Switzerland

Negotiated M&A Guide[1]

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 in effect on 1 September 2017. This guide does not constitute legal advice. Anyone involved in negotiated M&A transactions should seek specialist advice.

2. General Background

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 at 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 documentations which concretize the rudimentary statutory basis.

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

3. 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.

3.1 Share Deal

3.1.1 Characteristics

In a share deal, seller sells and 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 organized 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*).

3.1.2 Effects of the Transaction on the Target Enterprise

The sale of a company by way of a share deal has in general no effect on the target company's assets, liabilities, contracts, employees and governmental authorizations.

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 re-negotiate certain terms and conditions.

Last but not least, while governmental authorizations, permits and licenses 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 (e.g., disclosure duties to and approval rights by supervisory authorities).

3.1.3 Transfer of Title

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

a) *Stock corporation*. Shares in a stock corporation may be issued as bearer shares or registered shares (with or without transfer restriction), either in certificated or un-certificated form. While certificated bearer shares are transferred by way of physical delivery only, the transfer of certificated registered shares additionally requires an endorsement or, alternatively, a written assignment declaration. Un-certificated 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.

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

3.2 Asset Deal

3.2.1 Characteristics

In an asset deal, 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 seller being a Swiss company, an asset deal is generally less attractive than a share deal, as, (i) 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 (ii) in order to arrive at the shareholder level, the resulting gain has to be distributed as a (potentially taxable) dividend. By 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.

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

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[2] Publicly traded shares, however, are nowadays 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.

3.2.2 Effects of the Transaction on the Target Enterprise

The sale of an enterprise or parts thereof by way of an asset deal has multiple effects on the target enterprise's assets, liabilities, contracts, employees, governmental authorizations and tax situation.

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 buyer together with the assets by operation of law if the transferred assets form an enterprise or an organizational division and the employees were employed in such enterprise or organizational 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 authorizations, permits and licenses are usually granted ad personam, in view of qualities and assurances of the holder itself, and therefore most often need to be re-applied 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. By 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.

3.2.3 Transfer of Title

a. 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. 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. However, major disadvantages are on the one hand the strict formalities which have to be followed under the scrutiny of the commercial registry and on the other hand the fact that transactions registered in the commercial register are published in the Swiss Commercial Gazette and, thus, end up 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 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.

b. Individual Transfer of Assets and Liabilities

If the transfer is not effectuated 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 (i) for claims: a written assignment declaration, (ii) for

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[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.

movable assets: physical delivery (transfer of possession), (iii) for trademarks: written assignment declaration, etc.

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 buyer wants to assume the liability while at the same time releasing the original debtor. Otherwise, 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.

3.3 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.

Swiss law provides for two forms of mergers, the absorption and the combination merger.

3.3.1 Absorption Merger

In an absorption merger, the absorbing company takes over and amalgamates with the dissolving company. The assets, liabilities, contracts, employees and governmental authorizations 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.

3.3.2 Combination Merger

In a combination merger, two companies combine and amalgamate into a newly founded third company. The assets, liabilities, contracts, employees and governmental authorizations of the dissolving companies transfer to the newly founded company *uno actu* by operation of law. The shareholders of 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.

4. 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: Pre-agreements such as a confidentiality agreement and a letter of intent frame and define the first phase of a potential acquisition (see Section 5). A due diligence examination allows buyer to screen and evaluate the target company (see Section 6). The legal documentation phase consists of the drafting, negotiation and conclusion of a detailed sale and purchase agreement and its subsequent closing (see Section 7).

5. Pre-Agreements

5.1.1 Confidentiality Agreement

In a first phase, the parties normally enter into a confidentiality agreement (also called non-disclosure agreement), in particular to allow seller to reveal certain non-public information about the target company to the potential buyer and to protect against such information's unauthorized use.

5.1.2 Letter of Intent

Once seller and 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.

5.1.3 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 (i) not to sell his shares in the target company to a third party, or to sell his shares to the potential buyer under certain conditions, or (ii) to vote in favor of a certain transaction (e.g. in favor 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).

6. 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 the 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.

The due diligence process aims at mending the information deficit of buyer with respect to the target company. The purpose of the due diligence is at least two-fold: First, buyer wants to understand the purchase object and identify defects, deficiencies and risks; these have an impact on the value, thus, influence the price calculation regarding the target and the potential legal protection required by 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.

7. Sale and Purchase Agreement

For a valid sale and purchase, Swiss law in principle requires as essential terms only to identify the parties (seller and 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.

Sections 7.1 et seq. hereafter line out some of the key provisions of a sale and purchase agreement under Swiss law:

7.1 Preamble/Recitals

In the preamble or recitals, the parties usually describe in more or less detail the background of seller, buyer and the target company as well as the context of the transaction. The preamble has 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.

7.2 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).

7.3 Purchase Price

The purchase price can be freely determined by the parties. It is generally (i) a fixed amount stipulated in the agreement, or (ii) an amount determinable based on a calculation method or formula set forth in the agreement, or (iii) 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 seller is still active in the target company during the earn-out period. Most of the times, the earn-out is based on future EBIT or EBITDA.

7.4 Payment of Purchase Price

7.4.1 Full Payment at Closing

Following the traditional Roman law principle "*do ut des*"[4], at closing buyer and 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*).

7.4.2 Partial Payment at Closing

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

a. Holdback

In a holdback arrangement, part of the purchase price is not paid at closing but held back by buyer until a certain point in time in the future. The arrangement can also be described as a payment in installments and is rather buyer-friendly. 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, seller does not receive the full purchase price at closing and bears the risk of buyer's willingness to pay and its solvency.

b. Escrow

In order to avoid the above-mentioned disadvantages, a seller normally requests an escrow arrangement instead of a holdback. In an escrow arrangement, 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 seller and 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 (i) to 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, or (ii) based on a court judgment or an arbitral award, or (iii) 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 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 seller, 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.

7.5 Representations and Warranties

The Swiss statutory regime of a sale and purchase provides buyer with a basic set of representations, the so-called implied qualities, whereas 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% of the shares change hands (an opinion by the

[4] Verbatim translation from Latin: I give so that you give.

court heavily criticized 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 seller in the sale and purchase agreement, specifying and assuring certain actual qualities of the target enterprise.

7.5.1 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*: 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:* 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) *Authorizations*. Existence of all necessary authorizations 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.

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; no notice of termination to or by any key employee.

k) *Social security and pensions*. Compliance of target company's pension plan with all statutory requirements; due and timely payment of all social security and pension contributions; no underfunding.

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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 hereby emphasized 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, buyer often requires further representations and warranties specifically geared to the target company on the basis of the findings of the due diligence.

l) *Intellectual property*. Full unencumbered title to target company's intellectual property ("**IP**"); complete registrations in the relevant countries and classes in the name of the target company; valid license 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, if any.

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.

7.5.2 Qualifications

a. 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 buyer from seller or in the due diligence "qualify" and limit the representations and warranties given by seller or not? There are good reasons for both positions and the matter is often decided by the negotiation leverage of the parties.

Starting point is the legal framework and for once the Swiss Code of Obligations is clear: Seller is only liable for defects that buyer did not know at the time of the purchase. For defects that buyer could have known by applying ordinary diligence, seller is only liable if it warranted their absence (Art. 200 Para. 1 and Para. 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 seller and buyer, the parties will agree whether and to what extent the knowledge of buyer is limiting the seller's liability for breach of representations and warranties.

b. 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 it 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 (Art. 201 Para. 1 and Para. 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 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, e.g., 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 buyer is usually entitled to examine and make claims under the representations and warranties during a time period ranging from approx. six to approx. 36 months.

7.5.3 Survival of Representations and Warranties

In Switzerland, representations and warranties normally survive closing.

Normally, a buyer has between six and 36 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 buyer should have at its disposal at least one full audit cycle (i.e. 12 months) plus some time to carry out the audit and subsequently to make its claim.

On top of that, 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.

7.5.4 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, buyer takes over the operational responsibility with respect to the target company. Buyer leads the company, makes strategic decisions, hires and terminates employees, makes and declines deals, etc. The face of the target company is changed. It follows that 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.

Last but not least, the parties 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.

7.6 Indemnities

In some instances, the parties identify a particular risk whose realization 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/guarantee with respect to such particular risk. From a Swiss legal perspective, there is a difference between a representation & 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.[6] 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] From a legal perspective, there is a difference between these claims. While a claim under a representation and warranty is a claim for violation of contract, a claim under an indemnity/guarantee is a claim for performance.

7.7 Covenants of Buyer and Seller

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

7.7.1 Pre-Closing Covenants

The pre-closing covenants usually obligate buyer 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 buyer, that the state the business was in at the time of the due diligence will remain unchanged until closing.

Furthermore, as after signing buyer is already in a vested remainder with respect to the target company, buyer wants to be consulted with respect to certain significant transactions within the business of the target company.[7]

Last but not least, the parties normally need to work together in order to receive the necessary clearance and approval from the merger control authorities and/or other regulatory bodies. This requires constructive and open cooperation.

7.7.2 Post-Closing Covenants

Post-closing, the following obligations are most common: First, a provision of non-compete duty pursuant to which seller undertakes not to compete with the target company for the next few years. In employment contracts non-competes in excess of three years are illicit. In the context of the sale of an enterprise it used to be that a non-compete of seller could extend beyond three years in rare cases. But legal scholars now tend to also restrict it in that context to a maximum of three years.

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

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

7.8 Conditions Precedent to Closing

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

7.8.1 Governmental Approvals

Generally, in Switzerland the acquisition of an enterprise does not require a governmental approval or permit. However, certain significant mergers and acquisitions of special types of enterprises do require certain governmental approvals:

a. 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 reported (i) an aggregated worldwide turnover of at

[7] Please note that such pre-covenants may be problematic under competition law aspects.

least 2 billion Swiss francs or an aggregated turnover in Switzerland of at least 500 million Swiss francs; and (ii) at least two of the enterprises concerned reported an individual turnover in Switzerland of at least 100 million Swiss francs.

The term concentration means (i) the merger of two or more enterprises that are independent of each other or (ii) 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.

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

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, 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 II) investigation will have to be completed within four months. Therefore, the entire procedure (Phase I preliminary assessment and Phase II in-depth investigation procedure) must 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 in order to allow the reorganization 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.

b. Acquisition of Certain Types of Businesses

Banks and Insurance Enterprises: In Switzerland, banks and insurance companies require a license issued by the Swiss Financial Market Supervisory Authority FINMA. Once licensed, they are subject to ongoing supervision by FINMA. This is to monitor continued compliance with licensing conditions and other statutory and regulatory requirements. One requirement to obtain and maintain the license is that each individual or entity which (i) directly or indirectly holds at least 10% of the capital or the votes in a bank or insurance company, or (ii) otherwise has significant influence on the company management (collectively "**Qualified Participation**"), must assure that its influence does not adversely affect the prudent and solid management of the bank or insurance company. Changes with respect to Qualified Participations must be reported to FINMA prior to the transaction by the selling and the acquiring party. Although the law does not expressly impose a prior approval requirement, in substance parties are well advised to treat such requirement as a condition precedent to closing and to inform FINMA in advance and to get FINMA's opinion on the change of ownership early in the process.

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% of the capital or the shares in the concession holder, requires the prior written approval of the DETEC.

Other types of businesses which trigger an approval requirement and/or a confirmation of the concession or license 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.

c. Acquisition of Real Estate by Foreign Buyers

Last but not least, the direct or indirect acquisition of certain (in particular residential) real estate by foreigners is restricted and may require a prior approval by the relevant authority.

7.8.2 Other Approvals

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

7.8.3 Correctness of Representations, Warranties and Guaranties and Compliance with Covenants

Buyer often does not want to be forced to close the transaction unless seller has confirmed that the representations, warranties and guaranties have always been and are correct also at closing and that seller has complied with all covenants.

7.8.4 No Material Adverse Change

Another protection for buyer is the no material adverse change condition precedent. Buyer may refuse to close the transaction in case the target company has suffered a material adverse change, e.g., 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.

7.8.5 Due Diligence

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

7.8.6 Financing Condition

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

7.8.7 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.

7.8.8 Board or Committee Approval

In some organizations or entities, the negotiators at the front 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.

7.8.9 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 for ever, unless both parties agree to void the contract.

7.9 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 imposed. 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 fade.

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, e.g., 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, 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 no official language in Switzerland, especially in a cross-border context, it is recommendable 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.

7.10 Dispute Resolution

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

7.10.1 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.

7.10.2 Arbitration

In cross-border transactions, i.e., 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 also specialized 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. Switzerland offers with the Swiss Rules on International Arbitration one of the most modern and reliable sets of arbitration rules (see www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws) and a significant number 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.

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