

China

Contributed by Hongli Ma, Jun He Law Offices

The acquisition of assets and shares of a company in China is governed by general company laws and various regulations that may be incomplete, inconsistent or ambiguous, as the modern business framework emerged in China less than two decades ago. Because China is in the process of modifying its old business structure to accommodate the needs of its ever-increasing international engagements, it enjoys multiple forms of business entities. For example, China has many businesses that are organized and structured under the recently promulgated Chinese Company Law and related corporate statutes and regulations (Current Company Law). Such businesses include limited liability companies (including those involving foreign investments, commonly referred to as the foreign-investment enterprises, or FIEs), and limited joint stock companies. On other hand, many businesses in China are still organized under old laws and government ordinances, including joint operation companies and unincorporated state-owned enterprises. Each form of business is subject to different laws that greatly affect the determination and valuation of assets, ownership, taxes, and other considerations related to acquisitions. Furthermore, China has promulgated many statutes and regulations specifically aimed at companies and transactions involving foreign investments, which differ from the statutes and regulations governing domestic companies and transactions.

Given the purpose of this summary and in the interest of convenience, the following responses are limited to the major issues of concern for foreign investors considering acquisition of a Chinese company. Such answers should not be taken as comprehensive. Note that because the tax-related issues are not fully discussed, legal and tax experts should be consulted regarding any specific acquisition project.

1. ASSET VERSUS SHARE PURCHASE

1.1 As in many other jurisdictions, the major legal consideration for a buyer in choosing an asset purchase rather than a share purchase is the limitation of the buyer's successor liability, as discussed in Sections 5, 7, 8 and 9. As in other jurisdictions, asset acquisitions are generally more complicated to structure and handle than share acquisitions. Share acquisitions in China can, however, sometimes be more complicated than asset acquisitions, depending upon the business form of the company from which the shares are being purchased. Specifically, certain sectors of business and industry restrict or prohibit foreign investment, as discussed in Subsection 3.2.

Under Chinese law, if there is any foreign investment in a Chinese company (whereby the company would become an FIE), the aggregate registered capital contributed by such foreign investment must not be less than twenty-five percent of the entire registered capital of the company. A purchaser of shares of a Chinese company must observe this minimum investment requirement.

In a purchase of shares of a non-FIE (whereby the company would become an FIE), government approval is required to purchase the shares and to establish the FIE under the Provisional Measures on Merger of Enterprises (Measures on Merger) (State Reformation Committee, the Ministry of Finance and State Administration of State Assets, February 19, 1989). Establishing an FIE is a time-consuming process that involves many documents, such as a project proposal, a feasibility study and the constitutional documents of the company.

The purchase of shares of an existing FIE also requires government approval under the Regulations on the Change of Investors Shareholding in Foreign Investment Enterprises (the Ministry of Foreign Trade and Economic Cooperation and State Administration of Industry and Commerce, May 28, 1997).

To purchase shares of a public company, certain publication requirements must be met, as discussed more fully in Section 4.

1.2 In addition to those discussed in Subsection 1.1, the principal distinctions between the acquisition of substantially all the assets of a company and the acquisition of the shares of the company are as follows:

- Subject to contractual provisions to the contrary between the parties to the acquisition, an acquisition of shares of a company would normally result in the buyer's assumption of the liabilities of the seller, whereas an asset acquisition would not generally subject the buyer to the liabilities of the seller, except for the environmental liability described in Subsection 5.1 and the contractual obligations identified in Section 9.
- Share acquisitions, as opposed to asset acquisitions, have a tax advantage. We are not aware of any tax consequence on a buyer who purchases the shares of a company. In an asset purchase, however, the buyer pays certain taxes, including a value-added tax (VAT) on all goods purchased (ranging from thirteen percent to seventeen percent), stamp duties, exchange taxes and other taxes for the real estate acquired.

1.3 The considerations that have been mentioned would apply even if only part of the assets were to be acquired.

2. FORM OF DOCUMENTS

2.1 Documents that are acceptable in other jurisdictions are generally not adequate in China, as its legal requirements are unique. For certain types of asset acquisitions, the relevant government agencies (e.g., the State Administration of Industry and Commerce, the State Administration of Land, the Ministry of Construction, the State Patent Office at the national level and the Building and Land Administrative Bureau at the local level) have some model contracts. These model contracts serve only as references, however, and—except for contracts related to real estate—the parties may create their own contracts concerning an asset acquisition, subject to the discussions below. For contracts related to real estate, the respective local government may require the use of form contracts.

2.2 Because Chinese law requires that certain asset transfers be registered with various government agencies having various requirements, and because certain form contracts may be necessary, individual and separate contracts (instead of one comprehensive contract) for the transfer of different types of assets (e.g., real estate and patents) are necessary.

2.3 The form of the document that is adopted does not affect the tax rates levied on the assets transferred.

2.4 The transfer of registered trademarks, patent application rights or patents requires registration and public notice. The transfer of ownership of real estate and related land use rights requires registration with the government building and land agencies where the property is located in order to protect the purchaser from third parties.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Acquisition of the assets of an FIE does not require government approval. Under the Measures on Merger and the Chinese Company Law, the acquisition of assets of a state-owned company requires the approval of the company's governing agency or department and the State Administration of State Assets. The government agencies in charge of valuations must evaluate the company's assets in a Valuation Report, issued by the valuation agency and approved by the State Administration of State Assets.

Regardless of the stipulations in constitutional documents or other corporate documents of a company, the sale of substantially all the assets of a company, amounting to a merger of the Chinese company under Chinese law, generally must be approved by (a) a unanimous vote of all members of the board of directors, if the company is an FIE, or (b) by at least two-thirds of the shareholders upon recommendation of its board of directors for any other company.

3.2 According to the Provisional Regulations on the Guidance for Foreign Investments (Foreign Investment Guidance) (approved by the State Council on June 7, 1995, and published by the State Planning Committee, the State Economic and Trade Commission and the Ministry of Foreign Trade and Economic Cooperation on June 20, 1995, as amended in 1997), industries and businesses in China are classified into four categories: industries and businesses in which foreign investments are (a) encouraged, (b) restricted, (c) permitted or (d) prohibited. A detailed index of industries and businesses is attached to the Foreign Investment Guidance, which summarizes the general categories under which each industry and business belongs.

Generally, under the Foreign Investment Guidance, foreign investments are encouraged in the following areas: agriculture, high technology, infrastructure (such as energy and transportation), new materials, conservation of resources and environmental protection and use of human and natural resources in the western part of China. The government treats such projects favorably.

Foreign investments are restricted in businesses and industries that are in well-developed areas, that are experimenting with foreign investment or that are intended to remain under Chinese control. Examples include certain processing and manufacturing businesses, transportation services, postal services, exploration and processing of certain natural resources, domestic and foreign trade, tourism, real estate, service industries, finance and insurance. In these industries and businesses, Chinese law generally prohibits wholly owned foreign investments or requires that the domestic investment control the majority interest. Foreign-investment projects must be approved by the government at a certain level, such as the province and municipality with independent planning authority, where the approving authority may not be delegated to a lower-level government. Foreign investment in the restrictive industries and businesses must have a limited term.

Foreign investments are prohibited in certain industries and businesses, including those that would threaten the national safety or public interest, pollute the environment, destroy natural resources, be harmful to health, disrupt military facilities or use unique technologies developed in China. Examples include the following: electricity networks; city water supplies; sewage, gas and heating pipeline networks; natural resource exploration and processing; postal services and telecommunications; broadcasting, film and television; news services; and military industries.

4. UNFAIR COMPETITION

Although through its general procedures the government exerts some control over mergers and acquisitions involving national industries, China does not have antitrust laws similar to those found in the United States.

For public companies, however, the Chinese government deals with its concern about market manipulation through the Provisional Regulations on the Issuance of Stocks and Management of Stock Trading (Regulations on Stock Issuance and Trading) (State Council, April 22, 1993). These regulations stipulate that within three working days after an institutional investor's direct or indirect holding of stocks amount to five percent of all the issued and outstanding common stock of a publicly traded corporation, the investor must report to the China Securities Regulatory Commission, the Stock Exchange and the corporation and issue a public notice stating the investor's holdings and intent. Thereafter, similar reports and public notices are required whenever the investor's stock holding increases or decreases by two percent of all the common stock of the corporation. The investor is not permitted to purchase or sell stocks before such report and public notice or for two days thereafter.

Under the Regulations on Stock Issuance and Trading, any institutional investor (other than the original promoting entity) whose stock holding in a publicly traded company amounts to thirty percent of all the issued and outstanding common stock, must, within forty-five days, make an offer to each shareholder of the company to purchase the shares held by the shareholder at a certain price. Upon the investor's acquisition of more than seventy-five percent of all the issued and outstanding shares of the company, the company must cease trading on the Stock Exchange.

5. SUCCESSOR LIABILITY

5.1 The buyer of real estate is responsible for environmental liability related to the property, unless the asset acquisition agreement stipulates otherwise.

5.2 The buyer is not responsible for products sold or services provided before the acquisition.

5.3 The buyer does not automatically assume an obligation to fill the outstanding orders for products.

5.4 The buyer has no presumed responsibility for product warranty claims on transactions that occurred before the acquisition.

5.5 In an asset acquisition that involves real estate, the buyer steps into the shoes of the seller or the original lessor in connection with the lessor's obligations under the lease with the lessee.

5.6 No other liabilities or obligations of the seller will be automatically transferred to the buyer.

5.7 An environmental audit is recommended and usually conducted before an asset acquisition. For other specific due diligence items, see Section 6.

6. PUBLIC RECORDS

Because serious efforts at establishing a modern legal system in China began slightly over a decade ago, China's public record system is still incomplete in terms of both the accuracy of the records and the types of records open to the public. Most public records may be searched by licensed lawyers only. Therefore, to obtain results deemed adequate under American standards, due diligence investigations require detailed planning and a large amount of work.

- (i) Records of ownership of immovable property (i.e., real estate and leases, including pertinent land use rights) are available at the Building and Land Administrative Bureau where the property is situated. Such records are open to the public.

- (ii) Mortgages and other rights, including pertinent land use rights of real estate, must be registered at the Building and Land Administrative Bureau where the property is located if they are to be effective against third parties. Such records of registration are open to the public.
- (iii) China does not have a public record system for any environmental issues concerning a company.
- (iv) Apart from the liens mentioned below, liens and encumbrances on movable (personal) property are not, generally, registered anywhere.

Liens on equipment are recorded and may be searched at the Office of the State Administration of Industry and Commerce where the owner of the equipment is located. Liens on vehicles, airplanes and ships are recorded and may be searched at the relevant governing agencies of the government where the owner is located. Pledges of stocks of a publicly traded company are filed and may be searched on the Stock Exchange on which the company is listed.

- (v) Pledges of intellectual property rights may be searched as follows:
 - The State Patent Bureau keeps a Registration Book of Pledges of Patent Rights for public investigation.
 - Pledges of trademark rights may be searched at the State Trademark Bureau.
 - Pledges of copyrights may be searched at the State Copyright Bureau.

Note that ownership rights to trademarks are recognized without being registered at the State Trademark Bureau. However, the right to exclusive use of a trademark may be obtained only through registration. The ownership rights to patents are vested and protected only upon registration at the State Patent Bureau.

- (vi) The public does not have access to information about pending litigation or arbitration in China except for information regarding major lawsuits and arbitrations of publicly traded companies, which may be found on the Stock Exchange on which the company is listed.
- (vii) Information on the existence and standing of a company may be obtained at the Office of the State Administration of Industry and Commerce where the company is registered. Before starting their operations, companies of all kinds must register with this office, which conducts annual inspections of registered companies.
- (viii) Except for records resulting from the required initial and periodic disclosure of financial information by publicly traded companies, no other records are accessible to the public regarding financial information about companies.

7. LABOR MATTERS

7.1 The employees of a seller do not automatically become employees of the buyer in an asset acquisition. The arrangement of the seller's employees is made pursuant to the asset purchase agreement.

7.2 The buyer in an asset acquisition is not prohibited from requiring the seller to terminate some of its employees as a condition of closing, nor is the seller prohibited from requiring the buyer to make severance payments to the terminated employees.

7.3 The buyer is not required to assume the seller's obligations regarding pension plans, retirement, medical coverage or other benefits.

7.4 The generally accepted view is that the buyer and seller may allocate the responsibility for making any required severance payments.

7.5 An acquisition of a collectively owned enterprise generally requires the approval of the employee representatives at a general meeting, as the employees are the owners of the enterprise. If the entity is a state-owned enterprise, the opinions of the employee representatives at the general meeting must be taken into consideration but are not determinative. A non-state-owned enterprise need not obtain the approval or advice of its employee representatives before selling its assets.

7.6 After the closing of the asset acquisition, the buyer may change the terms of employment of the seller's employees.

7.7 In an asset acquisition, the buyer has no legal obligation to assume the seller's obligations to its employees. The buyer may have an arrangement with the seller concerning whether to assume such obligations, and such an arrangement normally will affect the price of the acquisition.

8. PLANT CLOSING LAWS

Under Chinese labor law, an enterprise may reduce its employment force when (a) it is on the verge of bankruptcy, (b) it is declared by the court to be in the process of reorganization or (c) it is experiencing such serious difficulty in its operations that it meets the thresholds set by the local government. For a state-owned enterprise, the governing state authority may apply to the court for a reorganization after the enterprise has applied for bankruptcy. The enterprise will have up to two years to reorganize and, if the enterprise then becomes solvent, the court will end the bankruptcy proceeding. Any enterprise that plans to downsize must (a) explain the situation to the union and the employees and provide information on production and operation of the enterprise thirty days before the downsizing, (b) propose a downsizing plan for comments by the union and the employees, (c) report the downsizing plan, with the comments of the union and the employees, to the local labor administration authority, (d) obtain suggestions from the local labor administration authority, (e) publish the downsizing plan that is adopted after this process of consultation, (f) terminate the labor contracts of the affected employees, (g) make the required severance payments to the affected employees and (h) issue proof of downsizing to the affected employees.

The following employees may not be laid off during a downsizing: (a) employees with partial or complete disability due to occupational disease or injury on the job, (b) sick or injured employees during any prescribed period of treatment or (c) female employees during pregnancy or maternity leave or during the time allowed for breast-feeding.

9. ASSIGNMENT OF CONTRACTS

In the event that an owner of leased real estate transfers its ownership during the lease term, the transferee is obligated to continue performing the obligations of the original lessor under the lease, and the lease is automatically transferred to the transferee without the necessity of obtaining the consent of the lessee, unless the lease agreement stipulates otherwise. We are not aware of any other contracts that by law would be automatically transferred to the buyer in an asset acquisition.

10. NONCOMPETITION

10.1 Chinese law does not specifically address the issue of whether the contracting parties in an asset purchase transaction may enter a noncompetition agreement that can be enforced against the seller. In practice, however, courts normally recognize noncompetition agreements. Under the general legal principle that contracts are binding on the parties, the principals and employees of the seller would need to sign the agreement to be bound by it.

10.2 There is no specific legal requirement that a noncompetition agreement be limited in duration, geographic area or activities. Because China's civil contract law requires that contracts be based upon principles of honesty, fairness and mutual benefit, noncompetition agreements generally contain certain limitations on their scope to avoid being unreasonable or unfair. Special registration is not required for noncompetition agreements or clauses found in asset purchase agreements.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Under China's restrictions on choice of law, the contracting parties may choose the substantive law applicable to the contract but may not choose the procedural law or the applicable conflict-of-law principles. Regarding jurisdiction, Chinese law provides that the contracting parties may select the court of the domicile of the defendant, the place where the contract is to be performed, the place where the contract was signed, the domicile of the plaintiff or the place where the object of the dispute is located. The choice of jurisdiction must not, however, violate the civil procedural law regarding exclusive or special jurisdiction. For example, in a lawsuit involving real property, the court where the property is located has exclusive jurisdiction on the matter.

11.2 Parties to an asset acquisition agreement may elect arbitration as a way of resolving disputes. An arbitration clause may designate an arbitration organization in China, or any other arbitration organization, to arbitrate the matter. The arbitration award is final and binding on the parties if conducted in China. For arbitration awards made by either (a) an arbitration organization in China having the authority to arbitrate matters between parties with a foreign interest or (b) any foreign arbitration organization, the Intermediary Peoples' Court has authority to invalidate or decline to enforce such awards based upon one of the following findings:

- There was no arbitration agreement between the parties;
- The subject arbitrated was not within the scope of the arbitration agreement, or the arbitration organization did not have authority over the matter;
- The formation of the arbitration panel or the arbitration procedure violated legal process;
- The evidence on which the arbitration award was based was forged;
- The winning party concealed substantive evidence influencing the fairness of the award; or
- The arbitrators requested or received bribes, were subject to conflicts of interest or were not impartial or reached the decision by abusing the application of law.

11.3 Generally, arbitration is favored over court proceedings in resolving disputes for the following reasons:

- The disputing parties may choose arbitrators, whereas they may not select judges;
- Because most arbitrators are independent and experienced experts and scholars, their judgments are relatively free from influence by either party, thus providing chances for a fairer result; and
- Arbitration generally takes less time to complete (normally less than a year) than court proceedings (normally more than a year).

It should be noted, however, that arbitration fees charged by arbitration organizations in China are normally greater than the court fees in a similar matter.

12. OTHER ISSUES

12.1 Asset purchase agreements rarely specify how the contracting parties will allocate attorney's fees due to the general understanding that each party pays its own attorney's fees.

12.2 Chinese law does not require the buyer or seller in an asset acquisition transaction to give notice to creditors of the seller, known to the seller, in advance of the transaction. Concepts similar to that of fraudulent conveyance in the United States do exist under Chinese law, however.

12.3 There are no other significant issues.

Finland

*Contributed by Kimmo Mettälä and Pasi Lehtinen,
Luostarinen Mettälä Räikkönen Attorneys at Law*

1. ASSET VERSUS SHARE PURCHASE

1.1 A buyer may seek tax advantages through an acquisition of assets if the asset acquisition would provide a higher depreciation basis for the acquired assets than would be obtainable in a share transaction. An acquisition of shares, however, is subject to a transfer tax of 1.6 percent of the value of shares being acquired. The rate of transfer tax in connection with the acquisition of land or buildings is four percent of the value of such land or buildings. Therefore, if a significant portion of the business being acquired consists of land or buildings, the transfer taxes payable in an asset acquisition may be higher than those payable in a share purchase.

An asset acquisition also will provide a buyer with immunity against claims by the seller's creditors, unless the buyer expressly assumes liability for such claims. Furthermore, an asset acquisition may provide immunity against environmental, health and safety liabilities, as well as other statutory liabilities, incurred by the seller before the acquisition.

1.2 In principle, a buyer of assets should not be liable for liabilities incurred by the seller, and this may be a relevant consideration if the buyer is concerned about undisclosed or unknown liabilities for breaches of environmental standards or other statutory liabilities.

1.3 The same considerations would apply if only part of the assets were being acquired.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement (MAPA) could be used as a basis for the acquisition, although the agreements used in Finnish transactions often are simpler and contain less elaborate representations, warranties and conditions. On the basis of the principles set forth in the Finnish Sale of Goods Act (which applies to some extent to the sale of a business), however, Finnish courts have sometimes found that the buyer has a duty to investigate the object of the purchase, regardless of representations given by the seller. Therefore, the buyer may not be fully protected by representations and warranties when the buyer was aware—or, due to having access to the books and records of the business, could have been aware—of certain facts that constitute a breach of the given representations and warranties.

In addition, it should be noted that the following provisions of MAPA are unusual in a Finnish acquisition agreement:

- References to the U.S. Foreign Corrupt Practices Act, Export Control and Anti-boycott Laws (MAPA Section 3.23).
- The reference to Federal and State Taxes in MAPA Section 10.2 may not be relevant if the seller is a Finnish company that is not subject to such taxes in the United States.
- It is not common to have title insurance in Finland; therefore, references to such insurance may not be necessary or relevant (MAPA Section 10.11).

2.2 Separate documents are required or advisable in the following cases:

- Transfer of real estate: Finland has specific requirements regarding the form of real estate transfer deeds. Such deeds must be witnessed by a notary public or other person who has the right to confirm real estate transfer deeds.
- Transfer of motor vehicles, ships or aircraft: Registration authorities in Finland require that the transfer be done using a specific form.
- Transfer of patents or trademarks: It is customary to use a very simple assignment document, which is filed with the registration authorities.

2.3 The form of the document makes no difference in the tax effects of the transfer.

2.4 Although generally there is no registration requirement for the transfer of business, registration may be required for individual assets included in the acquisition (e.g., real property and intellectual property rights).

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 No government approval is required for foreign investments in Finland, except in the case of the purchase of real estate in the border zone and protected areas in real property used for leisure-time purposes. Also, specific requirements apply regarding the Åland islands.

The board of directors has authority to approve the sale of a material part of the assets of a corporation, including the sale of any real property. The decisions of the board may not conflict with the purposes of the company, as set forth in the company's articles of association.

3.2 Acquisitions of businesses involving important national interests are subject to surveillance by the authorities. Businesses under such surveillance must have at least 1,000 employees, annual sales of at least FMK 1 billion or total assets of at least FMK 1 billion. Areas involving important national interests include defense, the environment and the security, health and general order of society. The Ministry of Trade and Industry may deny approval of foreign investment in these areas if the national interest would be adversely affected by such an investment.

4. UNFAIR COMPETITION

Finland is a member of the European Union (EU). Acquisitions of Finnish enterprises that are deemed to have a "community dimension" are therefore subject to notification and approval by the European Commission.

Also, the Finnish Parliament has adopted a law concerning the control of mergers and acquisitions. The law applies when the parties to a transaction have a combined annual turnover that exceeds FMK 2 billion and when the annual turnover of at least two of the parties exceeds FMK 150 million per company. Mergers and acquisitions that meet these thresholds require prior approval by the Finnish competition authorities (i.e., the Office of Free Competition). Notification of the acquisition must be made within one week from the

conclusion of the respective acquisition agreement. The authorities have one month to decide whether the merger should be reviewed in greater detail and, if so, they then have an additional three months to either approve or disapprove the merger. This law went into effect on October 1, 1998, and applies to all transactions entered into after that date.

5. SUCCESSOR LIABILITY

5.1 As a general rule, a polluter is liable for its violations of environmental standards. The current owner of the business has the burden of proving that a previous owner caused the pollution. Notwithstanding this rule, a landowner may be held liable for soil contamination if the identity of the polluter is unknown.

5.2 As a general principle, the buyer of the assets of a business is not liable for defects in products or services sold before the acquisition.

5.3 The buyer of the assets of a business is not liable for fulfilling outstanding orders, unless the buyer has specifically assumed such liability in the acquisition agreement.

5.4 Generally, unless it has been agreed that the buyer is liable for warranty claims, the liability for such claims remains with the seller.

5.5 The general rule is that a buyer or lessee is not liable for the obligations or defaults of the previous owner or lessee. The new owner may nevertheless be liable for soil contamination caused by the previous owner if it is not known which previous owner caused the contamination. Also, the present owner of real estate is liable for any unpaid real estate taxes, payable by the previous owner for the tax year of the acquisition.

5.6 Existing environmental permits, and the conditions for such permits, continue to apply to the new owner of a business. Also, the existing employees have rights to the same terms of employment under the new owner as they enjoyed under the previous owner.

5.7 It is customary for a buyer to conduct environmental audits, especially in environmentally sensitive industries. It is also customary for a buyer to conduct financial due diligence investigations, as well as legal due diligence investigations, composed of at least a review of corporate matters, material contracts to be assigned to the purchasers, employment contracts of key personnel, general employment conditions, pending litigation, real property and intellectual property rights to be acquired and other aspects of the business.

6. PUBLIC RECORDS

- (i) Public records are available concerning the ownership of immovable property.
- (ii) Public records are available concerning mortgages on, and other charges or real rights affecting, immovable property. (See Subsection 6(iv).)
- (iii) Environmental permits are a matter of public record, although the buyer would need to know the competent permitting authorities in each case and then request such information (i.e., such information is not found in the land records or other central registers).
- (iv) There are public registers concerning encumbrances on real property, ships, aircraft, motor vehicles and floating charges (i.e., business mortgages).

Encumbrances and mortgages on real property are entered into a public register of mortgages by local district courts. The register enjoys full faith and credit (i.e., as a general rule, there are no hidden encumbrances on real property that do not appear on the abstract of the register of mortgages).

The Register of Floating Charges is kept by the Trade Register. In principle, movable property belonging to the business is subject to a floating charge, except for property that can be subject to an encumbrance under other laws (e.g., a motor vehicle mortgage).

A motor vehicle mortgage may be registered for a bus, truck, trailer or motor-driven construction vehicle. Mortgages on these vehicles are entered into the register kept by the

Vehicle Administration Center. (If the vehicle is already subject to a floating charge, no additional motor vehicle mortgage can be registered.)

A ship registered in the ship register can be subject to a ship mortgage. These registers are kept by the National Board on Navigation and the County Government of Åland, the latter on ships having their port of registry in the County of Åland.

An aircraft mortgage may be registered for an aircraft that is registered in the Aircraft Register kept by the Civil Aviation Administration.

- (v) Public records exist that would provide information about patents, trademarks and utility models.
- (vi) Court proceedings are a matter of public record, although there is no central registry from which it would be possible to identify all litigation involving a specific party. Therefore, in practice it is very difficult to do a complete search on pending litigation. An inquiry to the district court of the target company's legal domicile may, however, reveal pending cases in which the target company is a defendant. Because arbitration proceedings are not public, it would not be possible to identify pending arbitration proceedings from any public records.
- (vii) There are no public records that would provide information about a seller's standing, except for information that is available from private credit information agencies.
- (viii) The financial statements of a Finnish stock corporation (osakeyhtiö) should be filed at the Trade Register.

7. LABOR MATTERS

7.1 Employees of the seller automatically become employees of the buyer as a consequence of the acquisition of assets.

7.2 The employee still has the right to continued employment. However, the buyer may terminate the employment of an employee within one month after the acquisition if a restructuring of the business by the new owner causes such termination.

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

7.4 Although it is legally enforceable to allocate responsibility between the seller and buyer for severance payment obligations, such agreement does not affect the rights of the employees.

7.5 There is a consultation obligation that applies equally in an acquisition of shares or assets. Under the Act on Cooperation in Companies, the employer must consult with the employees when, in connection with the transfer or merger of the business, employees are terminated, full-time positions are converted to part-time positions or other similar changes affecting employees are made.

The consultation obligation means that, in connection with a decision to transfer or merge the business, the employer must consult with the representatives of the employees regarding the reasons for, and the effects of, such proposed action as well as alternatives to that action. Normally, consultations under the act must take place before the employer adopts the relevant decision. In the case of a transfer or merger of the business, however, it is not required that these consultations be held before the decision to transfer or merge is made.

Consultation is mandatory when the number of permanent personnel of the target company is either more than thirty, or more than twenty, and at least ten will be terminated. In the case of suspension or termination of employees, or conversion of full-time positions into part-time positions, caused by a transfer or merger of business, the employer has fulfilled its consultation obligation when two months have passed from the date the consultations commenced. The outcome of the consultation must be confirmed in writing in all circumstances.

7.6 The buyer may not change the terms of employment for employees who are transferred to it, except as noted in Subsection 7.2.

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

8. PLANT CLOSING LAWS

There may be such provisions in collective bargaining agreements applicable to the industry in question. Also, the closing down of a substantial part of the activities of a company requires consultation in accordance with the Act on Cooperation discussed in Subsection 7.5.

9. ASSIGNMENT OF CONTRACTS

There are no other contracts that are automatically transferred with the assets.

10. NONCOMPETITION

10.1 A noncompetition clause cannot be enforced against the shareholders of the seller unless they are also a party to the noncompetition clause. A noncompetition clause may be enforced against an employee, but the employee generally cannot be restricted for a period exceeding six months, with the exception of members of senior management, who can be subject to restrictions of longer duration.

10.2 Noncompetition clauses are subject to limitations on geographic scope, product coverage and duration. Generally, a limitation of up to two years is enforceable. If the business includes significant unpatented know-how and goodwill, however, limitations of up to five years may be enforceable.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 (i) In general, the agreement of the parties regarding choice of law is respected. In matters related to real estate, however, Finnish law governs.

(ii) There are no restrictions regarding jurisdiction.

11.2 Arbitration is frequently chosen as the method of settling business disputes in Finland. An arbitral award is normally final; it can be overturned only on certain narrowly defined grounds.

11.3 In Finland, business disputes are often submitted to arbitration because the arbitral process is relatively quick, and the publicity of a court case can be avoided.

12. OTHER ISSUES

12.1 It is normal for the parties to bear their own legal costs in an acquisition transaction. However, such an allocation clause may be included in the agreement.

12.2 In Finland, there is no legislation comparable to the U.S. Bulk Sales Laws. Creditors get protection under the rules on voidable preferences set forth in the Finnish insolvency laws. These rules are not dissimilar to the rules on voidable preferences in other jurisdictions. A buyer of assets cannot obtain protection from the applicability of the voidable preferences rules, however, by means of publishing the type of notice described in this question.

12.3 [No response.]

France

*Contributed by Guy-Martial Weijer, NautaDutilh (Amsterdam) and
Miriam Berg, NautaDutilh (Paris)*

1. ASSET VERSUS SHARE PURCHASE

1.1 The major advantage of acquiring assets rather than shares is that a buyer of assets does not assume the liabilities associated with the acquired business. If the transaction qualifies as a so-called cession de fonds de commerce (assignment of business and goodwill), where the transfer of assets gives access to the clientele, the buyer must bear progressive registration duties, which amount to 4.8 percent of the price or value over FRF 150,000 (zero percent between FRF 0 and FRF 150,000).

The transfer of a fonds de commerce may result in substantial taxation assessed against the seller due to capital gains and cancellation of reserves (for accounts receivable, etc.) relating to the assets sold in the transaction.

Due to the high registration duties, most asset purchase transactions that qualify as a transfer of a fonds de commerce are for low value, whereas larger transactions are normally done through an acquisition of shares of a société anonyme (SA), or a société par Achais Simplifiée (SAS), which bears a one-percent registration duty with a ceiling of FRF 20,000 per transaction, or of a société à responsabilité limitée (SARL), which bears a 4.8-percent registration duty with no ceiling. Such an acquisition is backed up by a representation and warranty agreement, as the purchase of the share capital implies the indirect transfer of all the assets and liabilities of a target company.

When the object is to transfer a division of an existing company, the mechanism often used is to drop down such division into a new subsidiary (via a procedure known as apport partiel d'actifs).

1.2 A few years ago, the Tax Administration attempted to requalify the transfer of all the shares of a company as a transfer of the assets of the company (because the transfer of assets would trigger a higher tax payment than that of the transfer of the shares). This requalification is no longer attempted. Therefore, the acquisition of assets and that of shares each follow their own legal and tax particularities.

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

2. FORM OF DOCUMENTS

2.1 It is unlikely that the Model Asset Purchase Agreement will conform to French legal requirements. The Law of March 17, 1909, provides that a substantial amount of information must be included in an asset acquisition agreement if it is to qualify as an agreement for the sale and transfer of a fonds de commerce. In addition, the asset acquisition agreement must be drafted in French, as it must be filed with the Tax Authorities.

Because a transfer of business and goodwill does not include the transfer of liabilities, it is unusual to include representations and warranties in an asset acquisition agreement, except for statements regarding the right of the seller to transfer the fonds de commerce, liens and encumbrances and the turnover and profits realized over the past three years.

2.2 The transfer of real property and related rights must be made by way of a notarial deed and retranscribed in the cadastre and at the Land Registry.

When the transfer of a commercial lease is included in the agreement for the transfer of a fonds de commerce, it is theoretically free, but in practice it is often subject to various formalities, such as an invitation to the landlord to sign the transfer agreement. The fulfillment of such obligations is a condition to the enforceability of the assignment. The isolated transfer of a commercial lease agreement by a tenant, under most contracts, is subject to the landlord's permission.

The assignment of trademarks and patents may be included in the agreement for the transfer of the fonds de commerce, which must be filed with the National Institute of Intellectual Property. The assignment of trademarks and patents may also be subject to a separate agreement, which will then be filed with the National Institute of Intellectual Property.

The transfer of stock inventory is subject to a value added tax (VAT), but not to registration duties. Therefore, a separate inventory is usually drawn up.

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

2.4 Any agreement relating to the transfer of a fonds de commerce must be registered with the Tax Authorities. Furthermore, depending upon the type of assets transferred, various formalities must be carried out (registration, as mentioned under Subsection 2.2, with the National Institute of Intellectual Property when trademarks or patents are transferred, retranscription in the cadastre and at Land Registry when real property is transferred, etc.). Moreover, the transfer must be published in a legal gazette and registered with the Trade Registry.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 The board of directors' authorization is required when the articles of association limit management's authority. The shareholders' authorization will most likely be required for a major transaction that would result in the seller no longer being able to carry out its activities as provided in the object clause.

The staff delegates or works council must be consulted in all circumstances (see Subsection 7.5).

Specific qualifications and authorizations may be required for certain activities (e.g., a liquor license, a real estate agent license or a travel agency license).

3.2 Many activities require an authorization or a license. Obtaining such authorization or license often depends upon the buyer's representative having a specific (often French) diploma and expertise.

Certain activities—such as private detective agencies, casinos and drinking establishments—must be conducted exclusively by European Union (EU) nationals. In addition, in some industries, foreign nationals or entities may not hold more than a certain percentage of the shares or voting rights of the acquiring company (e.g., twenty percent for audio-visual communication companies).

4. UNFAIR COMPETITION

French competition regulations provide for the control of mergers and acquisitions by the Competition Council of the Ministry of Finance either (a) when the target company has globally realized more than twenty-five percent of the sales, acquisitions or other transactions on a national or regional market of substitute products or services or (b) when the total turnover (VAT excluded) of such business exceeds FRF 7 billion, and on the condition that at least two of the companies have realized a turnover of at least FRF 2 billion on the French market during the calendar year preceding the merger or acquisition.

Notice of such mergers and acquisitions is generally given by the concerned companies to the Ministry of Finance (within three months after the acquisition at the latest), or is directly submitted to the Competition Council by the Ministry of Finance (at its discretion). Once the merger or acquisition is given to the Ministry of Finance by notice of the concerned companies, the administrative authorities may oppose such merger or acquisition only within six months of such notice.

These rules are expected to be changed by an Act to be adopted by French Parliament in June 2001.

5. SUCCESSOR LIABILITY

5.1 The acquisition of isolated assets does not give rise to any legal successor liability, except for environmental matters in the case of an acquisition or rental of real property.

5.2 If the acquisition of assets qualifies as an acquisition of a *fonds de commerce*, the buyer often contractually assumes some of the seller's liabilities—pursuant to the acquisition agreement—to permit continuation of the going concern. The buyer may, for instance, assume product liability created by the seller's actions.

5.3 In the same way, the buyer may take over outstanding orders, raw materials and work in progress.

5.4 The seller remains liable for warranty claims that originate before the acquisition date, unless the buyer and seller have contractually agreed otherwise.

5.5 The creditors (including the tax administration) are entitled to preference on the acquisition price and may claim payment for an amount equal to their debts, which would be payable out of the acquisition price. To protect the buyer from the seller's creditors in this situation, the agreement must provide that the acquisition price will be held by an escrow agent (*séquestre*). In the absence of such an escrow provision, the buyer may be obliged to pay the acquisition price twice to pay off the creditors.

5.6 For a period of three months after the notification of the sale to the Tax Authorities, the buyer and seller are jointly and severally liable for the payment of corporate taxes due by the seller for the current financial year and the financial year preceding the sale. This liability is limited to the acquisition price of the *fonds de commerce*.

5.7 It is customary to audit the existence, validity and, when possible, merchantability of the assets transferred. Environmental audits have now become customary.

6. PUBLIC RECORDS

- (i) The ownership of immovable property can be ascertained at the Land Registry only if the number of the various plots and the identity of the owner are both available. A minimum period of two months is generally required to obtain this information.
- (ii) Information about mortgages on, and other real rights affecting, immovable property can be obtained from the Land Registry as described under Subsection 6(i).

- (iii) Environmental information is not available from public sources.
- (iv) The name and registration number at the Commercial and Companies' Registry allows access to information regarding liens and encumbrances against the seller.
- (v) If the name or registration number is available, copies of French or internationally (including French and EU) registered trademarks, designs, models and patents may be obtained from the National Institute of Intellectual Property. Copyright and software rights are not registered.
- (vi) Information regarding pending litigation is not available from public sources.
- (vii) See Subsection 6(iv).
- (viii) When duly filed by the seller, financial information—more particularly, the turnover and profits realized, the last three years' balance sheets and profit and loss accounts—may be obtained from the Commercial and Companies' Registry.

7. LABOR MATTERS

7.1 Transfer of isolated assets (which is not deemed to be a transfer of a fonds de commerce) does not result in any liabilities vis-à-vis the employees.

When the transaction qualifies as a transfer of a fonds de commerce, the provisions of article L 122-12 of the Labor Code apply. This article provides that none of the parties involved (seller, buyer or employees) may avoid the automatic transfer of all employees from the seller to the buyer. The transfer of such employees includes the rights they have acquired and, in particular, their rights resulting from length of service.

The collective bargaining agreement (negotiated between the unions and the Employers' Federations) will also be transferred if the business being transferred will remain autonomous from the other operations of the buyer. Also, the collective bargaining agreement will remain applicable if the same collective bargaining agreement already applies to the buyer.

7.2 It is permissible to require the seller to terminate certain employment agreements. It is rare, however, for a seller to agree to take the responsibility for terminating employees, mainly due to the risk that the transaction may not be consummated. Customarily, the buyer and seller reach an agreement to adjust the acquisition price, but the burden of terminating employees remains with the buyer.

7.3 Some employers have financial obligations related to pension plans, and all employers have financial obligations with respect to retirement, health or other benefits that are part of the compulsory national system. These obligations are funded by some charges, and the funding will automatically become the buyer's obligation.

7.4 Legally, the party that terminates the employment contracts bears responsibility for severance payment obligations, but the seller and buyer may agree on an allocation of the financial responsibility.

7.5 The transfer of the business is subject to prior consultation with the workers' representatives (i.e., works council or staff delegates). The opinion of the workers' representatives is not binding, but enforcing a decision in the face of worker opposition may lead to social harassment. When the transfer is likely to result in terminations or the loss of acquired rights or benefits, a specific additional consultation is required.

7.6 After the transfer, the buyer is entitled to make minor modifications to the terms of employment. An employee may treat major modifications, which he or she does not accept, as constructive dismissal, thus entitling the employee to require that the employment agreement be terminated (with all accrued damages and indemnities due in the case of dismissal payable to the employee). The applicable court has discretion to distinguish between minor and major modifications.

7.7 Insofar as the employment conditions and acquired rights of the employees remain unchanged, the buyer assumes all accrued liabilities in connection with the employees transferred as a result of the acquisition.

8. PLANT CLOSING LAWS

No such laws exist in France, although the termination procedure to be observed if more than ten employees are dismissed is cumbersome and includes the drafting of a social plan that is, together with the termination procedure, under the control of administrative authorities. The termination procedure is soon to become even more stringent, as the government that was elected in 1997 has announced a reinforcement of administrative control in such cases.

9. ASSIGNMENT OF CONTRACTS

Except as mentioned in Section 7, none of the contracts (including lease agreements) are automatically assigned to the buyer as a result of the transfer of assets or the transfer of a fonds de commerce.

10. NONCOMPETITION

- 10.1**
- (i) A noncompetition clause may be enforced against the seller of a fonds de commerce.
 - (ii) A noncompetition clause may be entered with the principals of the seller. Such a clause is enforceable against the principals only if they have accepted the noncompetition clause in writing.
 - (iii) It is not customary to enter a noncompetition agreement with any other employee.

10.2 A noncompetition clause must be confined to the activities carried out at the time of the transfer, limited to a maximum period of two years and/or geographically restricted to areas where competition could effectively damage the business transferred.

A judge decides on a case-by-case basis whether a noncompetition clause permits the principals of a seller to continue, and is therefore enforceable, or prevents the principals of the seller from exercising their normal skills, and is therefore unenforceable.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

- 11.1**
- (i) In an international contract, a foreign law may be chosen. Any purchase of real estate situated in France, however, or of a fonds de commerce operating in France, must be subject to French law.

The choice of French law is recommended for the assignment of intellectual property rights in view of the requirements that such transfer be filed with the National Institute of Intellectual Property for enforceability vis-à-vis third parties and be registered with the Tax Authorities.

- (ii) The proper venue for any litigation relating to the purchase of a fonds de commerce is the Commerce Court where the parties to the agreement carry out commercial activities. In principle, the Commerce Court of the place of business of the defendant is the proper venue, although the Commerce Court of the place of execution of the agreement may also be chosen.

11.2 Arbitration is possible because acquisitions of assets and of a fonds de commerce are not listed as matters that may not be submitted to arbitration. There are some restrictions regarding arbitration in matters related to intellectual property rights. The final award may be submitted to the French civil courts for recognition or exequatur.

11.3 Arbitration may be favored because it is more confidential than public court proceedings. Arbitration is more expensive than court proceedings, however.

12. OTHER ISSUES

12.1 It is common practice to include a clause allocating attorney's fees and costs in an asset acquisition agreement.

12.2 See Subsection 5.5 regarding the rights of the seller's creditors.

12.3 [No response.]