



100 years
1911
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UIA 12th Winter Seminar

Cross-border Investments / M&A Transactions

Duties and Liability of Directors in a Swiss Company

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Niseko, 28 February 2017

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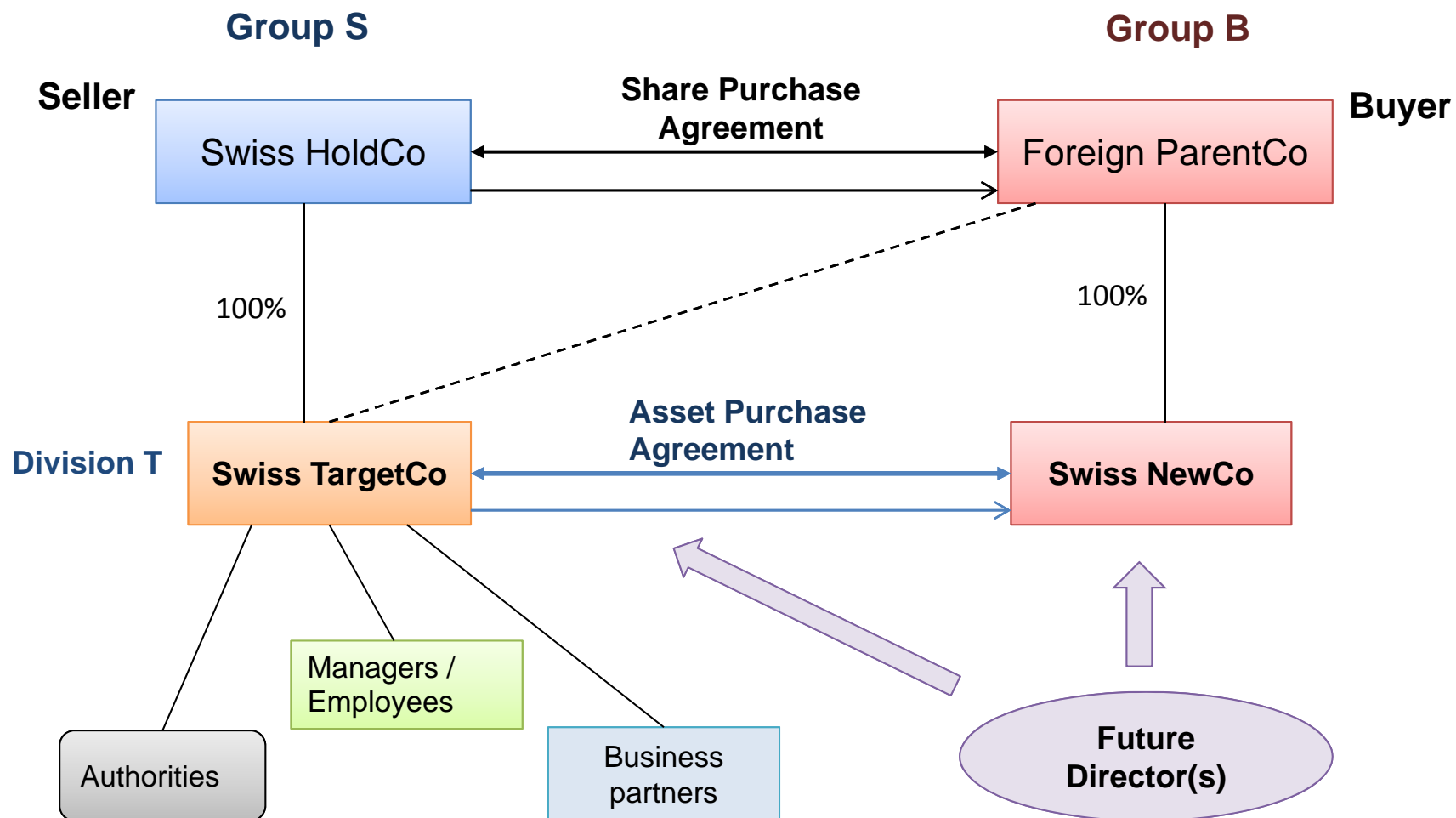
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Introduction

- 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

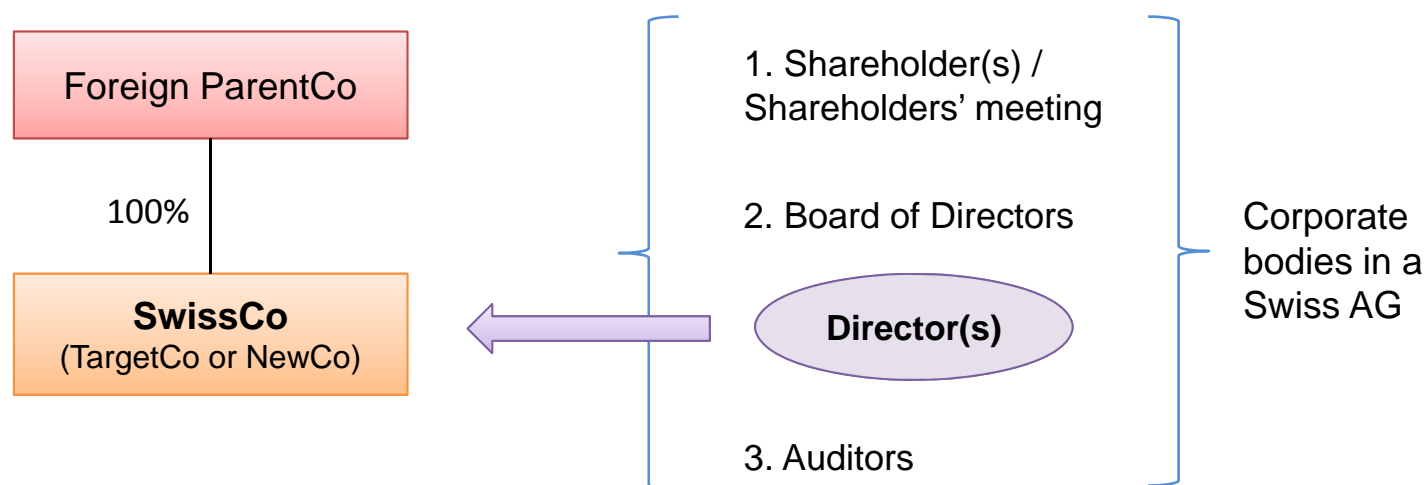


Case Study – Facts

- 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

Duties of all Directors

(1)



- 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

(2)



- 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

(3)



- 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
- Convening / 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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