



abels avocats

M&A and Contaminated Sites

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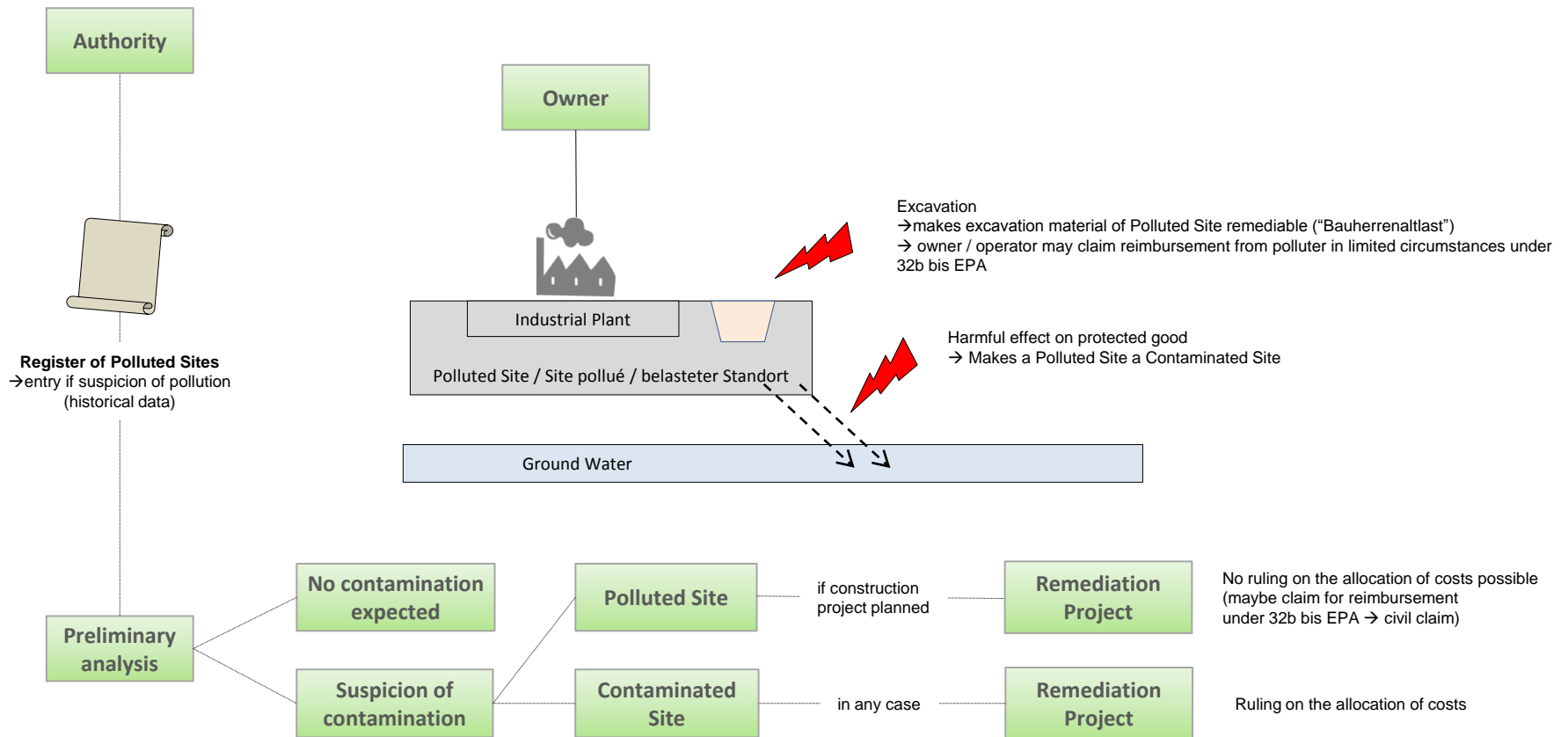
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What are we talking about?



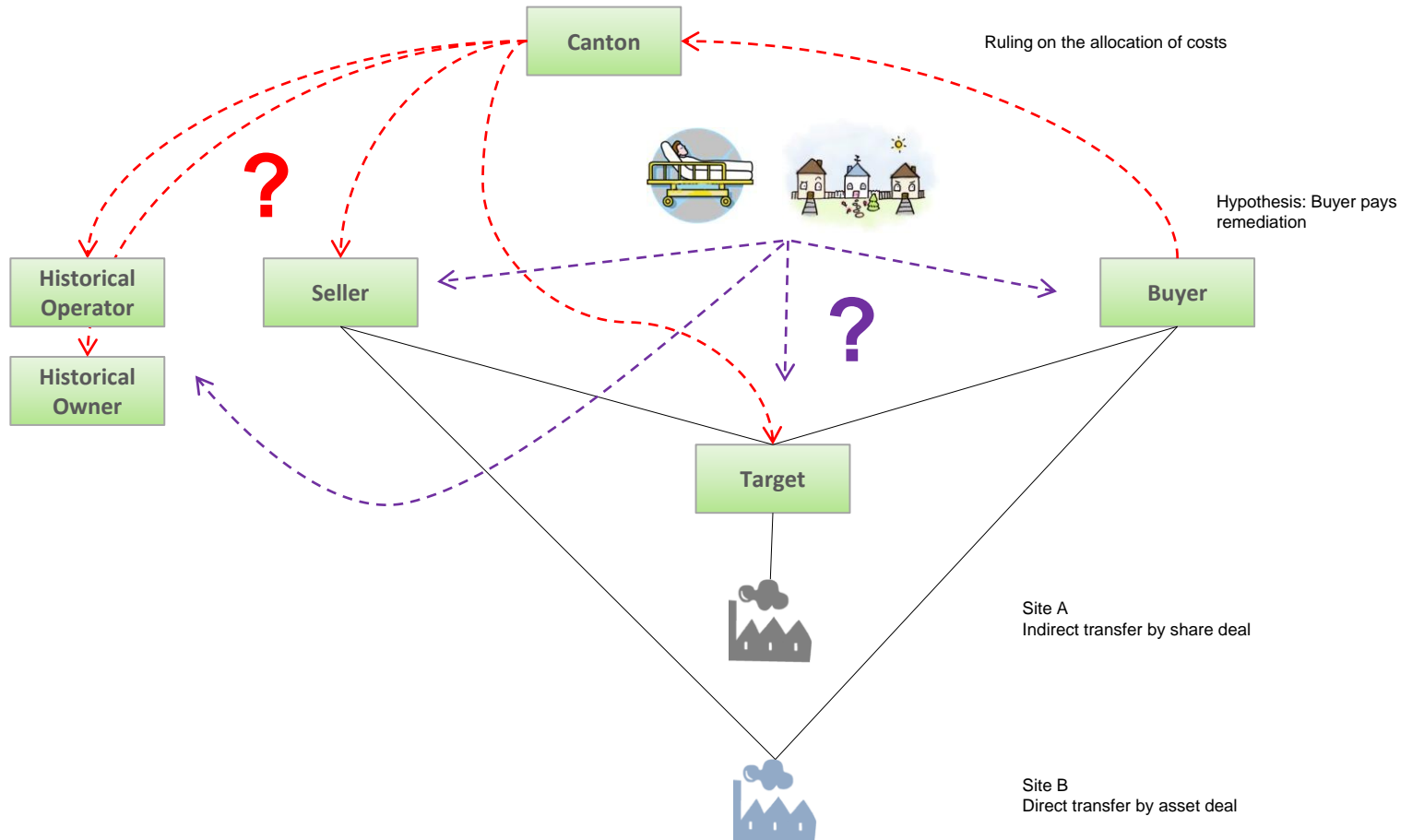
Key Concepts – Remediation of Contaminated Sites

- Polluted Site (“PoSi”) = sites polluted by Waste → Landfills, Industrial Plants, Accident Sites → are static
 ≠ Contaminated Site (“CoSi”; site contaminé; Altlast) → PoSi with harmful effects or nuisances on the environment
 → calls for remediation (art. 20 Contaminated Sites Ordinance (“CSO”); criteria: thresholds of the CSO)
- Polluter by virtue of misconduct / pollueur par comportement vs Pollutor by circumstances / pollueur par situation
- General rule of environmental law: polluter pays → Inversion regarding remediation duties: Owner/Operator pays, with option to ask for an Allocation of Cost Ruling through the Allocation of Cost Procedure (“ACP”) in certain limited circumstances (= shift of cost to third party)
- Difficulty: law is black and white – environmental measuring is very random and subject to interpretation



Key Concepts – M&A

- Key problem from a transactional viewpoint: time (remediation of sites and corresponding procedures can take many years)
- Distinction between transactions via Lfus, 181 old CO, pure asset deal – how often does it really matter?
- Mind the general rules of civil law (41 CO / 59a EPA / 679 CC)



Contaminated Sites – Negotiation Aspects

- Top difficulties: mind the terminology!! Think long term !!
- Difficulty: mix public law / private law – public law cannot be waived, but contracting around is possible to a certain extent
- General toolbox (caps, *de minimis*, price adjustment clauses, etc.) not addressed below

Issue / Scenario	Pro Seller	Pro Buyer	Comments
Diligence during negotiation	Do a Vendor Due Diligence Use environmental experts	Do a Due Diligence Use environmental experts	Entry / Non-entry in PoSi Register not a safe information source
Reps & Warranties	1 Top: No R&W; indemnify from ACP 2 R&W only if really CoSi 3 Only representations for past status 4 Only current use (“no digging”) Etc. etc.	1 Top: Maximum R&W 2 R&W re PoSi, CoSi, building, etc. 3 R&W 4 All uses included 5 Get deletion from Register of PoSi Etc. etc.	W&I Insurance thinkable if risks are determined
Remediation Covenant	Obligation for Buyer to remediate according to project (key to get long term safety)	No covenant / if timing permits: covenant of the Seller to remediate	
Reduction of value / price	Prefers minimalist model: only reduction by the costs triggered by necessary remediation in view of specific project If reduction given: get protection from ACP (incl for successors)	Prefers maximalist model: reduction by the costs of total remediation	
Information / Collaboration	May wish such rights, in particular if long term indemnification accepted	No interference from the Seller	
Excavation	Inter partes exclude recourse for cost	Specific wording as claim for costs may not apply	
Excursus: Asbestos	If representation given, then preference for a “no digging” equivalent	Address problem specifically as issue is not covered by a general “Contaminated Site” wording	Not a CoSi problem !! > duties come from workers protection or cantonal rules