

International Business Acquisitions

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International Business Acquisitions

Major Legal Issues and Due Diligence

Fourth Edition

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Authored by
World Law Group
Member Firms

 **World Law Group**

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Foreword

Purpose

This fourth edition of *International Business Acquisitions* (the Handbook) is intended as an easily accessed desk reference for lawyers, business executives and others concerned with the acquisition of the securities or business assets of a company located outside their own national jurisdiction. It is also directly relevant to those representing the sellers in such transactions, as they must anticipate and prepare for the foreign buyer's requirements and concerns.

Despite occasional set-backs in the pace of mergers and acquisitions activity, the number and diversity of international acquisition transactions continues to increase, reflecting the need for every successful company to develop or acquire the resources to compete on an international scale. Many local business enterprises have discovered, often to their surprise and detriment, that this need to acquire or be acquired by foreign companies is no longer limited to large multinational groups. The World Trade Organisation, regional and bilateral trade agreements, instant worldwide communication, internationalisation of management, the spectacular growth of what were previously third-world economies, the reduction of language barriers and other factors have created a worldwide marketplace, where companies will compete primarily on the basis of economic efficiency. International acquisitions, to access foreign markets, to provide foreign production or marketing capacity, to obtain regulatory approvals, to acquire complementary product or service lines or simply to spread product, service or market risk and to reduce costs, have become the norm.

In addition, there has been an explosion in venture capital and private equity driven acquisitions, their aim generally being to identify and exploit underperforming assets or businesses (at the same time giving an outlet to companies wishing to divest themselves of such assets and businesses which are no longer central to their strategies, generally being described as 'non-core'). The high gearing (debt finance) of these acquisitions puts enormous pressure on management and investors to make assets and businesses perform quickly so as to realise value for investors through a subsequent trade sale or IPO (initial public offer), itself leading to further acquisition

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activity. This constant striving to achieve the most efficient return on assets and investments in business could be described as the virtuous circle of mergers and acquisitions activity.

Regrettably or fortunately, depending upon one's perspective, the legal practices, requirements and pitfalls relevant to cross-border transactions, despite significant harmonisation within the EU, continue to be aggressively and uniquely national in character. This reflects not only historical differences in the development of national systems, but also differences in cultural priorities and business practices which inevitably affect the negotiation, documentation and implementation of an international acquisition transaction. By way of example, it is interesting to note that substantial acquisition transactions in Italy are often completed with little or no written documentation – a situation beyond the comprehension of most lawyers from common law jurisdictions. Nevertheless, the influx of US and English law firms into most European jurisdictions, often following in the footsteps of their multinational clients, has introduced increasingly common standards and documentation, and it could be argued that we are now seeing a much more global, and therefore consistent, approach not only in the process and procedures used to effect an acquisition in many different jurisdictions but also in the documentation being used.

The need for a clear understanding of the major legal issues and careful, informed due diligence are even more important in international acquisitions than in domestic transactions, where both parties have a relatively good understanding of the legal and business environment. Consequently, legal practitioners and many others involved in cross-border acquisitions need a user-friendly source of information covering the more important jurisdictions. This Handbook is intended to meet this need.

Concept to Publication

This Handbook is the result of a World Law Group project which was conceived and implemented by the WLG International Corporate Transactions Practice Group. Special recognition must be given to those who recognised the value of this Handbook, shaped the content and assured its consistent high quality.

Initial encouragement and guidance came from Kingston Berlew, the first President of the World Law Group and a former Chairman of the International Corporate Transactions Practice Group.

Thomas Heymann, then a partner of the firm now known as Taylor Wessing (Germany), and Michael Whalley of the Australian firm Minter Ellison served as both authors and editors for the first edition, writing, in large part, both the introductory chapter and the due diligence chapter, on which the individual country annotations are based. They and Franz-Jörg Semler, Thomas Heymann's successor as editor for both the second and third editions, were also responsible for legal editing of the country annotations and the country-by-country analysis of major legal issues which appears in Chapter 2. Their respective backgrounds in civil and common law were instrumental in making it possible for the Handbook to cover international business acquisitions without having entirely separate sections for common law and civil law jurisdictions.

Leigh Brown of Minter Ellison was the first to recognise the need to cover major legal issues separately from due diligence, and was instrumental in producing the initial Australian version of the major legal issues section which, together with the German version, served as a model for other country contributions.

Individual international business lawyers in each of the member firms contributed to the preparation of the country-by-country analysis of major legal issues and to the refining and country annotations of the due diligence section. The time and effort required to complete this work, despite competing business and family demands, is recognised and greatly appreciated.

The World Law Group

The World Law Group decided to carry out this ambitious but practical project primarily because the lawyers involved believed that the Handbook would be a valuable tool for many of our own firms, enabling them to respond more effectively to client needs and to interact more easily with the other member firms. Often, in the international business acquisitions context, the need for speed and responsiveness is indispensable and the Handbook should greatly facilitate that capability. At the same time we, and our publisher Kluwer Law International, concluded that the Handbook would also be valuable to clients and others involved in cross-border acquisitions.

Since this Handbook is the result of a cooperative effort by most of the WLG member firms, a brief description of the Group is in order. Member firms are independent, and have not 'merged' or 'combined' by joining the WLG, and each firm is solely responsible for its own work. There are currently 52 member firms with more than 15,500 lawyers in 69 countries and more than 200 international business centres.

The primary purpose of the World Law Group is to develop, maintain and coordinate the capabilities and resources required to provide high-quality, efficient legal services to international clients located throughout the world. We believe that bringing together in one group the legal knowledge, experience, resources and contacts of independent firms which represent the best in their communities and countries is the best way to accomplish this objective. The WLG is non-exclusive, which means that, while members are encouraged to refer matters to, and consult with, other WLG members, there is no policy that referrals go only to the WLG member in a given jurisdiction, nor are there any referral fees.

Practice Groups have been established in several areas including:

- Antitrust and Competition.
- Corporate Governance.
- Energy, Mining & CleanTech.
- Human Resources Law.
- Infrastructure & Public-Private Partnerships.
- Intellectual Property & Information Technology.
- International Corporate Transactions.

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- Litigation, Arbitration & Dispute Resolution.
- Privacy Matters.

These Practice Groups bring together lawyers with similar interests and clientele to share information and ideas, to work on projects such as this Handbook and to establish effective working relationships which are necessary for providing quality international legal services to our respective clients.

Legal counsel in the relevant jurisdiction(s) should be consulted both for the updating and application of applicable laws and regulations to specific matters.

Michael Whalley
WLG Handbook Series Editor

Editors' Preface to the First Edition

The process of compiling and editing a handbook which brings together contributions from a number of jurisdictions throughout the world inevitably leaves the editors with some valuable insights and impressions. The common format of each of the country contributions, and the way in which each contributor has been forced, often somewhat reluctantly, to summarise what are often complex legal issues, makes comparison easier.

At the same time, the need for simplicity and a common format has its dangers. Legal issues do not always fall happily into convenient pigeon holes, and some issues have a habit of emerging in a number of different contexts. The rights of creditors and employees are obvious examples.

The editors have been struck by the surprising uniformity in the principles which underpin business laws throughout the world. Laws which on first glance appear very different often turn out to be very similar, differences only arising from the different use of language or expression. For example, a number of civil law jurisdictions use the term 'limited liability company' only in the context of a family or private company. This can sometimes leave the reader with the impression that a public company does not have limited liability but this is, clearly, not the case.

There have been inevitable difficulties in trying to render each contribution into a common grammatical style. The written and spoken English of each of the handbook's contributors is, without exception, excellent, but rules of grammatical construction differ enormously throughout the world, and this is often reflected in the contributions. The editors hope that their attempts to give the text a common grammatical flow have not robbed each contribution completely of the style of its own author.

Readers will obviously draw their own conclusions from comparing the treatment of different issues by different jurisdictions. However, the editors have noted some interesting similarities or differences, some of which include:

- a number of civil codes provide that a seller of a business may not compete with the buyer after the sale, but no such restriction is generally imposed in common law jurisdictions;

Editors' Preface to the First Edition

- a purchaser of a business as a going concern (described in France, for example, as a *fonds de commerce*) can, in some jurisdictions, also inherit business liabilities even though these are not specifically dealt with in the agreement;
- the laws of different trading blocks are having an increasing influence over national laws: while other trading blocks do not have the same law-making powers as those enjoyed by the EU, the influence of international trade agreements over domestic business laws should not be underestimated;
- there has been almost universal abolition of exchange controls in the jurisdictions covered, which also largely welcome foreign investment (although still with a high level of government monitoring and, in some cases, interference, particularly in the case of 'sensitive' industries);
- civil jurisdictions appear to place an obligation on the parties to negotiate in good faith, but this is rare in common law jurisdictions;
- most jurisdictions seem to recognise and enforce non-competition covenants by both sellers and employees, provided they are reasonable;
- there is remarkable consistency in the principles which underlie competition laws throughout the world; and
- there is also surprising consistency in the issues which are relevant to a choice between buying shares or assets, the only notable exception being the issue as to whether the relevant jurisdiction requires the buyer of business assets to bear full responsibility for all of the employees of the business.

More extensive analysis may have to await a future edition. The catalyst for a new edition will, of course, be the response of readers, and the extent to which this handbook becomes a useful and continuing reference work.

Michael Whalley

London

Thomas Heymann

Frankfurt am Main

January 1996

Editors' Preface to the Fourth Edition

Eighteen years after the publication of the successful first edition of the International Business Acquisitions Handbook, six years after the third edition was published, and in the face of continuing strong demand for an easily accessible source of information on cross-border acquisitions, we offer this fourth edition to bring our readers up to date with developments in mergers and acquisitions laws in many jurisdictions around the world.

Like the third edition, the fourth benefits from both updating and substantial expansion of content. We are pleased to welcome additional contributors from Chile, Costa Rica, Indonesia, Poland, Russia, Thailand and Turkey, making a total of forty jurisdictions (plus the two special chapters on the laws of the European Union) now covered by this handbook.

This edition welcomes a new contributing co-editor from CMS Hasche Sigle, Mr Ralf Kurney, assisted by Claire Lamont. Thanks must be extended to previous co-editors Franz-Jörg Semler and Thomas Heymann, whose efforts have been instrumental in the evolution and success of the International Business Acquisitions Handbook.

In the editing process, we have noticed some significant new developments impacting upon cross-border acquisitions in a number of jurisdictions. Some of note include:

- (a) the continuing movement away from defined benefit (final salary) pension plans has in many cases reduced the risk of a target being exposed to under-funding liabilities, and thus the risk for buyers, but many jurisdictions have adopted statutory regimes for employee pension provision, adding further costs to business but creating significant long-term benefits for employees;
- (b) the drive towards trying to eliminate bribery and corrupt practices continues;
- (c) many countries that have previously not had sophisticated competition and anti-trust (merger) regimes are increasingly adopting them;
- (d) more particularly:

- (i) *Australia*'s new Personal Property Securities Act 2009, a new regime for almost all forms of security over assets, has had a profound effect on the registration of company charges and encumbrances, making due diligence enquiries more complex.
- (ii) *Austria* is making potential changes to its tax grouping laws and imposing new restrictions on claiming depreciation on acquired goodwill and has introduced a pre-closing approval requirement for certain direct investments of at least 25% if the target company operates in a sensitive market segment (industries relevant to Austria's national and international security) where the investment originates from countries outside the European Economic Area.
- (iii) *Argentina* has imposed new restrictions on the purchase by foreign interests of large land holdings and has made changes to the tax regime for dividends and the sale of unlisted shares.
- (iv) In *Brazil*, mandatory prior approval is now required from the Council for Economic Defence (*Conselho Administrativo de Defesa Econômica* or CADE) anti-trust agency in cases that exceed the *de minimis* examination thresholds.
- (v) *Canada* has relaxed its foreign investment restrictions (by applying significantly higher examination thresholds) for WTO member country resident investors, but has imposed new restrictions on investment by state owned enterprises.
- (vi) As expected, *China* continues to open up its economy to foreign investment and has introduced new protections for Foreign Invested Enterprises, has made reforms to its companies laws in relation to paid up capital and has simplified a number of foreign exchange procedures and approvals.
- (vii) *Denmark* has introduced a new form of corporate entity for entrepreneurial businesses.
- (viii) In the *United Kingdom*, a new Competition and Markets Authority has been created, taking over responsibility for monitoring merger activity in the UK from the Office of Fair Trading, a new regime for the auto-enrolment of employees into occupational pensions has begun, and the restriction on private companies providing financial assistance for the purchase of their shares has been removed.
- (ix) As with many countries trying to attract foreign investment, *France* has eased its registration requirements for foreign managers and its requirements for government authorisation for controlling stakes in French companies that are not in sensitive sectors; it has also modernised its competition law, putting this in the hands of a new Competition Authority.
- (x) *India* has a substantial new companies law, new takeover regulations and a new competition review regime.
- (xi) Similarly, *Israel* has adopted a new concentration (competition) law, designed to reduce economy wide business concentrations, and has

made changes to its company insolvency regime by introducing a US Chapter 11 style reconstruction procedure, with concomitant changes to creditors rights.

- (xii) As part of its introduction of competition laws, *Malaysia* has created a new competition commission, the MyCC.
- (xiii) *The Netherlands* legislators have been busy, creating new simplified and flexible arrangements for the capital structure of BVs (the new 'Flex BV'), introducing the ability to have a one-tier board and at the same time imposing quotas for the appointment of women to boards and senior management positions and restricting the number of supervisory board positions that an individual can hold, and restricting the ability to impose non-compete restrictions on certain employees.
- (xiv) *Norway* has introduced thin capitalisation rules restricting the deductibility of interest on inter-company borrowing (which includes external debt guaranteed by a group company).
- (xv) In *Portugal*, there have been a number of changes in company and securities laws in the period since 2007, including to transparency and disclosure rules and rules for the protection of investors in the context of IPOs, investment consultancy, hedge funds and collective investment undertakings.
- (xvi) Our new chapter on *Russia* is timely, updating us on improved recognition of shareholder agreements and attempts to give legal standing to put and call options over Russian securities and participation interests, highlighting difficulties for entering into conditional agreements which cannot be notarised, limiting statutory exit rights for minority shareholders and noting the introduction of a Strategic Investment Law regulating foreign investment in 'strategic industries'.
- (xvii) *Scotland* is to take advantage of its devolved powers by taking more control of taxation, particularly stamp duties on land transactions.
- (xviii) *Spain* has made major reforms in company and takeover laws, with a new Companies Structural Changes Act in 2009 dealing with structural changes to companies (transformation, merger, division, divestiture, and global transfer of assets and liabilities), regulated intra-community cross-border mergers and international transfers of registered offices, a restatement of all companies laws in 2010, changes to takeover laws in 2012 and amendments to the Spanish Insolvency Act, opening up new alternatives for selling businesses in insolvency proceedings through streamlined procedures, avoiding the impairment and depreciation of businesses.
- (xix) *Sweden* has also introduced new competition laws, under the powers of the Swedish Competition Authority, and has made changes to the prospectus laws, bringing them in line with the recent changes to the EU Prospective Directive.

(xx) *Switzerland* has introduced new laws governing the intermediation of certificated and non-certificated securities by custodians, has also abolished nationality and resident requirements for directors of Swiss companies (although there must still be at least one person able to represent the company who is domiciled in Switzerland) and has increased shareholder control over director and senior management compensation in listed corporations.

Our chapter on due diligence has again been revised and expanded, with the commentary recognising that due diligence now has many and varied purposes. The spectacular growth of private equity investment vehicles as major players in the international mergers and acquisitions space is an example. Advisers now need to pay as much attention to their audience's aspirations and concerns as to the target itself. Due diligence enquiries must also now be extended to new areas of law, such as those governing the internet and email marketing, ownership and use of social media, privacy and the need to maintain personal information on a confidential basis, and those which require companies to ensure that they have procedures in place to prevent money-laundering and bribery (or corrupt practices).

This edition has been updated by each of our contributors to reflect the law in force in their respective jurisdictions as at 31 January 2014. We hope this latest edition will serve as a valuable resource to its readership but, as always, this Handbook is intended only as a guide, and proper legal advice should always be sought when any actual transaction is contemplated.

Michael Whalley
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July 2014

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36. SWITZERLAND

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36.1 Introductory Comments

Switzerland is a federal republic consisting of twenty-six states (Cantons). Most areas of substantive law which are relevant for business acquisitions (e.g., laws pertaining to contracts, companies, accounting, property, etc.) are governed by federal legislation.

Nevertheless, the Cantons have retained far-reaching legislative and administrative powers in various areas including tax matters. In addition to the taxes collected by the federal government, the Cantons have the power to levy their own taxes on income and net worth at rates which vary considerably from Canton to Canton and even amongst the municipalities. Following the rejection by Switzerland of the Agreement on the EEA in the national referendum held on 6 December 1992, various pieces of national legislation were passed by the Swiss Parliament to adapt Swiss law to EU law in certain areas.

36.2 Corporate Structures

Corporate structures are governed by federal law.

The target of an acquisition of shares in Switzerland is usually a stock corporation ('Aktiengesellschaft') which is why the following remarks focus on the acquisition of stock corporations. Other business entities provided for under Swiss law include limited partnerships with shares ('Kommanditaktiengesellschaften'), limited liability companies ('Gesellschaften mit beschränkter Haftung') and cooperative corporations ('Genossenschaften'). Furthermore, Swiss law provides for three types of partnerships: the simple partnership ('einfache Gesellschaft'), the general partnership ('Kollektivgesellschaft') and the limited partnership ('Kommanditgesellschaft'). Partnerships do not have a separate legal personality, but it is possible to contract with partnerships.

The shares of Swiss stock corporations can be listed on the Swiss Stock Exchange. Special accounting and reporting rules apply to stock corporations which are listed.

36.3 Letters of Intent and Heads of Agreement

The act of opening negotiations between parties creates a quasi-legal relationship which imposes an obligation for these parties to act in good faith. Such an understanding can be entered into orally or in writing, or by mere actions implying an intention to do so.

Parties will often conclude formal preliminary agreements, such as letters of intent, heads of agreement or confidentiality agreements. Such agreements may comprise a number of specific obligations, including:

- a covenant not to negotiate with third parties;
- an obligation to grant to the other party access to material documentation (due diligence) and possibly to inspect the company's books;
- a commitment to keep the negotiations in confidence and not to disclose any information exchanged in the course of the negotiations;
- an undertaking to return all materials obtained by the other party in case of failure of the negotiations;
- the parties' right to terminate the negotiations at any time.

The legal significance of letters of intent depends on their contents and the individual facts.

Depending on the circumstances, some of these obligations may be considered to be already included in the generally recognized legal duty to act in good faith.

While an informal agreement to negotiate or a letter of intent in general cannot impose an obligation to conclude the contract at issue, such agreement may, depending on the circumstances, still result in damage claims for non-compliance with the obligations set out in it. From a practical point of view, it is important that the parties explicitly state which sections of such informal agreement to negotiate, or of a letter of intent, are binding and which are non-binding; the parties normally explicitly agree that the section setting forth the principal terms of the contemplated transaction are considered non-binding.

36.4 Taxes Affecting the Structure and Calculation of the Price

General

The acquisition of an enterprise, through the purchase of assets or shares, involves a large number of complex tax issues, the examination of which is beyond the scope of this guide. Appropriate tax advice should therefore be obtained to avoid unexpected problems particularly in respect of any tax issues pertaining to the deal structure and the purchase price.

Asset Acquisition

If securities are purchased in an asset acquisition, the federal transfer stamp tax is levied on the transfer of securities if a domestic securities dealer is involved in the sale either as a party or as an intermediary.

If a transfer of real property is involved, special cantonal/communal transfer taxes are levied. The capital gain realized upon the sale of the real property is, in principle, subject to the ordinary federal and cantonal/communal income tax. However, certain Cantons levy a special cantonal/municipal real estate capital gains tax instead of the ordinary income tax, which takes into account the holding period (i.e., a shorter holding period results in a higher real estate capital gains tax). In most Cantons, a statutory lien exists on the real property to secure both the real estate

transfer tax and the cantonal/communal real estate capital gains tax (but not the federal and the cantonal/communal income tax).

The purchase of assets may be subject to VAT which, however, can often be settled through the so-called notification procedure.

It is strongly advisable to include in the asset purchase agreement specific provisions dealing with the tax consequences regarding each type of asset to be transferred.

Share Acquisition

Careful consideration should be given to the tax consequences for the buyer and the seller in a share deal.

A share acquisition does not trigger income taxes, for either the company acquired (the book values remain unchanged, i.e., there is in particular no step-up in basis available) or the acquirer. As a general rule, individuals holding the shares in their private wealth ('*Privatvermögen*') will – subject to certain exceptions – realize a tax neutral capital gain (or loss) upon the sale of the shares. Any capital gain realized by any other Swiss resident seller is, in principle, subject to income taxes. However, capital gains realized by corporations are subject to the participation exemption scheme and are thus factually tax exempt provided that: (i) the minimum holding period of one year is met, and (ii) at least 10% of the total shares in the target company are sold.

In the case of a sale of a real estate company, some Cantons do tax the transfer of economic ownership regarding real estate situated in the Canton in question as a transfer of the real property itself. In these Cantons, a rather complex set of special rules apply which could involve cantonal/communal real estate capital gains taxes and cantonal/communal real estate transfer tax issues, the description of which is beyond the scope of this guide.

The buyer is usually burdened with a deferred tax liability on the level of the target company which will materialize if and to the extent hidden reserves are effectively realized (e.g., in the event of a sale of an asset having a low book value for a higher price or in case of liquidation of the target company). An individual shareholder holding the shares in his private wealth is, in addition, burdened with a deferred income tax liability (difference between nominal value and fair market value of the shares). Such income tax liability will materialize upon dividend distributions made by the target company and in the event of the liquidation of the target company.

The federal transfer stamp tax is levied on the transfer of shares if a domestic security dealer is involved in the sale either as a party or as an intermediary.

36.5 Extent of Seller's Warranties and Indemnities

The Swiss statutory sales law does not cover all possible situations that may arise in business acquisitions, especially those carried out in the form of a share purchase. In particular, statutory remedies only provide for limited protection in the event of a

misrepresentation or breach of warranty or non-performance. It is therefore strongly advised to include in the purchase agreement a comprehensive set of rules regarding the warranties and indemnities to be given by the seller or, under certain circumstances, by the buyer. Such warranties and indemnities should cover a variety of areas (including title situation, corporate existence, financial statements, business activity since effective dates of financial statements, taxes and duties, material contracts, employee matters, permits, licences, environmental matters, litigation, insurance, real estate, IP, etc.).

In terms of remedies, the parties usually entitle the buyer to request the seller to establish the financial situation of the buyer and the target company as it would have been in the absence of the warranty or indemnity infringement; in most cases, rescission of the purchase agreement is excluded. The seller tries to limit possible claims by including certain thresholds (*de minimis-provision; baskets*) and liability caps. Further, the parties often agree that the seller is not liable for facts which have been (fairly) disclosed to the buyer. Hence, if the buyer is aware of a certain risk (e.g., a pending litigation), he should try to have it reflected in the purchase price or to provide for a specific clause by virtue of which he will be indemnified if the identified risk materializes.

Support of these warranties by guarantees from the seller's parent company or by retention of part of the purchase price (escrow) should be considered. Further, in cases where a seller is not prepared or unable to give warranties and indemnities, a warranty and indemnity insurance may be a good solution (in particular for financial sellers in controlled auction processes).

36.6 Liability for Pre-contractual Representations

Negligent and fraudulent misrepresentations made during the preparation or negotiation of a purchase agreement by one party may give the other party the right to annul or rescind the contract based on material error or wilful deception and to claim damages. Deceptive warranties may, under certain circumstances, also result in a subsequent reduction of the purchase price. It is advisable to lay down all representations and promises in formal warranty clauses. Such clauses should specifically address and regulate the consequences that will result from a breach of such warranties (e.g., claims for damages, annulment of the contract, reduction of the purchase price, including relevant calculation methods, etc.).

36.7 Liability for Pre-acquisition Trading and Contracts

Asset Acquisition

If assets and liabilities are transferred pursuant to the Swiss Merger Law, all assets and liabilities listed in the inventory attached to the transfer agreement are transferred, by operation of law, to the acquiring party (buyer) upon registration in the commercial register. In this respect, it is still controversial whether contracts listed in the inventory

are also transferred by mere operation of law to the buyer without the third party's consent; however, the prevailing part of the doctrine seems to affirm such automatic transfer. Accordingly, if assets and liabilities are transferred pursuant to the Swiss Merger Law, a buyer is liable for pre-acquisition trading and contracts; in addition, the transferor remains jointly and severally liable for the liabilities transferred for a period of three years. Usually, a reference date ('*Stichtag*') is stipulated, stating the date upon which the benefits and risks under the contract shall pass from the seller to the buyer.

If assets and liabilities are transferred by way of singular succession, only the buyer is liable for the pre-acquisition trading. Thereby, the transfer of a liability to the buyer by way of singular succession, i.e., the assumption of an obligation in lieu of – and under discharge of – the seller (previous debtor) requires the consent of the creditor. If contracts as such should be transferred by way of singular succession, the counterparty's consent is also required. If such consent is obtained, only the buyer will be liable for pre-acquisition contracts.

In practice, the transfer of assets and liabilities in accordance with the Swiss Merger Law has not been as widely used as expected. In many cases, assets are still transferred based on a traditional asset deal, and, therefore, by way of singular succession.

Share Acquisition

If a stock corporation is acquired by virtue of a share deal, existing business contracts of the target remain – subject to potential change-of-control-rights – unchanged because the party to such contracts is the target company as a legal entity. The buyer himself as the (new) shareholder is, as a general rule, not liable for the pre-acquisition trading, i.e., the target company's debts. This is different in case of an acquisition of an interest in a non-corporate company, such as a general partnership or a limited partnership where the buyer is liable for pre-acquisition trading.

36.8 Pre-completion Risks

As mentioned above, Swiss statutory sales law does not contain sufficiently detailed rules governing the transfer of benefits and risks in business acquisitions.

A purchase agreement should therefore contain specific provisions as to which party will bear the risk for events occurring prior to completion of the agreement. In this respect, the parties may agree that pre-completion risks shall pass to the buyer upon completion of the agreement, upon signing of the agreement or at a point in time before signing. The passing of pre-completion (economic) risk often relates to the agreed pricing mechanism deployed in the purchase agreement (e.g., *completion accounts v. locked box mechanism*).

In a share acquisition, the seller is usually requested to give a covenant to the effect that the target company shall carry on its business after the signing date in the normal course except for matters which are dealt with or omitted to be dealt with at the request, or with the explicit approval, of the buyer. Furthermore, the parties may

include a material adverse change clause which would allow the buyer not to complete the deal if certain events occur, i.e., the contractually agreed pre-completion risks materialize.

36.9 Required Governmental Approvals

Investments made by foreign investors are not subject to a general authorization requirement, but are limited in certain areas.

In accordance with a federal law restricting foreign investment in Swiss real property ('*Lex Koller*'), the purchase of real property, or shares of a company owning such property, by non-resident individuals, foreign companies or Swiss companies controlled by non-residents may be subject to government approval. The acquisition of an enterprise owning Swiss real property by a foreign buyer may therefore involve proceedings to obtain government approval. Restrictions apply, however, in particular to the acquisition of residential real estate and building land, but not to commercial real estate ('*Betriebsstätte-Grundstücke*', i.e., properties which are used as business premises). Further, if the enterprise owning Swiss real property is acquired by virtue of a share deal, government approval is only required if the legal entity's *actual* purpose is to acquire or trade real estate which is examined based on an overall-assessment. If there is doubt as to whether governmental approval may be required, it should be considered obtaining a declaratory ruling, in particular in transactions which do not involve the commercial register or the land register.

In a number of professions and trades, a licence is required (see section 36.12). Some licences are reserved to Swiss residents and corporations registered in Switzerland.

36.10 Anti-trust and Competition Laws

The Swiss Law on Cartels enacted in 1995 adapted, to a substantial degree, rules which are similar to substantive EU competition law. Its aim was to establish a basis for a stronger competition policy. Under the Swiss Law on Cartels, unlawful restrictions on competition, namely unlawful agreements and unlawful practices of undertakings having a dominant position in the (relevant) market are prohibited.

The Swiss Law on Cartels also provides for a preventive merger control: if the turnover of the companies involved exceeds certain thresholds, the Competition Commission must be notified of the merger before its consummation. In particular, notification is required if: (i) the companies involved had, during the business year prior to the transaction, an aggregate worldwide turnover of at least Swiss Franc (CHF) 2 billion or an aggregate turnover in Switzerland of at least CHF 500 million, and (ii) at least two of the companies involved had, during the business year prior to the transaction, an individual turnover in Switzerland of at least CHF 100 million. Furthermore, merger notification is required if one of the companies has been declared to have a dominant market position. The Competition Commission may prohibit the contemplated merger or impose conditions and obligations on the parties if the

completed merger is deemed to have a negative impact on competition in the relevant market.

On 1 April 2004, the revised Law on Cartels came into force and, among other things, provided the Swiss Competition Commission with sharper tools: while previously sanctions could only be imposed in case of a repeated breach of the Law on Cartels, the Competition Commission may now impose substantial fines (of up to 10% of the total turnover realized by the undertaking in Switzerland during the last three financial years) without prior warning for certain first-time infringements, such as hardcore cartels, certain vertical restraints and abuse of a dominant market position.

Currently, a further revision of the Law on Cartels is being discussed in the Swiss Parliament. Potential amendments include the outright prohibition of certain horizontal and vertical agreements, such as agreements on prices and territories, and the adaptation of substantive and procedural law to the EU law in the field of merger control.

36.11 Required Offer Procedures

Public offers for listed shares are subject to the Law on Stock Exchanges and Securities Trade. A buyer acquiring, directly or indirectly, more than one-third of a corporation's voting rights must offer to buy all of its listed shares.

However, a potential target company can raise the marginal value to 49% ('opting-up') or even exempt itself from these takeover rules ('opting-out') by provision in its articles of association. A recent revision of the Law on Stock Exchanges and Securities abolished the previously existing rule on control premium, which allowed for payment of a premium to certain main shareholders prior to the public offer. The minimum offer price in a public offer has to be equivalent to: (i) the weighted average stock price on the relevant Swiss exchange of the sixty trading days prior to the formal pre-announcement or publication of the offer, and (ii) the highest price paid by the bidder or a person acting in concert for shares of the target company (included negotiated block trades) within the preceding twelve months.

There are no takeover rules for private companies or for asset purchases.

36.12 Continuation of Government Licences

With respect to a number of industries, a licence is required and sometimes only granted or upheld if the business operator is a Swiss resident or a Swiss company not controlled by non-residents. Industries in which a licence is needed include banking, insurance, air traffic, rail transport, job placement, casinos, broadcasting, cinemas and motion picture distribution.

In many cases, government licences are not transferable. In a business acquisition, therefore, new licences may have to be obtained by the buyer in its own name.

In a share acquisition, the change in ownership or control of the licensee (target company) may, with respect to certain industries (e.g., banking) involve the need to obtain a new government licence.

36.13 Requirements for Transferring Shares

Swiss stock corporations may issue registered or bearer shares. The transfer of shares must be based on a valid obligation to transfer the shares, which is normally contained in the purchase agreement. Further mechanisms for the transfer of shares will depend on the type of shares and whether share certificates have been issued (for intermediated securities see below). If share certificates have been issued, registered shares are transferred by transfer of possession and endorsement or assignment, respectively, whereas bearer shares may be transferred by mere transfer of possession. In both cases, transfer of possession may not only be effected by way of physical delivery, but also by way of contract (e.g., instruction to a depositary or other substitutes for physical delivery). If no share certificates have been issued, both registered shares and bearer shares are transferred by way of assignment.

Restrictions on the transfer of registered shares, in particular the requirement of the consent by the board of directors, may be contained in the company's articles of association or in shareholders' agreements. Within the articles of association of a private company, the company's right to reject a transfer is legally limited to a number of reasons. Where a company is listed on a Swiss stock exchange, a transfer may, in general, only be rejected if the buyer of the shares would exceed the ownership percentage limits provided in the articles, or if the acquirer fails to declare expressly upon the company's request that he has acquired the shares in his own name and for his own account.

According to government plans to amend the law on stock corporations, bearer shares shall be abolished in the future.

On 1 January 2010, the Swiss Federal Act on Intermediated Securities (FISA) entered into force. The FISA introduces a new concept to Swiss law referred to as '*intermediated securities*' ('*Bucheffekten*') and provides for regulations on the custody of certificated and uncertificated securities by custodians (as specified in the FISA) and the transfer of such securities. The transfer of intermediated securities is executed in two steps: First, the account owner has to instruct the custodian (e.g., a bank) to transfer the intermediated securities. Second, the intermediated securities shall be credited to the securities account of the buyer. The custodian is required to adhere to the account owner's instructions regarding the disposal of intermediated securities (in accordance with the corresponding agreement). Thus, the custodian is neither entitled nor required to verify the legal basis for the instructions of the account owner.

The transferability of the shares and the seller's authority and ability to transfer the shares should be covered by adequate warranty provisions in the purchase agreement.

36.14 Requirements for Transferring Land and Property Leases

Switzerland maintains a sophisticated land registration system governed by federal law, which covers most of the Swiss territory.

Title to land, mortgages, options and pre-emptions, easements and other charges on land have to be registered in the land register. Registration of these rights in the land register is generally exclusive, in the sense that no rights with respect to land exist except those properly recorded in the land register. Third parties acting in good faith may in general rely on the transcripts from the land register as being conclusive regarding the titles, mortgages or any other rights existing with respect to such property.

Formal requirements necessitate that transfers of title to or creation of a mortgage on land be made by way of a public deed and subsequent registration in the land register. In case of a transfer of assets and liabilities under the Swiss Merger Law (see section 36.7), the transfer of land takes place by operation of law upon registration of such transfer in the commercial register. In this exceptional case, the subsequent registration in the land register is merely of declaratory nature.

The transfer of land to a foreign investor may be subject to government approvals under the *Lex Koller* (see section 36.9). Special restrictions apply to the sale of agricultural property.

36.15 Requirements for Transferring Intellectual Property

Formal requirements apply regarding the transfer of patents, design rights and trademarks, whereas copyrights, plant varieties and topographics of semiconductor chips may be transferred without formal requirements. Registration of the transfer into the respective federal register (which exist with respect to all of the mentioned rights except the copyright) is not a condition precedent thereto but the only means to ensure that the transfer is effective *vis-à-vis* third parties. In case of a transfer of assets and liabilities under the Swiss Merger Law (see section 36.7), such intellectual property rights are transferred by operation of law.

In a share acquisition, no rights need be transferred. Therefore, while the owner of the shares changes, the acquired company continues to be the owner of the rights. Licence agreements may, however, contain provisions which are relevant in the case of a sale of the licensee.

36.16 Requirements for Transferring Business Contracts, Licences and Leases

As a general rule, the transfer of a contract to a third party and the release of the contracting party of its obligations thereunder, is only possible with the other contracting party's consent.

If assets and liabilities are transferred pursuant to the Swiss Merger Law, the prevailing part of the doctrine seems to be of the opinion that contracts listed in the inventory to a transfer agreement are transferred by mere operation of law to the buyer, i.e., without the third party's consent, whereby the seller remains liable for a limited time (see section 36.7). The Swiss Federal Supreme Court has, however, not yet decided this issue (automatic transfer of contracts). Taking this into consideration, it is still recommended that the consent of all counterparties to the (important) contracts to

be transferred be obtained. In case of complex business contracts, a formal novation of the contracts (whereby the buyer assumes all rights and obligations and the seller is released from its obligations) should be adopted. If assets and liabilities are not transferred pursuant to the Swiss Merger Law, but by way of singular succession, the transfer of contracts needs the consent of the contractual counterparty.

Special provisions apply to employment contracts and lease agreements: a tenant needs his or her landlord's written consent to transfer the lease agreement, but this consent may not be withheld unreasonably. In case of a sale of real property, the lease agreements relating to such property automatically pass to the buyer and new owner of the object, by operation of law. With respect to employment contracts, see section 36.24.

In a share deal, the contracts of the target company do not need to be transferred to the buyer since the target company remains the party to such contracts. However, long term contracts such as licence agreements may contain change-of-control clauses which could entitle the other party to terminate the agreement. In practice, a buyer will try to make the purchase agreement conditional on obtaining of change-of-control waivers or the conclusion of new contracts, if necessary.

36.17 Requirements for Transferring Other Assets

Title to movable assets (chattels) is transferred by conveying possession ('Besitz'). Transfer of possession can be effected either by physical delivery or (if the goods are physically maintained with third parties) by way of a contract (e.g., instruction to a depositary or other substitutes for physical delivery). As a general rule, rights in chattels acquired by a party on the assumption made in good faith that no other third-party rights exist thereon take priority over any such third-party rights.

Receivables can be transferred by way of simple assignment in writing unless otherwise provided for by law or specifically stipulated in the underlying contract from which the receivables originate. Notification to and consent by the debtor is not a precondition to the validity of the assignment. However, prior to notification of the assignment, the debtor of the claims assigned may validly discharge the claims by making payment to the assignor. Appropriate stipulations should be included in the purchase agreement regarding notification to the debtor.

In case of a transfer of assets and liabilities under the Swiss Merger Law (see section 36.7), both receivables and title to movable assets (chattels) are transferred by operation of law upon entry of the transfer in the commercial register.

36.18 Encumbrances and Third-Party Interests

Assets can be subject to a variety of third-party interests. With regard to land, as a general rule, third-party interests (such as mortgages or easements) do not come into existence unless they are properly recorded in the land register. For those parts of Switzerland which are covered by the federal land register, extracts from the land register can be relied upon by the buyer of real property as conclusive evidence

regarding the title and mortgage situation. For those areas not covered by the federal land register, further inquiries will be necessary.

Pledges on chattels do not come into existence as long as the assets are left within the pledger's exclusive possession. Therefore, a buyer of movable property acting in good faith generally acquires unencumbered title to the assets.

Chattels in which the seller has retained title remain encumbered with such title if the title is recorded in a special register ('*Eigentumsvorbehaltsregister*'). There are a number of liens which come into existence by operation of law (including the repairer's lien, the lessor's right of retention, certain statutory liens on land to cover the real property gains tax, etc.).

In order to protect the buyer, warranties from the seller as to clear title and the absence of statutory liens are essential to be included in the purchase agreement.

36.19 Minimum Shareholder and Officer Requirements

On 1 January 2008, an amendment of the Swiss Code of Obligations came into force which brought considerable liberalization to this area, in particular the abolishment of former shareholder and officer requirements to a great extent.

Both stock corporations and limited liability companies may be founded by and have only one shareholder; earlier, a minimum of three shareholders for stock corporations was required.

As regards members of the board of directors and officers, the nationality and residence requirements have been largely abolished. The only remaining mandatory requirement prescribes that at least one person domiciled in Switzerland must be able to validly represent the company (i.e., have sufficient signatory power). Such person can either be a member of the board of directors, an officer or a person registered with (normal) signatory power. If neither of such persons has single signatory power, the requirement can also be met by two persons domiciled in Switzerland having collective signatory power (i.e., being able to validly represent the company jointly). Further, the law provides that at least one member of the board of directors (whether domiciled in Switzerland or abroad) must be in a position to validly represent the company (i.e., have single or collective signatory power jointly with another director).

Unlike in other jurisdictions, companies – whether or not incorporated in Switzerland – cannot be appointed as members of the board of directors. Only the individuals who represent these companies can be appointed as such. If there are several classes of shares in respect of voting or pecuniary rights, the articles of association must ensure that each class of shares is represented by at least one representative in the board of directors.

36.20 Non-competition Clauses

A seller may agree not to compete with the buyer (in relation to the business sold) for a certain period of time. Such agreement is permissible to the extent that it is required for the full transfer of the enterprise value to protect the acquired customers and/or

know-how. The non-compete obligation of the seller should be reasonably limited in terms of place, time (usually two to three years, depending on whether goodwill and/or know-how is transferred) and subject, and may be secured by a contractual penalty (liquidated damages). However, a judge may reduce excessive non-competition clauses or penalties at his or her discretion.

36.21 Environmental Considerations

Switzerland's legislation protecting the environment is covered by a variety of federal laws, such as the Environmental Protection Law, the Water Pollution Law and the Civil Code. Apart from the polluter, the possessor ('Inhaber') of an industrial plant may be subject to a non-fault liability for any pollution caused by such plant and may be obliged to modify polluting structures in order to meet legal standards. Future owners and possessors may also become liable for contamination already present at the real estate when they acquire it.

A full environmental audit should thus always be carried out by the buyer. Acquisition due diligence may involve the appointment of environmental consultants to consider documentary information, to carry out site visits or to undertake further investigations. Due to the serious potential effects of environmental issues, it is important to ascertain such problems at an early stage, also to enable negotiation on the price. In addition, comprehensive warranties or indemnities with respect to environmental liability and damage should always be obtained from the seller in the purchase agreement.

36.22 Employee Superannuation/Pension Plans

The Swiss mandatory social security system is based on two 'pillars' connected to the employment relationship (a third 'pillar' has nothing to do with the employment relationship):

- the government Old-Age, Survivors and Disability Insurance; and
- occupational pension plans: in addition to the state insurance, employers are required to contribute to pension plans managed by separate entities under government supervision.

Employers are not liable for losses of the pension foundation unless they are members of the foundation council, the liability of which resembles that of the board of directors of a stock corporation. Moreover, the employer is liable to deduct both the employer's and the employee's share of the government Old-Age, Survivors and Disability Insurance, the unemployment and the accident insurances from the salary paid to the employee. Usually, the employer also takes out a voluntary insurance policy in order to cover his or her obligation to pay the wage for a limited time during an employee's sick leave.

Employees who have served at least twenty years and are at least 50 years old are generally entitled to a special severance compensation upon termination of the

employment relationship. Unless otherwise agreed by written agreement, standard employment contracts or collective contracts, the severance compensation should not be less than an amount equal to the employee's wages for two months and may not exceed an amount equal to the employee's wages for eight months. The severance compensation is reduced by the amount of benefits received by the employee from personal welfare institutions if and to the extent these benefits have directly or indirectly been funded by the employer; hence, in practice, this obligation of the employer is of very limited importance.

36.23 Employee Rights

Four main sources of law may be relevant for determining the rights and duties under an employment relationship:

- the individual specific employment contract;
- collective employment contracts;
- standard employment contracts decreed by the federal or a cantonal government agency for certain industries; and
- the provisions of the Swiss Code of Obligations and the Federal Labour Law.

36.24 Compulsory Transfer of Employees

In an asset acquisition, if the seller transfers the whole or part of the business to the buyer, the employment contracts related to the transferred business automatically pass to the buyer by operation of law together with all rights and duties. The seller and the buyer remain jointly and severally liable for the due performance of the employment contract until the expiration of its term or the date upon which such contract can be validly terminated in accordance with its terms. In order to protect the seller, appropriate warranties should be obtained from the buyer as to its due performance of the employment contracts so assumed.

It needs to be mentioned in this context, however, that the employee has the right to refuse such transfer. In order to enable the employee to make a well-informed decision in this respect, the employer has a duty to inform. Accordingly, if an employer transfers a business or a part thereof to a third party, the employees' representatives or, if there are none, the employees, shall be *informed* in good time prior to the transfer of the reason for the transfer as well as its legal, economic and social consequences for the employees. If, as a result of the transfer, measures affecting the employees are planned, the employees' representative body or, if there is none, the employees shall be *consulted* in due time prior to a decision on these measures. In case of non-compliance with these requirements, the employees' representatives may request the court to prohibit the entry of the transfer of assets and liabilities, or another transaction under the Swiss Merger Law (such as a merger), in the commercial register.

The simultaneous termination of employment relationships of a certain minimum number of employees is considered a mass dismissal. An employer planning such

a dismissal is required first to consult with the employees' representatives or, if there are none, the employees and then to report the dismissal and the results of the consultation to the public employment agency.

36.25 Tax Deductibility of Acquisition Expenses

If the buyer is an individual or a company not resident in Switzerland, the deductibility of the acquisition expenses is governed by the tax laws of the buyer's home jurisdiction.

If the buyer is a Swiss taxpayer, as a general rule, the acquisition costs are deductible to the extent they are justified business expenses (i.e., to the extent they represent a decrease in assets and thus need not to be activated as part of the acquired assets). Appropriate tax advice should be obtained regarding these issues.

36.26 Levies on Acquisition Agreements and Collateral Documents

In an asset acquisition, stamp duty payable on the sale of securities is levied if: (i) taxable securities (such as bonds, shares, fund units, etc.) form part of the assets purchased, (ii) if the purchase is effected, and (iii) if one of the contracting parties, or the person, or the company serving as intermediary to the transaction is considered a domestic securities dealer.

In a share acquisition, the stamp duty is levied on the shares sold, provided one of the contracting parties, or the person, or the company serving as intermediary to the transaction is considered a domestic securities dealer.

Except for public notary fees, which are payable if the agreements are concluded by way of public deeds, and the fees which are payable to land or other registers to effect the transfer of the property concerned (such as land), no significant duties are imposed on the purchase agreements.

36.27 Financing Rules and Restrictions

The Federal Tax Law and all the cantonal Tax Laws contain certain debt to equity limits which must be observed in order to ensure the deductibility of interest payments made by the company to its shareholders or related parties. Interest payments made on the debt portion exceeding the admissible ratio (so-called hidden equity) are denied for deduction and may trigger a withholding tax charge of 35% (deemed dividend distribution).

Loans granted to a Swiss company by related parties need to be structured on an arm's length basis. The Federal Tax Administration periodically publishes minimum and maximum interest rates for loans among related parties which serve as a safe-haven basis. Interest payments made at rates exceeding the admissible rates may be treated as constructive dividends for corporate income and Swiss withholding tax purposes.

The issue of new share capital and payments to the company's paid-in surplus are subject to stamp duty of 1%. No stamp duty is payable if the consideration paid to the stock corporation is below CHF 1,000,000. If such amount has not been reached upon the formation of the stock corporation, the unused balance is exempt from stamp duty in the event of a subsequent increase of capital. The repurchase by the company of its own shares which are cancelled or exceed the threshold of 10% or, with certain exceptions, are held for a period longer than six years is treated as partial liquidation for tax purposes. This will therefore trigger Swiss withholding tax at corporate level and may constitute taxable income for its Swiss resident shareholders.

36.28 Exchange Controls and Repatriation of Profits

There are no general restrictions on exchange controls in Switzerland or on the transfer of money from Switzerland to a foreign country. However, since September 2011, the Swiss National Bank has put a CHF 1.20 lower limit under the EUR/CHF exchange rate (floor).

Dividend payments made by Swiss companies are subject to 35% withholding tax, which is to be deducted by the company from the gross amount of the dividend declared. In relation to Swiss taxpayers, the 35% withholding tax serves only to secure income taxes. Swiss taxpayers can obtain a tax credit for the withholding tax accordingly and set it off against their income taxes. Non-resident recipients of the dividend may be entitled to obtain a reduction or a refund of the 35% withholding tax in accordance with applicable international tax treaties. Since 2011, the distribution of reserves from capital contributions of the shareholders (e.g., paid-in surplus) is exempt from individual income tax as well as from withholding tax, provided that the capital contributions have been booked under a separate account in the company.

There is, in general, no withholding tax on interest payments made by Swiss companies on loans. Exceptions apply in the area of syndicated financing (so-called 10/20 Non-Bank Rules) and for interest payments on loans from foreign creditors which are secured by Swiss real estate. Withholding tax is, however, deducted from interest payments made by banks or finance companies on interest-bearing accounts or other accounts of a similar nature ('*Kundenguthaben*').

36.29 Groups of Companies

Unlike in Germany, there is not a comprehensive set of rules on groups in Switzerland. Swiss law contains, however, specific rules for group companies in certain areas such as accounting.

In this regard, the Swiss Code of Obligations provides that companies must prepare – in addition to the annual accounts – consolidated financial statements (group accounts) if they control one or more other companies; control may be exercised: (i) by directly or indirectly holding a voting majority in the general assembly, (ii) by directly or indirectly holding the right to appoint or remove the majority of the members of the board of directors or equivalent governing body of the entity, or (iii) by having the

possibility to exercise dominant influence thanks to the articles of incorporation, the foundation deed, a contract, or similar instruments. If certain materiality thresholds (balance sheet total of CHF 20 million; revenue of CHF 40 million; annual average of 250 full time employees) are not exceeded on a group level within two consecutive financial years, Swiss companies are in general exempt from the requirement to prepare consolidated financial statements.

From a corporate law point of view, it is still debated if and to what extent members of the board of directors of a group company may consider the overall interest of the entire group when acting for such group company.

36.30 Responsibility for Liabilities of an Acquired Subsidiary

It is a fundamental rule of Swiss company law that the shareholders of a company are, in the absence of specific guarantees given by the shareholders, not liable for the company's debts. In a decision rendered by the Federal Supreme Court, however, a parent company was held to be liable for the debts of one of its subsidiary companies on the grounds that it acted *vis-à-vis* third parties in a way that led them to believe that the parent company would support the subsidiary and be liable for its debts. Careful consideration must be given to the issue of a shareholder's potential liability.

36.31 Governing Law of the Contract

The choice of law made by the parties in the purchase agreement is recognized if it has been agreed upon explicitly or becomes clearly evident from the circumstances. It would, depending on the wording of the clause, be limited to the purchase agreement itself. The substantive law applicable to special issues, such as the requirements for the transfer of title to goods, may be subject to different substantive laws (i.e., '*lex fori*') and only a limited or even no choice of law may be possible.

36.32 Dispute Resolution Options

A choice of forum is generally accepted by Swiss courts. The parties may also agree on arbitration proceedings to resolve disputes arising in connection with the contract. Switzerland is well known for its longstanding tradition of international arbitration and offers a sophisticated system of arbitration rules and services (Swiss Rules of International Arbitration issued by the Swiss Chambers' Arbitration Institution). The Swiss Private International Law Statute codifies, among other things, a set of rules dealing with international arbitration. Switzerland is also a party to the New York Convention on the Enforcement and Recognition of Foreign International Arbitration Awards.

Foreign decisions are generally recognized and enforceable in Switzerland, provided that certain constitutional standards have been observed by the foreign judicial authorities. Such standards are usually set out in bilateral or multilateral treaties such as the Lugano Convention (to which Switzerland has been a party since 1992; as per 1 December 2011, a revised version of the Lugano Convention has come

into effect). If no such treaty exists with a country, the recognition rules contained in the Private International Law Statute are applicable.

36.33 Other Issues

In principle, foreign individuals wishing to take up residence and to work in Switzerland need a government permit.

Companies wishing to employ foreign (non-Swiss) employees or executives to stay in Switzerland therefore must obtain a residence and work permit. These permits are governed by a quota system and are issued, depending on the circumstances, either by the federal government or the cantonal government where the company or the foreign individual is domiciled. There are various types of permits available including annual residence and work permits (Permits B), permanent residence permits (Permits C), temporary residence permits and cross-border permits. In granting the permits, the authorities do have relatively broad discretion, allowing them to take into account the facts and circumstances of the individual case.

Special rules currently apply to EU/EFTA nationals: the Agreement on the Free Movement of Persons between Switzerland and the EU/EFTA allows nationals from the EU/EFTA countries access to the Swiss labour market as well as the right to settle. Such persons must, however, find employment in Switzerland or be able to finance their own living expenses. Based on an initiative (constitutional amendment) adopted by the Swiss citizens on 9 February 2014, a quota system has to be re-installed with regard to nationals of the EU/EFTA within three years. The necessary detailed implementation of the referendum on a statutory level is unclear at this point in time.

On 1 January 2014, the ordinance against excessive compensation in listed stock corporations came into force which implemented the key elements of a constitutional amendment (the so-called '*Minder Initiative*'), namely increasing the shareholders' rights to have a say on the compensation of the board of directors and the executive management. The ordinance is applicable to Swiss stock corporations (i.e., corporations subject to the Swiss Code of Obligations) listed on a stock exchange in Switzerland or abroad. Pursuant to the new ordinance, the shareholders' meeting has to vote annually (binding vote) on the aggregate amount of the compensation for each of the board of directors and the executive management and the articles of association have to specify the mechanism of the say-on-pay vote (various mechanisms are possible). The ordinance prohibits certain forms of compensation to members of the board of directors and the executive management such as certain commissions in M&A transactions, severance payments which are contractually agreed or contained in the articles of association, and advance payments; however, sign-on bonuses should remain permissible as compensation for entitlements against the previous employer which are forfeited as a result of the change of employment.

The ordinance additionally contains far-reaching rules on the corporate governance of listed companies, such as the yearly election of the members and the chairman of the board of directors as well as the establishment of a compensation committee. Further rules govern the voting obligations of pension funds as well as the granting of

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proxies and voting instructions to the independent shareholder representative. The ordinance also provides for harsh criminal sanctions (prison sentences of up to three years and fines) in case of the intentional non-compliance with certain obligations set forth in the ordinance.