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Practice of the Swiss Financial Market Authorities for Financing Banks

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While the entry into force of the Financial Market Infrastructure Act (FMIA) on 1 January 2016 has brought a number of substantial changes to the Swiss disclosure rules, in particular with regard to the reporting of discretionary voting power related to equity securities, the takeover provisions contained therein have largely remained unchanged. This article examines the exemptions from (1) the disclosure duties related to significant shareholdings and (2) the duty to make an offer granted by the financial market authorities to the banks that provide financing facilities.

By Julia Tolstova, Olivia Biehal and Aurèle Bertrand

1) Disclosure obligations

a) General Framework of the Disclosure Regime

Under the Swiss disclosure regime, the general disclosure obligations apply to everyone who directly or indirectly or acting in concert with third parties acquires or disposes of shares or acquisition or sale rights relating to shares (i) of a company with its registered office in Switzerland whose equity securities are listed in whole or in part in Switzerland, or (ii) of a company with its registered office abroad whose equity securities are mainly listed in whole or in part in Switzerland and thereby reaches, falls below or exceeds the threshold of 3, 5, 10, 15, 20, 25, 33⅓, 50 or 66⅔% of the total voting rights, whether exercisable or not (article 120 (1) FMIA). Besides direct or indirect holdings, the disclosure duty also applies to anyone who has the discretionary power to exercise the voting rights associated with equity securities directly or indirectly held by a third party (article 120 (3) FMIA). It is important to note that the obligation to notify does not only arise with the acquisition, but also by pure sale positions (the so called "two-basket-principle"). Both baskets must be calculated individually and independently of each other, in other words no netting is permitted to determine whether a disclosure threshold is met.

The notification must be received by the company (*i.e.*, the issuer) and relevant disclosure office within four trading days after the obligation to notify is triggered (*i.e.*, upon the conclusion of the agreement). Subject to the notification duty is generally the beneficial owner of equity securities, *i.e.*, the direct or indirect holder controlling the voting rights stemming from a shareholding and bearing the associated economic risk (article 10 (1) FMIO-FINMA). If the beneficial owner confers the full discretionary powers to exercise the voting associated with equity securities to a third party, such third party is obliged to make a separate, *additional* notification if relevant disclosure thresholds are triggered by such third party (article 120 (3) FMIA in conjunction with article 10 FMIO-FINMA). The party subject to the disclosure duty of article 120 (3) FMIA is the party actually deciding on the exercise of the voting rights. However, if such person is directly or indirectly controlled, the notification pursuant to article 120 (3) FMIA can alternatively be made by the controlling person on a consolidated basis. In its explanatory report to FMIO-FINMA, the Swiss Financial Market Supervision Authority (FINMA) states that the discretionary power only exists if the beneficial owner is not influencing the manner in which the voting rights are being exercised (see FINMA Explanatory report of on the proposed FMIO-FINMA dated 20 August 2015, p. 25 (*Erläuterungsbericht zur FinfraV-FINMA*)). FINMA then later refined this statement by explaining that the mere fact that an instruction may be given or revoked at any time is irrelevant for the purpose of the assessment of the discretionary power (see FINMA Report on the results of the consultation regarding the proposed FMIO-FINMA dated 9 December 2015, p. 22 (*Bericht der FINMA über die Anhörung vom 20. August bis 2. Oktober 2015 zum Entwurf der FinfraV-FINMA*)).

b) Specific Exemptions for Banks and Securities Dealers

The disclosure regime provides for a number of general exemptions from the disclosure obligation as well as for some specific exemptions applicable to banks and securities dealers. Pursuant to article 19 FMIO-FINMA, banks and securities dealers, when calculating the positions held, are not required to take into account equity securities and equity derivatives that they hold (i) in their trading book, provided they do not reach the threshold of 5% of the total voting rights of the issuer; (ii) in the context of securities lending, transfer of title for the purpose of collateralization or repo transactions, under condition they do not reach 5% of the total voting rights; or, (iii) exclusively and for a minimum of two trading days for the purpose of clearing or settlement. This calculation pursuant to (i) to (iii) above, however, is only permitted if and as long as the bank or securities dealer has no intention to exercise voting rights or to otherwise influence management of the issuer. In addition, the exemptions for banks and securities dealers do not apply, and all positions must be disclosed if the total of voting rights held (shares and equity derivatives) reaches or exceeds 10% of the total voting rights of an issuer.

Besides the specific exemptions set out in article 19 FMIO-FINMA, there is a possibility to obtain an exemption for good cause from the relevant disclosure office (article 26 FMIO-FINMA).

c) Interests that trigger the disclosure obligation

As a general rule, the disclosure obligation is triggered by interests in shares and related equity derivatives. The beneficial owner of equity securities which are directly or indirectly acquired or sold has a duty to notify an acquisition or a sale if it reaches, exceeds or falls below the threshold of the issuer's total voting rights (article 120 (1) FMIA). For the purpose of FMIO-FINMA, equity derivatives are instruments whose value is derived at least partially from the value or performance of equity securities (article 15 (1) FMIO-FINMA). Securities lending and similar transactions, such as repo transactions and transfer of title as collateral are deemed to create a relevant interest in shares and must therefore be reported. An exemption applies to lending and repo transactions that are processed through standardized trading platforms for the purpose of liquidity management (article 17 (4) FMIO-FINMA).

It is not possible to provide a comprehensive list of equity derivatives that may qualify as having a voting right. In case of doubt it is recommended to discuss the matter with the disclosure office informally and possibly also seek a formal preliminary ruling regarding the applicability of the reporting requirements from the relevant disclosure office prior to the contemplated transaction. For instance, while equity securities held in connection with an outright transfer of title as collateral need to be included for the calculation of positions held for the duration of the ownership of the collateral taker over the collateral (article 17 FMIO-FINMA), no specific provision exists with respect to taking of a collateral over securities without transfer of title (*e.g.*, pledges). Pursuant to the case law of the disclosure office of SIX Swiss Exchange (DO) however, generally, no obligation to notify arises if the shares are pledged, but voting rights remain with the collateral giver (see Disclosure Office of SIX Swiss Exchange annual report 2013, p. 36 and annual report 2010, p. 62 (*with further references*)).

In a case concerning a refinancing transaction structured as a combination of cash-settled prepaid share basket forwards and cash-settled share basket swaps, all under the ISDA documentation, the parties sought the DO to issue a preliminary ruling confirming that the refinancing transaction and, in particular, the collateral agreements entered into for the purpose of securing the bank credits did not trigger the obligation of the banks to disclose (see Recommendation of the SIX Disclosure Office V-01-13 concerning Sulzer AG and OC Oerlikon Corporation AG, annual report 2013, p. 21 et seq). Under the collateral agreements no transfer of title to the banks was stipulated, except for the banks' possibility to appropriate the shares of the companies upon occurrence of a "Deemed Optional Termination Event" or an "Enforcement Event". Under certain circumstances, upon the occurrence of the Enforcement Event, the banks were also entitled to exercise the voting rights relating to the pledged shares upon written notification to the companies. The DO considered whether the collateral agreements with an appropriation option would qualify as a conditional acquisition/sale of equity securities or a conditioned purchase right over the securities. It ultimately came to the conclusion that the mere entering into such collateral agreements does not trigger the reporting obligation. At the same time the DO emphasized that the individual contractual arrangements need to be analyzed on a case-by-case basis and that it may revisit its practice at a later stage. The DO further clarified that the disclosure obligation would arise at the point in time the voting rights may be exercised or the shares are appropriated. With regard to the intercreditor deed governing the relationship between and coordination among the banks in case of an enforcement scenario (Intercreditor Deed), whereby the banks have an option of a coordinated sale of the pledged shares in case of a Deemed Optional Termination Event or an Enforcement Event, the DO concluded that no constitution of a group acting in concert can be assumed in respect to the shares that have not yet been appropriated by the group and thus, no disclosure obligation can be triggered.

In the second, similarly structured refinancing transaction among virtually the same parties, the details of which are outlined below, no preliminary ruling of the DO was made available. Taking into consideration, however, that the terms of the relevant provisions in the agreements are substantially the same, the outcome of such ruling would likely be the same.

On another occasion, the DO had an opportunity to rule on a similar issue with respect to the notification duty of a bank holding its clients' equity securities in custody (see Recommendation of the SIX Disclosure Office A-04-16, annual report 2016, p. 62 et seq). The agreements with clients stipulated a right of the bank to exercise the voting rights attached to the shares pledged for the benefit of the bank in the event of default by a client in repaying a credit granted by the bank. In this respect, the DO confirmed its practice by stating that the conclusion of the pledge agreement itself does not trigger the disclosure obligation and does not confer discretionary power onto the bank to exercise the voting rights. With respect to securities of foreign companies having main listing on SIX Swiss Exchange and held for managed clients, the terms and conditions stipulate a general right of the bank to exercise the membership rights attached to the assets held for the account of the client. In the view of the DO, such clause does confer discretionary powers to exercise the voting rights and therefore triggers the notification duty. The fact that the clients retain the right to give instructions on how the voting rights have to be exercised, does not exclude the discretionary power to exercise the voting rights within the meaning of article 120 (3) FMIA.

2) Duty to make an offer

a) Duty to make an offer in general

Under the framework of Swiss takeover law, anyone who directly, indirectly or acting in concert with third parties acquires equity securities which, added to the equity securities already owned, exceed the threshold of 331/3% of the voting rights of a target company, whether exercisable or not, has a duty to make an offer to acquire all listed equity securities of the company (article 135 (1) FMIA). Pursuant to article 33 in conjunction with article 12 (1) FMIO-FINMA, any party whose conduct regarding the acquisition or sale of shareholdings or exercising of voting rights is coordinated with third parties, by law, by a contractual agreement or by some other organised procedure, is deemed to be acting in concert or as an organised group.

When determining whether the threshold has been exceeded, all equity securities are taken into account which are directly or indirectly owned or whose voting rights have been transferred to the acquiring person in another way, regardless of whether the voting rights may be exercised (article 34 (2) FMIO-FINMA).

b) Specific Exemptions for Banks and Securities Dealers

In principle, a person obliged to make an offer may be granted an exemption from its duty by the Swiss Takeover Board (TOB) in justified cases (article 136 FMIA). In particular, an exemption may be granted where the statutory threshold is exceeded only temporarily (article 136 (1) (c) FMIA). For banks and securities dealers specifically, the duty to make an offer lapses, if banks or securities dealers acting independently or as a syndicate, acquire equity securities as part of an issue and undertake to sell the share of equity securities exceeding the statutory threshold within three months of exceeding the threshold. In such case, the claim to this exception needs to be only notified to the TOB, which may upon request extend the said period in case of adequate justification (article 136 FMIA in conjunction with article 40 FMIO-FINMA).

c) Practice of the TOB in Relation to Financing Banks

In the case described above concerning Sulzer AG and OC Oerlikon Corporation AG, the TOB had to assess whether the mere fact of entering into agreements in connection with the refinancing transactions as contemplated by the parties imposes a duty to make an offer (see Order of the Swiss Takeover Board 536/01 dated 24 July 2013 concerning Sulzer AG and OC Oerlikon Corporation AG). In the view of the TOB, the decisive element is whether the coordinated conduct of the parties of the transaction is aimed at taking over the company and consequently they shall be deemed as persons acting in concert. In this regard, the TOB found that the conclusion of the agreements in question does not trigger the duty to make an offer because the terms of these agreements neither confer the automatic right to exercise the voting tights, nor aim at coordinating the company's strategy or composition of its board of directors and therefore do not (at least until the occurrence of the Enforcement Event) facilitate a takeover of the company. In addition, the forwards and swaps were cash-settled and no shares had to be delivered thereunder. Regarding the right of the banks to appropriate the pledged shares in the Enforcement Event, the Intercreditor Deed did not aim at taking over the company, but rather coordinating the realisation of the pledged shares. In particular, the TOB held that there was no agreement among the banks as to a coordinated exercise of the voting rights related to the pledged shares or coordinated control of the company. The interest of the banks was limited to the disposal value of the pledged shares.

In the second decision of the TOB related to a refinancing transaction structured similarly as the one outlined immediately above, the Sulzer AG shares were also used as an underlying for cash-settled forwards and swaps (see Order of the Swiss Takeover Board 641/01 dated 7 October 2016 concerning Sulzer AG). In addition to refinancing transactions with a syndicate of banks, the company had also entered into a loan agreement with Sberbank. These credit agreements with the syndicate of banks and with Sberbank were secured by the pledge of Sulzer AG shares. Notably, the first ranking collateral agreement with Sberbank corresponded to 42.14% of voting rights of the company. Consequently, in case of exercise of the voting rights or an appropriation of the pledged shares following an event of default, Sberbank would exceed the statutory threshold of 331/3% on an individual basis.

As mentioned above, according to article 136 (1) (c) FMIA, the TOB may grant an exemption to the duty to make an offer where the threshold is exceeded only temporarily. Pursuant to the TOB's practice, a period of three months is deemed temporary (see article 40 (1) (b) FMIO-FINMA, which the TOB applies by analogy). In some instances, the TOB has qualified even longer terms as temporary (see Order of the Swiss Takeover Board 203/02 dated 24 August 2004 concerning SGF Societe de Gares Frigorifiques et Ports Francs de Geneve SA, c. 1.2.1 and 1.2.6; Order of the Swiss Takeover Board 56/04 dated 7 April 2000 concerning Flughafen-Immobilien-Gesellschaft, c. 3). In the case at hand, Sberbank's intention was not to acquire control over Sulzer, but to resell the pledged shares in order to cover potential losses arising from an event of default. Thus, Sberbank's interests were deemed similar to those of underwriting banks in the instance of a share issuance. Moreover, the Intercreditor Deed set forth that the pledged shares shall be resold within 180 days. Given the fact that the resale of shares in the context of the liquidation of a pledge may take more time than the resale of shares in the context of an underwriting process, the TOB considered the period of 180 days as temporary and thus granted Sberbank an exemption from the duty to make an offer, provided that Sberbank resells the pledged shares within 180 days and does not exercise any significant influence on Sulzer while the threshold is exceeded.

3) Conclusion

Thus, although the entry into force of the Financial Market Infrastructure Act (FMIA) on 1 January 2016 has brought a number of substantial changes to the Swiss disclosure rules, in particular with regard to the reporting of discretionary voting power related to equity securities, while the takeover provisions contained therein have largely remained unchanged, as illustrated by certain recent decisions of the DO and the TOB, the previous practice in respect to the financing banks has been refined and reaffirmed.

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Legal Issues in relation to the Transfer of Tokens

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The reliable and easy transfer of assets on a blockchain is a key prerequisite for the economic exploitation and development of new technologies. Asset transfers currently occur through the use and transfer of tokens. If tokens contain a claim against the issuer (e.g. the right to use certain services), then claims under applicable Swiss law must be transferred by way of assignment in accordance with article 164 et seq. CO, provided the tokens are not securitized or issued as book-entry securities.

This is the English translation of the article published by the authors in the *IT Jusletter* on 24 May 2018 which has been derived from the Position Paper on the legal classification of ICOs published by the *Blockchain Taskforce of the Swiss Federal Council* in April 2018.

By Rolf H. Weber / Salvatore Iacangelo

1) Starting Point

Nowadays, services and payments are provided more and more by way of digital means. The value of any services transmitted is resulting from (encrypted) data packages being forwarded. Financing can also be gathered digitally. In fintech, the concept of *tokens* as means of transfer of digital values has become widely accepted.

Tokens are issued directly on a blockchain and exist as digital units and part of a protocol in a (typically publicly accessible) database, which documents their existence and transfer. Issuers can configure the tokens differently; hence, in practice they represent a wide variety of content or rights. In its ICO Guidelines published on 16 February 2018, FINMA differentiates between three categories of tokens, however, in practice, there are further, so-called hybrid categories of tokens.

If tokens contain a claim against the issuer (e.g. the right to use certain services), then under applicable Swiss law the transfer must be executed by way of assignment in accordance with article 164 et seq. CO, provided the tokens are not securitized or issued as book-entry securities. Technically, there is a legal issue arising from such a transfer because Swiss law requires a valid assignment to be in written form (article 165 (1) and 973c (4) CO for the transfer of uncertificated securities).

In reality, however, the transfer of tokens takes place only on a blockchain and not in written form. Therefore, despite the representation of a claim in a token, such claim cannot lawfully be transferred by a mere database entry on a blockchain. Although both, a physical signature or a qualified electronic signature, would meet the legal requirement of the written form, such form is neither common nor practicable nor sensible when transferring tokens on a blockchain.

Unless the above-mentioned written form requirement is met (as required for the transfer of tokens that represent a claim), the transfer of a token would be invalid, and thus the claim would not have been validly transferred to the purchaser. Therefore, the question to consider is whether tokens can be transferred (*de lege lata*) in a form other than a written assignment or whether there is a need for a respective change in law (*de lege ferenda*).

De lege lata, the only viable way would be to acknowledge that tokens can be transferred like securities, i.e. that securities can be issued in form of tokens. Any alternative hereto would require a change in law. Therefore, we deliberately focus on the approach *de lege lata* in order to trigger a discussion on the risks and the viability thereof before concluding that a change in law might become inevitable.

2) Legal Qualification of Tokens

a) Qualification of Tokens as Securities

i. Securities Concept

According to Art. 965 CO, a security is any certificate to which a right is linked in such a way that it can neither be claimed nor transferred without the certificate. Thus, in order to be a security, there must be (i) a certificate, (ii) which securitizes a claim, and (iii) the link between claim and certificate must be narrow as to avoid an entitlement to the claim without the certificate.

ii) Criteria for the Qualification of Securities Certificates

(1) The Certificate

In private law terms, a certificate is a written document containing a declaration with private law relevance. A certificate thus consists of (i) a *declaration bearer* and (ii) a *declaration of intent* associated therewith, typically on a piece of *paper*. With respect to so-called *electronic certificates*, some legal scholars are of the view that a certificate does not necessarily have to be in paper form, but that any "material" on which declarations can be attached should be considered an appropriate certificate substance, irrespective of any form. A certificate is thus a bearer for a sign, i.e., the securement of information for later retrieval; the substance of the declaration bearer seems to be irrelevant, as correspondingly regulated in criminal law.

Further, some legal scholars are of the opinion that securities are not subject to the simple written form requirement according to article 12 et seq. CO, but rather to the principle of form freedom according to article 11 (1) CO. Whether the signature constitutes a validity requirement for a security is thus dependent on the right to be securitized (e.g., articles 622 (5), 1096 (7), 1100 (6), 1153 (1) CO). Consequently, a certificate does not necessarily have to be expressed in written form.

The certificate should: (i) be able to record a statement, (ii) be accessible to a designated group of persons, and (iii) have a certain durability, even if the declaration bearer and the declaration of intent are not necessarily inseparable. If these criteria are met by an electronic data carrier, it can qualify as an electronic certificate pursuant to article 965 CO. However, the use of electronic data carriers as a certificate is excluded if the signature is a validity requirement and the signature cannot be attached by an electronic signature (for example in the corresponding smart contract).

An exception applies in cases where a facsimile signature is customary (article 14 (2) CO) and where it can be technically attached.

In a next step, the question arises as to whether a token, respectively a token in connection with its underlying publicly accessible database on a blockchain and the private key, can be considered a certificate pursuant to article 965 CO. For this, it is necessary that a token comprises a declaration bearer and a declaration of intent associated therewith. Along with a publicly accessible database which has a definable collection of data on a blockchain, a token can qualify as a kind of declaration bearer if the token contains a hash value (as the case may be in connection with a smart contract) that is visible to all network participants concerned and unambiguously refers to the declaration of intent underlying the issue of the token, which is typically included in a (conventional) document (e.g., white paper).

A token, respectively a publicly accessible database on a blockchain, is indeed a new technology that is not physical, such as a CD, however, tokens in connection with a publicly accessible database and the necessary technical means are suitable to record a declaration. This declaration in a token is then permanently linked to its underlying publicly accessible database on a blockchain. The content of the declaration can be accessed by anyone at any time on the respective blockchain. However, only the owner of a private key remains entitled to the token. Blockchain technology also ensures that the data is immutably stored, respectively that any changes are visible and traceable.

Accordingly, there are good reasons why a blockchain can fulfil the same functions as an electronic data carrier or a conventional paper certificate. According to this view, a token in connection with the underlying publicly accessible database on a blockchain and the private key can fulfill the requirements of a certificate pursuant to art. 965 CO, at least provided that the right underlying the token does not require the written form and neither an electronic nor a facsimile signature can be attached.

(2) The Securitized Right

Basically, there are three categories of rights that can be securitized in a security: (i) claims, (ii) membership rights and (iii) real rights (rights *in rem*).

Due to their shapeable characteristics, the tokens must be qualified on a case-by-case basis. However, most tokens include a claim as they give the token holder a right against the token issuer. Such entitlements are mainly enshrined in utility tokens (e.g., right to access a particular platform) and asset tokens (e.g., right to dividends). Tokens comprising certain claims can be securitized in a security. However, it is not possible to shape payment tokens in form of securities - i.e. units of mere *cryptocurrencies* and thus not legally recognized, but factually usable means of payment. Payment tokens do not entitle the token holder to any claims against the issuer.

(3) The Connection between Right and Certificate

In addition, the certificate has to be linked with the right in such a way that the right cannot be exercised without the certificate. This is ensured by means of a certificate clause. There are five different types: (i) simple presentation clause, (ii) simple legitimation clause, (iii) simple security clause, (iv) order clause, and (v) holder clause.

There are three categories of securities: registered securities, instruments to order and bearer securities. A security is deemed to be a bearer security if the wording or the form of the certificate shows that the current bearer is recognized as the beneficiary (article 978 CO).

With respect to the question of whether tokens are to be qualified as one of the three types of securities, it can be stated that the certificate consists of a combination between the token, the information stored in the publicly accessible database on a blockchain and the private key. A token is a bearer security, if the right is securitized in such a way that the bearer and only the bearer of the token (together with the private key) is entitled to request performance. Therefore, the obligated party is solely able to perform to the bearer with discharging effect. The form of the certificate, i.e. the token stored in the publicly accessible database on a blockchain in connection with the private key, evidences that the respective owner of the private key is recognized as the entitled party (cf. article 978 (1) CO). Only the owner of a private key can claim the right securitized within the token. The token (along with the private key and the distributed ledger on the blockchain) contains a bearer clause as the owner of the private key is entitled to claim the right by merely presenting the token and the private key.

(4) Interim Conclusion

Since only the bearer of the private key can control the token like the bearer of a classic "security", based on a teleological interpretation, there are good reasons to qualify a token as a security pursuant to article 965 CO. Given the absence of court practice with this respect, however, there is (still) no legal certainty. Hence, this contribution aims to trigger the discussion around these specific legal issues.

b) Qualification of Tokens as uncertificated securities

i. Concept of Uncertificated Securities

As an alternative to the discussed securities, uncertificated securities are rights with the same function as securities (article 973c (1) CO).

ii. Criteria for Qualifying Uncertificated Securities

In order to issue uncertificated securities, the following conditions must be met: (i) authorization by the issuer, (ii) rights with the same function as securities and (iii) entry in the book of uncertificated securities.

(1) Authorization by the Issuer

The issue of uncertificated securities requires an authorization or a consent of the depositor - either in the terms of the issue or in the articles of association of the company (article 973c (1) CO). The terms of issue (borrowing terms) may be construed as a summary of all the relevant terms of the issue (such as amount, maturity, interest rate, etc.) based on which the issuer concludes independent stand-alone contracts with a large number of lenders. If membership rights are involved, an authorization is required in the articles of association of the company. In case that a consent of the parties entitled to the uncertificated security (as depositor) is given, uncertificated securities can be issued based on such consent of the entitled party.

The token issuer may further specify the terms of issue of his tokens in the "token terms" (usually published in a white paper, prospectus or even separately). These token terms comprise all essential elements of the tokens. The token issuance is subject to an authorization in their terms, unless it is related to membership rights.

(2) Rights with the same Function as Securities

Uncertificated securities may be defined as rights that are issued in a large number and are generally identical based on a common legal basis (e.g. articles of association or terms of issue).

Tokens are issued in a large number, they are generally identical and have similar characteristics (e.g., same debtor, same rights, same denomination). Hence, the person who acquires the uncertificated security is irrelevant. For the rights contained in uncertificated securities, reference is made to the above explanations related to the securitized rights.

(3) Book of Uncertificated Securities

According to article 973c (3) CO, uncertificated securities are created by entry into the book of uncertificated securities (constitutive effect), which is administered by the issuer (article 973c (2) CO). In the book of uncertificated securities, the issuer keeps the records of the number and denomination of the issued uncertificated securities and of the creditors. For this purpose, an electronic bookkeeping of the uncertificated securities is sufficient.

Tokens are generated on a blockchain, which e.g. does not only register ownership rights in a distributed ledger, but also token transactions. Since the book of uncertificated securities can also be administered electronically, a blockchain can be considered a book of uncertificated securities. Thus, tokens representing uncertificated securities are generated by way of entry on a blockchain.

iii) Interim Conclusion

The rights established in the token can be qualified as uncertificated securities pursuant to article 973c (1) CO; in its ICO Guidelines published on 16 February 2018, FINMA follows the same line of thinking. Unlike securities, uncertificated securities lack the connection to a certificate, which is why the uncertificated security is separate from the token and can be separately transferred. This is in contradiction to the practice as a token, similarly to a security, is aimed to fulfil a function of legitimation and transferability with respect to the underlying right.

c) Summary

Tokens intended to convey relative rights can thus be shaped and issued in the form of securities (based on a teleological interpretation under current law) as well as of uncertificated securities. In practice, usually uncertificated securities are issued. Ultimately, it depends on the intention of the issuer whether he wants to issue tokens in the form of securities.

3) Transfer of Tokens

a) Transfer of (*digital*) Securities

The transfer of securities is governed by the rules of property law (article 922 et seq. CC). The transfer of the securitized right takes place not by assignment but by transfer of possession of the certificate itself (article 967 CO).

A transfer of possession is necessary because only the bearer of the certificate can claim the securitized right. The transfer is governed by article 922 CC, but there are in general also alternative transfer options applicable for securities.

i. Transfer of Title

According to article 922 CC, title is transferred by handing over the item itself as well as by the conclusion of a valid transfer contract (article 922 CC as well as article 967

(1) and (2) CO). The transfer of possession must meet the following conditions: (i) the transferor must be the immediate possessor of the item, (ii) the factual control must be transferred to the transferee and (iii) both parties must have the willingness to transfer the item. In the case of bearer securities, no special formalities apply to the transfer agreement.

The determination of the meaning of the "transfer criterion" pursuant to article 922 CC in connection with article 967 CO has to be done in accordance with generally accepted interpretative methods. From the outset, two traditional methods of interpretation, namely grammatical and historical interpretation, are not applicable against the background of a new technological phenomenon, e.g. the token. Therefore, the teleological elements of interpretation that relate to the meaning of a norm are paramount. The Federal Supreme Court is regularly committed to a method pluralism, i.e. to a case-by-case application of those interpretation elements that give access to the proper meaning and content of a norm.

Tokens are ultimately digital data. Due to lack of physicality, tokens do not qualify as physical item and therefore cannot be physically transferred. Therefore, it is largely uncontested in legal doctrine that the traditional transfer of title is not applicable to the transfer of tokens. However, it remains to be analyzed whether the above-mentioned acknowledgment of digital securities can influence the assessment from a property law point of view.

Following the understanding that certificates can also have a digital shape, a digital transfer should be possible, even if the transfer does not take place physically. Against the background of the technical developments in recent years and based on a teleological interpretation, the transfer of title pursuant to article 922 CC should also allow for a valid transfer through digital means. This is because it ultimately fulfills – with the exception of the physical transfer (which incidentally is already considered fulfilled under current law when the removal permission of the item is given) – each criterion of a valid transfer: The token issuer and the token buyer (or the token sellers and the token buyers) conclude a contract (e.g. purchase agreement) in which a clear intention for a transfer of title of the token is expressed. In addition, the factual authority is transferred to the purchaser by the fact that the owner of the token or the private key has the actual power over a token, as required by article 919 (1) CC.

ii. Transfer of Title by way of Instruction

In special cases provided by law, the transfer of title mentioned above is not a requirement of a lawful transfer (so-called transfer surrogates, article 924 (1) CC). Such a legal transfer surrogate is the transfer of title by way of instruction. The transfer of title by way of instruction does not transfer the immediate possession, but the indirect possession. The immediate possessor remains the third party that holds the item.

In order for a transfer of title to happen by way of instruction, (i) there must already be staged possession, (ii) ownership of and control over the item must be with the possessor (and not with a possessor's agent), and (iii) there must be an agreement between the seller and the purchaser (agreement on the transfer of title by way of instruction) based on which the third party (as immediate possessor) exercises possession on behalf of the purchaser.

The transfer of title is triggered by a mere agreement between the seller and the purchaser. The written form, which is problematic for a token transfer, is not required for such an agreement. This transfer of title has only effect vis-à-vis the third party once the third party has been notified by the seller. This means that the third party does no longer exercise possession for the seller, but for the purchaser. The legal relationship between the third party and the purchaser continues to be the original one between the immediate possessor and the seller.

A staged possession exists when the item is in the custody of a third party holding the item as the immediate possessor (e.g. tenant-landlord). The immediate possessor is a person who can directly exercise factual authority over an item (i.e. without intermediary). If the possessor transfers the exercise of the factual authority to a third party, he becomes an indirect possessor.

If a token buyer purchases a token, the token issuer will transfer the token on a blockchain directly in the token buyer's wallet. His possession of the token is – provided the token has been lawfully transferred – autonomous and immediate. The factual direct authority is only with him and only the token buyer, being the owner of the private key, has access to the token. Thus, he can act directly and without an intermediary. Therefore, there would be no staged possession and a valid transfer of title by way of instruction would not be possible.

However, if necessary, staged possession can be assumed if the token remains with the token issuer and the token is not transferred to the token buyer (e.g. based on a specific agreement). In such a setting, the token buyer would be the indirect possessor and the token issuer the immediate possessor. By mere agreement, which does not need to be in writing, the possession of a token could be transferred from the token issuer to the buyer. The indirect possession would pass from the previous token owner to the buyer. The token issuer remains the dependent, immediate possessor and would now have possession for the buyer. The staged possession would thus continue to exist after the transfer of the indirect possession of a token.

However, in this relationship, it is necessary that the token issuer has possession of the token and not only acts as a possession agent. This is regularly the case if the token issuer would hold the token for the token buyer because the token issuer would depend on the instructions of the token buyer. He would thus only be a possession agent. Therefore, the legal institution of the transfer of title by way of instruction, which has the advantage to have effect without the written form requirement, would not be applicable to most token transfer transactions.

iii. Interim Conclusion

Following the understanding that securities can also be shaped digitally, the digital transfer should equally be possible, and this as a special type of transfer of title. The transfer of title by way of instruction would only be applicable in rare cases. Legal certainty is missing so far due to the lack of court practice.

b) Transfer of Uncertificated Securities

The problem with the qualification of tokens as uncertificated securities lies in the transfer thereof. According to article 973c (4) CO, the transfer of uncertificated securities requires a written assignment declaration. Hence, for a lawful transfer of tokens – which are issued in the form of uncertificated securities – either the law should be revised or the scope of the transfer provisions should be extended as to allow transfers for digitally transferable uncertificated securities in a form-free manner. Such an extension of the scope would also require a change of law; a concrete proposal is formulated below.

Martin Hess and *Stephanie Lienhard* (*Übertragung von Vermögenswerten auf der Blockchain, in: Jusletter of 4 December 2017*) have submitted (and substantiated in detail) a proposal - based on the change in securities law initiated by the FISA (*Bucheffektengesetz*, *BEG*) - which was published and based on the idea that, following the de-materialization of the security by the uncertificated security pursuant to article 973c CO, also the digitization by tokens could be covered by law with a new article 973d CO.

The authors are of the opinion that the mentioned appropriate proposal should be formulated in more *technology-neutral* terms as to comprehensively cover – to the extent possible – any future developments in the area of bitcoin, protocols, distributed ledgers, and tokens etc. without requiring yet another law change. Such a new legislative provision, which would have to be incorporated in the CO as article 973d, could have the following wording:

– The debtor may issue fungible rights in a digitally transferable form having the same function as uncertificated securities (as defined in article 973c CO) or substitute digitally transferable securities with fungible securities or global certificates entrusted to a single custodian, provided that the conditions of issue or the articles of association of the company provides for it, or the depositors have given their consent.

- The debtor registers the number and denomination of the issued digitally transferable uncertificated securities and their creditors in a decentralized transaction ledger.

- The digitally transferable uncertificated securities are created upon entry in the decentralized transaction ledger, provided independent expertise has checked and confirmed their functional reliability and compliance with the terms of issue or the articles of association of the company.

- The disposition of digitally transferable uncertificated securities (transfer of title, granting of collateral with full legal rights or as a pledge) takes place through the transfer of the digitally transferable uncertificated securities in the decentralized transaction ledger.

- The provisions of the Federal Act on Intermediated Securities (FISA) are applicable analogously.

These terms cover all tokens that contain claims, membership rights and real rights (rights *in rem*) vs. an issuer, as well as asset tokens. This would allow what already is allowed within the regulatory framework under current law: The asset tokens could be transferred in a form-free manner pursuant to article 24 FISA.

c) Transfer of Payment Tokens

Payment tokens do not provide specific rights to the token holder and are therefore neither securities nor uncertificated securities. The same applies to those utility tokens which, due to a decentralized infrastructure, do not constitute relative rights in view of the lack of a counterparty. Cryptocurrencies and, thus, also payment tokens are generally not recognized as legal currencies. However, the development and use of private means of payment do not violate Swiss currency law. Under civil law, private means of payment, such as payment tokens, can be stipulated to be acceptable means of payment, as exemplified by the WIR money in circulation for over 80 years. The only requirement is that the parties accept payment tokens as a means of payment. The provisions of the Code of Obligations are applicable for the stipulation of payment tokens.

However, the question also arises with regard to payment tokens as to how they can be lawfully transferred. In order for the debtor to fulfill his debt, title on a payment token must be lawfully transferred, i.e. as in the case of a purchase agreement, ownership on the stipulated private means of payment needs to be transferred. This transfer is governed by the aforementioned principles of property law of article 922 seq. CC.

Payment tokens can therefore also be lawfully transferred to the creditor by a digital transfer in the sense of the aforementioned considerations.

d) Other Transfer Options

i. Transfer by way of Assignment

If tokens contain a claim against the issuer, the claims under applicable Swiss law must in principle be transferred by way of an assignment in accordance with article 164 et seq. CO, provided the tokens are not securitized or issued as book-entry securities. The assignment, as mentioned, can only achieve practicability if article 165 CO were revised.

ii. Transfer by way of Contract Transfer

Another legal option would be to transfer the entire contract instead of a single token. Swiss law namely allows not only to transfer specific claims, but also contracts as a whole. This means that the transfer of the original contract between the token issuer and the original token holder takes place by way of a new contract between the two original parties and a third party, i.e. the new token holder.

The token holder transfers all rights and obligations under the original contract to a third party. After the transfer, the third party becomes the contractual party and replaces the previous token holder. All involved parties must agree to this transfer in order for the transfer to be valid.

The contract relating to the transfer of the original contract is subject to the same formal conditions as the original contract. As a result, unless there are formalities required for the original contract, the contract does not need to be in writing. Since the transfer of a contract, unlike the assignment of claims, does not require any written form, the contract transfer can occur in a form-free manner. In particular, given that a party is in a position to express its consent to the transfer of a contract in advance, the token issuer can already consent to the transfer of tokens (or the token contract) when issuing the tokens. However, it should be noted that the participation of an issuer in a contract transfer is impracticable if the transfer is made via a trading platform. A permanent offer in the general terms and conditions for the transfer to any third party is contested by the scholars and causes in practice also difficulties in view of the global adoption of general terms and conditions.

iii. Transfer through Creation of Book-Entry Securities

Another way to transfer tokens in a form-free manner is to issue tokens as book-entry securities. In this case, tokens would need to be deposited as securities or uncertificated securities with a custodian or registered in its main register and the respective rights are to be credited in a securities account (article 6 (1) FISA). The transfer of book-entry securities takes place by means of an instruction of the seller (article 24 FISA), which is not subject to any formal requirements.

The creation of tokens as book-entry securities, however, is hampered by the requirement of the central custodian. According to article 4 FISA, securities accounts can only be managed by one custodian. The provision of article 4 FISA is concluding according to the will of the legislator. Article 4 (2) FISA, therefore, provides for a specific list of domestic financial intermediaries which may act as custodian, and article 4 (3) FISA contains a provision concerning foreign financial intermediaries.

Even without an in-depth analysis, the issuers of tokens or the "operators" of a blockchain protocol (e.g. Ethereum) cannot act as a bank (lit. a), a securities dealer (lit. b), a fund management company (lit. c), the Swiss National Bank (e) or the Swiss Post (f). At best, the central securities depositories (lit. d) could be considered under article 61 FMIA. However, in this respect, at most only the "operator" of a blockchain protocol would be eligible, such as e.g. the Ethereum Foundation, which could be considered the operator of a central depository (i.e. an institution that centrally manages securities and other financial instruments based on common rules and procedures). However, this option is not applicable as a blockchain (or blockchain protocol) is a decentralized ledger or registry that is precisely not administered by a central agency.

iv. Transfer by way of Instruction

Furthermore, payment tokens, as already done for cashless payments, could be transferred by way of instruction, which is generally valid in a form-free manner (pursuant to article 466 seq. CO). However, the traditional legal framework governing instructions does not fit well with the token transfer characteristics; in particular, a revocation (article 470 CO) is technically impossible.

4) Outlook

We are of the opinion that, based on a teleological interpretation of article 922 CC, the existing law does not preclude the pure digital transfer of tokens, provided that they are shaped as electronic securities and kept in a decentralized transaction ledger. Such an interpretation is also justified by the practical circumstances and the economic efficiencies associated with it. However, given the lack of court practice on these aspects, the legislator should consider to eliminate any residual uncertainty and initiate a change in law by introducing a new article 973d CO.

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An Update on International Arbitration and Financial Institutions

Reference: CapLaw-2018-31

Unlike other sectors, the financial sector has been reluctant to embrace international arbitration for resolving finance disputes. The ICC Commission on Arbitration and ADR created the Task Force on Financial Institutions to study the concerns of financial institutions. The study's findings were published in a report in December 2016. This article builds on the findings of said report and provides an update on the status of international arbitration in the financial sector.

By Thomas Werlen / Jascha Trubowitz

1) Awareness of international arbitration within the financial sector

The financial sector has always lagged behind other sectors, such as construction, energy and insurance, in choosing international arbitration to resolve finance disputes. A 2013 Survey by Queen Mary University of London found that the sectors construction and energy prefer to use international arbitration in 56% resp. 68% of disputes, while the financial sector's preference stood at 23% (by contrast preference for litigation stood at 82%).

The ICC Commission on Arbitration and ADR (the Commission) established a task force, the Task Force on Financial Institutions and International Arbitration (the Task Force), to determine why the financial sector has been reluctant to use international arbitration. After a two-year study, which included interviews with about 50 financial institutions and information from 13 arbitral institutions, the Task Force released a report in December 2016 (the Report). The key discovery of the Report was that financial institutions are not inherently opposed to international arbitration. In fact, they do use international arbitration to resolve finance disputes but not on a consistent basis or on a large scale (p. 2 of the Report). As identified in the Report, it appears that financial institutions have common misconceptions about the arbitration process and lack an overall awareness of the benefits of international arbitration.

The interviews with the financial institutions revealed that many of these have had a general lack of awareness about international arbitration, which can be attributed to the financial institutions having had little or no exposure to international arbitration (p. 8 of the Report): 70% of the interviewees were not aware of whether their financial institution had been involved in any international arbitration proceedings within the last five years. 24% of the interviewees had used international arbitration in at most five percent of their disputes, while only six percent of the interviewees used it in more than five percent of their disputes.

2) The key issues raised by skeptical financial institutions

The lack of exposure to international arbitration has certainly played a key role in the skepticism financial institutions have shown towards international arbitration. While financial institutions have been skeptical about specific issues, they also have common misgivings shared by other sectors (p. 10 of the Report):

- Setting precedents: For financial institutions, it is essential that they can count on precedents as to ensure predictability and legal certainty. They fault international arbitration for the lack of transparency and available mechanisms for setting precedents.
- Interim measures: Many financial institutions believe that interim measures cannot be obtained through arbitration.
- Costs: Misgivings about costs have been a perennial criticism of international arbitration and not limited to the concerns of financial institutions.
- Summary/default awards: Financial institutions strongly favor rapid adjudication of claims in open-and-shut cases. The absence of summary/default awards in international arbitration is particularly concerning to financial institutions.

Although financial institutions remain skeptical about international arbitration, there are, nonetheless, global forces driving the need to reevaluate or at least reconsider the use of international arbitration for finance disputes.

3) The financial sector has gone global – can litigation keep pace?

Historically, London and New York have served as the world's preeminent financial centers. This has allowed the local courts in those jurisdictions to develop expertise in resolving finance disputes and thus ensure legal certainty for the financial institutions operating there. Financial institutions have therefore overwhelmingly litigated their finance disputes before courts in London and New York.

However, financial institutions are no longer only clustered in those two jurisdictions. According to the 2018 S&P Global Market Intelligence Report: Of the 100 largest banks in the world (in terms of assets) 18 are Chinese (four of these take the top positions in the ranking), eight are Japanese, six are South Korean, three are Singaporean and one is Indian.

The globalization of the financial sector raises a number of practical questions for the suitability of litigation in the financial sector. Court decisions are no longer only enforced in London and New York but increasingly all over the world. It is also difficult to ensure consistent interpretation of financial contracts across the globe through litigation, as judges in different jurisdictions may not have the same expertise and training to resolve finance disputes. In this regard, it is also unclear how one can ensure the availability of expertise beyond the financial centers of London and New York. Thus, it is questionable whether finance disputes can still be resolved effectively through litigation in a globalized financial sector.

4) International arbitration is suited to the needs of the globalized financial sector

While financial institutions have shown much skepticism in the past about using international arbitration, attitudes will naturally have to shift given the globalization of the financial sector. International arbitration is, unlike litigation, well suited to the challenges that globalization presents to dispute resolution. In addition, many of the issues raised by financial institutions have either been addressed or can be resolved by using international arbitration:

– Enforcement: Thanks to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention) financial institutions may enforce arbitration awards in more than 150 jurisdictions across the globe representing every commercially important country.

– Transparency: For certain areas, such as derivatives and the loan and bond market, transparency is key to developing a consistent body of law. Arbitration institutions have a solution for this. P.R.I.M.E Finance and the International Chamber of Commerce may publish redacted awards, insofar no party expressly prohibits it.

– Interim measures: Most arbitration institutions also have arbitral rules in place that provide for an emergency arbitrator that may grant interim measures.

– Expert adjudicators: Disputes involving questions about complex financial markets require expert decision makers. International arbitration allows financial institutions to appoint arbitrators with the specific expertise and knowledge in banking and financial markets.

– Summary/default awards: Through an arbitration agreement, financial institutions can tailor the arbitration procedure to the specific needs of a transaction. If quick adjudication is required, the arbitrators may be empowered in the arbitration agreement to decide on a summary basis.

– Costs: The length of the arbitration proceeding can be a major cost-factor. Time limits could be specified in the arbitration agreement to reduce costs.

5) Arbitration institutions are leading the way

Arbitration institutions have made preparations for administrating finance disputes and are thus confident that financial institutions will begin to turn to international arbitration more often. In 2012, the arbitration institution P.R.I.M.E. Finance was established. It is solely specialized in the settlement of finance disputes. In 2018, the Hong Kong International Arbitration Centre launched its panel of expert arbitrators for financial services disputes. Hence, there are efforts in the arbitration community to align international arbitration to the needs of financial institutions.

Progress is, albeit slowly, being made to persuade financial institutions of the benefits of international arbitration. A 2018 International Arbitration Survey conducted by Queen Mary University of London with White & Case (the Survey) found that 56% of the respondents to their survey anticipated an increase in the use of international arbitration in the financial sector. The Survey also reported that arbitration institutions are eager to enhance their rules to reflect the needs of the financial sector.

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Untrue or Incomplete Information in Offer Prospectus

Reference: CapLaw-2018-32

On 22 November 2017, the Swiss Takeover Board issued a ruling regarding untrue or incomplete information with respect to the offeror contained in the offer prospectus published by HNA in connection with the public tender offer for all shares in gategroup.

By Hans-Jakob Diem / Andreas Hinsen

1) Public Tender Offer for gategroup Holding Ltd.

On 11 April 2015, HNA Aviation (Hong Kong) Air Catering Holding Co., Ltd., Hong Kong (HNA) published the pre-announcement of its public tender offer (Offer) for all publicly held shares of gategroup Holding Ltd, Kloten, Switzerland (gategroup). The offer prospectus (the Offer Prospectus) was published on 20 May 2016.

The offer price was set at CHF 53.00 in cash for each registered share of gategroup and the Offer allowed for dividend payments in the aggregate amount of CHF 0.30 as was resolved by the ordinary general meeting of gategroup in April 2016. The Offer was, *inter alia*, subject to a minimum acceptance level of 67% as well as approval by all competent merger control authorities or expiry of the applicable waiting periods.

The initial acceptance period was open until 1 July 2016, with the additional acceptance period ending on 21 July 2016. On 22 July 2016, HNA published the definitive final result according to which, after the additional acceptance period, 96.1% of all gategroup shares were held by HNA. However, due to outstanding merger control approvals, completion of the Offer had to be postponed to the end of the third or beginning of the fourth quarter 2016. By ruling dated 18 November 2016, the Swiss Takeover Board granted an additional extension to complete the Offer until 31 December 2016. In the meantime, the tendered gategroup shares were traded on a separate trading line.

Finally, after all required approvals were obtained, on 20 December 2016, the separate trading line for the tendered gategroup shares was closed and the settlement (i.e. payment of the offer price) occurred on 22 December 2016.

2) Shareholders of HNA according to the Offer Prospectus

As required under Swiss takeover law, the Offer Prospectus contained the following description of the shareholders directly or indirectly controlling HNA:

"[HNA] is an indirectly controlled subsidiary of HNA Aviation. […] HNA Aviation is directly held and controlled by HNA Group. HNA Group is directly and indirectly controlled by Hainan Airlines Company Limited Employees Union Committee (HNA Employees Union) and Hainan Province Cihang Foundation (Cihang Foundation), which together own approximately 70.25% ownership interest in HNA Group. […] HNA Employees Union indirectly owns approximately 47.50% of HNA Group. […] Cihang Foundation indirectly owns approximately 22.75% of HNA Group. Bharat Bhisé […] indirectly owns approximately 17.40% of HNA Group. Jun Guan […] indirectly owns approximately 12.35% of HNA Group."

Summarizing the above, HNA was, according to the information published in the Offer Prospectus indirectly controlled by HNA Employees Union (47.50%), Cihang Foundation (22.75%), Bharat Bhisé (17.40%) and Jun Guan (12.35%).

3) Subsequent Financial Times Articles

In a Financial Times article which was published on 2 June 2017 with the title *"Who owns HNA, China's most aggressive dealmaker?"*, the ownership structure of HNA Group was described somewhat differently. According to this article, and by making reference to Chinese corporate filings, 13 individuals – all except one members of the top management of HNA Group – held together 76% of HNA Group. In particular, Chen Feng and Wang Jian each supposedly held 15% and Jun Guan approximately 29% in HNA.

Upon learning of this article, and in light of the possible untrue or incomplete information on the shareholders of HNA contained in the Offer Prospectus, the Swiss Takeover Board requested HNA on 12 July 2017 to comment on this Financial Times article. On 24 July 2017, HNA published its then current ownership structure, stating that, *inter alia*, Chen Feng and Wang Jian each hold 14.98%, Hainan Cihang Charity Foundation holds 29.5% and Hainan Procinve Cihang Foundation holds 22.75% in HNA (in each case indirectly).

In an additional article published by the Financial Times on 25 July 2017, the CEO of HNA Group, Tan Xiangdong, was quoted as follows: "*The [29.%] stake is [HNA's] own stake. For the whole time, [Mr Guan and Mr Bhisé] had just held the stake for us. That's why I can move the shares*". After a further exchange of information between HNA and the Swiss Takeover Board, HNA confirmed on 19 October 2017 that (i) Bharat Bhisé and Jun Guan were acting as nominee shareholders and (ii) in December 2015 a 47.5% interest in HNA Group was transferred from Hainan Airlines Company Limited Employees Union Committee to Chen Feng, Wang Jian, Tan Xiangdong, Li Xianhua, Li Qing and Chen Wenli (together the Co-Founders) based on a share option scheme concluded in 2008.

4) Ruling by the Takeover Board

In its ruling dated 22 November 2017, the Swiss Takeover Board concluded that the Offer Prospectus contained untrue or incomplete information on the ownership of HNA, in particular since Bharat Bhisé and Jun Guan were acting as nominee shareholders and the Co-Founders should have been disclosed as group controlling HNA. Since the Offer was already closed in December 2016, i.e. almost one year since the date of this ruling, the Swiss Takeover Board did not require HNA to publish an updated version of the Offer Prospectus. In addition, Ernst & Young AG was mandated to confirm whether the Co-Founders as well as Bharat Bhisé and Jun Guan complied with the minimum price rule and the best price rule. However, the Swiss Takeover Board explicitly stated that (i) due to the lack of a legal basis no fine would be imposed but (ii) it would inform FINMA and the Disclosure Office of SIX Exchange Regulation of this ruling. It should be noted that untrue or incomplete information in the report of the board of directors of the target would be subject to a fine of up to CHF 500,000 under applicable Swiss takeover laws.

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IPO of Klingelnberg

Reference: CapLaw-2018-33

Klingelnberg Ltd, a global leader in developing and manufacturing premium machine tools for bevel gear and cylindrical gear machining and precision measuring centers for gears, successfully priced its IPO and listed its shares on the SIX Swiss Exchange. Trading in the shares started on 20 June 2018. The shares of Klingelnberg were priced at CHF 53 per share, near the upper end of the price range, corresponding to a base offer of CHF 241 million. The offer price implies a market capitalization of approx. CHF 470 million leading to a free float of 56.6% (assuming full exercise of the over-allotment option), whereas the remaining 43.4% remain with the Klingelnberg family as anchor shareholder.

Issue of Senior Exchangeable Notes with Issuer Stock Settlement by Swiss Re

Reference: CapLaw-2018-34

On 20 June 2018, Swiss Re Ltd completed an offering of USD 500 million 6-year senior exchangeable notes, which may be stock settled at the option of Swiss Re or may be exchanged at the option of noteholders for registered shares of Swiss Re, unless Swiss Re elects to settle the exchange of notes in cash. Swiss Re has purchased call options on its own shares, which allow it to settle an exchange by noteholders without issuing new shares.

As is customary for international offerings of debt securities by Swiss (re-)insurers, Swiss Re issued notes to, and which are held by, a repackaging vehicle, in this case ELM B.V. (or a nominee acting on its behalf). ELM B.V. issued its own 6-year exchangeable notes secured by the notes issued by Swiss Re.

Placement of Senior Convertible Bonds by Sika and Creation of Unitary Shares

Reference: CapLaw-2018-35

On 15 May 2018, Sika AG completed the placement of CHF 1,650 million senior convertible bonds due 2025 to be listed on the SIX Swiss Exchange. The convertible bonds were provisionally allocated to investors participating in an institutional book building. The allocation is subject to claw back by existing shareholders who may exercise their subscription rights. The offering closed on 5 June 2018.

Subsequently, on 11 June 2018 the Extraordinary General Meeting of Sika AG approved, among others, the creation of unitary registered shares, the abolishment of the opting-out and transfer restrictions as well as the cancellation of the treasury shares purchased from Schenker-Winkler Holding AG as part of the settlement with Saint-Gobain.

IPO of Polyphor

Reference: CapLaw-2018-36

Polyphor Ltd, a clinical-stage biopharmaceutical company focused on the discovery and development of innovative antibiotics and other specialty pharma products, successfully priced its IPO and listed its shares on the SIX Swiss Exchange. Trading in the shares started on 15 May 2018. The shares were priced at the upper end of the price range, resulting in gross proceeds of CHF 155 million.

IPO of CEVA Logistics

Reference: CapLaw-2018-37

CEVA Logistics, one of the world's leading third-party logistics companies, successfully priced its IPO and listed its shares on the SIX Swiss Exchange, where trading commenced on 4 May 2018. With a market capitalization of CHF 1.6 billion and generating gross proceeds of CHF 821 million, this is so far considered as the largest IPO on the SIX Swiss Exchange for 2018. In addition, CMA CGM, the third largest container shipping group in the world, has committed to make a strategic cornerstone investment in CEVA Logistics by purchasing CHF 379 million of mandatory convertible securities which will convert into shares of CEVA Logistics once certain regulatory approvals have been obtained. Simultaneously with the IPO, CEVA Holdings, the former holding company of the CEVA group, migrated from the Marshall Islands to Switzerland by way of a cross-border merger with CEVA Logistic as the surviving company.

Corporate Governance for Banks – Legal and Regulatory Requirements and Best Practices

Friday, 10 August 2018, CS Forum St. Peter, Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Vortrag_Spezial_10.08.18_.pdf

Capital Markets and Transactions XIV (Kapitalmarkt – Recht und Transaktionen XIV)

Tuesday, 27 November 2018, Metropol Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Programm_Kapitalmarkt_27.11.18.pdf

21st Zurich Conference on Mergers & Acquisitions (21. Zürcher Konferenz Mergers & Acquisitions)

Tuesday, 4 September 2018, Lake Side, Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Programm_M_A_04.09.2018_01.pdf

In light of the changing data protection laws, CapLaw has recently released a privacy statement. The privacy statement, as updated from time to time, is available on our website (see http://www.caplaw.ch/privacy-statement/). For any questions you may have in connection with our data processing, please feel free to contact us at privacy@caplaw.ch.