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Corporate Litigation - Clarification on UBO reporting obligations

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Swiss Court gives important clarifications on UBO reporting. LALIVE successfully represented the shareholder as claimant in this corporate litigation, resulting in invalidation of shareholders' resolutions. The decision was published as a noteworthy judgment^[i].

Why this decision is important

The decision gives welcome guidance on the relatively new ultimate beneficial owner (UBO) reporting obligations. The court reminded that these aim at combatting money laundering and terrorist financing and are not a means to an end: Swiss Companies and directors cannot hide and abuse the formal requirements of the UBO to exclude unwelcome shareholders.

This ruling is helpful to both shareholders and directors of Swiss companies, since it clarifies their rights, obligations and limits over UBO reporting obligations.

It is also one of the few decisions where shareholder resolutions have been successfully declared null and void, and an abuse of rights accepted by the court, so it provides guidance on shareholder rights when challenging shareholder resolutions in general.

The Facts

This was a typical shareholders' dispute.

1. Two businessmen structured their joint venture through a Swiss company as equal partners and 50% shareholders in the Swiss company.
2. After years of successful cooperation, a dispute arose over financial aspects and changed business ideas.
3. At that time, the board of the company was 'controlled' by only one of the 50% shareholders.

The controlling shareholder refused to provide the other shareholder with financial and other relevant business information. The company also held various shareholder meetings (AGMs) without inviting the other shareholder, claiming he had not complied with UBO reporting obligations. The financial statements of the company were approved at these AGMs, and the existing board members were granted discharge (release from personal liability) and re-elected.

When the excluded shareholder became aware of these secret AGMs, he started litigation requesting the invalidation of all resolutions taken at them, on the basis that he was unduly deprived of his fundamental shareholder's right – namely the right to attend and vote.

The company – controlled by the other shareholder – tried to justify the exclusion by relying on UBO reporting obligations. Under these, a shareholder holding at least 25% of shares in a Swiss company must report the ultimate beneficial owner of said shares to the company.^[ii] The company argued that the other shareholder failed to comply with all formalities of Swiss UBO reporting obligations, resulting in a suspension of shareholder rights.^[iii]

The claimant shareholder rebutted the company's position on various grounds, but also argued that – regardless of any (possible) failures to comply with (all) formalities of the UBO reporting rules – the company was aware of the ultimate beneficial owners, so was acting in bad faith.

The decision

The Zug Cantonal Court confirmed that the company had been aware of the ultimate beneficial ownership of its shareholdings (as shown by former conduct and correspondence between the company and its shareholders).

It confirmed that UBO reporting obligations are not a means to an end and must not be relied on in an abusive manner. UBO reporting obligations aim to provide transparency to combat money laundering and terrorist financing. As such, they become irrelevant if the company is already aware of the actual ultimate beneficial ownership.

The court also ruled that – even if there were non-compliance with some formalities of UBO obligations – the company would have been obliged to inform the shareholder accordingly. The court ultimately confirmed an abusive behaviour of the company (and its controlling shareholder).

As a result, the court declared all resolutions taken at the AGMs (including the decision to re-elect the board members), null and void. Consequently, the company had no validly elected board – resulting in a lack of proper organisation of the company. This is the subject of another pending litigation.

LALIVE - André Brunschweiler and Judit Ottrubay