Dear clients and business friends,

In a number of recent decisions, the Swiss Federal Supreme Court has clarified and confirmed its case law with regard to the formal and substantive aspects of the special audit under the provisions governing companies limited by shares.

The concept of a special audit seeks to strike the necessary balance between the rights of shareholders to be informed and the company's interest in maintaining secrecy. It is not equivalent to an executive management audit. Initiating a special audit is a measure that serves the purpose of having certain factual situations examined by an independent third party, the objectivity of whom is particularly assured. Ultimately, such a review is intended to assist the shareholders in determining whether the company's interests were served and whether the board of directors complied with its duties.

Given that the thresholds required in order to force a special audit by way of the courts are to be lowered under the planned revision of company legislation, one can assume that the importance of this instrument will increase in future. This fact and a number of decisions by the Swiss Federal Supreme Court give cause to discuss the requirements for initiating a special audit as well as its inherent formal and substantive prospects and constraints.

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1. Requisite motion at the general meeting of shareholders

1.1 Special audit as subsidiary legal remedy

The special audit is an independent participatory right held by the shareholder. Nevertheless, it can only be exercised once the remaining rights to information have been exhausted. A shareholder can only bring a motion to conduct a special audit before the general meeting of shareholders provided that this is necessary for the proper exercise of shareholders' rights (Art. 697 SCO) and where he has already exercised his right to information or inspection, Art. 697a (1) SCO). According to case law, the latter requirement is deemed to have been fulfilled if the shareholder in question has been denied such right of information or inspection. It is not necessary for a shareholder to attempt to enforce his right to information or inspection by way of the courts. With reference to the prevailing view of legal doctrine, the Federal Supreme Court has held that the rejection by the general meeting of shareholders of a motion to conduct a special audit is equivalent to a rejection by the board of directors of a motion to hold a vote before the general meeting of shareholders concerning the motion to conduct a special audit. What is necessary is merely that the shareholder in question has insisted on such a vote at the general meeting of shareholders (obligation to pursue a vote). It is not necessary, however, that redress is sought before the courts (BGE 138 II 246,248).

In view of this requirement, the shareholder putting forward the motion must insist that the rejection of his motion be properly recorded in the minutes (Art. 702 (2) and (4) SCO).

1.2 Conducting a general meeting of shareholders as an indispensable prerequisite

The Federal Supreme Court has moreover clarified that the filing of a motion before the general meeting of shareholders represents an indispensable step towards the appointment of a special auditor, because subsequent proceedings are contingent on the outcome of the corresponding vote. Where the motion to conduct a special audit is granted by the general meeting of shareholders, the company or any shareholder can seek the intervention of the courts to appoint a special auditor (Art. 697b (1) SCO). Where the motion to appoint a special auditor is rejected by the general meeting of shareholders, it is only shareholders who collectively represent 10 per cent of the share capital or shares with a combined nominal value of 2 million that may seek the intervention of the courts to make such an appointment (Art. 697b (1) SCO).

However, for a corresponding motion to even be put forward, it is necessary that a general meeting of shareholders take place. The Federal Supreme Court explicitly held that the convocation of a general meeting of shareholders, unlike the right to information or inspection, must, in case of need, be enforced through the courts. This is nevertheless only possible for shareholders who collectively represent...
In order to initiate a special audit, a shareholder, on the other hand, are allegations - interpretation seems overly restrictive. As sufficient. In particular, given the uncompany rules (e.g., investment guidelines) of the law or the articles of association and a strictly literal sense. It requires a breach Supreme Court interprets this provision in breaches must be described in precise (Art. 697b(2) SCO). The alleged holders” have harmed the company or the shareholder “that founders or corporate bodies have violated the law or the articles of association and thereby have harmed the company or the shareholders” (Art. 697b(2) SCO). The alleged breaches must be described in precise detail. Allegations that are unsupported by evidence are insufficient.

In its decision 4A_648/2011, the Federal Supreme Court interprets this provision in a strictly literal sense. It requires a breach of the law or the articles of association and does not deem a breach of other internal company rules (e.g., investment guidelines) as sufficient. In particular, given the underlyng purpose of the special audit, this interpretation seems overly restrictive.

In our view, any “breach of their duties” within the meaning of Art. 754 (1) SCO should be sufficient. Clearly not sufficient, on the other hand, are allegations claiming inadequate performance, insufficient appetite for risk, or a lack of knowledge concerning the markets, as were at issue in decision 4A_648/2011.

2.2 Purpose of the special audit
The special audit serves the purpose of determining facts. The purpose thereof is to facilitate matters for a shareholder in terms of deciding whether or not to bring a liability action and to lighten the accompanying evidentiary burden incumbent upon him.

The most recent decision of the Federal Supreme Court, 4A_129/2013, which concerned the granting of a loan to the chairman of the board of directors, illustrates this principle. The shareholder in question managed to credibly establish that a breach of fiduciary obligations and the duty of care pursuant to Art. 717 (1) SCO had taken place, because the terms and conditions subject to which the loan was made, particularly the lack of collateral, were not in line with market practice. The issues with which the special audit was concerned served to clarify the relevant factual situation and were not intended to determine whether or not corporate bodies had breached their duties. Because these prerequisites were met, it was possible to further question the manner in which the board of directors had conducted itself. This allowed, in particular, the questioning with regard to the criteria used in the disbursement of a bonus that had been assigned as collateral for the loan. Because the bonus was intended to act as collateral for the loan, the criteria in question had a direct correlation to assessing the terms and conditions of the loan.

3. Summary
From a formal perspective, the Federal Supreme Court makes clear that – in addition to exercising one’s right to information and inspection – filing a motion before the general meeting of shareholders constitutes an indispensable prerequisite for the initiation of a special audit. In substantive terms, it is clear that the major difficulty that arises in connection with the special audit is adding sufficient evidence of a breach of certain statutory provisions or the articles of association by the acts or omissions of corporate bodies, and demonstrating where such breaches have occurred. For the shareholder as an outsider, it is difficult to meet this requirement. Should he be able to overcome this obstacle, however, far-reaching questions concerning the business conduct of the board of directors are admissible.