UIA 12th Winter Seminar

Cross-border Investments / M&A Transactions

Duties and Liability of Directors in a Swiss Company

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Introduction

- Cross-border M&A
- Acquiring a TargetCo / Business (M&A process)
- Operation and integration of TargetCo / Business (post M&A process)
- Buyer’s perspective (e.g. role as future shareholder)
- Future Director’s perspective
Case Study – Overview

Group S

Swiss HoldCo

Share Purchase Agreement

Swiss TargetCo

100%

Group B

Foreign ParentCo

100%

Swiss NewCo

Future Director(s)

Assets Purchase Agreement

Authorities

Managers / Employees

Business partners
Case Study – Facts

- Acquisition of a business in Switzerland
- Involved parties
  - Group S(eller), incl. Swiss TargetCo
  - Group B(uyer), incl. Swiss NewCo
- Planned M&A transaction
  - Acquisition of an ongoing business (Division T)
  - Structure:
    - (1) Share deal: Swiss TargetCo shares; or
    - (2) Asset deal: assets of Division T by a Swiss NewCo.
- Swiss TargetCo / NewCo
  - Swiss share corporation (*Aktiengesellschaft (AG)*)
  - Members of Board of Directors (Directors)
Corporate Structure of SwissCo

- A Swiss share corporation (AG)

- Separation of powers; checks and balances
- Position of Board of Directors
- Registration in commercial register

Corporate bodies in a Swiss AG

1. Shareholder(s) / Shareholders’ meeting
2. Board of Directors
3. Auditors

Foreign ParentCo

SwissCo (TargetCo or NewCo)

100%
Duties of all Directors

- Main sources for duties
  - Swiss corporate law, other laws
  - Articles of incorporation
  - Organization by-laws
  - Directives; chart of functions etc.

- Principle: The Board of Directors may take decisions on all matters which are not by law or the articles allocated to the shareholder’s meeting.

- Main duties of Directors
  - Non-transferable and inalienable duties
  - Art. 716a Swiss Code of Obligations

- Organization; management, delegation and its limits
Duties of all Directors

- Duty of care
- Duty of loyalty
- Interests of Swiss company
- Representation; signing authorities
- Ultimate supervision of persons entrusted with management, in particular, in view of compliance
- Major transactions
Duties of all Directors

- Financial planning and control
- Financial reporting
- Financings
- Capital protection and distributions
- Financial distress
Duties of the Chairman

- Organizational freedom / board’s self organization
- Appointment of chairman
- Covening / chairing of shareholder’s meetings
- Convening of board meetings
- Chairing of board meetings
- Functioning of Board of Directors
Board Composition & Procedures

- Composition
- Board meetings: formal aspects
- Board resolutions; substance
- Minutes on deliberations and decisions
- Circular board resolutions
Potential Liabilities under Swiss law

- Personal liability of Directors
- Liability vis-à-vis: (i) Swiss company; (ii) its shareholder(s); (iii) creditors; and (iv) public authorities

Basis for liability

1. Corporate / civil liability
2. Liability in other areas of law (e.g. taxes, social security)
3. Criminal liability

Means to mitigate effects of personal liability
Best Practices & Discussion

- Board organization & processes
- Directives, delegation & reporting
- Care with intragroup transactions
- Care with financings, distributions
- Follow due process for enabling informed and unbiased decision-taking by Board of Directors
- Hold regular board meetings
- Risk management, financial reporting system
Contact

Thank you for your attention

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