Informal Translation

4 November 2016

[Logo] Canton of Zug **Cantonal Court**

Division 3 **A3 2015 27**

Cantonal Judge Dr. R Meyer, division president
Cantonal Judge lic.iur. St. Scherer
Cantonal Judge lic.iur. B Furrer
Court Clerk Dr. A Staub

Decision of 27 October 2016

In the matter of

Schenker-Winkler Holding AG, Bannäbni 16, 6340 Baar,
represented by attorney lic.iur. Paul Bürgi, Buis Bürgi AG, Mühlebachstrasse 8, Postfach 672, 8024 Zurich and/or attorney Dr. Martin Neese, Neese Hagmann Stalder, Baarerstrasse 78, 6300 Zug,
Claimant,

versus

Sika AG, Zugerstrasse 50, 6340 Baar,
represented by attorney lic.iur. Harold Frey and/or attorney lic.iur. Dominique Müller, Lenz & Staehelin, Bleicherweg 58, 8002 Zurich,
Defendant,

and

1. Dr. Walter Grüebler, Rischerstrasse 37, 6343 Tisch,
represented by attorney Dr. Marco Niedermann, Niedermann Rechtsanwälte, Utoquai 37, 8008 Zurich,
2. Ethos – Schweizerische Stiftung für nachhaltige Entwicklung, Place Cornavin 2, 1211 Geneva 1,
represented by attorney Prof. Dr. Monika Roth, rothschwarzroth, Gartenstrasse 20, Postfach 326, 4102 Binningen 1,
3. Cascade Investment L.L.C., 2365 Carillon Point Kirkland, WA 98033, USA,
represented by attorney Dr. Andreas Casutt and/or attorney Dr. Andreas Blattmann, Niederer Kraft & Frey AG, Bahnhofstrasse 13, 8001 Zurich,
Joining Parties,

regarding

a challenge to general meeting resolutions

Prayers for Relief

Claimant

1. That the following resolutions of the general meeting of Defendant on 14 April 2015 be cancelled and that the invalidity of the following resolutions be declared:
   - Agenda item 4.1.1: re-election of Paul J. Hälg to the Board of Directors for a term of office of one year
   - Agenda item 4.1.5: re-election of Monika Ribar to the Board of Directors for a term of office of one year
   - Agenda item 4.1.6: re-election of Daniel J. Sauter to the Board of Directors for a term of office of one year
   - Agenda item 4.1.7: re-election of Ulrich W. Suter to the Board of Directors for a term of office of one year
   - Agenda item 4.1.9: re-election of Christoph Tobler to the Board of Directors for a term of office of one year
   - Agenda item 4.2.1: non-election of Max C. Roesle to the Board of Directors for a term of office of one year
   - Agenda item 4.3.1: election of Paul J. Hälg as president of the Board of Directors

2. That the following correct resolution of the general meeting of Defendant on 14 April 2015 be declared:
   - Agenda item 4.2.1: election of Max C. Roesle to the Board of Directors for a term of office of one year
3. That Defendant be ordered under threat of penalty to its corporate organs under article 292 SCC [StGB] to acknowledge the voting rights of Claimant for the 2,330,853 registered shares held by it, each with a nominal value of CHF 0.10, for all votes and elections at every general meeting of Defendant and every other exercise of rights which is connected with the voting rights for so long as Claimant is the holder of shares in Defendant.
4. That all costs and damage consequences (plus legal VAT) be borne by Defendant.

Defendant
1. That the claim be rejected, insofar as it is admissible.
2. That all costs and damage consequences be borne by Claimant.

Joining Party 1
1. That the claim be rejected, insofar as it is admissible
2. That all costs and damage consequences (plus legal VAT) be borne by Claimant.

Joining Party 2
The claim be rejected and all costs shall be borne by Claimant.

Joining Party 3
1. That the claim be rejected, insofar as it is admissible
2. That all costs and damage consequences be borne by Claimant.

Facts

1.1 Schenker-Winkler Holding AG (hereinafter: Claimant or SWH) is a stock corporation with its seat in Baar. Its corporate purpose is the permanent management of participations in other companies. Its share capital amounts to CHF 1,000,000.00 and is divided in 10,000 transfer-restricted registered shares of CHF 100.00 each (hereinafter: SWH shares). These registered shares are held in equal parts by the five siblings Gabriella, Monica, Carmita, Urs F. and Fritz Burkard (hereinafter: Burkard siblings) (cf. excerpt from the commercial register [act. 1/1]; Claimant share book [act. 1/12]).

1.2 Sika AG (hereinafter: Defendant or Sika) is also a stock corporation domiciled in Baar, whose corporate purpose is the participation in companies of all kinds and in particular the financing of companies for the production and application of and trade in special products and services for the building trade and industry. Its share capital amounts to CHF 1,524,106.80 and is divided in 2,333,874 transfer-restricted, unquoted registered shares of CHF 0.10 each (voting rights shares) and 2,151,199 bearer shares listed on the SIX Swiss Exchange of CHF 0.60 each. The Board of Directors of Defendant consists of the nine directors Dr. Paul J. Hälg (President), Urs F Burkard, Dr. Wilhelm Leimer, Monika Ribar, Daniel J. Sauter, Prof. Dr. Ulrich W. Suter, Carl Jürgen Tinggren, Christoph Tobler and Frits van Dyjk (cf. excerpt from the commercial register [act. 1/2]; excerpt from Sika's 2014 financial report [act. 1/7]).

1.3 Claimant holds 2,330,853 registered shares (corresponding to 99.87% of all registered shares) and 42,071 bearer shares (corresponding to 1.98% of all bearer shares) of Defendant (on 7 April 2015 Claimant took over 13,703 bearer shares from the Burkard siblings and thus increased its portfolio of bearer shares from 28,998 to 42,701). According to Article 7.3 (3) of Defendant's articles of incorporation, each share, regardless of its nominal value, has one vote at the general meeting. Claimant's participation in Defendant therefore amounts to 52.92% of the votes and 16.97% of the capital (cf. excerpt from the commercial register [act. 1/2]; Entry card of Claimant to the general meeting of Defendant of 14 April 2015 [act. 1/14] with a voting share of 2,330,853 registered shares and [still] 28,998 bearer shares; Judgment of the Higher Court of the Canton of Zug Z2 2015 13 of 10 June 2015 [act. 20/49] p. 3).

1.4 On 5 December 2014, the Burkard siblings (as sellers) and Compagnie Saint-Gobain, a stock corporation with its seat in Courbevoie, France (as purchaser, hereinafter: Saint-Gobain) concluded a share purchase agreement for all shares of Claimant for the price of CHF 2.75 billion (act. 59/101a; hereinafter: Share Purchase Agreement 2014).

1.5 After the Share Purchase Agreement 2014 was concluded and the Board of Directors of Defendant were informed, six directors, Dr. Paul J. Hälg, Monika Ribar, Daniel J. Sauter, Prof. Dr. Ulrich W. Suter, Christoph Tobler and Frits van Dyjk, were opposed to the Burkard siblings' plan. In a news release on 8 December 2014, Defendant disclosed that the Board of Directors and management of Defendant rejected the planned change of control (act. 1/22).

1.6 On 9 December 2014, Claimant requested Defendant to call an extraordinary general meeting, inter alia with the agenda item "de-election of the directors Paul Hälg, Monika Ribar and Daniel Sauter", as well as "election of Max Roesle as director". After Defendant did not approve this request, Claimant attempted to have a general meeting be called by the court. By way of a

decision on 16 March 2015, the Einzelrichter (summary judge) of the Cantonal Court of Zug rejected the application of Claimant (Case no. ES 2015 1).

1.7 On 22 December 2014, Saint-Gobain assigned its rights and obligations under the Share Purchase Agreement 2014 to Société de Participations Financières et Industrielles, a company controlled by it, in which Saint-Gobain guaranteed the purchase price payment (cf. Preamble ["Whereas"] of the "Share Purchase Agreement […] as amended on 7 April 2015").

1.8 In a news release on 26 January 2015, Defendant declared that the Burkard family and Claimant and Saint-Gobain constituted a group, which was why the voting rights of Claimant would be restricted to the 5% limit set out in the articles of incorporation. Therefore, the right to call an extraordinary general meeting was eliminated (act. 1/26). On 9 February 2015, Claimant made an application to the Einzelrichter of the Cantonal Court of Zug against Defendant for a declaration of precautionary measures. Essentially, it requested that Defendant be forbidden from partially striking Claimant from the share register or otherwise limiting its voting rights. On 20 March 2015, the application was rejected (Case No. ES 2015 71). The appeal brought by Claimant against this decision was rejected by the Higher Court of the Canton of Zug by way of a judgment on 10 June 2015 (Case No. Z2 2015 13, act. 20/49).

1.9 On 7 April 2015 Claimant and Société de Participations Financières et Industrielles concluded a new share purchase agreement ("Share Purchase Agreement […] as amended on 7 April 2015") for the same assets (all SWH shares), but with an increased price of approximately CHF 2.82 billion, which the contract parties signed as the "entire agreement" (hereinafter: Share Purchase Agreement 2015 [act. 1/21] / overall SG transaction).

1.10 On 14 April 2015, the 47th ordinary general meeting of Defendant took place, in which the Board of Directors limited the voting rights of Claimant to 5% of all registered shares in reliance on Article 4 of the articles of incorporation (transfer restriction), "insofar as this was necessary for the prevention of the anticipated transfer of control to Saint-Gobain". Claimant's voting rights were thus limited with regard to the disputed Board elections. As a result, the previous directors Dr. Paul J. Hälg (President), Monika Ribar, Daniel J. Sauter, Prof. Dr. Ulrich W. Suter, Christoph Tobler and Frits van Dyjk were re-elected, while Dr. Max C. Roesle, nominated by Claimant, was not. Urs F. Burkard was re-elected as a director, without Claimant's voting rights having been limited in this regard (cf. Minutes of the general meeting of Defendant of 14 April 2015 [act. 20/47] p. 4 et seq.).

2. On 20 and 24 April 2015, Claimant submitted an application for conciliation to the Baar Justice of the Peace and thereby created a lis pendens (article 62 (1) CPC). On 12 May 2015, the Baar Justice of the Peace granted Claimant an authorisation to claim in both applications for conciliation and imposed costs of CHF 1,200.00 (act. 1/B-C).

3. On 22 May 2015, Claimant submitted a claim against Defendant to the Cantonal Court of Zug with the Prayers for Relief referenced above (act. 1). The statements in each legal submission will be taken into consideration, insofar as is relevant to the decision.

4. By way of a court decision on 26 August 2015, Dr. Walter Grüebler was admitted as a joining party [*Nebenintervenient*] (hereinafter: Joining Party 1) on the side of Defendant (act. 10).

5. In the Statement of Defence of 22 September 2015, Defendant applied for a rejection of the claim, with costs to be borne by Claimant, insofar as the claim would be admissible (act. 20). Joining Party 1 presented the same prayer for relief in his Statement of Defence of 21 September 2015 (act. 19).

6. By way of a court decision on 4 November 2015, Ethos – Schweizerische Stiftung für nachhaltige Entwicklung was admitted as a joining party (hereinafter: Joining Party 2) on the side of Defendant (act. 33).

7. By way of a court decision on 23 November 2015, Cascade Investment L.L.C. was admitted as a joining party (hereinafter: Joining Party 3) on the side of Defendant. In the same decision, the joinder application of 21 September 2015 by William H. Gates III and Melinda French Gates (as Trustees of the Bill & Melinda Gates Foundation Trust) was rejected (act. 38).

8. In the Reply of 5 January 2016 (act. 42) and in the Surreply of 18 April 2016 (act. 50) the parties each maintained their Prayers of Relief. In their Surreplies of 18 January 2016 (act. 46) and 18 April 2016 (act. 49), Joining Parties 2 and 3 submitted the Prayers for Relief mentioned above, while Joining Party 1 affirmed his Prayers for Relief in the Surreply of 6 April 2016 (act. 48).

9. On 2 May 2016, Claimant submitted a "Position on the New Facts" (act. 51) and on 11 May 2016 it additionally submitted the "Submission of New Facts II" (act. 54). On 13 May 2016 (act. 55) Defendant submitted its position on Claimant's submission of 2 May 2016, and on 19 May 2016 (act. 56) Joining Party 3 submitted its position on Claimant's submission of 2 May 2016. On 23 May 2016, Defendant replied to Claimant's submission of 11 May 2016 (act. 57).

10. By way of a court decision on 2 June 2016, Claimant was required to provide a copy of the Share Purchase Agreement 2014 (without appendices) (act. 58).

11. By way of a submission on 13 June 2016, Claimant complied with this requirement. At the same time, it submitted its position on the importance of the Share Purchase Agreement 2014 for the questions to be adjudicated (act. 59). In this regard, Joining Party 1 submitted its position on 23 June 2016 (act. 61) and Defendant and Joining Party 3 submitted their respective positions on 27 June 2016 (act. 62 and act. 63). On 8 July 2016, Claimant again submitted a statement of its position on the submissions of Defendant and Joining Parties 1 and 3 of 23 and 27 June 2016, as well as a "Submission of New Facts III" (act. 64), on which both Defendant (act. 65) and Joining Party 3 (act. 66) each submitted a position on 25 July 2016.

12. After both parties waived the requirement for a main hearing to be held, the hearing scheduled for 14 September 2016 was cancelled (act. 67-70).

13. On 17 August 2016, Claimant submitted a "Submission of New Facts IV" (act. 73). On 29 August 2016, both, Defendant (act. 74) and Joining Party 1 (act. 75) submitted their positions on Claimant's submission of 17 August 2016.

Considerations

1. Claimant requests that the voting resolutions passed at the general meeting of Defendant on 14 April 2015, in which its voting rights were limited, be cancelled and declared invalid. It relies on articles 706 and 691 CO (act. 1 N 68) in making its claim. By way of justification, Claimant states that without the impermissible limitation of voting rights, the outcome of these resolutions would have been in line with Claimant's intentions. Defendant and the intervening parties claim that the limitation of voting rights was validly carried out.

2. Before analysing the conditions under articles 706 and 691 CO, it is to be discussed whether the procedural conditions are fulfilled and the claim is to be admitted. In addition to the procedural conditions, there is also the question of the competence of the court and whether Claimant has a legitimate interest worthy of protection (article 59 (2) CPC). The Court examines ex officio whether the procedural conditions are fulfilled (article 60 CPC).

2.1 Defendant has its seat in Baar. The Cantonal Court of Zug therefore indisputably has geographical jurisdiction for adjudicating the legal challenge (article 10 (1) let. b CPC). The value of the dispute is estimated at CHF 10 million according to the parties (act. 1 N 6; act. 20 N 361; article 91 (2) CPC). Therefore, the Cantonal Court of Zug also has factual and functional jurisdiction (§ 27 (1) GOG).

2.2 Prayer for Relief 1 of Claimant's Prayers for Relief contains two applications. Claimant requests that the contested voting resolutions of the general meeting be cancelled (action to modify a legal relationship according to article 87 CPC) and that the contested resolutions be declared invalid (action for declaratory judgment according to article 88 CPC). As with every claim, an action for declaratory judgment requires there to be a legitimate interest worthy of protection within the meaning of article 59 (2) let. a CPC. This so-called "interest in a declaratory judgment" is only confirmed if there is unreasonable uncertainty about a legal relationship for the claiming party and this uncertainty can only be eliminated through a legal declaration. In this respect, the action for declaratory judgment is subsidiary to an action for performance or an action to modify a legal relationship (Gasser/Rickli, Kurzkommentar zur Schweizerischen Zivilprozessordnung, 2. A. 2014, Art. 88 ZPO N 2; Weber, Basler Kommentar, 2. A. 2013, Art. 88 CPC N 9; each with references).

Claimant states that notwithstanding the cancellation of the resolutions (action to modify a legal relationship), it has an interest in a declaration of invalidity because with a mere cancellation Defendant could once again limit Claimant's voting rights at the next general meeting (act. 1 N 130 first paragraph). This argument cannot be accepted. The prayer for declaratory relief (and correspondingly a possible declaratory judgment) only refers to the general meeting of 14 April 2015. Therefore, nothing could be derived from a declaration of invalidity with respect to future general meetings or later actions by the Board. A declaratory judgment does not give Claimant more legal protection than judgment modifying a legal relationship, thus there is no reason to make an exception from the principle of subsidiarity of an application for declaratory judgment (cf. also Bodmer, Die allgemeine Feststellungsklage im schweizerischen Privatrecht, 1984, p. 101 and 103). The action for declaratory judgment in the second part of Claimant's Prayer for Relief 1 is therefore not admissible. Also, the contested resolutions of the general meeting are not invalid within the meaning of article 706b CO, which is another reason why the action for declaratory judgment (Declaration of invalidity; cf. Schenker, Die

Anfechtung von Generalversammlungsbeschlüssen bei der Aktiengesellschaft, in: Kunz/Arter/Jörg [Hrsg.], Entwicklungen im Gesellschaftsrecht X, 2015, p. 17 et seqq., 46) is not granted.

2.3 In Prayer for Relief 2, Claimant requests that the correct resolution of 14 April 2015 regarding the election of Max C. Roesle to the Board of Directors for a one year term of office be declared.

This prayer for relief concerns a positive action for declaration of a resolution (also called a positive voting right action). Although this application of Claimant is formulated as an action for declaratory judgment and not as an action modifying a legal relationship, according to the jurisprudence of the Supreme Court it is to be understood as an action modifying a legal relationship (BGE 122 III 279 p. 280 and consid. 3c/bb; sceptical: Bühler/von der Crone, Positive Beschlussfeststellungsklage, SZW 2014 p. 564 et seq., 570). In a positive action for declaration of a resolution which goes beyond the annulling effect of a declaration of invalidity, it is requested that the legal validity of the resolution be justified, i.e. generally, that it be based on approval of an application rather than a minuted cancellation of an application. The permissibility of a positive action for declaration of a resolution is affirmed in the predominant legal literature (instead of many: Bühler/von der Crone, loc.cit., p. 572; Böckli, Schweizer Aktienrecht, 4. A. 2009, § 12 N 500; on the other hand Judgement of the Higher Court of the Canton of Zug Z1 2010 36 of 3 December 2013 consid. 8.2 [obiter dictum]; the Supreme Court leaves this question open in its judgment 4A_48/2014 of 2 June 2014), insofar as it is used to correct a contested defect in the determination of the voting results (votes of persons not authorized to vote were counted, votes of persons authorized to vote were excluded, votes were incorrectly added up or an incorrect quorum was used). Thus, Claimant's Prayer for Relief 2 is admissible.

2.4 In Prayer for Relief 3, Claimant essentially requests that Defendant be ordered to recognize Claimant's voting rights now and in the future for all votes and elections. This action for performance under article 84 CPC, which is connected with the application for an order of enforcement measures (article 343 (1) let. a CPC and article 292 SCC), is also admissible.

2.5 It follows that the action for declaratory judgment in the second part of Claimant's Prayer for Relief 1 is not admissible due to lack of a legitimate interest worthy of protection. Incidentally, it is not denied that the contested resolutions took place as they did because of the limitation of Claimant's voting rights and that the result would have been otherwise had they not been limited (cf. BGE 122 III 279 consid. 3a; 133 III 453 consid. 7; Böckli, loc.cit., § 16 N 107; Länzlinger, Basler Kommentar, 4. A. 2012, Art. 691 OR N 14 and Art. 692 OR N 5).

3. In the following, it is to be examined whether the conditions for the legal challenge under article 706 (1) CO are fulfilled. Additionally, before these conditions are presented (consid. 3.4), the conditions such as capacity to sue and to be sued as well as compliance with the legal deadline are to be examined (consid. 3.2), the burden of proof is to be distributed (consid. 3.3) and the procedural materials are to be determined (consid. 3.4). Article 4 (1) of Sika's articles of incorporation – which Defendant relies upon for limitation of the voting rights – is to be interpreted and it is to be examined whether the SG transaction falls under this provision (consid. 4). Then, also by way of interpretation, it is to be clarified whether Claimant's attempt not to re-elect the existing members of Defendant's Board of Directors and instead to elect new members constitutes (bypassing) conduct within the scope of application of the transfer re-

striction (E.5). Following that, it is to be discussed whether the limitation of voting rights is a valid legal consequence of the attempted bypassing actions (consid. 6). Finally, specific objections from Claimant are considered (consid. 7).

3.1 According to article 706 (1) CO, the Board of Directors and each shareholder may bring a claim to court against the company to challenge resolutions taken at a general meeting which are against the law or in breach of the articles of incorporation. Article 706 (2) CO lists special circumstances which are various grounds for challenge arising from the basic facts defined in article 706 (1) CO. A voting rights action under article 691 (3) CO is one of these special circumstances. According to article 691 (3) CO, each shareholder can challenge a resolution of the general meeting if people who are not authorized to participate in the general meeting were involved in the resolution, on the condition that the defendant company does not prove that this involvement had no influence on the resolution process. For a challenge under this provision, according to its wording each shareholder who is unlawfully excluded from participating in the general meeting or the resolution process also has capacity to bring a challenge. Resolutions of the general meeting which come about with the assistance of people who are not authorized to participate in the general meeting are not void, but rather are open to being challenged. According to article 706a (1) CO, the right to bring a challenge expires if a claim is not brought within two months following the general meeting (BGE 53 II 346; 96 II 18 consid. 3; 122 III 279 consid. 2; BGE 4C.107/2005 of 29 June 2005 consid. 2.2 et seq.; Böckli, loc.cit., § 16 N 110 et seqq. and 119 and § 12 N 499; Länzlinger, loc.cit., Art. 691 OR N 12 and 14; Schenker, loc.cit., p. 32; Schleifer, Der gesetzliche Stimmrechtsausschluss im schweizerischen Aktienrecht, 1993, p. 297; Tanner, Zürcher Kommentar, 2. A. 2003, Art. 706 OR N 186).

3.2 Claimant is a shareholder of Defendant. It voted against the contested resolutions at the general meeting of Defendant on 14 April 2015. Additionally, according to Claimant, it was unlawfully and selectively excluded from having voting rights, in that its voting rights were limited to 5% of all registered shares. It therefore undeniably (cf. act. 1 N 68, act. 20 N 446) has capacity to bring a challenge under article 706 and article 691 (3) CO (Länzlinger, loc.cit., Art. 691 OR N 14; Truffer/Dubs, Basler Kommentar, loc.cit., Art. 706 OR N 3 and 6). Defendant has capacity of being sued, because the legal challenge is to be brought against the company (article 706 (1) CO). Claimant complied with the two month deadline according to article 706a (1) CO, in that it submitted its application for conciliation on 20/24 April 2015, within 6, respectively 10 days after the general meeting.

3.3 The burden of proof in a legal challenge proceeding is fundamentally on the claimant (article 8 CC). However, the defendant company is obliged to prove that a potentially unequal treatment of shareholders (analogous to article 691 (3) CO) was justified. Where a shareholder who is registered in the share register has been unlawfully excluded from having voting rights or has had its voting rights limited, it is the defendant company and not the shareholder who bears the burden of proof for the legal validity of the exclusion or limitation (von der Crone, Aktienrecht, 2014, § 8 N 210; Tanner, loc.cit., Art. 706 OR N 209 et seq.; Forstmoser/Meier-Hayoz/Nobel, Schweizerisches Aktienrecht, 1996, § 25 N 74). Therefore Defendant has to prove that it lawfully limited the voting rights of Claimant to 5% in the disputed votes. This evidence can demonstrate external as well as internal facts. Internal facts, such as an intention to bypass, are not possible to directly prove, but are proven indirectly through implication from the external conduct of a person or through the circumstances (cf. BGE 140 III 193 con-

sid. 2.2.1; 134 III 452 consid. 4.1). Where an allegation is not contested (in a substantiated way) or the court requires convincing that a fact is proven or disproven, the question of the sharing of the burden of proof is obsolete (BGE 119 II 114 consid. 4c; BGE 4C.154/2004 of 20 August 2004 consid. 2.1).

3.4 Procedural materials include – insofar as relevant to the decision – the submissions of the participants to the proceedings and the documents filed. Also to be taken into account is the Share Purchase Agreement 2014 produced by Claimant. It is not necessary to comprehensively assess whether and to what extent the unsolicited submissions are to be taken into account, considering the restriction on bringing new facts and evidence (Art. 229 CPC) and the constitutional right to respond (Art. 29 BV; BGE 4A_215/2014 of 18 September 2014 consid. 2.1); insofar as these submissions or positions are referred to, they are in any event permissible.

4. The Parties submit a different understanding regarding the extent and scope of application of Article 4 (1) of Sika's articles of incorporation. It is disputed whether Article 4 (1) of Sika's articles of incorporation applies to the transaction with SG, specifically, whether its scope covers not only the direct sale of registered Sika shares but also the alleged "indirect sale" effected by selling SWH shares. Like any other issue of application of law, this question must primarily be decided by interpreting the provision (von der Crone, loc.cit., § 3 N 93: "The interpretation of the articles of incorporation controls"). Article 4 (1) of Sika's articles of incorporation needs interpretation.

4.1 The wording of Article 4 of Sika's articles of incorporation of 14 April 2015 as well as other provisions of the articles of incorporation which are currently relevant (act. 1/6) is as follows:

"**4. Restriction of transferability [*Vinkulierung*]**

[1]The 5% Threshold: The Board of Directors reserves the right to refuse an acquirer of registered shares as shareholder, if the number of registered shares held by him exceeds 5% of the total number of registered shares entered in the commercial register.

The limitation of 5% also applies to the subscription to or the purchase of registered shares by means of exercising subscription rights, options, or conversion rights of registered or bearer shares or other securities issued by the Company or third parties.

Legal entities and partnerships with legal capacity, which are affiliated through common ownership or votes, through common control or in any similar manner, as well as natural persons or legal entities or partnerships with legal capacity, which act in concert in view of a circumvention of registration limitations, are regarded under these provisions as a single buyer.

Article 652b par. 3 and Article 685d par. 3, CO remain unaffected.

[2]Fiduciary acquisition: Furthermore, the Company may deny registration in the shareholder's register if, upon the Company's request, the acquirer does not explicit-

ly declare that the shares have been acquired in his own name and for his own account.

[3]False information: After consulting the party concerned, the Company may, cancel registration in the shareholder's register if the registration is the result of false information provided by the acquirer. The acquirer must be informed of the cancellation immediately.

[4]Providing evidence: The acquirer must provide a statement declaring that the registered shares were transferred to him in due form.

5. Public Tender Offer

Opting out: An acquirer of shares of the Company is not obliged to make a public purchase offer pursuant to Art. 32 and 52 of the Swiss Law on Stock Exchanges and securities trading.

[…]

7. The general meeting

[…]

7.3 Procedure, Voting and Representation

[…]

[3]Voting right: Each share confers the right to cast one vote at the General Meeting.

[4]Resolutions: Unless the law or these Articles of incorporation provide otherwise, the adoption of resolutions and elections requires an absolute majority of votes represented at the General Meeting (not taking into account abstentions, blank votes and invalid votes).

At least a two-thirds majority of the votes represented, and an absolute majority of the par values of shares represented, is required for the adoption of resolutions concerning:

1. modification of the purpose of the Company;
2. introduction of voting shares;
3. limiting or facilitating the transfer of registered shares;
4. an authorized or conditional increase of the capital;

5. an increase of the capital by conversion of capital surplus, by contribution in kind, for the purpose of acquisition of property and the granting of special rights;

6. limiting or revoking subscription rights;

7. change of location of the principal office of the Company;

8. dissolution of the Company without liquidation;

9. conversion of registered shares into bearer shares;

10. removal from office of more than one third of the Board of Directors.

[…]

8. The Board of Directors

8.1 Election and Composition

[1]Election and office term: The General Meeting elects the members of the Board of Directors individually. The term of office ends with the conclusion of the following ordinary General Meeting. Re-election is possible.

[…]"

4.2 Contrary to the interpretation of laws (article 1 CC) or contracts (article 18 CO), there are no general legal provisions for the interpretation of articles of incorporation. However, articles of incorporation have common features with laws and contracts, which is why the interpretation of articles of incorporation sits between the interpretation of laws and contracts. In choosing the applicable method, it is necessary to differentiate between the type of company (either a small, tightly-held company or a public company) and the effect of the provision to be interpreted (a provision of the articles of incorporation either with internal effects or external effects). If small companies or provisions with internal effects are involved, the principles of contract interpretation are paramount, while for public companies or provisions of the articles of incorporation with external effects, the interpretation method which is applicable to laws is to be followed (cf. BGE 140 III 349 consid. 2.3; 114 II 193 consid. 5a; 107 II 179 consid. 4c; Böckli, loc.cit., § 1 N 633 et seq.; Ott, Die Interpretation von Verträgen und Statuten, 2000, p. 1 und 10 et seqq.; Forstmoser/Meier-Hayoz/Nobel, loc.cit., § 7 N 38 et seqq.).

Article 4 (1) of Sika's articles of incorporation regarding transfer restrictions has external effect, because it is aimed at both current and potential shareholders. Additionally, Defendant, whose bearer shares are traded on the SIX Swiss Exchange, is a public company (Art. 727 (1) No. 1 CO; act. 20 N 30). As the parties agree, Article 4 (1) of Sika's articles of incorporation is therefore to be interpreted according to the method used for interpreting laws.

4.3 When interpreting laws, legal doctrine and jurisprudence use multiple interpretation methods. The starting point for interpretation is the wording of the provision. In addition to this grammatical element of interpretation, there are also the systematic, historical and teleological elements. Moreover, there are some aids to interpretation, such as the comparative analysis of laws (BGE 141 III 155 consid. 4.2; Emmenegger/Tschentscher, Berner Kommentar, 2012, Art. 1 ZGB N 166 et seq. with further indications).

In comparative law, special attention is paid in the present case to legal doctrine and practice in Germany and Austria. According to predominant doctrine and also legal jurisprudence in both countries regarding companies with limited liability and stock corporations, a simple statutory transfer restriction clause, i.e. a clause which does not explicitly govern the indirect disposal of shares, also applies to the situation in which all shares of a participating company are transferred (indirect sale), if the company whose shares are sold is a pure holding company, which in addition to the participation in the protected company has no other participations and has no other "company" assets (for German law: Judgement of the Oberlandesgerichts Naumburg 7 U 133/03 [= NZG 2004, p. 775] of 22 January 2004 E. II.2c/aa; Judgment of the Landgerichts München 15 HKO15764/02 of 12 September 2002 i.S. Axel Springer Verlag gegen Leo Kirch, cited as Liebscher, Umgehungsresistenz von Vinkulierungs-klauseln, ZIP 2003 p. 825 et seqq., 827; Liebscher, loc.cit., p. 828 et seq.; Bayer, in: Goette/Habersack [Hrsg.], Münchener Kommentar zum Aktiengesetz, 4. A. 2016, § 68 [d]AktG N 122; Heinrich; in: Heidel [Hrsg.], Aktienrecht und Kapitalmarktrecht, 4. A. 2014, § 68 [d]AktG N 15; Lutter/ Grunewald, Gesellschaften als Inhaber vinkulierter Aktien und Geschäftsanteile, AG 12/1989 p. 409 et seqq., 409 et seq.; Seibt, in: Scholz [Hrsg.], Kommentar zum [d]GmbH-Gesetz, 11. A. 2012, § 15 [d]GmbHG N 111a; for Austrian law: Karollus/Artmann, Zur Auslegung einer Vinkulierungsklausel – individuelles Zustimmungsrecht, Ersetzung der Zustimmung durch das Gericht und mittelbare Anteilsverschiebung, GesRZ 2001 p. 64 et seqq., 66 et seq.; Kurat, Konzernwirkung von Vinkulierungsklauseln, DerGesellschafter 2/2009p. 92 et seqq., 94 et seq.; contrary Schopper, in: Gruber/Harrer [Hrsg.], Kommentar zum [ö]GmbHG, 2014, § 76 [ö]GmbHG N 29).

4.4 The starting point for interpretation is the wording of the provision (grammatical interpretative element). According to the wording of Article 4 (1) of Sika's articles of incorporation, only the transfer of Sika's registered shares – but not the transfer of SWH shares – falls under the transfer restriction regime. Also subparagraphs 2 and 3 of Article 4 (1) do not encompass the indirect sale of Sika shares, according to a word-for-word interpretation. The wording supports Claimant's position. On this, the parties agree. What is disputed, however, is whether in this case the wording is to be deviated from. Claimant claims that the existence of transfer restrictions must be clearly described in the articles of incorporation and arguments by analogy are not permissible.

4.4.1 In legal doctrine and jurisprudence, it is acknowledged that the wording is indeed the primary interpretative element, both in interpreting laws and contracts. However, clear wording is not decisive alone, and interpretation purely according to the letter of the provision is not permissible. The clear wording of a legal provision may however only be deviated from when there are valid reasons for saying that it does not reflect the true intentions of the provision. Valid grounds can arise from the relationship with other provisions (systematic interpretation), the origins of the provision (historical interpretation) and the intention and purpose of the provision (teleological interpretation). Hence, it is not the apparently clear wording of a clause

which is decisive, but rather its true legal meaning, which is to be determined according to the acknowledged rules of interpretation. The same holds true for the interpretation of articles of incorporation (instead of many others: BGE 131 III 606 consid. 4.2; 129 III 335 consid. 4; 111 Ia 292 consid. 4b; Forstmoser/Meier-Hayoz/Nobel, loc.cit., § 7 N 48; Böckli, loc.cit., § 1 N 635).

4.4.2 In the present case, a pure wording-based interpretation is to be rejected. As will be shown, the wording of Article 4 (1) of Sika's articles of incorporation contradicts the understanding of the provision which arises from a systematic as well as teleological interpretation. Arguments by analogy – which in criminal law are impermissible because of the strict legality principle (nulla poena sine lege) – are not prevented from being used in the interpretation of private law provisions of articles of incorporation (cf. Böckli, loc.cit., § 1 N 635 in fine). The fact that the provision relates to a transfer restriction changes nothing, even when according to article 627 no. 8 CO and article 685b (7) CO the limitation of the transferability of the registered shares has to be governed by the articles of incorporation. In this case, the transfer restriction is expressly governed by the Sika articles of incorporation, Article 4 (1). All that remains to be clarified is what the scope of application is. Here, the provision is to be interpreted by means of the interpretative elements mentioned above. Defendant's Board of Directors already did this, which – contrary to the statements of Claimant (act. 42 N 79 et seq.) – was not outside its sphere of competence.

4.4.3 The legal dispute over Article 5 of the Sika articles of incorporation (opting out) also shows that the Sika articles of incorporation should not be interpreted according to the letter. Claimant claims that from this provision, it is "clear that the opting out clause […] refers to the sale of all SWH shares to a third party" (act. 42 N 385). If Article 5 was strictly interpreted according to its wording, then this provision would not release Saint-Gobain from having to make a public tender offer. Since Article 5 only says that an acquirer of "shares of the company", therefore Sika shares, is not obliged to make a public offer according to article 32 and 52 aBEHG (BEHG as amended by 1 January 2016). Article 32 aBEHG, which is referred to in the articles of incorporation, indeed refers to an indirect acquisition or indirect disposal, yet according to a grammatical consideration, Article 5 of the articles of incorporation only refers to the two legal provisions in aBEHG in relation to a "purchase offer" and not an "acquisition" ("to a public purchase offer according to Article 32 and 52 of […]"). The Federal Administrative Court however defended the interpretation of the opting out clause, which went beyond the wording of the clause, and ruled that Saint-Gobain was protected by Article 5 of Sika's articles of incorporation from the duty to make an offer (cf. Decision of the Federal Administrative Court B-3119/2015 of 27 August 2015 [act. 20/57] consid. 5.1.2). An interpretation according to the letter of the transfer restriction provision is incidentally also rejected by the prevailing legal doctrine and jurisprudence in Germany (instead of many: Liebscher, loc.cit., p. 828) and Austria (instead of many: Karollus/Artmann, loc.cit., p. 66 et seq.).

4.5 The systematic interpretative element calls for the provision of the articles of incorporation to be interpreted to be positioned within the broader framework of the articles as a whole. The provision in question is to be interpreted in this context. In systematic interpretation, it is necessary to differentiate between external and internal systematics (cf. Forstmoser/Meier-Hayoz/Nobel, loc.cit., § 7 N 48; Emmenegger/Tschentscher, loc.cit., Art. 1 ZGB N 250 with references).

4.5.1 The classification of a provision within a broader group of legal rules is interpreted according to an external systematic (cf. Emmenegger/Tschentscher, loc.cit., Art. 1 ZGB N 250 with references). In an external systematic, there are no specific requirements for the interpretation of articles of incorporation in comparison with the interpretation of laws. The provision is compared within the articles of incorporation instead of within the law. In the present case, however, no conclusions can be drawn from the external systematic alone as to whether Article 4 (1) of Sika's articles of incorporation also includes indirect sales of Sika's shares or not.

4.5.2 An internal systematic is to be understood as the functional interplay of the relevant provision, according to the legislators' intention. Arguments relating to internal systematics are of a systematic-teleological nature. They can concern the interplay of single rules within a law, they can refer to the connection between the provisions of different laws, or they can take account of the interplay of a legal provision with the value judgments and principles of the law, the relevant part of the legal system or even the entire legal system (Emmenegger/Tschentscher, loc.cit., Art. 1 ZGB N 255 with references). For the interpretation of articles of incorporation, the internal systematic requires that the transfer restriction be consistent with other provisions of the articles of incorporation (cf. also Weismann, loc.cit., p. 256 et seqq.; Koppensteiner, Vinkulierungsklauseln in mittelbaren Beteiligungsverhältnissen, in: Schweizer/Burkert/Gasser [Hrsg.], Festschrift für Nicolas Druey zum 65. Geburtstag, p. 427 et seqq., 436; see consid. 4.5.3–4.5.7) and with the value judgments of the drafter regarding the transfer restriction (Ott, loc.cit., p. 102, speaks about "legal conformity"; consid. 4.5.8). A comparison with the articles of incorporation of other companies (consid. 4.5.9) – analogous to the comparison of legal provisions with other laws – is not advisable, because the issuance of articles of incorporation is a private, autonomous and individual act, so that generally there is no consistent basis for a comparison with other companies.

4.5.3 Claimant argues that an extensive interpretation of Article 4 (restriction of share transferability [Vinkulierung]) contradicts article 5 of Sika's articles of incorporation ("Opting-out"). Claimant submits that Defendant's general shareholders' meeting unanimously accepted the opting out provision in 1998. [Claimant submits that] there could not be more distinct evidence of an acknowledgment that Claimant's owners may make a sale at any time and, thereby, obtain a control premium (act. 1 N 53). The Court does not agree with this line of argument.

Article 4 and article 5 of Sika's articles of incorporation do not contradict each other because the restriction of share transferability and the opting out are separate issues. As the Swiss Financial Market Supervisory Authority FINMA correctly pointed out in its order of 4 May 2015 (act. 1/49), the opting out and the restriction of share transferability serve different purposes. They regulate different issues, and are applied independently of each other. A restriction of share transferability restricts the transferability of registered shares of publicly listed or privately owned stock corporations by requiring the company's agreement for the transfer of property or voting rights of the shares (Art. 685a et seq. CO). On the other hand, an opting out is an instrument from takeover law and excludes the rules regarding mandatory offers pursuant to Art. 32 aBEHG. Neither legal doctrine nor jurisprudence promote a connection between these two legal instruments, nor does such a connection correspond to the relevant legal concept (act. 1/49 N 45). On the contrary, according to the legal concept in article 32 aBEHG, an obligation to make an offer exists regardless of whether the voting rights are exercisable or not. The phrase "exercisable or not" refers to a situation where the seller or acquirer of shares is not or will not be entered in the share register because of the transfer re-

striction provisions and thus its voting rights cannot be exercised (Tschäni, Die Gruppe im Übernahmerecht – "Are we all one?", in Tschäni [Hrsg.], Mergers & Acquisition VI, 2004, p. 179 et seqq., 181 [Fn 7]). FINMA further correctly considered that the drafter did not exclude the combination of opting out, restricted transferability of registered shares and voting shares, such as the Sika registered shares compared to the Sika bearer shares. Nor did the drafters make any arrangements for the regulation or limitation of the interaction between these three instruments. Thus, the drafters accepted that all three instruments can be concurrently implemented in a situation such as the present one (act. 1/49 N 38).

The Federal Administrative Court – as the appeal body above FINMA – drew the following correct conclusions in its decision of 27 August 2015: if the civil court, which the parties applied to regarding the interpretation of the transfer restriction, decides in favour of Defendant, Saint-Gobain could not (fully) exercise its acquired voting majority; that would nevertheless have no effect on the question of the obligation to make an offer. In the contrary case, Saint-Gobain could exercise its acquired voting rights without being subject to an obligation to make an offer. There is no contradiction in either scenario. If the transfer restrictions is to be applied to the transaction, this would simply mean that it effectively protects the interests of the minority shareholders despite the opting-out clause (Judgment of the Federal Administrative Court B-3119/2015 of 27 August 2015 [act. 20/57] consid. 5.1.2).

The combination of an opting out and a restriction of share transferability balances the interests of the owners of the registered shares and those of the bearer shares. Even when applying Article 4 to the indirect sale of registered Sika shares, it is not precluded that Claimant or the Burkard siblings may sell the registered Sika shares or SWH shares without submitting a purchase offer, as well as obtaining a control premium thereby, e.g. when selling to an economically independent third party ("White Knight") or to Defendant itself; in these two scenarios economic independence (cf., consid. 4.7.12), as safeguarded by Article 4 (1) of Sika's articles of incorporation, would hardly be endangered (cf. act. 20 N 314). What is meant by a control premium is an additional price which is paid so that a control majority is sold along with the share packet (cf. Daeniker, Angebotspflicht und Kontrollprämie – die Schweiz gegen den Rest der Welt?, in: Tschäni [Hrsg.], Mergers & Acquisitions XIII, 2010, p. 93 et seqq., 107). Contrary to the views of Claimant, Article 5 of Sika's articles of incorporation does not convey the "message" (according to the expert report of Prof. Dr. Peter Böckli [act. 1/4] p. 37) that a change of control is always possible under all circumstances. Finally, it remains to be said that Article 5 of Sika's articles of incorporation applies just as much to the indirect acquisition of Sika's registered shares (consid. 4.4.3) as to direct acquisition, which is why a differentiated interpretation would be contradictory to the systematic of the articles of incorporation without any objective reason.

4.5.4 However, if Claimant's interpretation of the transfer restriction is followed, there is a contradiction in the assessment of Article 4 of Sika's articles of incorporation, namely in Article 4 (1) subpara. 3. In Article 4 (1) subpara. 3, the transfer restriction provision contains a group clause (on group clauses: Tschäni, Vinkulierung nicht börsenkotierter Aktien, 1997, p. 22), which consists of a group clause and a bypassing clause. According to the wording of the group clause ("People […] who are affiliated") and the bypassing clause ("people […] who act in coordination in view of a circumvention of registration limitations"), they have no application to the transfer of SWH shares. Only the transfer of registered shares is affected. Additionally, according to a word-for-word analysis, the group clause only captures combinations of

people who only acquire majority rights through the formation of a group, which for Claimant is formally not the case, because Saint-Gobain does not stand beside Claimant, but rather stands behind it or indeed even in its place. Nevertheless, the group clause is important evidence of the fact that the transfer restriction is not to be considered in isolation. In particular, in the group clause it is clear that the transfer restriction is to be considered as an economic provision. The importance of the economic approach in connection with the transfer restriction is accentuated by the fact that in Sika's articles of incorporation, there is only one group clause for transfer restrictions. If, according to Article 3 (1) subpara. 3 of Sika's articles of incorporation, the transfer restriction cannot be bypassed by various affiliated people acquiring individual registered shares, then it would be contradictory if the transfer restrictions would not apply when almost all Sika registered shares would be indirectly sold (cf. also Karollus/Artmann, loc.cit., p. 67). Therefore, from a systematic point of view, there is no justification for only prohibiting interference on a "horizontal level". The possibility of individual people interfering with the intentions of a group or a company which is formally the forefront is structurally even greater on a "vertical level" (in parent-subsidiary relationships). That is why in legal doctrine and literature the most typical case is a vertical reach-through (between subsidiaries and parents) and not a horizontal reach-through (between sister companies).

4.5.5 In Article 4 (2) of Sika's articles of incorporation ("fiduciary acquisition", act. 20 N 257 et seq.; act. 48 N 16), there is further systematic evidence that a formal legalistic consideration of the transfer restriction provision is to be rejected and that instead an economic assessment is required. This so-called fiduciary clause requires that it be declared for whose account the acquirer has acquired the shares. The provision corresponds verbatim to article 685b (3) CO. Its purpose is to prevent a bypassing of the statutory transfer limitations by straw men. Thus, the transfer restriction regime justifies the rejection of an acquirer, even when the obstacles to transfer are fulfilled not by the formal share owner, but rather the person with economic rights. The transfer preconditions therefore have to primarily be fulfilled by the person with economic rights (von der Crone, loc.cit., § 3 N 93; Oertle/Du Pasquier, loc.cit., Art. 685b CO N 15). Moreover, the fiduciary clause exists against the backdrop of the fiduciary being dependent on instructions (cf. Böckli, loc.cit., § 6 N 116), which also applies to Claimant (see consid. 5.5).

4.5.6 Also to be taken into account in the systematic interpretation is Article 7.3 (4) subpara. 2 of the articles of incorporation. According to this provision, a resolution of the general meeting is necessary for the limitation or easing of the transferability of the registered shares. The resolution should be passed by at least two thirds of the represented votes and the absolute majority of the represented share value. In Article 7.3 (4) subpara. 2 No. 3 of Sika's articles of incorporation, there is a so-called "petrifying" clause. The intention and purpose of this clause is to make it difficult for an aggressor to take over control of the company (Böckli, loc.cit., § 12 N 398; von der Crone, loc.cit., § 4 N 54; Tschäni/Diem, Das Defence- bzw. M&A-Manual, in: Tschäni [Hrsg.], Mergers & Acquisitions X, 2008, p. 97 et seqq., 122 et seq.). This provision was inserted along with the transfer restriction in 1993. In a letter to the then-president of the Board of Directors of Defendant and the vice-president of Claimant, Dr. Kurt Furgler, on 5 April 1993 (act. 20/6; cf. act. 20 N 52), the lawyer Dr. Marcus Dessax said that a basis in the articles of incorporation would be required if the intention was to maintain solid majority relationships for Sika Finanz AG (Defendant) well into the future and to offer protection against hostile takeovers. Additionally, Dr. Dessax suggested inter alia the introduction of an increased quorum for the cancellation or relaxation of the transfer restriction or the de-selection of more than one third of all directors (act. 20/6 p. 3). The then-Board of Directors followed

this suggestion, and the suggested changes to the articles of incorporation were approved by the general meeting. The purpose of the quorum provision was (and is) to guarantee effective protection of the transfer restriction through consistency of the transfer restriction provision. This protective purpose in Article 7.3 (4) subpara. 2 No. 3 was and is apparent to public shareholders. So that protection can be effectively guaranteed, the purpose and spirit of the provision and the Sika transfer restriction regime applies not only to elimination or relaxation within the sense of a (formal) change of the articles, but also to by-passing through a "de facto elimination". In section 3.4 of the fourth heading of the Share Purchase Agreement 2015 (and section 3.4 of the Share Purchase Agreement 2014), the Burkard siblings made a commitment to Saint-Gobain that at closing, they would deliver up a cancellation of the transfer restriction through a resolution of the general meeting. This shows that a cancellation of the transfer restriction is essential for a change of control, but according to Article 7.3 (4) subpara. 2 No. 3 of the Sika articles of incorporation – we will return to this provision below (consid. 5.6) – a capital majority of a level that Claimant could not reach alone would be necessary.

4.5.7 A further conservation of the transfer restriction's status quo, and therefore a further protection against takeover (cf. von der Crone, a.a.O, § 4 N 54), is contained in Article 7.3 (4) subpara. 2 No. 10 of Sika's articles of incorporation. According to this provision, the "removal from office of more than one third of the Board of Directors" – just like with the relaxation or cancellation of the transfer restriction – requires a qualified majority.

4.5.8 With regard to the internal systematic of Article 4 of the Sika articles of incorporation, there is a further question of whether an application of the transfer restriction to the indirect sale of Sika shares (namely the sale of SWH shares) is contradictory to the intentions of the drafters. Subject to mandatory rights, articles of incorporation may deviate from the legal order and thus also from the intention of the drafters, yet there is then the question of whether this deviation is actually desired. These questions are of a systematic-teleological nature. They will be returned to in the teleological interpretation (consid. 4.7).

4.5.9 A comparison with the articles of incorporation of other companies is, as already mentioned, not advisable. This also applies for a comparison with the articles of incorporation of Schindler Holding AG, which Claimant suggested. Claimant refers to article 13 let. E (2) of these articles of incorporation (in the version of 17 March 2014), without however stating to what extent a conclusion could be drawn with respect to the Sika articles of incorporation. The mere fact that the articles of incorporation of Schindler Holding AG contain (according to Claimant) a complex arrangement for indirect transfers does not lead to the conclusion that if there is no such (complex) arrangement, one cannot be inferred through interpretation. Also, nothing relevant to the present case can be inferred from the "Serono Transaction" put forth by Defendant (sale of Bertarelli Biotech SA; act. 64 N 25 et seq.) because of the different circumstances therein, in particular the different provisions in the articles of incorporation (act. 64/104) but also the different capital and shareholder structure (cf. the uncontested statement of Defendant [act. 65 N 12 et seq.]).

4.5.10 The result of the systematic interpretation is that the indirect sale of registered Sika shares via the sale of all of SWH's shares to Saint-Gobain is equally within the scope of Article 4 (1) of Sika's articles of incorporation as the direct sale [of registered Sika shares].

4.6 A further interpretative element is historical interpretation. This requires an examination of the development history of the articles of incorporation. Documents which were prepared during the development of the articles (so-called "historical source documents") can serve as interpretive aids in this regard. In historical interpretation, one must differentiate between subjective and objective historical interpretation. In subjective historical interpretation, the intentions of the people who drafted the provision are examined, whereas in objective historical interpretation, the general prevailing views and ideas of the day (political, social, economic, ideological) arising in a historical context are examined. In interpreting articles of incorporation which have external effect or the articles of incorporation of public companies, it is objective and not subjective historical interpretation which should be applied (cf. also Koppensteiner, loc.cit., p. 429). Consequently, in the present case objective historical interpretation is to be applied. Even if historical source documents about the development of the provisions are scarce, the factual (subjective) intention of the article drafters should not be examined. In interpreting a provision of the articles of incorporation of a public company, the perspective of the public shareholder, who does not know about the provision's development history, should be borne in mind, as well as the perspective of shareholders who joined the company later or even potential shareholders. In this respect, historical interpretation is to be considered as supplementary at most (cf. also BGE 26 II 284; Böckli, loc.cit., § 1 N 634; Emmenegger/Tschentscher, loc.cit., Art. 1 ZGB N 295).

4.6.1 For historical interpretation, all that is important are the circumstances in place at the time of the change to the articles of incorporation in 1993. At that time, transfer restriction provisions were introduced (at that time as § 5 [act. 1/19.6b]), and have been left virtually unchanged since then. The previous version (before 1993) differed significantly from this version (act. 1/95b: "[…] The Board of Directors can refuse authorization without providing reasons"). In this respect, statements made before 1993, namely those of the Burkard siblings in a policy paper which was attached as a "confidential" supplement to the minutes of the general meeting of Claimant from 25 November 1988 (act. 1/42; act. 1 N 46 et seq.), are not relevant.

4.6.2 Also not relevant are the statements in connection with the introduction of the transfer restriction in 1993 which Defendant's public shareholders were not aware of. These include for example personal letters (cf. letter from Dr. Marcus Dessax to Dr. Kurt Furgler of 5 April 1993 [act. 20/6]; letter from Dr. Romuald Burkard of 30. Juni 1992 [act. 42/78]) or minutes concerning comments made at board meetings and general meetings of Claimant. Insofar as Claimant relies on such sources without stating that the public shareholders had knowledge of them (cf. act. 1 N 46 et seq. or act. 42 N 135), they are to be ignored from the outset. According to Claimant, "all participants" should have known that the shareholders of Claimant could have sold to a third party (act. 1 N 53). From the context (cf. act. 1 N 50), however, it is not to be concluded that by "all participants" Claimant meant the public. For the same reason, the letters of the former CFO and acting CEO of Defendant, Emil Rebmann, of 20 December 2015 (act. 42/71) are not relevant. He writes, it "was fully clear to us, that the sale and transfer of the shares of Schenker-Winkler Holding AG to any third party was not limited by the transfer restriction clause according to article 4 of Sika's articles of incorporation". It does not follow from this letter that the same was clear to public shareholders. The term "us" was hardly intended to refer to the public shareholders. Without a legally relevant statement, Emil Rebmann's witness testimony is unnecessary (cf. Art. 150 (1) CPC).

4.6.3 Therefore, the statements in 1993, which have no clear connection with the transfer restrictions under Article 4 (1) of Sika's articles of incorporation, are not relevant. Dr. Kurt Furgler, then-president of the Board of Directors of Defendant, told the general meeting of 17 June 1993 that in the future Sika would remain an independent company with the Burkard family as a strong main shareholder (cf. Referat of Dr. Kurt Furgler [act. 20/7] p. 3). From this statement alone, it was not clear to the public shareholders whether the supposed continuation of the Burkard family's involvement in Defendant was based on the transfer restriction and not on other provisions of the articles or other circumstances such as contractual obligations (cf. also Judgment of the Federal Administrative Court of 27 August 2015 [act. 20/57] consid. 5.2.4) or moral commitments. Consequently, it is not clear from these historical source documents whether and to what extent they were reflected in the articles of incorporation. Therefore they are not relevant for the interpretation (cf. Emmenegger/Tschentscher, loc.cit., Art. 1 CPC N 312). The same also applies for example to the claim in the Statement of Claim that Lex Friedrich or Lex Furgler were the reason for the introduction of the percentage-restriction of transferability (act. 1 N 39 et seq.); Claimant anyway already deviated from this position in the reply (cf. act. 42 N 23 and N 439).

4.6.4 The only document on record that can be considered as an aid for historical interpretation is an article from a working group under the leadership of Prof. Dr. Peter Forstmoser. In view of the commencement of a revision to stock corporation law in 1992, this working group drafted template clauses for articles of incorporation, which it commented and gave recommendations on (Recommendations, template clauses and commentary published in SZW 1993 p. 80 et seq. [act. 42/80]). When the articles of incorporation were changed in 1993, Defendant took on the drafting suggestions of the working group in Article 4 (1) subpara. 4 of its articles of incorporation. With the exception of the word "full shareholder", which was replaced by the word "shareholder" in Sika's articles of incorporation, Article 4 (1) subpara. 1 and 3 match the template articles word for word. In the working group's report, there was no comment on the scope of application of the subject of Article 4 (1) subpara. 1 of Sika's articles of incorporation (percentage-restriction or quota clause) (SZW 1993 p. 81 et seq.). Regarding the group clause which is contained in Article 4 (1) subpara. 3 of Sika's articles of incorporation, the working group stated that this applies to corporate groups [*Konzerne*] "according to an economic approach". Additionally, it also applies to combinations of people which do not fulfil the requirements of a corporate group but which are aimed at bypassing the registration limitation (SWZ 1993 p. 83). The principle of the economic approach is also illustrated in the commentary (at least with regard to the group clause). The template clauses and the commentary do not make any reference to an indirect transfer of shares (change of the control relationship in shareholders). This silence does not allow one to conclude, however, that an indirect transfer should be deliberately excluded from the scope of application of the transfer restriction provisions. Claimant also does not claim this. For this reason, an examination of the members of the working group as witnesses, which Claimant has offered, is not necessary (cf. act. 42 N 84 et seq.). Clearly, it was simply the case that nobody in the working group thought of this situation when formulating the template text, which can be traced back to the fact that a few years ago, there was no sufficient awareness of this legal question (cf. Karollus/Artmann loc.cit., p. 66). If the working group had thought of a situation such as the present one, it can be assumed that they would at least have referred to it in the commentary.

4.6.5 The historical interpretation is therefore not informative in determining the scope of application of Article 4 of Sika's articles of incorporation. However, in any case, as already men-

tioned the historical interpretative element is of supplementary importance at most in interpreting articles of incorporation. Instead, what is decisive is the systematic and teleological interpretation, which is to be carried out according to a present-day understanding of the issues (interpretation according to the current view).

4.7 The teleological interpretation requires a determination of the meaning and purpose of the clause on the restriction of transferability of registered shares. In applying a teleological interpretation, one examines the articles of incorporation as independent, objective provisions. Therefore, over the course of time, the articles of incorporation may take on meanings which their drafters did not think of. What is decisive is the intention which a typical, careful reader of the articles under the present circumstances can and must infer from the provision of the articles of incorporation (cf. Böckli, loc.cit., § 1 N 634; BGE 107 II 179 consid. 4c; for German law: Liebscher, loc.cit., p. 828). What is relevant is the intention and purpose of the actual provision. The starting point for the teleological interpretation of Article 4 of Sika's articles of incorporation should however show a conventional percentage-restriction of transferability (consid. 4.7.1). Below, the general or conventional understanding held by legal doctrine and jurisprudence, as well as generally by the people to whom the transfer restriction provision would be addressed to, will first be examined. The people to whom the transfer restriction is addressed are all current and potential shareholders of Defendant. On the basis of this understanding, the actual circumstances are to be examined in order to see if there was a deviation from it.

4.7.1 Restriction of transferability means that a company can disallow the transfer of registered shares based on a clause in its articles of incorporation (Art. 685a al. 1 CO). The purpose of such a clause is in general to exclude undesired influences on the decision-making that happens within the corporation. Permissible transfer restrictions differ according to whether the registered shares of the company are listed on the stock exchange (article 685 et seq. CO) or not (article 685b et seq CO). For unlisted registered shares, the transfer restriction serves to fend off unwanted people as shareholders and to prevent the existing power relationships within the company from being changed. Under the law, the rejection of a transfer is limited to permissible (important) reasons. The important reasons listed in the law (article 685b (1) and (2) CO for unlisted registered shares and article 685d (1) CO for listed registered shares) are described as provisions which are aimed at achieving a particular result [*Zielnormen*]. It is not enough for the articles of incorporation merely to refer to a provision aimed at achieving a particular result. Instead, the reasons must be expressly included and substantiated in the articles of incorporation of the company. The percentage-restriction of transferability (so-called percentage-restriction of transferability or quota clause) is an admissible, sufficiently specific reason to disallow the transfer of shares which are not listed on an exchange as well as for those which are listed (cf. Art. 685d (1) CO). The purpose of such a quota clause is to secure the economic independence of a company. Thus, this clause further specifies the purpose clause, which is to maintain economic independence (cf. BGE 4C.35/2007 of 18 April 2007 consid. 3.3, and 4C.242/2001 of 5 March 2003 consid. 5.2; BGE 109 II 43 consid. 3b; von der Crone, loc.cit., § 3 N 71; Bieri, loc.cit., N 267 et seq.; Böckli, loc.cit., § 6 N 272; Kläy, Die Vinkulierung, 1997, p. 12 et seq., 32 et seq., 307 and 511 et seq.; Hirschle/von der Crone, Vinkulierung und Stimmrechtsvertretung bei nicht nicht börsenkotierten Gesellschaften, SZW 2008, p. 103 et seqq., 106 et seq.; Tschäni, Vinkulierung nicht börsenkotierter Aktien, loc.cit., p. 21 et seq.; Forstmoser/Meier-Hayoz/Nobel, loc.cit., § 44 N 151). The percentage-restriction of transferability is sometimes even described as the central means by which the important re-

quirement of economic independence is substantiated in the articles of incorporation. Certain authors are of the view that if one wants to implement the aim of economic independence into a practicable standard, one inevitably comes to the conclusion that a percentage-based limitation of the acquisition of registered shares is required (Böckli, loc.cit., § 6 N 271). It is not necessary that the articles of incorporation expressly refer to the protection of economic independence as a purpose. This purpose also arises from article 685b (2) CO (Kläy, loc.cit., p. 163 with references). Therefore Claimant's remarks that this purpose is not mentioned in Sika's articles of incorporation (act. 42 N 166) are not expedient.

The purpose of the percentage-restriction of transferability (securing economic independence) suggests that the restriction of transferability also applies to indirect transfers of shares. The reason for this is that the transfer of all shares of a holding company to a corporate group usually comes with a change in the economic independence of the company whose shares are subject to transfer restriction [*vinkulierte Gesellschaft*]; the buyers' ability to influence the decision-making of the company whose shares are subject to transfer restrictions are the same when acquiring these shares indirectly as when acquiring them directly (for German law: Liebscher, loc.cit., p. 826; Lutter/Grunewald, loc.cit., p. 409 et seq.; for Austrian law: Karollus/Artmann, loc.cit., p. 67; Weismann, loc.cit., p. 256 et seq.). Unlike what Claimant submits (act. 42 N 307), the fact that an indirect application of a restriction of transferability, such as Article 4 (1) of Sika's articles of incorporation, to a situation involving a holding company has not yet been the subject of consideration in Switzerland, does not mean that such an application contradicts the way that legal doctrine, jurisprudence and the addressees of the norm understand a restriction of share transferability. One should rather conclude from this that the understanding of a public shareholder is limited to the idea that the purpose of a quota clause is to secure the economic independence.

4.7.2 For the application of Article 4 (1) of Sika's articles of incorporation to the SG transaction, Claimant, who holds 99.87% of all registered shares of Defendant, is a pure holding company (for the concept of a pure holding company: Meier-Hayoz/Forstmoser, loc.cit., §24 N 76). The limitation of the company purpose to the holding of participations is a formal construction whereby the holding company exercises actual influence on the subsidiary. A change in the holding shareholder also amounts to a change in the subsidiary shareholder. Therefore, the issue of a pure holding company is central to the interpretation (cf. for German law: Liebscher, loc.cit., p. 830; Lutter/Grunewald, loc.cit., p. 410; Bayer, loc.cit., § 68 [d]AktG N 122 in fine; for Austrian law: Kurat, loc.cit., p. 94 et seq.). The fact that Claimant is a pure holding company, with no operational activity, is clear from the purpose limitation in the commercial register (act. 1/1; article 9 CPC). As Claimant itself stated (act. 1 N 14), this has been the case since 1968. Not least because the commercial register is public (article 930 CO), this was and is known to the existing and potential shareholders of Defendant.

4.7.3 Further evidence of the applicability of Article 4 (1) of Sika's articles of incorporation to the SG transaction comes from the fact that Claimant has voting rights (52.92%) over Defendant. Consequently, Claimant is not a classic finance holding company, in which the held company would be broadly independent and the possibility for the holding company to exert influence over it would be limited to allocating or deducting financial resources (for the concept of a financial holding company: Meier-Hayoz/Forstmoser, loc.cit., §24 N 80). In the case of a classic financial holding company (with limited ability to exert influence), the protection of (other) voting minorities and investors through the preservation of economic independence would be

of lesser importance; the purpose of protecting economic independence takes on a higher importance if the participation of a shareholder who can significantly exert influence on the company changes (cf. also Liebscher, loc.cit., p. 830; Kurat, loc.cit., p. 94; Koppensteiner, loc.cit., p. 434). These participations were known not only to the parties but also to the public shareholders (cf. Claimant's statements [act. 1 N 21; act. 42 N 133 et seq. and 185] with references to the Sika annual report of Defendant [act. 1/20] and a share notice of 17 April 2014 [act. 42/84]). Because of the fact that the articles of incorporation are to be interpreted according to a present-day point of view, it is not relevant that at the time Claimant accepted the disputed transfer restriction provision, i.e. in 1993, it "only" held 48% of the votes of Defendant, as Claimant claims (act. 42 N 20 et seq. and 204). Apart from that, where one has a voting share of 48% in a public company, one has control, or at least significant influence over that company if one takes into account that at the general meeting, it is rare that all votes be represented (cf. Böckli, loc.cit., § 6 N 270; Daeniker, loc.cit., p. 98; Kurat; loc.cit., p. 94). For example, the participation level in Defendant's general meeting of 14 April 2015 was about 75% (cf. Minutes [act. 20/47]). Since 1996 (in particular also on 14 April 2015), Claimant has held a control majority of more than 50% (cf. Sika Annual Report for 1996 [act. 1/20. 1996], p. 7).

4.7.4 The fact that Claimant has a capital participation of "only" 16.97% but a voting majority through its voting shares also speaks to the applicability of Article 4 (1) of Sika's articles of incorporation to the SG transaction. This is a ratio of one to six (cf. excerpt from the commercial register [act. 1/2]), which was and is known to the public shareholders. This voting right ratio is to be considered as already taking the interests of the registered shareholders – and therefore practically exclusively the interests of Claimant – significantly into account, so that the requirement to protect the bearer shareholders in connection with the transfer restriction is therefore to be given more weight.

4.7.5 Additionally, it should also be taken into account that the only (appreciable) participation which Claimant holds is its participation in Defendant. This has been the case since 1993. In a management letter from Neutra Treuhand AG on 2 November 1993 (act. 42/70), it is clear that Claimant's participation in Sika was recorded in Claimant's books as approximately CHF 36.8 million, while the other participations ("securities") were only around CHF 0.09 million. In the Statement of Claim, Claimant only spoke of other financial investments and other participations in the past tense (act. 1 N 14 last sentence). In the Reply, it spoke of holding shares other than Sika shares only in the past tense (cf. act. 42 N 184 last sentence). In the submission of 8 July 2016, Claimant claimed (act. 64 N 36) that in practice, "with holding companies it often happens that it is limited to holding one participation if, as in the present case, several people hold a participation together in a large company by way of a holding company […]". Hence, Claimant's only purpose has been for decades to hold the Sika shares and to bundle the family Burkard's voting rights, as described by Defendant (act. 20 N 9 and 34) and not contested by Claimant. The reason for bundling the voting rights and implementing a holding construct is not relevant (cf. also Weismann, loc.cit., p. 256 et seq.). Since the Sika registered shares are the only participation held by Claimant, with regard to the question of economic independence it is less important whether the Sika registered shares or the SWH shares are sold (cf. for German law: Liebscher, loc.cit., p. 830; Lutter/Grunewald, loc.cit., p. 410; for Austrian law: Kurat, loc.cit., p. 95). As far as can be seen, the public shareholders did not have a different view with regard to the participation of Claimant. In public, Claimant seemed only to be a majority shareholder of Defendant – insofar as it was even referred to, and the Burkard siblings were not mentioned directly – (cf. 2013 Sika annual report [act. 1/20.2013] p. 49 and other annual

reports [act. 1/20]; Report in the SonntagsZeitung of 19 April 2015 [act. 1/28]: "[…] the Schenker-Winkler-Holding, through which the Burkard family holds its voting rights in Sika"; article from Bilanz 24/2014 [act. 20/8]: "The share-package of the Burkard family – they control the construction chemistry conglomerate [Defendant] with around 53 percent of voting rights – has […]").

4.7.6 Another reason for applying Article 4 of Sika's articles of incorporation to the SG transaction is the fact that in addition to not holding any other participations other than the Sika registered shares, Claimant also has no other "business assets" (cf. Lutter/Grunewald, loc.cit., p. 410; Weismann, loc.cit., p. 256 et seqq.; Kurat, loc.cit., p. 95; also Koppensteiner, loc.cit., p. 434) which are being transferred to Saint-Gobain. In section 2.2 of the Share Purchase Agreement 2014 (act. 59/101a) it was agreed that at the completion date, the only "material assets" of Claimant are to be the Sika registered shares. In section 3.3.1 of the contract it was stated that by the completion date, all assets still held by Claimant with the exception of the Sika participation are to be distributed to the Burkard siblings as a dividend. Consequently, through an extensive interpretation, Article 4 (1) of Sika's articles of incorporation does not affect other assets of Claimant (cf. Liebscher, loc.cit., p. 830 with references).

4.7.7 A further argument for stating that Article 4 of Sika's articles of incorporation include the present indirect sale is that not only Claimant but also the Burkard siblings (as far as can be seen) have no other appreciable participation apart from the SWH shares (i.e. Sika registered shares) and do not carry out any other business which conflicts with the interests of Defendant. Defendant's statement that the Burkard family does not have any other company apart from Defendant, let alone a competing company, is not contested (cf. act. 20 N 51; act. 42 N 200). The further claim of Defendant that the Burkard siblings and Claimant form a single economic unit and have identical interests is not substantially denied (act. 20 N 9 and 318; act. 42 N 167 et seq. and 332; act. 50 N 311 and 461). A substantiated denial would be necessary because Claimant is closer to these facts than Defendant is and it is hardly possible for Defendant to substantiate these facts based on its own knowledge (cf. Art. 222 (2) CPC; BGE 133 III 43 consid. 4.3; 115 II 1 consid. 4.; BGE 4C.366/2000 of 19 June 2001 consid. 5b/bb and 5A_710/2009 of 22 February 2010 consid. 2.3.1; Dolge, Anforderungen an die Substanziierung, in: Dolge [Hrsg.], Substantiieren und Beweisen, 2013, p. 17 et seqq., 25; Brönnimann, Die Behauptungs- und Substanzierungslast im schweizerischen Zivilprozessrecht, 1989, p. 183 et seq. and p. 219 et seqq.; each with references). To the extent that it is on the record, the public shareholders have also held this view, since the Burkard siblings have been associated in public only with Defendant (cf. Article in Bilanz 24/2014: "The share-package of the Burkard family – they control the construction chemistry conglomerate [Defendant] with around 53 percent of voting rights – has increased its value by more than a fifth in the last year. […] He [Urs F. Burkard] and his four siblings hold the shares [of Defendant] in equal parts" [act. 20/8]). Claimant was and is therefore not an intermediate holding company. In an intermediate holding company, the scope of the restricted transfer provision would have to be assessed in a more limited way, in particular because the economic relationships are not transparent to the public shareholders and a typical, reasonable public shareholder cannot assume in good faith that the transfer provision also includes indirect sales (cf. also Koppensteiner, loc.cit., p. 434 et seqq.; Seibt, loc.cit., § 15 [d]GmbHG Rz 111a).

4.7.8 The fact that the SWH shares of the Burkard siblings were (seemingly) never traded, but remained with the family (cf. act. 42 N 103), also speaks for Defendant's position under a teleo-

logical interpretation. This is relevant because under these circumstances it is not to be assumed that among the SWH shareholders, there are people who would have bought into the company without knowing that Article 4 (1) of Sika's articles of incorporation existed and who would have relied upon the ability to resell their shares at any time without limitation (cf. Weismann, loc.cit., p. 256 et seqq.; Asmus, Vinkulierte Mitgliedschaft. Der Schutz mitgliedschaftlicher Vinkulierungsinteressen und das Problem der Gesetzesumgehung, 2001, p. 147).

4.7.9 Claimant claims that the restriction of transferability in article 4 (1) of Sika's articles of incorporation could not be aimed at the preservation of the economic independence as Claimant controlled Defendant and thus, Defendant has never been economically independent (act. 42 N 199). This argument does not hold up.

Indeed, Defendant is largely dependent on Claimant in terms the voting rights and in this respect, Defendant is not independent. However, this lack of independence is not of an economic nature but rather of a personal nature. In contrast to Claimant's view (act. 42 N 309), the decisive question is not whether there exists a dependence or a lack of independence as such. What is decisive is whether there is economic dependence or economic independence. The conclusion that Defendant was and still is economically independent follows from the fact that Claimant does not hold any other stake in a company (nor does it have any company assets) and that it is not involved in any other commercial activities and that the Burkard siblings do not hold any other stake and are not involved in business activities which are in conflict with the interests of Defendant. Furthermore, as Defendant asserts (act. 20 N 293) also the fact that the Burkard family restrained itself from influencing Defendant's business, is an argument underlining the economic independence in spite of Claimant's control. This holds true at least for the present (which is relevant for the decision) as well as the past decades. The contrary assertion of Claimant, according to which Claimant had "also played an active role regarding the business" (act. 42 N 125), is not supported by the document submitted as proof, dating from 1989 (company history of Schenker-Winkler Holding AG, Baar, 2 August 1983 [act. 42/83]), at least not for the period following 1983. Moreover, Claimant does not describe how it has exerted the alleged influence in the recent past. Given that the restrained exertion of influence is a negative fact, an even more substantiated contestation can be expected from Claimant claiming the contrary (Walter, loc.cit., article 8 CC N 353; Brönnimann, loc.cit., p. 217 et seq.). The blanket assertion that it had "always played an active role" is not sufficient.

However, even if initially the purpose was not the preservation of economic independence, nothing would be gained for Claimant. This is because for the interpretation of article 4 (1) of Sika's articles of incorporation it is not its historical origin or the interpretation in place when the articles of incorporation were drawn up which is decisive, but rather what a typical, diligent public shareholder can and has to infer in good faith from this provision today. Public shareholders have to and can in good faith understand the percentage-restriction of transferability at present as protecting economic independence, in spite of personnel dependencies of Defendant.

4.7.10 Furthermore, Claimant's objection that the percentage-restriction of transferability was established as at the time Claimant did not have the majority of voting rights and as it wanted to ensure that no third party could acquire a majority without its consent, is unfounded. Claimant asserts that the share purchase restriction was neither directed against it – Claimant – nor against the members of the Burkard family as shareholders of Claimant (act. 42 N 21 and 23).

It is incomprehensible why the majority of capital should have consented to an amendment to the articles of incorporation which on the one hand would have served the purpose of deterring third parties from Defendant and on the other hand would have conferred a right on Claimant to sell its shares (directly or indirectly) to any third party. Also, Claimant does not describe to what extent this alleged objective was disclosed to the shareholders who approved the amendments of the articles of incorporation in 1993. In any case, Claimant's allegation is, even if it were true, irrelevant, as the decisive factor is the public shareholders' objective understanding of article 4 (1) of Sika's articles of incorporation as of today. Anyhow, it is unthinkable that public shareholders in the present situation where Claimant holds 52.92% of Defendant's voting rights, can and must assume in good faith that the purpose of article 4 (1) of Sika's articles of incorporation is to prevent a third party other than Claimant from acquiring a majority interest (cf. act. 50 N 296, 398 et seq. and 508).

4.7.11 In addition, the fact that the Burkard siblings are selling their entire package of SWH shares, and not only part of it, also speaks in favour of the application of article 4 (1) of Sika's articles of incorporation to the SG transaction. From an economic perspective, the participating company, i.e. Claimant, does not remain the same but is rather changed completely (cf. also Lutter/Grunewald, loc.cit., p. 412; Weismann, loc.cit., p. 256 et seq.; furthermore: BGE 140 II 233 consid. 5.6.1 regarding the transfer of only part of the shares of a company possessing an agricultural business).

4.7.12 Given that the purpose of Article 4 (1) of Sika's articles of incorporation was and is to preserve economic independence, it needs to be shown that this economic independence would be lost if the transaction with SG were to close. Defendant explains that the planned takeover by Saint-Gobain would imply the final incorporation of Defendant into the conglomerate of its competitor Saint-Gobain which would mean that it would definitely lose its economic independence (act. 20 N 5 et seq., 51 and 296 et seq.). Claimant contests the fact that Defendant would lose its independence as a consequence of the sale to Saint-Gobain. It holds that from an economic perspective, nothing would change (act. 42 N 314).

Claimant's position cannot be accepted. As already stated, Defendant's current economic independence lies in the fact that Claimant does not hold any other significant participation (other than the Sika shares) and that Claimant does not pursue any activities other than the management of these shares, which by way of analogy is also true for the Burkard siblings (consid. 4.7.7). This, however, does not hold true for the Saint-Gobain conglomerate – be it for the holding company Saint-Gobain (according to the Share Purchase Agreement 2014) or the subsidiary Société de Participations Financières et Industrielles (according to the Share Purchase Agreement 2015). According to Urs F. Burkard's input during the general meeting of Defendant on 14 April 2015, the Saint-Gobain Group is an industrial group with a company history that goes back 350 years. Apparently, Saint-Gobain is the world's number 1 in construction materials. Urs F. Burkard went on to state that in the mortar business, Saint-Gobain is a partial competitor of Defendant (cf. appendix 5 to the protocol [act. 20/47] p. 83 and 85). Even in the present proceedings Claimant does not dispute that Defendant and Saint-Gobain are competitors in the mortar business; Claimant, however, tries to relativize and submits that the competition is not "pronounced", as Claimant and Defendant would not be in direct competition but rather offer "complementary" product ranges (act. 42 N 37 and 230). In addition, Defendant was listed as "Main Competitor" in the area "Industrial Mortars" in Saint-Gobain's annual reports of 2008 to 2013 (act. 50/77). Whether there is a competitive relationship is, however, ir-

relevant as integration into a conglomerate alone leads to the loss of independence (cf. Böckli, loc.cit., § 6 N 268; Oertle/Du Pasquier, loc.cit., Art. 685b OR N 5; Kläy, loc.cit., p. 167). As the Higher Court of the Canton of Zug [*Obergericht*] already found to be credible, Defendant would be in danger of being integrated and absorbed by Saint-Gobain in case of a change of control, which would arguably lead to Defendant irrevocably losing its economic independence (cf. Decision Z1 2015 13 of 10 June 2015 consid. 4.4.3). The type of group affiliation is irrelevant. Equally irrelevant are the questions whether Defendant will – besides the affiliation to Saint-Gobain – also be consolidated in Saint-Gobain's financial statements (cf. the diverging opinions [act. 20 N 81; act. 42 N 223]; investors presentation Saint-Gobain of 8 December 2014: "The company [Defendant] will be fully consolidated" [act. 20/9] slide 20) or whether this is legally permissible (cf. act. 20 N 81; Böckli, loc.cit. § 11 N 361 et seq.). Amongst the decisive factors is the fact that not only part of the shares in Claimant are sold but that the Burkard siblings are selling the entire package of SWH shares (consid. 4.7.11).

The true intention behind the SG transaction only relates to Claimant's stake in Sika. Claimant's objection that the Share Purchase Agreement 2015 clearly stated that the object of the sale were merely Claimant's shares (act. 42 N 119 et seq.) is formal and legalistic, and does not hold up. First, the objection does not address Defendant's statement that the "true intent" (not the object of sale in the formal sense) relates to Sika's shares (act. 20 N 190). Second, it can readily be deducted from the Share Purchase Agreement 2015 that the actual object of sale is the Sika shares. The purchase price in article 2.2 of the Share Purchase Agreement 2015 economically only refers to the stake in Sika held by the Burkard family. According to article 3.3.1, last paragraph, of the Share Purchase Agreement 2014 (act. 59/101a), Claimant shall repay all debts and distribute all assets, except for the Sika shares, to the Burkard siblings in the form of a dividend distribution before closing. Hence, only the Sika shares remain. Furthermore, the closing conditions in article 3.2 of the Share Purchase Agreement 2015 indisputably only refer to Defendant and its shares but not to Claimant (act. 20 N 190 second bullet point). Article 3.2 (ii) requires for the closing of the purchase agreement that "[…] there has been no change in the ownership of the Sika Shares". Article 3.3 (iii) requires that Defendant (not Claimant) "has not otherwise altered the Capital Structure". Article 3.3 (v) requires that there will be no "Material Adverse Effect" regarding Defendant (not regarding Claimant), for example that profit and turnover expectations of Defendant will not change substantially. In article 4.3 of the share purchase agreement, the Burkard siblings assert that Claimant has unencumbered ownership of the Sika shares it holds (act. 20 N 190 third bullet point). Furthermore, article 11 of the Share Purchase Agreement 2015 contains a non-compete and a non-solicitation clause referring exclusively to Defendant (and not to Claimant) ("The Sellers undertake and guarantee that neither the Sellers nor any […] will […] compete […] with Sika"; act. 20 N 190 fifth bullet point). Even Pierre-André de Chalendar, president and CEO of Saint-Gobain, wrote in his letter to shareholders, employees, clients, suppliers and other stakeholders of Defendant, that Saint-Gobain will be a future Sika shareholder (act. 42/79 first paragraph: "[…] as it is important to me to explain the circumstances and our intentions as acquirer of Schenker-Winkler Holding – and therefore as future Sika-shareholder") and that the future of Defendant (not of Claimant) lies within the Saint-Gobain family (last paragraph: " The future of Sika is – within the Saint-Gobain family – in the best hands"). In a press release of 7 April 2015, Claimant also announced that with the extension of the Share Purchase Agreement 2014, Saint-Gobain has reiterated its firm intention "to acquire SWH and thus to acquire control over Sika AG" (act. 20/45). In his statement during the general meeting of 14 April 2015, Urs F. Burkard explained that after the transaction, Sika representatives shall become mem-

bers of important bodies of Saint-Gobain (cf. appendix 5 to the protocol of the general meeting of Defendant of 14 April 2015 [act. 20/47] p. 84). Finally, it is also stated in article 3.3.2 (2) in fine of the Share Purchase Agreement 2014 "that Sika shall, after the Closing, become a member of the Saint-Gobain Group".

It clearly follows from the above that in case of a sale of the SWH shares to Saint-Gobain, Defendant would become part of the Saint-Gobain conglomerate. By Saint-Gobain obtaining control over Defendant indirectly, i.e. via Claimant, the economic independence would be lost (cf. also Kurat, loc.cit., p. 94, Lutter/Grunewald, loc.cit., p. 412). Furthermore, the sale of all SWH shares to Saint-Gobain cannot be compared to the transfer of a few SWH shares within the Burkard family. For this reason, contrary to the view of Claimant (act. 42 N 103), Defendant's board of directors does not act in a contradictory manner if it did not make reference to the share purchase restrictions when transfers within the Burkard family were made but did make reference to those restrictions in the present SG transaction (cf. also Karollus/Artmann, loc.cit., p. 67).

4.7.13 Moreover, the application of article 4 of Sika's articles of incorporation to the SG transaction is supported by the fact that an indirect sale is the only practically conceivable instance of selling the nominal Sika shares one can think of. It is a basic precondition of the teleological method of interpretation that the provision of the articles of incorporation that will be interpreted has a purpose, i.e. that there exists a (practical) case which it can be applied to. The assumption that a provision has become pointless is not to be made needlessly. In case of doubt, a provision is to be interpreted such that it is considered as valid and that it has a (practically relevant) area of application. This rule is applied to the interpretation of contracts; accordingly, in case of doubt, the interpretation which does not imply the annulment of the contract is to be preferred (favor negotii; cf. Jäggi/Gauch/Hartmann, Zürcher Kommentar, 4. Ed. 2014, article 18 CO N 488 et seq.). This rule is equally applicable to the interpretation of legislation (cf. BGE 112 II 167 consid. 2b).

As a consequence, this principle must also be considered when interpreting Sika's articles of incorporation. This approach is particularly important in the present case. This is because during the modification of the articles of incorporation in 1993, Dr. Marcus Dessax reviewed the draft of the articles of incorporation, amongst others, to make sure that the articles of incorporation contained only clauses of practical relevance. In his letter of 5 April 1993 to Dr. Kurt Furgler (act. 20/6), Dr. Marcus Dessax stated: "The referral to […] is […] rather theoretical in nature and should be deleted in my opinion" (p. 2) or "This article could be deleted in my opinion because SIKA Finanz AG will very probably never issue registered shares which are not fully paid in" (p. 4). These recommendations were subsequently implemented. As far as the present situation is concerned, it is striking that the share transfer restriction remained unchanged since 1993. In contrast, the articles of incorporation have been revised nine times since 1998 (act. 1/6 p. 11). This equates to an average time of two years between modifications. At this pace, it must be assumed even more strongly that the articles of incorporation are up to date, and that the shareholders can rely on the clauses in the articles of incorporation being relevant, i.e. that they have a practical area of application. This is also supported by the fact that the Sika articles of incorporation address a broad audience, and, thus, one can assume all the more that superfluous clauses would be deleted on a regular basis. In any case, Claimant does not claim anything to the contrary.

Given that as of today Claimant holds 99.87% of all registered shares, the share transfer restriction and its threshold of 5% can only relate to sales of shares concerning these 99.87%. Claimant or its owners are, thus, factually the only addressees of Article 4 (1) of Sika's articles of incorporation. It would now be possible that either Claimant sells its Sika shares, or the Burkard siblings sell their SWH shares. The public shareholders are and have been aware of the fact that SWH's shares can be sold instead of Sika's registered shares, which is not disputed by Claimant. That Article 4 (1) of Sika's articles of incorporation would be applicable if Claimant had sold more than 5% of registered Sika shares to a third party, e.g. Saint-Gobain (direct sale), is – rightfully – undisputed (cf., act. 42 N 167; act. 50 N 651). However, it is almost inconceivable that this sale situation would arise because according to article 16 (3) FDTL [*DBG*] (and according to the cantonal tax laws [cf., namely article 23 (1) let. b Tax Law of the Canton of Zug]) only capital gains derived from the sale of private property are tax-free, whereas capital gains derived from the sale of business property are not. Like Dr. Romuald Burkard, father of the Burkard siblings, once remarked, the tax burden when directly selling the Sika shares would be 40% to 50% higher than in case of an indirect sale, i.e., in the case of sale of the SWH shares (cf. note by Dr. Romuald Burkard "Future Politics of SWH" of 30 June 1992 [act. 42/78]). Even Claimant states in its submission that the sale of the holding was the only way to realize a tax-free capital gain (act. 1 p. 7 and N 107). Thus, the only factually perceivable change in the shareholder structure of Sika's registered shares is that the Burkard siblings sell their SWH shares. Claimant only submits that the sale of shares by the Burkard family was not the only practical instance of application. However, Claimant uses the past tense (act. 42 recital 204: "[…] was the only practical case of application, is wrong"), whereas Defendant refers to the present – which is the time relevant to the decision – (act. 20 recital 58: "at the latest from this point in time [referring to the delisting of the registered shares in 2003] is […] the only practical case of application"). If the scope of application of Article 4 of Sika's articles of incorporation were to be limited to a direct sale of Sika's registered shares, this article would, therefore, lose its practical relevance. Article 4 would be deprived of its purpose without there being any objective reason for this. This also contradicts Claimant's interpretation of Article 4 of Sika's articles of incorporation.

4.7.14 The fact that Article 4 (1) of Sika's articles of incorporation was introduced at a time when Sika's registered shares were still listed on the stock exchange – they were delisted in 2003 – does not argue against the application of this provision to the SG transaction. On the contrary, after the delisting current and potential shareholders have all the more reason to trust that the economic independence and the board's possibility to have an influence on the composition of shareholders will have a higher priority.

4.7.15 In light of the above, an economic approach shall be applied based on the systematic and teleological interpretation of Article 4 (1) of Sika's articles of incorporation (likewise Auberson/Oppliger, L'affaire Sika: un exemple en faveur d'une approche économique des transferts d'actions soumis à l'agrément de la société, SZW 2015 p. 614 et seqq., 628). The application of the principle of the economic approach is not limited to public law, in particular tax law. This principle is also acknowledged in private law. However, it shall not be applied indiscriminately but only in cases where it is required by the purpose of the norm, i.e. if the purpose is of an economic nature. Thus, excluding the economic approach in private law in general would entail a complete negation of the teleological interpretation. As far as can be established, neither the doctrine nor the case law comprise any such votes. Quite the opposite is true

(instead of many: BGE 126 III 462 consid. 3b; 115 II 175 consid. 4b; Lanz, Von der wirtschaftlichen Betrachtungsweise im Privatrecht, ZBJV 2001 p. 1 et seqq.; each with references). Moreover, in the present case it has to be taken into account that a provision of the articles of incorporation – and not a provision of law – has to be interpreted and that, therefore, the connecting factor for the economic approach has to ensue from the articles of incorporation (in the present case, it ensues from Article 4 (1) of Sika's articles of incorporation); therefore, the argument that the "law regarding restriction on transferability (Article 685a et seqq. CO)" does not provide a basis for an economic approach is irrelevant anyway.

4.7.16 Claimant takes the view that the registration of indirect transfers of registered shares with restricted transferability would only be possible if the law was changed. In all cases in which the change of control of shareholders should be registered as an indirect transfer, this indirect transfer is specifically mentioned in the law, for instance in Article 120 FMIA (Article 20 oSESTA), Article 135 FMIA (Article 32 oSESTA) and the new provisions regarding disclosure (Article 697j CO; see act. 64 N 78). Against this it may be argued that the registration of the indirect transfer would only be impossible if it violated mandatory law which is not the case. Besides, there is not only no violation of statutory law but there is also no inconsistency with the legislature's assessment (see in this regard consid. 4.5.8 and 4.7.1). On the basis of the fact that the economic approach is only provided in certain passages of the law alone, one cannot infer that this approach is excluded in all other passages (see also Lanz, loc.cit., p. 2 et seqq.).

4.7.17 Moreover, Claimant refers to Article 685b (7) CO according to which the articles of incorporation shall not impose restrictive conditions on transferability beyond the legal scope. Claimant claims that this provision did not allow the interpretation alleged by Defendant (act. 42 N 86 et seqq.). Article 685b (7) CO constitutes mandatory law (see Oertle/Du Pasquier, loc.cit. Art. 685b N 17; Kläy, loc.cit., p. 292), but in the present case it is not relevant. This legal provision only makes clear that the grounds for refusal listed in Article 685b (1) and (2) CO ("good causes") constitute a numerus clausus (see Rouiller, La prise du pouvoir dans les sociétés commerciales en Suisse, 2013, p. 26). This means that it is inadmissible to create new grounds for refusal in the articles of incorporation. In this context the doctrine discusses the admissibility of the right of pre-emption, the right of first refusal, the submission to shareholders' agreements, or "twin shares" (see Böckli, loc.cit., § 6 N 295 et seqq.). From the prohibition on creating new grounds for refusal it shall by no means be inferred that it is prohibited to incorporate legally valid grounds for refusal, in particular the maintenance of the economic independence, in the by-laws and to interpret this provision of the articles of incorporation according to its meaning and purpose.

4.7.18 Finally, Claimant sets forth that after the revision of the articles of incorporation in 1993 the parties and the Burkard family repeatedly commented on Defendant's economic independence with a strong major shareholder – the Burkard family – or on the saleability of the SWH shares (with regard to the comments that were made prior to or at the time of the revision of the articles of incorporation, see consid. 4.6.3). Claimant considers this to be clear evidence "for the fact that neither Claimant nor Claimant's shareholders accepted any restriction with respect to a sale on the part of Claimant" (act. 1 N 54). On the other hand, Defendant states

that the Burkard family repeatedly confirmed its role as guarantor of Defendant's independence also in public (act. 20 N 59).

Irrespective of whether these comments are referred to by Claimant or by Defendant, they are irrelevant in the present case because what is at stake is not the interpretation of a contract where the corresponding will of the parties would have to be determined on the basis of the parties' declarations of intent. In the interpretation according to the methods of the interpretation of law these comments are not relevant because they either did not reach the public shareholders (see, for instance, minutes of the board meetings [act. 1/43 and 1/46]; memoranda [act. 1/44]; alleged [act. 73 N 1 et seqq.] but contested [act. 74 N 1 et seqq.; act. 75 N 1 et seqq.] and not proven [act. 73/107-110] talks and preparations of a sale of Claimant to Saint-Gobain in the years 2011 and 2012; see consid. 4.6.2) or they had no apparent connection to the provision on the restriction on transferability and therefore did not allow any conclusions to be drawn in this respect (see, for instance, script of the general meeting of shareholders of May 27, 1998 [act. 20/62] p. 45 et seq.; anniversary booklet "Trocken, aber nie langweilig, 100 Jahre Sika" from 2010 [act. 1/47] p. 77, newspaper article in Bilanz 24/2014 [act. 20/8]; Annual Report 2013 [act. 1/20.2013] p. 49 and 51, whereby the word "change of control" mentioned there did obviously not refer to the restriction on transferability but to takeover bids under stock exchange law [act. 57 N 4]; see also consid. 4.6.3). For the sake of completeness it has to be mentioned that these kind of comments – as far as they reached the public at all – shall not be considered by analogy as "established doctrine" or "established tradition" pursuant to Article 1 (3) CC (see in this regard Emmenegger/Tschentscher, loc.cit., Art. 1 ZGB N 475 and 483).

4.8 Thus, the teleological and the systematic interpretation lead to the result that the purpose of the percentage-restriction of transferability is to maintain Defendant's economic independence and that Article 4 (1) of Sika's articles of incorporation covers the SG transaction because if this transaction was completed Defendant would lose its economic independence.

Nothing else would ensue if Article 4 (1) of Sika's articles of incorporation was not considered as being subject to interpretation but rather as being incomplete and if the gaps were filled by conclusion of analogy (according to Dürr, Zürcher Kommentar, 3rd Ed. 1998, Art. 1 ZGB N 405 et seqq. the distinction between interpretation and judicial "gap-filling" is outdated and without practical relevance; according to Meier-Hayoz, Berner Kommentar, 3rd Ed. 1962, Art. 1 ZGB N 137 et seqq. the transition between interpretation and "gap-filling" is fluid).

5. As it has been established that the SG transaction falls within the scope of application of Article 4 (1) of Sika's articles of incorporation, it now has to be examined whether Claimant's attempt to replace Defendant's board of directors is covered by this provision. The written submissions and the case law mention a circumvention predominantly with respect to this conduct and less with respect to the sale of the registered SWH shares instead of the registered Sika shares.

5.1 In an evasive transaction those involved intend to evade – through the nature of the design of the law – a legal provision, a provision stipulated in the articles of incorporation or a contrac-

tual provision. The admissibility of the transaction depends on the content of the provision that is intended to be circumvented, i.e. on the teleological understanding of the circumvented norm. Either, the circumvented legal provision, the provision stipulated in the articles of incorporation or the contractual provision is – according to its meaning and purpose – applicable to the evasive transaction; in this case the transaction is also subject to the relevant provision. Or, the circumvented provision is – according to its meaning and purpose – not applicable to the evasive transaction; in this case the transaction is not subject to the provision and remains valid. To assess the issue of circumvention all circumstances of the individual case have to be examined and evaluated. According to the more recent doctrine and case law of the Federal Supreme Court the issue of circumvention is only an issue of interpretation and not (any longer) a specific application of the principle prohibiting the abuse of rights (instead of many: BGE 140 II 233 consid. 5.1; BGE 125 III 257 consid. 3b; Lanz, loc.cit., p. 19; Hausheer/Aebi-Müller, Berner Kommentar, 2012, Art. 2 ZGB N 93; Honsell, Basler Kommentar, 5th Ed. 2014, Art. 2 ZGB N 31; each with references). For the sake of clarity, in the following we will still use the (familiar) term of the circumvention with respect to the replacement of the board of directors. When considering the issue of circumvention or of the interpretation of the provision of the articles of incorporation, respectively, constructs such as liability based on trust or piercing the corporate veil (according to Monsch/von der Crone, Durchgriff und wirtschaftliche Einheit, SZW 5/2013, p. 445 et seqq. piercing the corporate veil is exclusively an issue subject to interpretation) shall not be taken into account.

5.2 A circumvention of a restriction of transferability (and thus an act which falls under the scope of application of the provision as ascertained by interpretation) exists if by application of formally permissible methods – in the present case, the replacement of the board of directors – de facto a condition is created which is contrary to the meaning and the purpose of the restriction of transferability. Such a condition exists if the future acquirer, whose unlimited control is meant to be prevented by the restriction of transferability, exercises influence on the targeted company prior to the acquisition of shares. The Federal Supreme Court stated in various decisions that an abuse of rights is committed by anyone who sells his shares with restricted transferability and undertakes to exercise his voting right at the general shareholders' meeting to the effect that persons subordinate to him are elected to the board whereupon the acquirer can successfully apply for an approval of the transfer of shares (see BGE 81 II 534 consid. 3; BGE 90 II 235 consid. 4d; BGE 109 II 43 consid. 3b). The Commercial Court of Zurich considered voting commitments with respect to the election of the board of directors to be an abusive circumvention of a restriction of transferability stipulated in the articles of incorporation (ZR 1990 No. 49). In the literature these decisions – as far as can be established – were never criticized but rather supported (instead of many: Kläy, loc.cit., p. 307; Forstmoser/ Meier-Hayoz/Nobel, loc.cit., § 2 N 90 et seq. and § 16 N 822; Maizar, Die Willensbildung und Beschlussfassung der Aktionäre in schweizerischen Publikumsgesellschaften, 2012, p. 328). Thus, there are two requirements for a non-re-election or a new election of certain members of the board to constitute a circumvention of a restriction on transferability (which is a facultative provision): Firstly, the only purpose of the election must be to appoint a member of the board who does not apply the restriction on transferability (consid. 5.4). Secondly, there must be a legal obligation or equivalent to exercise the voting right at this election of the board in the interest of the acquirer (consid. 5.5).

5.3 The principles of the decisions referred to also apply in the present case, based on the specific events in the present case (consid. 5.4 and 5.5), irrespective of whether or not these decisions are based on the principle prohibiting the abuse of rights pursuant to Article 2 (2) CC. Thereby, it is irrelevant whether the registered shares with restricted transferability are sold directly or indirectly via the holding company; the principles shall be applied in cases where a restriction on transferability which is applicable in case of acquisition is intended to be circumvented (and in the present case, applicability has already been confirmed by the court (consid. 4)). Moreover, the decisions shall be taken into account regardless of whether they were rendered at a time when the splitting theory (and not yet today's entity theory) for non-listed registered shares prevailed. With respect to a circumvention of the restriction on transferability, it is irrelevant whether the voting and the dividend right in non-listed shares can be divided (which was the case in the splitting theory which was valid until the corporate law revision in 1991) or whether these rights have to be considered as a single unit or entity (currently applicable entity theory; see Article 685c (1) CO, with the exception in Article 685c (2) CO). Also, under the corporate law now in force, a circumvention is disapproved of (see, for instance, act. 20 N 2, 10, 132 and 338; act. 50 N 338).

5.4.1 In principle, it is correct that due to its majority of votes, Claimant is entitled to appoint the members of Defendant's board of directors (except for one representative of the holders of bearer shares) (Article 703 and 709 CO as well as Article 7.1 (1) No. 2, Article 7.3 (3) and Article 8.1 (6) of Sika's articles of incorporation). In the present case, the only purpose of Claimant's replacement attempt was to implement and enforce the SG transaction. Other comprehensible reasons for replacing the board of directors have not been raised (in a substantiated manner) and are not in the facts presented to the court. Irrespective of the allegedly inadmissible restriction of the voting rights Claimant fails to establish whether and in what way the present board of directors acts contrary to Claimant's expectations or contrary to the board's obligations – in strategic, personnel-related (e.g. relating to the appointment of the management) or in other respects (see decision of the High Court of the Canton Zug Z2 2015 13 of June 10, 2015 [act. 20/49] consid. 4.3.2). Claimant generally contests (without success) the idea that the reason behind the attempted replacement was the intention alleged by Defendant (act. 20 N 13) but Claimant does not contest the idea that the "submissive" board envisaged by Claimant would have been intended to abstain from applying the restriction on transferability. Claimant only claims that the restriction on transferability was not applicable anyway (act. 42 N 175). However, Claimant does not even seem to consider that the complete board of directors composed according to Claimant's wishes could deviate from Claimant's view and apply the restriction on transferability. On the contrary, Claimant emphasizes that based on the majority of votes and on the majority principle of the law on stock companies, it was entitled to appoint the majority of the board and that the thus-appointed board of directors was entitled to decide how to apply the restriction on transferability (act. 42 N 194 last bullet point). Claimant then states that with its majority of votes, it was entitled to "elect persons to the board of directors who do not apply the restriction on transferability" and that "by staffing the board with persons of its choice it was entitled to decide whether or not the restriction on transferability was actually applied to a certain acquirer" (act. 42 N 203 last bullet point). This clearly argues for Claimant's intended circumvention.

5.4.2 In particular, Defendant's course of business obviously does not present a reason for Claimant wanting or having wanted to replace Defendant's board of directors. It is uncontested that in 2014 and in the years before, Defendant's operating results under the present board of directors were extremely positive. Net profits increased from CHF 226 million in 2009 to CHF 441 million in 2014 (increase of 95%); the share price of Sika bearer shares increased from CHF 944.00 in the beginning of 2009 to CHF 2,036.00 as per the end of 2014 (increase of 211%) and in 2014 Defendant achieved the best annual results in the company's history (see act. 20 N 43 et seq.; press releases of 2 March 2010 and of 27 February 2015 [act. 20/2-3]; chart regarding the share price development [act. 20/4]). Moreover, in the first half of 2015 Defendant achieved an additional increase in turnover and profits compared to the same period in the previous year (act. 20 N 44; press release of 24 July 2015 [act. 20/5]). Even if reasons such as favourable global economic development or the fact that construction activity benefitted from the low interest rate environment did play a role in these good results and, in addition, considering the fact that group management and not the board of directors conducts the business, there was no objective reason to replace the members of the board due to the course of business.

5.4.3 The dissonance between the Burkard family and Defendant's board of directors in 2012 (alleged by the Claimant) was also not a reason to attempt to replace the board of directors. Claimant states that Defendant's board of directors refused to propose Fritz Burkard for election to the board at Defendant's general meeting of shareholders whereby the board of directors negated Claimant's rights as a majority shareholder and suggested its claim to power (act. 42 N 40). To this it may be responded that at the 46th ordinary general meeting of shareholders Claimant voted for the re-election of all members of the board of Defendant. In this respect, it is not comprehensible that these dissonances should be the cause for Claimant's proposals and for its voting behaviour on the occasion of Defendant's general meeting of shareholders on 14 April 2015.

5.4.4 Also, contrary to Claimant's view (act. 42 N 258), the fact that six members of the board announced that they would resign cannot have been the reason for Claimant's attempt to replace Defendant's board of directors. In Defendant's press release of 8 December 2014 (act. 1/22) it was stated that the independent members of the board of directors and the group management had independently come to the conclusion that, if the transaction was realized, they would no longer be in a position to represent the interests of Defendant and of all its stakeholders in the best possible way and that, therefore, they had decided to resign as a body following the closing of the SG transaction. The announcement of the resignation in the event that the transaction should be realized was a reaction to the takeover initiated by Claimant and the Burkard family. Besides, it is not comprehensible why the "announcement of the resignation" should have led to a "sudden understaffing of the board of directors" (so Claimant in act. 42 N 258). In what way the "announcement of the resignation" should have caused a loss in value of Defendant and whether Claimant's attempt to replace the board of directors would have been the suitable means to stop or prevent this loss in value is not plausible for lack of substantiated allegations on the part of Claimant. It is rather likely that it was not the "announcement of the resignation" but the announcement of the takeover caused the price reduction for a short time

(see chronology of the events and share price development in the article of Bilanz 04/2015 [act. 1/27]).

5.4.5 Claimant allegedly also tried to replace the board of directors because the six members of the board Hälg, Ribar, Sauter, Suter, Tobler and van Dyik had taken "an extremely hostile attitude" towards Claimant and its shareholders, conducted a "defamation campaign" against the Burkard family in the media and that for this "fight against the major shareholder" several million had been spent and that, as a result, the mutual trust between these members of the board and Claimant had been destroyed (act. 42 N 253). This explanation is also not convincing. On 9 December 2014 Claimant requested that an extraordinary general meeting of shareholders be held to deselect or replace the board members Hälg, Ribar and Sauter (see act. 62 N 11; act. 20 N 141 et seqq.). Thus, the first actual attempt to replace the board occurred on 9 December 2014, i.e. only one day after the public announcement of the takeover by Saint-Gobain or one day after it became known that Sika's board of directors rejected the transaction. At this time it was impossible that a "defamation campaign" had been conducted and that millions had been spent.

5.4.6 Hence, it has been established that the sole purpose of Claimant's attempts in the time from 9 December 2014 until 14 April 2015 to replace Defendant's board of directors was to accomplish the completion of the SG transaction, i.e. to ensure the premature change of control. In other words, the election of the board was "the key to the circumvention of the restriction of transferability" (act. 50 N 368). This also means (and this fact is undisputed) that Claimant's attempt to replace the board of directors would have been a suitable means to ensure the non-application of the restriction on transferability (see act. 42 N 194 last bullet point and N 203 last bullet point).

5.5 To establish a circumvention of a restriction of transferability in case of an election of the board of directors, the second requirement is that the voting rights of the seller who is entitled to vote be exercised in the interest of the acquirer and that there is a legal obligation or equivalent to exercise the voting rights accordingly. The obligation to exercise the voting rights in a certain way must be of a certain level. This coordinated approach is part of an attempt to provide the acquirer with the legal position of a shareholder who is entitled to vote (with influence), which, according to the restriction of transferability provided in the articles of incorporation, could only be obtained with the consent of the board of directors. Thus, as soon as this voting commitment exists, the change of control has – factually or legally – occurred (see BGE 81 II 534 consid. 3; Kunz, Werben um Aktionärsstimmen bei Schweizer Publikumsgesellschaften ["Proxy Fights"], 2015,N 527; Karollus/Artmann, loc.cit., p. 67; Lutter/Grunewald, loc.cit., 409). The parties disagree whether Claimant carried out the attempt to replace the board in its own interest or in the interest and according to the instructions of Saint-Gobain. Defendant alleges that Claimant exercised its voting rights in the contested elections in the interest and according to the instructions of Saint-Gobain (act. 20 N 131 et seqq.). On the other hand, Claimant takes the view that it acted in its own interest and without a voting commitment (act. 42 N 250 et seqq.).

5.5.1 Claimant's position is not convincing. It already follows from the Share Purchase Agreement 2014 that a voting commitment existed. In the Agreement, the Burkard siblings undertook to use their best efforts to ensure that by completion of the transaction, the board members of Defendant whose actions or behaviours showed that they wanted to prevent the SG transaction would be replaced. In particular, board members who failed to fully cooperate with respect to the full registration of the registered Sika shares held by Claimant in Defendant's register of shares should be replaced. Board members who in all likelihood would refuse to resign contrary to the wishes of Saint-Gobain should not be re-elected. The respective provisions in the Share Purchase Agreement 2014 read as follows:

> **"3.3.2 Conduct of Business with Regard to Sika**
>
> […]
>
> Sellers shall use best efforts (for the avoidance of doubt, such best efforts include in this and the next sub-paragraph a duty to replace one or more Sika board member(s) as soon as it becomes recognizable that such board member(s) engage(s) in actions which would result in a breach of duties and guidelines of Sika described below) to assure […] that Sika […] complies with the following guidelines:
>
> - no action or behavior which hinders the completion of the transaction contemplated hereunder, but rather full co-operation by Sika to obtain all necessary authorizations in particular the ones referred to in Art. 3.2;
>
> - no decision materially affecting the Capital Structure or voting rights structure of Sika […].
>
> […]

3.2 Conditions Precedent to Closing

The transaction agreed herein shall be consummated if the following conditions have been met:

[...]

(ii) there has been no change in the ownership of the Sika Shares, i.e., the Company owns the Sika Shares free and clear of all liens or other rights of third parties and the Sika Shares (to the extent they are registered shares) are registered as voting shares in the shareholders' register of Sika (and there is no procedure challenging this registration or the voting rights);

[...]

8. Shareholders' Meeting of Sika

Immediately after the conditions precedent set forth in Art. 3.2 (i) have been fulfilled, Sellers shall [...] cause the Company [Klägerin] to request Sika to convene an extraordinary shareholders' meeting [...].

To the extent it is foreseeable for the Sellers that any then current member of the board of directors of Sika is not ready, if so requested by the Purchaser after the Closing Date, to resign, Sellers undertake not to re-elect such member of the board of directors at the ordinary shareholders' meeting 2015 [...]. "

In the best efforts clauses (Article 3.3.2 of the Share Purchase Agreement 2014) the Burkard family undertook to be diligently active in this regard, either directly or through Claimant. These are legal obligations. The binding nature of these obligations does not change depending on whether or not success is owed and whether or not a violation of these obligations entails a claim for damages (see Claimant's objections [act. 64 N 24 second bullet point). Besides, these obligations do not constitute common contractual clauses. Claimant's objection to the contrary, in which it refers to a comparison of the clauses used in the Agreement with sample clauses and quotations from the literature (act. 64 N 21; act. 64/102) is unfounded. There is no clause explicitly providing for the replacement of uncooperative board members ("duty to replace one or more Sika board member[s]") in these sample and standard clauses. But even if Article 3.3.2 of the Share Purchase Agreement 2014 did not establish an express voting obligation, the voting commitment finds expression in other ways. The Burkard family could only meet its obligation to replace the board members who are opposed to the SG transaction by exercising its voting rights at the general meeting or by exerting pressure in other ways, in particular by initiating liability proceedings. In the present case the Burkard family and Claimant took both measures (see act. 20 N 169; letters of Claimant's representative [act. 20/39-44]; order of the Cantonal Court Zug [act. 42/89]). However, Article 8 of the Share Purchase Agreement 2014 expressly provides for the voting commitment. According to this provision, the Burkard family is obliged to arrange that Defendant's board members who will probably not be willing to resign upon Saint-Gobain's request not be re-elected at Defendant's ordinary meeting of shareholders in 2015. Additional proof of the voting commitment is that in their disclosure notifications of 11 December 2014 (act. 1/51) and 5 January 2015 (act. 1/52) (because of their timing, these notifications could only refer to the Share Purchase

Agreement 2014) they stated under the heading "nature of the agreement" (para. 7 page 3 in each notification) that "agreement[s] in the scope of the sales contract [Share Purchase Agreement 2014] had been made to ensure the proper transfer of the control to the acquirer [Saint-Gobain]" and that "this may interfere with the company [Defendant]". In the present case it is irrelevant whether or not Saint-Gobain and the Burkard family formed or form a group subject to the duty of disclosure (see disclosure notifications [act. 1/51-52]; email of FINMA of July 14, 2015 [act. 42/75]; act. 1 N 63 and 64 second bullet point; act. 42 N 36). By exercising the shareholders' rights arising from the registered Sika shares the Burkard family could decide through the intermediary Claimant anyway; therefore, the contractual provision in this respect in the Share Purchase Agreement 2014 did not predominantly serve the interests of the seller; it primarily served the interests of the purchaser, i.e. of Saint-Gobain.

5.5.2 The Share Purchase Agreement 2015 which is meant to replace the Share Purchase Agreement 2014 (see Article 10.5 of the Share Purchase Agreement 2015 ["Entire Agreement"]; act. 1 N 23) no longer contained the best-effort clause described above. In Article 3.2 of the Share Purchase Agreement 2015 the parties to the contract even confirm that no instruction had been given with respect to the exercise of the voting rights linked to the registered Sika shares since the signing of the Share Purchase Agreement 2014. Article 3.2 of the Share Purchase Agreement 2015 reads as follows:

> " Given the fact that regulations in these jurisdictions prohibit Purchaser from exercising any control over or influence the Company or Sika before the relevant authorizations are granted, the Parties herewith agree that the Purchaser until the Closing has no right to, and shall not give any instructions to the Company or to the Sellers on how to manage the participation in Sika, including but not limited to the exercise of voting rights attached to the Sika Shares or the Shares. All contacts between Purchaser and the Company between Signing Date and Closing are subject to this principle of non-interference. The Parties furthermore confirm that no such interference has occurred and no instructions have been given since the Signing Date."

This subsequent "negative confirmation" (act. 20 N 200 et seqq.; act. 61 N 24 et seqq.) is unable to change the voting commitment that had been established earlier. Irrespective of the fact that Article 3.2 of the Share Purchase Agreement 2015 only refers to cartel law ("regulations") it seems obvious that it constitutes, at least in the last sentence ("The Parties furthermore confirm that no such interference has occurred and no instructions have been given since the Signing Date"), a tactically motivated amendment to the Share Purchase Agreement 2014. Firstly, such a negative confirmation is neither common for a purchase agreement nor for the adaptation of the purchase agreement to changed circumstances. It is not obvious why this confirmation which Claimant alleges was required by the competition authority with regard to approval under cartel law (act. 1 N 59), was not given exclusively and directly to said authorities (see, for instance, Saint-Gobain's confirmation of 6 February 2015 [act. 1/50]). Secondly, the "negative confirmation" and Article 3.2 of the Share Purchase Agreement 2015 refer to actual instructions (in terms of a directive or the authority to give directives) since the signing of the Share Purchase Agreement 2014. It is obvious that this does not refer to the general obligation established in the Share Purchase Agreement 2014 to replace uncooperative board members. In cases where a general obligation to exercise one's voting right in a certain manner has been established by conclusion of contract (arrangement) it is not necessary to substantiate said ob-

ligation after the conclusion of contract by means of instructions (directives), at least under the circumstances in the present case. Thus, an actual authority to give directives – the existence of which is repeatedly denied by Claimant (see act. 1 N 64 first bullet point, N 66 and N 117) – is not necessary. Hence, the voting commitment – at least in terms of an arrangement – arose on 5 December 2014 (conclusion of the Share Purchase Agreement 2014) and it was in force beyond 7 April 2015 (conclusion of the Share Purchase Agreement 2015).

5.5.3 This is not changed by Claimant's objection that Saint-Gobain would not have been allowed to take over the control of Claimant and to give directives prior to the issuance of the approval under cartel law and the transfer of the shares (see act. 1 N 61). The prohibition of an acquisition of control under cartel law prior to the merger of two companies (see Article 32 i.c.w. Article 4 (3) (b) LCart and Article 1 of the Ordinance on the Control of Concentrations of Undertakings [SR 251.4]) cannot easily be put on the same level as a voting commitment prohibited under corporate law (and by the articles of incorporation). Control in terms of cartel law means that the controlling company has the possibility of deciding on essential management issues and on general business policy (see Zäch, Schweizerisches Kartellrecht, 2nd Ed. 2005, N 723; Lang/ Jenny, Keine Wettbewerbsabreden im Konzern. Zum Konzernprivileg im schweizerischen Kartellrecht, sic! 4/2007 p. 299 et seqq., 307 et seq.; Entscheid der Wettbewebskommission [in: RPW 2000/3 p. 417 N 14]; contrary Reinert, Basler Kommentar, 2010, Art. 4 Abs. 3 KG N 120 et seq.). Such an extensive acquisition of control is not required with regard to the voting commitment for the purpose of evading the restriction on transferability; therefore, Claimant's comparison with cartel law is irrelevant.

5.5.4 Irrespective of whether a legal obligation regarding the exercise of the voting rights existed, Claimant had and still has a strong economic interest in the completion of the SG transaction. This interest is obvious (see act. 20 N 337 et seqq.; act. 62 N 10); even Claimant admits this indirectly (see act. 42 N 139: "The fact that due to its portfolio of registered Sika shares Claimant has the voting majority in Defendant makes this total portfolio even more valuable because it is linked to the control premium"). Moreover, upon completion of the Share Purchase Agreement the Burkard siblings would receive about CHF 2.82 billion; this corresponds to a control premium of at least CHF 800 million (Claimant mentions CHF 800 million [act. 42 N 142] and Defendant mentions a minimum of CHF 1.16 billion [act. 20 N 12; act. 50 N 82 and 470]). In the case of amounts of this size, arrangements and directives regarding the exercise of voting rights are unnecessary anyway. The obvious economic incentive is equivalent to an express contractual obligation (see ZR 1990 No. 49 E. III.2.2). Therefore, in reality a factual coordination, control or voting commitment also exists.

5.5.5 Thus, under the Share Purchase Agreement 2014 and the Share Purchase Agreement 2015 the Burkard siblings were under a legal and factual obligation to make Claimant exercise its voting rights at Defendant's general shareholders' meeting so that persons subordinate to Claimant should be elected to the board of directors in order to successfully seek authorization for the transfer of the SWH shares or to ensure that the restriction of transferability would not be applied. This approach contravenes the meaning and purpose of Article 4 (1) of Sika's articles of incorporation and according to case law (BGE 81 II 534 consid. 3; BGE 90 II 235 consid. 4d; BGE 109 II 43 consid. 3b; ZR 1990 No. 49) constitutes an inadmissible circumvention. In ex-

ercising the voting rights, it is irrelevant whether the interests of the acquirer (Saint-Gobain) and of the seller (the Burkard family or Claimant, respectively) are identical (contrary Auberson/Oppliger, loc.cit., p. 626) because what is decisive is the mere possibility of an exertion of influence on Defendant by the acquirer or in the interest of the acquirer, as the restriction on transferability is directed at the acquirer not at the seller.

5.6 Another reason why a circumvention exists is in this case is the fact that Claimant's approach was aimed at achieving a loosening or cancellation of the restriction on transferability. Had Claimant intended to implement its intentions (i.e. the non-application of the clause regarding restriction on transferability and the unlimited acknowledgement of Claimant's voting rights) in a formal and transparent manner, it would have had to change the articles of incorporation. In the Share Purchase Agreements 2014 and 2015 the Burkard family even undertook to do so (in Article 3.4 4th bullet point in both contracts). However, a change in the articles of incorporation would require a resolution of a least two thirds of the represented votes and an absolute majority of the represented share capital (Article 7.3 (4) (2) (3) of Sika's articles of incorporation). With a 16.97% share of the total share capital, Claimant would not have achieved this quorum.

5.7 Thus, as an interim finding it may be stated that Claimant's actions at Defendant's general meeting of shareholders on 14 April 2015 to replace Defendant's board of directors were planned in agreement with and in the interest of Saint-Gobain, and that therefore they constituted an (inadmissible) circumvention of Article 4 (1) of Sika's articles of incorporation, which is also covered by the scope of application of said restriction on transferability. To be precise, the circumvention only exists insofar as Claimant intended to use a voting share of more than 5% of all registered shares to vote for the replacement of the board; Defendant's board of directors would not be entitled to reject approval of the resolution by a voting share of up to 5% (see consid. 6.2).

6. As it has been established that the SG transaction falls under the restriction on transferability of Article 4 (1) of Sika's articles of incorporation and that the attempted replacement of the board of directors constitutes a circumvention which also falls under this provision, the legal consequences have to be determined. It has to be examined whether Defendant was entitled to prevent Claimant's replacement attempts at the general meeting of shareholders on 14 April 2015 by limiting Claimant's voting right to 5% with respect to certain items.

6.1 Sika's articles of incorporation do not contain an express provision on the voting restriction of a shareholder registered in the register of shares (see Article 692 (2) sentence 2 and Article 627 (10) CO; in addition, Article 691 (1) CO regarding circumvention of a voting restriction stipulated in the articles of incorporation). Also the law does not provide for such a provision (with regard to the mandatory exclusion of voting rights see Article 695 (1) CO or Article 659a (1) CO; with regard to the suspension of voting rights under public law based on SESTA or BankA see Bieri, Statutarische Beschränkungen des Stimmrechts bei Gesellschaften mit börsenkotierten Aktien, Zurich 2011, N 88 et seqq.). However, an express exclusion of voting rights pursuant to Article 692 CO is not required.

6.2 The circumvented legal provision, contractual provision or provision in the articles of incorporation is applicable to an evasive transaction (BGE 125 III 257 consid. 3b). Thus, the evasive transaction is subject to the circumvented provision, and is subject to the legal consequences provided for in this provision. In the present case this means that the provision of the articles of incorporation which has been or is to be circumvented (i.e. Article 4 (1) of Sika's articles of incorporation) is now to be deemed applicable (by analogy), i.e. at a time when the act which is subject to the restriction has not yet occurred (the SWH shares have not yet been transferred [act. 1 N 96]) but the circumvention can still be prevented and there is no fait accompli in contravention of the articles of incorporation. As set forth above, Saint-Gobain, the Burkard siblings and Claimant want to ensure the change of control prior to the completion of the SG transaction. Therefore, the current board of directors – and not the "cooperative" board of directors which would be in place following acquisition of the SWH shares – has to be able to apply or at least to ensure the effectiveness of Article 4 (1) of Sika's articles of incorporation. The provision would lose its effectiveness if it was possible to perform acts in the time between the execution (act creating a legal obligation, signing) and the completion of the purchase contract (transfer of ownership, closing) that would result in a lapse of the restriction of transferability (see, in particular, BGE 81 II 534 consid. 3 and ZR 1990 No. 49; Karollus/Artmann, loc.cit., p. 67). With regard to the type of circumvention chosen by Claimant, Article 4 (1) of Sika's articles of incorporation has inherent advance effect. However, the advance application is limited to the circumvention. Thus, the limitation of the voting rights to 5% (as mentioned above, for a voting share of up to 5% the board of directors is not entitled to refuse the approval of the resolution) is only admissible to the extent the voting right is used to evade Article 4 (1) of Sika's articles of incorporation. This applies to the intended replacement of Defendant's board of directors, i.e. to the vote which is in dispute. It is only by means of this interpretation of Article 4 (1) of Sika's articles of incorporation that this provision can remain effective and protect the interests of the holders of bearer shares in an effective manner. The Federal Administrative Court already found that subject to it being applicable, the clause regarding the restriction of transferability in Sika's articles of incorporation protects the interests of the minority shareholders in an effective manner (decision of the Federal Administrative Court B-3119/2015 of 27 August 2015 [act. 20/57] consid. 5.1.2 in fine).

6.3 This case-specific interpretation in the present factual matrix of circumvention does not establish a "split" voting right or the like. Also, the principle according to which the voting rights of shareholders registered in the register of shares shall not be restricted is not undermined. Therefore, it may remain open whether, as alleged by Claimant, a "split" voting right does not exist under Swiss law or whether the voting right shall not be restricted in a selective manner with regard to certain items on the agenda (act. 1 N 78), whether Claimant is registered in Defendant's register of shares and is thus – pursuant to Article 686 (4) CO – acknowledged by Defendant as having all rights, including voting rights (act. 1 N 78), whether a deletion from the register of shares is inadmissible pursuant to Article 686a CO (act. 1 N 79 et seqq.), whether the voting rights of a shareholder cannot be restricted in case of a change that occurred after the registration in the register of shares (act. 1 N 82 et seqq.) or whether an express limitation of voting rights has been included in the articles of incorporation (act. 1 N 90 et seqq.).

7. Finally, the court will address Claimant's other objections – abuse of rights (consid. 7.1), violation of organizational regulations through the election of Ulrich W. Suter (consid. 7.2) as well as the nullity of the board of director's resolution regarding the restriction of the voting rights taken prior to the general meeting of shareholders (consid. 7.3).

7.1 Claimant objects that the approach of Defendant or of Defendant's board of directors constituted an abuse of rights in various respects. However, these objections are unfounded.

7.1.1 Claimant alleges that Defendant's board members merely wanted to maintain their power and enrich themselves (act. 1 N 25 and 29; act. 64 N 43). This allegation is far-fetched. If the aim of the board members was to "maintain power", they would hardly have assumed their office without compensation – at the general shareholders' meeting the approval of future remuneration of the board was refused (minutes of the general shareholders' meeting [act. 20/47] p. 23) – or the risk of liability claims that has materialized in the meantime. Had they wanted to ensure their "power" as Defendant's board members, they would have had to take the side of the shareholder with the majority of votes.

7.1.2 Moreover, Claimant alleges that Defendant and its board of directors only wanted to leverage its offer to buy the share package at a price of CHF 2.25 billion – about CHF 500 million less than Saint-Gobain would pay (act. 1 N 67). This allegation is also unfounded. It can be seen from the record that Defendant intended to submit a settlement offer to Claimant on condition that Claimant/the Burkard siblings would sign a confidentiality agreement. Claimant/ the Burkard siblings refused to sign the agreement (email correspondence between Stefan Mösli, Urs F. Burkard and Paul J. Hälg of April 9 and 11, 2015 [act. 20/61]). Therefore, Defendant never submitted an offer to Claimant, much less an offer in the amount of CHF 2.25 billion. The figure of CHF 2.25 billion originates from the media (article in SonntagsZeitung [act. 1/28]). Defendant never confirmed this figure (note in the NZZ newsticker [act. 1/29]: "He [Defendant's media spokesman] did not comment on the amount of the offer"). The mere offer to submit a settlement proposal cannot be considered an attempt to exert pressure in an abusive manner (act. 20 N 381 et seqq.). Moreover, Claimant's allegation that in an article in the Tribune de Genève of 14 April 2015 (act. 1/30) Jörg Neef from Defendant's PR consulting firm confirmed that Defendant's strategy consisted of creating pressure by reducing the voting rights and ensuring that the action for annulment would be protracted in order to obtain Claimant's shares at a price of CHF 2.25 billion, i.e. CHF 500 million less (act. 1 N 28). This is not what can be inferred from the article in the Tribune de Genève, because the alleged statement of the PR consultant in the newspaper article does neither refer to an (actual) offer of the board to the Burkard family nor to the duration of the action for annulment (act. 20 N 383). Finally, Claimant's allegation that the article in "Finanz und Wirtschaft" of 22 June 2016 (act. 64/106) shows that the board of directors intended to sell Claimant's share package to large-scale investors (act. 63 N 42) is also incorrect. This article expressly states that Defendant's board of directors did not confirm this ("Hälg did not confirm […]" [act. 64/106]).

7.1.3 Finally, Claimant also considered it to be an abuse of rights that the six board members who rejected the SG transaction announced that they would resign if the transaction was completed (see press release of 8 December 2014 [act. 1/22]; act. 1 N 25). The announcement to resign

under these circumstances is not abusive but is an understandable reaction to the planned takeover (see consid. 5.4.4). In light of the fact that these board members would be replaced anyway in the event of completion of the SG transaction, the resignation announcement was even less abusive. The fact that the actions of these board members delay the completion of the SG transaction (act. 1 N 28) cannot be avoided in a takeover battle and it is not abusive, even less so given that the takeover battle is conducted on the basis of a provision restricting the transferability which is applicable to this transaction.

7.2 Then, Claimant alleges that the election of Prof. Dr. Ulrich W. Suter to Defendant's board of directors (item 4.1.7 on the agenda) was flawed because Prof. Suter exceeds the age limit of 70 years stipulated in para. 14.4 of Defendant's organizational regulations (act. 1 N 35).

Defendant rightly counters that the age limit stipulated in the organizational regulations issued by the board of directors was a mere objective that was not binding upon the general meeting of shareholders (act. 20 N 389; act. 50 N 627). Even if the board's proposal to elect Prof. Dr. Ulrich W. Suter violated the organizational regulations this would not change the validity of the election. The election of the board of directors is within the irrevocable sphere of competence of the general meeting of shareholders (Article 698 (2) CO) and in the present case there are no statutory age limits nor age limits stipulated in the articles of incorporation (see also Forstmoser, Organisation und Organisationsreglement der Aktiengesellschaft, 2011, § 15 N 9 and § 13 N 2) that are binding upon the general meeting of shareholders. Therefore, Claimant's objection is unfounded.

7.3 In addition, Claimant alleges that the board of director's resolution regarding the restriction of the voting rights taken prior to the general meeting of shareholders was invalid, on the one hand because not all board members participated in said "meeting" or certain board members were excluded (act. 1 N 25 and N 73); on the other hand, it was invalid because the board members voted (on their own account) that the restriction of voting rights would also apply to their own election (act. 42 N 71 et seq.).

7.3.1 Claimant's objection that not all board members participated in the relevant meeting is contrary to the records. According to the minutes of the meeting of the board of directors of 14 April 2015 (act. 20/48 p. 1) at which the restriction of the voting rights for the general meeting was resolved, the board members Urs F. Burkard, Jürgen Tinggren and Dr. Willi Leimer were present when agenda items 2-4 ("Report of Nomination & Compensation Committee", "Preparation General Assembly" and "Miscellaneous") were discussed. They were only absent when agenda item 1 ("Preparation General Assembly [non-conflicted Board members only]") was discussed. However, the restriction of the voting rights was resolved under agenda item 3.1, i.e. in the presence of and taking into account the voting rights of the three board members Burkard, Tinggren and Leimer. Moreover, it is on record that the restriction of the voting rights was extensively discussed in the presence of Mr. Burkard, Mr. Tinggren, and Mr. Leimer. Urs F. Burkard, for instance, read out two comments (statement to the minutes 1 and statement to the minutes 2 ["Decision on voting rights restrictions"]) and he commented spontaneously several times (act. 20/48 p. 3-6). Thus, there is nothing that might lead to invalidity or nullity of this board resolution. Whether an exclusion with respect to agenda item 1 by rea-

son of alleged "conflicts of interest" was admissible (see act. 20 N 378 p. 116; in addition, Böckli, loc.cit., § 13 N 653; Sommer, Die Treuepflicht des Verwaltungsrates gemäss Art. 717 Abs. 1 OR, 2010, p. 110 et seqq.) need not be decided for the reasons mentioned above.

7.3.2 Finally, the objection that the board members had an obvious conflict of interest when they decided to restrict Claimant's voting rights for their own election is also unfounded. As set forth above, the decision to restrict voting rights was made to prevent circumvention; there was no self-interest on the part of the board members (consid. 7.1.1). Besides, this also follows from the fact that the six board members did not vote for a restriction of voting rights with regard to the votes on the discharge (décharge) and the compensation of the board of directors. But even if the board resolution regarding the restriction on [Claimant's] voting rights had been invalid, the outcome of the election would not have changed. Since each board member is elected individually (Article 8.1 (1) of Sika's articles of incorporation) at Defendant's general meeting of shareholders, the board could (also) have resolved the restriction of voting rights individually for each (individual) election. In the case of these (individual) resolutions on the restriction of Claimant's voting rights, only the respective board member would have had to abstain from voting. Then, it could have been assumed that the remaining five uncooperative board members and thus the majority of the board members would still have voted for the restriction of the voting rights.

8. In view of the above considerations the restriction of Claimant's voting rights to 5% with respect to the elections in question was justified. Hence, these resolutions were made in conformity with the law and with the articles of incorporation (Article 706 (1) CO). There is no need to assess whether other means to prevent the attempted circumvention would have been admissible (for instance if Defendant had abstained from voting or an analogous application of the quorum pursuant to Article 7.3 (4) (2) of Sika's articles of incorporation [consid. 5.6]).

8.1 Accordingly, para. 1, first part of the sentence, and para. 2 of Claimant's prayer for relief shall be dismissed. In para. 3 of the prayers for relief Claimant requests that Defendant shall be ordered under threat of penalty to acknowledge Claimant in all votings and elections at each general meeting of shareholders of Defendant and in any other exercise of rights connected to the voting rights as long as Claimant is the holder of shares of Defendant. Since it has been decided that the restriction of voting rights to 5% at the general meeting of shareholders on 14 April 2015 must be considered lawful, Defendant cannot be ordered to acknowledge the voting rights of Claimant in an unlimited manner. Besides, Claimant fails to substantiate what changed since the general meeting of shareholders of 14 April 2015 with regard to the legally relevant facts. Thus, para. 3 of Claimant's prayer for relief shall also be dismissed.

8.2 For the sake of good order it has to be mentioned that for the present decision it is irrelevant whether the transaction is based on "industrial logic", whether the synergy potentials between Saint-Gobain and Defendant are realizable, whether the Burkard family's decision to sell or the defensive attitude of certain members of Sika's board of directors are ethically justifiable and whether the transaction in general is in Defendant's economic interest. Defendant's statements in this regard (see, for instance, act. 20 N 80 et seqq.) are not relevant for the decision. The decision of Defendant's board of directors to restrict Claimant's voting rights at the general meet-

ing of shareholders of 14 April 2015 with respect to certain items was not a formal and appealable decision on the approval of the transfer pursuant to Article 685a (1) and Article 685c (3) CO, the lawfulness of which would have to be verified in the present proceedings (with respect to the appeal: Oertle/Du Pasquier, loc.cit., Art. 685c OR N 10 und Art. 685f OR N 11). The present decision is only aimed at ensuring that the board of directors is not prematurely deprived of the power granted to it under to Article 4 (1) of Sika's articles of incorporation ("The board of directors can […] refuse") by the attempted circumvention.

8.3 But even if the resolution of Defendant's board of directors regarding the restriction of voting rights with respect to certain items was considered an (anticipated) refusal pursuant to Article 685c (3) CO, this would not change the result. Due to the term "can" in Article 4 (1) of Sika's articles of incorporation, the board of directors has wide discretion with regard to the refusal of an acquirer of more than 5% of registered Sika shares. Thereby, the board of directors should take into account that exceptions from a percentage clause shall only be accepted with the utmost caution because an acceptance would constitute a deviation from the purpose of maintaining economic independence. A judicial intervention against a refusal of the board of directors is only justified if this discretionary or business decision obviously violates the interests of the company (Article 717 (1) CO; for instance if the board of directors pursues self-interests), if it violates the principle of equality among shareholders (Article 717 (2) CO), if it is abusive (Article 2 (2) CC) or if it is not based on a proper decision making process (see Kläy, loc.cit. p. 167 et seq. and 357 et seq.; Böckli, loc.cit., § 6 N 78; Oertle/Du Pascquier, loc.cit., Art. 685d OR N 13; Kunz, Der Minderheitenschutz im schweizerischen Aktienrecht, 2001, § 4 N 179; BGE 139 III 24 consid. 3.2; decision of the Federal Supreme Court 4A_219/2015 of September 8, 2015 consid. 4.2.1). The burden of proof for the existence of these facts is upon Claimant (Article 8 CC). However, in the present case such proof has not been furnished. It has been set forth above that the resolution is neither abusive nor does it pursue the self-interests of the board of directors (consid. 7.1.1). An unjustified violation of the (relative) principle of equality among shareholders has not been proven either, neither in the relationship between the holders of registered shares nor in the relationship between the holders of registered and of bearer shares. An obvious violation of the interests of the company would already have to be denied in light of the fact that even among the experts it is controversial whether the SG transaction is in the interests of the company; however, numerous experts consider the SG transaction to be disadvantageous for Defendant (see act. 20 N 109 et seqq. and 117 et seqq.). In view of the abundance of expert opinions (also referred to by the High Court of the Canton Zug in the decision Z2 2015 13 of June 10, 2015 [act. 20/49] consid. 4.4.3) it cannot be assumed that the resolution of the board of directors was not made in a proper decision making process based on appropriate information and free of conflicts of interests. Therefore, the court cannot set aside the resolution, i.e. it cannot be declared invalid or void.

9. In summary, it follows that para. 1, second part of the sentence, of Claimant's prayer for relief shall be rejected for procedural reasons. As for the rest the Action shall be dismissed.

10. Given the outcome of the proceedings, court costs shall be awarded against Claimant (Article 106 (1) CCP). Claimant shall bear the court costs and it shall pay reasonable party compensation to Defendant (Article 95 (1) CCP).

10.1 Given the value in litigation of CHF 10 million (see the corresponding assessment of the parties [act. 1 N 6; act. 20 N 19 and 361]; Article 91 (2) CCP) the court costs amount to CHF 120'000.00 (§ 11 (1) KoV OG). The attorneys' fees are governed by the Ordinance on Lawyers' Fees (OLF). For a value in litigation of CHF 10 million the basic fee amounts to CHF 106'400.00 (§ 3 (1) OLF). There is no reason for an increase (see § 3 (3) OLF). The sizeable expenditure of time which has been claimed is taken into account in the basic fee which is quite high due to the value in litigation. However, on the basis of two exchanges of briefs, the extensive amount of documents and the complexity of the case a surcharge of 75% is justified (§ 5 (1) subpara. (2) and (3) OLF), resulting in CHF 186'200.00. After adding the standard amount for expenses of CHF 1'000.00 (§ 25 OLF), a compensation of CHF 187'200.00 ensues.

10.2 According to the Federal Supreme Court's case law and the prevailing doctrine, joining parties shall not be awarded party compensation unless for reasons of equity (BGE 130 III 571 consid. 6; Rüegg, Basler Kommentar, loc.cit., N 9 zu Art. 106 ZPO; Urwyler/Grütter, in: Brunner/Gasser/Schwander [Ed.], Schweizerische Zivilprozessordnung ZPO, 2nd Ed. 2016, Art. 106 ZPO N 10; Graber/Frei, Basler Kommentar, loc.cit., Art. 77 ZPO N 3; Schmid, in: Oberhammer/Domej/Haas [Ed.], Kurzkommentar ZPO, 2nd Ed. 2014, Art. 106 ZPO N 10; decisions of the Cantonal Court Zug A3 2012 10 of December 18, 2014 consid. 5.1, A3 2014 21 of July 30, 2015 consid. 6 and A3 2015 38 of November 12, 2015 consid. 6.1). The Joining Parties do not claim such reasons and no such reasons are immediately obvious. Besides, it would be inequitable if a suing party who challenges a resolution of the general meeting of shareholders of a public company as a shareholder would be ordered to pay party compensation to numerous intervening co-shareholders who could not have been anticipated to join when the action was filed. This applies irrespective of whether or not the Joining Parties have a party-like position. Therefore, the Joining Parties shall not be awarded party compensation.

Decision

1. The Action is dismissed insofar as it is not rejected for procedural reasons.

2. The court costs are determined as follows:

   CHF 120'000.00 court costs

   The court costs awarded against Claimant are set off against Claimant's advance payment in the amount of CHF 120'000.00.

3.1 Claimant is ordered to pay Defendant party compensation in the amount of CHF 187'200.00.

3.2 The Joining Parties are not awarded party compensation.

4. An appeal against this decision may be filed with the High Court of the Canton Zug within 30 days as of receipt. The appeal shall be in writing, indicating the grounds and the prayers for relief; the decision under appeal shall be attached. The appeal may be filed on grounds of an incorrect application of the law and/or an incorrect establishment of the facts (Article 310 CCP). The appeal may be filed in paper form (one copy for the court and one copy for each opposing party) or electronically, certified by the recognised electronic signature of the sender (Article 130 (1) and (2) CCP).

5. To be served upon:

   – Parties

   – Joining Parties

   – Cashier of the High Court (operative part of the decision)

Cantonal Court of the Canton of Zug
3rd Division

[signature] [signature]

Dr. R. Meyer
Cantonal Judge

Dr. A. Staub
Court clerk

Sent on: 31 October 2016 [stamp of the Cantonal Court]

STA