Key Documents for Acquiring a Private Company (Switzerland)

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A Practice Note explaining the purpose and main provisions of the key documents that feature in the acquisition of the shares of a private company in Switzerland, covering preliminary agreements, auction, due diligence and transaction documents, and documents for signing (exchange) and closing (completion).

The acquisition of the shares of a private company in Switzerland feature the following key documents:

- Preliminary agreements.
- Auction documents.
- Transaction documents.
- Documents produced at signing and closing.

This Note explains the purpose of these documents and describes their main provisions.

It focuses on share purchase transactions where the seller, buyer, and target company are Swiss and Swiss law is adopted as the governing law of the share purchase agreement (SPA). However, there is an explanation of issues that should be considered in cross-border transactions involving a Swiss entity, where either the seller or buyer (or both) are non-Swiss entities.

For more information on private mergers and acquisitions (M&A) transaction structures in Switzerland, see *Practice Note, Acquisition Structures: Comparing Asset Purchases and Share Purchases (Switzerland)*.

Preliminary Agreements

At the outset of transaction negotiations, the parties usually enter into the following preliminary agreements:

- Confidentiality (or non-disclosure) agreement (see *Confidentiality (or Non-Disclosure) Agreement*).
- Letter of intent, heads of terms, term sheet, or memorandum of understanding (MOU) (see *Letter of Intent*). In this Note, these documents are jointly referred to as "letter of intent".
- Exclusivity (or lock-out or no-shop) agreement (see *Exclusivity Agreement*), which is typically included in the letter of intent.

In some transactions, confidentiality or exclusivity provisions may be incorporated into the letter of intent.

Confidentiality (or Non-Disclosure) Agreement

At the very beginning of the transaction, the parties may execute a confidentiality agreement before the seller exchanges information with the buyer about the target company. In Swiss M&A deals, confidentiality agreements are normally mutual, but they can also be drafted in a way that only one party, normally the seller, is the beneficiary. They are often replaced by the confidentiality clause in a letter of intent or in the SPA.

The seller generally provides the first draft, which typically:

- Provides that the prospective buyer must only use confidential information for the purpose of evaluating the feasibility of the acquisition.

- Prohibits the disclosure of confidential information. In the case of a mutual agreement, both parties agree not to disclose information shared during the negotiations, as well as the fact that the parties are negotiating a possible deal.

The terms of a confidentiality agreement depend on each individual transaction. However, a confidentiality agreement typically includes the following provisions:

- A definition of the confidential information to be protected, with exceptions for information that is not construed as confidential.
- The obligation to keep the information confidential and use it only for permitted specific purposes (typically limited to investigating a prospective transaction).
- Restrictions on copying the information and on the way in which it is stored.
- The circumstances in which, and the persons to whom, the recipient is permitted to disclose the confidential information (and the obligation to impose similar confidentiality covenants on those persons).
- What the recipient must do with the information if the transaction does not proceed (for example, return or destroy the information, including an obligation to provide proof of compliance).
- More rarely, but depending on the target company and the nature of its business, a non-solicitation covenant for both employees and customers.
- Survival of confidentiality in the case of termination of negotiations.
- Liability with respect to disclosure of the information in breach of the agreement.
- Duration of the confidentiality agreement. Confidentiality agreements are usually entered into for a fixed term between two and five years following the termination of negotiations, or longer if the information disclosed is particularly sensitive and justifies a longer period.
- Remedies for breach of the confidentiality agreement. The potential remedies include:
    - injunctive relief to halt the continuation of the breach; or
    - damages, although they are rarely an effective remedy for breach of a confidentiality agreement and the damage can be difficult to quantify. Therefore, it is advisable to include a penalty clause in the confidentiality agreement in accordance with Articles 160 to 163 of the *Federal Act on the Amendment of the Swiss Civil Code, Part Five: The Code of Obligations SR 220* (CO)). A penalty is accessory to the principal obligation and is therefore dependent on its existence. The amount of the penalty must be reasonable considering all circumstances, as a court may reduce penalties which it considers excessive.

  Specific performance is, in theory, also possible. However, in practice, it is rarely granted.
- Choice of law. It is possible to choose a governing law for the confidentiality agreement that is different from that chosen in the rest of the transaction documents, although this is rare and not recommended. This is because other transaction documents often do not contain stand-alone confidentiality provisions and instead refer to the obligations of the confidentiality agreement. Therefore, consistent applicable law provisions in the confidentiality agreement and the main transaction documents is advisable to avoid discrepancies in the interpretation of confidentiality obligations in different transaction documents in the event of litigation.

A confidentiality agreement may also include an exclusivity clause (see *Exclusivity Agreement*).

Letter of Intent

For complex transactions, the parties often agree in principle the key terms before detailed due diligence or negotiation of the definitive transaction documents commences. The document recording their preliminary discussions is commonly referred to as a letter of intent (also known as heads of terms, term sheet, or MOU).

The letter of intent outlines the roadmap for the subsequent steps of the transaction, usually describing:

- The deal structure (share or asset purchase and any pre-closing divestitures).
- The price or price formula (often subject to confirmatory due diligence).
- Other key terms of the transaction (for example, conditions precedent, completion or escrow accounts, non-compete covenants, scope of the representations and warranties, employee arrangements, and incentive mechanisms for key management).
- The timing of the proposed transaction and the various phases leading up to it (for example, due diligence, the provision of a data room and regulatory approval, and the expected dates for signing and closing (see *Signing and Closing*)).
- Taxes and costs.
- Choice of law, jurisdiction, or arbitration clauses.

Letters of intent are not normally binding agreements with regard to the parties' obligations to enter into the envisaged transaction. Therefore, they must be carefully drafted so that they are not deemed to be a firm and binding offer to buy or sell the company.

Many letters of intent contain provisions that are intended to be binding. For example, binding confidentiality clauses are commonly included in letters of intent, although a stand-alone confidentiality agreement may be executed (see *Confidentiality (or Non-Disclosure) Agreement*). Exclusivity and break-fee clauses (with the seller as beneficiary, or the buyer as beneficiary in a reverse break-fee clause) are rarer, though possible. Additionally, the parties typically agree on binding provisions on governing law, jurisdiction, or arbitration.

Consequently, it is important to use unambiguous language in the letter of intent to state which provisions are legally binding and which are not. Nevertheless, entering into negotiations, as evidenced by a letter of intent, triggers the duty for each party to act in good faith (*Article 2, paragraph 1, Swiss Civil Code SR 210* (SCC)). For more information, see *General Duty to Negotiate in Good Faith*.

Exclusivity Agreement

Before committing significant time or expenditure to a possible transaction, a buyer may require an exclusivity commitment from the seller. This is an agreement in which one party, normally the seller, agrees not to enter into negotiation with another prospective buyer for a certain period of time. This gives the buyer a period of exclusivity in which to negotiate and conclude a transaction with the seller.

Exclusivity agreements are legally binding and valid and enforceable in Switzerland, even if they do not provide for consideration. As they are designed to protect the time and costs incurred during negotiations, exclusivity agreements are most common in large transactions involving complex due diligence and a lengthy negotiation period.

While exclusivity commitments are often dealt with in a separate agreement, they can also be incorporated in another preliminary agreement (for example, a confidentiality agreement or letter of intent). If set out in a letter of intent, the exclusivity commitment should be expressed as legally binding.

In some instances, the buyer may not be prepared to finalise a letter of intent unless the seller agrees to grant the buyer some degree of exclusivity. Conversely, the seller may not be prepared to grant exclusivity to a prospective buyer until the letter of intent is finalised.

The potential remedies for breach of an exclusivity agreement are:

- Damages. However, as calculating the damage is often difficult, it is generally preferable to include a penalty clause.
- Termination of the exclusivity agreement.

These remedies may be cumulative if they are not incompatible.

Additionally, specific performance is, in theory, also possible. However, in practice, it is rarely granted.

General Duty to Negotiate in Good Faith

According to the principle of freedom of contract, a party is free to break off negotiations whenever they want to, with or without justification (*Article 2, paragraph 1, SCC*).

However, the exercise of this freedom is limited by the rules of good faith and the doctrine of *culpa in contrahendo* (fault in the conclusion of a contract). The latter doctrine is based on the concept that the opening of negotiations creates a legal relationship between the parties and imposes reciprocal duties. In particular, the parties must negotiate in earnest, in accordance with their true intentions (*Federal Supreme Court, First Civil Chamber, 10 October 1995 (BGE 121 III 350)*). Therefore, a party who has entered into negotiations must not:

- Give the other party false hope that a deal will be concluded and therefore induce them to take steps in that direction.
- Give the impression that they are more willing to reach an agreement than they actually are.

(*Federal Supreme Court, First Civil Chamber, 4 September 2019 (4A_55/2019)*.)

While fiercely disputed in legal doctrine, there may be certain circumstances under which the seller may (even if due diligence is being, or will be, conducted) be under a legal obligation to exceptionally point out certain facts or circumstances to the buyer if:

- The seller knows, or should know, that the buyer is not aware of them.
- The seller has specific expertise which the buyer lacks.
- A relationship of trust exists.

In practice, it is advisable in private M&A transactions for parties to inform each other if the negotiations are subject to approval of a corporate body.

A breach of the duty to act in good faith exposes a party to the risk of liability for damages under the doctrine of *culpa in contrahendo* (*Federal Supreme Court, First Civil Chamber, 8 October 2019 (4A_71/2019)*).

However, the bar for finding a breach that gives rise to damages is set very high. A breach will not be found purely on the basis that the negotiations lasted a long time or that the party who terminated the negotiations was aware of the investments made by the other party. A party who incurs expenses before the conclusion of the contract does so at their own risk (*Federal Supreme Court, First Civil Chamber, 4 September 2019 (4A_55/2019)*).

Finally, it is important to note that a party seeking to invoke the duty of good faith cannot do so if they failed to exercise due diligence, as required in the circumstances (*Article 3, paragraph 2, SCC*).

Auction Documents

In a sellers' market, *auction sales* are rather common in Switzerland and are not subject to specific regulation.

An acquisition of a private company structured as an auction sale usually commences with the seller or its financial adviser distributing a teaser and a confidentiality agreement. On execution of the confidentiality agreement, the financial adviser distributes one or several bid process letters and an information memorandum to prospective bidders, inviting them to submit indicative offers for the target company or business (see *Bid Process Letter* and *Information Memorandum*).

Bid Process Letter

A bid process letter explains the rules and procedures of the auction process and seeks to ensure that any offers are made on a basis that enables the seller to make meaningful comparisons between them. The bid process letter should also seek to elicit whether there are any regulatory issues, merger clearances, or other conditions that could reduce the likelihood of concluding a transaction quickly with a particular bidder.

The bid process letter typically includes:

- The number of expected bidding rounds.
- The date that indicative and final bids are due.
- Details of the due diligence process (including timing and scope of the bidders' due diligence review).
- Whether and when there will be a management presentation and site visit.
- Contact details for the seller's financial and legal advisers.
- The seller's disclaimers and reservation of rights (for example, the seller should always reserve the right to amend or discontinue the auction process at any time).

The bid process letter should also specify what each bidder must include in their indicative offers. In a second round, the process letter usually details what the binding offer should contain (for example, valuation, consideration, capital structure, financing, strategy development for the future, incentive package for the company's management, anticipated consents, and any approvals required (such as regulatory approvals)).

To protect the seller in the evaluation process, the bid process letter should avoid prescribing the likely criteria for evaluating bids. Additionally, to retain maximum flexibility for the seller, the letter often states that the highest price will not necessarily succeed.

The seller should make it clear at the outset that it is not obliged to accept any bid, nor to consider any offer tendered, and should generally reserve its discretion to vary the auction procedures.

Information Memorandum

The (confidential) information memorandum (IM or CIM) is a key document in the auction process. It is a marketing document which is intended to provide prospective bidders with a reasonable amount of information about the target business to elicit meaningful indicative bids.

An IM usually contains the following:

- A description of the target business, including its industry, trading history, and principal assets.
- Up-to-date and historical financial information and projections.
- Information about management and employees, including the senior management team and board of directors.
- Depending on commercial sensitivity, information about major customers and contracts. However, before disclosing this information, it should be checked that this disclosure is within the limitations of Swiss competition law. This is particularly important if the parties are active in the same market.

The seller should ensure that the description and details of the target business are accurate and not misleading.

The IM usually contains a disclaimer stating that the seller is not making any representations or warranties regarding the information provided in it and should emphasise the function in this respect of the final SPA. However, the successful bidder may occasionally seek to include express warranties in the SPA concerning some or all of the IM's contents. The seller will, in turn, seek to resist this on the basis that the IM is purely a marketing document.

Sometimes, in an auction process, the bidder in addition to the IM receives a legal, financial, or tax book prepared by the seller's legal, financial, and tax adviser, disclosing some of the key considerations relating to the target company from a legal, financial, or tax perspective.

Due Diligence Documents

Once the preliminary agreements have been signed, the buyer (or each bidder in an auction process) typically carries out *due diligence* to ensure that it fully understands the company that it is proposing to acquire.

The due diligence process usually involves the following documents:

- Due diligence questionnaire (see *Due Diligence Questionnaire (or Information Request or Due Diligence Checklist)*).

- Data room rules (see *Data Room Rules*).
- Due diligence report (see *Due Diligence Report and Vendor Due Diligence Report (VDD)*).

Due Diligence Questionnaire (or Information Request or Due Diligence Checklist)

The cornerstone of any due diligence investigation is the questionnaire, which sets out the areas of investigation and a list of questions, enquiries, and document and information requests to be put to the seller pertaining to the target company. These questions are usually supplemented by further requests as the negotiations proceed and as the buyer learns more about the target company.

Ideally, the questionnaire should not be too technical. Each section should be self-standing so that the appropriate adviser can consider it. It should also be tailored so that the due diligence questions are pertinent to the target company. Depending on the type of transaction and target business, the buyer may undertake separate financial, legal, tax, commercial, IT, and other due diligence investigations.

The information received in response to a due diligence questionnaire should assist the buyer in making an informed assessment of the potential risks and rewards of the proposed acquisition. Based on this information, the buyer can determine whether it is appropriate to:

- Proceed with the transaction on the negotiated terms.
- Seek to renegotiate the terms of the acquisition to reflect any issues or liabilities identified during the due diligence process.
- Withdraw from the transaction.

In addition to identifying any issues that may affect the buyer's decision to enter into the transaction (or the terms on which it is prepared to proceed), the information revealed during the due diligence exercise assists the buyer in:

- Determining the scope of the warranties that should be included in the SPA (see *Share Purchase Agreement (SPA)*).
- Identifying any areas of risk that should be subject to specific indemnities.

On auction sales, the data room is compiled by the seller without the requirement of establishing a questionnaire. However, the questionnaire is then often used to double check that all important areas are covered.

Data Room Rules

On larger transactions and auction sales, it is common for sellers to set up a data room containing legal, commercial, tax, and financial information about the target company for buyers to access when conducting due diligence. Today, sellers usually use a virtual data room (VDR) that allows prospective buyers to access materials via a website (with a secure user identification and password). VDRs are online spaces that act as a repository of the target company's key documents. An online data room avoids the need to have a physical data room.

Review of the information in a data room is normally carried out by a combination of the buyer's (or bidder's) own personnel, their accountants, lawyers, and other advisers. To manage access to the information, the seller draws up data room rules. This document outlines the basis on which potential buyers and their advisers are granted access to the data room to conduct their initial due diligence and the rules governing this procedure. Before granting the buyer access to the information, the seller usually requests that the data room rules are signed on behalf of the prospective buyer and each of its advisers. The seller should ensure that the data room rules are aligned with any applicable confidentiality agreement.

For general information on key considerations for a seller and its advisers in setting up a data room, see *Practice Note, Setting up a data room* (UK). For guidance on the use of virtual data rooms in an acquisition, see *Practice Note, Using a Virtual Data Room for an M&A Transaction* (US).

Due Diligence Report and Vendor Due Diligence Report (VDD)

On completion of the due diligence process, the buyer's advisers prepare due diligence reports for the buyer, highlighting any potential issues that became apparent during the due diligence investigation. The buyer is particularly interested in:

- Issues that potentially affect the viability of the transaction (for example, title chain issues, which are common in Swiss entities).
- The value of the target company (for example, title to key assets and operating licences, and large potential liabilities, such as environmental liabilities).
- The target company's ability to generate profits (for example, contracts with customers and suppliers).

In a competitive auction process, the seller's advisers can prepare a vendor due diligence report (VDD). A VDD helps to speed up the process by providing the prospective bidders with a comprehensive analysis and detailed information about the target company. A VDD is often organised if multiple bidders are involved in an auction process, the timetable is tight, and confidentiality is mandatory. It can, however, limit the possibility of prospective buyers to undertake their own investigation of the target company. Also, a VDD may be conducted if the seller wants to limit its exposure through warranties and indemnities (W&I) insurance by means of a "stapled" W&I insurance.

Transaction Documents

Share Purchase Agreement (SPA)

Main Purposes of an SPA

An SPA is the principal transaction document in a private share acquisition. The main purposes of the SPA are as follows:

- **Documenting the terms of the transaction.** The SPA should set out what is being sold, to whom, and for how much, as well as specify any other obligations and liabilities of the parties in relation to the transaction.
- **Specifying any conditions to which the transaction is subject.** In some circumstances, it may be necessary for closing of the SPA to be conditional on certain matters, such as obtaining shareholder consent or a regulatory approval.

- **Allocating transaction risk.** To provide it with some contractual protection against key undisclosed risks or understated liabilities, the buyer usually seeks an extensive package of express warranties and indemnities in the SPA relating to various aspects of the target company and its business. It is also common practice for the buyer to seek specific indemnification against the consequences of any known or assumed issues or risks. It is, however, rather uncommon in Swiss transactions for the parties to agree on termination or recission rights.
- **Depending on the specific circumstances, protecting the buyer against post-completion competition from the seller.** To protect the goodwill of the target company, the buyer usually wants to impose contractual restrictions (restrictive covenants) on the seller's ability to establish a competitive business following completion of the transaction.

Form and Content of an SPA

In bilateral transactions, there is no clear market practice on which side prepares the first draft of the SPA. If the transaction involves an auction sale, the SPA is usually drafted by the seller as the seller controls the auction process. This means that the first draft of the SPA for a sale by auction is likely to be much more seller-friendly than in an average bilateral sale, with far less onerous seller warranties and more extensive limitations on liability.

While there is no legal requirement for an SPA to follow a prescribed form, most SPAs include the same core provisions and adopt a similar order to the following:

- Parties.
- Recitals, describing the context of the transaction.
- Definitions and interpretation (often in an annex to the agreement).
- Agreement to sell and purchase the shares.
- Price and payment terms, including purchase price mechanisms, such as adjustment or locked-box provisions (for example, no leakage covenants).
- Conditions, such as shareholder approval, financing for the acquisition being received and competition and other regulatory clearances or notifications.
- Material adverse change (MAC) provisions. In addition to allocating the risk of breach of a seller's representation, warranty, or covenant, the buyer also seeks to allocate to the seller pre-closing adverse change risk. This is the risk of something happening before the closing that has or, at some time in the future, may have a materially adverse effect on the business for reasons other than seller factual misrepresentations or seller-covenant breaches. Pre-closing adverse change risk includes, among other things:
    - changes in financial markets, interest rates, currency exchange rates, unemployment levels, or other macroeconomic conditions;
    - key employee departures; and
    - force majeure events (such as natural disasters, war, or acts of terrorism).

    However, in a seller's market, these types of provisions are much rarer.

- Closing mechanics and deliverables.
- Seller's pre-closing obligations in respect of the management of the business between signing and closing. This usually includes the obligation of the seller:
  - to continue normal operation of the business of the target company;
  - not to enter into any significant new agreements or terminate same; or
  - not to acquire or sell substantial assets of the target company without consulting the buyer.

  When agreeing on these obligations, the parties are well advised to take competition law limitations into consideration.
- Seller's post-closing obligations (including restrictive covenants, such as non-compete or non-solicitation obligations).
- Buyer protection provisions, such as seller representations and warranties, indemnities, and specified remedies.
- Limitations on the seller's liability under the W&I.
- Confidentiality and notices.
- Boilerplate provisions (such as particular co-operation, termination, assignments, amendments, fees, and entire agreement).
- Governing law and jurisdiction.
- Date and signature blocks.

Additionally, there are likely to be various schedules or ancillary documents to the SPA, including:

- Disclosure schedule (see *Disclosure Schedule (or Disclosure Letter)*).
- Transitional services agreement (see *Transitional Services Agreement*).
- Guarantee, retention account, or escrow arrangement documents (see *Guarantee or Escrow Agreement*).

Disclosure Schedule (or Disclosure Letter)

Agreeing on a disclosure schedule is rather off-market in Swiss transactions. In the rare cases a disclosure schedule is used, mostly agreed in cross-border transactions with UK or US involvement, this is typically in exchange for concessions by the buyer. Instead of a disclosure letter, typically the information provided in the VDR qualifies the seller's warranties. For the buyer's protection, this qualification is usually limited to facts "fairly disclosed", meaning disclosure of a fact in a manner which, in view of the level of information available to the buyer, allowed the buyer and its advisers to reasonably identify and assess the impact of that fact on the business operations and prospects of the target company. Further, the effect of the disclosure can be excluded for certain key topics.

As the seller's warranties in an SPA are typically drafted in broad and absolute terms, it is unlikely that every warranted statement will be completely true and accurate.

To the extent that the seller is aware of any matter or circumstance that renders any of the warranties inaccurate, it is common practice for the seller to record this information and for the buyer to agree in the main body of the SPA that no liability will arise under the warranties where information has been adequately disclosed in this way.

The seller usually states in the SPA that the warranties are subject to formal disclosure of certain facts, with a view to the buyer agreeing not to sue or claim indemnification based on these disclosed facts. Disclosures can be set out in one of the following ways:

- **Data room disclosure (market standard).** The entire data room is deemed to be disclosed against the warranties. For future reference, the data room index and a data stick or CD or DVD containing the contents of the data room are added as a schedule to the SPA. Typically, the effect of this disclosure is limited to facts which have been "fairly disclosed", meaning disclosure of a fact in a manner which, in view of the level of information available to the buyer, allowed the buyer and its advisers to reasonably identify and assess the impact of that fact on the business operations and prospects of the target company. Data room disclosure may occasionally be accompanied by disclosure schedules to specific warranties.
- **Disclosure schedule or letter (rare).** Instead of a full data room disclosure, in rare cases (mostly cross-border transactions with UK or US involvement), the parties agree to list disclosures in an appendix or schedule attached to the SPA. Alternatively, disclosures may be made in a separate disclosure letter, in particular to cover the period between the closing of the data room and the signing of the SPA.

The seller's disclosures serve two key purposes:

- **Provide a further source of information to the buyer concerning the target company.** The disclosure process often flushes out additional information which may not have been provided during the buyer's due diligence investigation.
- **Protect the seller against breach of warranty claims in respect of disclosed matters.** The buyer is normally prevented under the terms of the SPA from claiming against the warranties in respect of any issues that have been adequately disclosed.

Transitional Services Agreement

As part of the due diligence exercise, the buyer must give careful thought to the steps that it will need to take to integrate the target business into its own operations following completion of the acquisition. This can be a particularly complicated exercise if, pre-completion, the target business formed part of a group of companies and did not operate on a stand-alone basis (for example, where the target company relied on the group's shared technology infrastructure).

In some transactions, it may be necessary for the seller (or another member of its corporate group) to provide certain services to the target company on a transitional basis following completion of the transaction. In these cases, the ancillary documents may include a transitional services agreement. This sets out the ongoing support the seller will provide, and the terms on which it will provide that support, to assist with the transition of the target business for a defined period following closing.

A transitional services agreement is usually aimed at preserving the status quo of the services in the divested business that existed before the transaction. As such, new or increased obligations are generally not imposed on the seller (and the seller is unlikely to accept this, as it is not a professional service provider to the buyer). For example, if formal service levels did not exist before the commencement date of the transitional services agreement, then they are unlikely to be imposed after closing.

Guarantee or Escrow Agreement

The transaction documents may include documents designed to protect the buyer or the seller from default by the other party.

A buyer may seek to protect itself against the seller's default in the form of a parent company or bank guarantee, retention account, or escrow agreement:

- As security for performance of the seller's post-closing obligations.
- To meet claims for breach of the warranties and under the indemnities.

A seller may seek similar assurance that the buyer is able to meet its payment obligations, which may be reliant on debt financing structures and which may involve deferred consideration. Obtaining a guarantee from the buyer or its parent company is particularly relevant if the buyer has been specially incorporated for the purposes of the acquisition.

If the buyer is using debt financing to fund the acquisition, the seller usually requires a duly executed debt facilities agreement (or binding term sheets) before committing itself to the sale. Additionally, it may seek directly enforceable equity commitment letters to cover equity financing.

Bank or Parent Company Guarantee

A guarantee is a promise to ensure that a third party fulfils its obligations or a promise to fulfil those obligations if that third party fails to do so (or both). Various types of guarantee may be exchanged in an acquisition, from a letter of comfort to a binding guarantee.

Escrow Agreement

Escrow agreements provide that part of the purchase price is deposited with a third party who holds it "in escrow" for the parties and only releases it in accordance with the terms of the escrow contract, the parties' joint instruction, or a court order. If there is a dispute and the parties cannot agree, the money remains in the escrow account and the matter is referred to a court or arbitration.

Signing and Closing

Concluding a share purchase transaction is usually a two-stage process:

- **Signing.** The parties make a legally binding commitment to proceed with the transaction by signing and dating the SPA. For more information, see *Signing*.
- **Closing (or completion).** The parties carry out the steps required to implement and conclude the transaction, including the seller delivering a duly executed share transfer document (for example, a share certificate or a declaration of assignment) and the buyer paying the purchase price to the seller. For more information, see *Closing*.

In many smaller transactions, closing takes place immediately after the parties sign the SPA, thereby combining signing and closing into a single phase (referred to as a simultaneous sign and close). However, there may be a gap between signing the SPA and closing the transaction. This typically arises because one or more conditions need to be satisfied after the parties have signed the SPA and before they can complete the transaction.

Signing

Documents that are commonly produced and executed at signing include:

- **Documents conferring power and authority to enter into the transaction.** Evidence of powers and authority of the parties and of the signatories to enter into the transaction. For example:
    - board resolutions approving the transaction and granting authority to sign; and
    - powers of attorney authorising a signatory.
- **SPA.** The parties execute the SPA, making its terms legally binding (see *Share Purchase Agreement (SPA)*).
- **Data room index, including data stick or CD or DVD, or disclosure letter** (see *Disclosure Schedule (or Disclosure Letter)*).
- **Evidence of employee or trade union notification and consultation**, if applicable.

Closing

The following key documents are commonly produced, exchanged, and, if applicable, executed at an acquisition closing meeting:

- Relevant transfer documents depending on the type of company being sold:
    - *Aktiengesellschaft* (AG) (UK: public limited company; US: corporation) (*Articles 620 to 763, CO*): share certificate or declaration of assignment (the latter can be included in the SPA itself) and, if the articles of association contain transfer restrictions, approval of the appropriate corporate body (in most cases, this is the board of directors); and
    - *Gesellschaft mit beschränkter Haftung* (GmbH) (UK: private limited company; US: limited liability company) (*Articles 772 to 827, CO*): declaration of assignment in compliance with Articles 685 to 688 of the CO and, if the articles of association contain transfer restrictions, approval of the partners' meeting.
- Notification by the buyer to the target company of the buyer's ultimate beneficial owners (*Article 697j to 697m, CO*).
- Target company's updated statutory books (that is, the share register and register of beneficial owners).
- Target company's shareholder and board resolutions (for example, a resolution approving the transaction, if required by the target company's articles of association, and appointing new directors).

- Other documents evidencing the target company's ability to conduct its business, which may include title to premises and administrative authorisations or licences, or the parties' authority and power to enter into the transaction (for example, merger control clearance).
- Proof or confirmation of payment of the purchase price and receipt of this.
- Guarantee or escrow agreement documents (see *Guarantee or Escrow Agreement*).
- Evidence of release of shares, pledges, security, guarantees, and indemnities (if applicable).
- Consents, authorisations, and regulatory approvals that enable the target company to continue carrying out its business (for example, change of control consents or merger control clearance).
- Ancillary agreements (such as transitional services agreements).
- Shareholders' agreements (in case of sale of less-than-100% interest).
- Closing memorandum (or closing minutes) evidencing the occurrence of the closing and respective closing actions and each party's confirmation of receipt or acknowledgement of the respective documents, actions, and payments.

Cross-Border Transactions

Additional Considerations in Cross-Border Transactions

In the case of a cross-border transaction involving either a non-Swiss buyer or seller of a Swiss company, there are additional issues that should be considered, notably:

- The language, governing law, and jurisdiction applicable to the SPA and ancillary documents (see *Choice of Law*).
- The forum and method for dispute resolution (see *Dispute Resolution*).
- Compliance with execution formalities and logistics, if any. Swiss law does not impose special formalities for the execution of documents by foreign companies, other than those imposed on a Swiss company.
- Any restrictions that may apply to investments in certain protected assets or sectors (such as residential real estate, national defence, banking, insurance, or electricity) by foreign investors.

Choice of Law and Dispute Resolution

Choice of Law

It is possible, although rare, for an SPA to be governed by a foreign governing law. Generally, provisions of national law would then not apply. However, mandatory Swiss laws relating, for example, to tax, employee protection, competition, and the mechanics of transferring the shares would still apply, where relevant.

Although in most circumstances local courts will respect the contracting parties' free choice of foreign governing law, the courts may require that all documents are translated by a court-certified translator into an official language (as relevant), which can add a significant additional cost. The judge will then try to establish the relevant requirements of the foreign law, including by hearing expert witnesses and ordering legal opinions by independent experts (at the costs of the parties), or may require the parties to do so. Further, court proceedings are always conducted in the court's language (German, French, or Italian). Consequently, it is considerably more efficient for a judge to decide cases based on Swiss law with which they are familiar.

Dispute Resolution

Though rare, the parties may in certain cases choose to include a clause in an SPA requiring them to agree to negotiate in good faith for a specified period to try to resolve their differences amicably before turning to judicial resolution or arbitration. If, however, a dispute cannot be resolved by the parties themselves, it may be submitted to the Swiss courts for resolution.

Alternatively, parties to a cross-border acquisition may consider adopting international *arbitration* as a dispute resolution mechanism for reasons of enforcement and perceived neutrality. For more information, see *Practice Note, Arbitration in Switzerland*.

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