

DRAFT

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PLEASE DO NOT SHOOT THE PIANIST. HE IS DOING HIS BEST.

Oscar Wilde once quoted this sign, written over the piano of many a saloon in the 19th century American West. The poor Swiss Verein should perhaps make the same appeal: not only is it doing its best -- arguably it is doing precisely that which has made it highly appealing over many decades.

In recent times the Verein, currently the legal form of choice for the mini-flood of new international law firm tie-ups, has taken a lot of heat. A random sampling includes Mark Brandon, *Verein today, gone tomorrow* <http://goo.gl/tE9Qm?http://goo.gl/Cb35A>; Peter Kalis, *Grand Illusion* <http://goo.gl/INfDq>; 3 Geeks and a Law Blog, *Cross Selling Doesn't Work - Especially When You Verein It* <http://goo.gl/wY9MO>; Julius Melnitzer, *Swiss Vereins and jellyfish* <http://goo.gl/4vneV>; Woldow and Richardson, *Do You Want Swiss With That?* <http://goo.gl/tE9Qm> ...the list goes on and on; the commentary ranges from the unflattering to snarky.

What is this strange legal construct that has created such a ruckus? The Verein has no precise counterpart in common law countries. It is sometimes described as being closest to a voluntary association, but can also have characteristics of a Massachusetts Trust, or a limited liability partnership or a membership corporation. Indeed, the very considerable range of qualities it can be endowed with is part of its attraction. Governed by the provisions of the Swiss Civil Code (ZGB Art. 60—79), the Verein is the form of entity frequently chosen by everything from garden clubs and singing societies, to cartels, labor unions, NGOs – and now professional service firms. And while the Verein itself may not conduct business for a profit, it has long served to bring together and coordinate the business interests of its members under one roof.

The legal history of such usage is not free of controversy. The highest Swiss federal court, the Bundesgericht, as early as the 1930s, had approved the use of a Verein as a vehicle for cartels as diverse as watchmakers and cigarette manufacturers. The Court's practice was criticized by leading Swiss academics; nevertheless, it held until 1962. In that year the Bundesgericht refused to follow the prior cases and held that the use of a Verein for an *indirect* for profit purpose – by a group of iron wholesalers – was not permissible. That proved to be a brief hiccup; the Bundesgericht reverted to its prior view two years later, and there Swiss law has remained for nearly half a century. Academic criticism has continued, though there are distinguished voices on both sides of the argument.

A useful discussion of the cases and the issues in English can be found in the award of an arbitration panel: *Association of service industry firms v. Service industry firm*, Award of 27 May 1991 in Albert Jan Berg van den (ed), Yearbook Commercial Arbitration 1992 - Volume XVII, Volume XVII (Kluwer Law International 1992) pp. 11 – 41.

It appears to this writer¹ that shooting at the Verein is aiming at the wrong target. The current critics tend to the view that the Verein lacks the glowing virtues of a true “firm”. But of course, it is precisely those virtues that are incredibly difficult to maintain as a traditional law partnership expands its number from a handful to dozens to hundreds of partners. Indeed, almost amusingly in this context, some recent commentary forcefully argues that the partnership form has outlived its purpose. So, for example, Stephan Mayson’s thoughtful blog post. *Law firm partnership: the Grand Delusion*, <http://goo.gl/AAiOw>.

But the problem is that law firms, if they are to grow, surely must find entities and forms that meet their expanding needs. (Whether growth is wise or desirable is best left to another discussion). No matter how fervently counter-arguments are advanced (see, e.g., Peter Kalis’ arguments in *Grand Illusion*, supra), there comes a time when jamming evermore partners into a firm becomes unworkable. The workarounds – multiple classes of “partners”, delegations of power, and the like – become increasingly unwieldy. Regulatory strictures, ranging from bar rules to taxation to exchange controls, hugely burden multi-jurisdictional firms of expanding size.

It is also important to keep in mind that under the rubric “Swiss Verein” there exists a multitude of quite different firms. There is the global law firm organized as a single partnership (think pre-Verein Baker & McKenzie) that decides to adopt a new form as it reaches the perceived limits of the partnership form. There are unions of previously independent law firms, from multiple jurisdictions, perhaps created under markedly different legal regimes, who wish to join forces (think King & Wood Mallesons, DLA Piper or Norton Rose Fulbright).

What the Verein offers is an exceptional bundle of attractive attributes. It is easily formed, has legal personality, can be self-governed in almost any way its members see fit, and is highly flexible in how it is made to “look and feel”. Indeed, it can be made to have much of the feel of casual informality that many cherished in the partnership form. And a final “virtue” in the eyes of many, a Verein’s members have a degree of limited liability – both by virtue of Swiss law, and arising from the fact that the Verein will be, of necessity, a non-practicing entity. How impenetrable a shield that is has not yet been definitively tested.

This bundle of attributes is useful, but there are certainly other forms that can be tried – indeed, Deloitte and PwC now both use a UK private company limited by guarantee (a form of entity, unsurprisingly, which has much in common with the Verein). KPMG, which until recently used a Swiss Verein, has changed to a

Swiss Cooperative. The basic point to keep in mind is that neither the flaws nor the virtues of large professional firms have much of anything to do with their legal form. Cohesiveness, professionalism, quality control, and high ethical standards...all these can be made to be integral to any organization, independent of legal form. Being part of a Verein won't make people better – but it also won't make them worse.

Whither the future? The hunt for the perfect organizational form and situs will undoubtedly continue. History suggests that perfection is hard to find, so varying corporate fashion is likely to influence the organizational choices. The more interesting and challenging undertaking would be to work on the shape and values of the organizations that will likely replace today's professional firms. Think of a world where lawyers and accountants – the holders of a license – will no longer be the exclusive occupants of the peak of the pyramid, but will share that space with quants and project managers and trades not yet invented. A world where there is still high value in having people closely bond, in having them *feel* as if they were “partners” even if they number in the thousands. Those organizations that manage that successfully will own the future.

ⁱ The author was a partner of Baker & McKenzie for some 35 years – but was not involved in the firm's decision to change from a global partnership to a Swiss Verein. The author also served as counsel to Touche Ross International when it organized itself as a Swiss Verein in the 1970s, and a decade later to Deloitte Touche Tohmatsu International when that organization followed the same path – but was no longer involved when the latter firm reorganized as a UK private company limited by guarantee.

