

Judicial District VIII Bern-Laupen

Civil Department

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June 4, 2004

Information submitted by fax is not considered when determining whether a deadline has been met!
Postal account 30-3600-0

Bern, June 2, 2004

Z 04 2094

HOJ

Decision

in the matter

Philippe Piccapietra, Schloss Rötteln, P.O. Box 38, 5466 Kaiserstuhl AG
represented by attorney Gerhard Schnidrig, Bahnhofplatz 5, P.O. Box 6233, 3001 Bern
- Petitioner -

vs.

Walter Schäppi, Brückfeldstrasse 19, P.O. Box 685, 3000 Bern 9
represented by attorney Sibylle Burger-Bono, Spitalgasse 34, P.O. Box, 3001 Bern
- Respondent -

regarding

Request for a preliminary injunction

After the Respondent has submitted his comments, the Court, based on the assertions and documents submitted by both parties and without further hearings,

finds:

1. The petition is dismissed.
2. The Petitioner is condemned to bear the court cost in the amount of SFr. 1,250.00 (fees plus expenses). They will be deducted from the advance payment made by the Petitioner.
3. The Petitioner is condemned to pay the Respondent's court costs in the amount of SFr. 7,706.30 (fees: SFr. 7,000.00; expenses: SFr. 162.00; value-added tax SFr. 544.30).
4. This decision is to be communicated to the parties through the normal legal channels.

Justification:

I. Complaint background

1. On April 15, 2004, the Petitioner submitted the following request before the court:

1. Respondent to be ordered to surrender all files of the foreign associations of the Lazarus Order as well as all material of the Lazarus Order located at Brückfeldstrasse 19 in Bern (a laptop computer, a PC, a telephone system, cabinets, desks and tables) to the Petitioner (per address Schloss Rötteln in 5466 Kaiserstuhl).

2. As a first alternative: the Respondent is to be ordered to deposit, at a neutral location (warehouse) and at the expense of The Petitioner, all files of the foreign associations of the Lazarus Order as well as all furniture of the Lazarus Order located at Brückfeldstrasse 19 in Bern (laptop computer, PC, telephone system, cabinets, desks and tables).

3. As a second alternative: the Respondent is to be forbidden to dispose in any way of the files of the foreign associations of the Lazarus Order as well as all furniture of the Lazarus Order located at Brückfeldstrasse 19 in Bern (laptop computer, PC, telephone system, cabinets, desks and tables).

4. In case of a contravention, to threaten penalties pursuant to Art. 403 ZPO (Civil Procedure) and pursuant to Art. 292 StGB (Penal Code).

5. A preliminary injunction is to be issued for the surrender, deposit or prohibition under no. 1, 2 and 3 above pursuant to Art. 308a ZPO by summary procedure,

with payment of court costs.

The Petitioner justifies this request essentially as follows: The Lazarus Order had been in existence since about 1120 and was originally a knightly order. Today, it is active worldwide and has about 4,500 members structured in 24 country associations (Grand Priories). Its organization had been enshrined in the Constitution of September 15, 1990. The Respondent had been honorary Secretary General of the Order for three years and had maintained an office at Brückfeldstrasse 19 in Bern. On February 19, 2004, the Respondent resigned as Secretary General and the Petitioner was elected Secretary General. In March 2004, a general assembly of all country associations took place in Toronto. Due to irreconcilable differences the Order split in two, one contained 9 country associations and the other 15 country associations. The Petitioner and the Swiss country association belong to the group of 15 country associations, 9 country associations having allegedly left the Order. Per letter dated May 6, 2004, the Respondent was requested by the group of 15 country associations, thus the majority of the Order, to surrender the documents, which he so far

has refused to do. The Respondent allegedly had signed an agreement already on January 14, 2004, promising to surrender the archive to the Petitioner if the Chapter General in Toronto did not reach a majority decision. However, no decisions were possible in Toronto because of the ongoing dispute. On March 11, 2004, the Respondent allegedly refused access to the archive to the Petitioner and two other members of the Order (Daniel Senn and John Kerry Keane), refused to answer the letter written the same day by the lawyer for the Petitioner, or to take delivery of the registered letter dated March 15, 2004, asking him to surrender the files by March 18, 2004. In the meantime, he surrendered the files of the Swiss country association to the Petitioner but continued to withhold the remaining documents (some very valuable documents from the Middle Ages). The total value of the archive allegedly is about SFr. 30,000.00. The Petitioner also refused to surrender the furniture as it had a total value of SFr. 15,000.00 and had been purchased by the Lazarus Order. The archive was the common property of the Order, an association as contemplated in Art. 150 IPRG (International Private Law Act), and which, according to the residence statute of Art. 154 para. 2 IPRG, was subject to the laws of the country in which it was effectively administered. Therefore, Swiss law was to be applied.

2. Per certification and order dated April 21, 2004, the Presiding Judge of Court 1 dismissed the request for a preliminary injunction as contemplated in Art. 308a ZPO (No. 5 of the request) and gave the Respondent 10 days to respond.

3. The request was successfully delivered by mail to the Respondent on April 22, 2004. He responded in good time - taking into consideration that the deadline was Sunday, May 2, 2004, - per letter dated May 3, 2004, and asked for the request to be dismissed with payment of court costs. He gave essentially the following justification: The files had not been at the Respondent's business address in Brückfeldstrasse 19 for some time and the furniture that is there was the Respondent's property. The local jurisdiction therefore no longer applied. The archive allegedly consisted of about 50 files that went back no further than to the year 1960 and had only sentimental value. The original medieval knightly order had been destroyed during the French Revolution and was reestablished only in 1921 in France. Around 1960, the Obediences split, one in Paris and one in Malta. A reunification had been attempted already on the occasion of the Chapter General in Oxford in 1986, when the current Grand Master Duc de Brissac of the Paris Obedience was nominated Grand Master. However, the decisions taken in Oxford were never carried out. In recent years, there had been repeated attempts to achieve the reunification of the Obediences, something the members of the Paris Obedience decided by an overwhelming majority at their Chapter General in Dublin. At that meeting, the Grand Master Duc de Brissac announced his resignation as per February 2004, and said that he would recognize the Duke of Seville, Grand Master of the Malta Obedience, as Grand Master for both Obediences. A Group around the Petitioner allegedly started an opposition movement against the reunification and began to promote Prince Charles Philip of Orléans, until today not a recognized member of the Order due to his not satisfying the

conditions pursuant to Art. 10 of the Constitution, as new Grand Master. After being admonished, the Petitioner was ousted from the Order on January 5, 2004, because of his behavior. The Respondent resigned as Secretary General on March 1, 2004. At the Chapter General in Toronto, the group of delegates from Bohemia, Bulgaria, Denmark, England and Wales, Germany, Ireland, New Zealand, Liechtenstein, the Netherlands, Sweden, Switzerland, Croatia, Hungary, Austria and Romania left the room under protest. The meeting continued in accordance with the regular agenda. The Spiritual Leader attempted to reunify the assembly, but, after some further discussion, said group peremptorily left the assembly. The meeting continued and the Chapter General was completed. The decisions of the Chapter General were therefore valid and binding for the entire Order, i.e. the Paris Obedience. The Duke of Seville was elected new Grand Master with 542 votes in accordance with Art. 12 of the Constitution, while the Prince of Orléans captured only 47 votes. A new Secretary General was appointed, Mr. Georges M. Parent from Canada. The dissident group around John Kerry Keane and Philippe Piccapietra did not accept the decision of the Chapter General and installed their own internet website, spreading statements injurious to all leading members of the Order and even the Spiritual Leader. The former Grand Master allegedly supported the new Grand Master in the interim and, in this capacity, decreed, with the full agreement of the latter, to oust the dissident group from all offices. The Petitioner did not appear on that list because he had not been a member of the Order since January 5, 2004. The Respondent allegedly refused access to the premises to him and the persons accompanying him on March 11, 2004, and banned him from the premises, which was not complied with, necessitating the intervention of the police. The Respondent allegedly did not react to the subsequent letters.

II. Procedural matters

4. Respondent asserted that the local court had no jurisdiction in the matter, because the files to be surrendered were no longer in Bern and because the furniture was his property. He also contested the material jurisdiction, though without justification (Art. 25 of the reply to the request). However, he asked that the request not be rejected but only dismissed, which is of no consequence insofar as the conditions for a lawsuit are beyond the control of the parties (*Leuch/Marbach/Kellerhals/Sterchi*, op. cit. Art. 191 N 3c).

5. The Petitioner asserts that it is a question of an international matter (Art. 6 of the request), because the files of foreign country associations are concerned and because the archive is jointly owned by the Order, which is an association pursuant to Art. 150 para. 1 IPRG.

The IPR-relevant internationality of a matter cannot be described abstractly and must be examined separately in each individual case; considering the respective legal questions and the applicable jurisdiction and assignment norms, one must examine concretely whether and to what extent factual elements might have IPR relevance and whether the matter should therefore be qualified as being "international;" in case of doubt the IPR-relevant internationality of the legal is-

sue is to be assumed (see *Schnyder/Liatowitsch*, International Private and Civil Procedural Law, Zurich 2000, page 5).

The concept “associations” in Art. 150 IPRG comprises all associative and institutional forms of a civil, commercial or public-law nature, with or without legal entity; this is an autonomous qualification of the *lex fori* that necessarily leads to a more precise definition of the legal form under the *lex causae* (see *Vischer*, IPRG Commentary, Zurich 1993, Art. 150 N 1). The concept “organized associations of persons” comprises, irrespective of their legal form and their objectives, corporations and partnerships, legal personal associations as well as domestic and international organizations; also included are simple associations as long as they show an organization or a structure that is recognizable as such to an outsider (see *Vischer*, op. cit., Art. 150 N3, 5, 21).

The Lazarus Order is an international knightly order with the titular seat in France (Art. 1 and 7 of the Constitution). Its internal structure is laid down in the Constitution of September 15, 1990, and it is certainly recognizable as such to an outsider, whereby the functionaries make themselves known as such to outsiders and the Order acts as such toward outsiders. The Lazarus Order is therefore an association as contemplated in Art. 150 IPRG.

Since it is a question of the ownership of the files of this association, internationality as contemplated in the above-mentioned scholarly opinion must be affirmed, even though in the actual proceeding, a judgment has to be passed on the surrender request between two parties residing in Switzerland. The local jurisdiction is therefore evaluated within the confines of the IPRG.

In association disputes the Swiss courts located at the seat of the associations have jurisdiction over complaints against the association, the members or the persons liable under the association statutes (Art. 151 para. 1 IPRG). The Swiss courts located at the residence, or, if there is no residence, the courts located at the normal address of the defendant (Art. 151 para. 2 IPRG) also have jurisdiction over complaints against a member or against a person liable under the association statutes. The complaint pursuant to Art. 151 para. 2 IPRG may also concern the affairs of foreign companies (*Vischer*, op. cit., Art. 151 N 5). The local Swiss courts or authorities at the location of the asset to be protected also have jurisdiction over measures taken for the protection of assets of associations domiciled in a foreign country (Art. 153 IPRG). The Petitioner alleges that the assets of the Lazarus Order that are to be protected are located in Bern, which is denied by the Respondent. This question is therefore based on a double-relevant fact by also covering the material claim of the Petitioner and the answerability by the Respondent as the proper party, at least to the extent that such claim is grounded in property law - and not contract law. Double-relevant facts are examined only in one single examination phase, namely when their justification is examined; for examining admissibility, it is sufficient if the plaintiff makes a case that this is so (see *Leuch/Marbach/Kellerhals/Sterchi*, Civil Procedure for the Canton Bern, 5th Edition 2000,

ZPO 191 N 3d). The respective assertion of the Respondent makes this case, so that local jurisdiction of the court based on Art. 153 IPRG must be affirmed.

6. According to an unwritten principle of IPRG, the procedural law of the invoked court applies (*Siehr*, International Law in Switzerland, Zurich 2002, p. 645). The present action is a summary action concerning a preliminary injunction outside of the proceedings. The material jurisdiction of the presiding judge of the court with regard to injunctions pursuant to Art. 326 ff. ZPO that are not to be handed down within the context of a proceeding before the appellate court or the commercial court flows directly from Art. 2 ZPO. The material jurisdiction is therefore given. The other procedural conditions are also given, in particular both representatives of the parties are duly authorized and the parties are admissible as parties and have the standing to sue.

The request is granted.

7. The Petitioner justifies the applicability of Swiss law with Art. 154 para. 2 IPRG. Pursuant to Art. 154 para. 1 IPRG, associations are subject to the laws of the country under whose regulations they are organized if they satisfy the publicity and registration requirements prescribed in these laws or, in case there are no such regulations, if they have organized themselves under the laws of that country. If an association does not satisfy these conditions, it is, pursuant to Art. 154 para. 2 IPRG, subject to the laws of the country in which they are effectively administered.

The linkage to the seat of the actual administration is secondary: it is not invoked just because the statutory and actual domiciles differ, but only if the association cannot be considered as being local under the primary criteria of para. 1 or does not permit a legally valid constitution; the laws in effect where the effective administration takes place therefore has the function of last resort: it assures the assignation of the matter to a legal system if the other linkages are not successful (see *Vischer*, op. cit., Art. 154, N 21, with reference).

The statutes of the Lazarus Order do not make clear which laws of which country should apply, nor do they reveal whether any publicity or registration requirements had to be observed when establishing the Order. Rendering the association local under the criteria of Art. 154 para. 1 IPRG is therefore not possible, entailing the application, based on Art. 154 para. 2 IPRG, of the laws of the country where it is effectively administered. The place where it is effectively administered is not the place of internal decision-making but the places where these decisions are implemented and are revealed to outsiders (see *Vischer*, op. cit., Art. 154 N 1. with reference). The place where it is effectively administered, according to the representations of the Petitioner, is Bern (Request Art. 6 lit. d) or should, in his opinion, be somewhere in Switzerland, possibly at his own address. The Respondent counters that the actual administration and thus the seat of the new Secretariat General has been in Canada since March 2004. This double-relevant matter of the pla-

ce of the actual administration has to be examined for its justification, and, at this stage, the representation of the Petitioner must be assumed to be correct, according to which this place is located in Switzerland. Based on Art. 154 para. 2 IPRG, Swiss material law is therefore applicable.

III. Facts Of The Case

8. The Petitioner requests a preliminary injunction based on Art. 326 ZPO. According to that regulation, the judge can issue a preliminary injunction if a plausible case has been made that such an injunction is justified for one of the reasons mentioned in the regulations. When the law does not require proof but only plausibility, it is sufficient if there is a certain probability that the facts in question do exist, even if the possibility cannot be discarded that the probability might not materialize (*Leuch/Marbach/Kellerhals/Sterchi*, Civil Procedure for the Canton of Bern, 5th edition 2000, ZPO 219 no. 2d). Conversely, such plausibility applies also to facts alleged by the Respondent against the request, which follows from the precept of equality before the law (*Leuch/Marbach/Kellerhals/Sterchi*, op. cit., ZPO 326 N3a with references).

If no definitive decision is handed down in a summary proceeding that limits the volume of the proceedings material and the evidence regarding material claims, a decision has to be made on the basis of what is immediately available; evidence that cannot be handled immediately and is not compatible with the summary proceeding can be rejected by the judge (*Leuch/Marbach/Kellerhals/Sterchi*, op. cit., ZPO 309 N 1b). The petition brought forward by the Respondent for review of the police protocol of March 11, 2004, (Art. 17 of the reply to the request) is denied because it is not compatible with the nature of a summary proceeding and because it is unlikely to be able to contribute to the clarification of the relevant circumstances. The relevant believable facts of the case shown below derive solely from the legal briefs and the documents submitted by both parties.

9. An international knightly order exists under the name Military and Hospitaller Order of Saint Lazarus of Jerusalem, with seat in the ruins of the royal castle of Boigny near Orléans in France (Constitution, GB 5, Art. 1 and 7). The head of the Order is the Grand Master as appointed by the Chapter General as the highest administrative entity (Const. Art. 8.1 and 8.7). He nominates all members of the Governing Council, the administration, the high magistrates, the constitutional council and the honorary council; he confirms the nomination of all Grand Priors, Grand-Bailiffs, Friars, Bailiffs and Grand Commanders; nobody can become a member of the Order against his wishes and all functionaries within the Order or high-ranking officials remain in their functions as long as the Grand Master grants his assent (Const. Art. 8.1). The Grand Master can issue orders that are necessary and desirable for the administration of the Order as long as they do not contradict the Constitution (Const. Art. 14). The Spiritual Protector of the Order is Gregorios III, the

Greek-Melchitic Patriarch of Antiocha and the Entire Orient, of Alexandria and of Jerusalem (Const. Art. 1 and 9).

10. Respondent was Grand Secretary General of the Order until his resignation on March 1, 2004 (resignation letter dated March 1, 2004, GB 9). While the Petitioner alleges that the resignation took place on February 19, 2004, he himself invokes the resignation letter of March 1, 2004, (GB 9). This can only be in error because the evidence does not show that the resignation took place already on February 19, 2004.

According to the concurrent representations of the parties, the Respondent administered the General Secretariat on Brückfeldstrasse 19 in Bern.

11. The Petitioner alleges that he had been elected new Secretary General (request Art. 3 lit b.). He does not explain when and by whom he was elected and does not produce any evidence. According to the explanation under numeral 9 above regarding the date of the resignation of the Respondent, this appointment can have occurred only after March 1, 2004. In another context, however, the Petitioner mentions as evidence a letter dated March 6, 2004, from the "Interim Chairman," John Kerry Keane, to the Respondent (GB 11). This shows that the Governing Council appointed the Petitioner as Grand Secretary General for 2 years in Toronto on March 5, 2004, and that the Petitioner was to hand all documents to the former and grant him access to the offices of the Order (GB 11).

Respondent alleges that the Petitioner had been ousted from the Order by a Grand Majestral Decree dated January 5, 2004, (Décret No. 04.01, AB 3) issued by the then reigning Grand Master, the Duke of Brissac. The ouster of the Petitioner is indeed evidenced by the written record in AB 3. The Respondent thereby makes it believable that the Petitioner was no longer a member of the Lazarus Order as of January 5, 2004. It remains to be examined whether he was appointed Grand Secretary General in Toronto on March 5, 2004, by the Governing Council.

12. a) According to the allegation presented by the Petitioner in Art. 4 of the request, the Order split into two groups on the occasion of the general assembly of all 24 Grand Priorities in Toronto at the beginning of March 2004, because of irreconcilable differences, namely one of 15 country associations and one of 9 country associations. He and the Swiss country association belonged to the group of 15 country associations, with 9 associations having left the Order. As evidence for this allegation, the Petitioner mentions the document "Summary of the general assembly in Toronto on www.lazarusorden.ch" (GB 10). The Petitioner also alleges (request Art. 5, lit b) that no decisions at all were taken at the general assembly in Toronto because of the ongoing dispute.

b) According to the Respondent's representations in Art. 16 lit. e of the reply to the request, the delegates of 15 country associations left the properly opened assembly of the Governing Council in Toronto under protest. The Spiritual Leader was able to unify them for a short while, but the group left the meeting after some further discussions. In spite of this, the Chapter General was completed after having been properly convened and was able to pass binding resolutions. It appointed the Duke of Seville as new Grand Master with 542 votes against 47. The Respondent supports this allegation with the Protocol of the Governing Council of March 4, 2004, and the Chapter General of March 5, 2004, (GB 4 and 5, both in the English original and in a German translation).

c) The Petitioner's representations are already in themselves not quite plausible, because it is a question, on the one hand, of a split of the Order, and on the other, of an exodus of 9 country associations. While it cannot be excluded that a split actually took place with the exodus of 9 country associations in order to together establish a new order, the Respondent does not provide any further details, leaving it ultimately open whether only the current Lazarus Order with 15 country associations continues in existence or whether one or even two new orders were established. Moreover, yet another version emerges from the documents submitted as evidence by the Petitioner himself. According to the summary of what happened at the General Assembly in Toronto, the group of 15 country associations (Austria, Bohemia, Croatia, Denmark, England and Wales, Germany, Hungary, Ireland, Liechtenstein, Holland, New Zealand, Rumania, Slovakia, Sweden, Switzerland) left the Grand Chapter before the election of the new Grand Master (no. 4 of GB 10). It is not clear how this is supposed to prove that the nine remaining country associations left the order or that the Order split in two. More plausible is the conclusion that the group of 15 country associations left the Order, leaving it still open as to whether they established a new order amongst themselves. However, what speaks in favor of that version is the already mentioned letter dated March 6, 2004, from John Kerry Keane (delegate of the Irish country association) to the Respondent regarding the nomination of the new Grand Secretary General (GB 11), because it was written under the letterhead of the Governing Council meeting in Toronto, leading to the conclusion that the 15 country associations carried out their own meeting. Nevertheless, it is impossible, just like that, for the 15 country associations to embody the Lazarus Order as it existed up to then, and the Petitioner is unable to present any justification for it, making an evaluation of evidence *a priori* unfeasible.

What is, however, believable and agrees with the evidence - and also with the "Summary of the General Assembly" submitted by the Petitioner - is the allegation of the Respondent according to which the delegates of the mentioned 15 country associations left the Grand Chapter under protest and thereby boycotted the election of the Grand Master, even though the election was able to take place in compliance with the statutes and the Duke of Seville was elected Grand Master. Even in this version, the question remains whether the fact that the delegates of the mentioned country associations left the meeting resulted in their exclusion from the Order. What is clear,

however, is that the Lazarus Order is not constituted all of a sudden of these same 15 country associations and that the decisions of the Governing Council and the Chapter General pursuant to the protocols AB 4 and 5 are applicable to the Lazarus Order.

d) The Protocol of the Governing Council dated March 4, 2004, (AB 4 + 4a) submitted by the Respondent reveals that the Grand Master informed the Governing Council of the nomination of Knight Georges N. Parent as Grand Secretary General and that the Governing Council unanimously supported and approved said nomination (AB 4 p. 4; AB 4a p. 2).

e) In summary it can be said that the Petitioner is neither able to make a plausible case that he is the officiating Grand Secretary General of the Lazarus Order nor that the Chapter General was unable to make any more decisions. Rather, the Respondent has been able to make the case in a counter-argument that the Lazarus Order continues to exist (made up, at a minimum, of those 9 country associations of which the Petitioner says that they had left or had split off), that the officiating Secretary General is Georges N. Parent and that the Petitioner was ousted from the Order already in January 2004.

13. Already on January 14, 2004, the parties had signed an agreement (GB 12). The Petitioner explains that the Respondent already on January 14, 2004, undertook in an agreement (in particular its no. 6) to hand over the archive to the Petitioner if the Chapter General could not reach a majority decision in Toronto. In GB 12 there actually is an agreement dated January 14, 2004. It shows as parties the Respondent and the "Noble Duty Foundation," the latter represented by the Petitioner. No. 6 of said agreement reads as follows: "If, for any reason, the Chapter General is unable to make a majority decision, Walter Schächli undertakes to make the files of the Order accessible and hand them over only to the delegate designated by the Noble Duty Foundation." Whether the Petitioner is really the delegate designated by the Noble Duty Foundation, which he himself does not claim to be, is not examined here as it is already clear, based on no. 12, that the Chapter General was very well capable of making a majority decision.

14. Even with regard to the content and the current location of the archive of the Lazarus Order and the ownership of the equipment used in the secretariat (incl. PC), the representations of the parties diverge. If at all relevant, the content of the archive, the scope of the equipment belonging to the Order, as well as its current location should be determined later in connection with the respective legal considerations.

III. Legal issues

15. The Petitioner bases his request on Art. 326 no. 2 and no. 3 lit b ZPO. According to these provisions, the judge may issue a preliminary injunction upon the request of one of the parties as a

precautionary measure, provided a plausible argument is made that such an injunction is justified for the protection of a threatened status as owner and the recovery of an illegally confiscated and withheld property (Art. 326 no. 2), or for the protection of due legal claims aimed at other than monetary or guaranteed performances, in case the claimant is threatened by a substantial or not easily repairable damage or disadvantage if the claims are not satisfied. (Art. 326 no. 3 lit b).

16. Art. 326 no. 2 serves two purposes, namely, on the one hand, the rapid implementation of a property protection claim; i.e., possessory protection, and on the other hand a quick implementation of protection on the basis of a right to recuperate an illegally confiscated and withheld property; i.e., the claim under property or a contractual claim for return or vindication (*Leuch/Marbach/Kellerhals/Sterchi*, op. cit., ZPO 326 N 7a).

The Petitioner is of the opinion that the Lazarus Order is a simple association and that its archive and/or its assets are communal property of the members of the Order (Art. 7 lit b of the request). As communal property owner, he therefore claims supposedly exclusive authority conceived as an exception to the community of property principle pursuant to Art. 653 para. 2 ZGB (Civil Code) because of the urgency and because a joint action by all 4,500 members of the Order after all is never possible.

Based on that, there is no need to determine the legal nature of the Lazarus Order under Swiss law. The result of the review of evidence is already in; namely, that the Petitioner is no longer a member of the Order and therefore has no authority whatsoever to take care of the interests of the communal property, if such property even existed. Even in the case of a club, the Petitioner, as a non-member, could not, of course, enforce that files and furniture belonging to him according to his own say-so would have to be handed over to him, never mind that such a claim could not be based on Art. 326 no. 2 ZPO.

The Petitioner therefore has no active authority pursuant to Art. 326 no. 2 ZPO.

17. Moreover, the Petitioner, based on the agreement dated January 14, 2004, is asserting a contractual surrender claim (Art. 7 lit. g request). This claim is not justified in several ways based on the evidence presented. It is, for example, dependent on a condition that has not happened; namely, that the Chapter General supposedly would be unable to pass resolutions. Also, the agreement was concluded between the Respondent and the Noble Duty Foundation represented by the Petitioner. The claim is for a surrender (or access) provided to "the delegate designated by the Noble Duty Foundation." the Petitioner shows neither who nor what the Noble Duty Foundation is, nor does he show that he is the

delegate designated by it, making an assessment of evidence in this question moot, which results in its immateriality. The claim after all only refers to “the files of the Order,” and it is not clear how a contractual surrender claim with regard to the furniture could be justified.

On a contractual basis, there exists therefore neither a claim for the surrender nor an active authority on the part of the Petitioner.

18. In summary, it can be said that the Petitioner is not actively authorized either as joint owner based on Art. 326 no. 2 ZPO or as mandatory claimant based on Art. 326 no. 3 ZPO, making a detailed examination of the further legal but also factual conditions for surrender or any of the other requested actions unnecessary. What cannot be evaluated *a priori* in the present proceeding is the legality of the ouster of the Respondent, the implementation of the Chapter General and the nomination of a new Grand Master of the Order as well as the question as to whether a new order has been established alongside the existing order and what claims the former could assert against the Lazarus Order.

The request is dismissed.

V. Costs

A decision on the costs of the proceeding rests on Art. 58 ff ZPO in conjunction with Art. 326 no. 2 and 3 ZPO. According to the result of the present proceeding, the Petitioner is now responsible for all costs. He has to defray the accrued court costs at a set fee amounting to SFr. 1,250.00 (incl. fees for summary action). These will be deducted from the advance payment.

The Petitioner also has to defray the court costs of the opposing party amounting to SFr. 7,706.00 in fees payable to attorney Burger-Bono according to the fee schedule of June 2, 2004, (fee: SFr. 7,000.00; expenses: SFr. 162.00; value-added tax: SFr. 544.30). The Petitioner has put the disputed value at SFr. 45,000. The fee of SFr. 7,000 is within the framework set for such a disputed amount in Art. 10 lit. a in conjunction with lit. c DAG [TN: abbreviation not recognized] (SFr. 960.00 to SFr. 9,420.00) and is reasonable in view of the criteria of Art. 4 DAG. The cost claims of the Respondent are therefore approved in the requested amount of SFr. 7,706.30 and referred to the Petitioner for payment.

The Presiding Judge 1:

[signature]

P. Kaelin

The Court Clerk:

[signature]

Hofstetter

Instructions for legal remedies:

The parties may file a written appeal against this decision within **10 days** of receipt of this decision (Art. 336 para. 3 ZPO). The statement of appeal should show to what extent a change is requested in the judgment of the first instance and what further collection of evidence is requested. The appeal may be justified in writing within the appeal period (Art. 339 para. 3, ZPO); it is to be submitted at the Civil Department of the Judicial District VIII Bern-Laupen (Art. 339, para. 1 ZPO).