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The Swiss Code of Obligations lays down a stringent framework for the rules contained in articles of association restricting the transfer of registered shares in unlisted companies

The provisions of Article 685 b CO (Swiss Code of Obligations) are often overlooked by the authors of the articles of association of a limited company.

These authors are in fact inclined to include pre-emption rights between shareholders and purchase or sale option clauses in the articles of association with a view to verifying the capacity and identity of every new shareholder.

However, the Swiss Code of Obligations prohibits the inclusion of such clauses in the articles of association.

Article 685 b CO does not permit any restrictive conditions on transferability of registered shares save to maintain the shareholder group in order to safeguard the pursuit of the company's objects or its economic independence. Those are the only "good cause" for which the company is entitled to decline or restrict the transfer of such shares.

Except in such cases, if the company wishes to prevent the transfer of ownership, it must undertake to acquire the shares concerned at their real value or at a value which corresponds as objectively as possible to the value of the company. That value may be substantially higher than the figure to which the company is willing to agree. In this connection, it should be noted that the company is not allowed to possess more than 10% of its own share capital.

If the company wishes to control the transfer of ownership of its shares, it must therefore create bearer shares or its shareholders shall be required to conclude a shareholders' agreement between themselves. The provisions of such an agreement are of course only enforceable between the parties thereto. Third parties acting in good faith are not concerned and the transfer of share ownership in their favour is not protected. Similarly, the breach of a shareholder's agreement cannot lead to cancellation of the transfer but only to the possible award of compensation to make good the prejudice suffered by the injured party.

We find that the registers of commerce now take care to assure stringent application of the rules set out in Article 685 b CO. Many provisions contained in articles of association stipulating, for example, a pre-emption right which had been tolerated by the registers of commerce in certain Swiss cantons until recently are therefore now prohibited and unlawful. Their application cannot be tolerated. In any such case, we advise taking legal action to declare the nullity of the implementing decision of the Board of Directors by analogy with Article 706b section 3 CO.

Source :

<https://www.wg-avocats.ch/en/news/commercial-law/the-swiss-code-of-obligations-lays-down-a-stringent-framework-for-the-rules-contained-in-articles-of-association-restricting-the-transfer-of-registered-shares-in-unlisted-companies/>