

## D23 Company law – Solutions

1

- a A basic distinction is made between sole proprietorships and companies. The sole proprietorship is distinguished from the company in particular with respect to the ownership rights. The two enterprise forms are distinguished as follows:

<b>Sole proprietorship</b>	<b>Company</b>
- Single person as owner, investor, and bearer of business risk	- Multiple people (shareholders) as owners, investors, and bearers of business risk
- Management and decision-making power usually incumbent on sole proprietor (internal agency)	- Management or decision-making power often delegated to a third party (external agency)

b

<b>Enterprise form</b>	<b>Advantages</b>	<b>Disadvantages</b>
<b>Sole proprietorship</b>	<ul style="list-style-type: none"> <li>- High degree of flexibility and adaptability</li> <li>- Quick decision-making</li> <li>- Greater share of profits for the sole proprietor</li> <li>- Foundation is straightforward in legal terms</li> <li>- No fiduciary duty</li> <li>- The enterprise may be dissolved at any time</li> </ul>	<ul style="list-style-type: none"> <li>- Low degree of creditworthiness</li> <li>- Greater financial risk for the sole proprietor</li> <li>- Full liability</li> <li>- Continuity is not guaranteed</li> <li>- Difficult succession planning</li> </ul>
<b>Company</b>	<ul style="list-style-type: none"> <li>- Individual owners face lower risks, as they are divided up</li> <li>- Higher creditworthiness because several people are liable for company debts</li> </ul>	<ul style="list-style-type: none"> <li>- Lengthier decision-making processes</li> <li>- Less flexibility</li> </ul>

2

- a The following elements are indicative of the existence of a company:
- Association of people: A combination of natural and/or juridical persons.
  - Contractual basis: There is a contractual relationship between the people. The contract can have been concluded either verbally and in writing.
  - Common purpose: The contractually linked people must pursue a common purpose with shared means and efforts to be classified as a company (community of interests).

b

- Not a company: Companies are communities of interests (pursuit of a purpose with shared means and efforts). This case, however, deals with an exchange relationship (purchase agreement), which is characterized by a clash of interests: One party performs in order to receive compensation from the other. The performances of the parties are therefore exchanged and not, as would be the case in a company, fitted together to pursue a common purpose.
- Not a company: A community of heirs, as outlined in Art. 602 ZGB, is a community of interests under the terms of private law. This means it is not based on a contract (as a condition for a company) but is created by law whenever a testator has left several heirs.
- Company: Moritz, Daniel, and Franz are natural persons (association of people) who unite to pursue a common purpose (being paid to garden for neighbors) with shared resources (labor, pocket money).
- Not a company: In this case, Anna and Vera have concluded an employment contract. This belongs to the so-called agency agreements, in which, in contrast to the exchange contracts (e.g., purchase agreement, see the first example with Thomas), no clash of interest exists: Both Anna and Vera share the common goal of selling flowers. However, this goal is determined by only one person, namely Anna as owner of the flower shop – Vera (as an employee) is only working in its interest. The situation is lacking a commonly agreed-to purpose, which is part of what distinguishes a company (voluntary nature of pursuing a purpose).
- Not a company: This is the case of a loan with profit sharing, a so-called shareholder loan. Since both parties, Alois and Dieter, have a common interest in achieving the highest possible profit, it can sometimes be difficult to distinguish such a situation from a simple partnership. However, a common interest in striving for profit is not enough for a partnership to come into being. There must also be present a shared interest in achieving a common purpose (e.g., sale of newspapers and magazines) (the so-called *animus societatis*).

### 3 Individual solutions.

4

- a Requirement of form: Shareholders have to use one of the eight types of company outlined in Swiss law.

Consistency of form: There are limitations placed on content and structure of the articles of association. Art. 530–926 OR and 60–79 ZGB contain generally mandatory requirements for the respective company form, which are only dispositive when expressly outlined.

- b In contrast to company law, the rule of "private autonomy" prevails in contract law: The main types of contracts are provided for by law (e.g., sales contract, rental contract, etc.), but new types of contracts not explicitly provided for by law may also be created, and they are not subject to the requirement of form (innominate contracts, such as leases). In terms of content, the contracts may be largely freely configured (limited consistency of form).

**5**

- a In legal associations, the principle of internal agency applies.
- b A corporate body is a separate entity and legally a distinct person.
- c In a corporate body, it is not necessarily a shareholder that takes over management; instead, it can also be a third party.
- d A legal association is not a separate entity but is made up of natural persons. For this reason, they are liable for the debt.
- e A corporate body is a separate entity and exists independent from specific individuals.
- f The scope of decisions made by individuals involved in a corporate body is limited.
- g A corporate body is a separate entity, which is why only the company assets are liable for company debts.

**6**

- a Jenny, Larissa, and Yuan are natural persons who have united to pursue a common purpose (trade in schoolbooks) with shared means and efforts (their work). There is a mutual expression of intent. Accordingly, this is a case of a simple partnership.
- b The partners face primary, unlimited, and joint liability for the debts of the company. This means that all partners (Jenny, Larissa, and Yuan) are primarily liable with their private assets. In addition, each partner is liable for the entire debt of the company. Creditors (classmates who sold their books to shareholders) can claim the full amount owed from any of the three shareholders.

**7**

- a A commercial enterprise is understood to mean:
  - A manufacturing business: Enterprise that creates new or finished products through the processing of raw materials and other goods with the help of machines or other technical means.
  - A trading business: Enterprise that involves the exchange of goods and/or services.
  - Any other business "operated according to commercial principles": While neither a manufacturing nor trading enterprise, this would still be similar by requiring commercial operation and proper accounting.
- b - Commercial enterprise: Andreas, Philip, and Markus have established a consulting firm together, in which they provide consulting services in a process based on division of labor. The division of labor in providing this service requires a high degree of coordination between the partners as well as proper business accounting. For this reason, this is a case of a commercially run enterprise.
  - Not a commercial enterprise: According to the Swiss Federal Supreme Court, the case of so-called "independent professions" (doctors, architects, teachers, etc.) does not involve a commercial enterprise, as long as the main services are provided by a single person (e.g., a doctor).

## 8

- a While the members of partnerships and limited liability companies are subject to wide-reaching obligations, especially a non-compete clause, a shareholder in a company limited by shares is only required to fully pay for his share(s). In turn, shareholders are entitled to fewer rights than a member of a partnership or a limited liability company: While shareholders only have a right to a share of the profits (dividends) and certain rights to scrutinize and be informed of information, partners have also the right to (shared) management and representation.

The difference between the company limited by shares and partnerships/limited liability companies lies in the "closeness" of shareholders to the company: Partnerships companies have a strongly "personal orientation", while the company limited by shares and other corporate bodies (aside from the GmbH, as a mixed form) have a strong "capital orientation". The AG was created in order to allow everyone to have a stake in a company without having to lay out a great deal of capital and, especially, without any further obligations aside from paying for shares in full. As a shareholder does not have to comply with any further obligations, including not being subject to non-compete clause, his rights are severely limited: He has participation rights at the general meeting but no right to management or representation.

- b The principle of external agency is at the core of the company limited by shares: The AG acquires its ability to act not through its shareholders as such, but through its corporate bodies. Stipulated by law are the general meeting (Art. 698–706b OR), board of directors (Art. 707–726 OR), and statutory auditors (Art. 727–731a OR).

- General meeting: As the "highest" body of the AG, the general meeting shall elect the board of directors and the auditors as well as monitor these as they carry out their duties. In addition, the general meeting determines the company bylaws, approves the annual report and the annual and consolidated financial statements, and decides on the appropriation of profits.
- Board of directors: The board of directors represents, so to speak, the executive branch of the AG. It acts as the company's most senior management body and is therefore responsible for the management and representation of the AG. Furthermore, it determines the organization of the company and shall appoint and dismiss members of management (to the extent that the board delegates management to a third party, such as a CEO, and does not take it on itself).
- Auditors: The auditors examine the annual and consolidated financial statements of the company limited by shares for the protection of shareholders, creditors and the general public.
- Other bodies, such as a managing director (CEO, etc.), directorate or advisory board, can be created by the AG. However, the so-called parity principle must be observed in this: The law assigns to each of the three compulsory bodies (general meeting, board of directors, and auditors) specific, irrevocable and non-transferable tasks.

- c Restricted transferability means that limitations can be placed on how a security such as a share can be bought, sold or otherwise come to change hands. Only registered shares may be subject to transfer restrictions, not bearer shares. In addition, further limitations are placed on restricting the transferability of listed (publicly traded) shares, which is why such restrictions are mostly placed on non-listed shares. Restricting transferability is mostly considered in smaller family AGs in order to control the composition of shareholders and to prevent shares from falling into unwanted hands.

9

- a An association is as a corporately structured type of company. In principle, therefore, it is only association assets that are liable for association debts.
- b The contributions by association members are fixed by the bylaws (Art. 71 I ABG). If such a determination is not made, members have to provide in equal shares those contributions necessary to pursue the association's purpose and to cover its debts (Art. 71 I ABG). Liability for association debts is thus a personal, unlimited and solidary.
- c In contrast to the cooperative and other types of company, an association may expel its members without giving any reasons. In addition, it can be stipulated in the bylaws that associations can limit, subject to conditions, or completely eliminate the ability of new members to join.