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Statutory approval clauses and the Sika case

As the newspaper Le Temps aptly described in its June 26 edition, each year the month of June brings to mind one of the most important legal battles in Swiss corporate law: Sika AG v. Saint-Gobain.

The articles of association of Sika AG in Zug contained a so-called approval clause. These clauses allowed the board of directors to refuse the acquisition of a certain share of the company's share capital if this acquisition was above a certain threshold, in this case 5% of the share capital. In the case of Sika AG, two other clauses also prevented the unwanted entry of a new shareholder: (i) the share capital was composed of different classes of shares with differentiated nominal values (i.e. two main classes: (a) on the one hand, 2'151'199 registered shares listed on the stock exchange with a nominal value of CHF 0.60, and on the other hand 2'330'853 unlisted registered shares with a nominal value of CHF 0.10, representing 16.43% of the share capital, but giving its holders (the founder's family) 52.62% of the voting rights), (ii) the articles of association also contained an opting-out clause allowing for an exemption from the obligations relating to public take-over bids.

The present contribution will only briefly describe the scope of statutory approval clauses in Swiss law and draw the reader's attention to the need to consider the special case of "indirect acquisitions" when drafting them.

Approval clauses are authorized in Swiss corporate law by articles 685a to 685c CO for unlisted companies and by articles 685d to 685g CO for listed companies. These clauses are very frequently found in the articles of association, particularly in SMEs, as they allow the company to control the circle of its shareholders, in order to protect it from hostile acquisitions, for example by competitors.

In the Sika case, the articles of association of this company provided, in accordance with article 685d CO, that any acquisition of more than 5% of the share capital required the prior approval of the board of directors. The approval clause in Sika AG's articles of association could only be waived by a qualified majority, i.e. by a majority above the threshold of the aforementioned preferred shares held by the founder's family holding company.

But what about an "indirect acquisition", i.e. an acquisition which does not change the shareholder structure but which consists in the change of ownership of an existing shareholder, without the latter changing his shareholding? In other words, does the approval clause apply in the event of a change in the shareholding of an existing shareholder? In this case, the French group Saint-Gobain had acquired the share capital of the preferred shareholder, i.e. the family holding company of the founder, without this holding company seeing its participation in the capital of Sika AG changed.

After a lengthy legal battle, the Zug Cantonal Court ruled, after a careful and very precise examination not only of the wording (grammatical interpretation) and origin (historical interpretation) but also of the context (teleological interpretation) of the approval clause in the articles of association of Sika AG, that it should not only apply to direct acquisitions but also to indirect acquisitions. The Federal Supreme Court did not have to rule on this case because the parties, on the basis of the Zug judgment, decided to settle their dispute definitively by an out-of-court settlement.

Will the decision of the Zug High Court set a precedent? Nothing is less certain. In this case, the Zug cantonal judges refused to consider that there had been an abuse of rights in order to rule that the proposed acquisition by Sika-Gobain should be rejected, but based their decision on a specific question of interpretation of the clause in question.

It is therefore not at all clear that any “indirect acquisition” is automatically considered abusive under Swiss law. Drafters of approval clauses would therefore be well advised to take the Sika case as a guide when drafting articles of association to strengthen their wording to include any case of indirect acquisition within the scope of the proposed approval clause. In the case of unlisted companies, however, this drafting exercise is perilous because paragraph 7 of article 685b CO prohibits the articles of association from making the transfer conditions more stringent than the regime provided for in paragraphs 1 to 4 of this legal provision. This clause does not apply to the articles of association of listed companies.

The new law on corporations, which is expected to come into force in 2023, does not contain any changes to the terms of articles 685 a to 685 g CO. This problem therefore remains unresolved. If the drafting of approval clauses remains possible, it will have to be the object, following the “Sika case”, of renewed attention from its authors, certainly with the help of one or more legal professionals.

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