Corporate Relocations – A Swiss Perspective on Cross-border Restructurings of Groups

Franz Schubiger, LL.M.
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4. Transfer of Foreign Company to Switzerland (Redomiciliation)
   a) Applicable Law, Legal Framework
   b) Foreign and Swiss Redomiciliation Requirements
   c) Principal Steps and Implementation
   d) Practical Challenges
5. Discussion / Q&A
Introduction

Cross-border restructurings

Description of a corporate relocation

Drivers for relocations and criteria for choosing locations

Freedom of establishment / free movement of companies?

Stakeholders, interests involved

Inbound vs. outbond relocations
Case Study – Overview on Restructuring Scenario

Relocation (inbound):
- Foreign ParentCo
- Foreign HoldCo
- Foreign ReloCo

Relocation (outbound):
- SwissSub

- Authorities
- Business partners
- Creditors
- Employees
- Shareholder
- Lenders

Foreign country

Switzerland

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Case Study – Facts

International group of companies

Foreign HoldCo and ReloCo are based abroad

Group has existing operations in Switzerland (Swiss SubCo)

Relocation of ReloCo to Switzerland (centralize functions)

ReloCo is an LLC organized under foreign law

ReloCo's operations and legal relationships

Continuation of ReloCo as legal entity is key
## Typical Instruments for Cross-Border Restructurings

### Instruments for case study

#### Typical instruments for corporate relocations and transfer of businesses to Switzerland (inbound)

<table>
<thead>
<tr>
<th>Transfer of ReloCo to Switzerland / Redomiciliation:</th>
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</thead>
<tbody>
<tr>
<td>a) Foreign ReloCo relocates to / continues in Switzerland without liquidation and re-incorporation</td>
</tr>
<tr>
<td>b) Legal entity transfers its registered office, submits to Swiss law and continues in the form of a Swiss company (e.g. as Swiss LLC/GmbH)</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Cross-border merger:</th>
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<tbody>
<tr>
<td>a) Foreign ReloCo merges with Swiss SubCo based on merger agreement</td>
</tr>
<tr>
<td>b) All assets, liabilities and contracts transfer by operation of law</td>
</tr>
<tr>
<td>c) Foreign ReloCo disappears; business continues in Swiss SubCo</td>
</tr>
<tr>
<td>d) Feasibility (e.g. availability of merger and feasibility in both jurisdictions)</td>
</tr>
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<table>
<thead>
<tr>
<th>Transfer of assets:</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Sale and transfer of assets and liabilities by ReloCo to Swiss SubCo</td>
</tr>
<tr>
<td>b) Subsequent liquidation of ReloCo</td>
</tr>
<tr>
<td>c) Asset deal with individual transfers and assumptions or statutory business transfer (if instrument is available in both jurisdictions)</td>
</tr>
</tbody>
</table>
Transfer of a Foreign Company to Switzerland (Redomiciliation)

(1) Cross-border / international setting

(2) Mechanics: Transfer of registered office of Foreign ReloCo and submission to Swiss law without liquidation and re-incorporation

(3) Corporate law applicable to redomiciliation

      Starting point: Law applicable to company (incorporation theory) (art. 154 para. 1 CPIL)
      Transfer of Foreign Company (art. 161 para. 1 CPIL):
      
      A foreign company may, without liquidating and reincorporating, submit itself to Swiss law if the governing foreign law so permits. The company must satisfy the requirements fixed by the foreign law and must be able to adopt one of the forms of organization of Swiss law.

   b. Foreign law applicable to ReloCo

   c. Swiss corporate law

(4) Other sources of law relevant for re-domiciliation

      Examples: tax law, contract law, public/administrative law, employment law

Principle of cumulative application of mandatory provisions of law
### Foreign and Swiss Requirements for Redomiciliation (inbound)

<table>
<thead>
<tr>
<th><strong>Foreign company law</strong></th>
<th><strong>Swiss company law</strong></th>
<th><strong>Other legal / tax issues</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Admissibility of Redomiciliation under Foreign Company Law</td>
<td>Legal form of ReloCo is compatible with equivalent Swiss company form</td>
<td>Examples:</td>
</tr>
<tr>
<td>(1) Foreign law permits the relocation of ReloCo to Switzerland in principle</td>
<td>• Comparative legal assessment (e.g. by Swiss Institute of Comparative Law (SICL) in Lausanne, <a href="http://www.isdc.ch">www.isdc.ch</a>)</td>
<td>(a) Tax aspects (both jurisdictions)</td>
</tr>
<tr>
<td>• Foreign law assessment</td>
<td>• Numerus clausus of available Swiss company forms</td>
<td>• Exit and other taxes</td>
</tr>
<tr>
<td>• Legal opinion of foreign counsel or authority</td>
<td>• Examination of equivalence and adaptability based on specific structure and features of ReloCo</td>
<td>• Advance planning / tax ruling requests in Switzerland</td>
</tr>
<tr>
<td>Requirements under foreign law have been met</td>
<td>• Mandatory features of Swiss company law (e.g. share capital, rights and obligations of share- or quotaholders)</td>
<td>(b) Employment law issues (both jurisdictions)</td>
</tr>
<tr>
<td>• Corporate steps (e.g. board and shareholder resolutions, creditor protection process, notifications)**</td>
<td></td>
<td>(c) Governmental permits</td>
</tr>
<tr>
<td>• Other approvals (e.g. regulatory)**</td>
<td>(5) Company capital covered by assets</td>
<td>(d) Existing contracts of ReloCo</td>
</tr>
<tr>
<td>ReloCo must legally exist in foreign jurisdiction</td>
<td>• Relocation balance sheet</td>
<td>• Notification and/or consent requirements</td>
</tr>
<tr>
<td>• Trade register extract or similar document (e.g. certificate of good standing)</td>
<td>• Review by Swiss audit expert, report</td>
<td>• Termination rights</td>
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<td></td>
<td>(6) Center of business activities</td>
<td>(e) Legal proceedings / litigation?</td>
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<td></td>
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<td>(f) Other issues</td>
</tr>
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<td></td>
<td>(7) (Formal) registration requirements</td>
<td>Reverse DD review</td>
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** For illustration, depends on local law
Corporate Relocation to Switzerland / Principal Steps and Implementation

**Preparatory Phase**
- Finalize tax assessment and file ruling requests with Swiss tax authorities
- Coordinate issuance of legal opinions (e.g. from SICL, foreign counsel) and other reports
- Prepare employee information/measures, creditor protection process, seek consents etc.

**Implementation Phase**
- Decisions to relocate (board, shareholder resolutions of ReloCo)
- Registration of ReloCo as Swiss company in commercial register in Switzerland
- Deregistration of ReloCo in foreign country (e.g. trade register)

**Assessment of feasibility of relocation (e.g. financial, legal, tax, regulatory), incl. reverse DD**
- Draft relocation documents; pre-review with authorities (e.g. notary public, commercial register)
- Financial statements of ReloCo (relocation balance sheet), review by Swiss audit expert

**Establish all pre-requisites for relocation are met**
- Transfer of activities of ReloCo to Switzerland
- Publication of registration / relocation in Swiss Official Journal of Commerce (SOJC)
- Post relocation actions (e.g. updating of registers)
Practical Challenges

(1) Adaptation of ReloCo to Swiss company form
   a) Name of Swiss company
   b) Language of articles of association
   c) Structure of share capital and type of shares
   d) Rights and obligations of shareholders / quotaholders
   e) Capital protection

(2) Corporate resolutions of ReloCo, decision-taking
   a) Resolutions required pursuant to foreign law
   b) Resolutions required pursuant to Swiss law

(3) Legal effectiveness of redomiciliation
   a) Effective time of redomiciliation
   b) Registration in Switzerland - deregistration in foreign country
   c) Register entries reflecting continuation?

(4) Complexity of corporate relocation projects
   a) Cooperation among client, legal counsel(s) and tax advisor(s)
   b) Involvement of various third parties in involved jurisdictions
   c) Different workstreams
   d) Need for planning and coordination (step plans, timeline, etc.)
Discussion / Q&A

- Inbound corporate relocations in other jurisdictions
- Say on relocations by different stakeholders
- Cross-border corporate relocations on the rise or decline?
- Impact of globalism and protectionism on relocations
- Key drivers for relocations and other types of cross-border restructurings
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