeding of the competence of the board of directors – at least in material cases.

2.2.3 Delegation to an external third party

Finally the question arises as to the possibility of delegation to third parties. There is no reason not to permit this under the same conditions and with the same effects as for internal company delegation. In banking law, there is a similar regulation regarding outsourcing in a SFBC directive,[47] where only the outsourcing of the upper management, supervision and control of the board of directors as well as the central management duties is prohibited. Also from this point of view, the duties of the RA should be delegable.

2.3 Liability of the Responsible Actuary as a natural or legal entity

On the basis of the above comments, it follows that the RA as an individual – be this as an employee or third party – without membership of the board of directors or executive management is liable as a substantive corporate body in the sense of Art. 754 CO. In spite of his substantive corporate body function he is not liable jointly and severally in the sense of Art. 759 CO for mistakes of the members of the board of directors. This conclusion applies equally in the opposite case, i.e. the other members of the board of directors are not liable for the errors of the RA, to the extent they have observed the three requirements properly.[48]

Where the RA as an employee is also a member of the board of directors or the executive management or sits as an external third party in the board of directors,[49] he shall be liable both as substantive corporate body for his activities as RA and also absolutely as a normal member of the board of directors or executive management with corresponding joint and several liability with the other members of the board of directors or de facto corporate bodies.

Where an external legal entity is appointed as RA, the liability and joint and several liability situation is analogous to that in paragraph 1 above. As explained, the external legal entity must nominate an employee as RA. Analogous to the situation of the corporate body ‚auditor', that a leading auditor describes, only the legal entity is liable in this case.[50]

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46 They will also question the RA orally.

47 SFBC-Circular 99/2 Outsourcing with Appendix 1 and SFBC-Notification Nr. 23 dated 5.9.2002

48 To the extent the RA is an employee, he is liable naturally as an employee in the sense of Art. 321e CO. Liability for simple negligence in the sense of Art. 101 Para. 3 CO for the RA typical activities cannot in any way be excluded towards third parties. The rules of liability of corporate law responsibility have precedence here. With regard to the liability of the RA as employee towards the employer for his RA typical activity, the liability as corporate body has precedence. In this way, an agreed limitation of liability for simple negligence of the RA towards his employer in the case of corporate law responsibility cannot be challenged by the claimant. Even the threshold for duty of care in Art. 321e Para. 2 need not be considered, to the extent that it is less than the degree of fault required in corporate law responsibility.

49 As an external party he cannot be a member of the executive management, because he would otherwise be an employee

50 BK, Art. 755 N 5/ Urs Bertschinger indeed suggests that only the lead auditor should be liable, in: Der Schweizer Treuhänder (Zürich) 1999, 914, Schweizer Zeitschrift für Wirtschaftsrecht 1999, 79f. as well as the Zeitschrift für Schweizerisches Recht, Band 124 (2005) II, S. 599 et seq.

2.4 Corporate law responsibility in general

The explanation of corporate law responsibility – with which the RA must also comply – is not part of this paper. In brief, this states that the RA is only liable if the four provisions of the breach of duty, the adequacy of causal connection, fault and loss are fulfilled. Potential claimants are the company, the shareholders or the creditors, depending on whether the company is already in liquidation or not and whether it relates to an indirect or direct loss.[51]

[51] See on this the extensive literature on corporate law responsibility, e.g. Forstmoser, 8. Kapitel or Böckli § 18.