

KNOETZL

SUPREME COURT DECISION ON THE BUSINESS JUDGMENT RULE

The Austrian Supreme Court recently issued its first decision (6 Ob 160/15w) on the Business Judgment Rule that was introduced into law as of 1 January 2016. Since this is the first decision on the Business Judgment Rule, the court took the opportunity to make its views on certain central issues clear

KNOWHOW

UPDATES FOR “STIFTUNGSVORSTÄNDE”

The decision-making process of your foundation's board should conform to the new Business Judgment Rule:

- Strict adherence to the limits of authority (by-laws, foundation deed, law); Provisions on fraudulent accounting have been harmonized;
- Avoid extraneous influences/self-dealing; Gross negligence has been defined;
- Gather sufficient information (poss. expert opinions);
- Justify your “good faith” that the decision is in the interests of the company.

Courts will be reluctant to question the content of the board's decision, thus providing a safe harbour both from removal actions and damage claims.

BUSINESS JUDGMENT RULE APPLICABLE TO FOUNDATIONS

The court clarified that, while the Business Judgment Rule was formally introduced only in the Act on Companies with Limited Liability and the Stock Corporation Act, it is a general principle and is equally applicable to private foundations.

NO DISMISSAL FOR CAUSE IF SAFE HARBOUR ACHIEVED

The Business Judgment Rule pertains to potential liability for past management decisions, while removing a managing director for due cause aims to protect the company from future damaging decisions. Nonetheless, similar considerations apply: If the manager is safe from liability under the Business Judgment Rule, there is, in general, no justification for his dismissal.

CONSIDERATIONS UNDERLYING THE AUSTRIAN BUSINESS JUDGMENT RULE

The Austrian Supreme Court views the Austrian Business Judgment Rule as being, in essence, the same as the German and Lichtenstein versions, despite minor deviations in the wording.

The court emphasised that the introduction of the Business Judgment Rule seeks to allocate the risks of business decisions: the commercial risk for any entrepreneurial activity is always borne by the owner, who also enjoys the benefits. This risk may not be shifted to the managers.

WHAT IS A “BUSINESS DECISION”?

Decisions only qualify as “business decisions” under the Business Judgment Rule if they pertain to future occurrences and are characterised by predictions and non-justiciable assessments; an imminent element of risk is a must.

A decision of the board of directors of a foundation may also qualify as a business decision. Strategic decisions on the investment of the foundation's assets are within the core scope of the Business Judgment Rule. However, in order to qualify for safe harbour the decision

- may not violate “mandatory rules”, e.g. the rule that dividends may not be disbursed to beneficiaries to the detriment of the foundation's creditors; and
- must be in compliance with the foundation's deeds, statutes and by-laws. If investments are not in compliance with the purpose of the foundation (“Stiftungszweck”) or any investment guidelines contained in the statutes or by-laws, safe harbour is not available.

CRITERIA FOR SAFE HARBOUR

The four criteria for safe harbour are as follows:

- i. The manager is not being affected by extraneous considerations or influences.
- ii. He had adequate information to form the basis of a reasonable decision.
- iii. From an ex ante perspective the decision clearly serves the interest of the company.
- iv. The manager must (reasonably) believe that he is acting in the company's best interest (“acting in good faith”)
- v. Safe-harbour is not granted if the manager exceeds his

authority or in the event of self-dealing.

THE CONTENTS OF THE SUPREME COURT DECISION ON THE BOARD'S DECISIONS

In the case at hand (6 Ob 160/15w), which is one of many dealing with ongoing disputes between the members of a foundation's board and its beneficiaries, the Austrian Supreme Court ruled that the following do **not** constitute a dereliction of duty:

- The decision that the beneficiaries are only entitled to **the disbursement of dividends** of EUR 1.1 million if the management board remained in office.
 - » *Resolving disputes with the beneficiaries lies in the foundation's interests, in particular if, as here, several disputes are pending. Moreover, the board acted within the margin of its discretion and based its decision on the analysis of a neutral expert. Even if – due to the board members' personal interest in remaining in office – the safe harbour rule does not apply, their actions cannot be deemed a dereliction of duty.*
- The **reinvestment of profits** earned by subsidiaries is within the bounds of the board's latitude, in particular if, as in this instance, the board obtained a neutral expert's opinion.
- The Business Judgement Rule does not apply to the question of whether beneficiaries are entitled to have **access to the company's books**.
 - » *The failure to provide lawful access to the company's accounts can qualify as a dereliction of duty. In this case, however, the denial of such access was, while unlawful, defensible from an ex ante perspective. The beneficiaries could, moreover, have requested the courts to review this issue.*
- The **sale of the foundation's assets** indubitably qualifies as a business decision and lies in the discretion of the management board (the deed of foundation permitted the sale of assets "if necessary or at least expedient", which gives the board wide latitude). Since the management acted within the boundaries provided in the foundation's governing deeds, the management board members are not deemed to have overstepped or abused their powers.
- The board's attempt to **amend the deed of foundation** in order to stop the beneficiaries from dismissing them or appointing a new management board is not necessarily a dereliction of duty.
 - » *Any amendment of the deed of foundations is subject to review by the courts; the application for such amendment was, moreover, based on comprehensive legal considerations.*