



Corporate Law Newsletter

Federal Supreme Court Confirms that Liquidation of Company for Lack of Having the Requisite Corporate Bodies May Be Ordered as *Ultima Ratio* Only

1 Decision

In a decision rendered by the Federal Supreme Court on December 16, 2013¹, the Court confirmed its previous holdings that a company may be liquidated for lack of having the requisite corporate bodies only where it is apparent that the company is unable or unwilling to remedy the unlawful situation and fails to appoint the requisite corporate bodies upon request.

2 Facts

In the case at hand the Commercial Registry of the Canton of Solothurn notified the Company on October 31, 2012 that the Company's auditors have been stricken from the registry upon application of the Company's auditors and set a deadline of thirty days to appoint new auditors for registration in the Commercial Registry. It also notified the Company that it will apply to the court for taking the requisite measures should the unlawful situation not be rectified.

On December 11, 2012 the Commercial Registry applied to the court of first instance to take appropriate measures according to Art. 731b Code of Obligations ("CO"). According to Art. 731b CO a shareholder, creditor of a company or the Commercial Registry may file a motion with the court to take the appropriate measures where a company's s corporate bodies are missing or are not composed in accordance with the law. The competent judge may in particular admonish the company to rectify the situation under threat of liquidation, to institute the

corporate body or a trustee; or to put the company into liquidation in accordance with the rules of bankruptcy law.

The court notified the Company of the motion on January 13, 2013 and ordered the Company to register new auditors or to submit a response. The court further announced to liquidate the Company in application of Art. 731b CO.

The Company filed for two extensions which were granted until March 15, 2013. Amongst other, the Company reasoned that it considered an opting out and that it would require more time. By order dated April 10, 2013 the court extended for the last time the deadline until May 15, 2013. By email dated May 28, 2013 the Company filed an application for registration of new auditors with the Commercial Registry which was refused by same day email because the company failed to submit the requisite originals and for a formal discrepancy in the minutes submitted by the Company.

By order dated July 16, 2013, the court put the Company into liquidation. The appellate court rejected the appeal.

3 Reasoning

Upon appeal, the Federal Supreme Court argued that Art. 731b CO availed the court of a large degree of discretion in order to take the appropriate measures according to the case to be decided. By doing so, the court must balance the interests under the principle of proportionality. Only where a more lenient interference would not achieve the purpose, may a court order the liquidation as *ultima ratio*.

¹ 4A_354/2013



The Supreme Court found that the court of lower instance violated this principle of proportionality by selecting between the remedies provided for by Art. 731b CO. Only where a company completely ignores any and all requests, may a court assume that the company will also ignore a request made by the court and not submit a retainer for the costs, may the court order the liquidation.

In the case at hand the Company has reacted and - albeit in a defective manner - proceeded to appoint new auditors. Hence, the Federal Supreme Court found the court of lower instance to have violated the principle of proportionality and that the court should have appointed the missing corporate body.

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