Switzerland

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

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1. INTRODUCTION

This guide provides an overview of the law and practice dealing with negotiated M&A transactions in Switzerland, as of 31 December 2021. This guide does not constitute legal advice. Anyone involved in negotiated M&A transactions should seek specialist advice.

1.1 Important recent developments

1.1.1 Revision of Swiss company law

After decades of preparatory work, on 19 June 2020 the Swiss Parliament passed an extensive revision of the company law. The revision makes company law more flexible and contains, in particular, innovations in corporate governance (including gender representation), share capital, shareholder rights and compensation. The revision intends to make Switzerland even more attractive as a business location. The revision is expected to enter into force in 2023 at the earliest. Therefore, this guide does not yet reflect such revision.

1.1.2 Impact of Covid-19

After a downturn in transaction volume at the beginning of the Covid-19 pandemic – mainly caused by the uncertainties linked thereto – the M&A activity in Switzerland recovered during the second half of 2020 and remains strong.

Important factors for the continued activity during the pandemic were, among others, the stable political and regulatory environment in Switzerland with very few restrictions in investments, the availability of financing at relatively favourable terms and some very attractive investment opportunities. Given that large amounts of capital are competing for attractive targets in Switzerland, the Swiss M&A market continues to be rather seller-friendly.

1.2 Legal landscape applicable to M&A transactions

The field of M&A transactions relating to privately held Swiss enterprises or parts thereof is governed by a multitude of statutes and case law precedents. Despite the economic importance and frequency of such transactions, there is no specific statute governing the acquisition of a company whose shares are not listed on a stock exchange (for public tender offers relating to listed companies, see the IBA Takeover Guide). Instead, the general rules on the sale of goods as set forth in Articles 184 et seq. of the Swiss Code of Obligations (CO) apply. These rules are specified by case law and complemented by additional rules. Nevertheless, transactions handled by sophisticated parties and professional advisers are usually based on elaborated contractual documentation, which concretise the rudimentary and fragmentary statutory basis.

Today, Switzerland does not have a comprehensive statutory foreign investment control regime. In recent years, however, foreign state-owned or state-affiliated companies have increasingly invested in Swiss companies. This poses a certain security risk, can lead to distortions of competition and cause sensitive know-how can flow away. In line with the general global trend, the Swiss legislator is now in the process of creating a legal basis for controlling such foreign investments in order to avert these dangers in the future. It is to be expected that in a few years' time, Switzerland will introduce certain barriers to such direct investments by certain foreign companies – as most countries in Europe already do.

Mergers of entities, as well as restructurings such as spin-offs or conversions from one company form into another one (eg, from a limited liability company into a stock corporation), are governed by the Swiss Act on Mergers, Demergers, Transfers of Assets and Transformations, which was enacted in 2004 (Merger Act).

2. STRUCTURE OF A SALE AND PURCHASE TRANSACTION

Sale and purchase transactions with respect to privately held companies in Switzerland are in almost all cases structured as a share deal, an asset deal (either by way of a classic asset deal, a registered transfer of assets and liabilities or a regulated spin-off, both pursuant to the Merger Act) or a merger.

2.1 Share deal

2.1.1 Characteristics

In a share deal, the seller sells and the buyer buys a certain percentage of the outstanding equity securities in a target company on the basis of a sale and purchase agreement. In Switzerland, companies are most often organised in the form of a stock corporation whose capital is divided into shares (*Aktiengesellschaft, AG; société anonyme, SA*) or, less common, as a limited liability company (*Gesellschaft mit beschränkter Haftung, GmbH; société à responsabilité limitée, Sàrl*).

2.1.2 Effects of the transaction on the target enterprise

The sale of a company by way of a share deal has – in contrast to an asset deal – in general no effect on the target company's assets, liabilities, contracts, employees and governmental authorisations.

As the whole company is transferred, individual assets or liabilities must not be transferred but stay with the target company. All employees remain employed with the target company, and neither the target company nor the employee can derive any right from the share deal. In case of contractual change of control provisions, the transaction may trigger certain rights of entitled contractual counterparties of the target company, most often a right to terminate the contract or a right to renegotiate certain terms and conditions.

While governmental authorisations, permits and licences relating to the target company's business stay generally in place and remain unaffected by the transaction, the change of control may also trigger duties to comply with certain requirements of regulated industries, such as banking, insurance or gaming (eg, disclosure duties to and approval rights by supervisory authorities).

2.1.3 Transfer of title

Title to the target company's shares is transferred as follows.

Stock corporation

Since the abolishment of bearer shares in 2019,[1] shares in a stock corporation are necessarily

[1] Since the entry into force of the Federal Act on the Implementation of Recommendations of the Global Forum (ie the Global Forum on Transparency and Exchange of Information for Tax Purposes) on 1 November 2019, bearer shares are no longer permitted in Switzerland. An exception is made for companies whose shares are listed on the stock exchange or are structured as intermediated securities (for example, held in a securities account at a bank). Companies had been given until 1 May 2021 to adapt their share structure accordingly.

issued as registered shares (with or without transfer restriction), either in certificated or uncertificated form. The transfer of certificated registered shares requires the physical delivery of the certificates and an endorsement or, alternatively, a written assignment declaration. Uncertificated shares are transferred by written assignment only.[2] If the company's articles of incorporation provide for a transfer restriction clause, a valid share transfer additionally requires a resolution of the board of directors of the target company approving such transfer. In addition, the buyer will request to be registered in the company's share register, because in relation to the company, only the persons entered in the share register are deemed to be shareholders.

Limited liability company

Shares (also called quotas) in a limited liability company are uncertificated and, unless the articles of association provide otherwise, are transferred by way of written assignment in combination with a resolution of the shareholders' meeting approving such transfer.

2.2 Asset deal

2.2.1 Characteristics

In an asset deal, the buyer acquires the assets and liabilities of a target company instead of the shares in such company. Therefore, the target company itself is party to the asset sale and purchase agreement and recipient of the consideration. Each individual asset (and, possibly, liability) changes its proprietor. Therefore, the asset deal has far-reaching effects on the selling and the buying enterprise.

From a tax point of view, for the seller being a Swiss company, an asset deal is generally less attractive than a share deal, as:

a) on the level of the target company, an asset deal triggers corporate income tax on the difference between the book value and the purchase price of the assets; and
b) in order to arrive at the shareholder level, the resulting gain has to be distributed as a (potentially taxable) dividend. In contrast, any gain resulting from a share deal is basically tax free for a Swiss individual seller.

From a buyer's perspective, in contrast, an asset deal is generally more attractive than a share deal, as an asset deal enables buyer to depreciate the acquisition costs.

In most cases, the share deal is preferred. Normally, the asset deal route is chosen if the buyer only wants to buy a limited number of assets and liabilities of the company, or if the buyer wants to make sure that no unknown liabilities transfer to the buyer. However, due to the tax consequences, an asset deal often results in a higher purchase price than a share deal.

2.2.2 Effects of the transaction on the target enterprise

The sale of an enterprise or parts thereof through an asset deal has several effects on the target's assets, liabilities, contracts, employees, governmental authorisations and tax situation.

[2] Publicly traded shares, however, are mostly issued in the form of book-entry securities (*Bucheffekten; titres intermédiés*) which are transferred by entry into the securities book of the target company in accordance with the Swiss Act on Book-Entry Securities which entered into force on 1 January 2010. Although possible, book-entry securities remain a rare exception in privately held companies, which is why we do not go into further detail here.

As individual assets are transferred, the parties must follow the specific transfer modalities required for each specific asset (unless the parties opt for the registered transfer of assets pursuant to the Merger Act).

Liabilities may only be transferred with the approval of the respective creditors. Contracts may only be transferred with the approval of the contractual counterparty. As in almost all European countries, employees are automatically transferred to the buyer together with the assets by operation of law, if the transferred assets form an enterprise or an organisational division and the employees were employed in such enterprise or organisational division. However, an employee has a right to reject such transfer and terminate the employment agreement with the statutory (not the contractual) notice period.[3]

Governmental authorisations, permits and licences are usually granted *ad personam*, in view of qualities and assurances of the holder itself, and therefore most often need to be reapplied for.

From a tax perspective, in principle, any difference between the book value and the purchase price of the assets is subject to corporate income tax at the level of the selling entity. In contrast (with the exception of real estate capital gains taxes under certain circumstances), a share deal does not trigger tax consequences for the target company.

2.2.3 Transfer of title

Registered transfer of assets pursuant to Merger Act

The Merger Act provides for the possibility to transfer an entirety of assets and liabilities by way of registration in the commercial register (*Vermögensübertragung; transfert de patrimoine*). The transfer is effectuated *uno actu* by operation of law with the filing of a transfer agreement including an inventory list with the commercial register (including real estate, which is otherwise only transferred by way of registration in the land register). The obvious advantage is that the parties do not have to follow the specific transfer modalities required for each specific asset or the assumption of liabilities (except that in case of real estate the agreement needs to be notarised). However, major disadvantages are that strict formalities must be followed under the scrutiny of the commercial registry, and the fact that transactions registered in the commercial register are published in the Swiss Commercial Gazette and, thus, are in the public domain.

In addition, in cross-border transfers to a foreign acquirer, the use of the registered transfer pursuant to the Merger Act is often not feasible, as the Federal Commercial Registry Office requires that the laws of the relevant foreign jurisdiction provide for an equivalent legal form of transfer (which is rarely the case). For these reasons, the use of the registered transfer of assets is not as widely used as originally expected.

Individual transfer of assets and liabilities

If the transfer is not effected by way of a registered transfer of assets, each individual asset needs to be transferred following the transfer rules applicable by law to the specific type of asset. For example, transfer requirements are (1) for claims: a written assignment declaration, (2) for movable assets: physical delivery (transfer of possession), (3) for trademarks: written assignment declaration, (4) for real estate: a notarised deed and filing with the land register, etc.

[3] The statutory notice periods are: during the first year of service – one month; in the second and up to and including the ninth year of service – two months; and thereafter – three months, always with effect as of the end of a calendar month.

Liabilities may only be transferred with the approval of the creditor. In this context, the parties must make sure *vis-à-vis* the creditor that the buyer wants to assume the liability while at the same time releasing the original debtor. Otherwise, the buyer will only undertake to internally indemnify the original debtor against any claim of the creditor or, alternatively, to jointly assume the liability as additional debtor without releasing the original debtor.

In order to 'transfer' entire contracts, the consent of the contractual counterparty is required. Such consent must be given in the form required by the contract. From a legal point of view, it is a tripartite agreement pursuant to which the transferor, the transferee and the contractual counterparty agree on the transfer of the contract.

2.3 Merger

Mergers of companies are regulated by the Merger Act. The Merger Act determines the substantive and formal requirements for the effectuation of a merger and the rights of the involved shareholders. In an arm's-length transaction, the boards (or other governing bodies) of both merging entities determine and negotiate the value of their entities and the share conversion ratio to be set forth in a merger agreement.

The merger is of great practical importance, especially for intragroup restructurings. For the execution of third-party M&A transactions, however, the merger is much less important than the acquisition of a business via a share or asset deal. Swiss law provides for two forms of mergers: the absorption and the combination merger:

2.3.1 Absorption merger

In an absorption merger, the absorbing company takes over and amalgamates with the dissolving company. The assets, liabilities, contracts, employees and governmental authorisations of the dissolving company transfer to the absorbing company *uno actu* by operation of law. The shareholders of the dissolving company receive shares in the absorbing company in exchange for their shares in the dissolving company. Following the merger, the dissolving company is deleted from the commercial register.

2.3.2 Combination merger

In a combination merger, two companies combine and amalgamate into a newly founded third company. The assets, liabilities, contracts, employees and governmental authorisations of the dissolving companies transfer to the newly founded company *uno actu* by operation of law. The shareholders of the two dissolving companies receive shares in the newly founded company in exchange for their shares in the dissolving companies. The two original companies are dissolved and deleted from the commercial register.

2.3.3 Cross-border merger

Swiss law also permits cross-border mergers in any direction, subject to the condition that such a merger is also provided for in the law applicable to the merging foreign company.

3. OVERVIEW OVER THE PROCESS OF AN INDIVIDUALLY NEGOTIATED SALE AND PURCHASE TRANSACTION

In a professionally structured Swiss M&A transaction, the process includes the following elements:

a) Pre-agreements, such as a confidentiality agreement and a letter of intent, frame and define the first phase of a potential acquisition (see section 4).
b) A due diligence examination allows the buyer to screen and evaluate the target company (see section 5).
c) The legal documentation phase consists of the drafting, negotiation and conclusion of a detailed sale and purchase agreement and its subsequent closing (see section 6).

4. PRE-AGREEMENTS

4.1 Confidentiality agreement

In the first phase, the parties normally enter into a confidentiality agreement (also called a non-disclosure agreement or NDA) to allow the seller to reveal certain non-public information about the target company to the potential buyer, and to protect against such information's unauthorised use. In transactions between (actual or potential) competitors, it must be ensured that no confidential and sensitive business data is exchanged without protective measures.

4.2 Letter of intent

Once the seller and the buyer have agreed on the basics of a transaction, it is common in Switzerland to enter into a letter of intent to structure the deal and to agree on certain aspects of the transaction process. The letter of intent regularly contains the following points:

a) description of the transaction and the common goal;
b) description of the main terms and conditions;
c) description of when and how the potential buyer may conduct a due diligence;
d) possibly, an agreement relating to exclusivity for the potential buyer during a certain period of time;
e) confidentiality (if not exhaustively regulated in a separate confidentiality agreement);
f) clause identifying which provisions are binding and which are non-binding for the parties;
g) clause regarding the assumption of costs;
h) applicable law; and
i) jurisdiction/arbitration.

Normally, points (a) to (c) are non-binding as they are subject to further analysis, negotiations and documentation of the parties. The remaining points are usually binding provisions. In principle, a letter of intent obliges the parties to negotiate the transaction in good faith, but it does not commit the parties to the conclusion of the transaction.

4.3 Lock-up (or voting) agreements with major shareholders

In the context of negotiated M&A transactions, lock-up or voting agreements are considered to be agreements with a shareholder of a company in which such shareholder undertakes *vis-à-vis* the potential buyer (1) not to sell their shares in the target company to a third party, or to sell their shares to the potential buyer under certain conditions, or (2) to vote in favour of a certain transaction (eg, in favour of a merger with the company of the potential buyers).

Although quite rare under Swiss law, potential buyers may enter into such lock-up or voting agreements with major shareholders; such agreements are valid and binding upon the parties. They can even be made conditional upon the successful acquisition of the target company by the potential buyer (contrary to the context of a public takeover, where such arrangements are restricted by law in order to allow an auction process).

4.4 Term sheets

In case of prolonged contract negotiations, the parties involved usually set out the main points on which there is an agreement, at least in principle (still non-binding), and thus facilitate negotiations by recording what has been achieved, promoting a focus on the essentials und ultimately providing legal advisers with a basis for the main contract governing the transaction. Term sheets are in terms of content very similar to letters of intent.

5. DUE DILIGENCE

Today, it is generally accepted in Switzerland that the acquisition of a company requires a due diligence examination in at least four areas: the target company's products, financials, tax and legal situation. Depending on the target company and type of transaction, the due diligence may need to be expanded to further fields, such as pensions, insurance, health and safety, and environmental aspects. Of ever-growing importance, in particular in a cross-border M&A context, is also compliance due diligence – in particular, a review of a target entity's policies and practical implementation in the fields of data protection, data security, anti-corruption and international sanctions, and generally in environmental, social and governance (ESG) matters.

The due diligence process aims at mending the information deficit of the buyer, with respect to the target company, before signing the acquisition agreement. The purpose of the due diligence is at least twofold. First, the buyer wants to understand the purchase object and identify defects, deficiencies and risks; these have an impact on the value, thus influencing the price calculation regarding the target and the potential legal protection required by the buyer in the acquisition agreement. Secondly, the due diligence can furnish valuable information to prepare the business integration process with respect to the target company after the closing of the transaction. In addition, the due diligence process can considerably reduce the liability risk for the seller, as the knowledge that a buyer acquires and/or can acquire in the due diligence process generally limits a seller's representations and warranties.

6. MAIN TRANSACTION AGREEMENT (SALE AND PURCHASE AGREEMENT)

There is no formal requirement for the conclusion of a sale and purchase agreement under Swiss law and it could therefore also be concluded orally. In practice, the sale and purchase agreement is drawn up in writing. For a valid sale and purchase, Swiss law in principle requires as essential terms only to identify the parties (the seller and the buyer), the object of the sale and the purchase price (so-called *essentialia negotii*). However, the parties usually add various provisions which address certain of their mutual and/or individual needs. The types of provisions and their content heavily depend on the object of the sale and its characteristics, the structure of the transaction as well as the sophistication and bargaining power of the parties.

Here are some of the key provisions of a sale and purchase agreement under Swiss law.

6.1 Preamble/recitals

In the preamble or recitals, the parties usually describe in more or less detail the background of the seller, the buyer and the target company, as well as the context of the transaction. The preamble has in principle no binding effect on the parties. However, in case of a dispute with respect to the interpretation of the agreement, it may help to understand and prove the original intentions of the parties.

6.2 Object of purchase

The contract should identify in detail the object of purchase: in a share deal, the shares to be sold/purchased, if possible indicating not only the quantity but the individual share number and nominal value of each share; in an asset deal, the assets and liabilities related to the enterprise to be sold listed item by item (by reference to the relevant annexes).

6.3 Purchase price

The purchase price can be freely determined by the parties. It is generally (1) a fixed amount stipulated in the agreement, or (2) an amount determinable based on a calculation method or formula set forth in the agreement, or (3) a combination of the two.

It is advisable to state fixed amounts as far as possible and to only refer to a calculation method or formula if the parameters for the calculation are not yet known at signing. The most common case in which the parameters are not yet known at signing is the final determination of the purchase price based on closing date financial statements. The parties agree on the adjustment of the preliminary purchase price paid at closing, based on the recalculation of the price using the agreed calculation formula and the numbers of the financial statements drawn up as per the closing. ‘

Another important price determination mechanism in which the specific figures are not known at signing and at closing is the agreement of an earn-out. In an earn-out, the parties agree that part or all of the purchase price shall depend on future results of the target company. Earn-out arrangements are often chosen when the parties do not share the same view on the future results or profitability of the target company and the seller is still active in the target company during the earnout period. Most of the times, the earn-out is based on future earnings before interest and taxes (EBIT) or earnings before interest, taxes, depreciation, and amortisation (EBITDA).

6.4 Payment of purchase price

6.4.1 Full payment at closing

Following the traditional Roman law principle ‘*do ut des*’,[4] at closing the buyer and the seller exchange the purchase object(s) and the purchase price. The performance by one party of its obligations under the sale and purchase agreement takes place in mutual interdependence from the other party’s performance of its contractual obligations (*Zug um Zug*). In practice, this payment modality is mostly chosen.

[4] ‘I give so that you give.’

6.4.2 Partial payment at closing

A buyer is generally not interested in paying the whole purchase price at closing. Depending on the bargaining power, the buyer may prevail with this wish. There are several ways to achieve that:

Holdback

In a holdback arrangement, part of the purchase price is not paid at closing but held back by the buyer until a certain point in time in the future. The arrangement can also be described as a payment in instalments and is rather buyer-friendly. The buyer benefits from the deferral of its payment and, as a security, from the option to offset any potential claims under the agreement, typically for breach of representations and warranties, against the respective outstanding purchase price payment. In contrast, the seller does not receive the full purchase price at closing and bears the risk of the buyer's willingness to pay and its solvency.

Escrow

In order to avoid the above-mentioned disadvantages, a seller normally requests an escrow arrangement instead of a holdback. In an escrow arrangement, the buyer pays a portion of the purchase price to an independent third party mandated by the parties (the escrow agent). The escrow agent enters into an escrow agreement with the seller and the buyer pursuant to which it holds on to the money on behalf of the parties and only pays out the money pursuant to contractually agreed instructions. Such instructions typically include the payment (1) to the seller after a certain period of time – normally the expiration of the time limit set forth in the sale and purchase agreement for claims based on a breach of representations and warranties, (2) based on a (final) court judgment or arbitral award, or (3) based on mutual instructions by the parties.

In Switzerland, escrow services are usually provided by fiduciaries or lawyers who would hold the money on an escrow account at a deposit bank. Sometimes, but less and less frequently, a bank is also directly used as escrow agent. In any case, the escrow agent will have to comply with applicable anti-money laundering regulation. An escrow arrangement avoids certain drawbacks for the seller (eg, the lack of willingness or solvency of the buyer), but involves added complexity and certain costs, including escrow agent and deposit account fees. A rather new issue to be tackled in such a context is the question which party shall bear possible negative interest on the deposited money.

6.5 Representations and warranties

The Swiss statutory regime of sale and purchase provides the buyer with a basic set of representations, the so-called 'implied qualities', but these only refer to the object of the purchase. With regard to share deals, the Swiss Federal Supreme Court has held that, based on the applicable law on the sale of goods, the objects of the sale and purchase are only the shares and not the enterprise itself, not even when 100 per cent of the shares change hands (an opinion by the court heavily criticised by legal scholars). Therefore, the statutory regime on the sale of goods does not offer any comfort or protection to a buyer with respect to the central issue as to whether the underlying target enterprise is free from defects. As a consequence, a buyer regularly insists on the inclusion of an elaborated set of additional representations and warranties of the seller in the sale and purchase agreement, specifying and assuring certain actual qualities of the target enterprise.

6.5.1 Examples of customary representations and warranties

In a professional M&A environment, a seller is often asked to give representations and warranties under a sale and purchase agreement which address the following subject matters:[5]

a) *Capacity of seller:* the seller's right and authority to enter into the acquisition agreement and to perform the obligations thereunder; no violation of any of the charter documents of the target company by the contemplated transaction.
b) *Title to shares:* the seller's sole legal and beneficial ownership of the shares, free and clear of any encumbrance.
c) *Status of the company:* due incorporation and valid existence of the target company under the laws of Switzerland; no bankruptcy or dissolution.
d) *Financial statements:* compliance of the relevant financial statements with the applicable reporting standard and past accounting practices as well as adequate reflection of the financial position of the target company;
e) *No material adverse change:* no material adverse change in the financial position or operations of the target company.
f) *Taxes:* due and timely filing of all tax returns; timely payment of all taxes due; no contingent taxes.
g) *Authorisations:* existence of all necessary authorisations and permits to conduct the business.
h) *Compliance with laws and regulations:* compliance by the target company with all applicable laws and regulations, including data protection, data security, anti-corruption and international sanctions rules as well as more generally ESG.
i) *Material contracts:* disclosure of all material contracts of the target company; no termination or right to terminate or default; all contracts at arm's length.
j) *Employees:* disclosure of all relevant terms and conditions of the employment of all employees of the target company, including a state-of-the-art provision regarding the creation and transfer to the employer of intellectual property (IP) created by employees; no notice of termination to or by any key employee.
k) *Social security and pensions:* compliance of the target company's pension plan with all statutory requirements; due and timely payment of all social security and pension contributions; no underfunding.
l) *Intellectual property:* full unencumbered title to the target company's IP; complete registrations in the relevant countries and classes in the name of the target company; valid licence for all necessary IP not owned.
m) *Real property:* valid title to its land and premises, either by way of property or by way of a (long-term) rental agreement.
n) *Plant and machinery:* good working order and proper maintenance of plant and machinery.
o) *Insurance:* customary insurance coverage; policies in full force and effect; no claims.
p) *Litigation and proceedings:* no actual legal action, proceeding, suit, litigation, prosecution, investigation, enquiry or arbitration in which the target company is involved.
q) *Competition law:* neither party to any agreement, nor carrying on any practice, that contravenes any antitrust or similar legislation in any relevant jurisdiction.
r) *Environment:* compliance with all applicable environmental laws and regulations; existence of all necessary environmental permits.

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[5] The following are generic subject matters for representations and warranties which, in one form or another, are found in many Swiss and international acquisition agreements. It is emphasised that these provisions need detailed specification and elaboration depending on the specific transaction and, importantly, due to the fact that their specific meaning has to be interpreted and shaped under Swiss law. In addition, the buyer often requires further representations and warranties specifically geared to the target company on the basis of the findings of the due diligence.

6.5.2 Qualifications

Buyer's knowledge

One of the battles most ferociously fought in many transactions is the issue regarding the effects of buyer's knowledge on claims for the violation of representations and warranties. Should the knowledge acquired by the buyer from the seller or in the due diligence 'qualify' and limit the representations and warranties given by the seller or not? There are good reasons for both positions and the matter is often decided by the negotiation leverage of the parties.

The starting point is the legal framework, and for once the Swiss Code of Obligations is clear: The seller is only liable for defects that the buyer did not know at the time of the purchase. For defects that the buyer could have known by applying ordinary diligence, the seller is only liable if it warranted their absence (Article 200, paragraphs 1 and 2, CO).

However, this statutory regime is not mandatory. The parties are free to change those rules in their transaction and this is regularly done. Depending on the facts of the particular transaction and the negotiation leverage of the seller and the buyer, the parties will agree whether and to what extent the knowledge of the buyer is limiting the seller's liability for breach of representations and warranties.

Duty to investigate

Pursuant to the statutory regime on the sale and purchase of goods, a buyer needs to examine the purchased objects in due course to ascertain the condition of the purchased object. If the buyer fails to do so, the purchase is deemed to have been approved with respect to deficiencies which could have been detected by way of a customary examination (Article 201, paragraphs 1 and 2, CO). If, at some later point in time, deficiencies appear which could not have been detected by way of a customary examination, such defects need to be notified immediately to the seller.

The Swiss Federal Supreme Court is very strict in its interpretation of 'examination in due course' and 'immediate notification'. But again, the statutory regime is not mandatory. The parties can agree on different terms and conditions with respect to the examination of the purchased object. It goes without saying that the examination of an enterprise requires more time than that of, eg, a newly bought apple, it is customary that the parties to a share deal generally waive Article 201 CO and replace it with an alternative regime, pursuant to which the buyer is usually entitled to examine and make claims under the representations and warranties during a time period ranging from approximately six to thirty-six months.

6.5.3 Survival of representations and warranties

In Switzerland, representations and warranties normally survive closing. Normally, a buyer has between six and thirty-six months to make a claim for violation of representations and warranties. In many cases, the parties agree on a time period of 18 or 24 months based on the consideration that the buyer should have at its disposal at least one full audit cycle (ie, 12 months) plus some time to carry out the audit and subsequently to make its claim.

Certain representations and warranties require longer periods in order to address the specific situations. Sellers are often asked to grant a warranty period covering the whole applicable statute of limitations for claims relating to tax, social security, pension and environmental matters plus some months (usually between one and six) to make a claim.

Last but not least, it is not uncommon to have a time period of ten years for the title representation.

6.5.4 Remedies

It is customary in Swiss sale and purchase agreements to exclude the statutory remedy of rescission of the contract (*Wandlung; résiliation du contrat*). Normally, at closing, the buyer takes over the operational responsibility with respect to the target company. The buyer leads the company, makes strategic decisions, hires and terminates employees, makes and declines deals, etc. Consequently, the face of the target company is changed. It follows that the buyer can never give back the same enterprise as it received at the time of closing.

Often, the parties also negotiate on a *de minimis* amount for each single claim, a threshold (tipping basket or real threshold) which needs to be reached before a party is entitled to request indemnification, and an overall cap for all claims.

The parties also may agree on certain exclusions from damages, such as damages covered by insurance, the tax effect (the amount in taxes saved as a consequence of the damage suffered), and damages with respect to which the target company entered a provision into its books.

6.6 Indemnities

In some instances, the parties identify a particular risk, the realisation of which lies in the future and its occurrence is either sure or not sure. As the risk is in itself distinct, buyers often insist on having a specific indemnity in the form of a Swiss law guarantee with respect to such particular risk. From a Swiss legal perspective, there is a difference between a representation and warranty, and an indemnity. While a claim under a representation and warranty is a claim for violation of the purchase agreement, a claim under an indemnity/guarantee is a claim for performance. One of the reasons for providing for an indemnity is that often such indemnities are not made subject to any *de minimis*, threshold or cap. Another one is that only indemnities can relate to the future; representations and warranties can, by contrast, only cover the past and the present.

6.7 Covenants of the buyer and the seller

Covenants set forth certain obligations of the seller and the buyer to do, or refrain from doing, something. Most often the acquisition agreement differentiates between pre-closing and post-closing obligations.

6.7.1 Pre-closing covenants

The pre-closing covenants usually obligate the seller to conduct the business of the target company between signing and closing in the ordinary course of business as conducted in the past. This shall ensure, for the benefit of the buyer, that the state the business was in at the time of the due diligence will remain unchanged until closing. Furthermore, as after signing the buyer is already in a vested remainder with respect to the target company, the buyer wants to be consulted with respect to certain significant transactions within the business of the target company.[6]

The parties normally need to work together to receive the necessary clearance and approval from the merger control authorities and/or other regulatory bodies. This requires constructive and open

[6] Such pre-covenants may be problematic under competition law aspects if the transaction is subject to standstill obligations based on Swiss or foreign merger control rules.

cooperation. However, if the transaction is subject to the clearance by the competent competition authorities, care must be taken that no sensitive and confidential business data is exchanged with the buyer prior to the receipt of such clearance.

6.7.2 Post-closing covenants

Post-closing, the following obligations are most common.

First is provision of a non-compete duty pursuant to which the seller undertakes not to compete with the target company for the next few years. In employment contracts, non-compete undertakings must not exceed three years except in special circumstances. In the context of the sale of an enterprise it used to be that a non-compete of the seller could extend beyond three years in rare cases. But the Swiss competition authorities now tend to also restrict it in that context to a maximum of three years insofar as know-how and goodwill have been transferred. Also, for competition law reasons, only sellers who had the ability to control (jointly or on their own) the target company can validly be made subject to a noncompete undertaking.

A second obligation is the non-solicitation of employees of the target company. The seller normally undertakes not to solicit or even employ any of the target company's employees for a certain period of time.

Given that the resulting damage may be hard to prove in case of a violation of these undertakings, the buyer often insists on a contractual penalty with a fixed amount.

6.8 Conditions precedent to closing

Conditions precedent to closing make the transaction unenforceable unless certain conditions are met. The following are customary conditions precedent.

6.8.1 Governmental approvals

Generally, the acquisition of an enterprise does not require a governmental approval or permit in Switzerland unless they fall within the scope of Swiss merger control. However, certain significant mergers and acquisitions of special types of enterprises do require certain governmental approvals.

Merger control

Under the current Swiss merger control legislation, the concentration of enterprises must be notified to the Swiss competition authorities if, in the last accounting period prior to the concentration, the enterprises concerned (ie, the acquiring enterprise(s) and the acquired enterprise or business) reported (1) an aggregated worldwide turnover of at least CHF 2bn or an aggregated turnover in Switzerland of at least CHF 500m; and (2) at least two of the enterprises concerned reported an individual turnover in Switzerland of at least CHF 100m each.

Alternatively, a concentration must be notified irrespective of the turnover if the Swiss competition authorities have previously issued a legally binding decision stating that one of the enterprises concerned is dominant in a specific market related (horizontally, vertically, or adjacent) to the activities at issue in the transaction.

The term 'concentration' means (1) the merger of two or more enterprises that are independent of each other or (2) any transaction whereby one or more enterprises acquire, in particular by way of an acquisition of an equity interest or conclusion of an agreement, direct or indirect control of one or more independent enterprises or a part thereof. This also includes the creation of a joint venture.

The threshold triggering a notification duty (formal criterion) is considered to be relatively high in comparison to international standards. A transaction can be notified prior to the conclusion of the final agreement. However, the parties will have to demonstrate a good faith intention to enter into a binding agreement and to complete the transaction. Once the notification has been submitted (generally after a pre-notification process), the authorities will conduct a preliminary investigation and have to decide within one month whether there is any need to initiate an in-depth investigation of the transaction.

If initiated, the in-depth (Phase 2) investigation will have to be completed within four months. Therefore, the entire procedure (Phase 1 preliminary assessment and Phase 2 in-depth investigation procedure) should not exceed five months. While closing of the transaction is prohibited prior to the notification and clearance or (silent) expiration of the preliminary investigation phase, the competition authorities may allow a preliminary closing if there are important reasons for such preliminary closing.

In the past, this instrument was mainly used to allow the reorganisation in case of failing companies. However, in its earlier practice the competition authorities have also allowed a preliminary closing in case of a pending public takeover bid. However, it has been made clear that there is no general exception for public bids (contrary to the situation according to the European merger control rules) and that each case will be assessed individually.

Acquisition of certain types of businesses

Banks, securities firms, and insurance enterprises: In Switzerland, such firms require a licence from the Swiss Financial Market Supervisory Authority (FINMA) and they are subject to ongoing prudential supervision by FINMA.

One requirement to obtain and maintain the licence is that each individual or entity which (1) directly or indirectly holds at least 10 per cent of the capital or the votes or (2) otherwise has significant influence on the company management (collectively qualified participation), must meet ‘fit and proper’ requirements and assure that its influence does not adversely affect the prudent and solid management of the bank, securities firm or insurance company.

Changes with respect to qualified participations must be reported to FINMA by the regulated firm and by any holder of a qualified participation. The statutory provisions do not expressly impose a prior approval requirement unless the change in ownership results in the bank, securities firm or insurance company being under foreign control. However, also in all other cases the parties are well advised to treat such reporting requirement as a condition precedent to closing and to build into the transaction documentation the relevant conditions addressing any objections FINMA may raise. Therefore, these reporting obligations should be addressed early in the process and, in the event of any open points, a consultation of FINMA prior to closing the transaction may be advisable.

In addition, if a Swiss-controlled bank or securities firm passes under foreign control as a result of the acquisition of a participation, it must request an additional licence from FINMA. A new additional licence is also required if there is any change in a qualified participation held by a foreigner in a foreign-controlled bank or securities firm.

Radio and television enterprises: In Switzerland, radio and television enterprises require a concession issued by the Swiss Federal Department of the Environment, Transport, Energy and Communications (DETEC). The transfer of a concession, directly or indirectly, through a change of ownership with respect to more than 20 per cent of the capital or the shares in the concession holder, requires the prior written approval of DETEC.

Other types of businesses which trigger an approval requirement and/or a confirmation of the concession or licence to conduct a certain type of business are, for instance: schools, casinos, body leasing (*Personalverleih, location de services*), and production of and trade in arms and munitions (*Kriegsmaterial, materiel de guerre*). This list is non-exhaustive.

Acquisition of real estate by foreign buyers

The direct or indirect acquisition of certain (in particular residential and non-developed) real estate by foreigners is restricted. In certain cases, a confirmation by the relevant authorities is required that a transaction involving real estate is not subject to the restrictions.

6.8.2 Other approvals

The transaction may be made dependent on certain third-party approvals such as, for instance, the consent of contractual counterparties.

6.8.3 Correctness of representations, warranties and guarantees, and compliance with covenants

The buyer often does not want to be forced to close the transaction unless the seller has confirmed that the representations, warranties and guarantees have always been and are (materially) correct at closing, and that the seller has (materially) complied with all covenants.

6.8.4 No material adverse change

Another protection for the buyer is the no material adverse change (MAC) condition precedent. The buyer may refuse to close the transaction in case the target company has suffered a material adverse change, eg, in its financial condition or its operations. As there is no statutory definition of MAC, it is wise to define what constitutes a MAC in the sale and purchase agreement.

6.8.5 Due diligence

It can also be observed that, in the case the buyer's due diligence is not fully completed at signing, the buyer makes the consummation of the transaction conditional upon the (reasonably) satisfactory completion of the due diligence.

6.8.6 Financing condition

In certain circumstances, it is necessary and justified to make the acquisition contingent on the availability of the financing to the buyer.

6.8.7 No exercise of rights of first refusal or rights of first offer

The sale of the shares may be subject to rights of first refusal or rights of first offers of third parties, such as other shareholders of the target company. In these cases, the parties make the transaction conditional upon the non-exercise of such third-party rights.

6.8.8 Board or committee approval

In some organisations or entities, the negotiators need to submit the final deal after signing to the board or an investment committee or the like. In such cases, it is necessary to include a condition precedent to that effect. However, sellers often insist that the buyer obtains that approval before signing.

6.8.9 Consequence: right to terminate the acquisition agreement

If a condition precedent is not met or waived within a certain time period (so-called long-stop date), the transaction is not consummated and a party may terminate the acquisition agreement. It is important to provide for a termination mechanism in the contract, because otherwise the transaction could be hanging in the balance forever, unless both parties agree to void the contract.

6.9 Miscellaneous provisions

In this section of a sale and purchase agreement, the parties regulate general topics like who assumes the costs and taxes in connection with the transaction. In Switzerland, it is standard that each party bears its own costs and taxes. In private equity and venture capital transactions, it used to be generally the target company that bears the transaction costs to the extent this is acceptable from a tax point of view, but this practice seems to be fading.

Also, the parties agree on the terms and conditions relating to the confidentiality of the existence and the content of the sale and purchase agreement. If a public announcement is planned, the parties often agree who will be in charge of the drafting and dissemination and what rights the other party has (approval, information, consultation).

Further aspects covered by the miscellaneous provisions are: in what form the parties deliver notices to each other; whether rights under the contract may be assigned; whether claims under the contract can be set off against each other; that the present contract contains the entire agreement of the parties relating to subject matter of the contract; that amendments to this contract must be in writing; and that in case of invalidity of a clause the contract shall survive with a valid clause as close as possible as the invalid clause.

Last but not least, as English is not an official language in Switzerland, especially in a cross-border context, it is recommended to add a provision setting forth that the terms in German or French printed in italics in the contract constitute Swiss legal terms specifying the meaning of the terms in the English language they refer to which shall be taken into account when interpreting the contract.

6.10 Dispute resolution

Disputes in M&A transactions can be solved by ordinary courts or by arbitration.

6.10.1 Ordinary courts

M&A disputes involving a Swiss target are generally civil matters which can be brought in civil court in Switzerland. The civil proceedings in each of the Swiss cantons are governed by the Swiss Federal Code of Civil Procedure. The language of the proceedings is German if the court is situated in the German part of Switzerland, French in the French part of Switzerland and Italian in the Italian part of Switzerland. Within certain limitations, the parties to a contract can choose which court shall have jurisdiction and which law shall be applicable to their contract. Normally, the parties agree that Swiss law shall be applicable. The Swiss judiciary system is fully independent and reputed to be fair and efficient by international standards.

6.10.2 Arbitration

In cross-border transactions, ie, a transaction involving a foreign buyer or a foreign seller, and in which the contract language is English, the preferred route is often arbitration. Arbitration is usually quicker than proceedings before state courts. Arbitrators are normally from 'neutral' countries and specialised in the field and industry of the dispute. Their awards are confidential and enforceable in most countries.

The parties are free to designate their arbitrator(s) and they can select the applicable law, the seat of the arbitration, the language of the proceedings and their legal counsel. With the Swiss Rules on International Arbitration, Switzerland offers one of the most modern and reliable sets of arbitration rules (see www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws) and a significant number of very experienced international arbitration practitioners. As a result, arbitration under the Swiss Rules is a widely used, cost-effective mechanism for cross-border dispute resolution.

7. CLOSING ACTIONS

At closing, the seller is obliged to provide the buyer with ownership of the object of purchase (ie shares or assets), while the buyer is obliged to pay the purchase price in mutual interdependence (*Zug um Zug*).

Everything to be handed over by the parties is defined in a protocol (closing minutes) in which the parties state, on the one hand, that the conditions for executions have been met and, on the other hand, confirm to each other that the required closing actions have been performed correctly. These closing minutes are to be signed by both parties to complete closing. This protocol then serves both parties as a receipt for the performance of their contractual duties.