

How to Transfer Registered Shares? How and When to Challenge Decisions of Shareholders Meetings?

The Case: The articles of association (Statuten) of a Swiss share corporation provided that the company ("Company") maintains a share register in which the owners of the Company's (registered) shares shall be registered. Anyone who intends to be registered as shareholder must provide sufficient evidence that he/she has validly acquired the shares. The Company only recognizes those persons as shareholders who are entered in the share register in such capacity. The articles of association, further, provided that any transfer of registered shares requires consent of the board of directors which the board can withhold, among others, (i) if the Company offers to the selling shareholder to take over the shares, against payment of their *real value*, on account of the Company, of other shareholders or third parties; or (ii) if the buyer does not expressly declare to acquire the shares in his/her own name and for his/her own account. The shares of the Company were held by four shareholders, each of them was holding a 25% stake. All shareholders were, further, members of the board of directors and employees of the Company.

In March 2006, the Company terminated the employment agreement with shareholder E, and shareholder E wrote a letter to the other members of the board of directors providing, inter alia: *"I hereby advise you in your capacity as directors and shareholders ... that I wish to transfer my shareholding ... to A. This transfer will consist of my entire holding of 25% the company shares. I can confirm that A is purchasing the shares as a personal investment"*. The Company did not proceed with registering A as new shareholder in the share register as it held that the formal requirements for such entry were not fulfilled. In one of its letters (sent in February 2007) to E and/or A it stated: *"In order to be registered in the register of shareholders a new shareholder must apply for registration. A basic requirement to be registered in the register of shareholders is the one that the applicant must give evidence that he is the legal owner of shares ... As you state that you 'will acquire' the shares we conclude that you currently do not own any shares ... Therefore, you are not in a position yet to apply for registration."*

On the day following the date of said letter, the Company held an extraordinary meeting of the shareholders to which it had invited all registered shareholders (i.e., in particular, E, but not A) in order to determine an increase of the share capital. Neither E nor A attended the meeting. The other shareholders attending the meeting determined to increase the share capital, to grant the shareholders a subscription right in relation to their current shareholding and not to allow transfer of such subscription right. On the same day, the Company sent a letter to all shareholders (identified in the share register) granting a deadline of 20 days to exercise their subscription rights. Following dispatch of this letter, A (but not E) notified the Company that he wished to exercise the subscription right and further requested to be registered as shareholder. In response to this notification, the Company requested, inter alia, that A provide evidence for having acquired ownership in the shares of E. End of March 2008 counsel to A responded that A had acquired ownership in the shares by way of oral assignment pursuant to UK law and explained that for this reason no written assignment agreement did exist.

The Company rejected registration of A as new shareholder explaining that he had not provided any evidence to having acquired the shares. In April 2007, A lodged a claim with the district court of Zurich requesting that the decision of the shareholders to increase the share

capital be declared null and void and, alternatively, that the Company be ordered to hand over A 25% of the newly issued shares. He explained that on the day of the extraordinary meeting of the shareholders he was already a shareholder and that, therefore, he would have had the right to participate in the meeting, a right which was, however, disregarded by the Company. Further, he contended that he would have had the right to subscribe to the newly issued share capital.

In July 2010, the district court of Zurich dismissed A's claim, and in November 2011 the Court of Appeals of the Canton of Zurich dismissed the appeal of A lodged against the district court's decision. A then filed an appeal with the Swiss Federal Court and requested that the decision of the Court of Appeals of the Canton Zurich be set aside.

The solution: In its decision of 2 October 2012 (no. 4A_10/2012) the Swiss Federal Court analysed, in particular, the question as to whether or not A had validly acquired the shares and the question as to whether and what extent A had filed his appeal on time.

In respect of the alleged transfer of ownership of shares, the Federal Court held that in accordance with Swiss Private International Law, companies are subject to the laws of the jurisdiction under which they have been established and are organized (i.e. Swiss law in the case at hand). The Swiss legislator's intent is that the applicable law applies widely, which includes that any transfer of registered shares in the Company must fulfil the Swiss law requirements. In the case at hand, the shares were not issued and were not available as securities in printed form. Therefore, any share transfer had to comply with the statutory requirements for assignments of right. Swiss law provides that any assignment must be in writing and contain a declaration of assignment by the assignor as well as a declaration of receipt by the assignee. The Federal Court held that this was not the case in respect of the alleged transfer of shares to A so that in February 2007 (when the shareholders meeting took place) A was not yet a shareholder.

In respect of A's claim for setting aside the decisions of the shareholders meeting, the Federal Court first noted that a claim to challenge a decision of a shareholders meeting must be lodged within two months (unless the decision so heavily violates Swiss law that it must be deemed null and void in which case no time limit would have to be complied with; this was, however, not the case in the case at hand). Within these two months the appellant must not only file the claim, but also identify and discuss the legal grounds based on which the appeal is filed. According to the Federal Court it is not allowed to remedy any mistakes in the appeal at a later stage and to come up with new legal arguments/reasons. The Federal Court concluded that this was the case here. While in his appeal with the district court A had (only) contended that the holding of the shareholders meeting in February 2007 violated his rights as of participation as shareholder (as he had not been properly invited/admitted), in the appeal he brought forward that the decision of the shareholders to increase the share capital and the relevant conditions/restrictions, in particular the restriction regarding the transfer of the subscription right, violated Swiss statutory law.

The latter argument was, thus, raised only after the two months appeal period had expired and could, thus, not be taken into consideration by the courts. Therefore, even if the courts had been to assume that A had validly acquired ownership in the shares after the shareholders meeting in 2007 (but before lodging the appeal with the district court of Zurich), in which case he might have had the right to challenge the shareholders' decision restricting the transfer of the subscription rights in the newly issued shares, A could not be heard with this particular argument as he raised it only in the appeal proceedings with Court of Appeals and

the Federal Court, but not in its appeal brief that he had to submit within two months of the relevant shareholders meeting in March 2007. Thus, his right to challenge the decisions of the shareholders for reasons of unduly restricting the subscription rights had been forfeited.

Conclusions: First. Transfer of registered shares in a Swiss share corporation must comply with the formalities provided by Swiss statutory law. If the registered shares are not issued as securities in printed form the parties must comply with the conditions for assignments of rights. Second. A shareholder that wants to challenge the decisions of a shareholders meeting must do so within two months from the date of the shareholders meeting. He must not only file the brief on time, but also identify and discuss the relevant legal grounds/arguments of his appeal, otherwise he will be time barred from bringing in new arguments.

(Source: Swiss Federal Court, decision no. 4A_10/2012)

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