CapLaw

SWISS CAPITAL MARKETS LAW

No. 4/2015

The Launch of the Real Estate Investment Foundation

Reference: CapLaw-2015-41

While Swiss investment foundations have been used quite often for indirect real estate investments of Swiss pension plans in the past, recently, more market participants have been using the real estate investment foundation as an attractive real estate offering for their eligible clients. In addition to the general regulatory and civil law framework that applies to all Swiss investment foundations, some specific requirements must be observed for the launch of real estate investment foundations. This article aims to provide a brief overview on the applicable general and specific requirements.

By Sandro Abegglen / Luca Bianchi / Thomas Hochstrasser

1) Introduction

The tax efficient Swiss (real estate) investment foundation was created in order to serve as a regulated and collective investment structure for Swiss pension funds. Despite its major commercial relevance, it had previously not been subject to a dedicated, specific set of regulations. The structural reform with respect to pension fund regulation introduced a new, specific regulatory framework for the Swiss investment foundation which has had a major impact on its structuring and issuance process. In addition, investment foundations with a particular focus on real estate investments are subject to some specific requirements that one should be aware of when structuring such an investment vehicle.

This article aims to provide an overview of selected features of the legal framework (including documentation) to be observed in connection with the launch of Swiss real estate investment foundations.

2) Statutory Basis of Swiss Investment Foundations

Swiss investment foundations are regulated by articles 53g et seqq. of the Occupational Retirement, Survivors' and Disability Pension Plans Act (OPA). Detailed provisions solely applicable to investment foundations are set out in the Ordinance on Investment Foundations (IFO). Furthermore, the Ordinance on the Supervision of the Occupational Retirement, Survivors' and Disability Pension Plans (OPO 1) contains provisions that are relevant for the establishment of an investment foundation and the applicable regulatory approval process. In addition, the Ordinance on the Occupational Retirement, Survivors' and Disability Pension Plans (OPO 2) must be taken into consideration with respect to provisions regarding conflicts of interests and transactions with related parties that may apply by analogy. Notably, the rules governing (common) civil law foundations are subsidiary applicable. They are set forth in articles 80 et seqq. of the Civil Code (CC). Investment foundations are subject to direct supervision and must be (pre-)approved by the Occupational Pension Supervisory Commission (OPSC).

3) Aspects to be Considered for the Launch of a Real Estate Investment Foundation

a) General Aspects

The most crucial and time-consuming aspect of the creation and launch of an investment foundation is the designing of its internal organization. In practical terms, this means that a broad range of documents have to be produced (and pre-approved by OPSC), including, but not limited to, the foundation regulations, articles, organizational and other regulations, organization chart, description of activities and financial situation, business plan, management agreements, asset management agreements in the case of delegation of asset management to a third party and outsourcing agreements. The external asset manager of an investment foundation requires a regulatory asset management registration with OPSC (which should be distinguished from the regulatory product approval process concerning the investment foundation) or another accepted regulated status (*e.g.*, of a FINMA licensed bank, securities dealer, fund management company, or CISA asset manager).

In its approval process, the OPSC examines whether the irreproachable business conduct of the investment foundation can be granted. In particular, the members of the foundation board and the directors of the investment foundation must establish their know-how, expertise and integrity based on their CVs, their criminal and debt enforcement records, declarations regarding qualified shareholdings and pending proceedings as well as personal references. Not more than one third of the members of the foundation board may consist of persons that are entrusted with the management, administration or asset management of the investment foundation (respectively, their employees).

Investment foundations regularly launch a number of investment groups with different investment strategies. Each investment group is economically independent and managed autonomously. In the extremely unlikely event of the investment foundation's bankruptcy, the assets of each investment group would be segregated in favor of the investors of such investment group. The launch of an additional investment group can be executed much faster than the initial structuring of the entire investment foundation, respectively, the first investment group (subject to a pre-approval of the investment guidelines by OPSC in the event the investment group is involved in alternative investments or foreign real estate).

The circle of potential investors of an investment foundation is limited to tax-exempt occupational pension schemes with their domicile in Switzerland and collective investment schemes which are subject to supervision of the Swiss financial market supervisory authority FINMA, of which the investors' eligibility is restricted to occupational pension schemes. As a result, the investment foundation benefits from the same tax treatment as their investing pension schemes (which should be ensured by a tax ruling from the competent tax authorities).

Once the investment foundation and their investment group(s), respectively, are approved by OPSC and registered in the commercial register, the fundraising period begins. For this stage, the production of a road show presentation, a specific term sheet for each investment group and respective subscription forms or capital commitment agreements comprise the market standard in terms of documents that are used for the fundraising.

b) Aspects Specific to Real Estate Investment Foundations

i) Selected Regulatory Features

The formation of each investment group of a real estate investment foundation is subject to a regulatory prospectus duty. The real estate investment foundation is obliged to publish a prospectus before the subscription period for the relevant real estate investment group begins. Based on the OPSC-accepted market standard, such a prospectus is considerably shorter than, for instance, a prospectus of a FINMA-approved collective investment scheme. The prospectus must be filed with OPSC.

The real estate investment foundation has to establish investment guidelines which define the investment focus, the eligible investments, and the investment restrictions in a complete and coherent manner for each investment group. To the extent the investment focus of an investment group so permits, the investments must be diversified by regions, locations, and types of usages.

Generally, a maximum of 30 % of the assets of an investment group may be invested in real estate developments such as construction projects, construction land, unfinished construction buildings, and buildings subject to reconstruction. However, this threshold does not apply for investment groups that invest exclusively in such real estate projects. Real estate investment foundations are only permitted to purchase undeveloped properties if they are made accessible and the prerequisites for an immediate development are fulfilled.

The articles and regulations of a real estate investment foundation may provide for capital commitments from investors. Thereby, it can ensure that the real estate investment foundation can carry out capital calls at a point in time in the future when the capital will be required.

In principle, a leverage of up to one third of the total market value of the real estate portfolio of the real estate investment foundation is permitted (although it may be increased temporarily under certain conditions).

Transactions with related parties must be concluded at arm's length terms and disclosed to the auditor in connection with the annual audit. The auditor shall examine whether the interests of the investors have been safeguarded with respect to such transactions. In connection therewith, specific restrictions on transactions with related parties may be suggested by OPSC.

ii) Code of Conduct and Transaction Handbook

In addition to the above described documentation of an investment foundation, a number of further documents are regularly established. For instance, a code of conduct may be necessary in order to deal with conflicts of interest. Typically, a code of conduct contains sections on (i) general rules of conduct, (ii) the applicable laws and regulations (specifically, with respect to the rules of conduct), (iii) conflicts of interests (and particular means and methods to avoid them or to exclude that they adversely affect the interests of the investors), (iv) transactions with related parties, (v) further organizational rules, and (vi) rules on market conduct (including own-account/employee transactions). An elaborate code of conduct may not only be a regulatory requirement, but also protects the responsible directors and officers against accusations of having acted under conflict to the detriment of the investment foundation and its investors.

Furthermore, so-called "transaction handbooks" may be created in order to deal with specific issues of proposed types of real estate acquisitions or disposals. The transaction handbook sets out additional and more detailed rules when compared with those included in the general investment process description of the real estate investment foundation. Typically, a transaction handbook contains detailed guidelines and restrictions for the selection of target investments (including, the regulatory and civil law requirements to be observed, the due diligence and evaluation process as well as the settlement and timeline of the transaction). Transaction handbooks are used frequently for large real estate transactions and may become quite sophisticated in case of regulated parties and/or complex package transactions.

4) Conclusion and Outlook

The considerable flexibility in structuring real estate investment foundations, in particular when compared with other regulated investment structures, make them an attractive offering for pension plans seeking exposure to and yield from the real estate market. This, nevertheless, remains true despite the structural reforms that have led to a more detailed regulatory regime. The familiarity of institutional investors with the investment foundation and its oversight by a recognized, Swiss supervisory authority increase the attractiveness of the real estate investment foundations, not only for investors, but also for product providers/asset managers. Finally, the relatively fast approval process, contingent upon the quality of the application by the respective applicants, also speaks in favor of this investment vehicle from a time-to-market perspective. For these reasons, and due to the ever more urgent economic need to allocate capital in the real estate segment, we may see a significant number of new launches of real estate investment foundations/investment groups in the near future.

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EU Recognises Swiss (Re)Insurance Supervision as Equivalent

Reference: CapLaw-2015-42

On 5 June 2015, the European Commission recognised the Swiss (re)insurance supervision system as being fully equivalent with the Solvency II Directive. The European Commission recognised in particular the equivalence of the Swiss system in three areas, such as reinsurance, solvency calculation and insurance group supervision.

By Petra Ginter

1) Introduction

The European Insurance and Occupational Pensions Authority (EIOPA) has conducted a detailed assessment on the equivalence of the Swiss (re)insurance supervision system with the Solvency II Directive (Directive 2009/138/EC, as modified by the "Omnibus II" Directive 2014/51/EU) which will be fully applied from 1 January 2016. The Solvency II Directive will introduce a modernised risk-based prudential and supervisory regime for (re)insurance undertakings in the European Union.

Switzerland is the only third country whose insurance regulation the European Commission has recognised as equivalent in full and for an indefinite period. It appears that the EU has positively recognised the regulatory framework and (re)insurance supervision in Switzerland, and in particular the changes that have been introduced with the revision of the Swiss Insurance Supervision Ordinance (ISO). The EU recognition of the equivalence of the Swiss (re)insurance supervision system enhances the reputation and competitiveness of Switzerland as a global financial centre.

The decision of the European Commission shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

2) What are the Three Areas of Recognised Equivalence?

The Solvency II Directive provides for equivalence determination of third countries in three areas namely:

- Resinsurance: A reinsurer located in a third country enters into a reinsurance arrangement with a (re)insurer in the European Economic Area (EEA) (Article 172 Solvency II Directive).
- Solvency Calculation: A (re)insurer is headquartered within the EEA and has participations or subsidiaries (collectively known as related undertakings) located outside the EEA (Article 227 Solvency II Directive).
- Group Supervision: A (re)insurer is headquartered within a third country and has related undertakings located within the EEA (Article 260 Solvency II Directive).

For each of the above three areas, full equivalence of Switzerland's (re)insurance regulation / supervision system has been recognised for an unlimited period.

3) What are the Main Criteria that Led to an Equivalence Decision by the European Commission?

The following criteria are relevant for the determination of equivalence:

- Supervisory authorities in the third country must have the necessary means, powers and responsibilities to effectively ensure the protection of policyholders and beneficiaries of (re)insurance contracts.
- (Re)insurance undertakings in the third country must hold adequate financial resources, in line with the solvency requirements of the Solvency II Directive. This implies in particular that there is a market consistent valuation of all assets and liabilities, technical provisions reflect all (re)insurance obligations, assets are invested in the best interest of policyholders and beneficiaries, own funds and the use of internal or standard models are adequate, and ultimately capital requirements adequately capture risks and protect policyholders in case of significant losses.
- (Re)insurance undertakings in the third country must have an effective system of governance in place, in particular an effective risk management system and adequate functions and procedures as defined under the Solvency II Directive.
- Transparency of information both towards the supervisory authorities in the third country and to the public must be ensured.
- Professional secrecy and exchange of information obligations between authorities must be complied.

– The supervisory authorities of the third country must consider the impact of their decisions on global financial stability and take into account potential procyclical effects.

Some other equivalence criteria are specific for equivalence for group supervision or for reinsurance. For instance, for group supervision, supervisors must have the power by law to determine which undertakings fall under the scope of supervision at group level. For reinsurance, the taking-up of business of reinsurance must be subject to prior authorisation by the supervisor.

4) What are the Main Benefits of the Recognition of Equivalence?

The recognition of equivalence has the following main benefits for a third party (re)insurer (and such as (re)insurance undertakings in Switzerland):

– If a solvency regime of a third country is deemed equivalent under Article 172 Solvency II Directive, its reinsurers cannot be subject to a requirement to post collateral in the EU.

– If a solvency regime of a third country is deemed equivalent under Article 227 Solvency II Directive, EU (re)insurance groups can do their EU prudential reporting for a subsidiary in that third country under local rules instead of Solvency II, if deduction and aggregation is allowed as the method of consolidation of group accounts.

– If a prudential regime of a third country is deemed equivalent under Article 260 Solvency II Directive, its (re)insurance groups which are active in the EU are exempted from some aspects of group supervision in the EU.

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P.R.I.M.E. Finance – the Boon and Bane of a Specialized Dispute Resolution Institution

Reference: CapLaw-2015-43

P.R.I.M.E. Finance is an arbitral institution specialized in the settlement of financial disputes that was established in The Hague in 2012. As a relatively novel arbitral institution it is not only facing promising opportunities but also difficult challenges.

A hotly debated topic is P.R.I.M.E. Finance's closed list of arbitrators from which the parties are obliged to choose. While the list includes specialists with expertise in finance and arbitration, it is nevertheless exclusive and may therefore lose attractiveness vis-à-vis other arbitral institutions. Another issue is the publication of awards by

P.R.I.M.E. Finance. Even though the transparency of awards helps to build up a consistent body of law aiming at more legal certainty in the financial markets, parties may be unwilling to trade off the confidentiality advantage of arbitration.

Despite these challenges, P.R.I.M.E. Finance may have a positive market resonance. In September 2013, its model arbitration clause has been hardwired into the first Arbitration Guide of the International Swaps and Derivatives Association (ISDA), a market with a tremendous volume.

By Désirée Klingler

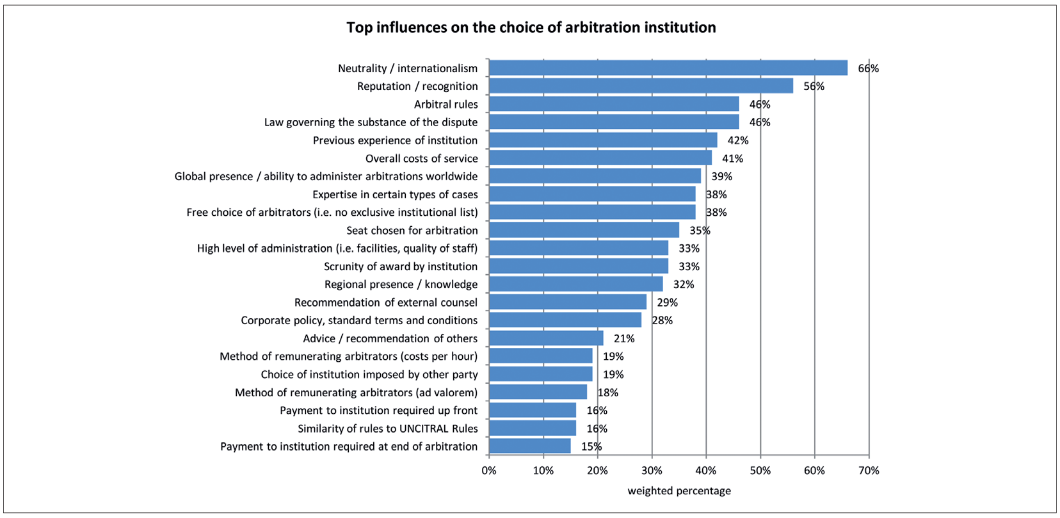
1) Do we need P.R.I.M.E. Finance?

The necessity of P.R.I.M.E. Finance is a central question that founders and critics have addressed likewise. Even though the institution has not decided a case yet, mostly being occupied with the issuance of expert opinions, it may nevertheless play an important role in future dispute settlement.

a) Bridging Gaps between Jurisdictions

Making use of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention), which applies in over 150 jurisdictions, P.R.I.M.E. Finance may rely on a well-established and relatively simple mechanism for the enforcement of its awards.

Another advantage is P.R.I.M.E. Finance's location. The Hague has not only a longstanding history of international judiciary, hosting for example the International Court of Justice, but is also known for its political neutrality. According to the International Arbitration Survey 2010, neutrality is perceived as the most important factor in the choice of an arbitration institution (66%, Graph 1).



Graph 1: International Arbitration Survey 2010

In this respect, The Hague provides for a good compromise to Anglo-American market participants and Asian parties that have become active players in the financial markets in recent years.

b) Trend for Specialized Courts

Over the last decades, a trend for specialized courts may be observed. In Switzerland for example, the Federal Administrative Court with a division specialized in financial market regulation has been established. This trend for specialization may also be observed in the realm of arbitration: Both the ICC Arbitration Court and the London Court of International Arbitration (LCIA) are designed for the resolution of commercial disputes, whilst the International Centre for Settlement of Investment Disputes (ICSID) is devoted to resolving investment disputes, and the Court of Arbitration for Sport (CAS) has specialized in sports-related disputes. As a very recent development, the International Centre for Energy Arbitration (ICEA) was established in 2013. In light of these specialized arbitration forums, one for the resolution of financial disputes seems logical.

This holds true all the more since the global financial crisis in 2008, when disputes arising out of financial relationships have risen dramatically. In Switzerland, the creation of a specialized arbitration court for the resolution of disputes between banks and customers has been recently discussed by parliament but finally dismissed. One argument was that financial disputes could also be resolved through the existing court system and that it was considered difficult to find experts that were both knowledgeable in banking and independent from any financial institution.

Even though the existing judicial system may be capable of settling financial disputes, expertise can produce faster and arguably fairer decisions. Certainly, a specialized tribunal would deliver a higher degree of uniform decisions and therefore provide for more legal certainty. Specialized courts may improve case management relieving the overloaded court systems experienced by many jurisdictions. They also have a more flexible system that can be adapted to the workload, either with judges who serve for limited terms or with experts that may be requested as needed.

Whether the benefits of a specialized court can balance off its drawbacks needs to be decided on a case-by-case basis. In a fast changing environment like finance, expertise providing for prompt decisions is certainly key.

2) Challenges Faced

a) Closed List of Experts

P.R.I.M.E. Finance currently provides for a list of around 80 finance and 30 dispute resolution experts from both academia and practice. Just to name two: Darrell Duffie, Finance Professor at Stanford University, and Guy Dempsey, former General Counsel at Barclay's Capital. While the list has been expanded in March 2014, there seems to be ongoing effort to broaden or eventually open up the list.

The free choice of arbitrators ranks high amongst the top influences on the choice of an arbitration institution (38%, Graph 1) and is, therefore, an important competitive factor vis-à-vis peer arbitral institutions. The ICC Arbitration Court and the LCIA have no public list of arbitrators. This is consistent with party autonomy, a core principle in arbitration.

A system known at ICSID and the China International Economic and Trade Arbitration Commission (CIETAC) strikes a balance between the two extremes: In case the chairman of ICSID is requested to appoint arbitrators, he must choose them from the list. Similarly, the parties of a CIETAC proceeding must choose from CIETAC's Panel of Arbitrators (around 1'000 experts), unless they agree to nominate arbitrators from outside the list (article 26).

To promote P.R.I.M.E. Finance and attract the attention from arbitrators and financial institutions alike, while guaranteeing expertise and not limiting the parties' autonomy, such a median approach could be a sensible solution.

b) Tension between Confidentiality and Predictability

An important reason for parties to choose arbitration is confidentiality. It is common practice that arbitration proceedings are held behind closed doors. However, arbitral institutions have answered the question of confidentiality differently.

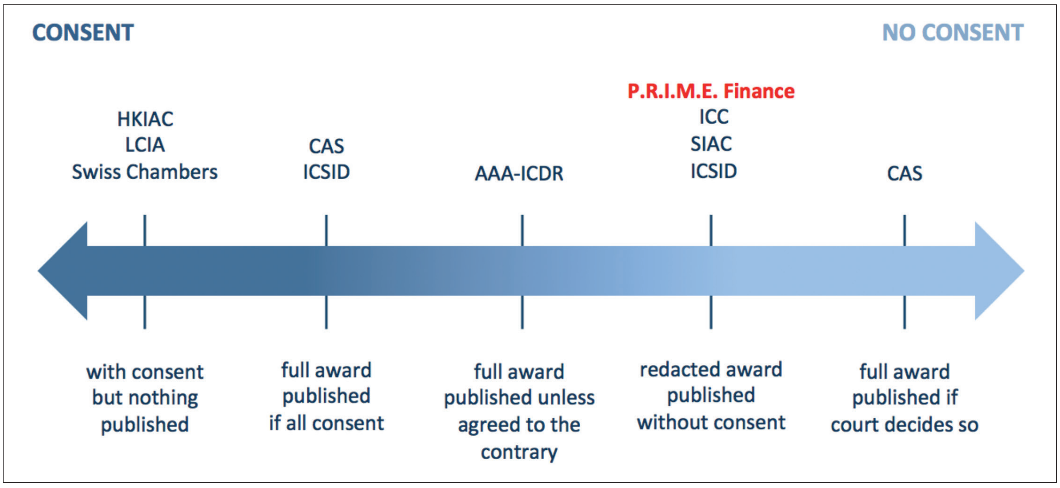
i) Publication of Awards

At the first glance, article 34 (5) of the P.R.I.M.E. Rules is in conformity with arbitration practice. It allows the publication of awards if all parties consent or if required by law. The latter option aims to prevent conflicts between *jus cogens* and the parties' wish for confidentiality. However, what is different relates to the disclosure that is required of a party or *P.R.I.M.E. Finance*. Unlike other arbitration rules, the request for disclosure may also be sought from the institution itself. While the provision ultimately aims at more legal certainty, it clearly contradicts the principle of party autonomy.

But P.R.I.M.E. Finance is not the only institution that foresees the institutional publication of awards. The CAS Code, for example, states that awards shall not be made public unless all parties agree or the CAS Division President decides so (Rule 43). According to the institution, awards published on the request of the CAS Division President are very rare. In contrast to that, the ICSID Center may only publish awards with the parties' consent (ICSID Convention article 48 (5)). In fact, most awards – which often affect entire states – are made public on its website.

The most transparent method to publish awards is in unredacted form. ICSID and CAS follow this practice. Even though it is not foreseen in the arbitration rules, the ICC regularly publishes extracts or summaries of awards in its bulletin. Recently, the Singapore International Arbitration Centre (SIAC) has commenced publicizing awards in anonymised form. To further advance a consistent body of case law but at the same time respect the parties' wish for confidentiality, P.R.I.M.E. Finance foresees the publication of awards in redacted form.

Whether or not the parties consent is required and in which form the awards are published, can be illustrated as follows, with P.R.I.M.E. Finance being on the less consensus-oriented side:



Graph 2: Based on the respective arbitration rules

ii) Trend for Transparency

The transparency of awards could be one of P.R.I.M.E. Finance's biggest obstacles to gain a foothold in arbitration. While the intention to enhance financial market stability is certainly valuable, financial institutions may prefer to keep their disputes secret. Since proprietary disputes between commercial parties are generally open to arbitration, their wish for confidentiality is absolutely legitimate.

Yet, transparency and cooperation requests by financial market regulators have increased since the financial crisis in 2008. Eventually, the delivery of information to the national regulator does not depend on whether the transparency of awards is explicitly enshrined in the arbitration rules or not. Arbitration confidentiality is not absolute. Even the strict confidentiality rules of the Hong Kong International Arbitration Centre (HKIAC), Swiss Chambers and ICC have to respect certain limitations imposed by law or by public policy, or limitations arising from court decisions.

Hence, the transparency rules of P.R.I.M.E. Finance are certainly ahead of the time. Whether these rules are perceived as a drawback or competitive advantage largely depends on the future developments in financial market regulation.

c) Model Arbitration Clause in the ISDA Master Agreement

In September 2013, ISDA published its first Arbitration Guide suggesting arbitration clauses of seven arbitral institutions, including P.R.I.M.E. Finance.

The hardwiring of P.R.I.M.E. Finance's arbitration clause in the ISDA Master Agreement, a standardized contract that is used to enter into derivatives transactions on an international scale, has enormous potential. ISDA is a trade organization active in the market for over-the-counter (OTC) derivatives with more than 800 members in 67 countries. The notional amount of all outstanding OTC positions stood at USD 693 trillion in 2013, having more than tripled since 2004 (BIS Statistical Report 2013).

So far, disputes between parties of the ISDA Master Agreement have been settled before English or New York courts (article 13 (b)). The reason was the courts' long-standing judicial experience with financial disputes. Today, many parties entering into ISDA Master Agreements are based in emerging markets and therefore the enforcement of foreign judgments may be at risk. By means of the New York Convention, allowing for a large-scale enforcement of awards, this risk can be avoided.

Confidential arbitral proceedings also prevent a precedent effect on similar market transactions. This can be of great value for large financial institutions, which can therewith avert a negative effect on similar cases. In addition, financial institutions may profit from information asymmetries, having insight into a larger number of proceedings than their private counterparties. Hence, with the publication of awards, P.R.I.M.E. Finance weakens its position considerably.

Notwithstanding the above, P.R.I.M.E. Finance is the only institution suggested in the Arbitration Guide that provides for special expertise in finance. Disputes relating to the ISDA Master Agreement can be highly complex, and, as history has shown, finance savvy courts are of high value. Considering that ISDA has published the Arbitration Guide to a large extent to guarantee the enforcement of the awards, rather than for confidentiality considerations, P.R.I.M.E. Finance's know-how in finance is a clear advantage. The sheer market volume of OTC derivatives in combination with P.R.I.M.E. Finance's expertise could outweigh the drawbacks.

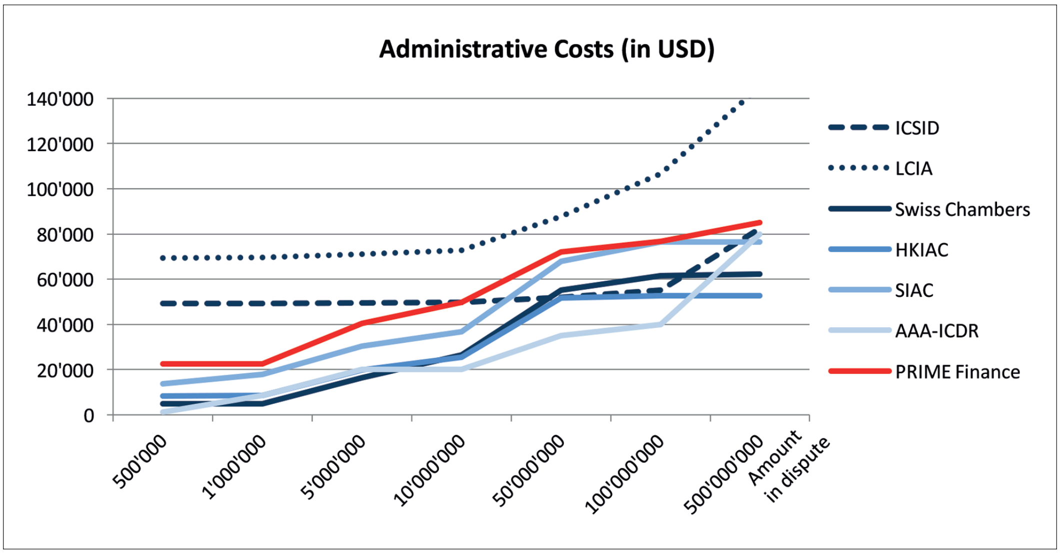
3) What does it cost?

According to the keynote "Money makes the world go round", arbitration costs cannot be neglected (41%, Graph 1). Arbitration costs can be divided in two categories:

1. Administrative costs (including registration fee) to manage the case, and

2. Arbitrators' fees, which are the remuneration of the tribunal.

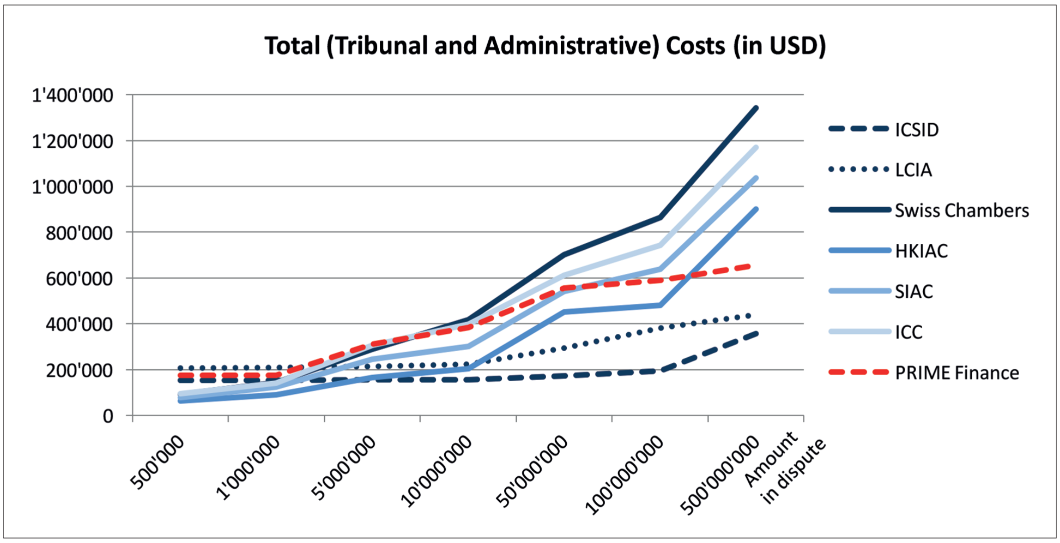
To understand P.R.I.M.E. Finance's market position, the following graph illustrates the administrative costs in comparison to six arbitration institutions. Data of LCIA and ICSID are displayed for reference only since LCIA costs are calculated on an hourly rate (instead of an *ad valorem* basis), and to ISCID arbitrations different principles, such as equal treatment, apply.



Graph 3: Based on the respective cost schedules, converted into USD in May 2015

As the graph illustrates, P.R.I.M.E. Finance is priced slightly higher than the other arbitral institutions. This may be explained by the absence of economies of scale. While high administrative costs can deter parties, high costs may also be seen as a seal of quality and therewith attract complex cases.

The determination of arbitrators' fees leaves P.R.I.M.E. Finance to the discretion of the tribunal. In relation to the total costs of six other arbitral institutions and based on P.R.I.M.E. Finance's administrative costs, the following graph shows a prospective trend line of P.R.I.M.E. Finance's total costs.



Graph 4: Based on the Global Arbitration Review 2013 and the respective arbitration rules

As illustrated above, the Swiss Chambers have the highest total costs, followed by the ICC and SIAC. In relation to their competitors, the total costs for P.R.I.M.E. Finance are estimated to be ***higher*** in lower, and clearly ***lower*** in ascending amounts in dispute. The estimated trend for P.R.I.M.E. Finance's total costs may be explained by the assumption that the complexity of disputes does not depend on the amount in dispute, resulting in relatively consistent arbitrators' fees.

Relative to its competitors, the estimated total costs make P.R.I.M.E. Finance an attractive choice when medium to high amounts are in dispute. Nevertheless, this trend line is only an estimate, leaving the parties with certain insecurity when it comes to the arbitrators' fees.

4) Conclusion

Even though exposed to certain criticism, P.R.I.M.E. Finance has potential in the settlement of financial disputes. To further increase its attractiveness, P.R.I.M.E. Finance may open up its closed list of experts. With the advantage to enforce arbitral awards internationally, together with its expertise in finance, P.R.I.M.E. Finance is poised to take a strong position among the international arbitration regimes. The greatest challenge relates to the transparency of awards and that market participants gain confidence in P.R.I.M.E. Finance. If cooperation efforts by public authorities in financial markets rise, and P.R.I.M.E. Finance successfully hardwires its arbitration clause into financial contracts on a larger scale, it may expect a busy future.

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No Tailoring of Opting Out Clauses – Takeover Board rejects Schindler's Proposed Changes to its Articles of Association

Reference: CapLaw-2015-44

In its recent decision 610/01 in the matter of Schindler Holding Ltd (published on 21 July 2015), the Swiss Takeover Board held that Swiss takeover law does not allow companies to provide for individual rules on the obligation to make a takeover offer that go beyond the options set forth in the law. Accordingly, in the eyes of the TOB, a new provision in the articles of association of Schindler which indirectly provides for an obligation to make a takeover offer for anyone who acquires more than 50% of the voting rights in Schindler, combined with Schindler's existing opting out clause, would not have any legal effect.

By Pascal Hubli / Nadin Schwibs

1) Factual Background

The case discussed herein involves Schindler Holding Ltd, Hergiswil (Schindler), a Swiss stock corporation listed at the SIX Swiss Exchange and active in the area of mobility solutions, *i.e.* elevators and escalators. Schindler is controlled by the families Schindler and Bonnard (the Schindler Family Shareholders), who together own around 70% of the voting rights (as at 31 December 2014).

Schindler's articles of association (Articles) provide for an opting out clause (Opting out Clause) which was introduced in May 1996 and which waives the statutory offer obligation, i.e. the obligation for acquirers of shares in Schindler to make a public takeover offer if they pass (alone or acting in concert with others) the threshold of 33 1/3% of the voting rights.

On 3 July 2015, Schindler informed the public about its intention to amend its Articles by introducing what it referred to as a "tailor-made opting in clause". This new clause provided that any person acquiring 50% or more of the voting rights in Schindler shall only be entered into the share register as a full shareholder if it proved that (i) it had made a voluntary takeover offer to all shareholders of Schindler with (ii) an offer price of at least 90% of the highest price paid in the 12 months before the offer (Schindler Clause).

On 6 July 2015, Schindler also informed the Chairman of the Swiss Takeover Board (TOB) about the planned amendment of its Articles. Thereupon, the Chairman decided to initiate proceedings to assess the permissibility of the Schindler Clause. Interestingly, the decision in this matter was taken by a panel consisting of five members instead of the usual three members.

2) Main Considerations of the TOB

a) Competence of the TOB to Review the Schindler Clause

The TOB found that, contrary to Schindler's view, it was competent to review the Schindler Clause based on article 23 of the Swiss Federal Stock Exchange Act (SESTA), according to which the TOB may rule on any question that arises with respect to the application of the provisions on public takeover offers. Therefore, in the TOB's view, any clause in the articles of association of a company that may be of relevance under public takeover law should be subject to its review. For the Schindler Clause, which, if implemented, would not only modify Schindler's existing Opting out Clause but would additionally create an individual set of rules for public offers for shares in Schindler, the TOB considered this to be the case.

b) Characterization of the Schindler Clause

The TOB then elaborated on the statutory framework providing for an obligation to make a public takeover offer as well as the options for limiting the applicability of such offer obligation through (i) a general waiver (opting out, articles 22 (2) and (3) SESTA), (ii) a waiver with regard to designated shareholders (selective opting out) or (iii) an increase of the triggering threshold from 33 1/3% to 49% (or anywhere in between, opting up, article 32 (1) SESTA).

With regard to the Schindler Clause, the TOB considered that any rational acquirer of 50% or more of the voting rights in Schindler would logically be interested in no less than being accepted as full shareholder with full voting power. Consequently, in the eyes of the TOB, the Schindler Clause would factually establish an obligation for such an acquirer to make a takeover offer. However, as the TOB further pointed out, the Schindler Clause provides for a different triggering threshold than the law and, more importantly, would allow the payment of a (limited) control premium to a controlling shareholder. Based thereon, the TOB concluded that the Schindler Clause did not fit into the statutory framework but went beyond the options provided for under Swiss public takeover law.

This, in turn, led to the core question of the decision:

Is Schindler free to deviate from the existing legal framework regarding the offer obligation as well as the statutory options to opt out of it and to provide for its own set of rules for public takeover offers in order to satisfy its specific needs? Or is Schindler rather limited by the rules and options provided for by law? In other words, the TOB had to examine, whether the system of the SESTA and its implementing ordinances left room for tailor-made solutions such as the Schindler Clause, particularly if such solutions are in the interest of the minority shareholders.

c) Rejection of Tailor-Made Solutions

The answer to this question was not evident from the wording of the legal texts and, thus, had to be determined by interpretation. The TOB first examined the intentions of the legislator at the time of the introduction of the relevant public takeover rules and concluded that, likely, the historic legislator would have rejected the possibility for listed companies to tailor the rules, preferring instead the approach that companies must decide for or against an opting out or opting up with no option of modifying the rules individually.

In this regard, the TOB also called attention to the fact that, in 2012, the legislator had decided on eliminating the option of paying a control premium in mandatory public takeover offers whereas a change of the rules on opting out and opting up clauses had not been discussed. Had the legislator wanted to eliminate or modify the current system relating to opting out or opting up clauses it could have done so in the course of the 2012 revision (entry into force: 1 May 2013).

Finally, the TOB reflected on whether any individual modifications to the applicable takeover framework would be in compliance with the general takeover law principles according to article 1 of the Takeover Ordinance: the principles of integrity, transparency and equal treatment. It considered that the introduction of a tailor-made solution, as intended with the Schindler Clause, may indeed be considered favourable, especially with a view to the principle of equal treatment. However, in the eyes of the TOB, permitting such tailoring of the applicable takeover rules could lead to a myriad of individual solutions that may (fairly) easily be changed at any shareholders' meeting. The resulting legal uncertainty and lack of transparency would not even be justified by the advantages of a tailor-made solution for the minority shareholders. At least, the TOB pointed out that anyone who considers acquiring a stake in a listed company nowadays has full access to such company's articles of association and, therefore, can have full knowledge about the lack of minority shareholder protection in case of a change of control.

The TOB concluded that the legislator created an exhaustive statutory regime consisting of the obligation to make a takeover offer (article 32 (1) SESTA) as well as the possibility of an opting out (articles 22 (2) and (3) SESTA) and an opting up (article 32 (1) SESTA), which leave no room for any further individual solutions by the listed companies themselves, *e.g.* in their articles of association.

Consequently, the TOB held that the Schindler Clause was not in compliance with Swiss takeover law and, even if implemented by Schindler's shareholders' meeting, would not have any legal effect.

3) Remarks

The proposed changes to Schindler's Articles were intended to safeguard the interests of the minority shareholders in case of a general change of control over Schindler, while maintaining the advantages of the Opting out Clause, in particular, sheltering the controlling Schindler Family Shareholders from the risk of being obliged to make a takeover offer in case of (significant) changes within the controlling group. As the TOB pointed out itself, the added protection for minority shareholders appears noble and welcome. The recent intense discussions about the admissibility and fairness of the opting out clause in the articles of association of Sika Ltd (see the recent decision of the Swiss Administrative Court dated 27 August 2015 in the matter of *Sika Ltd* for further information) also seem to support Schindler's approach. In this light, the decision of the TOB in the matter of Schindler may even be described as regrettable.

However, the TOB's reasons for not allowing Schindler to implement the Schindler Clause are logical and dogmatically correct. The TOB rightfully stated, that the current Swiss takeover law and the practice of the TOB already provide for adequate options for adapting Schindler's Opting out Clause in order to reflect Schindler's intentions and fulfil its needs, including a certain protection of minority shareholders.

In particular, with reference to its recent important decision 600/01, dated 22 April 2015, in the matter of *Kaba Holding AG*, the TOB reiterated that it considers so-called selective opting out clauses, that is, clauses that only release a specific (group of) shareholder(s) from the obligation to make a takeover offer when passing the threshold of 33 1/3% in connection with a specific transaction, fully admissible from a takeover law perspective – provided that the general requirements for the introduction of an opting out clause as developed by the TOB in various cases over the last years are met.

In its decision in the matter of Schindler, the TOB also made it clear, that an opting out clause allows, and even has the purpose to allow, controlling shareholders to sell their stake in a company listed in Switzerland at any price and receive a premium of any amount or percentage. Considering that one of the arguments for disallowing the Schindler Clause was the undue reinstatement of the possibility to pay a control premium to the controlling shareholders, the TOB's reasoning seems inconsistent at first glance. However, the reinstated control premium based on the Schindler Clause would have been limited to a takeover offer which an acquirer of more than 50% of the shares in Schindler would have been obliged to make. Yet, the control premium was explicitly abolished for public takeover offers in 2013. The possibility to pay a premium to a controlling shareholder in connection with opting out clauses, on the other hand, has always been a tolerated side effect of such clauses (see, *e.g.*, decision 569/01 dated 24 June 2014, in the matter of *Pretium AG*). Even at times, when the SESTA and its implementing ordinances still allowed the payment of a control premium in a takeover situation, an opting out clause went further as it fully released a bidder from observing any minimum price rules and thus did not limit the premium. Having said this, one could ask if the TOB's considerations in this decision should have an impact on the information requirements for a post-listing introduction of an opting out clause in the articles of association of a company.

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Electronic Means of Communication in Future Takeover Proceedings – Thoughts on the New Rules Proposed by the TOB on 18 August 2015

Reference: CapLaw-2015-45

In August/September 2015, the Swiss Takeover Board (TOB) conducted a consultation proceeding on a proposed revision of the Takeover Ordinance (TOO). At its core, the revision aims at abolishing the duty to publish the offer documents in newspapers. The authors support the proposed revision for efficiency reasons. For policy reasons, the authors further advocate the issuance of an official list of media-addressees (including email-addresses) by the TOB and a change of the current practice of the TOB according to which the offeror bears all the risks in case of (partial) failure of the electronic publication. Rather, the offeror shall be responsible only for publishing the offer documents on its website and for delivering them to the media-addressees as per the list of media-addressees and to the TOB.

By Severin Roelli / Christian Leuenberger

In August/September 2014 the TOB had conducted a consultation proceeding on a proposed revision of the TOO. At its core, that revision aimed at timing the publication in the electronic and print media (*i.e.*, newspapers) for the same day. Already at that time the authors suggested, amongst other, the abolishment of the duty to publish the offer documents in newspapers. The reasons put forward by the authors were, in essence, the substantial costs for a newspaper publication and that in view of the reality how information is obtained nowadays such newspaper publication was outdated. The 2014 consultation proceeding did not result in a change of the TOO though.

One year later, the TOB is now proposing another revision of the TOO at the core of which is the abolishment of the duty to publish the offer documents in newspapers. The TOB puts forward the reasons which were also put forward by the authors. In addition, the TOB conducted a comparison of takeover regulations in other jurisdictions as well as a comparison with other fields of Swiss law and found that in both, foreign takeover regulations and other fields of Swiss law, the newspaper publication was scarcely relevant today. In this context, the TOB expressly mentions the recent amendment of the SIX Swiss Exchange Listing Rules abolishing the instrument of the listing notice and fully relying on electronic means for dissemination (official notice).

The currently applicable rules of the TOO require – besides publication on the offeror's website (or a special offer website) and delivery to (at least two) leading financial information providers as well as the TOB – the publication in (at least one) German-language as well as (at least one) French-language newspaper.

According to the proposed new rules, the offeror publishes the offer documents relating to a tender offer (for example, the pre-announcement and the offer prospectus) by the following means: (i) publication on the offeror's website (or a special offer website), (ii) delivery to the major Swiss media, press agencies as well as financial information providers (the **Media-Addressees**) and (iii) delivery to the TOB. By proposing these new rules, the TOB acknowledges that the electronic publication is not just a mere option complementing the newspaper publication, but has become the standard proceeding. As compared to the currently applicable rules, the consequences described below are particularly noteworthy.

1) Electronic Publication as triggering event for the beginning of / compliance with time limits

Because the newspaper publication requires more preparation time (delivery of content to typesetter, printing etc.), the currently applicable rules provide that the newspaper publication has to be made no later than three SIX-trading days following the electronic publication (i.e., publication on the offeror's website and delivery to the financial information providers as well as to the TOB).

The two different dates of electronic publication and newspaper publication (and their interdependence) requires coordination: Based on a respective practice developed by the TOB, the TOO currently states that the relevant point in time for establishing the legal effects of the offer documents' publication (e.g., in the case of publication of the pre-announcement or the offer prospectus, the calculation of minimum price or restrictions for defensive measures) is (i) the newspaper publication or (ii), as the case may be, the electronic publication if the newspaper publication follows no later than three SIX-trading days thereafter (article 8 TOO).

Under the proposed new rules, there is no need for coordination: the legal effects of the offer documents' publication are established at the point in time of the electronic publication.

Further, the point in time of the electronic publication will be relevant for the beginning of resp. compliance with various other time limits for which currently the newspaper publication (or, as the case may be, the electronic publication if the newspaper publication follows no later than three SIX-trading days thereafter) is the triggering event (*e.g.*, publication of offer prospectus, beginning of offer period, publication of the report of the target's board of directors, time limit for amendment of offer, publication of interim results and final results, publication of a competing offer).

2) Risk allocation in case of (partial) failure of the electronic publication

As compared to the electronic publication according to the currently applicable rules of the TOO, the circle of addressees of the electronic publication according to the proposed new rules is expanded: in addition to the publication on the offeror's website (or a special offer website) and delivery to (currently at least two) major financial information providers (*e.g.*, Bloomberg, Reuters, Telekurs) as well as the TOB, it requires delivery to the major Swiss media (*e.g.*, editorial office of major newspapers, radio and TV-stations) and the major press agencies in Switzerland (*e.g.*, SDA, awp Finanznachrichten).

While in the experience of the authors, delivery to two major financial information providers leads to a broad coverage in electronic and print media, they still support the expansion of the circle of addressees of the electronic publication from a policy standpoint: the wider the dissemination of the relevant information, the higher the information transparency in the market.

To simplify the process for the offeror, the TOB proposed to provide a list of the Media-Addressees and to publish such list on the TOB's website. The authors support the idea of the TOB-list for efficiency reasons. In their opinion, the TOB-list should include the email-address of each Media-Addressee. In addition, the authors advocate taking an additional step forward and changing the TOB's current practice according to which the offeror bears the risk if – for whatever reason – the electronic publication fails or is incomplete (see TOB-recommendation 0358/1 re Groupe Baumgartner Holding SA of 3 April 2008, N 1.4). The authors are of the opinion that for practical reasons and policy considerations the TOO should state explicitly that the offeror bears the risk only for publishing the complete offer document on its website (or a special offer website) and for sending the complete offer document to the TOB and to the email-addresses of the Media-Addressees in the TOB-list. If, with respect to the latter, the publication fails later on (*i.e.*, in the sphere of influence of the Media-Addressees or the TOB), the offeror shall nonetheless enjoy the benefits of the publication (*e.g.*, in the case of publication of the pre-announcement or the offer prospectus, the calculation of the minimum price or restrictions for defensive measures).

From a practical point of view, it has, firstly, to be acknowledged that the risk that the publication fails becomes smaller, the more Media-Addressees the TOB-list contains. Further, in the unlikely case of failure of receipt / processing by the Media-Addressees (*e.g.*, outdated email-addresses on the TOB-list), the TOB and the offeror would notice this within hours and the offeror would – in its own best interest in view of a successful offer – re-deliver the offer documents in due course. To mitigate this remote risk, one could think of including the target company in the list of addressees and relying on the target's ad hoc-publicity duties to ensure widespread dissemination; in the view of the authors, the preparation for such an event would, however, be unduly onerous on the ad-hoc officers / departments of listed companies.

In view of the authors, the publication by the media does not have to contain all material terms of an offer, it rather serves as means to create the awareness of the investor community that an offer has been launched. Complete offer documents are then available on the TOB's and the offeror's website (or a special offer website) and can be found easily with the common electronic search tools. Therefore, the authors are of the opinion that an incomplete publication of the offer documents by the media, should not hinder the triggering of the legal effects.

From a policy point of view, the comparison of the interests involved requires the allocation of risks as proposed by the authors:

– If the offeror bore the risk of failure or incompleteness of the publication absent his fault (*i.e.*, the fault is in the sphere of influence of the Media-Addressees or the TOB), the consequence of such failure or incompleteness deprived the offeror from the benefits of the publication (in particular, (i) in the case of publication of the pre-announcement or the offer prospectus, the calculation of the minimum price or the restrictions for defensive measures, (ii) in the case of publication of an amendment to the offer at the last possible date, such amendment, or (iii), most importantly, in the case of the publication of a competing offer at the last possible date, such competing offer). The consequences for the (competing) offeror, and ultimately for the takeover market, would be severe.

– If the shareholders bore the risk of failure or incompleteness of the publication absent the offeror's fault (*i.e.*, in the sphere of influence of the Media-Addressees or the TOB), the consequence of such failure or incompleteness is that the shareholders loose a few hours of the offer period in which they can decide to accept the offer or not. Given that the offer period is at least ten days (excluding exceptions), the consequences for the shareholders seem minor. More importantly, however, the negative consequences have to be weighed against the positive consequences of a failed or incomplete publication in case of an amendment of the offer or in case of a competing offer. Further, the argument that shareholders may sell their shares at a lower price, because they have not learned about a higher-priced offer (TOB-recommendation 0358/1 re Groupe Baumgartner Holding SA of 3 April 2008, N 1.4 could be interpreted to follow this line of argumentation) is not a valid one, because the allocation of the risk to the offeror does not improve the shareholder's situation in this regard.

The TOB itself has not taken a clear position with respect to such change of practice. However, the new wording in the TOO as proposed by the TOB does no longer require the offeror to disseminate the offer document nationwide ("*muss […] landesweit bekannt gemacht werden*"), but only requires that it is published on the offerors website and delivered to the Media-Addressees as well as the TOB. This could be seen as an indication for a change of the practice.

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Generali completes the divestment of BSI SA to BTG Pactual

Reference: CapLaw-2015-46

On 15 September 2015, Assicurazioni Generali S.p.A. announced that it completed the divestiture of its participation in BSI SA to Banco BTG Pactual SA. In line with the agreement executed on 14 July 2014, the final consideration for the sale is CHF 1,248 million, of which approx. CHF 1 billion in cash and the remaining portion in BTG Units listed on the Sao Paulo Stock Exchange.

Axel Springer and Ringier Form New Joint Venture Company

Reference: CapLaw-2015-47

The two media groups Axel Springer and Ringier are founding a new joint venture company in which each will hold an equal stake. A letter of intent for this purpose had already been signed in December 2014. Axel Springer Switzerland will contribute to the new joint venture company the entire Swiss business of Axel Springer SE, and Ringier will contribute all its publications in the German speaking and French speaking part of Switzerland, together with their online offerings and Le Temps, the quality daily newspaper published in the French speaking part of Switzerland. The operations of the new joint venture company, Ringier Axel Springer Media Switzerland AG, are expected to commence on 1 January 2016.

Kuoni Group Completes the Divestment of its European Tour Operating Businesses

Reference: CapLaw-2015-48

Kuoni Group (SIX: KUNN) announced on 14 September 2015 that it completed the sale of its European tour operating businesses to REWE-ZENTRALFINANZ eG. The sale included Kuoni's tour operators, specialists and travel agencies in Switzerland, United Kingdom, Scandinavia/Finland and Benelux. The completion of the sale of the remaining tour operating businesses in India and Hong Kong/China is expected to be completed in the course of 2015. Upon the completion of these remaining transactions, Kuoni Group will have successfully implemented the exit from its global tour operating business that was publicly announced on 14 January 2015.

KKR Acquires 25% Stake in SoftwareONE

Reference: CapLaw-2015-49

KKR, a leading global private equity investment firm, has agreed to acquire 25% of the shares in SoftwareONE Holding AG, a leading global provider of software portfolio management solutions with more than 25,000 customers in 115 countries. The four founding partners together with the management team will retain a 75% stake in the company. The transaction is subject to merger control approvals and expected to close in fall 2015.

Evolva Holding SA Successfully completes Rights Offering

Reference: CapLaw-2015-50

Evolva Holdings SA's recent rights offering closed on 17 September 2015 and generated gross proceeds of approximately CHF 57.4 million. Existing shareholders were offered 62,412,477 new shares with a nominal value of CHF 0.20 each at a subscription price of CHF 0.92 per new registered share. The offering was fully underwritten by Credit Suisse AG and Bank Vontobel AG.

Monsanto Abandons Plan to Acquire Syngenta

Reference: CapLaw-2015-51

On 26 August 2015, Monsanto announced that it would no longer pursue its proposal to acquire Syngenta. Monsanto had approached Syngenta in April of this year with an unsolicited proposal and again in August with a revised proposal. Both proposals were rejected by the board of directors of Syngenta.

Legal Challenges in International Banking (Rechtliche Herausforderungen im internationalen Banking)

Friday, 13 November 2015, CS Forum St. Peter, Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Flyer_Markus_Diethelm_13.11.2015.pdf

Financial Market Regulation – Recent Legal Issues (Finanzmarktregulierung – aktuelle Rechtsprobleme)

Tuesday, 17 November 2015, Convention Point, Zurich

http://www.lam.unisg.ch/de/lam-tagungen/finanzmarktregulierung.php

Capital Markets and Transactions XI (Kapitalmarkt – Recht und Transaktionen XI)

Thursday, 26 November 2015, Kongresshaus Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Programm_Kapitalmarkt_26.11.2015.pdf