

INTRODUCTION

In a recent decision (FCR 1994, 120 II 331) the Swiss Federal Court has established a new liability for parent corporations which have - by their behaviour but without any sort of contractual undertaking - obtained and subsequently betrayed a third party's trust in the reliability of a subsidiary. This new form of liability could have a major impact on intra-group relationships and, in particular, on a parent's responsibilities in relation to contracts of their subsidiaries with third parties.

FACTS

In July 1987, Swissair Beteiligungen AG ("Swissair") incorporated IGR Holding AG ("IGR"). IGR offered to its "Members" - on a time-sharing basis - luxurious housing near golf courses in Switzerland and abroad. The price of "Membership" for a 40 year period was between CHF 30'000.-- and 90'000.--. In December 1988 Wibrü Holding AG ("Wibrü") bought a Membership for CHF 90'000.--. In February 1989 IGR informed its Members that Swissair would be selling its IGR-shares to Euroactividade AG and that Swissair would acquire a minority package of Euroactividade. In Spring 1990 IGR was declared in bankruptcy. In contrast to IGR's previous announcements Swissair had sold its IGR-shares but had not acquired any shares of Euroactividade.

Nonetheless, Wibrü sued Swissair for damages of CHF 90'000.--. Wibrü, inter alia, argued that IGR, in its advertising material, on its stationary, in contacts with Members, etc., had always pointed out the fact that it was part of the Swissair group, that it was 100% owned by Swissair and that Members could have faith in the reliability of IGR because Swissair was behind it. The Swissair-logo was printed on many documents of IGR, for instance on the stationary. All this was known to Swissair. By selling IGR without giving comprehensive information to the Members and leaving IGR without enough capital, Swissair had betrayed the trust of the Members obtained during previous contractual negotiations of its subsidiary.

LEGAL CONSIDERATIONS

The Court first stated that the behaviour of Swissair could not be interpreted as any kind of contractual guarantee towards third parties. The Court then dismissed claims based on tort. However, the Court

did accept that the particular behaviour of Swissair during the negotiations of its subsidiary with third parties had created a special legal relationship between Swissair and the third parties, which was based neither on a contract nor on tort. Third parties were entitled to trust in the good faith of Swissair acting as a parent in accordance with its previous actions and declarations. A breach of such confidence by Swissair could therefore justify non-contractual claims for damages.

The Court established the following general conditions which have to be fulfilled to cause such liability of the parent corporation:

- (the parent corporation has caused third parties to trust that it would act as a reliable and trustworthy parent,
- (the parent corporation has betrayed this trust,
- (third parties have suffered damages,
- (there is a causal link between the betrayal of trust and the damages suffered by third parties.

Furthermore, according to the Court, the duties of the parent corporation could not be defined generally. They depend upon the circumstances of the specific case. In particular, they depend upon the declarations and actions of the parent. The parent may, for instance, be obliged to:

- (provide its subsidiary with sufficient assets at the date of incorporation;
- (give third parties sufficient information regarding its subsidiary; in particular, the parent corporation is obliged to inform third parties if it plans to change its participation regarding the subsidiary.

In this case, the Court decided that Swissair had actually breached its above-defined duties because it had not correctly informed the Members of its intentions to sell IGR to Euroactividade without acquiring shares of Euroactividade thereby preventing the Members from selling their Memberships at a time when IGR still had sufficient funds.

CONCLUSION

The outlined decision leaves parent corporation with a considerable legal uncertainty. Firstly, what activity - e.g. advertisement, logo on the stationary, letter of comfort (which was supposed to be only

morally binding), etc. - will suffice to obtain a third party's trust in a parent corporation's good faith? Secondly, what duties of the parent corporation will result from such activity? Obviously, a general answer to these questions is not given, and the Court's vague statement whereby these duties shall depend upon the circumstances of the specific case are not of great help to corporate lawyers having to answer these questions. It must be stressed, however, that under Swiss law the parent corporation and the subsidiary remain two legal independent entities. Hence, the means of a parent corporation to influence a subsidiary or to directly deal with a partner of a subsidiary are and shall remain limited. This notwithstanding, in the future special care will need to be taken by group counsels, in particular if the reputation of the parent corporation is used in favour of the subsidiary, for example as a means of financing.

The content of this article is intended to provide general information on the subject matter and is not a legal advice. An individual matter requires legal advice according to the specific circumstances.

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