

India

Contributed by Ebrahim A.K. Faizullahoy, Mulla & Mulla & Craigie Blunt & Caroe

1. ASSET VERSUS SHARE PURCHASE

1.1 The major advantage to a buyer acquiring assets rather than shares is that a buyer of assets does not assume the liabilities associated with the acquired company. When the shares of a company are acquired, the buyer acquires the whole company, including the liabilities. This includes both contingent and unknown (or undisclosed) liabilities related to past transactions, which may arise or be discovered after the transfer of shares.

Further, in an acquisition of assets, the due diligence investigation is confined mainly to the details pertaining to the assets and whether the assets are free from liens, mortgages and encumbrances.

1.2 An acquisition of shares can be effected by execution and delivery of transfer deeds, which must be duly stamped and registered with the target company. This must happen within the prescribed time set forth in the Companies Act and must be accompanied by share certificates. An acquisition of shares is an easier and a much quicker transaction. In a transfer of assets, several additional documents may become necessary, depending upon the nature and number of assets involved in the transaction. Other considerations include the following:

- Depending upon the state in which the immovable property is situated, the stamp duty on the transfer of immovable assets varies from eight percent to fourteen percent of the market value of the property, whereas the stamp duty on movable property is about three percent of its value. By comparison, the stamp duty on the transfer of shares is very small (0.1 percent), based upon the consideration paid for such shares.
- Both income tax and capital gains tax on corporations are higher than comparable taxes on individuals.

Movable assets (including shares) held for a period of one year or longer before the date of transfer are subject to long-term capital gains rules. If no depreciation has been claimed for such assets, then long-term capital gains tax at the rate of twenty percent would be payable. If such movable assets are held for a period of less than one year or if depreciation has been claimed for such assets, then any capital gains on the disposition of such assets would be added to the income of the company and taxed at thirty-five percent, plus a surcharge of fifteen percent.

Immovable properties held for a period of three years or more attract a long-term capital gains tax at the rate of twenty percent. However, if the same are held for a shorter period or

if depreciation is claimed for such assets, then any capital gains on the disposition of such assets would be added to the income of the company and would be taxed at thirty-five percent, plus a surcharge of fifteen percent.

In a transfer of assets, both income tax and capital gains tax for the transfer will be payable by the seller. By comparison, in a transfer of shares, income tax and capital gains tax, as the case may be, are payable by the individuals holding the shares to be transferred. This transfer is subject to a lower rate. In the case of individuals, capital gains for shares held for a period of one year or more are taxed at the rate of twenty percent if the assessee takes advantage of paying per the indexation method (i.e., the cost/price of the asset/shares is increased depending upon the number of years for which they are held in accordance with an indexation formula); if the indexation method is not followed, the rate is ten percent. For shares held for less than one year, the capital gains would be taxed at the same rate as ordinary income.

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

2. FORM OF DOCUMENTS

2.1 Generally, the form and structure of the Model Asset Purchase Agreement could be used. In fact, in many transactions, a similar form is currently being used. No specific form of agreement is required for such a transaction.

2.2 Normally, a composite agreement consisting of one document similar to the Model Asset Purchase Agreement would be entered, followed by various documents actually transferring the assets, depending upon their nature.

Although the parties may agree to the transfer of movable assets in the form proposed by the Model Asset Purchase Agreement, such a transfer is not effected by executing any documents because this would attract stamp duty. Rather, the transfer is effected by means of delivery and handing over physical possession.

Intangible assets and accounts receivable can be transferred as follows:

- The debtor agrees to make payment of its debts directly to the buyer instead of the seller.
- The seller recovers the amount from the debtor and agrees to pay the same to the buyer.
- The intangible receivables are transferred by a document, which would attract stamp duty of approximately three percent, and the notice of such document is given to the debtor, which would be binding on the debtor, who is then obligated to pay the amount to the buyer.

2.3 The form of the document generally does not make any difference in the tax effects of the transfer, except as stated in Subsection 1.2 where a different rate of stamp duty would apply depending upon whether the transfer involves immovable or movable assets.

2.4 Transfers of immovable assets are required to be registered.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 The Reserve Bank of India (RBI) has issued various notifications under the Foreign Management Act of 1999, applicable beginning January 6, 2000, which have liberalized and simplified the provisions regarding acquisition of shares or assets.

Approval of the seller's board of directors is required for the sale of a company's assets, and when a substantial part of the assets are to be sold, the approval of the seller's shareholders is also required.

In the case of acquisition of shares exceeding a certain percentage in a company listed on the Stock Exchange, the provisions of the Substantial Acquisition of Shares & Takeovers Regulations of 1997 (Takeover Code) must be followed.

3.2 Foreign investment in most industries (even up to 100 percent) is now permitted without any prior approval from RBI, although there is a sectoral cap, ranging from forty-nine percent to seventy-four percent, for investing in certain industries. Under the Automatic Route Guidelines, RBI need only be informed about the investment within thirty days of remittance. In the case of a purchase of shares from Indian residents, the prior permission of the Foreign Investment Promotion Board (FIPB) and RBI are required, regardless of the number or value of shares acquired.

4. UNFAIR COMPETITION

Although the Takeover Code imposes certain requirements related to an acquisition of shares of a listed company, there are no such regulations applicable to an asset acquisition.

5. SUCCESSOR LIABILITY

Except as noted below, a buyer of assets is not responsible for any of the liabilities noted in this Questionnaire unless the acquisition agreement provides for such an obligation. In practice, such a provision is very unusual. In the case of an acquisition of shares, however, the buyer acquires the liabilities of the target company.

Certain tax revenues can be recovered from and levied against not only the owner but also the property itself if the owner fails to pay. The buyer assumes such obligations with the transfer of the property. No other liabilities automatically transfer to the buyer.

It is now customary for a buyer to conduct an environmental audit and a due diligence investigation before the acquisition of shares and/or assets.

6. PUBLIC RECORDS

Public records and/or the registering authority for the listed matters are indicated below:

- (i) Ownership of immovable property: Sub-Registrar of Assurances (state authority).
- (ii) Mortgages on, and other charges or real rights affecting, immovable property: Local Zoning Authorities and Forest Department. (The Local Zoning Authorities are state authorities and the Forest Department, although a creation of the Forest Conservation Act of 1980 is a state authority. Every state has its own Forest Department.)
- (iii) Environmental issues affecting immovable property: see Subsection 6(iv).
- (iv) Liens and encumbrances on movable property: Registrar of Companies. (The Registrar of Companies (ROC) is an authority created by the Companies Act of 1956. Every state has its own ROC.)
- (v) Ownership of intellectual property: Intellectual Property Authorities. (Established under central legislations, these authorities have offices in the states.)
- (vi) Pending litigation: Registrar or Prothonotary of High Court. (Every state has its own High Court, and the Registrar or Prothonotary is a state authority.)
- (vii) Standing of the seller: See Subsection 6(iv).
- (viii) Statements of accounts (financial information): ROC.

7. LABOR MATTERS

7.1 In asset acquisitions, the employees do not automatically become employees of the buyer.

7.2 The buyer need not make it a condition of closing the transaction that the seller terminate its employees because there is no risk that the buyer will automatically be burdened with either keeping the seller's employees or the seller's severance liability. Furthermore, it is difficult for a seller to terminate its employees due to pro-labor legislation in India. Therefore, such a clause in an asset acquisition agreement may not be advisable.

7.3 A buyer of assets is not bound by the obligations of the seller in connection with pension plans.

7.4 Almost any obligation between buyers and sellers, including severance payments, can be apportioned by contract, subject to Subsection 7.2.

7.5 An asset sale need not be authorized by any labor entity.

7.6 The buyer may not change the terms of employment unless the employee agrees to such a change. This is a matter of contract between the buyer and the employee and not a legal restriction.

7.7 Subject to the above, a buyer can assume accrued liabilities as negotiated in the acquisition agreement with the seller. Accrued liabilities are not automatically transferred to the buyer, however.

8. PLANT CLOSING LAWS

The Industrial Disputes Act of 1947 (IDA) is labor welfare legislation in India that regulates layoffs and retrenchments. The provisions in IDA appear to be similar to the provisions of the WARN Act, as they restrict the ability of the employer to engage in plant closings and mass layoffs.

9. ASSIGNMENT OF CONTRACTS

The following contracts, except when they provide to the contrary, are generally transferred to the buyer from the seller by operation of law:

- insurance policies pertaining to the assets being transferred, with the exception of fire insurance policies, for which consent of the insurer is needed before assigning the policy (though consent of the insurer is not required for assignment of other types of insurance policies, the insurer must be given notice of the transfer so the policy may be transferred to the name of the buyer) and
- all other contracts that attach to the property, such as leases, easements and mortgages.

10. NONCOMPETITION

10.1 A broad noncompetition clause in an asset acquisition agreement contravenes Section 27 of the Indian Contract Act of 1872 (ICA), which provides that any contract in restraint of trade is void. As held in a recent decision of the Supreme Court, however, a noncompetition clause is enforceable under Indian law if it has certain limitations that cause the clause not to be in restraint of trade.

10.2 There is no law in India prescribing limitations on the enforceability of a noncompetition clause so long as the restrictions are reasonable. The enforceability of a noncompetition clause is subject to limitations of time, geographic area, scope and similar limitations. As noted in Subsection 10.1, however, such a clause is not enforceable under ICA

unless the restrictions are reasonable. No registration is required for enforcing a noncompetition clause that is otherwise enforceable.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Indian law does not place any restrictions on the choice of applicable law, venue or jurisdiction (subject to the principles of Private International Law). When the approval of the government is required for an acquisition of assets or shares, the government—though granting approval—may require that such transaction be governed by Indian law.

11.2 Under the Arbitration and Conciliation Act of 1996, which is the newest law governing arbitration, an arbitral award, once issued, is final and binding. Generally, there is no judicial review of an arbitral award except on technical grounds, but judicial review is more likely to occur if the parties do not provide in the arbitration agreement that the arbitrator need not give a reason for the award.

11.3 The main reason, specific to the Indian judicial system, for favoring arbitration over court proceedings is the advantage of avoiding the delay and backlog of pending cases before the Indian courts. In practice, it takes several years before proceedings in court are decided. Arbitration is comparatively faster and more expeditious. Furthermore, the arbitration proceedings are more informal than court proceedings.

12. OTHER ISSUES

12.1 It is typical to include a clause in an asset acquisition agreement regarding attorney's fees and other costs. The parties usually agree to bear their respective attorney's costs.

12.2 [No response.]

12.3 In our experience, foreign investors are usually more interested in acquiring the shares of the seller or in investing by subscribing to the shares in the target company than they are in acquiring such company's assets. In the case of a purchase of shares or assets in India, the buyer must deal with Indian law, which has been covered only very generally.

Indonesia

Contributed by Rahmat Soemadipradja and Linda Widyati, Soemadipradja & Taher

1. ASSET VERSUS SHARE PURCHASE

1.1 The major advantage to a buyer acquiring assets rather than shares is that a buyer of assets does not assume the liabilities associated with the acquired business. Indonesia's financial reporting and publication system is not yet fully developed. Generally, only two types of companies are required to publish audited financial statements: (a) companies listed on either the Jakarta or Surabaya Stock Exchange (these companies issue debt instruments that are listed, such as bonds) and (b) companies whose business activities relate to the use of public funds, such as banks and insurance companies. (See also Subsection 6(viii).) Therefore, it is very difficult to establish the exact scope of liabilities of a nonlisted company whose shares are purchased.

Normally, tax considerations also play an important role in deciding whether to choose an asset or a share acquisition. A transfer of assets can be subject to transfer taxes (e.g., when land is transferred) and value added taxes (VAT). Tax advice is necessary before making any decision that would affect the method of acquisition.

Finally, practical implications are important. An acquisition of shares is relatively easy to accomplish, whereas an acquisition of assets is more complicated due to the various legal requirements necessary for the transfer of assets.

1.2 The main distinction between an acquisition of shares and an acquisition of assets is that, in an acquisition of the shares of a company, the new shareholder of the target company acquires (indirectly) all the liabilities of such company. In a transfer of assets (whether substantially all, or only part of, the assets), the acquiring party does not assume any liability except as otherwise agreed. The concept of successor liability is not recognized.

1.3 The answer to Subsection 1.2 would be no different if only part of the assets were to be acquired.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement could be used generally in its present form, including its extensive representations, warranties and indemnities. No specific form is required for acquisitions of assets generally, except in connection with the transfer of land (see Subsection 2.2).

Under current practice, such a form of agreement is increasingly used, although Indonesian parties who must deal with such an agreement may not feel comfortable with it because the practice is not yet fully developed.

2.2 Generally, the method of conveyance depends upon the asset involved. The transfer of assets takes place by various instruments. For instance, accounts receivable are transferred by way of a written deed of transfer. Subsequent acknowledgment by, or proper notice to, the debtor is required to perfect the rights of the assignee.

The transfer of land title takes place before a land deed official (PPAT) by execution of a written deed of transfer and subsequent registration of such transfer in the register kept by the applicable regional land office. Indonesia operates a system of land title rights that bears resemblance to the concept of leaseholds. This system enables the owner to use or exploit the land for specific purposes during a certain period of time. The most common title for companies is a Hak Guna Bangunan (HGB) title. This bestows the right to build for a thirty-year period, which can be extended up to eighty years.

Title to buildings cannot be registered in Indonesia. From a practical point of view, buildings are normally transferred together with the land title connected to the underlying land, followed by a subsequent delivery of possession.

Movable assets are transferred by delivery and by the buyer—or a person designated by the buyer—taking physical possession.

Intellectual property rights are transferred by written deed of transfer, and further registration is necessary (see Subsection 6(v)).

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

2.4 The transfer of land titles and of intellectual property rights can, and should, be registered. Furthermore, the transfer of various movable assets—such as ships, cars and trucks—must be registered in the name of the new owner.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Generally, a transfer of assets would not involve the Indonesian government. However, when assets of foreign-investment companies (PMAs) are transferred, the investment plan as stated in the investment license of a PMA may require amendment in relation to any transfer of assets that affects the investment plan. The license contains, among other things, an approved investment scheme that must be carried out within a certain period of time. (See Subsection 3.2 for details on PMAs.) As a result, government authorities, particularly the Capital Investment Coordinating Board (BKPM), which is responsible for enforcement of the foreign-investment laws, may become indirectly involved with the transfer of assets of PMAs.

In addition, under the New Company Law of 1995 (Article 88), a company's general meeting of shareholders must approve—with a qualified majority of at least seventy-five percent—any transfer of a majority of the company's assets. Such approval must be followed by notice of the transfer published in two newspapers after the transfer has been completed. Listed companies are also subject to this requirement.

No administrative filings are required before any acquisition of assets, except as may be required pursuant to the foreign-investment rules and regulations (see Subsection 3.2). Additionally, pursuant to the rules issued by and policies of the Capital Market Supervisory Agency (BAPEPAM), a substantial transfer of assets by a listed company must be reported first to BAPEPAM and then disclosed to the public (i.e., shareholders). If the proposed transfer of assets involves a conflict of interest, then the transaction requires approval of independent shareholders.

3.2 Under the Foreign Investment Law of 1967 (as amended), any foreign entity that intends to engage in business activities in Indonesia must establish a PMA for such purposes.

Such entity must obtain a proper business license before engaging in any business activities.

The Indonesian government regularly publishes a so-called Negative List, which describes the sectors of the Indonesian economy that are closed to foreign investment or that require specific Indonesian participation in any investment. Due to the economic crisis currently affecting Indonesia and the resulting International Monetary Fund program adopted by Indonesia, which calls for removing restrictions on foreign investment, the number of areas closed to foreign investment has been reduced substantially. The Negative List is updated from time to time, as deemed necessary by the government. The most recent Negative List was issued in August 2000.

4. UNFAIR COMPETITION

Antidumping rules specifically apply to foreign companies that wish to export to Indonesia. The New Company Law of 1995 states that, while effecting a merger, consolidation or takeover, the parties must take into consideration the public interest and fair competition in carrying out their business activities. There is no practice (or any relevant case law) that would give any indication about how this provision should be interpreted.

The trademark law contains provisions that make unfair competition practices and counterfeiting criminal acts.

The Indonesian government is currently preparing a draft of a competition law.

5. SUCCESSOR LIABILITY

No general rules exist and successor liability theories are not recognized.

5.1 The environmental law practice in Indonesia has hardly any legal precedent. Under Law No. 23 on Environmental Management, a number of industries are required to conduct an Environmental Impact Assessment Analysis (so-called AMDAL reports) before developing industrial sites. Buyers of industrial assets must be aware of this requirement and should obtain confirmation about whether AMDAL reports have been completed properly. It is likely that a buyer of assets could be held responsible for any environmental liabilities of the seller, but only to the extent that the buyer has contributed to any damage caused by the transferred assets.

5.2 In general, a buyer will not be liable for the products or services sold by the seller before the acquisition. Third parties can make claims only against the party who actually sold the products or provided the services.

5.3 The buyer must fulfill any outstanding orders to the extent it has assumed the liability to do so either by assuming the underlying contract (which requires the consent of the other contracting party) or by specifically assuming such obligation.

5.4 Generally, a buyer will not be liable for warranty claims that have not been specifically assumed by it as part of the acquisition transaction. No specific rules apply.

5.5 Generally, a buyer is not responsible for obligations or defaults of the previous owner or lessee. No relevant case law is available that describes the circumstances under which such liability may be imposed.

5.6 Unless otherwise agreed between the lessor and lessee, the buyer of land or a building must honor the rights of a lessee of such land or building. (See Sections 1575 and 1576 of the Indonesian Civil Code.) There are no other liabilities or obligations of a seller that automatically transfer to a buyer as a matter of law.

5.7 It is customary for buyers to conduct environmental audits (see Subsection 5.1) and specific due diligence investigations before the acquisition of assets. Such due diligence is of particular importance because Indonesia still lacks reliable registers containing publicly available information about business entities and title to certain assets.

6. PUBLIC RECORDS

- (i) By presenting an original copy of the land title certificate, one can request the regional land office to confirm whether certain real estate is registered in the name of the party mentioned in such certificate. The land register is not open to the public to make random inquiries, however. A kadaster (a land registry office as found in Holland) does not exist.
- (ii) See Subsection 6(iv) regarding public records that disclose mortgages on, or other charges or real rights affecting, immovable property.
- (iii) Third parties can obtain copies of AMDAL reports (see Subsection 5.1), which the responsible parties must file with the Environmental Control Agency (BAP-PEDAL).
- (iv) There are no public records on liens and encumbrances—except in connection with mortgages granted—that must be registered in the applicable regional land office. Parties can gain access to the relevant land register and request confirmation about whether mortgages have been established only with the cooperation of the encumbered party. Normally, land register officials will ask for the original land title certificate.
- (v) Inquiries concerning intellectual property, including those regarding registration of certain intellectual property rights, can be made at the Office of Trademarks, Patents and Copyrights. Trademarks, patents and copyrights can be registered in Indonesia and are protected (upon registration) in Indonesia.
- (vi) One may ask the relevant district court, arbitration body (in this case, the Badan Nasional Arbitrasi Indonesia) or labor committee about the existence of pending litigation or claims against a company but only with a power of attorney granted by that company.
- (vii) There are no public records regarding the standing of a company.
- (viii) No public records exist concerning a company's financial statements and other financial information, although public companies (which include companies listed on the Jakarta or Surabaya Stock Exchange) and companies with business activities that relate to the use of public funds (banks, insurance companies and mutual funds) must publish their financial statements. Such financial statements must be audited. See also Subsection 1.1.

7. LABOR MATTERS

7.1 Under previous legislation, the employees of a seller did not automatically become employees of the buyer as a consequence of an acquisition of assets. However, under Labor Law No. 25 of 1997, which became effective on October 1, 1998, it is stipulated that employment relationships do not terminate as a result of a sale of a company. This may mean that employment relationships will remain valid and automatically transfer to a buyer who purchases substantially all the assets of the target company. It is important to await the reaction of the Indonesian courts to see how they will interpret the 1997 legislation, particularly with respect to whether the rules would also apply to a transfer of only some of the assets.

As a more general observation, Indonesian courts tend to give priority to the protection of employees' rights over those of employers.

7.2 It is permissible to include a clause requiring the seller to terminate employees as a condition to closing without leading to severance liability on the part of the buyer. Under current law and practice, however, employees must be given severance pay if the employment relationship is terminated due to a change in the corporate status or ownership of the

company. Furthermore, the Regional Manpower Office will become involved and must be consulted if more than ten employees of a single company will be laid off.

7.3 A buyer is not automatically bound by the obligations of a seller in connection with pension plans and retirement, health or other benefits. Many employees are entitled to the national program for Employers Social Security (Jamsostek), however, which is mandatory for all employers in Indonesia without exception. Indonesian buyers and sellers of assets must participate in this program, which provides insurance against accident and death.

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

7.5 There are no laws and/or regulations requiring that an asset sale be subject to consultation with, or authorization from, any works council or labor union. In practice, however, it is advisable to consult with the trade union about the consequences of any substantial transfer of assets that will affect employees.

7.6 After consummation of an acquisition, the terms of employment can be changed, subject to agreement between the employer (buyer) and employee.

7.7 A buyer does not assume all liabilities in connection with transferred employees unless the buyer and seller agree. No rules or regulations are effective concerning the accrual of such liabilities.

8. PLANT CLOSING LAWS

There are no such restrictions in Indonesia. In practice, however, consulting with—and obtaining the consent of—the labor union and the Regional Manpower Office is recommended to help prevent strikes or social unrest in case the rights of the employees involved are being affected.

9. ASSIGNMENT OF CONTRACTS

No contracts transfer automatically with the assets in a transfer of assets, except in connection with lease agreements for land or buildings (see Subsection 5.6).

10. NONCOMPETITION

10.1 No rules, regulations or legal cases prohibit or limit the effect of noncompetition clauses. Generally, all such clauses can be enforced against the seller, its principals and its employees. Please note, however, that the enforcement of contracts (including noncompetition clauses) is subject to the generally applied principle that agreements must be implemented in good faith.

10.2 No requirement to register noncompetition agreements exists.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Generally, no mandatory restrictions exist concerning the choice of applicable law in asset acquisition agreements. Indonesian law, however, must govern the actual deeds of transfer of Indonesian land, of intellectual property rights registered in Indonesia and of shares in Indonesian limited liability companies. Indonesian courts will uphold choice-of-law provisions to the extent that they have sufficient connection with the agreement or the parties involved and are not against public policy.

No specific requirements regarding choice of venue apply in Indonesia, with the exception of land transactions, for which the proper venue is the district court that has jurisdiction over the region in which the land is located.

Generally, if enforcement will take place against an Indonesian company (buyer or seller), it may be advisable to choose Indonesian law as the applicable law and the Indonesian courts as the appropriate venue because Indonesian courts have only limited experience with enforcing contracts that are governed by other laws.

It is important to note that Indonesian courts do not recognize foreign judgments. Legal proceedings must be initiated again in Indonesia. The foreign judgment can be used as evidence supporting the Indonesian claim.

11.2 Arbitration is an acceptable form of dispute resolution in Indonesia. Indonesia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of June 10, 1958 (New York Convention). In 1990, the Indonesian Supreme Court issued implementing regulations for the New York Convention, which allowed the New York Convention to have effect in Indonesia. Foreign arbitral awards must satisfy all the following conditions:

- The award must be granted by an arbitration tribunal from a country that has either entered a bilateral agreement with Indonesia regarding recognition of arbitral awards or is also a signatory to the New York Convention.
- The award must arise out of a dispute that is “commercial” (whether contractual or otherwise) in nature.
- The award may be enforced only after a writ of execution (exequatur) is obtained from the Indonesian Supreme Court. Foreign arbitral awards may not be contrary to Indonesian public policy.

11.3 Litigation in Indonesia is considered an undesirable and ineffective method of dispute resolution. Generally, the judiciary is not yet ready to deal with complicated, international financial or trade matters because it lacks sufficient sophistication and has little experience in resolving disputes. In addition, the outcome of legal proceedings is often unpredictable, and the proceeding itself is deemed by many parties to be prohibitively expensive. Arbitration, on the other hand, is perceived to allow parties to obtain an objective judgment by professional arbitrators within a fairly limited period of time.

12. OTHER ISSUES

12.1 [No response.]

12.2 There is no law in Indonesia similar to the Bulk Sales Laws in the United States.

12.3 One of the most distinct differences between the Indonesian system of law and the U.S. system of law can be found in the enforcement of contracts. As explained above, enforcement of contracts through the Indonesian courts is cumbersome, time consuming and expensive. Accordingly, in most cases, parties are left to negotiate their way out of disputes.

Indonesia’s legal system is based upon the civil law system introduced by the Dutch before 1945. As a result, the concept that contracts must be implemented in good faith is an important overriding principle present in all contractual relationships.

Purchasing assets in Indonesia still requires the involvement and cooperation of the Indonesian bureaucracy, which is necessary to secure registration of title (in the case of land) and the licenses required to operate the business for which the assets are acquired. Securing such cooperation may be cumbersome and expensive.

Israel

Contributed by Arnon Gicelter, Rotenstreich-Gitzelter

1. ASSET VERSUS SHARE PURCHASE

1.1 The major advantage to a buyer acquiring assets rather than shares is that (subject to limited exceptions) a buyer of assets does not assume the liabilities associated with the acquired business. When all the shares of a target company are acquired, although the buyer does not thereby assume the liabilities of the acquired company, the acquired company (which is now owned by the buyer) continues to be responsible for all its own liabilities. Other considerations include the following:

- The assets of the acquired business may include, or the acquired business may be dependent upon, contracts or other assets (such as leasehold land and buildings) that are not assignable or that may be assignable only with the consent of another party. It is less common (but not unknown) for contracts to provide for termination or other adverse consequences on change of ownership or control of a company.
- On an acquisition of shares, there is no “step-up in basis” and the target company retains its historic base cost (basis) in its assets for capital gains taxation purposes. On an acquisition of assets, the buyer’s basis is the price paid for the assets. On a shares acquisition, the buyer’s basis in the shares is the price actually paid for them. (In both cases this is subject to an annual increase to reflect inflation when the buyer is a company.) When the buyer is not an Israeli taxpayer, however, disposal of the acquired shares will in most cases be free of Israeli taxation. A disposal by the acquired company of its Israeli assets, however, normally gives rise to Israeli taxation of any gain realized over the inflation-adjusted historic basis. If the disposal proceeds are reinvested in business assets, it may be possible to defer the taxation. Detailed consideration of the tax affairs (in all relevant jurisdictions) of the buyer and the target company is required to form a fair assessment of the comparative tax advantages and disadvantages of a shares or an assets acquisition.
- On a sale of shares, the target company might be deemed to be leaving a group of companies for Israeli taxation purposes. Sometimes this can trigger taxation charges against the target company itself and not just against the seller.

- When the acquired business constitutes only part of the undertaking of a company, it can sometimes be easier to structure the transaction as an asset acquisition.
- When the business is conducted by more than one company in the seller's group, it can sometimes be easier to structure the transaction as an asset acquisition.
- On a sale of shares, there is no interruption in the identity of the entity conducting the business, which can sometimes ease the transition on day-to-day legal and operational matters, such as collection of accounts receivable.
- A sale of shares is quite often much more tax efficient from the seller's standpoint. Accordingly, a seller may demand a higher price for a sale of assets than a sale of shares.
- Israeli law provides for a special corporation: the Real Estate Entity. This is a registered corporation whose sole purpose is to own specific real estate. These corporations are considered as real estate properties by themselves, and the sale of the shares of such corporations is considered a sale of the property they own.

1.2 In general, Israeli law respects the form chosen for the transaction (shares acquisition or assets acquisition) even if the assets acquired constitute the entire undertaking of the company. An exception is the sale of a Real Estate Entity, as described in Subsection 1.1. Israeli law will not (subject to limited exceptions) transfer liabilities to a buyer of assets merely because the business itself is being transferred.

1.3 An additional consideration is the tax imposed on real estate transactions as well as on the ownership and use of such properties. These are "land betterment" taxes, one being a tax on any capital gain and the other being a municipal improvement tax.

2. FORM OF DOCUMENTS

2.1 As a general proposition, the form and structure of the Model Asset Purchase Agreement could be used in a transaction for the acquisition of the assets of an Israeli business, although the language may need to be modified to reflect local laws and customs. For example, the provisions concerning employment and employee benefits (including pensions) must be rewritten in the light of local law. It also would be appropriate to replace or supplement references to U.S. statutes with the appropriate local analogues. As a matter of custom, closing legal opinions would not be exchanged in a purely domestic transaction between an Israeli buyer and an Israeli seller. The buyer would need to consider whether (and to what extent) it requires a closing opinion from the seller's Israeli counsel in light of the particular circumstances of the transaction.

2.2 Full legal title to certain classes of assets must be conveyed by separate documents. When the assets of a business include real estate, patents, trademarks or shares in other corporations, a separate transfer document is normally required for the buyer to be registered as the legal owner of the relevant assets. In addition, it is sometimes desirable to obtain specific assignments of receivables to make it easier for the buyer to bring collection proceedings. Even if the assets are those that can be transferred by a single document, it is normally desirable to apportion the purchase consideration among various classes of assets for tax and accounting reasons.

2.3 Sometimes the text of the document may substantially affect tax considerations. This includes, for example, whether the transfer is expressed as a sale, a transfer without consideration or a gift. Similarly, the form of any irrevocable commitments has tax consequences.

2.4 As noted in Subsection 2.2, full legal title to certain assets (such as real estate, patents, shares and trademarks) will not pass to a buyer until the buyer is registered in the appropriate register as the owner. Registration is not compulsory, however. Failure to register would mean that the seller remains the legal owner of the property, subject to a trust in favor of the buyer, with the buyer being the equitable owner of the property pending registration in its name.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Generally, foreign investment is not restricted. There are, however, some exceptions:

- The purchase of assets that are considered important to the national interest (banks, insurance companies, natural resource companies, etc.) requires approval of the foreign investor. These approvals are granted by special government committees, usually the Ministry of Justice and/or the Ministry of Finance, which are nominated to approve and license such transactions.
- The purchase of long-term leases of State-owned real estate by a foreigner requires a permit. As a matter of practice, this permit is almost always granted.
- The Company Laws require corporate procedures for approval and execution of purchase and/or sale by an incorporated entity.
- All real estate transactions, and assets that require registration (heirs, aircraft, motor vehicles, etc.), require administrative filing.

Generally speaking, the board of directors of an Israeli company has authority to dispose of all of the company's assets without reference to shareholders.

3.2 Generally, there are no limitations on involvement of nonnationals in the local economy. The Israel Land Administration requires identification of non-Israeli purchasers (long-term leases) of State-owned lands. There are some restrictions stemming from Israel's special security situation (some industries and/or products are subject to official State secrets laws). Otherwise, foreign investments are highly encouraged and may even be subsidized.

4. UNFAIR COMPETITION

Antitrust trade restraints and concern for monopolies or other unfair competition practices are developing trends in Israeli legislation and legal practice. The Commissioner of Trade Restraints (with the Ministry of Trade and Industry) is in charge of restricting and controlling unfair competition.

The rules are very similar to U.S. rules, and the same observations and cautions that would apply to a U.S. transaction apply to any asset transaction. Any transaction that gives the merged entity control (i.e., a market share of 50 percent or more) or the "power to influence" fifty percent or more of the local market in a specific product or service requires premerger notification or approval. The penalties for antitrust violations are both civil and criminal.

5. SUCCESSOR LIABILITY

5.1 A buyer can become responsible for environmental liabilities arising out of the acquired business assets:

- by statute, when the buyer allows pollution (particularly of the acquirer) to continue after the acquisition;
- when the buyer allows a common law nuisance to continue after the acquisition; and/or
- when the seller ceases to exist (e.g., due to insolvency), in which case regulatory authorities have certain powers to proceed against the current owner of the relevant land or asset.

5.2 Anyone in the chain of supply from the manufacturer to the wholesaler can be liable for defective products or services. A buyer does not, however, assume these liabilities unless it agrees to do so.

5.3 As a matter of law, an acquisition of assets does not normally carry with it assumption of liabilities, except to the extent that an acquired asset is itself a contract under which the buyer has agreed to become bound. As a matter of practice, however, asset acquisitions

normally entail the buyer and seller agreeing that the buyer will take the benefit and burden of all—or an identifiable portion of—matters such as outstanding orders.

5.4 A buyer is not responsible for contractual or other legal defaults of the seller committed before the acquisition date, except to the extent that the buyer has contractually agreed to be so bound.

5.5 Freehold and leasehold property must be distinguished. As far as freehold property is concerned, a buyer is normally not bound by positive obligations of the seller. In contrast, negative obligations (e.g., not to use the land for certain purposes) can sometimes bind the land and pass with it. Furthermore, if the property is subject to mortgages or other security interests that are not discharged at closing, the rights of the secured creditor against the property continue notwithstanding its sale even though the buyer is not personally liable for the secured debt.

In relation to leasehold property, the transfer to the buyer will probably require the landlord's consent. This consent will normally be granted only if the buyer agrees to be bound by all the obligations and liabilities of the tenant (sometimes including past breaches). Furthermore, even when the landlord's consent is not required, if there are continuing breaches of the lease, the landlord may be able to take action to evict the buyer by reason of the continuing breaches even though the landlord may not be able to sue the buyer to remedy the breaches.

The owner of real estate property is liable for a variety of omissions (and actions) stemming from the property or in connection with it. A new owner is liable for State and municipal taxes, compliance with Town Planning Rules and Regulations, required permits or licenses and negligence cases, even if such occurred before the owner's purchase of the property (which fall under the definition of "continuous acts"), although it will be a good defense if the new owner did not, could not and/or should not have known of the essential circumstances leading to the allegations against it.

5.6 Civil obligations of a seller (like debts secured by the asset, liens or mortgages) require registration and are therefore easily ascertainable and are usually assumed by the buyer.

5.7 Environmental restrictions are not widespread at the moment, but it is a growing issue and will certainly require due diligence in any such related transaction. Financial, commercial and legal due diligence (the extent of which depends upon the subject matter) is widely practiced in almost every asset purchase transaction.

6. PUBLIC RECORDS

- (i) Ownership of real estate property must be registered with the Land Registrar and is available for inspection.
- (ii) Mortgages, charges and liens on immovables that require registration are registered with the Land Registrar and are available for inspection.
- (iii) Environmental matters do not require registration unless imposed by Town Planning Rules. Apart from this, there is no way to learn from any public records what environmental concerns affect the property.
- (iv) Liens and encumbrances on movables that are owned by incorporated entities or that require registration (like motor vehicles) are registered with the asset, and these records are open for inspection.
- (v) Intellectual property that requires registration (patents, trademarks, trade names, etc.) is registered with the Registrar of Patents, Trademarks and Trade Names. Copyright ownership can be verified only through contractual reviews, warranties and undertakings.
- (vi) Pending litigation cannot be practically searched in court records (although these are open for inspection) because of the regionalization of the courts.

- (vii) The Companies Registrar requires annual updates of all essential corporate information. Certain security interests must be filed at the Companies Registry and in the company's own internal registers. There is also provision for registration of certain security interests created by other entities, including natural persons. All of the above applies to personal (movable) property. The Companies Registrar will not provide a certificate of good standing.
- (viii) The standards of audit and financial reports in Israel are fairly developed and meet all western standards. This information is available only for corporations whose shares are listed on a stock exchange. Private companies are not required to make their accounts public.

7. LABOR MATTERS

7.1 Unless a buyer specifically undertakes to continue the employment of existing personnel, a sale of assets terminates the employer-employee relationship and entitles the employee to termination rights (like severance pay, advanced notice, realization of accumulated vacation days, etc.), unless the buyer agrees to offer that employee the same job on the same terms and conditions.

7.2 Depending upon the type of employment agreement (i.e., collective agreement, personal agreement or no contract), a buyer may not be obliged to employ any—or part—of the existing workforce. Collective agreements do not grant the power to force employment (on either the employer or the employees), but the unions do have the power to react to unwanted actions by the employer.

7.3 The buyer is bound only by those labor liabilities that it expressly agrees to assume.

7.4 The buyer and seller may allocate responsibility for severance payments. It should be noted, however, that most employers set aside an allowance to fund any severance liabilities, with the result that, when a business is sold, the employees are substantially—and in a few cases fully—covered.

7.5 In businesses where the terms of employment are governed by collective bargaining agreements, consultation with the unions representing the seller's employees must take place.

7.6 Although there are some restrictions on the parties' freedom to change the terms of the employment relationship, in general, the buyer may make changes in the terms of employment of the seller's employees.

7.7 See Subsection 7.1.

8. PLANT CLOSING LAWS

Mass layoffs would be faced with "organized objections" only in places where labor relations are controlled by collective bargaining agreements and the workers are represented by the National Union. Otherwise, it is a matter to be resolved between the employer and the individual employee. In some cases, the State intervenes through its agencies, especially if the whole workforce in one location is to become unemployed.

Termination of labor relations is subject to advance notice in any case, and the extent of notice required varies from three weeks to ninety days, depending upon the length of the relationship that has existed between the employer and the employee.

9. ASSIGNMENT OF CONTRACTS

Third-party contracts (such as insurance contracts) covering the seller's business or the purchased assets are not automatically assigned in an asset transfer. There would have to

be a novation for the buyer to take advantage of the seller's contracts unless, under the terms of such a contract, the obligations or benefits could be assigned.

10. NONCOMPETITION

10.1 Noncompetition restrictions are enforceable, provided the restrictions are reasonable.

- (i) A noncompetition clause that binds the seller is normally enforced in accordance with its terms to the extent that it is reasonable and to the extent that such a clause protects the goodwill that the buyer purchased when it bought the seller's business.
- (ii) Similarly, a noncompetition clause entered by the seller's principals is enforceable against them, provided the restrictions are reasonable and each principal receives consideration.
- (iii) The courts would be less likely to uphold restrictions in a noncompetition clause entered by an employee if it were seen as limiting the employee's freedom to practice his or her trade and make a living.

10.2 A noncompetition clause must be reasonable in terms of the length of time it applies and the scope of the activities it restricts. There is no registration of such undertakings.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 The principles of the Private International Laws that are applied in the United States are also practiced in Israel. Israel has acceded to the New York Convention. Arbitral awards of other countries are enforceable in Israel.

11.2 It is customary to include choice-of-law and choice-of-jurisdiction clauses, and it is practical to agree on arbitration.

11.3 Certain assets (mainly real estate properties) are better subjected to Israeli laws because the pertinent Israeli laws are unique.

12. OTHER ISSUES

12.1 It is common for the parties to agree that each side bears the costs of its legal advisers.

12.2 [No response.]

12.3 The Israeli Company Laws stem from, and are very similar to, U.K. Company Laws. In recent years, however, the legislature and the courts have tended to adopt U.S. practice. The Israeli legal system is quick to adopt up-to-date issues from the English-speaking world, and U.S. models are often sympathetically considered.

Monopoly and competition issues, ecological concerns, securities and stock exchange rules and public health are often important governmental concerns in business acquisitions. Israel has a relatively controlled business environment and the government tends to intervene, directly or indirectly, in the majority of business activities. This influence is expressed through indirect taxation (mainly customs duties), restrictions on imports, protection of sensitive businesses and industries (particularly the defense industries) and encouragement of experts' assistance to foreign investors. Some industries are encouraged and enjoy special privileges—among these are diamond industries and high-tech developers.