Argentina

Contributed by Fernando Noetinger, Noetinger & Armando

1. ASSET VERSUS SHARE PURCHASE

1.1 The major advantage to the buyer in acquiring assets rather than shares is that the buyer of assets reduces its exposure to liabilities that were not evaluated during the due diligence period.

An asset purchase may have tax disadvantages for the seller. There may be tax advantages for the buyer, however, which must be evaluated on a case-by-case basis. These advantages will depend upon how the deal is structured with respect to the tax position of the buyer.

1.2 Argentinean law establishes a procedure—called "transfer of stock in trade" or "transfer of business"—that should be followed when substantial assets of a company are acquired. This procedure benefits creditors of the seller and, if it is not followed, the buyer may be held liable for debts of the seller.

A "transfer of business" is valid vis-à-vis third parties only if the procedure established by Law 11867 is followed. This procedure begins with an announcement of the proposed transfer, which must be published for a period of five days in the official gazette and in one major newspaper of the city or town where the business is located. The announcement must include the names and addresses of the buyer and seller, the type of business that will be transferred and, when a notary public or broker is involved, that person's name and address. Within ten days of the last publication, creditors of the seller can file an opposition to the transfer. The amounts that correspond to each creditor that has opposed the transfer must then be deposited by the buyer, notary public or broker in a special bank account. This deposit must be kept for twenty days to allow the creditor to obtain a court order attaching the amount of the debt. If there are no oppositions, or if the amounts that correspond to creditors that have opposed the transaction have been deposited, the buyer and seller can proceed with the transaction. Those deposits for which the creditor has not obtained a court order can be withdrawn and passed on to the seller.

1.3 If the acquired assets are an important part of the seller's assets (e.g., important trademarks), then the creditors of the seller may allege that the buyer is liable for the seller's debts because the procedure discussed in Subsection 1.2 was not followed.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement may be used, although it will be necessary to have other documents executed to record the transfer in the corresponding registers. See Subsection 2.2.

2.2 The transfer of certain assets must be done with the aid of a notary public, as in the case of real estate. Other transfers must be recorded before a special registry (e.g., transfers of trademarks, ships, aircraft, cars and shares). In these cases, it is necessary to submit a true copy of the asset acquisition agreement (usually a copy of the original document certified by a notary public) or to request the recording of the transfer by signing a special form. In some cases, both must be done.

2.3 The form of the document does not make any difference in the tax effects of the transfer.

2.4 As indicated in Subsection 2.2, transfers of certain assets must be recorded before the relevant registry if they are to be effective against third parties. The following list shows some examples of assets that must be registered:

- Real estate must be registered with the Registry of Real Estate of the jurisdiction where the property is located;
- Cars, ships and aircraft must be registered with the Registry of Cars, Ships and Aircraft;
- Trademarks and patents must be registered with the National Institute of Industrial Property; and
- Shares must be registered in the relevant stock register that companies must maintain by law.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Whenever the most important assets of a company are being sold, approval of the board of directors is required. To determine which assets are "most important," one must assess the assets' relevancy to the main activities of the company. If an acquisition involves all the assets, or the ones most relevant to the seller's normal operations, it is advisable to have the stockholders approve the sale; this ratifies the approval by the board of directors so that it cannot be questioned later by the stockholders. Under the Law on Defense of Competition No. 25,156, certain acquisitions may be subject to prior approval by the government. See Section 4.

3.2 Acquisitions related to telecommunications, press and related activities require government approval. Assignment of contracts that involve a concession of the government (e.g., mining) will require prior approval.

4. UNFAIR COMPETITION

In Argentina, the Defense of Competition Law No. 25,156 requires that parties who propose to engage in a merger, transfer of business or acquisition of shares or voting securities that gives the buyer control over a company (economic concentration) must be previously notified to the National Tribunal on Defense of Competition. Such notification is mandatory, and the transaction will have no effect until it is cleared by the National Tribunal when the total volume of the business of the buyer and seller in Argentina exceeds $200 million.

Deals that fall within the above standards are, however, exempted from the obligation to submit the deal for prior approval when (a) the buyer already holds more than fifty percent of the shares of the company that is acquired, acquisition of shares or securities with no voting rights, (b) the deal refers to the acquisition of one single company by one single buyer with no previously owned assets in Argentina, (c) the buyer acquires a company that has been liquidated and has not been active during the previous year, or (d) the value of the assets in Argentina and the value of the acquisition do not exceed $20 million, except when acquisitions made in the previous twelve months exceed said amount, or those made in the previous thirty-six months exceed $60 million.

The notification must be made before the conclusion of the deal, or within one week from the date the deal has been decided by the relevant bodies of the merged companies or from which the transfer of business has been published or the transfer of shares registered, whichever occurs first.

The National Tribunal has forty-five working days to authorize the deal, prohibit it or approve it subject to the fulfillment of certain conditions. If that period expires without any decision by the National Tribunal, the deal is considered to have been approved.

5. SUCCESSOR LIABILITY

5.1 No such circumstances exist because these liabilities correspond to the person or entity that owned the asset when the damage to the environment was done.

5.2 As indicated in Subsection 5.1, the liability corresponds to the owner of the specific asset that caused the damage. Whenever a specific registry exists where all transactions must be recorded, the person or entity under whose name the asset is registered at the time the damage occurs is also a liable party, together with the person that caused the damage.

5.3 There are no obligations of the buyer for fulfilling outstanding orders.

5.4 All warranties made by the seller must be honored by the seller unless the agreement provides otherwise.

5.5 When real estate is transferred, a notary public must make sure that all obligations, such as property taxes and real estate common expenses, have been paid up to the date the deed is executed. The notary public may also check on utilities (e.g., gas, electricity, etc.), although the buyer usually does this.

5.6 All agreements involving the rental or lease of real estate continue until the end of the agreement and must be honored by the buyer.

5.7 It is customary and advisable to conduct investigations into the status of assets of the registered owner and any restrictions that may exist regarding the free transferability of the property.

6. PUBLIC RECORDS

There are public records on the following:

- **(i)** Ownership records of real property are available at the Real Estate Registry in the jurisdiction where the property is located.
- **(ii)** Information regarding mortgages on interests in land or property and ships and aircraft is available at the National Ship Registry (for ships) and the National Aircraft Registry (for aircraft). Information regarding registered pledges is available at the National Registry of Pledges.
- **(iii)** Not applicable.
- **(iv)** Not applicable.
- **(v)** Ownership records pertaining to intellectual property are available at the National Institute of Industrial Property.
- **(vi)** Information regarding pending litigation for certain causes is available at the Court of Appeals for Civil or Commercial Matters.
- **(vii)** Private entities (e.g., Dun & Bradstreet and others not run by a government agency or office) may have information on the financial situation and standing of the target company.
- **(viii)** See Subsection (vii).

7. LABOR MATTERS

7.1 It is customary for the seller to terminate all employment agreements whenever the acquisition of assets is involved.

7.2 It is permissible and common.

7.3 The buyer is not bound by such obligations unless the transaction is considered a "transfer of business" where all the assets are involved or where the assets sold are those that correspond to the main activities of the company.

7.4 It is legally enforceable to allocate responsibility between the buyer and seller for severance payment obligations.

7.5 An asset sale will not be subject to consultation with, or authorization from, any works council, labor union or similar body.

7.6 If the employment agreements are transferred to the buyer, the terms cannot be changed without the employees' consent.

7.7 The buyer assumes such liabilities if the employment agreements have been transferred. Therefore, it is advisable for the seller to terminate the employment agreements and the buyer to enter into new ones.

8. PLANT CLOSING LAWS

In the case of a mass layoff or suspension due to (a) force majeure or (b) economic or technological reasons, a restriction known as "crisis procedure" requires an employer to notify the labor authorities of its intent to engage in such action. A short period of negotiations between the parties is then opened, during which an employer cannot execute the intended action. If no agreement is reached after the negotiation period ends, then the employer is free to take that action.

9. ASSIGNMENT OF CONTRACTS

Leases or rental estates are transferred automatically in sales of property. If the lease is assigned, the prior consent of the landlord is usually required. Similar consent is required in other rental or insurance agreements, which may require the consent of the property owner or the insurer, depending upon the provisions included in the lease or legal documents.

10. NONCOMPETITION

10.1 Noncompetition agreements can be enforced against the seller only if the procedure for the "transfer of business" has been followed (see Subsection 1.2). It is very difficult to enforce such clauses against the principals, and it is almost impossible to do so against the employees.

10.2 Noncompetition clauses must be limited in both time and geographic area. The extent of the time limitation will depend upon the nature of the business. Generally, a one-year period is permissible. No registration of noncompetition clauses is required.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Parties are free to choose applicable law and venue, provided that the public interest is not involved.

11.2 Arbitration is possible. An award will be reexamined only if the arbitration procedure was not followed, preventing parties from exercising their rights.

11.3 Saving time is the principal reason for choosing arbitration.

12. OTHER ISSUES

12.1 It is not typical to include a clause regarding the allocation of attorney's fees in an asset acquisition agreement because each party usually bears its own cost. In the case of real estate, the fees of the notary public, as well as certain other expenses, are paid by the buyer; other expenses are paid by the seller, and others are split equally between the buyer and seller.

12.2 See 1.2. Because the procedures that must be followed vary according to the type of asset, it is important for the buyer to know which requirements apply and whether the "transfer of business" procedure is recommended and/or mandatory before entering negotiations.

12.3 [No response.]

Australia

Contributed by William Koeck, Partner, Blake Dawson Waldron and Glenn Hughes, Corrs Chambers Westgarth

The following responses pertain only to the laws of New South Wales and the laws of the Commonwealth of Australia. The laws of the other states (and of the two territories) are similar—but by no means identical—to the laws of New South Wales.

1. ASSET VERSUS SHARE PURCHASE

1.1 Tax and funding issues aside, the major reason for structuring an acquisition as an asset purchase is the absence of assumed liabilities, other than those expressly assumed in the acquisition agreement itself. Depending upon the nature of the assets being acquired, more extensive documentation may be required. The assets may include assignments or novations of existing contracts, assignments of any work in progress, assignments of intellectual property and transfers of real property. As discussed in Section 7, various employment law issues may arise from the sale of the business by way of an asset purchase.

Any transfer of assets in New South Wales is subject to a local transfer tax known as "stamp duty." The duty is calculated on the higher of the consideration paid or the market value of the assets acquired. For the purchase of assets, the rate of duty varies, to a maximum of 5.5 percent for consideration greater than AUS $1 million. For the purchase of shares, however, the stamp duty is only .06 percent. In both cases, the buyer pays this duty.

1.2 The acquisition of shares and the acquisition of assets are different concepts at law, even though in practical terms the result may be the same. The only time a buyer would unintentionally assume the liability of the seller would be when a court or the Australian Tax Office made specific orders or judgments against specific assets. In these situations, however, the buyer could probably rely on the warranties given by the seller that the assets were being sold free from encumbrances.

1.3 The answer to Subsection 1.2 would not be different if only part of the assets were to be acquired.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement could be used in its present form, so long as it is tailored to the specific fact scenario at hand. There is no law, custom or practice in New South Wales that requires a specific or different form of agreement.

2.2 Essentially, there can be one document for the conveyance of all the assets of the business. Because of administrative, tax or other reasons, however, there may be a need for

separate agreements for intellectual property, real property and the assignment/novation of specific contracts. In addition, there will undoubtedly be various forms that must be filed with government agencies in the post-closing period.

2.3 Generally speaking, from a tax perspective, the form of a document plays a secondary role to the substance of the transaction.

2.4 Generally, there are no registration requirements. Some assets (such as motor vehicles and real estate) and some types of businesses that require specific licenses (such as food preparation or sale) require registration as such by the buyer to continue operation.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 The Foreign Acquisitions and Takeovers Act requires that any acquisition of an Australian corporation or business, where the total assets are greater than AUS $50 million, be notified and that approval be received before closing.

Notifications of foreign investment should be made to the Foreign Investment Review Board, a department of the Federal Treasury. A voluntary notification may be made in some cases (when compulsory notification is not required) to prevent the Federal Treasurer from exercising its power to block the transaction or order divestiture if it is deemed to be against the national interest. Notification begins a thirty-day period within which the Federal Treasurer has the opportunity to object. If no objection is made within that time limit, the Federal Treasurer loses power to make any subsequent orders.

In most—if not all—cases, approval by the board of directors will be required. If the assets are a significant part, or in fact the whole, of the corporation's business, then shareholder approval may also be required.

Antitrust issues may arise. Although there is no compulsory premerger notification requirement in Australia, if the result of the acquisition potentially decreases competition in the particular market, then notification to the Australian Competition and Consumer Commission would be advisable.

3.2 The media/telecommunication (including television, radio and newspaper), mining and airline industries are the major industries subject to special regulations for nonnational participation.

4. UNFAIR COMPETITION

There are no premerger notification requirements in Australia. However, if a transaction leads to a substantial lessening in competition in the relevant market, the Australian Competition and Consumer Commission, pursuant to the powers granted to it by the Trade Practices Act, may order divestiture or issue other remedial orders.

5. SUCCESSOR LIABILITY

5.1 Under Australian law, the current occupier (e.g., owner or tenant) of real property is primarily liable for a breach of any environmental law. Therefore, a buyer could be liable for breaches of environmental law that were in fact caused by acts or omissions on the part of the seller.

5.2 There are no general rules, but the general convention is to make the seller liable for claims arising before the date of closing. This, however, raises a potential commercial risk because, if the liability is not met by the seller, then the buyer may be forced to assume such liability to protect the goodwill of the ongoing business.

5.3 This will depend upon what is agreed and what liabilities are assumed in an acquisition agreement. The agreement may provide that the seller is liable to fulfill outstanding

orders, that there is to be a transition period or that the buyer is to assume the liability as of and from the closing date.

5.4 Again, this depends upon the terms of the acquisition agreement, although the general convention would be that any warranty claim that originates before the acquisition date would be the responsibility of the seller.

5.5 The liability for breach of an environmental law lies with the current occupier, that is, the buyer.

5.6 The only liabilities assumed are those related to real property (as discussed in Subsection 5.5) and those expressly assumed in the acquisition agreement.

5.7 It is customary for a buyer to conduct such audits and investigations, although the scope of such due diligence will depend upon the value of the acquisition, the potential liabilities being assumed and the strength of the warranties and representations provided by the seller.

6. PUBLIC RECORDS

(i) Public records are available that would disclose the existence of, or provide information about, the ownership of immovable property.

(ii) Public records are available that would disclose the existence of, or provide information about, mortgages on and other charges or real rights affecting immovable property.

(iii) Public records would disclose the existence of, or provide information about, environmental issues affecting real property only when such environmental issues have been recorded or lodged at the relevant local council.

(iv) Public records are available that would disclose the existence of, or provide information about, liens and encumbrances.

(v) Ownership of patents, trademarks and registered designs can be determined by a review of public records. Other intellectual property, such as copyright and know-how, are not registered in Australia and, therefore, are not contained in any public records. Patents, trademarks and registered designs are all within Commonwealth jurisdiction and are contained in a national registry with regional offices. There is no national or state registry for copyright or know-how.

(vi) No public records disclose the existence of, or provide information about, pending litigation.

(vii) No public records disclose the existence of, or provide information about, the standing of the target company. The Australian Securities Commission, however, will provide a letter of good standing noting that the company has been incorporated and that there are no regulatory matters outstanding, such as late annual returns.

(viii) Listed public companies are required to file and disclose annual accounts. Private companies are not subject to this obligation.

7. LABOR MATTERS

7.1 This depends upon the terms of an acquisition agreement. Employees cannot be forced to transfer, and they must be terminated by a seller and rehired by a buyer. If an agreement contemplates that the employees are to be transferred as part of the transaction, then there will be a transmission of the business. This will constitute a deemed continuity of employment for purposes of the employees' entitlement.

7.2 Typically a seller terminates employees at closing, and the buyer offers to employ the employees. Any employee who is not offered new employment will either remain with the seller or have a claim for redundancy against the seller.

7.3 Again, this depends upon what is assumed in an acquisition agreement. Normally, a buyer is free to offer whatever benefits it likes to the employees it rehires. Australia, however, has a national superannuation scheme that requires all employers to make minimum statutory contributions to employees' superannuation funds. In addition, if the employees are governed by particular employment agreements with trade unions, then the buyer may be forced to accept the terms and conditions contained in such employment agreements and awards.

7.4 It is legally enforceable to allocate responsibility between the buyer and seller for severance payment obligations.

7.5 Whether consultation with a labor union is required depends upon the particular industry and the number of employees involved. Industries that are typically unionized include the construction, transportation and maritime industries. Consultation with unions in those industries would be required to complete an acquisition effectively. In some circumstances, the relevant employment awards and agreements may impose restrictions on a seller in selling its business. In most cases, however, there is no such obligation.

7.6 After the consummation of an acquisition, the buyer can change the terms of employment for employees who are transferred to it as a result of the acquisition. This may trigger a redundancy liability (an obligation similar to unemployment insurance) on the part of the buyer, however. The method a buyer typically uses to change the terms of employment is to rehire the employees at closing, on the terms under which the buyer wishes them to perform, as opposed to changing the terms after consummation of the transaction.

7.7 Again, this will be determined by the terms of the acquisition agreement. Ordinarily, an allowance would be made to the purchase price for the amount of liability that is being assumed by the buyer in connection with the employees' accrued liability.

8. PLANT CLOSING LAWS

Although there are no specific statutes like the WARN Act, similar restrictions may be imposed as a result of various State and Federal Employment Awards and Agreements. These Awards and Agreements may set forth minimum requirements for notice and severance payments. When more than fifteen employees will be laid off, there is an obligation to notify the Commonwealth Employment Service. In addition to the various restrictions and procedures set forth in State and Federal Awards, restrictions or obligations may also arise under the terms of any contracts of employment with various key employees.

9. ASSIGNMENT OF CONTRACTS

Generally no such contracts are transferred automatically, although there may be some forms of assets that have warranty provisions that inure to the benefit of subsequent purchasers.

10. NONCOMPETITION

10.1 To be enforceable, a noncompete clause must be reasonable in terms of time, scope of covered activities and geographic area. Such clauses can be enforced against a seller so long as they are reasonable under the circumstances. Another factor that adds to the reasonableness of a particular clause and, hence, its enforceability, is the consideration paid for such restraint. Accordingly, unless the principals of the seller are receiving some benefit from the transaction, it would be unlikely that a broad noncompete clause would be enforceable against the seller. A broad noncompete clause may not be enforceable against an employee unless the employee's terms of employment include a noncompete clause. Even then, what is reasonable for the seller of a business may not be reasonable for an employee.

10.2 As discussed above, a noncompete clause will be enforceable only if it is reasonable under the circumstances. In New South Wales, there is a Restraint of Trade Act that allows a court to "read down" (i.e., reform) a noncompete clause if it is reasonable but, in a court's opinion, too broad given the circumstances. There are no registration requirements for noncompete clauses.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 There are no restrictions relevant to asset acquisitions by foreign parties regarding jurisdiction or choice of applicable law.

11.2 The parties may pledge in the acquisition agreement that arbitration is final and binding. If so, the parties are bound by that clause.

11.3 Arbitration and litigation are almost on par in terms of costs and expenses. In most circumstances, however, arbitration will provide a quicker resolution to the dispute than litigation.

12. OTHER ISSUES

12.1 It is typical to include a clause regarding the allocation of attorney's fees in an asset acquisition agreement.

12.2 Australia has no general laws requiring sellers or buyers to publish notice of a bulk sale in advance. That is not to say, however, that creditors are unprotected. In circumstances where there are potential or actual insolvency issues, any sale of goods by a seller not in the ordinary course of trade may be held to be a preferential transaction and may be subsequently unwound by a liquidator, with the proceeds reclaimed for the benefit of the seller's creditors.

A creditor of a seller may also attempt to protect itself by using some type of reservation-of-title clause in the sale contract between the seller and the creditor. These clauses attempt to reserve title to the goods with the creditor until the seller actually pays for the goods. There are numerous variations and permutations in the way such clauses are drafted, including, for example, the extent to which the seller may hold the proceeds of sale in trust for the creditor.

In both of the above situations, a buyer would normally seek to protect itself against claims from the seller's creditors by obtaining warranties from the seller pertaining to solvency and title to the goods. Obviously the strength of the warranty (in terms of the seller meeting its warranty obligations) must be assessed in each circumstance.

12.3 Although this has been discussed earlier, stamp duty often determines how the transaction will be structured in Australia. A foreign buyer should also be aware of various tax laws and implications that have not been addressed in this questionnaire.

Belgium

Contributed by Benoit Feron, NautaDutilh (Brussels)

1. ASSET VERSUS SHARE PURCHASE

1.1 The major consideration for the buyer in choosing an asset acquisition rather than an acquisition of shares is the fact that the buyer can "pick and choose" the assets and/or liabilities it wishes to acquire or assume. The disadvantage, however, is that there are various statutory requirements regarding the transfer of certain types of assets. Contracts, for example, cannot be transferred unless the transfer is notified to the co-contracting party and that party's consent is duly obtained. Moreover, permits, licenses and authorizations are usually not transferable.

1.2 There is a tax advantage in an asset acquisition because the buyer can depreciate the assets purchased based upon the purchase price (i.e., on a step-up basis). If the assets sold form a branch of activities (i.e., all assets and liabilities of one or more divisions of an enterprise) or a universality of goods (i.e., all assets and liabilities of all branches of activity), the transfer will not be subject to Value Added Tax (VAT). If, however, the transferred assets include a building, registration duty will, in principle, be due on the market value of the building at a rate of 12.5 percent. The registration duty is calculated on the value of the building itself and the property on which the building is erected.

If the buyer purchases the shares of the company rather than its assets, there will be no tax advantages resulting from a step-up of the assets. Furthermore, if the acquisition is not justified based upon legitimate financial or economic needs, there can be no utilization of the tax losses carried forward by the seller.

1.3 A transfer for consideration is, in principle, subject to VAT, which is recoverable in the buyer's name but must be paid in advance. If the transferred assets include a building, registration duty will become due on the market value of the building, including the property on which the building is erected, at a rate of 12.5 percent.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement, including its representations and warranties, could be used in Belgium. As there are no linguistic requirements, the English language could be used.

Belgian law does not require an asset acquisition agreement to be under a seal or in notarized form.

2.2 A transfer of assets can be effected by way of one document, executed and signed by all parties concerned. Although conveyance documents are not required, notifications may be necessary. The transfer of accounts receivable, for example, is not enforceable against third parties unless the transfer of each and every account receivable is notified in writing to each relevant debtor. Similarly, the transfer of trademarks must be notified for registration to the Benelux Trademark Register.

If the acquisition includes real property, a separate notarized deed of transfer will be required.

2.3 If the document is a notarized deed, it must be registered and will be subject to a registration duty. The registration duty is, in principle, a fixed rate amounting to BF 1,000. However, if the notarized deed records the transfer of real property, the registration duty will amount to 12.5 percent of the market value of the real property.

2.4 Pursuant to the Belgian Code on Registration Taxes, any transfer of a business (or part of a business) must be registered with the local collector of registration taxes. The transfer is not enforceable against the Income Tax Administration up to the end of the second month following the registration. Nonenforceability means that the Income Tax Administration can take any measure of conservation and enforcement to recover the outstanding tax liabilities from the seller. However, nonenforceability does not apply if a certificate is obtained confirming that the seller has no outstanding tax liabilities.

Unless the tax authorities issue a certificate stating that the seller has no outstanding tax liabilities, the buyer is potentially responsible for the tax liabilities of the seller up to the amount that the seller has paid to the buyer at the end of the second month.

If the transfer includes real property, the deed of transfer must be registered with the Mortgage Registry Office (Conservation des Hypotheques).

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 As a rule, the acquisition of assets in Belgium is not subject to government approval. If the business being transferred, however, is subject to the supervision of a governmental or regulatory agency, approval by such agency may be required. Belgian law requires the prior approval of the Commission for Banking and Finance in the case of a transfer of business between banks or investment enterprises. Similarly, a transfer between insurance companies of all or part of the rights and obligations arising out of the company's insurance contracts is subject to the prior approval of the Insurance Control Office.

Moreover, if an asset deal includes the transfer of real property located in the territory of the Flemish Region, the seller must obtain a soil certificate (so-called bodemattest) from the Flemish Region before execution of the transaction. The soil certificate notes the pollution level of the property being transferred. Depending upon the content of this soil certificate, the Flemish Region may compel the buyer to prefinance the cleaning of the soil.

The seller's board of directors is authorized to decide on a transfer of assets, unless the articles of association provide otherwise (e.g., by requiring the shareholders' approval).

3.2 If a foreign company acquires a business in Belgium, it will be deemed to have a legal establishment in Belgium. Such establishment must be registered as a branch office with the local Court of Commerce and the local Trade Registry.

Although certain categories of business activities (e.g., banking, financial services, insurance, construction) are subject to special regulations, such regulations do not prevent nonnationals from engaging in these activities. Nonnationals may be subjected to formalities and/or requirements, however, that are more extensive or burdensome than those imposed on Belgian nationals. The requirements for nonnationals consist of approvals from the competent authorities (enterprises from European Union (EU) member states are usually excepted) or the imposition of more stringent conditions.

4. UNFAIR COMPETITION

Pursuant to the Belgian Act of 5 August 1991 on the Protection of Economic Competition, asset acquisitions must be notified to the Belgian Competition Council for approval if the parties to the acquisition have a combined worldwide consolidated turnover in excess of BF 3 billion and have a combined market share of twenty-five percent (or more) of the relevant Belgian market. The act prohibits the consummation of acquisitions subject to the Act for a minimum of thirty days after the notification.

If the Competition Council fails to issue a decision within one month after the notification, the acquisition shall be deemed to have been permitted.

No approval by the Belgian cartel authorities is required if the acquisition has an "EU-dimension" as provided under EU Merger Control Regulation 4064/89.

5. SUCCESSOR LIABILITY

5.1 As a rule, the buyer is not responsible for environmental liabilities of the seller. Pursuant to a decree of the Flemish Region, however, a buyer that has acquired polluted land or other real property from the seller may be ordered to clean up the property. Such an order can be challenged only if the buyer is able to prove that it has not caused the pollution and was not aware of such pollution on the acquisition date.

5.2 The buyer is not liable for products or services sold before the acquisition date unless it has acquired the business as a whole or has agreed to assume product liability debts.

5.3 The buyer is not required to fulfill outstanding orders unless it has expressly agreed to take over such orders or has acquired the business as a whole.

5.4 The buyer has no liability in connection with warranty claims originating before the acquisition date unless it has agreed to assume such claims or has acquired the business as a whole.

5.5 If the buyer agrees to take over a lease contract from the seller, the buyer will be liable for the obligations of the seller under the contract.

5.6 Except in the case of fraudulent acquisitions in which some collusion between the seller and the buyer can be demonstrated to organize the insolvency of the seller, no other obligations can be automatically transferred to the buyer. In the case of fraudulent acquisitions, any third party to the transaction can assert the invalidity of the transfer.

5.7 There is an increasing tendency in Belgium to conduct a due diligence investigation before the acquisition because the Belgian Civil Code does not provide adequate remedies to cover the risks of an acquisition. This tendency is enhanced by the fact that environmental laws and regulations are becoming more rigorous, especially in the Flemish Region.

6. PUBLIC RECORDS

- **(i)** Information regarding the ownership of immovable property, as well as attachments on such property, can be found at the Land Registry Office (Cadastre) and Mortgage Registry Office (Conservation des Hypotheques).
- **(ii)** See Subsection (i).
- **(iii)** There is no specific register regarding environmental issues affecting immovable properties. In the Flemish Region, however, a so-called register van ontreinigde gronden exists, which includes all known polluted land.
- **(iv)** Information regarding mortgages and pledges on the business (Be: pand op handelszaak/gage sur fonds de commerce) can be found at the Mortgage Registry Office.

(v) Information relating to the ownership of intellectual property rights can be obtained from the Patent Office at the Belgian Ministry of Economic Affairs, the Benelux Trademark Register and the Benelux Register for Drawings and Designs. Copyrights may be registered with collecting companies, such as SABAM.

(vi) There is no reliable system for discovering pending litigation. According to the Royal Decree of 8 October 1976 on the annual accounts of enterprises, however, a provision for litigation in process must be recorded in the accounts of the enterprises.

(vii) In relation to the good standing of the seller, a copy of the deed of incorporation and of the articles of association can be obtained from the local clerk of the Court of Commerce. Any amendments to the articles of association (e.g., increase of share capital, liquidation, etc.), as well as any appointments of directors and managing directors, are published in the *Belgian Official Journal*. In addition, limited information about the business activities and the trade name of the company can be obtained from the Registry of Commerce.

(viii) A copy of the annual accounts can be obtained from the National Bank of Belgium.

7. LABOR MATTERS

7.1 The safeguarding of employees' rights in the event of transfers of undertakings (i.e., legal entities), businesses or parts of businesses is regulated by the Collective Bargaining Agreement No. 32 bis. The agreement is entered by one or more representative employer organizations and one or more representative employee organizations, which determine the individual and collective relations between employers and employees. Chapter II of the Collective Bargaining Agreement No. 32 bis applies to any transfer of an undertaking, business or part of a business, which does not occur in the context of a bankruptcy or judicial composition, if the following conditions are met:

- The transfer results in a change in the employer;
- The economic entity that is transferred keeps its identity; (This means that the transferred entity includes sufficient elements to continue to operate as a commercial enterprise.)
- The transfer does not result from the death of the employer.

In the case of a transfer within the limitations of the Collective Bargaining Agreement No. 32 bis, the rights and obligations of the seller, arising from a contract of employment existing on the date of the transfer, shall automatically be transferred to the buyer.

7.2 Pursuant to the Collective Bargaining Agreement No. 32 bis, all rights and obligations arising from an employment contract existing on the date of the transfer will automatically be transferred to the buyer. Furthermore, the Collective Bargaining Agreement No. 32 bis provides that the transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferring employer or the transferee. The employment contracts can, however, be terminated for economic, financial or organizational reasons. If the seller's termination of the employment contracts is not grounded on the transfer itself, and the contracts are terminated before the time of the transfer, the buyer cannot be held liable for the payment of a severance indemnity.

7.3 The Collective Bargaining Agreement No. 32 bis does not provide for the automatic transfer of old-age, health-related or survivor benefits under supplementary company or intercompany schemes. However, if such benefits are part of a collective bargaining agreement that was concluded on a company or industry level, they will be binding on the buyer.

7.4 Because the buyer and seller are both liable jointly and severally for the payment of debts resulting from the employment contract existing at the time of the transfer, the allo-

cation of responsibility for severance payment obligations will be legally enforceable only inter partes (i.e., between the parties, as subject to an indemnity agreement).

7.5 The employer involved in negotiations relating to the transfer of its business, or part of its business, must inform and consult the representatives of the employees in the works council in good time and before the public announcement of any transfer. Consultation with the works council must address the effect(s) that the transfer will have on the working conditions and employment of the business. The employer has the final word, however, on whether the transfer will take place.

7.6 Within certain limitations, the employer may modify terms of employment if the changes are justified for economic reasons, but the employer is not allowed to modify essential elements of the contract unilaterally. A unilateral modification of an essential element of the employment contract will constitute an illegal termination of the contract.

7.7 After the date of the transfer, the seller and the buyer are both jointly and severally liable for the payment of debts resulting from the employment contract and existing at the time of the transfer.

8. PLANT CLOSING LAWS

The Act of 18 June 1996 concerns the indemnity to be paid to employees who are dismissed as a result of a plant closure. The act applies to undertakings that have employed an average of at least twenty employees during the previous calendar year.

According to Article 2 of the Act of 28 June 1966, a plant closure will be deemed to have occurred when the following conditions are met:

- there is a permanent cessation of the main activity of an undertaking or one of its divisions, and
- the number of employees of the undertaking or the division concerned decreases below twenty-five percent of the average number of employees employed during the preceding calendar year.

The plant closure will be deemed to have taken place on the first day of the month following the month in which the second condition set forth above is satisfied. The employer that intends to close its plant or a division thereof must inform its employees by posting a signed notice. The intention must also be notified in writing to the works council or, in the absence of a works council, to the trade union delegation. On the day the notice is posted, notification must be sent by registered letter to the Minister of Labor, the Minister of Economic Affairs, the Regional Unemployment Office, the president of the competent Joint Committee and the Closing Fund for Employees Affected by Plant Closings. There are several penalties for failing to comply with the requirements of the Act of 18 June 1996.

9. ASSIGNMENT OF CONTRACTS

Except for employment agreements, which are transferred from the seller to the buyer by operation of law (see Section 7), no contracts can be transferred without the consent of the other contracting party.

A recent amendment to the Companies Act, however, provides that in a transfer of a business or part of a business, all assets and liabilities of the business (including all contracts) are automatically transferred to the buyer, provided that the parties to the transaction have observed a detailed "merger-like" procedure. This procedure, which is not mandatory, includes the execution of a notarized proposal of transfer, a decision of the general meeting of shareholders, a notarized deed of transfer and various publications in the *Belgian Official Journal*.

10. NONCOMPETITION

10.1 A noncompetition clause can be enforced against the seller, provided such a clause is limited in time, scope and geographic area.

A noncompetition clause will be enforceable against an employee only if all the following conditions are met:

- The clause must be in writing;
- The clause must relate to similar activities;
- The period during which the clause remains applicable may not exceed twelve months after the expiration or termination of the employment contract;
- The clause must preferably be limited to the territory in which the employee can effectively enter competition with the employer within the Belgian territory;
- The clause must provide for payment by the employer to the employee of a sum equal to at least half the gross remuneration of the employee. This sum should correspond to the duration of the noncompetition obligation unless the employer waives the non-competition clause within fifteen days of termination of the employment contract; and
- The employee's annual remuneration exceeds BF 1,822.

10.2 See Subsection 10.1.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 In Belgium, there are no major restrictions, relevant to asset acquisitions by foreign parties, regarding the choice of applicable law. The property law issues, however, will be governed by the lex rei sitae (i.e., the law of the location of the property). No important restrictions exist regarding jurisdiction.

11.2 Arbitration is possible. Although an arbitration award is final and enforceable, it is subject to the exequatur (i.e., obtaining a judgment) procedure, involving a fast formal review of the award, before it receives the same authority as a judicial decision. It is also possible to ask for the award to be nullified in cases where there has been a violation of public policy.

11.3 In general, parties select arbitration to avoid long court proceedings; it is preferred that expert arbitrators decide the case. Parties may also choose arbitration to avoid negative publicity in cases that would be subject to public scrutiny should they go to trial.

12. OTHER ISSUES

12.1 Because the U.S. approach to negotiating deals is increasingly applied in Belgium, there are no major differences from the U.S. system, or other significant issues, that should be stressed here.

12.2 [No response.]

12.3 [No response.]