

# The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

## Editor's Comments

BY LEWIS F. MATUSZEWICH

Susan M. Goldberg, vice chair of the International and Immigration Law Section Council, provided notes from a brief discussion she had with David W. Aubrey, chair of the Section Council. It appears as, "Conversation with the Chair."

Dr. Florian S. Jörg is a partner in the Zurich office of Bratschi Wiederkehr & Buob Ltd. Florian's earliest article, "Developments in Swiss business law for the first half of 2009" appeared in the September 2009 issue of *The Globe*.

Since then he has provided periodic Updates or Recent Developments, and his enclosed article, "Corporate Migration to Switzerland" will be his 13<sup>th</sup> article published in *The Globe*.

Meaghan Vander Schaaf is currently vice chair of the International and Immigration Law Section Council and last year served as secretary. Her introductory biography is included in this issue's "Meet

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## Conversation With the Chair

BY SUSAN M. GOLDBERG

This year's International and Immigration Law Section Council chair is David W. Aubrey, who is a graduate of Southern Illinois University School of Law, and has a B.A. in applied linguistics and an M.A. in international human rights.

David has worked at The Gori Law Firm in Edwardsville since his second year of law school and is now a partner in the firm. Just four years after earning his law degree, David authored the winning brief to the Missouri Supreme Court asking the Court to deny Defendants' petition for an extraordinary writ. (Interesting side note: the trial judge was named as the Respondent in the petition for writ, as is required in Missouri.) David was

representing a truck driver who, while unloading, attempted to stop a diesel engine he was hauling from falling off his flatbed trailer, but the engine fell and struck him. David persuaded the trial court to reconsider its grant of summary judgment for the Defendants, citing case law that a superseding cause must be an outside force or actor and cannot be a plaintiff himself. See *State ex rel. Ecology Auto Parts Inc. v. Hendrickson*, SC957445 (Mo. 2016).

Here is an excerpt from my interview with David:

SG: You and your wife have a new baby boy. How's parenthood?

DA: It's a lot of fun!

SG: Any fun facts about you?

DA: I like working on cars—I used to help out in an auto shop when I was in high school and my first job was working as a snowboard instructor in Duluth, Minnesota. I also like beer making. I read all the books on brewing that I can get ahold of.

SG: What are your favorite places?

DA: British Columbia—it's one of the most beautiful places in the world. Also, I loved

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the Section Council.”

Thank you to Susan, Florian, and Meaghan for their material.

At the ISBA website there are now various “communities” which provide an opportunity for sharing information, requesting referrals, or asking specific questions. Go to the ISBA website, [www.isba.org](http://www.isba.org), look for “Groups and Participation” and on the drop-down menu select “ISBA Central Communities.” This page will explain how to participate in the various discussion groups. For some, you have to be a member of a specific section, such as the International and Immigration Law Section. Other discussion groups may be open to all ISBA members.

In the International and Immigration Law Section discussions, Susan Goldberg posted a job opening for an immigration attorney and Lynne Ostfeld has posted several informative links concerning

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visiting Paris and Normandy, France.

SG: Any places on your travel wish list?

DA: I would love to tour the mountains in Switzerland and Austria by car.

SG: What's your favorite part about being a lawyer?

DA: I like litigation and finding new theories that have not been ironed out yet. In asbestos litigation, there are often nooks and crannies of liability.

SG: What advice would you give to new lawyers?

DA: I see new associates becoming too comfortable too fast in practice. Excelling in legal practice will require working into the evening, in the early morning, and on weekends, but your effort will pay off in your practice. ■

agriculture or food issues in international trade. I asked a specific question concerning the ability of legal permanent residents in the United States and what federal income tax return form they should file. I received my first answer, which was specific and helpful, the same day I posted the question. The webpage indicates there are 465 members of the discussion group, a wealth of knowledge and resources for your practice. ■

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## The Globe

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# Corporate Migration to Switzerland

BY FLORIAN S. JÖRG

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While the free movement of natural persons is seen as a given in Western European society, it is less known outside of the European Union that entities such as e.g. corporations or limited liability companies are equally able to relocate. This movement of a legal entity from its registered domicile is referred to by lawyers as corporate migration. The focus of the following text is, therefore, not the immigration of individuals but the legal migration of a foreign corporation to Switzerland.

## Basics

According to the Swiss legal concept, a foreign company moving to Switzerland may keep its legal existence and is not liquidated in its place of origin. However, this foreign company may not keep its present legal structure, i.e. a German GmbH or an English LLC, but must assume the corresponding Swiss company form. Therefore, unlike the EU, any company immigrating to Switzerland becomes a Swiss entity and has to adopt one of the Swiss company forms provided by law. From the day of its migration onwards, it is subject to Swiss law. The respective rules are set forth in art. 161 and 162 of the Statute on Private International Law and art. 126 of the Commercial Register Ordinance.

Likewise, a Swiss company leaving Switzerland, shall remain existent but as a foreign company, so ceases to be a Swiss entity.

## Planning for the Migration

First, the migrating company must decide on the future location of its corporate domicile. There are various factors that are usually taken into consideration:

- quality of available work force (software companies prefer a proximity to technical universities and their environment with start-up businesses);

- cantonal and municipal tax regimes (contrary to the common notion not the most important aspect);
- pre-existing structures such as already operating businesses (e.g. Fintech companies prefer the Cryptovalley in Zug);
- quality of living for the employees; and
- the support of the local authorities (it is helpful if the local offices for business development provide assistance with finding office space as well as personnel and help with the formalities).

Advisers appreciate a flexible (not necessarily lenient) approach from the local authorities when dealing with the formalities of the commercial registry or while applying for work permits.

## Detailed Preparation of the Migration

Once the location of the new corporate domicile is determined, the migrating company has to start actual preparation, ideally divided into work streams.

## Tax

Swiss tax authorities are prepared to provide assessments of the involved tax questions in advance in order to provide certain security on tax consequences. Companies may present their case including the expected tax consequences and the authorities will, provided they agree, stamp the presentation and thereby create a binding ruling.

Following a second attempt, Swiss voters recently accepted a corporate tax reform. As a principle, this will abolish many specific advantages yet will be offset by the Cantons lowering the general corporate tax for all companies to approximately 15%, depending on the Canton.

## Premises

Most corporations need to rent or acquire office space in order to carry out normal operations after migrating to Switzerland. In various Cantons, the respective offices for economic development are more than happy to provide the management with renting and buying opportunities tailored to the needs of the inquiring company.

## Workforce

Usually, migrating corporations bring part of the workforce along, especially the management, while also hiring new employees. Existing and new employees of a foreign nationality, will need to apply for work permits in advance. Pre-existing regulations on staff matters need to be adjusted to confirm with the Swiss laws. Old age pension and other social security questions must be addressed in due time.

Further, on the private side, the relocating employees need guidance with immigration formalities, housing requirements or smaller issues such as the import of a car or pet. Even in this respect, some cantonal authorities can provide helpful assistance.

## Corporate Formalities

Significant efforts are needed to fulfil the corporate requirements of Swiss law according to the local interpretation.

## Application for Registration

The application for entry into the local commercial register is nearly identical to that of a newly incorporated entity. Differences and the addition of the following documents are needed and must be submitted to the registrar:

- Foreign public deed with articles of association: The competent corporate body of the migrating company needs to adopt the relocation of the company in a notarized deed. For corporations that intend to continue

their existence as a Swiss share corporation («AG» or «SA») this meeting should also adopt changes to the articles to align with equivalent admissible articles of a Swiss share corporation.

- Declarations of acceptance by the members of the board of directors: All members of the board of directors of a corporation or of the managing board of a Swiss LLC (i.e. a GmbH/Sàrl) must accept their mandate in writing.
- Notarized signatures: The commercial register requires a notarized sample signature of all signatories of the company for its file. Foreign notarizations must further be accompanied by an apostille. Ideally, such notarization is applied on the declaration of acceptance of a board membership, if any, or on a separate sheet of paper.

#### «Stampa Declaration»

This is a formality of Swiss law (soon to be replaced) which requests members of the board of directors to state explicitly that no other assets were taken over by the company, no other set-off was applied and no other special advantages were granted than those mentioned in the documents submitted to the registrar.

#### Notarized Excerpt of the Foreign Commercial Register

Usually, the submission of a notarized excerpt of the foreign commercial registry is a pure formality, generally easy to comply with. Problems arise if the excerpt of the foreign commercial registry does not accurately reflect the actual facts. In this case, flexible solutions must be found with the cantonal and the federal commercial registry, e.g. by providing notarized declarations.

#### Legal Opinion Under Foreign Law That Emigration From the Respective Country Is Possible

The Swiss commercial registers also require a statement from a professional in the present country of the migrating company confirming the possibility of

migration according to the applicable foreign law. The authorities thereby ensure that the jurisdiction abroad will not raise objections to the planned migration. Depending on the cantonal register and the jurisdictions involved, this statement can be by a professor, notary public or government official of the respective country.

#### Legal Opinion Under Swiss Law That the Foreign Company Form Can Be Transformed Into an Equivalent Swiss Company Form

On the other side, migrating companies must also provide a legal opinion under Swiss law, that the foreign entity can be converted into a Swiss company form. Such opinion must be drafted by a legal scholar active in the respective field or by the «Institut suisse de droit compare» in Lausanne-Dorigny. The latter is notoriously overloaded with work. It is recommended to ask the respective commercial registry beforehand whether they would accept a statement from the individually chosen author(s) of an opinion.

#### Proof That the Majority of the Migrating Company's Business was Migrated

This is one of the oddest requirements: to register the migration of the company it is required to prove that the majority of the business is now in Switzerland. It is needless to say that this has to occur before the company officially established its new domicile.

How can the transfer of the majority of the business be proven? There are no audited statements regarding the activity deployed in Switzerland and general statements are not accepted. The company can, therefore only show that the majority of the workforce needed to accomplish the tasks at the new Swiss domicile have moved and already live or are about to live in Switzerland. If only part of the pre-existing business is transferred, such proof is obviously only needed for the parts moved.

#### Report by a Licensed Auditor

The migrating company needs to further submit a report signed by a licensed auditor confirming that the company's formal

capital is covered under Swiss law. This is an additional requirement provided by the auditors who need to anyway draft financial statements for bookkeeping reasons. Although it is not a requirement to present the opening balance to the commercial registry when starting the business in Switzerland, such statements need to be drafted for auditing and tax purposes.

#### Resolution by the Board of Directors

Similar to the first meeting of the board of directors of a newly incorporated company, the board needs to decide on its constitution and signatory rights. It can further form resolutions on the issuance of share certificates, the adoption of organizational regulations, the appointment of a delegate of the board, the duration of the business years (if not already set forth in the articles of association) and the applicable accounting standards. Instead of a physical meeting and in absence of any request for an oral debate, circular resolutions in writing are possible.

#### Acceptance by Auditors

The auditors will be happy to provide their declarations of acceptance. In our view, it does not harm at all if the date of such declaration precedes the respective corporate decisions to migrate.

#### Migration

The actual migration usually takes place parallel to the formal steps: The furnishing of the offices, the hiring of local staff and the start of the activities are not formally dependent on the legal migration process. However, it is advisable to determine a date of migration and to try to stick to it for practical purposes. Again, several cantons provide assistance with these day-to-day challenges, which when possible, is worth taking advantage of.

Depending on the size of the migrated business, it might be a good idea to invite the local authorities and the cantonal office of economy for a drink once the migration is completed. Experience has it that a good relationship with the local authorities is highly valuable.

## Post-Migration Issues

Typically, there are a bundle of questions associated with the post migration adaption to the new legal and factual environment. This may include the alignment of the employment agreements and the employment regulations, questions regarding the organization of shareholders' and board meetings or the number of signatories and proxy holders abroad.

In certain cases, especially in which the company has only slightly adapted the articles of association, a further «swissification» of the company might be desirable.

It is also rather common that the respective migration documents will be needed on various occasions after migration. It is both mandatory and helpful to have a well-organized and handy file containing all legal documents. ■

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*Dr. Florian S. Jörg, MCJ, is a partner in the Zurich office of Bratschi Wiederkehr & Buob Ltd., one of the largest independent Swiss law firms. He graduated from the University of St. Gallen Law School and obtained a postgraduate degree from NYU Law. His areas of practice include corporate law, M&A and banking law. Florian mainly advises both foreign and domestic companies and banks. He is also a lecturer for private law at the University of*

*St. Gallen Law School. Further, Florian is admitted to the Swiss bars and to the bar in New York (not practicing) and he is a member of IBA, ABA, IPBA and NYSBA. Currently, he is also the co-chair of ABA SII's M&A and Joint Venture Committee, a former co-chair of the Europe Committee and a Fellow of the American Bar Foundation. For questions please contact Florian S. Jörg at +41 58 258 10 00 or by email to [florian.joerg@bratschi.ch](mailto:florian.joerg@bratschi.ch).*

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# Meet the Section Council

BY MEAGHAN VANDER SCHAAF

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The International and Immigration Law Section Council brings to the ISBA a wide range of experiences and interests. Following is an introduction to Section Council Vice Chair Meaghan Vander Schaaf:

**Meaghan Vander Schaaf** is a senior associate at Barnes, Richardson & Colburn, a boutique firm specializing in international trade regulation and customs law. Meaghan's practice focuses on the representation of importers and exporters facing issues of compliance with United States law.

Meaghan graduated from Loyola University Chicago, School of Law. During her time at Loyola, she earned an International Law Certificate and studied abroad in Beijing, China with the Comparative Law Program. Meaghan earned her Bachelor of Arts degree from Millsaps College where she majored in Economics and minored in Business Administration and French.

Meaghan is a member of the Illinois bar and is also admitted to practice before the U.S. Court of International Trade. She is a member of the Chicago Bar Association,

where she is also the former vice-chair of the Customs & US International Trade Law Committee and a member of the YLS International Corporate & Trade Law Committee and the International & Foreign Law Committee. She is the former president of the Organization of Women in International Trade (OWIT) and a member of the Customs & International Trade Bar Association (CITBA). She is also a member of the ISBA and current vice chair of the International & Immigration Law Section Council. ■