

Interpretation of company articles in Sika takeover battle

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Introduction

A recent Zug Cantonal Court decision sheds light on the way that Swiss company articles of association must be interpreted under Swiss company law in cases in which they are not only applicable internally among a few shareholders, but also have an effect on third parties. The decision also confirms that the observation of merely the letter and not the spirit of company articles by a company board or majority company shareholders in a general meeting can, in certain circumstances, even amount to an abuse of law.

Interpretation of company articles

Company articles of association are not interpreted like contracts, but assimilated to Swiss legal provisions if they are not only applicable internally among a few shareholders, but also have an effect on third parties. As with Swiss legal provisions, it is not only the wording of a single company article provision that is decisive for its interpretation, so too is:

- the provision's systematic position in relation to other provisions;
- the provision's overall historic development pursuant to past shareholder general meetings on company article amendments; and
- all other relevant economic circumstances of the particular case, particularly regarding the purpose envisaged by shareholder meetings at the time.

Facts

Swiss multinational Sika has long been recognised as a leading provider of highly sophisticated chemicals to the global construction industry and profited from record earnings as a result. In December 2014 its anchor shareholders, the Burkhart family's holding company (which inherited Sika from its founder Kaspar Winkler), announced the planned sale of roughly 16% of Sika's nominal share capital – which represents (under Sika's capital structure distinguishing ordinary bearer shares and preferred registered shares with restricted transferability and six-fold voting rights for the same nominal share amount) 52% of the voting rights to the French conglomerate Saint Gobain. Thus, Saint Gobain would acquire full control over Sika by paying for only 16% of its nominal share capital.

The six (out of nine) Sika board members (traditionally independent of the Sika family) opposed (together with 160 Sika top managers) the transaction with Saint Gobain. At a 2015 general shareholders' meeting, this independent majority of the existing Sika board blocked the attempt of the anchor shareholder (the Burkhart family's holding company) to appoint new Sika board members supporting its sales plans (ie, to alter the majority of the Sika board). Instead, the Sika board limited the voting rights of the Burkhart family's holding company in the Sika general shareholders' meeting

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to 5%, thereby calling on the transfer restrictions in Sika's articles of association.

In this respect, the Sika board argued that the Burkhardt family along with Saint Gobain constituted a newly established shareholder group, as a result of which the existing independent board majority was allowed to limit the Burkhardt family's holding company voting rights to 5%, instead of upholding the previous share ledger evidencing 52% of the voting rights in the Sika general shareholders' meeting in its favour.

Thus, the Burkhardt family sought for a cancellation of the 2015 Sika general shareholders' meeting resolution, in which its previous shareholders' majority voting rights were reduced to 5% by Sika's board. The board defended its decision with the support of an important holder of Sika bearer shares – the Bill and Melinda Gates Foundation's manager Cascade.

Decision

The Zug Cantonal Court dismissed the Burkhardt family holding company's court action based on the court's interpretation of the Sika articles of association in favour of the independent Sika board majority mainly with the following arguments:

- Under the mere wording of the Sika articles of association, only the direct transfer of control is caught by their restriction of transferability, not the indirect transfer through the Burkhardt family's sale of shares in its family holding company for its Sika participation.
- However, the Burkhardt family had also applied another statutory provision pursuant to which the purchaser of Sika shares is entitled not to make an offer to the minority Sika bearer shareholders within a takeover (so-called 'opting out') in its favour, despite the fact that the wording of this provision mentioned only direct share transfers (ie, it had changed its interpretation of the articles beyond the mere wording to suit their envisaged purpose in another case).
- In addition, the court concurred with the Sika independent board majority's systematic interpretation of various Sika articles, pursuant to which indirect transfers of Sika shares such as the one by the Burkhardt family via a transfer of shares in their holding company are also caught by the Sika articles' inherent purpose to restrict the transferability of Sika shares in various cases. In this respect, the Burkhardt family also had to edit its purchase agreement with Saint Gobain for their Sika shares. The court found several contractual clauses aiming to circumvent the transfer restrictions in the Sika articles of association even before the Saint Gobain takeover could close.
- The above provisions of the Sika articles of association were historically introduced by a Sika general assembly in the 1990s under the Sika board chairmanship of former Swiss federal councillor and head of the Federal Department of Justice, Kurt Furgler, with the explicit purpose to preserve Sika's independence against unfriendly takeovers. At the time, six out of nine Sika board members were already independent of the Burkhardt family. In this respect, the court also took into account that the Saint Gobain chairman had publicly announced in an open letter to the Sika shareholders its intention to fully integrate Sika into the Saint Gobain group.

For the above reasons, the court concluded that the transfer restriction in the Sika articles of association must be construed in the view of an average public shareholder who considers it irrelevant whether Sika's registered shares with restricted transferability will be sold directly or indirectly via the family holding of an existing shareholder group. As a result, the court upheld the Sika board's decision in the 2015 general assembly to limit the Burkhardt family holding's voting rights to 5%, with regard to the election of new board members suggested by the Burkhardt family (in a vain attempt to alter the independent majority of the Sika board in its favour for the implementation of the planned takeover by Saint Gobain).

Taking into account all circumstances, the court even characterised the behaviour of the Burkhardt family (and Saint Gobain) as an unlawful circumvention of these transfer restrictions in the Sika articles of association by illegally envisaging a transfer of the control over Sika to Saint Gobain even before completion of the transaction.

It is likely that the battle regarding control over Sika will end at the Federal Supreme Court, as Saint

Gobain has renewed its commitment to buy Sika until 2018. Simultaneously, Sika's existing board has intensified its own takeover efforts in relation to the Burkhart family through the offer of a buy-back of the Burkhart family holding shares in Sika by Sika itself.

Comment

All company board members are personally liable to comply not only with the wording of a single company articles provision, but also with its spirit and true meaning resulting from its interpretation in light of all other articles' provisions.

Of particular importance is the purpose envisaged with the articles of association provisions – in this case, it was clearly the protection of the 84% nominal share capital investment made by the Sika bearer shareholders against the 52% voting majority of the Burkhart family's registered voting shares, but representing only 16% nominal Sika share value by upholding Sika's economic independence. Likewise, all investors willing to sell or buy a Swiss company's contractual provisions must carefully scrutinise the target's articles of association from the outset with a view to avoiding unhelpful actions and statements such as those of the Burkhart family and Saint Gobain.

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