

Chapter 59 – Asset Transfer Agreements under Swiss Law

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ASSET TRANSFER AGREEMENTS UNDER SWISS LAW

Asset Transfer Agreements under Swiss Law

Chapter 58 A. Commentary

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ASSET TRANSFER AGREEMENTS UNDER SWISS LAW

Introduction

In Switzerland, acquisitions of a business mainly take two forms: the share deal, where shareholders sell (or simply transfer) their shares in a company to a buyer, and the asset deal, where a company transfers some or all of its assets, liabilities, and/or contracts to another company. In other words, in a share deal, the company is the target; in an asset deal, it is a party to the transaction agreement, the asset purchase agreement or, if there is no consideration for the transfer of the assets, the asset transfer agreement (APA/ATA).

The question of whether to transfer a business by share deal or asset deal is a commercial decision, and often it is tax driven. There also can be practical reasons for choosing an asset deal, e.g., for the carve-out of certain assets within a share deal transaction or in case of incurable title chain issues, where it is preferable to transfer the assets instead of tainted shares.

Once it has been decided that an asset deal is the way to go, there are again two legal concepts from which to choose under Swiss law: the asset transfer by ‘singular succession’ according to the Swiss Code of Obligations (CO), and the asset transfer by way of ‘partial universal succession’ according to the Swiss Merger Act (SMA).¹

Singular Succession

An asset transfer by singular succession (hereafter ‘singular succession’) is, in principle, nothing else than a purchase agreement (or, if there is no consideration involved/if the consideration is in a form other than money, a donation agreement, respectively, an exchange agreement) under Swiss private law.

The transaction consists of one or several obligation(s) (*Verpflichtungsgeschäft*) to transfer (a) one or several assets (including, as the case may be, claims) and/or (b) one or several liabilities as well as, (c) as the case may be, entire agreements. There are no formalities to be observed for this obligation, except where real property is involved (public deed), and/or if all or substantially all of the assets of a

1. Note that, if a company transfers all or substantially all of its assets and the shareholders do not have the intention to maintain any operations within the company, this would be deemed to be a factual liquidation of the company, requiring a shareholders’ resolution taken in front of a public notary in the form of a public deed and a registration of the liquidation with the commercial register. If these formalities are not respected, any transactions implemented in connection with the asset transfer might be deemed void from a corporate law point of view. In addition, whether these formalities are respected or not, the tax authorities would deem this transaction a liquidation triggering a joint and several liability of the liquidators (i.e., the directors) for any outstanding corporate taxes.

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company are concerned so that it stops being a going concern (a so-called factual liquidation) (*see* footnote 1 on pg. 1).

In order to perfect the singular succession, all items must be transferred according to the applicable rules (*Verfügungsgeschäft*), which are (under Swiss law, depending on the location of the items, foreign law might also be considered):

- (1) movable assets and bearer securities: transfer of title, i.e., transfer of possession or so-called transfer surrogates (such as the handing over of the keys to a building), and if held by third parties, a notification to the third party (*Besitzanweisung*);
- (2) real property: entry in land register;
- (3) receivables: written assignment (and, in order to be binding on the debtor: notification);
- (4) registered securities: endorsement or assignment and transfer of possession;
- (5) liabilities: consent of creditor (expressly or impliedly), as otherwise the transferor is not released;
- (6) entire agreements: consent of counterparty;
- (7) book-entry securities: securities must be credited on the account of the acquirer;
- (8) ledger-based securities (tokens): according to the provisions of the registration agreement.

If a business unit is transferred, the employment relationships linked to this unit are transferred by operation of law, notwithstanding their being mentioned in the agreement or not. The concerned employees must be notified of the transfer and, if measures affecting their employment are intended, consulted prior to the transfer. If they refuse the transfer, their employment agreement ends with the legal notice period. Transferor and transferee are jointly and severally liable for claims resulting from the employment relationship which accrue until the time when the employment agreement could be legally terminated.

(Partial) Universal Succession (Articles 69 *et seq.* SMA)

PARTIES

The concept of an asset transfer according to the SMA (hereafter, ‘SMA transfer’) is only available for transferors that are companies registered in the commercial register, limited partnerships for collective investment schemes, open-ended investment companies (SICAV) and registered individual enterprises, but not to unregistered individuals, simple partnerships, or branch offices. Special rules apply for foundations, pension schemes and in case public law entities are involved. The acquirer can be any private law legal entity, public law institution as well as pension funds (however, only in the case of transfers of assets by other pension funds).

OBJECT OF TRANSFER

The concept is available for any form of asset transfer notwithstanding if (subject to the reservation of the misuse of rights) only one or many assets are transferred. It is not required that the assets form a business unit (*Betriebsteil*) or an aggregate of things (*Sachgesamtheit*). Even completely discretionarily mixed bags of items can be transferred.

AGREEMENT

The basis for the transfer is an APA/ATA. The written form is required, except where real property is to be transferred (public deed) and/or if all or substantially all of the assets of a company are concerned so that it ceases being a going concern (*see* footnote 1 on pg. 1). The necessary elements of the agreement are listed in the SMA. The most important part of the agreement is the inventory of assets and liabilities (if liabilities shall be transferred), which is usually framed out into an annex to the agreement.

Separate lists are required for real property, securities and intangible assets (intellectual property rights, know-how and goodwill, (if any), as well as for employees (which, however, if a business unit is transferred, are transferred by operation of law, notwithstanding if listed or not).

In practice, the contracts to be transferred also are listed in a separate annex. Furthermore, the aggregate value of the assets and liabilities needs to be set out in the agreement, whereby it is important to note that the delta between assets and liabilities needs to be positive, as otherwise, transfer is not possible. If there is a compensation, it has to be set out in the agreement as well.

Additional further typical, but voluntary, elements of the APA/ATA are catch-all fiduciary, setup type of clauses for forgotten or not validly transferred items because, according to the law, those assets and claims that cannot be attributed according to the inventory remain with the transferor. This also may include obligations to forward payments that are erroneously sent to transferor.

It is often discussed how exactly the assets and liabilities must be described. With regard to assets and liabilities of a business unit, a balance sheet is sufficient.¹ With regard to contracts, it depends on the practice of the local cantonal commercial register. Whereas most registers now seem to accept anonymised descriptions of the agreements to be transferred, there still may be some that do not or will have specific requirements.

This is particularly relevant not only for the transfer of bank accounts due to the banking secret, information subject to data protection laws such as personal or sensitive data but also for other confidential or sensitive agreements, where it is paramount that an anonymous transfer is possible, as otherwise, the transaction is not possible by way of an SMA asset transfer. All items that are not required to go into the APA/ATA by law (e.g., representations, warranties, indemnities) can be framed out into a separate agreement that does not have to be filed with the commercial register.

1. Commercial Register of the Canton of Zürich.

CORPORATE REQUIREMENTS

The main corporate requirement is the consent of the ‘supreme executive or administrative bodies’ (*oberstes Leitungs- oder Verwaltungsorgan*) of the involved companies. In a stock corporation, this is the board of directors. No separate board resolutions are required if all board members (transferor and transferee) sign the agreement or the application for registration with the commercial register.

The consent of the shareholders is only required if the transaction leads to a change of the corporate purpose, factual liquidation (*see* footnote 1 on pg. 1), or if directors on both sides are identical or otherwise conflicted; however, except in the case where the transferred assets represent less than 5% of the total assets of the transferring company, the shareholders of the transferor must be informed of the asset transfer in an annex to the financial statements or at the next shareholders’ meeting. Furthermore, there is only an obligation to provide information for companies, but not for foundations, sole proprietorships entered in the commercial register and institutes under public law. No audit report or creditors call is required.

COMPLETION

The asset transfer becomes legally effective with the entry in the commercial register at the statutory seat of the transferring entity.¹ This ‘publicity’ replaces the publicity generated in singular succession transactions by the respective means of disposal (e.g., possession, notification, and endorsement). This also means that the agreement, including inventory and compensation, is publicly available for review, which sometimes deters transferors from choosing this transaction setup and opting for a singular succession instead.

Upon approval by the Federal Office for the Commercial Register, the legal effect of the transaction among the parties retroactively takes place as of the date of the entry in the journal (*Tagesregister*). For third parties, the day of the publication in the Swiss Official Gazette of Commerce (SOGC) is relevant. As of this day, all parties are deemed to be familiar with the entries in the commercial register (public reliance).²

1. In the case of an incorporation or capital increase in kind via asset transfer or insofar as the consideration for a transfer of assets in turn consists in a transfer of assets, the registration is exceptionally also made by the acquiring entity at the commercial register of its seat.
2. If the exact date of registration is important, e.g., due to a going-live of software or information to customers etc., the documents (i.e., agreement incl. inventory) need to be previewed by the register and the registration date has to be co-ordinated with the register. Allow a few weeks for this, especially if registration is requested on 30 June (last date for fiscally/accounting-wise ‘retroactive’ effect as per 1 January) or 31 December (festive season closing times).

ASPECTS WORTH NOTING

Employees

If a business unit is transferred, the employment relationships linked to this unit are transferred by operation of law, notwithstanding their being on a schedule to the ATA. Employees¹ of the transferor and of the transferee must be notified and, as the case may be, consulted. If they refuse the transfer, their employment agreement ends with the legal notice period.

A longer (or shorter) contractual notice period or a fixed term of the employment relationship is irrelevant. Transferor and transferee are jointly and severally liable for claims resulting from the employment relationship which accrue until the time when the employment agreement could be legally terminated. If the employees are not consulted, they might (under certain circumstances) block the transaction by requesting a commercial register ban.

Transfer of Contracts/Change of Control Clauses

Whereas, under an SMA transfer, in principle, the contracts listed in the agreement are transferred without the consent of the counterparty with the registration of the transfer in the commercial register,² in doctrine, there are various opinions on what is to happen with agreements with change of control and non-assignment clauses: these clauses do not hinder the transfer of the agreement, but the agreement may be terminated by a counterparty who did not consent. Furthermore, damage claims might be triggered if the transfer leads to a damage of the counterparty.³

Pending Court Procedures

Article 83 of the Civil Procedure Code provides that the transferee may enter into pending court procedures regarding transferred claims or assets without the consent of the counterparty.

Cross-border Transactions

Cross-border asset transfers pursuant to the SMA are not possible if the law of the foreign party does not recognise a similar concept (which is the case for many

1. It is to be noted that, by law, the employee representation body is to be notified and consulted. Only if such employee representation body does not exist, are the employees to be notified and consulted directly. In practice, employee representation bodies rarely exist.
2. There is an exception for lease agreements of commercial premises where the law provides that a transfer of an agreement is only possible with the consent of the landlord who, however, may only withhold the consent for important grounds. It is disputed in doctrine whether this specific approval requirement overrides the general SMA rule that contracts are transferred without consent of the counterparty. In practice, if commercial leases form part of the items to be transferred, consent from the landlord should, therefore, always be sought.
3. Hence, it is always advisable to request the transferor to seek the consent of the counterparty for the transfer of agreements with change of control clauses prior to closing, at least for such agreements that are deemed material for the business to be transferred.

countries, such as Germany). Even if a transfer is possible, there are certain additional and onerous requirements under the International Private Law Act that often make parties opt for an asset transfer by singular succession in cross-border transactions.

Governmental Authorisations

There are various situations where government authorities must be consulted in connection with asset transfers. If regulated entities (such as financial institutions) are involved, the consent of the Financial Market Supervisory Authority (FINMA) may be required.

Merger control approvals may come into play if certain turnover thresholds of the involved entities are exceeded. If residential real estate is to be transferred, approval requirements may apply under the so-called *Lex Koller* and, if polluted sites are to be transferred, local environmental authorities may have to consent.

Permits

Individual government permits and authorisations usually stay with the transferor, whereas permits that are linked to an asset are, in general, transferred with the asset (e.g., construction permit).

Foreign Assets

Assets located outside of Switzerland and agreements that are subject to foreign law may need to be transferred according to the law applicable to the asset or agreement in question in order for the transfer to be valid under that law.

Pro Memoria (Article 181 CO)

Article 181 CO provides that, if an aggregate of assets (*Vermögen*) or a business (*Geschäft*) with assets and liabilities is transferred, all liabilities¹ pertaining to the business/aggregate of assets are transferred by operation of law without consent of creditors as soon as they are notified² and the transferor remains jointly and severally liable for three years for transferred liabilities. This provision only applies to an organically self-contained part of the assets or business, not to mixed bags of assets and liabilities. It is not a case of (partial) universal succession but a special case of debt assumption (*Schuldübernahme*).

Article 181 CO is *not applicable* on asset transfers of commercial companies, corporations, associations, foundations and individual enterprises registered in the commercial register. These can choose between singular succession and (partial) universal succession pursuant to the SMA, as set out above. The

1. Article 181 CO has no consequence for the transfer of assets. They must be transferred individually.
2. This means that the consequences of Article 181 CO can be avoided if the creditors are not notified of the transfer.

possible remaining transferors are thus individuals, non-registered associations, or a simple partnership.

Commentary to Template Agreements

ARTICLE 1 (ASSET TRANSFER)

This clause contains the obligation to transfer (*Verpflichtungsgeschäft*) and determines whether the asset transfer is made by singular succession or according to the SMA.

ARTICLE 2 (TRANSFERRED ASSETS)

This clause determines the type of items that are to be transferred under the agreement, and whether they are part of a business unit or not. This is important to point out because if it is a business unit, this has consequences on the employment relationships attached to it. However, even if it is not mentioned, and even if the parties are not even aware that they are transferring a business unit, if they do transfer a business unit, the employment relationships attached to it will be transferred by operation of law.

Usually, it is stipulated in this clause whether liabilities will be transferred. For the assets, it is usual to refer to an annex containing an inventory of assets (and, as the case may be, liabilities).

It is often discussed how exactly the assets (and liabilities) must be described. In a singular succession, the parties have quite a discretion and can decide to be vague, as long as the scope of items to be transferred is determinable in good faith (i.e., ‘all assets and liabilities attached to the XY department’). In an SMA transfer, with regard to assets and liabilities of a business unit, a balance sheet is sufficient.¹ With regard to contracts, it depends on the practice of the local cantonal commercial register.

In SMA transfers, if securities, real estate or intangible assets shall be transferred, they must be listed in separate annexes. Furthermore, the value of all the assets being transferred has to be explicitly set out in the agreement.

Further items are usually dealt with separately in more detail, such as the employee relationships, the contracts, and the liabilities (if any).

Whereas under the SMA, items that are not explicitly listed in the agreement (or its annexes) remain with the transferor by law, under a singular succession setup, the parties also may agree that in case of doubt, an asset will belong to the transferee. In any case, it is advisable to explicitly say what happens with forgotten items or such items that have not been transferred for some reason although the parties wanted them to be part of the transfer (‘wrong pocket clause’).

1. Commercial Register of the Canton of Zürich.

ARTICLE 3 (COMPENSATION)

Compensation is not a mandatory element of the asset transfer agreement. However, if there actually is a compensation, it has to be stipulated in the APA, which means that it will be accessible to the public for review in the case of an SMA transfer as part of the commercial register files, whereas a singular succession agreement need not be disclosed to the public. In the proposed clause, the compensation is in the form of a purchase price.

ARTICLE 4 (EMPLOYMENT AGREEMENTS)

As set out above, if a business unit is transferred, even if it is not mentioned in the agreement (and even if the parties are not even aware that they are transferring a business unit), the employment relationships attached to it will be transferred by operation of law. Usually, an ATA does mention the employees or what will happen with the employment relationships by referring to the applicable provisions of the law.

Frequently, employees also are listed in an annex. An annex is mandatory in SMA transfers. It is to be noted that, personal data of the employees must be anonymous due to data protection reasons. For both transaction setups, the law stipulates that the employees must be informed about the transfer. If no changes to their employment (including pension funds) are intended, the notification is sufficient. If, however, ‘measures affecting the employees are envisaged’, the employees must be consulted prior to closing (*see* footnote 1 on pg. 9). The results of the consultation must be considered by the involved parties (but not necessarily implemented). This process on average takes up to two weeks. Under a singular succession, it is sufficient to notify and consult the transferred employees only whereas under an SMA transfer, the employees of the transferee must be notified and consulted as well.

If any of the employees refuse the transfer, their employment agreements end with the legal notice period. A longer (or shorter) contractual notice period or a fixed term of the employment relationship is irrelevant. Transferor and transferee are jointly and severally liable for claims resulting from the employment relationship which accrue until the time when the employment agreement could be legally terminated.

This liability can be internally apportioned differently among the parties. Under an SMA transfer only, if the employees are not consulted, they might (under certain circumstances) block the transaction by requesting a commercial register ban.

The parties can agree on other, more practical aspects of the employment relationships, such as the payment of vacation and overtime credits or accrued salary and bonus payments.

Ideally, such claims are settled prior to closing. If this is not possible, e.g., for accounting and payroll reasons (if the closing happens in the middle of a month), the parties should agree on an indemnity mechanism for claims that arise prior to closing and for which the transferee usually does not want to be liable (*see* Article 8).

ARTICLE 5 (CONTRACTS)

The contract section is probably the most important difference between a singular succession and an SMA transfer from a legal point of view. Under an SMA transfer, the contracts are transferred by operation of law upon registration of the transfer with the commercial register;¹ under a singular succession, the consent of the counterparty is required for a valid transfer.

In doctrine, there are different opinions on what happens with agreements with change of control/non-assignment clauses under an SMA transfer. The authors' view is that these clauses do not hinder transfer of the agreement, but the agreement may be terminated by a counterparty who did not consent.

Furthermore, damage claims might be triggered if the transfer leads to damage for the counterparty. Hence, it is always advisable to request the transferor to seek the consent of the counterparty for the transfer of agreements with change of control clauses prior to closing, at least for such agreements that are deemed material for the business to be transferred.

In singular succession transactions, the consent of the counterparty needs to be sought for all (material) agreements, even if they do not feature a change of control clause. The wording of the notification should be discussed and agreed upon among the parties, as this can be a strategically important issue: depending on how the counterparty perceives the transferee, it may or may not consent to the transfer, or be tempted to request a transfer fee or a re-negotiation of certain contractual terms it is not happy with.

In transactions with a great number of agreements to be transferred, often the counterparties are not requested to explicitly consent to the transfer but instead are notified of the transfer with the information that, absent an explicit declaration to the contrary, the counterparty is deemed to accept the transfer.

The contracts are usually listed in a separate annex. It is often discussed how exactly the contracts must be described. The answer is that this depends on the practice of the local cantonal commercial register. Whereas most registers now appear to accept anonymised descriptions of the agreements to be transferred, there may be some that do not or that have specific requirements.

This is particularly relevant for the transfer of bank accounts due to the banking secret and for other confidential or sensitive agreements, where it is paramount that an anonymous transfer be possible, as otherwise, the transaction is not possible by way of an SMA asset transfer. As set out above, whereas, under the SMA, contracts that are not explicitly listed in the agreement (or its annexes) remain with the transferor by law, under a singular succession arrangement, the parties may agree that, in case of doubt, a contract will belong to the transferee. However, as long as no third-party consent has been obtained for such transfer, it is not enforceable against the counterparty.

1. There is an exception for lease agreements of commercial premises where the law provides that a transfer of an agreement is only possible with the consent of the landlord who, however, may only withhold the consent for important grounds. It is disputed in doctrine whether this specific approval requirement overrides the general SMA rule that contracts are transferred without consent of the counterparty. In practice, if commercial leases form part of the items to be transferred, consent from the landlord should, therefore, always be sought.

ARTICLE 6 (LIABILITIES)

For liabilities, the same is true as for the contracts. Whereas, under an SMA transfer, liabilities are transferred by operation of law upon registration of the transfer with the commercial register, under a singular succession, the consent of the creditor is required for a valid transfer (*externe Schuldübernahme*).

Instead of asking for explicit consent of the creditor, under singular succession agreements, the parties often opt for a ‘silent’ transfer (*interne Schuldübernahme*), i.e., foregoing a notification of the creditor and agreeing on an indemnity. In this case, if a claim arising from a transferred liability is asserted against the transferor, the transferee is obliged to indemnify the transferor against such claim.

ARTICLE 7 (EXCLUDED ITEMS)

As set out above, whereas, under an SMA, items that are not explicitly listed in the agreement (or its annexes) remain with the transferor by law, under a singular succession, the parties also may agree that in case of doubt, any item forming part of the transferred business unit shall belong to the transferee.

However, in both cases, it sometimes makes sense to specifically exclude certain items from the transfer to assure that they do not transfer by operation of law or otherwise. Note that, in transactions involving polluted sites or even only a business unit that formerly (even in a distant past as there is no statute of limitations on environmental claims) may have operated hazardous plants or machinery, it is advisable to explicitly exclude the transfer of environmental claims from the transfer as otherwise, these claims will stick to the polluting business unit and move to the transferee, even if they have not yet materialised at closing and no one is remotely aware of their existence.

ARTICLE 8 (BENEFIT AND RISK)

The parties have a certain discretion to allocate the passage of benefits and risks of the transfer. This is relevant from a tax and accounting perspective and will only spread effects among the parties, but not towards third parties.

From a tax perspective, the ‘retroactive effect’ of the transfer may not go back further than six months. In practice, the parties often chose the first day of a business year for obvious accounting reasons or use the closing date.

ARTICLE 9 (CLOSING)

The parties are free to determine whether to transfer all assets directly upon signing of the ATA or to stipulate a deferred closing mechanism with the usual clauses regarding conduct between signing and closing (Article 11) and setting a long stop date for closing conditions with a right of termination in case the conditions are not met until that date (Article 13).

Singular successions become legally effective upon implementation of the transfer formalities (Article 14). SMA transfers must be filed with the

commercial register and deploy their legal effect upon registration of the transfer with the commercial register. This filing with the commercial register can be submitted as soon as the board of directors of both parties have approved the agreement. The respective minutes must be submitted to the Commercial Register unless all board members of a party sign the ATA or the commercial register application.

ARTICLE 10 (JOINT AND SEVERAL LIABILITY)

This clause is only relevant for SMA transfers, and it is not required to be explicitly mentioned in the ATA, as it applies by operation of law. Pursuant to Article 75 Paragraph 1 SMA, the transferor is jointly and severally liable, with the transferee, for the debts incurred prior to the transfer with respect to the transferred assets, liabilities and contracts for a period of three years, whereby the claims against the transferor expire at the latest three years after the publication of the transfer in the Swiss Official Gazette of Commerce or, if the claim only becomes due after publication, three years after the due date (Article 75 Paragraph 2 SMA). Under the conditions of Article 75 Paragraph 3 SMA, both parties are obliged to secure these claims. This liability can (and often is) internally be distributed differently among the parties.

ARTICLE 12 (CONDITIONS PRECEDENT TO CLOSING)

As set out above, the parties are free to agree on a deferred closing under both transaction methods. They also can stipulate closing conditions at their discretion. One closing condition that is regularly required under singular succession transactions but not necessary under SMA transfers is the consent of the counterparties to the transfer of the agreements.

ARTICLE 14 (CLOSING DELIVERIES AND ACTIONS)

An SMA transfer becomes effective upon registration with the commercial register. Other than the approval of the board of directors of both parties of the agreement, no items or deliveries are required. The parties are free to determine whether the compensation is to be delivered prior to or after the registration of the transfer with the commercial register (*see* wording of Article 3).

However, in a singular succession transaction, every item must be transferred according to the rules applicable to a transfer under applicable law. This means that:

- (1) tangible assets must be handed over or made accessible or, if they are located at a third party, under notification of such third party;
- (2) claims and intellectual property rights must be assigned by written declaration; and
- (3) for contracts and liabilities, the consent of the counterparty/creditor is required etc.

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In both types of transactions, including catch-all language in order to make sure any ancillary documentation required for a smooth transfer of the operations is transferred is recommended.

ARTICLE 15 (INDEMNITY)

As set out above, the law provides that the transferor and transferee are jointly and severally liable for claims resulting from transferred employment relationships which accrue until the time when the employment agreement could be legally terminated and, under SMA transfers, that the transferor be jointly and severally liable with the transferee for the debts incurred prior to the transfer for three years.

This often does not reflect the intentions of the parties, who internally prefer to stipulate a ‘clean break’ with a liability of the transferee for all claims and liabilities of third parties and employees related to the transferred business arising after the closing, whereas the transferor will be solely responsible for claims of third parties and employees that have arisen prior to closing (with the obvious exception of such liabilities that have been explicitly transferred to the transferee). The parties can agree on a mutual indemnity in this sense, but it will not be binding on third parties.

ARTICLE 16 (REPRESENTATIONS AND WARRANTIES) AND ARTICLE 17 (REMEDIES)

The representations and warranties (and, as the case may be, indemnities) that are typically given under ATAs and in the corresponding remedy section do not differ from customary share-purchase agreements (with the exception that no title chain representations are necessary).

Therefore, these clauses are not specifically discussed here. Representations and warranties must be customised to the assets and contracts being transferred and reflect the findings of a due diligence review of these items.

ARTICLE 18 (COVENANTS)

This clause deals with the issue of assets and contracts that are not validly transferred as intended by the parties for any reason. This can happen because the transfer is not legally possible because not all transfer requirements under applicable law have been met or simply because the item was forgotten.

There also can be further requirements to perfect a transfer that is already legally effective, such as the registration of transferred IP in the competent registers. For these cases, the parties (and in particular, the transferor) undertake to do what they can to make the transfer or registration happen.

The third paragraph specifically deals with contracts that were not validly transferred because the consent of the counterparty was not obtained. This issue does not only arise in singular succession transactions but also in SMA transfers, e.g., if an agreement is subject to foreign law that does not allow a partial

universal succession or if it is an agreement that has been entered into due to specific capacities of the transferor that the transferee does not fulfil (*ad personam* agreements). It also may apply in cases where agreements contain change of control clauses, even if such clauses should not hinder the transfer under Swiss law.

In all these cases, the transferor continues to hold the contract on a fiduciary basis on behalf, for the benefit and risk, of the transferee. In the proposed clause, the transferor is not allowed to terminate the agreement without the consent of the transferee, but it also is possible to say that the transferor may terminate the agreement, e.g., if, after a certain time, consent has not been obtained despite best efforts.

ARTICLE 19 (FREE DISPOSAL)

This clause is only relevant if the assets are transferred in the context of an incorporation or capital increase by contribution in kind (Article 634 Paragraph 1 Nr. 3 CO).

ARTICLE 20 (MISCELLANEOUS)

These are typical standard provisions that need not be discussed specifically here. The confidentiality clause (Article 20.1) is only relevant for singular succession transactions as the ATA under an SMA transfer is publicly available.

With regard to the form requirements (Article 20.2) please refer to the sections “Singular Succession” and “Agreement”. As to the applicable law clause (Article 20.5) bear in mind that assets located outside of Switzerland and agreements that are subject to foreign law may need to be transferred according to the law applicable on the asset or agreement in question in order for the transfer to be valid under that law.

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Asset Transfer Agreements under Swiss Law

Chapter 59 B. Forms and Documents

Oliver Künzler, Benjamin Dürig, and Valérie Berger

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ASSET TRANSFER AGREEMENTS UNDER SWISS LAW

1. Asset Purchase Agreement

Oliver Künzler, Benjamin Dürig, and Valérie Berger

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ASSET TRANSFER AGREEMENTS UNDER SWISS LAW

Asset Purchase Agreement dated []

Between [] (the ‘Transferor’)

and

[] (the ‘Transferee’)

(each a ‘Party’ and together, the ‘Parties’)

Singular Succession	SMA Transfer
Preamble	
[. . .]	[. . .]
1. Asset Transfer	
<p>The Transferor hereby undertakes to sell and transfer assets[, liabilities] and contracts in accordance with the provisions of this Asset Transfer Agreement (the ‘Agreement’) to the Transferee (the ‘Transfer’).</p> <p>The Transfer is not a transfer of a business with assets and liabilities in the sense of Article 181 of the Swiss Code of Obligations (‘CO’) or Article 69 <i>et seq.</i> of the Swiss Merger Act (‘SMA’), but an assignment and transfer [and assumption] of certain assets [, liabilities] and contracts by individual transfers [and assumptions]. The Parties expressly exclude the application of Article 181 CO and Articles 69 <i>et seq.</i> SMA to the transactions contemplated by this Agreement.</p>	<p>The Transferor hereby transfers, within the meaning of Articles 69 <i>et seq.</i> of the Swiss Merger Act (‘SMA’), assets [, liabilities] and contracts in accordance with the provisions of this Asset Transfer Agreement (the ‘Agreement’) to the Transferee (the ‘Transfer’).</p>
2. Transferred Assets	
<p>The transferred assets (the ‘Assets’) comprise all assets necessary for the operation of [. . .] [and all liabilities related thereto (the ‘Liabilities’)] (the</p>	<p>The transferred assets (the ‘Assets’) comprise the assets necessary for the operation of [. . .] [and all liabilities related thereto (the ‘Liabilities’)] (the</p>

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Singular Succession	SMA Transfer
<p>‘Business’), including (without limitation) the assets [and liabilities] listed in the inventory (the ‘Inventory’ – <u>Annex 1</u>).</p> <p>[No liabilities are transferred.]</p>	<p>‘Business’) as listed in the inventory (the ‘Inventory’ – <u>Annex 1</u>).</p> <p>The Assets do not include any securities, real estate or intangible assets which must be listed individually.</p> <p>[No liabilities are transferred.]</p> <p>The value of the assets [corresponds to their book value] and amounts to a total of CHF [...] as at [valuation date].</p>
<p>3. [Compensation]</p>	
<p>The purchase price for the Assets amounts to CHF [...] (the ‘Purchase Price’).</p> <p>The Purchase Price shall be transferred to a bank account designated by the Transferor on the Closing Date.</p>	<p>The purchase price for the Assets amounts to CHF [...] (the ‘Purchase Price’).</p> <p>The Purchase Price shall be transferred to a bank account designated by the Transferor within [(. . .) calendar days after/prior to] the Closing Date.</p>
<p>4. Employment Agreements</p>	
<p>The employment relationships with the employees of the Transferor, which are attributable to the Business and are listed in <u>Annex 2</u> (the ‘Employees’), shall be transferred to the Transferee with all rights and obligations pursuant to Article 333 CO.</p> <p>The Transferor shall inform or consult (as applicable) its employees in accordance with Article 333a CO in due time prior to the Closing Date.</p> <p>If an Employee exercises his/her right of refusal, the employment relationship shall nevertheless be transferred pursuant to Article 333 Paragraph 2 CO, but shall be terminated upon expiry of the statutory notice period.</p> <p>[The Transferor is obliged to settle the vacation and overtime credits as well as claims to bonuses, expenses, commissions and hourly wages of the</p>	<p>The employment relationships with the employees of the Transferor, which are attributable to the Business and are listed in <u>Annex 2</u> (the ‘Employees’), shall be transferred to the Transferee with all rights and obligations pursuant to Article 333 of the Swiss Code of Obligations (‘CO’).</p> <p>The Parties shall inform or consult (as applicable) their employees in accordance with Article 77 SMA in conjunction with Article 333a CO in due time prior to the Closing Date.</p> <p>If an Employee exercises his/her right of refusal, the employment relationship shall nevertheless be transferred pursuant to Article 333 Paragraph 2 CO, but shall be terminated upon expiry of the statutory notice period.</p> <p>[The Transferor is obliged to settle the vacation and overtime credits as well as</p>

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<p>transferred Employees directly as of the Closing Date and to pay them to the Employees. If payment to the Employees is not permitted for legal reasons, the Transferor undertakes to transfer the corresponding amount to the Transferee within 30 calendar days after the Closing Date.]</p>	<p>claims to bonuses, expenses, commissions and hourly wages of the transferred Employees directly as of the Closing Date and to pay them to the Employees. If payment to the Employees is not permitted for legal reasons, the Transferor undertakes to transfer the corresponding amount to the Transferee within 30 calendar days after the Closing Date.]</p>
<p>5. Contracts</p>	
<p>All contractual relationships relating to the Business are set out in <u>Annex 3</u> (the ‘Contracts’) and are hereby transferred by the Transferor to the Transferee, which shall assume them with all rights and obligations as per Closing.</p> <p>The Transferor shall inform the counterparties about the transfer of the Contracts prior to the Closing Date and seek their consent to the transfer. The Transferor shall submit the wording of the notification to Transferee for prior approval.</p> <p>[Contractual relationships that are not expressly listed in this Agreement (including its appendices) shall remain with the Transferor.]</p>	<p>All contractual relationships relating to the Business are set out in <u>Annex 3</u> (the ‘Contracts’) and are hereby transferred by the Transferor to the Transferee, which shall assume them with all rights and obligations as per Closing.</p> <p>The Parties shall jointly inform the counterparties about the transfer of the Contracts immediately after the Closing Date.</p>
<p>6. [Liabilities]</p>	
<p>In case of any claim brought or threatened by a third party against the Transferor pursuant to any Liability (a ‘Claim’), the Transferor shall notify the Transferee of such Claim within 20 calendar days of becoming aware of such Claim and the Transferee shall assist the Transferor in the defence of and hold the Transferor harmless against such Claim.</p> <p>The Transferor shall ensure that the Transferee shall be provided with all materials, information and assistance relevant in relation to the Claim, be</p>	<p>N/A</p>

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<p>given reasonable opportunity to comment or discuss with the Transferor any measures which the Transferee proposes to take or to omit in connection with a Claim. The Transferor shall keep the Transferee informed and consult with the Transferee before any Claim is settled.</p> <p>The Transferee’s obligation to indemnify the Transferor for a Claim shall be reduced insofar and to the extent that:</p> <ul style="list-style-type: none"> a) the Transferor failed to use its commercially reasonable efforts to mitigate its loss or damage in respect thereof as required by law; or b) the Transferor has recovered from any third person, including, but not limited to an insurer, costs, expenses or damages in respect of any matter to which a Claim relates. 	
7. [Excluded Items]	
<p>The following assets [and liabilities] shall be excluded from the scope of the Transfer and, therefore, not qualify as Assets [or, as the case may be, Liabilities]:</p> <p>[...]</p>	<p>The following assets [and liabilities] shall be excluded from the scope of the Transfer and, therefore, not qualify as Assets [or, as the case may be, Liabilities]:</p> <p>[...]</p>
8. Benefit and Risk	
<p>Benefit and risk in the Business shall pass to the Transferee [on the Closing Date/on 1 January 20XX].</p> <p>Consequently, all corresponding acts and business transactions of the Business shall be deemed to have taken place for the account and at the risk of the Transferee as of [the Closing Date/on 1 January 20XX] and shall be accounted for accordingly.</p>	<p>Benefit and risk in the Business shall pass to the Transferee [on the Closing Date/on 1 January 20XX].</p> <p>Consequently, all corresponding acts and business transactions of the Business shall be deemed to have taken place for the account and at the risk of the Transferee as of [the Closing Date/on 1 January 20XX] and shall be accounted for accordingly.</p>

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9. Closing	
<p>Subject to the fulfilment or waiver of the conditions set out in Clause 12, the Transfer shall take place [upon execution of this Agreement by the Parties/on [...] at a place to be determined by the Parties] (the ‘Closing Date’).</p>	<p>The Transfer shall become legally effective upon its entry in the Commercial Register of the Canton of [...] (the ‘Closing Date’).</p> <p>The Transferor shall ensure that the Transfer is filed with the Commercial Register of the Canton of [...] [upon execution of this Agreement/upon fulfilment or waiver of the conditions set out in Clause 12].</p> <p>The board of directors of the Transferor and the board of directors of the Transferee have approved this Agreement.</p>
<p>Subject to the fulfilment or waiver of the conditions set out in Clause 12, the Transfer shall take place on [...]at a place to be determined by the Parties (the ‘Closing Date’).</p>	<p>The Transfer shall become legally effective upon its entry in the Commercial Register of the Canton of [...] (the ‘Closing Date’).</p> <p>The Transferor shall ensure that the Transfer is filed with the Commercial Register of the Canton of [...] [upon execution of this Agreement/upon fulfilment or waiver of the conditions set out in Clause 12].</p> <p>The board of directors of the Transferor and the board of directors of the Transferee have approved this Agreement.</p>
<p>Subject to the fulfilment or waiver of the conditions set out in Clause 12, the Transfer shall take place [at the date hereof/on [...]] at a place to be determined by the Parties (the ‘Closing Date’).</p>	<p>The Transfer shall become legally effective upon its entry in the Commercial Register of the Canton of [...] (the ‘Closing Date’).</p> <p>The Transferor shall ensure that the Transfer is filed with the Commercial Register of the Canton of [...] [upon execution of this Agreement].</p> <p>The board of directors of the Transferor and the board of directors of the</p>

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Singular Succession	SMA Transfer
	Transferee have approved this Agreement. The respective minutes shall be submitted to the Commercial Register of the Canton of [. . .], unless all board members members of a Party sign this Agreement.
10. Joint and Several Liability	
N/A	<p>Pursuant to Article 75 Paragraph 1 SMA, the Transferor is jointly and severally liable with the Transferee for the debts incurred prior to the Transfer with respect to the Assets and the Contracts for a period of three years, whereby the claims against the Transferor expire at the latest three years after the publication of the Transfer in the Swiss Official Gazette of Commerce or – if the claim only becomes due after publication – three years after the due date (Article 75 Paragraph 2 SMA).</p> <p>Under the conditions of Article 75 Paragraph 3 SMA, both Parties are obliged to secure these claims.</p>
11. Conduct of Business between Signing and Closing	
[only relevant in case of deferred Closing]	[only relevant in case of deferred Closing]
12. Conditions Precedent to Closing	
<p>The respective obligations of the Transferor to purchase the Business shall be subject to the satisfaction or waiver, on or by the Closing Date, of the following conditions:</p> <p>a) The Seller shall have provided in writing (including by way of PDF scans or by other electronic means of evidence) the unconditional consent of all counterparties to the Contracts to the transfer of such Contracts onto the Transferee without any extra cost or fees (the ‘Consent’).</p> <p>b) [. . .]</p>	[only relevant in case of deferred Closing]

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13. Right of Termination	
[only relevant in case of deferred Closing]	[only relevant in case of deferred Closing]
14. Closing Deliveries and Actions	
<p>At the Closing Date, [concurrently with, and in exchange for, the payment of the Purchase Price,] the Transferor shall:</p> <ul style="list-style-type: none"> a) procure for the passing of title to the tangible Assets by handover of the tangible Assets to the Purchaser or by a surrogate for the transfer of possession (such as the delivery of keys or notification of third party possessors); b) [deliver to the Transferee written assignment declarations for the claims and IP rights forming part of the Assets (the ‘Receivables’ and ‘IP Rights’);] c) deliver to the Transferee the Consents; and d) as far as permitted by law, deliver to the Transferee any and all writings, data, records and any other documents and information regarding the Business, Assets, [Liabilities,] Contracts and Employees and any related know-how necessary and useful for the Transferee to reasonably use and exploit the Business. <p>For the avoidance of doubt, the Parties confirm that all matters at the Closing Date will, irrespective of their order, be considered to take place simultaneously and in exchange and no delivery of any document, asset or funds will be deemed complete until all transactions and deliveries of documents, assets and funds required by this Agreement to take place at the Closing Date are completed.</p>	<p>At the Closing Date, and as far as permitted by law, [concurrently with, and in exchange for, the payment of the Purchase Price,] the Transferor shall deliver to the Transferee any and all writings, data, records and any other documents and information regarding the Business, Assets, [Liabilities,] Contracts and Employees and any related know-how necessary and useful for the Transferee to reasonably use and exploit the Business.</p>

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15. Indemnity	
[With the exception of the Claims,] the Transferor undertakes to fully indemnify the Transferee in connection with any claims of third parties and Employees related to the Business, whether justified or unjustified, which are established or arise prior to the Closing Date.	[With the exception of the claims related to the Liabilities,] the Transferor undertakes to fully indemnify the Transferee in connection with any claims of third parties and Employees related to the Business, whether justified or unjustified, which are established or arise prior to the Closing Date.
16. Representations and Warranties	
[include representations and warranties appropriate for the assets to be transferred]	[include representations and warranties appropriate for the assets to be transferred]
17. Remedies	
[include appropriate remedies for breach of representations and warranties and, as the case may be, further indemnities]	[include appropriate remedies for breach of representations and warranties and, as the case may be, further indemnities]
18. Covenants	
<p>The Parties undertake, to the extent that the transfer of the Assets and/or Contracts does not validly take place at the Closing Date for any reason, to make all declarations, perform all acts, conclude contracts and pass all resolutions necessary for the transfer of the Assets and/or Contracts concerned after the Closing Date. The same applies to other assets and contracts which are necessary for the Business but which have not been transferred under this Agreement for any reason.</p> <p>The Transferor further undertakes to perform all acts still necessary or reasonably requested by the Transferee, namely acts of transfer, applications for registrations and the like, or to obtain consents from third parties, also after the Closing Date, in order to complete and perfect the transfer of the Assets</p>	<p>The Parties undertake, to the extent that the transfer of the Assets and/or Contracts does not take place by operation of law for any reason pursuant to Article 73 Paragraph 2 SMA, to make all declarations, perform all acts, conclude contracts and pass all resolutions necessary for the transfer of the Assets and/or Contracts concerned on the Closing Date and, if necessary, also thereafter. The same applies to other assets and contracts which are necessary for the Business but which have not been transferred under this Agreement for any reason.</p> <p>The Transferor further undertakes to perform all acts still necessary or reasonably requested by the Transferee, namely acts of transfer, applications for registrations and the like, or to obtain consents from third parties, also after</p>

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<p>and/or Contracts in the best possible way in accordance with the provisions of this Agreement.</p> <p>To the extent that a transfer of a Contract is not possible, the Transferor shall hold the Contract in trust for the Transferee and all profits, income, losses, expenses, taxes or other items arising therefrom as of the Closing Date shall be for the account of the Transferee without any processing fee being due to the Transferor and the Transferee shall indemnify the Transferor for any losses, expenses, taxes or other items arising therefrom as of the Closing Date. The obligations and liabilities under any such Contract to the respective counterparties shall be diligently performed by the Transferor, with the assistance of the Transferee, for the benefit and account of the Transferee, and the rights and benefits under any such Contract shall be asserted and received by the Transferor for the benefit and account of the Transferee in accordance with the instructions of the Transferee. The Transferor shall terminate any such Contract upon the direction of the Transferee in accordance with its terms.</p>	<p>the Closing Date, in order to complete and perfect the transfer of the Assets and/or Contracts in the best possible way in accordance with the provisions of this Agreement.</p> <p>To the extent that a transfer of a Contract is not possible, the Transferor shall hold the Contract in trust for the Transferee and all profits, income, losses, expenses, taxes or other items arising therefrom as of the Closing Date shall be for the account of the Transferee without any processing fee being due to the Transferor and the Transferee shall indemnify the Transferor for any losses, expenses, taxes or other items arising therefrom as of the Closing Date. The obligations and liabilities under any such Contract to the respective counterparties shall be diligently performed by the Transferor, with the assistance of the Transferee, for the benefit and account of the Transferee, and the rights and benefits under any such Contract shall be asserted and received by the Transferor for the benefit and account of the Transferee in accordance with the instructions of the Transferee. The Transferor shall terminate any such Contract upon the direction of the Transferee in accordance with its terms.</p>
19. [Free Disposal]	
<p>The Transferor declares that the items covered by this transfer of assets are freely transferable. The Transferee will be able to dispose of them immediately after entry in the Commercial Register.</p>	<p>The Transferor declares that the items covered by this transfer of assets are freely transferable. The Transferee will be able to dispose of them immediately after entry in the Commercial Register.</p>
20. Miscellaneous	
20.1 Confidentiality	
[...]	N/A

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20.2 Written Form	
Amendments and supplements to this Agreement must be made in writing and signed by all Parties.	Amendments and supplements to this Agreement must be made in writing and signed by all Parties.
20.3 Severability, etc.	
[include appropriate standard language]	[include appropriate standard language]
20.4 Cost	
Each Party shall bear its own costs for the preparation of this Agreement.	Each Party shall bear its own costs for the preparation of this Agreement and for the Commercial Register application.
20.5 Applicable Law and Jurisdiction	
<p>This Agreement shall be exclusively governed by and construed in accordance with the substantive laws of Switzerland, excluding its conflict of laws principles and excluding the UN Convention on Contracts for the International Sale of Goods.</p> <p>The exclusive place of jurisdiction for any dispute, claim or controversy arising under, out of or in connection with or related to this Agreement (or subsequent amendments thereof), including, without limitation, disputes, claims or controversies regarding its existence, validity, interpretation, performance, breach or termination, shall be [. . .], Switzerland.</p>	<p>This Agreement shall be exclusively governed by and construed in accordance with the substantive laws of Switzerland, excluding its conflict of laws principles and excluding the UN Convention on Contracts for the International Sale of Goods.</p> <p>The exclusive place of jurisdiction for any dispute, claim or controversy arising under, out of or in connection with or related to this Agreement (or subsequent amendments thereof), including, without limitation, disputes, claims or controversies regarding its existence, validity, interpretation, performance, breach or termination, shall be [. . .], Switzerland.</p>

[Signature page]
[Annexes]