

Recent court decisions in Swiss corporate law

De facto body of a corporation

May a de facto body (“*faktisches Organ*”) represent the Company vis-à-vis third parties?

A person who is neither elected nor entered into the commercial register may not, through his or her behaviour, become holder of the powers and rights of a director and represent the Company vis-à-vis third parties. It follows that a sole or majority shareholder who interferes with the administration of the Company does not have the quality of a corporate body and is not able to contractually oblige the Company in the sense of Art. 718 of the Swiss Code of Obligations (“CO”). However, the Company can still become liable for tortious acts of a person fulfilling the conditions of a de facto body in the sense of Art. 722 CO (SCD 146 III 37, 43 f.).

Creditor’s ability to sue board members of a corporation

Are creditors able to sue liable board members of a corporation?

The CO states the following: “*The members of the board of directors and all persons engaged in the management or liquidation are liable not only to the Company, but also to each shareholder and to the Company’s creditors for damage caused by intentional or negligent violation of their duties.*” (Art. 754 CO). In situations where the loss caused concerns only the creditor’s assets, the creditor may generally file a suit for his individual and direct loss against the liable board members (subject to certain limits once the Company has gone bankrupt). In situations where the loss caused concerns the assets of the Company or both the assets of the Company and the assets of the creditor, the creditor may only file a suit against the liable board members after the Company has gone bankrupt, provided that the bankruptcy estate refrains from filing a suit (SCD 4A_407/2018).

Dealing of a corporation with own directors or managers

How must Companies handle contracts with their own board members or managers?

In the event of a conflict of interest between the Company and a self-advantaged board member or manager, the contract is generally invalid, even if it is not signed by the same person (i.e. no self-contracting pursuant to Art. 718b CO), unless (1) there is no risk of disadvantage of the Company due to the nature of the transaction; or (2) the Company has authorized the director or manager to enter into the contract with him- or herself or confirmed the transaction subsequently (SCD 126 III 361). In the case at hand, however, no confirmation was necessary for the transaction to be valid, as the self-advantaged persons were at the same time the only shareholders of the Company and the relevant group companies, respectively. The approval by the superordinate body was tacitly assumed because there were no opposite interests (SCD 144 III 388).

Determination of share value (shares of a corporation)

Are shareholders able to ask the court to appoint a special auditor for determination of the intrinsic value of their shares in view of a planned sale?

Shareholders must first exercise their information and inspection rights and ask the General Meeting for the performance of a special audit if the respective preconditions are given (Art. 697 and 697a CO). Only afterwards may shareholders file a request for a special audit with the court in order to determine the intrinsic value of their shares. The request addressed to the court must thematically be consistent with the prior request addressed to the General Meeting and comply with the requirements of Art. 697b CO (SCD of 2018, 4A_107/2018).

Withdrawal of auditor's license

What breach of duty is required to justify a withdrawal of an auditor's license?

Auditors who breach their duties may not only face claims for damages, but also lose temporarily their license. In the case at hand, an audit expert carried out a limited audit due to lack of documents, although the Company was in fact subject to an ordinary audit. As a consequence, the Audit Supervisory Authority withdrew the license for a period of four years. The Swiss Administrative Court considered the breach of duty as severe and the withdrawal of the license as proportional (FACD of 2019, B-7186/2017).

Legal domicile of a corporation

What happens if the Office of the Commercial Register is unable to have letters delivered to the Company?

A Company needs a legal domicile in the canton of its registered office. If the Office of the Commercial Register sends letters to the Company at the address communicated to it requesting confirmation and proof of domicile and such letters cannot be delivered, it may assume that there is no domicile at the communicated address and eventually order the dissolution of the Company pursuant to Art. 153b of the Commercial Register Ordinance (Administrative Court of Zurich, decision of 2019, VB.2018.00566).

Share ownership in dispute (shares of a corporation)

What can shareholders do if there is disagreement regarding their ownership of shares?

In the event of unclear share ownership it is not possible for shareholders to ask the court to appoint an administrator to sell the shares by auction due to an organizational deficiency pursuant to Art. 731b CO. Rather, the shareholders must file a complaint with a civil court asking for determination of share ownership (GVP-ZG 2018, S. 145).



Dr. Alois Rimle
Attorney at Law, LL.M.