Brazil

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Although Brazil has a federal structure and the component states exercise legislative powers, the matters addressed in this response are governed by federal law.

1. ASSET VERSUS SHARE PURCHASE

1.1 In Brazil, the main considerations in structuring a transaction as an asset purchase rather than a share purchase are tax and commercial risks.

In a purchase of shares, the buyer's liability is of a primary nature; in a purchase of assets, such liability may be of a subsidiary nature. (Primary and subsidiary liability are explained in Subsection 1.2.) The buyer of all or substantially all the assets of a business is held liable for the tax liabilities of the seller on a primary or subsidiary basis, as the case may be. Conversely, if the buyer acquires only a small portion of the seller's assets, successor liability does not exist.

Although commercial successor liability is automatic in a share purchase, the buyer of assets is, in general, insulated from such liability. In an asset purchase, and apart from environmental liability (see Subsection 5.1), such liability would exist only if the buyer expressly assumed certain commercial relationships of the seller. Thus, upon purchasing shares rather than assets, a buyer assumes the labor liabilities vis-à-vis all employees. In an asset purchase, however, a buyer is liable only for those obligations associated with the employees actually transferred to it.

1.2 Pursuant to the Brazilian Tax Code and other legislation, a buyer of substantially all assets of a company may be held liable for the tax and labor obligations of the seller. If the seller ceases to be in business by virtue of the sale and does not engage in business, whether in the same area or not, within the six-month period following the sale, the buyer's liability is "primary;" that is, the buyer has primary liability under the legislation even though it may have a right against the seller. If the conditions for making the buyer primarily liable are not met (e.g., if the seller remains in business), the seller retains primary responsibility. If, however, the seller does not pay, the buyer may have secondary or "subsidiary" liability.

The parties are free to allocate between themselves the responsibility for tax and other liabilities, but any such agreement between the parties may not be raised as a defense against the tax authorities to eliminate the buyer's liability.

A concept that has similar consequences for a buyer is the "sale of an establishment." When a seller has, for example, a number of plants manufacturing different products and it

sells one plant (i.e., it sells the land, buildings, equipment, inventories, customer contracts and lists of that business and transfers the employees at that plant), the sale of the plant would constitute the sale of an establishment, and the buyer would be responsible for the labor and tax liabilities associated with that plant.

1.3 Assuming that only certain selected assets are acquired and the sale does not qualify as the sale of an establishment, the buyer's successor liability is eliminated. For instance, upon the purchase of certain equipment and the trademarks, the buyer is not liable for past labor and tax obligations of the seller. The extent of the buyer's liability in any asset purchase may have to be ascertained on a case-by-case basis.

2. FORM OF DOCUMENTS

2.1 In principle, Brazilian laws impose no restrictions that could affect the use of the Model Asset Purchase Agreement. Although the model follows more international standards, such form of agreement could be used in a Brazilian transaction.

2.2 The agreement must list all the assets that are being transferred by a seller to a buyer. Regardless of whether the parties comply with the requirements regarding transfers of assets, the agreement will be a binding contractual obligation between the parties. Breach of the obligation entitles the buyer to an order of specific performance. All sales of assets—as opposed to sales of shares—must comply with the rules (which may require special forms) governing the transfer of particular kinds of assets (e.g., land and intellectual property).

2.3 The form of the document may affect the right to have the transfer registered with a public registry. A private deed for the transfer of real estate is not entitled to be registered, although such a deed will be fully effective between the parties. A public deed (i.e., a document prepared by a notary public) is required for registration and effectiveness of the conveyance against third parties. By an analogy drawn from the Brazilian Civil Code, the tax effects of a transfer are not, however, affected by the fact that the form used by the parties is not the one required for an effective transfer.

2.4 The perfection of the transfer (i.e., its effectiveness against third parties) may require additional documents. The transfer of real estate requires that a public deed of transfer be prepared and recorded in the books of a notary public and registered with the Real Estate Registry. In the case of trademarks and other intellectual property rights, the laws do not provide for any special transfer form, provided, however, that such document complies with the requirements for filing with the Brazilian Patent and Trademark Office (INPI). In the case of movable assets, the tax laws require that the seller issue an invoice to the buyer.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Generally speaking, foreign investment is not subject to any prior approval by any governmental authority in Brazil. Antitrust laws (see Section 4) under certain circumstances provide for merger filings that may be accomplished before or after completion of the relevant transaction. As for corporate actions, a corporation's bylaws normally require that a transfer of assets be approved by a specified corporate body, the shareholders or the board of directors. Such approval is usually given by a general meeting of the shareholders, unless the company has elected a board of directors (only public companies are required to have boards of directors), in which case the authority to approve the transfer may be given to the board. In the case of a limited liability company (i.e., a company that is identified as "Ltda"), the approval of the shareholders is required.

3.2 Under the Federal Constitution of 1988, several areas of the economy were reserved for investment by Brazilian nationals. The Constitutional Reform that began in 1994 removed

most of the bans on foreign investments. Examples of the few cases still subject to controls include the ownership of newspaper and broadcasting companies and activities related to medical care.

4. UNFAIR COMPETITION

The Brazilian antitrust law was first enacted in 1962. During the following three decades, the law was applied in very few instances and was not a matter of major concern for investors. That period coincided with the development of a Brazilian industrial sector, which may have been the reason for the limited application of the law. Since 1990, however, antitrust laws have been a major concern for investors. The Brazilian antitrust law provides for premerger filings under certain circumstances. The premerger filing, however, has seldom been used because investors have taken advantage of another legal provision that allows any "concentration act" (i.e., any merger) to be reported within fifteen business days following its completion. The failure to report the transaction may expose the parties to a fine that may range from US $5 million to US $50 million, as established by the antitrust agency.

Law No. 8,884 of June 11, 1994, describes, among other provisions, the transactions that must be submitted to review by the Administrative Council for Economic Defense (CADE)—the Brazilian antitrust agency equivalent to the U.S. Federal Trade Commission. CADE is composed of seven members, all appointed by the president of Brazil and approved by the Brazilian Senate.

Any transaction, however arising, that may (a) restrain or in any way adversely affect free competition or (b) result in the domination of a relevant market for goods or services, must be submitted to CADE for review. Submission is also mandatory for any transaction involving any type of economic concentration—whether by means of a merger or consolidation, formation of a parent company or any other business combination—(a) that results in a company or group of companies that will hold a twenty-percent or greater share in a relevant market or (b) that has any participant that has recorded in its latest balance sheet annual gross sales equal to or in excess of US $350 million.

If the antitrust agency determines that the transaction is detrimental to competition, it may require the disposal of certain assets or divestiture by the buyer.

5. SUCCESSOR LIABILITY

5.1 In principle, a buyer has successor liability in connection with environmental matters. If, for example, a buyer purchases an industrial facility consisting of land and buildings and the buyer remains on the same site, it will be held responsible for any environmental claims arising from the conduct of the seller, such as underground contamination and other forms of atmospheric and water pollution. The buyer may be liable to all those harmed by the contamination. The buyer would have a claim to indemnification by the seller in these circumstances. The buyer may escape liability if it can prove that the alleged breaches of the environmental regulations occurred before the purchase and that it subsequently cured the failures of its predecessor.

5.2 Under the Consumer Protection Law, anyone involved in the manufacture and distribution of products, including a foreign provider of technology, is held responsible for any defective products. The same rule applies to the provision of services. The responsibility arises once a relationship between the defect and the manufacturer is proven, regardless of any evidence of fault, negligence or willful misconduct. Furthermore, in consumer claims the burden of proof is transferred to the defendant (i.e., to avoid liability, the manufacturer must demonstrate that it did not cause the defect). In the case of an asset sale, a buyer is not liable for obligations of a commercial nature (subject to an important qualification de-

scribed in the following paragraph). Because product liability claims arise from commercial obligations, the buyer is not liable for them.

The law governs the discontinuance of a business and its obligations in connection with products sold and services rendered up to that time. These rules are very stringent and impose requirements regarding the maintenance of after-sale services and the supply of inventories of spare parts. These rules apply to both share and asset sales.

5.3 Upon the sale of assets, a buyer will be a different entity from the seller. In principle, the seller that contracted with its customers must fulfill outstanding orders unless the buyer acquires all the rights under the outstanding orders. In sum, the obligation does not exist unless the buyer expressly assumes it.

5.4 Because warranty claims originating before the acquisition date are commercial obligations, the buyer's liability exists only to the extent that the buyer assumes the obligations. The general rule—no liability in connection with commercial obligations—applies in that context.

5.5 A distinction must be made between situations that arise under contract law and those that arise under property law. If a seller has a lease, then one of two situations can occur upon the purchase and sale of assets:

- the buyer may negotiate a new lease agreement with the landlord and, therefore, any default or breach by the seller in connection with the previous lease would be a matter to be addressed between the previous tenant and the landlord, or
- the existing agreement may be assigned to the buyer.

In the latter situation, either (a) the agreement requires the landlord's consent, in which case the consent releases the buyer from any successor liability, or (b) less likely, the assignment of the contractual rights does not depend upon the landlord's consent, in which case the buyer would be deemed to have assumed the obligations of the assignor.

If real property has been purchased and the price is to be paid in installments (a method of financing that is functionally equivalent to a mortgage), then the buyer is liable for any installments that are not paid by the seller.

The buyer will, under general rules governing property, be liable for any obligations attached to the land, such as easements and other rights held by neighbors. The buyer may have a right to indemnification from the seller if the agreement has preserved the buyer's right to make such a claim.

5.6 The basic liabilities that are assumed by a buyer who buys all or substantially all the assets of a seller are tax, labor and environmental liabilities. Note, however, that in the case of a sale of an establishment, where the seller continues its operations in other establishments or in the head office, successor tax liability may be mitigated by virtue of the subsidiary (i.e., secondary) liability placed on the buyer.

5.7 In view of successor liability, it is very common for buyers to conduct due diligence investigations of a legal and accounting nature during the negotiation period. The legal due diligence covers all major areas, such as labor, tax, litigation, contracts, real estate, regulations and other key areas, depending upon the nature and scope of the transaction foreseen by the buyer.

More recently, in view of the fact that environmental protection is an evolving area of law in Brazil, buyers are increasingly likely to conduct environmental audits before acquiring assets. These audits check compliance with environmental regulations, such as whether the seller holds the appropriate environmental licenses and whether the seller's equipment operates within the limits imposed by the relevant environmental agencies. Phase 1 environmental investigations by prospective buyers of assets are very common. Depending upon the nature of the activities conducted by the seller and those of its predecessors on the site, as well as the outcome of the Phase 1 investigation, a Phase 2 environmental investigation may be necessary to ascertain whether any underground or water contamination has occurred.

6. PUBLIC RECORDS

In Brazil, a prospective buyer may conduct an investigation of the target company and its assets by relying upon publicly available information. The sources of this information follow.

(i) Under the existing system in Brazil, all real property is registered with a Registry of Real Estate. By consulting the files, a prospective buyer may obtain information regarding the acquisition chain of the property, the validity of the seller's title to it and the existence of any court-ordered attachments or mortgage liens. When acquiring real property, it is usual to review the preceding twenty-year acquisition chain to avoid any claim on grounds of usucapio, a term that refers to the peaceful possession of land for a certain period. Usucapio is analogous to, but not identical with, claims based upon prescription.

(ii) As mentioned above, the existence of mortgages and other liens may be determined by applying for certificates of the records of the relevant Real Estate Registry in the places where the assets are situated.

(iii) Unless there is pending or past litigation affecting the real estate assets, only the seller itself may obtain environmental administrative certificates, and such information is not publicly available.

(iv) Liens and encumbrances affecting movable property must be registered with a Registry of Deeds and Documents situated in the city where the company is headquartered. Registration applies to pledges and liens affecting inventories, machinery and equipment and receivables. Once registered with a public registry, the liens and encumbrances are binding on third parties.

(v) Title to intellectual property must be registered with the Brazilian Patent and Trademark Office. Licensing agreements may also be needed to protect intellectual property rights. The Brazilian Patent and Trademark Office has established a computer system that may be accessed by remote terminals.

(vi) Federal and state civil and criminal courts, as well as labor courts, maintain records of pending and past litigation. A prospective buyer may apply for certificates of the records of the courts and have access to information regarding civil, commercial, criminal and tax litigation—pending and past—filed against the target company or seller or in which the target company appears as claimant or plaintiff.

(vii) All of a target company's corporate actions that affect the rights of third parties (in the case of officer and board of directors meetings), as well as the minutes of general shareholders meetings, must be filed with the relevant Registry of Commerce of the state in which the company is headquartered. Tax certificates evidencing the good standing of a company may be obtained only by the company itself and are not publicly available. The only public tax certificates that may be obtained are those that the courts issue in connection with pending or past litigation.

(viii) The law requires only corporations—not limited liability companies, partnerships or limited partnerships—to file annual financial statements with the Registry of Commerce. The financial statements of all corporations must be published in the official gazette of the state in which the company is registered and in a major newspaper in the city where the head office is located. Publicly traded corporations must prepare audited financial statements semiannually and are subject to the publication requirements of all corporations. In addition, the Brazilian Securities Exchange Commission (CVM) provides copies of the quarterly and annual reports filed by publicly traded corporations (similar to the 10-K and 10-Q forms of the U.S. Securities and Exchange Commission).

7. LABOR MATTERS

7.1 In an asset sale, unless the seller transfers the employees to the buyer, they do not automatically become employees of the buyer. In general, the dismissal of an employee requires the payment of all accrued rights and the release of proceeds deposited in the Federal Severance Pay Fund (FGTS) individual account, plus the direct payment to the employee of a penalty of forty percent of all amounts deposited in his or her individual fund. The laws of Brazil allow transfer of employees from the seller to the buyer without dismissal. This is the usual procedure, and the buyer becomes liable for all labor liabilities of the employee. This procedure is adopted because it saves the amounts associated with dismissal (primarily the forty-percent penalty) and because of the interpretation of the law by the labor courts. These courts have ruled that, even if an employee is dismissed from a company and hired by another company, there exists a continuation of the labor contractual relationship to the extent that the employee, on the day after the transfer, starts to work in the same facilities performing the same duties and using the same tools, machinery and equipment that he or she used before the transfer date. Assuming that all amounts associated with the dismissal have been properly paid, the liability of the buyer would be limited to any rights (other than those associated with the dismissal) accrued and not paid by the former employer.

7.2 The buyer and seller may agree that the seller will terminate the seller's employees. Usually, some employees are transferred to the buyer and others are dismissed. Assuming that the dismissed employees will not be hired by the buyer, any severance payments must be made by the seller before or after the closing date, in which case the buyer is not liable. For employees transferred to the buyer, it is usual to establish that the seller will be liable for any acts or omissions that occurred before the closing date and that relate to any claims that may be filed by the employee. Pursuant to Brazilian law, any employee may file a labor claim within the two-year period following termination of employment. Also, on the condition that such claim is timely and properly filed, the employee may claim rights that accrued within five years before the termination date.

7.3 Insofar as the buyer has assumed all obligations under the labor contract vis-à-vis transferred employees, it will be held liable as a successor to the seller's labor liabilities. Although the buyer may not raise its agreement with the seller as a defense to employees' claims, the agreement will be binding upon the buyer and seller. Hence, agreements between buyers and sellers normally establish detailed procedures, including a seller's right to defend any claims filed by former employees in lieu of immediately making payment of any amounts claimed. In the event that a seller exercises its right of defense, the obligation to make any payment is suspended until a labor court awards a final and unappealable decision.

7.4 When a seller transfers some or all employees to a buyer, it is usual to establish that the seller's responsibility for labor payments is limited to obligations that arise until the closing date. In general, it is agreed that any payments due by the buyer upon termination of the labor contract will remain the sole responsibility of the buyer. This is a negotiable point, however, and the law does not impose any restrictions. Assuming that before the transfer date the seller has properly made all payments under the then-existing labor contract, the payments due upon termination by the buyer will be (a) the rights the dismissed employee accrued (such as vacation and Christmas salary) up to the termination date, (b) the forty-percent payment of the total amount deposited in the FGTS individual account and (c) if applicable, a cash payment in lieu of the thirty-day prior notice of termination.

7.5 In principle, the sale of assets is a matter of corporate decision making and the unions have no say in the matter. Depending upon the nature of the business, the prospective layoff program and the importance of the business for the community, the parties may negotiate the terms of any layoffs with the unions. This is purely voluntary and, even if negotiation occurs, the consent of the unions is not required for the sale of the assets unless a provision along those lines exists in the collective bargaining agreement between the target company and the unions representing its employees. Such a provision is unlikely to be found and, to the best of our knowledge, has not been included in any collective bargaining agreement.

7.6 Under the Brazilian Labor Consolidated Laws, the terms of a labor contract may be altered only if the employee expresses his or her agreement to such change, and in no circumstance may such change be detrimental to the rights acquired by the employee. Otherwise, any change of terms is deemed a unilateral change of the labor contract and the original conditions will be restored by court order.

7.7 To the extent that a buyer and seller reach no agreement regarding accrued liabilities, it is fair to state that the buyer will assume them. Alternatively, the liabilities may be split between the seller and buyer, or the seller may assume all of them. In no circumstance may the buyer, however, rely on such private agreements to limit its obligations to the transferred employees.

8. PLANT CLOSING LAWS

Brazilian laws do not contain any provision regarding prior notice of plant closings and mass layoffs. From a purely legal standpoint, an employer may decide to close a plant or implement a mass layoff without notifying any agency or governmental authority. In practical terms, however, employers usually negotiate mass layoff plans with unions, and this has become the normal procedure in the context of privatizations. Also, collective bargaining agreements usually contain rules applicable to temporary plant closings and mass layoffs. Hence, it is crucial to review any existing collective bargaining agreements before implementing such plans.

Furthermore, in any acquisition that is or must be reported to the Brazilian antitrust agency to ascertain whether the transaction might lead to an undesirable concentration, the agency is keen to limit the employer's ability to implement mass layoffs and discontinue activities conducted by the acquired business. In such cases, and to the extent that the approval of a merger filing has imposed certain limitations of that kind, prior notice and negotiation may, in fact, be necessary.

9. ASSIGNMENT OF CONTRACTS

In Brazil, some contracts contain a provision whereby the change of control of a company, or the sale of all or substantially all assets of a company, gives rise to early termination. In such a case, the assignment of rights under the contracts requires the express consent of the other party to be binding. In the absence of such provision, a seller may assign its rights to the buyer. To the extent that the sale of assets implies the transfer of rights and obligations from one company to another, there is no assignment by operation of law. Furthermore, in accordance with a provision of the Brazilian Civil Code, the assignment of credit rights to any third party must be notified to the debtor in writing to be binding upon the debtor.

10. NONCOMPETITION

10.1 In the case of the seller and its principals, the restriction on competition must derive from a contractual arrangement. The enforceability of the restriction is conditioned upon the parties establishing a geographic area, temporal limits and the scope of activities covered.

The enforceability of a noncompetition clause is also limited by constitutional provisions that protect an individual's right to work. Long-term covenants are, in general, unenforceable. Depending upon the structure adopted for the transaction, it is recommended that the parties allocate a portion of the purchase price as consideration for the noncompetition covenant. Such an allocation is in line with the most recent Brazilian case law.

10.2 The limitations to which enforcement of noncompetition covenants are normally subject are mentioned in Subsection 10.1. A noncompete covenant may need to be reported to the competition authorities to the extent that compliance with it may alter or modify the market share of the buyer by eliminating free competition.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 In principle, the parties are free to establish governing law and the place where any litigation may be brought. In practical terms, the parties usually prefer Brazilian law and jurisdiction if the transaction is completed between a foreign entity and a Brazilian company. A Brazilian court at the situs of immovable property has exclusive jurisdiction over any claims regarding the title to such property.

11.2 Brazil has no long-standing tradition in arbitration. Until very recently, an agreement to arbitrate would not be enforced by specific performance. A party's failure to abide by an arbitration clause gave rise to a claim for indemnification of the damages suffered. In 1996, however, the Brazilian Congressional Houses approved a new arbitration law that eliminated the obstacles for development of arbitration in Brazil, mainly by allowing specific performance of an arbitration clause. Under the law, the arbitral award is final, may be immediately enforced and, if the parties so establish, is not subject to any recourse. Under the former law, an arbitral award had to be confirmed by a judicial court to be enforceable against a party.

Should arbitration be conducted in a foreign jurisdiction under the rules of any arbitral institution and be governed by foreign laws, the arbitral award may be enforced in Brazil against a Brazilian party only if it is first confirmed by the Brazilian Supreme Court. (Brazil is not a signatory party to the 1958 New York Convention, but has, however, adhered to and ratified the terms of the 1975 Panama Convention on the same matter.) In the process of confirmation, the merits of the foreign award are not subject to any retrial or reexamination by the Brazilian Supreme Court, but the award will not be confirmed if it violates the Brazilian public policy, national sovereignty or good morals.

In certain instances, the parties may agree that arbitration will be governed by foreign law in connection with the substance of the claim and that the procedures will be those established by an arbitral institution such as the International Chamber of Commerce (ICC), but that Brazil will be the place of arbitration. By application of the ICC Rules of Conciliation and Arbitration, the award in such case is a domestic award, which avoids the need for confirmation by the Brazilian Supreme Court as a condition for enforcement in Brazil.

11.3 Even with the recent changes to Brazilian law, arbitration cannot always be recommended. Although judges now have the power to order specific performance of the agreement to arbitrate, a judge may, nevertheless, award only damages if specific performance is considered impractical. The availability of judicial recourse may make litigation quicker than arbitration. Nevertheless, the parties may have reasons for choosing arbitration.

12. OTHER ISSUES

12.1 In general, an asset acquisition agreement provides that each party will bear its own costs—including consultant and attorney's fees—associated with the preparation, discussion and negotiation of the agreement.

12.2 There is no legislation in Brazil dealing with bulk sales.

12.3 Certain products—principally food, chemicals and cosmetics—are subject to extensive labeling rules. A seller of such products will have registered the products and the labels with the appropriate governmental agency. Registration cannot be transferred from the seller to the buyer; the buyer must reregister. If the buyer wants to continue to make and

market the products, it must apply for new registrations, and this process can take a long time.

Under the laws of Brazil, particularly under the Brazilian Bankruptcy Law, a sale of all or substantially all assets of a seller may be set aside by a judge if the sale occurs within the "preference period." This period is set by a judge and may go as far back as sixty days before the first protest of a negotiable instrument issued by the seller. The power of the court to set aside the sale does not depend upon the seller having any intention to defraud its creditors. To reduce the risk posed by the law, it is necessary to investigate the records of protest of negotiable instruments registered against the selling entity.

Canada

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These responses* pertain only to the laws of Quebec and Ontario and the laws of Canada applicable in those provinces. Apart from the law of Quebec, Canadian law is based upon the common law. The law of Quebec is based upon the civil law and is codified in the Civil Code of Quebec. The laws of the other provinces of Canada (and of the three territories) are generally similar—but by no means identical—to the laws of Ontario.

1. ASSET VERSUS SHARE PURCHASE

1.1 The major considerations that a buyer in Ontario or Quebec has when choosing between an asset and a share purchase would not differ greatly from the considerations of most purchasers in the United States. Generally speaking, tax considerations are often the driving force, though additional considerations include (a) the ability to manage the acquisition of liabilities (leaving the seller with the risk of hidden or unknown liabilities) and (b) the ability to choose the specific assets in which the buyer is interested, thus excluding unwanted assets, such as obsolete inventory or those that are difficult to value. The asset purchase agreement is generally more complicated to draft than a share purchase agreement because the agreement must identify and convey all the assets being purchased and the liabilities being assumed.

1.2 The most obvious distinction between an asset and a share purchase is that a buyer of assets does not carry on the corporate legal personality of the seller. Apart from contractually assumed obligations and specific situations such as successor rights in employee matters (see Section 7), environmental liability imposed upon buyers in certain circumstances (discussed below) and bulk sales liability to a seller's creditors (see Subsection 12.2), a buyer of assets will not be liable for the obligations of the seller.

Neither Ontario nor Quebec imposes a value added tax, transfer duty, stamp tax or other similar tax on the transfer of a corporation's shares. However, a sale and transfer of assets can attract a goods and services tax (GST)—a federal tax imposed upon the sale and importation of most goods and services and equivalent to a value added tax—and the Ontario provincial sales tax (Ontario PST) or the Quebec sales tax (Quebec QST) for sales within these jurisdictions. The purchase of all or substantially all the assets of a business that the

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buyer intends to carry on will be exempt from the federal GST (seven percent), provided certain information is filed with the tax authorities. Ontario PST (eight percent) and Quebec QST (7.5 percent) will still be payable in most cases.

Municipalities in Quebec collect duties on the transfer of any immovable property (roughly equivalent to real property) situated in their territories, computed in accordance with the following formula: 0.5 percent on the consideration below CAN $50,000, 1.0 percent on the consideration between CAN $50,000 and CAN $250,000 and 1.5 percent on the excess. Certain incidental movable property (i.e., personal property) transferred with the immovable property may also be subject to this tax. In Ontario, buyers of real property—other than certain residential properties for which different rates apply—pay a tax of 0.5 percent of the value of the consideration given for the conveyance of the property up to CAN $55,000, 1.0 percent of the value of consideration between CAN $55,000 and CAN $250,000 and 1.5 percent on the remainder.

Most industrial operations in Quebec require an environmental permit (certificate of authorization) to operate in the province. A buyer of assets will likely require either a new environmental permit or the assignment, with governmental consent, of an existing environmental permit upon the transfer of assets. There is an exception for businesses that were being operated before the Quebec Environment Quality Act was in force; such businesses benefit from acquired rights that permit them under certain conditions to carry on the business without a permit. In Ontario, an environmental permit (certificate of approval) is required, but only in exceptional circumstances is the government's consent necessary for the transfer of an existing environmental permit. In most cases, only postclosing notification of the transfer is required.

Various federal and provincial statutes also impose environmental duties on owners, occupiers and operators of property. The government agencies overseeing the application of the legislation have powers to prosecute and impose substantial fines on offenders and to order compliance. Except for exceptional circumstances and under specific conditions where there is an urgent need to avoid the spread of contamination, an owner of property in Quebec cannot be made liable under statutory law for any contamination of the property unless it caused or contributed to the contamination. An owner of property can, however, be made liable to third parties if damage is caused to neighboring property by the escape of contaminants, provided the owner was aware of the situation and did not prevent it. If a buyer is required to get a new certificate of authorization or to get approval for some other activity, the certificate or the approval may be conditioned upon removal of the contamination from the property. In Ontario, the owner or occupier of property can be made liable under the Environmental Protection Act for the costs of cleanup, regardless of whether that person contributed to the contamination.

1.3 There would be no difference to the response in Subsection 1.2 if only part of the assets were being acquired, except that the GST exemption might not be available.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement (MAPA) could probably be used, perhaps with some modifications, in both Ontario and Quebec, as neither requires a specific or different form of agreement. In Quebec, the Charter of the French Language imposes language requirements on contracts in specific circumstances, none of which are likely to apply to the purchase and sale of the assets of a business. (Language requirements apply to standard form contracts and to contracts with certain governmental agencies if they are signed in Quebec.) As a civil law jurisdiction, Quebec has a Civil Code that will supplement MAPA if the law governing the agreement is the law of Quebec and the parties have not expressly contracted out of that Civil Code provision or expressly provided otherwise. Even when foreign law is chosen to govern the contract, the Civil Code may apply in exceptional circumstances.

Because the transfer of property rights is generally determined by the lex situs, the law where the property is situated will determine the form of document necessary to make the transfer effective against third parties. (See also Subsection 2.2.)

2.2 So long as consideration passes between the parties and the transfer is in writing, the transfer of assets will be valid between the parties without any particular form of documentation being required. To make certain transfers effective against third parties, however, some kind of public filing or notice—such as registration—is usually required. Thus, it may be necessary to sign documents in registrable form. (See Subsection 2.4.)

2.3 The form of document would not affect the tax consequences of the transfer.

2.4 Transfers of real property must be properly registered in both Ontario and Quebec to be effective against third parties. Intellectual property is protected in Canada under the federal laws relating to trademarks, copyright, patents and industrial designs. Registration under the appropriate legislation is necessary to protect the assignee of any such intellectual property.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 The Investment Canada Act (ICA) applies to all acquisitions of control of Canadian businesses by non-Canadian investors, including acquisition of the assets of a Canadian business. ICA prohibits a non-Canadian from implementing direct acquisitions that are "reviewable" until the government approves the transaction. The thresholds for determining whether a transaction is reviewable are established by reference to the asset value and the type of business being acquired and vary depending upon whether the non-Canadian investor or seller is ultimately controlled by a World Trade Organization country. Non-Canadians must also file a notice with Investment Canada regarding all nonreviewable acquisitions or establishments of new Canadian businesses. Special rules apply for notifiable transactions that are related to Canada's cultural heritage or national identity. The minister under ICA retains the right to require the review of any transaction falling into one of the latter prescribed areas, even if the transaction would otherwise be only notifiable.

A sale of assets always requires approval by the seller's board of directors and, depending upon the jurisdiction of incorporation of the seller, may also require shareholder approval.

3.2 Certain sectors of the Canadian economy are strictly regulated due to their perceived importance to national economic policy. For example, acquisitions of businesses providing financial services, communications and energy are subject to various provincial and federal regulations.

4. UNFAIR COMPETITION

The federal Competition Act requires those proposing a merger with, or acquisition of, a Canadian business that exceeds certain thresholds (related to the size of the transaction and the parties) to notify the Commissioner of Competition before completion of the transaction. This notification is designed to give the Commissioner advance notice of significant transactions that may have an anticompetitive effect. The filing fees payable to the Commissioner are CAN $25,000, plus taxes. After notification, the waiting period before the transaction can be closed is either fourteen or forty-two days, depending upon whether a corporation elects to file the shorter or more detailed form. After the relevant time period has elapsed, the parties are free to proceed with the transaction unless the Commissioner has obtained an order from the Competition Tribunal preventing the merger or acquisition. When the Commissioner decides that a merger is likely to prevent or lessen competition substantially, he may apply to the Competition Tribunal (a) before the closing, for an order that the parties not proceed with the transaction or (b) within three years after the transaction has closed, for an order to dissolve the merger or to dispose of the assets or shares. Even if notification

is not required, the Commissioner has the power to apply to the Competition Tribunal to prevent or unwind a merger or acquisition that could have an anticompetitive effect.

5. SUCCESSOR LIABILITY

5.1 As noted in Subsection 1.2, an owner of property in Quebec generally cannot be held liable for any contamination of the property unless the owner caused or contributed to the contamination. On the other hand, an owner or occupier of property in Ontario can be made liable for the costs of cleanup, regardless of whether that person contributed to the contamination.

5.2 In general, a buyer of assets will not be liable in connection with products sold or services provided before the acquisition absent a contractual assumption of such liabilities.

5.3 Again, a buyer of assets generally will not be responsible for fulfilling outstanding obligations of the seller, absent a contractual provision to this effect. In the case of an assignment of a contract, such a provision might be required by the other party to the contract in order to obtain its consent to the assignment.

5.4 In general, a buyer of assets will not be liable in connection with warranties on products sold or services provided before the acquisition absent a contractual assumption of such warranty obligations.

5.5 A buyer of contaminated property may be liable for environmental cleanup of contamination caused by a previous owner. A buyer of property in Ontario that is subject to a mortgage, or of property in Quebec that is charged with a hypothec—a technical term in Quebec law roughly equivalent to a mortgage—or other kind of security interest will not be personally liable for the obligations under the security agreement, but the property will remain charged if the proper registrations are in effect. An owner of real property in Quebec will be liable for any injury caused by the collapse or dilapidation of a building if the harm was caused by a failure to repair or by a defect in construction. An owner of real property in Ontario is subject to the general law of nuisance.

5.6 In general, except as stated above, a seller's liabilities or obligations are not automatically transferred to the buyer. Two exceptions exist: the buyer may be liable to the seller's employees (see Section 7), and the buyer may, under Bulk Sales Laws, be liable to the seller's creditors (see Subsection 12.2).

5.7 For most acquisitions, extensive due diligence is customary and considered essential. Environmental audits are also becoming standard practice for many businesses and properties. The extent of such investigations depends upon the type of business involved and the value of the assets being acquired.

6. PUBLIC RECORDS

(i) For immovable property in Quebec, searches can be made of the appropriate land register, with its complicated cadastral system of registration, which is in the process of being reformed. In Ontario, searches can be made of registers under either of the two systems of land registration: the registry system and the land titles system (a Torrens system).

(ii) Mortgages must be registered in Ontario in the appropriate land titles or registry office and, in Quebec, immovable hypothecs must be "published" (i.e., registered) in the land register in the appropriate registry office of the registration division. There are also mining registers established under the federal and provincial mining acts, which show transfers or other instruments related to an immovable mining right.

(iii) Regarding environmental issues affecting real property, if the Quebec Ministry of the Environment obtains a judgment against the owner of a particular property, it can register a legal hypothec against the property, which will be revealed by

a search of the Quebec land registry office in the appropriate jurisdiction. Under the Quebec Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, a search of the files of the Ministry of the Environment can be conducted, which will reveal any inspections or notices of violation that have been issued in connection with a particular property. Only a search of court records would reveal criminal proceedings for environmental offenses. In Ontario, the sheriffs' offices maintain lists of judgments against individuals and corporations concerning actions in their particular jurisdictions. If a judgment has been registered against a particular property, it will be shown in the appropriate land register. The Ontario Access to Information and Protection of Privacy Act permits searches to determine whether the Ontario Ministry of the Environment has obtained an environmental order or is in the course of an investigation related to a particular property.

(iv) There is no title registry for personal property in either Ontario or Quebec. Both Quebec and Ontario have, however, established registry systems that can be searched to determine if liens or encumbrances exist against personal property. In Quebec, the Registry of Personal and Movable Real Rights includes registration of all hypothecs against personal property as well as rights associated with other financing contracts that are not technically hypothecs, such as certain installment sales, sales with a right of redemption, leasing contracts, long-term leases and trusts. Absolute assignments done before 1994 must be searched in the Index of Names in the appropriate registry office. Pledges of certain uncertificated securities may be entered into the book entry system of an approved clearinghouse. In Ontario, the Personal Property Security Act requires registration of security interests other than possessory security interests. Searches are also done for Bank Act security (principally security to finance manufacturing) and other types of property (e.g., rail freight cars) in federal registers.

(v) For intellectual property, searches can be made of the records of the Canadian Patent Office, the Canadian Trademarks Register, the industrial design records, the Copyright Office records and the provincial business and corporate names registers.

(vi) Pending litigation against real property is often registered in the appropriate real property register. To determine the existence of other pending litigation, searches of appropriate court records—which are public in Ontario and Quebec—are permitted. Bankruptcy searches are done through the Office of the Superintendent in Bankruptcy.

(vii) The standing of a seller can be determined by searching the appropriate government registers. Any company incorporated in Quebec or doing business in Quebec must be registered under the Act Respecting the Legal Publicity of Sole Proprietorships, Partnerships and Legal Persons. The register maintained under this legislation can be searched and a Certificate of Attestation for the corporation can be obtained. Similarly, the Director under the Canada Business Corporations Act (CBCA) maintains a register and will issue a Certificate of Compliance attesting to a corporation's due incorporation and existence. In Ontario, corporations doing business in Ontario must be registered, and a Certificate of Status may be obtained in connection with the corporation's status under the Ontario Business Corporations Act (OBCA).

(viii) In general, financial information on corporations is made publicly available only through provincial securities commissions, in connection with public or "offering" companies. Public corporations under CBCA are required to file their financial statements with the director under the Act.

7. LABOR MATTERS

7.1 In Quebec, both unionized and nonunionized employees of the seller are automatically transferred to the buyer. For unionized employees, the Quebec Labor Code provides that the alienation in whole or in part of an undertaking does not invalidate any certification or collective bargaining agreement, and the new employer is bound by the certification and collective bargaining agreement. For nonunionized employees, the Civil Code of Quebec states that the sale of a business does not terminate the existing contracts of employment with the seller, and that these contracts are binding on the representatives or successors of the seller. As a result, employees who were not terminated by the seller before completion of the sale of the business retain their employment rights against the buyer, including their years of seniority acquired with the seller.

For unionized employees in Ontario, pursuant to the Labor Relations Act of 1995, the buyer of a business is bound by the seller's collective bargaining agreement and all proceedings (such as grievances) thereunder and, accordingly, becomes the employer of the unionized employees. For nonunionized employees, the buyer has the option of employing or not employing the seller's employees. The Employment Standards Act (ESA) stipulates that when an employer sells its business to a buyer who thereafter employs an employee of the seller, the employee's employment is not terminated by the sale, and the period of employment with the seller is deemed to have been employment with the buyer for certain purposes of ESA. When a seller sells its business to a buyer who does not thereafter employ the employees of the seller, and the employees are terminated as a result, the seller is required to provide the employees with notice of termination, or pay in lieu thereof, and severance pay, if applicable, both under ESA and at common law.

7.2 In Quebec, it is not permissible to require a seller to terminate all employees as a condition of closing a transaction without exposing the buyer to severance liability. Indeed, employees terminated by the seller before the closing date may, if they have not been paid by the seller, file a complaint against the buyer for severance allowances or, if they have accumulated more than three years of uninterrupted service with the seller, they may file a complaint seeking reinstatement in their employment with the buyer.

For Ontario, refer to the response in Subsection 7.1.

7.3 In Quebec, employees who continue their employment with a buyer are entitled to be employed on terms and conditions comparable to those they enjoyed as employees of the seller. The buyer may effect some minor changes to benefit plans (e.g., the buyer may change the insurance carrier or obtain a group insurance policy that differs slightly from the seller's), but the overall remuneration package offered to employees must be comparable to the global remuneration package of the seller.

For nonunionized employees in Ontario, the buyer can offer employment to the seller's employees on different terms and conditions, including different benefit plans, insurance plans and health and welfare plans. From a practical perspective, however, the business deal normally requires the buyer to offer employment on substantially similar, comparable or the same terms as those the employees enjoyed with the seller. Absent a collective bargaining agreement, the buyer does not need to establish a pension plan, as nothing in the Pension Benefits Act (Ontario) requires a successor employer to provide a pension plan. If benefit and pension plans are included in a collective bargaining agreement, the buyer must grant the same level of benefits, either through a new plan or by assuming the seller's plans.

7.4 In Ontario and Quebec, it is possible to allocate between the buyer and seller the responsibility for payment of severance obligations, and the courts will enforce the allocation of responsibility. Such an agreement between the seller and the buyer cannot, however, be invoked against employees, who will retain whatever legal entitlements they may have to sue the buyer for severance payments, even if the parties have allocated the responsibility to the seller.

7.5 For asset sales in both Ontario and Quebec, there is no obligation to consult with a union unless the employees are covered by a collective bargaining agreement that specifically creates an obligation for the employer to consult with the union.

7.6 In both provinces, once employees have accepted a buyer's offer of employment, the buyer cannot make changes that would materially and adversely affect the fundamental terms and conditions of employment. Should the buyer unilaterally modify these terms and conditions, the employees may successfully argue that the buyer has constructively dismissed them. The consequences of a constructive dismissal are the same as those for a straightforward dismissal: the employer has an obligation to provide employees with reasonable notice of termination of employment, or compensation in lieu of notice. Moreover, in Quebec, employees who have accumulated three years of uninterrupted service may file a complaint under the Labor Standards Act, seeking reinstatement.

7.7 In Quebec, a buyer assumes responsibility for all accrued liability in connection with employees transferred to it as a result of an acquisition. The buyer assumes all rights, powers, duties or liabilities that arise under, or are related to, the contracts of employment. This includes contractual, statutory and civil law liabilities.

The same response applies in Ontario for unionized employees. For nonunionized employees who accept employment with a buyer, the buyer assumes the liability provided by the terms and conditions of employment. The buyer assumes an employee's service for purposes of vacation pay, statutory holidays, pregnancy and parental leave and termination and severance pay obligations under ESA. In addition, absent a clearly documented offer of employment that stipulates that the buyer will not recognize an employee's service for common law purposes, the buyer will be considered to have inherited the service of the employee with the seller for all purposes.

8. PLANT CLOSING LAWS

In Quebec, the Act Respecting Manpower Vocational Training and Qualification requires any employer who, for technological or economic reasons, foresees a collective dismissal (i.e., a mass layoff) to give notice to the Minister of State for Labour and Employment of not less than

- two months when the number of dismissals contemplated is between 11 and 99,
- three months when the number of dismissals contemplated is between 100 and 299, and
- four months when the number of dismissals contemplated is 300 or more.

Upon receipt of the notice, the Société québécoise du développement de la main-d'oeuvre (the Quebec Labor Development Board) will follow up with the employer and may require that it take part in the establishment of a committee for the "reclassification" of employees. One purpose of this committee is to provide relocation services to employees affected by the layoff. The employer is usually required to contribute approximately half the costs of these relocation services. Penalties for an employer who does not comply range between CAN$650 and CAN$1,400 for each day during which the offense lasts.

In Ontario, ESA requires an employer to give notice of termination if, in any period of four weeks or less, it intends to terminate the employment of 50 or more employees. The employer must give

- eight weeks' notice if between 50 and 199 employees are to be terminated,
- twelve weeks' notice if between 200 and 499 employees are to be terminated, and
- sixteen weeks' notice if 500 or more employees are to be terminated.

It should also be noted that ESA requires information to be filed with the Ministry of Labor if a mass termination is contemplated. ESA provides that the required notice shall be deemed not to have been given until the date the completed form is received by the Minister of

Labour, following which the completed form must be posted in the workplace. In addition, ESA provides that the Minister may require, for the purpose of facilitating the reestablishment of the employees in employment, that the employer (a) participate in such actions or measures as the Minister may direct, (b) participate in the establishment and work of a committee upon such terms as the Minister considers necessary and (c) contribute to the reasonable cost or expense of the committee referred to in clause (b), at such amount or in such proportion as the Minister may direct. From a practical perspective, if the buyer will employ all the employees of the seller so as to trigger the "deemed continuity of employment" provisions under ESA, the seller will likely not give notice. This issue is, of course, one of business risk.

9. ASSIGNMENT OF CONTRACTS

The general law of assignment in both Ontario and Quebec is similar to that in most common law jurisdictions. Generally, contracts will not be automatically assigned upon the transfer of the assets of a business, except, in Quebec, when the benefits of those contracts that are "accessory" to the assets or "directly related" to them will automatically pass to the buyer.

10. NONCOMPETITION

10.1 A noncompetition clause that is part of an asset acquisition agreement or a related agreement can be enforced against the seller and its principals. A noncompetition clause can be enforced against the seller's employees if they have personally undertaken not to compete in a contract made with the buyer and there is consideration for their undertaking. It will not be possible for a noncompetition clause between the seller and one of its employees to be assigned to the buyer unless the employee has consented to the assignment.

10.2 A noncompetition clause may be enforced if it can be shown that, when the contract was made, the restriction on competition was reasonable in terms of its length and geographical scope. No registration of the clause is possible.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 In general, there are no restrictions on the choice of the law to govern a contract or on the place to which the parties may attorn on an exclusive or nonexclusive basis. Under Quebec law, if the contract does not have a "foreign element"—a phrase that is not defined in the Civil Code of Quebec—then, in spite of the parties' choice of law, the mandatory provisions of the law that would have applied had there been no choice will still apply.

11.2 Arbitration of any dispute arising out of an asset sale is possible, and an agreement to arbitrate will be enforced by the courts of Canada. An arbitral award is final and, unless the parties provide for judicial review, a court will not reexamine the award.

11.3 Canada and Quebec have adopted the New York Convention of 1958. Ontario adopted the Convention at the same time as Canada and Quebec, but its current legislation, the International Commercial Arbitration Act, no longer specifically adopts it. (A Canadian province is not bound by Canada's accession to an international convention, and may or may not adopt any convention or treaty as part of its law.) Although the action of Ontario will probably not affect the enforceability of foreign arbitral awards in Ontario, it may limit the enforceability of Ontario awards outside Canada.

In certain circumstances, an arbitration award may be more easily enforced than a court judgment, though the situations in which this will be true are less frequent than when Canada acceded to the Convention. In some cases, proceedings before an arbitrator or arbitration panel may be quicker and less expensive than litigation. Arbitration may be preferable

if the issues are complex and the arbitrator has the expertise necessary to deal with them, or if it is important to keep the proceedings or the information disclosed at the hearing confidential.

12. OTHER ISSUES

12.1 It is very common for an asset purchase agreement to state that each party will bear its own lawyers' fees.

12.2 Both Ontario and Quebec have Bulk Sales Laws that govern most sales of the whole or a substantial part of an enterprise when the sale is not made in the ordinary course of the seller's business. In both jurisdictions, a statement with the names and addresses of the seller's creditors must be obtained. Creditors who have not waived their rights to receive their pro rata shares of the purchase price must be paid. Certain limited exceptions to compliance are provided, including, in Ontario, an exemption given on application to a court. Failure to comply with the provisions may make the sale ineffective against any unpaid creditor of the seller and the buyer liable to account to creditors for unpaid claims.

Because compliance with the law is difficult, it is not uncommon for the parties to waive compliance. In these situations, the buyer will normally require an indemnity from the seller, provide for a holdback or escrow of part of the purchase price, or require security for any liability through a letter of credit or guarantee from a third party.

12.3 There are no other significant issues.

Chile

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1. ASSET VERSUS SHARE PURCHASE

1.1 The major advantage to a buyer acquiring assets rather than shares is that the buyer of assets does not assume the liabilities associated with the acquired business (except for labor, tax and environmental contingencies under certain circumstances, which are discussed below). However, the acquisition of assets is more complicated than the acquisition of shares.

The buyer should acquire assets and not shares when (a) the target company does not approve a due diligence test under the buyer's standards, (b) the seller is not willing to provide adequate representations and warranties or to agree on escrow accounts, (c) the target company does not provide adequate information regarding its financial situation, (d) the books, records and accounting of the target company are not reliable, (e) there are doubts regarding the legal status of the target company under the laws of its incorporation, or (f) the buyer is not willing to assume the liabilities and contingencies of the target company that by law are transferred to the buyer as discussed below.

1.2 The buyer under an agreement providing for the acquisition of substantially all the assets of a company will be liable for labor contingencies of the seller and environmental contingencies affecting the real property so acquired, under certain circumstances (see Subsections 5.1 and 5.7). As a general rule, the buyer is not liable for tax contingencies unless the seller ceases in its activities and businesses as a consequence of such sale. In addition, the buyer is not liable for any agreement entered by the seller (including loan agreements, lease agreements and services agreements), nor is the buyer subject to product liability for products sold before the transfer.

1.3 If only part of the assets were acquired, then the buyer would not be subject to the liabilities described under Subsection 1.2.

2. FORM OF DOCUMENTS

2.1 Chilean law does not require a specific form of asset purchase agreement. However, if the assets to be acquired include real property, the instrument of transfer of such real property must be evidenced in a public deed. Chilean law also requires certain registrations regarding the sale of vehicles, trademarks and shares, among other items.

2.2 It is irrelevant under Chilean law whether the asset acquisition agreement is evidenced in one or more documents. Generally, asset purchase agreements are executed in a single document. At the time of the closing, further documentation dealing with each of the assets that require special formalities is executed.

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

2.4 As mentioned in Subsection 2.1, the transfer of real property, shares, trademarks and vehicles requires registration in certain public registries. The general rule is that no registration is required for movable assets. However, the issuance of an invoice evidencing such transfer is required.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 **(i)** Government approval is not required unless the transfer refers to banks or financial institutions. It is irrelevant whether the buyers are local or foreign.

(ii) If the owner of the assets is a corporation, the sale of such assets must be approved by a supermajority consisting of two-thirds of the voting shares. There are no provisions regarding the approval of the board of directors, but the buyer typically requires such approval as a matter of protection.

(iii) If the seller is a corporation, it must inform the transaction to the Chilean authority (The Superintendency of Insurance and Securities) and to the relevant stock exchanges.

3.2 As a general rule, no special authorizations or approvals must be obtained by foreign investors when acquiring assets located in Chile (except for authorization under foreign-exchange and foreign-investment regulations, which do not refer directly to the acquisition of assets). There are some exceptions regarding real property located at the international borders and others of a similar nature.

4. UNFAIR COMPETITION

There are no similar restrictions in Chile, although antitrust authorities are entitled to prohibit or restrict certain transactions that, in their judgment, may impair free competition. The antitrust authority is the Resolutory Commission, acting upon request of third parties or on its own initiative.

5. SUCCESSOR LIABILITY

5.1 Under Chilean law, a buyer of assets is not subject to successor liability. If the acquired assets include real property that is causing environmental damage, however, then the buyer is liable for such damage unless evidence is provided that the seller caused the damage.

5.2 The buyer is not liable under Chilean law for products or services sold before the acquisition transaction.

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

5.4 There are no obligations of the buyer for warranty claims that originate before the acquisition date.

5.5 The buyer of real property is not liable for obligations of the seller, with the following exceptions: (a) real estate taxes and (b) lease agreements evidenced in public deeds, in which case the buyer must honor such lease agreements. Of course, if the acquired property is subject to a prior mortgage or lien, then the beneficiaries may foreclose their rights under the liens regardless of the rights of the purchaser.

5.6 Under Chilean tax law, the buyer is liable for tax obligations and contingencies of the seller when the latter ceases in its businesses or transactions. Tax law is broad and

ambiguous regarding this matter, however. There is no exact definition of relevant activities or the period of time that must elapse from closing for the purpose of constituting a total discontinuation. The buyer can protect itself from this contingency by including an indemnification clause in the purchase agreement.

5.7 In the past few years, due to the fairly recent enactment of environmental laws, environmental audits are becoming an important issue to be considered in a due diligence process. Other due diligence investigations include those related to titles, taxes, trademarks and patents, among others.

6. PUBLIC RECORDS

- **(i)** Public records at the local Real Estate Registry disclose the existence of, or provide information about, the ownership of immovable property.
- **(ii)** Public records at the local Real Estate Registry disclose the existence of, or provide information about, mortgages on—and other charges or real rights affecting—immovable properties.
- **(iii)** There are no public records that disclose the existence of, or provide information about, environmental issues affecting real property.
- **(iv)** There are public records that disclose the existence of, or provide information about, liens and encumbrances related to real property (at the local Real Estate Registry), shares (at the Shareholders Registry), vehicles (at the Motor Vehicles Registry) and trademarks (at the Industrial Property and Intellectual Property Departments).
- **(v)** Public records at the Intellectual Property Department disclose the existence of, or provide information about, the ownership of intellectual property.
- **(vi)** Public records at the local Real Estate Registry disclose the existence of, or provide information about, pending litigation, although such records are not completely reliable.
- **(vii)** Public records at the Commercial Registry disclose the existence of, or provide information about, the standing of the target company.
- **(viii)** Public records at the Superintendency of Insurance and Securities disclose the existence of, or provide information about, statements of accounts of the target company.

7. LABOR MATTERS

7.1 The seller's employees become the buyer's employees as a consequence of the transaction, unless the asset purchase agreement refers to a nonsubstantial part of the company's assets.

7.2 It is permissible to require such termination, but it is not always possible due to the costs involved. Under Chilean labor law, the employer (i.e., the seller) is required to pay certain severance payments and other indemnifications upon the termination of a work contract. These payments are (a) an amount equivalent to the employee's last monthly salary, unless thirty days' prior notice of termination is given, and (b) a severance payment in an amount equivalent to one month's salary per year worked for the employer, subject to certain legal limits.

7.3 The buyer is bound by the seller's obligations to its employees in connection with pension plans, and retirement, health and other benefits.

7.4 It is legally enforceable to allocate responsibility for severance payments, but if the seller breaches such an allocation agreement, the buyer will be liable vis-à-vis the employees.

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

7.6 The buyer may change the terms of employment for such employees, but the amendment of the terms of certain work contracts requires the approval of the respective employees.

7.7 The buyer assumes all accrued liabilities in connection with employees transferred to it as a result of an acquisition.

8. PLANT CLOSING LAWS

There are no similar restrictions in Chile, although if an employee has worked for an employer for more than one year, and the employee is dismissed due to the needs of the company, then the employer may have to pay two indemnifications to the employee:

- an amount equal to one month's salary per year worked and
- an amount equal to one month's salary if thirty days' notice of the termination of the work contract was not given.

9. ASSIGNMENT OF CONTRACTS

Lease agreements regarding real property, when executed by public deed, are transferred automatically with the assets.

10. NONCOMPETITION

10.1 A noncompetition clause, subject to legal limitations, may be enforced against the seller or its principals. (See Subsection 10.2.) Noncompetition clauses that have been freely negotiated and that meet the conditions mentioned in Subsection 10.2 may also be enforceable. A noncompetition clause agreed to by the seller, under which the seller may not hire certain former employees for a restricted period of time, is enforceable against the seller. The parties to a noncompetition agreement may agree on a liquidated damages clause. The seller, however, may not request specific performance.

10.2 As a general rule, noncompetition clauses are against the Chilean Constitution (which guarantees the freedom to initiate any kind of economic activity) and against antitrust regulations. However, noncompetition clauses that are limited in time and scope, that refer to a competitive market in which many players participate and that are freely negotiated between the parties are valid and enforceable. There are no specific tests to determine whether a provision is valid and enforceable, and there are very few precedents on which an opinion may be based.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Assets located in Chile are subject to Chilean law. Lex loci rei sitae (i.e., the law of the place where the thing is situated) applies. There are no restrictions regarding jurisdiction.

11.2 Arbitration provisions typically provide that an award is final and not subject to appeal. However, the Supreme Court may always reexamine an award if the arbitrator has acted in a clearly abusive manner.

11.3 Selecting arbitration is favorable when dealing with sophisticated transactions requiring certain expertise. It is possible to agree that the arbitration take place in a country other than Chile and that it be subject to the rules of the International Chamber of Commerce

or the American Arbitration Association. When representing foreign clients dealing with locals, we recommend that arbitration proceedings take place abroad, subject to such rules.

12. OTHER ISSUES

12.1 It is not typical to provide for the allocation of attorney's fees, although there are no restrictions against doing so.

12.2 Chile does not have Bulk Sales Laws, nor does it have comparable laws, other than its bankruptcy law. If, however, an asset purchase agreement has been executed with the intent of defrauding a seller's creditors, certain legal actions could be taken to revoke such a fraudulent act.

12.3 [No response.]