Italy

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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 generally assume the liabilities associated with the acquired company. In an acquisition of shares, the buyer acquires the company with all its liabilities, whether evident or hidden, disclosed or undisclosed. In an acquisition of assets, the buyer acquires the assets with either no liabilities or specific liabilities. The buyer may, for example, inherit specific liabilities in connection with a piece of machinery that is subject to a reservation of ownership or a lien in favor of third parties (such as prior owners and/or lenders). Moreover, in an acquisition of substantially all the assets of a company (i.e., an azienda—see Subsection 1.2), the buyer becomes responsible for certain liabilities of the seller incurred before the acquisition concerning employees and taxes.

Another important consideration is the impact of the form of transaction on the cost of the acquisition. Depending upon the circumstances, an acquisition of assets may be more or less cost-effective than an acquisition of shares. Different accounting rules (e.g., concerning depreciation) and taxes may apply under different forms of transactions, and this may ultimately affect, either favorably or unfavorably, the cost of the acquisition and consequently the purchase price.

1.2 An acquisition of substantially all the assets of a company is considered an acquisition of a "business" or "ongoing concern" (an azienda). An acquisition of an azienda differs from an acquisition of shares. In an acquisition of shares, the buyer acquires the company with all its liabilities, whether known or unknown. In an acquisition of an azienda, the buyer acquires the business or ongoing concern with more limited and specific liabilities and generally only with the liabilities that are evident in the mandatory accounting books of the seller. Exceptions to this rule follow:

- Regarding employees: The buyer of an azienda becomes jointly and severally liable with the seller for all of the benefits and payments due in favor of the employees up to the time of the transfer of the azienda, even if the amounts payable do not appear in the mandatory accounting books of the seller.
- Regarding taxation: In case of nonperformance by the seller, the buyer becomes responsible up to the value of the azienda for the payment of both direct and indirect taxes and penalties due from the seller for the year in which the transfer takes place

and for the two preceding fiscal years, even if the amounts payable are not shown in the mandatory accounting books of the seller. Moreover, the government may attach the assets of the azienda acquired by the buyer to recover income taxes and penalties due by all previous owners of the azienda.

As for the costs of the transaction, different taxes may come into play depending upon the form of the acquisition. For example, in an acquisition of an azienda, the buyer may attribute to goodwill and depreciate over a period of time the portion of the purchase price exceeding the book value of the assets, which is not possible in an acquisition of shares. Also, in an acquisition of shares, a transfer tax of 0.14 percent of the purchase price may apply, whereas in an acquisition of an azienda, registration taxes apply at rates that, depending upon the nature of the assets, range between three percent (personal property and goodwill) and eighteen percent (real property).

1.3 The situation would be different if the acquired assets do not constitute an azienda. The criteria for establishing whether the assets transferred constitute an azienda are the intention of the parties (whether expressed in the agreement or implied) and, more importantly, whether the assets transferred are sufficient to carry out an autonomous business.

In an acquisition of an azienda, the seller need not transfer all the assets of its enterprise (or of a branch or division thereof), but it must transfer those assets that are essential to the activity of the enterprise (or the branch or division). In practice, an azienda may consist of just a few employees and clients if these are the only essential assets of the enterprise (or of its branch or division). In an acquisition of individual assets, the buyer inherits only those liabilities attached to the individual assets (e.g., mortgages or liens).

In an acquisition of individual assets, a value added tax (VAT) will usually apply rather than a registration tax. A VAT often does not result in a cost to a buyer that is an entrepreneur or business organization; a buyer is entitled to deduct the amount of VAT paid for the purchase of assets from the VAT collected from its customers and payable to the government. For example, if the VAT payable by the buyer on the purchase of the assets is Lire 1 million and the VAT collected by the buyer from its customers in connection with the sale of goods or the rendering of services by the buyer is Lire 3 million, then the buyer must pay only the difference of Lire 2 million to the government. If the VAT paid for the purchase of the assets exceeds the VAT collected from customers, the buyer is entitled to a "carry forward" and/or a refund of VAT from the government.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement, including its extensive representations, warranties and indemnities, generally may be used for multinational acquisitions involving an azienda or individual assets located in Italy without any major changes but with ad hoc additional provisions reflecting Italian law.

2.2 Contracts having as their object the transfer of the ownership or utilization (e.g., lease agreements) of an azienda must be evidenced in writing and formalized in a notarized document. Such document must be registered at a local Registry Tax Office (Ufficio del Registro) along with the payment of a registration tax and must be reported for inscription at a local Registry of Companies (Registro delle Imprese).

In the case of a multinational asset acquisition agreement involving assets in a number of jurisdictions, including an azienda in Italy, the entire asset acquisition agreement normally is not notarized or registered in Italy because doing so may involve additional costs and taxes. It is common practice, however, to notarize an excerpt or appendix of the asset acquisition agreement or, preferably, to execute a separate notarial agreement dealing exclusively with the transfer of the azienda.

In addition to the contract related to the azienda, the transfer of the particular items of property that are included in the azienda is subject to compliance with certain formalities.

For example, the transfer of patents, trademarks and/or other intellectual property may require the execution and recording of particular documents.

2.3 The form and content of the documents executed and registered in Italy may make a difference in connection with Italian taxes and other costs. In particular, the registration in Italy of the entire asset acquisition agreement may require its translation into Italian and the payment of higher registration taxes.

2.4 To make the transfer of certain assets effective vis-à-vis third parties, the law requires specific forms of notice. For example, the acquisition of real property or a lease of real property having a duration of more than nine years must be made public by means of recordation at the local Registry of Immovable Property (Conservatoria dei Registri Immobiliari) to be enforceable against third persons. In the case of a dispute between two buyers of the same real property, the party that records the agreement earlier prevails.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Foreign-exchange controls have been lifted in Italy for many years, and generally no governmental approval of foreign investment is required.

Generally, a disposition of assets must be approved by a majority of the members of the board of directors of the seller or by one or more of the directors who have sufficient powers delegated by the board of directors. If, however, the assets represent a substantial part of the business of the seller, then a majority of the seller's shareholders must also approve the disposition. The bylaws of the seller may establish additional or different requirements.

Specific approvals may be necessary in connection with the acquisition of certain assets (e.g., oil concessions or pharmaceutical registrations) or specific business activities (e.g., banking, insurance or transportation).

3.2 There are some limitations on foreign investors who acquire control or a substantial share of companies operating in specific sectors of public interest (e.g., newspapers). Such limitations vary depending upon whether the investor is a European Union (EU) or non-EU person or entity. The acquisition of assets and/or the engagement in business activities in Italy by certain non-EU persons or entities may also be limited by conditions of reciprocity with the foreign country.

4. UNFAIR COMPETITION

Under the Law on Competition, in an acquisition of a company or of part of the same by another company, the enforcing agency (Authority on Competition) must be given advance notice if (a) in the preceding financial year the combined Italian turnover (gross revenues) of the parties involved in the transaction (i.e., the consolidated Italian turnover of the whole group of the buyer plus the Italian turnover of the target company or branch or division thereof) exceeded Lire 714 billion or (b) the turnover of such target company, or branch or subdivision thereof, was more than Lire 71 billion. Fines for failure to notify may be up to 1 percent of the combined turnover of the parties. (Please note that these figures are revalued on a yearly basis.)

Implementing an acquisition subsequent to notification, but before clearance, does not give rise to any liability under the Law on Competition. It is possible, however, that the Authority on Competition may order the parties to suspend the transaction until a decision is taken. Moreover, there is a risk that if the transaction raises serious competition problems, the Authority on Competition may not allow it and may order measures (including divestiture) to restore the parties to their pre-acquisition positions.

If, within thirty days from the date of filing of notice, the Authority on Competition determines that the transaction is likely to be prohibited, it must inform the parties and institute

special proceedings. If the Authority on Competition does not communicate with the parties within the thirty-day term, or if it informs the parties that no proceedings will be instituted, then the acquisition can continue without any risk of interference. The Authority on Competition must complete its investigations and render its final decision within forty-five days from the institution of the proceedings. (This term may be postponed by thirty additional days.)

An acquisition will be prohibited whenever it creates or strengthens a dominant position, resulting in the elimination or substantial reduction of competition in the Italian market.

If an acquisition of Italian assets (alone or together with the acquisition of other assets and/or shares in other EU countries) has a "European dimension," then the matter will not be governed by the Law on Competition, but rather by the European Merger Control Regulations, in which case notice of the acquisition must be made to the European Commission. It is worth noting that, in such case, the acquisition cannot be implemented after the notification; the parties must wait for clearance from the European Commission.

5. SUCCESSOR LIABILITY

5.1 In accordance with the general principles outlined in Subsection 1.2, a buyer of an azienda is responsible only for the debts derived from the seller's environmental violations that appear in the seller's mandatory accounting books. In the case of an acquisition of assets that does not constitute an azienda, the buyer is not responsible for any of the seller's debts of an environmental nature. In either case, however, the buyer becomes generally responsible upon the acquisition for any existing violations of an environmental nature, which must be cured according to the law (e.g., the buyer must clean sites, bring air and water pollution to an end, establish appropriate waste disposal, etc.).

5.2 The buyer of an azienda is responsible only for the debts deriving from the seller's product liabilities that are recorded in the seller's mandatory accounting books. In the case of an acquisition of assets that does not constitute an azienda, the buyer is not responsible for any product liability debts of the seller. In either case, the buyer becomes generally responsible for product liability in connection with the products purchased from the seller and delivered to customers after the acquisition.

5.3 Generally, unless otherwise agreed between a buyer and seller, the buyer of an azienda succeeds to all of the seller's contracts that are stipulated for the conduct of the azienda and that are not personal in nature. The other party to such contract can withdraw from the contract within three months from the date it is given notice of the transfer of the azienda if there is just cause but, in such case, the seller remains liable vis-à-vis the other party. Consequently, the buyer is responsible for fulfilling outstanding orders, but the buyer and seller may agree that the seller will fulfill any outstanding orders.

5.4 A buyer of an azienda is responsible only for the debts deriving from contractual warranties that originate before the transfer and that appear evident in the seller's mandatory accounting books. Upon the acquisition of the contracts related to the conduct of the azienda, however, the buyer becomes generally responsible for the warranties that are still in effect at the time of the transfer of such contracts.

5.5 A buyer of an azienda is responsible for all debts that are related to the real estate property included in the azienda and that are recorded in the seller's mandatory accounting books. Moreover, the buyer of real estate, either with or without an azienda, is responsible for the seller's obligations and defaults that are guaranteed on the real property (through mortgages, liens or other encumbrances).

5.6 In addition to the liabilities and obligations mentioned above, a buyer of an azienda incurs the liabilities and obligations related to employees and taxes that are described in Subsection 1.2.

5.7 The necessity and extent of an audit and/or due diligence depends upon the type of business carried out by the seller and upon the nature and importance of the assets to be acquired by the buyer. In the case of an acquisition of an azienda, it is customary to conduct a legal and accounting audit of all of the mandatory books of the seller, of all of the existing contracts stipulated by the seller for the conduct of the azienda and of all other documents and records concerning employee relations and taxes. It is also customary to verify the status of all licenses, authorizations and permits for the conduct of the business of the azienda. For specific assets, it is customary to make a search for title of real estate and to conduct a technical inspection of land, plants and products purchased to establish potential environmental and/or product liabilities.

6. PUBLIC RECORDS

- **(i)** Ownership of real property and limitations thereon can be ascertained at local Registers of Real Property and Offices of the Cadastre (Uffici del Catasto), which maintain detailed records and maps.
- **(ii)** Mortgages and other charges or real rights affecting real properties are registered with the local Registers of Real Property.
- **(iii)** No public records of real property exist which contain information on environmental matters.
- **(iv)** Generally, liens and encumbrances are not registered for personal property, although the existence of certain liens and encumbrances may be ascertained in the local Registers of Real Property and Registries of Companies.
- **(v)** The Italian Trademark and Patent Office furnishes information on patents, trademarks, trade names and designs. The Office of Intellectual Property furnishes information on copyrighted works, including software.
- **(vi)** There is no national register of pending litigation. Each local court and the Supreme Court have registers of pending cases in criminal, civil, commercial, tax and other administrative matters. The public is generally granted access to these registers but not to the files of the cases.
- **(vii)** The public can obtain from the competent Registry of Companies certificates stating whether any local company registered with it is "in the free enjoyment of its rights" and is not subject to any bankruptcy or other procedure for the benefit of creditors.
- **(viii)** The public can also obtain from the competent Registry of Companies copies of the annual balance sheets and of other corporate documents that the local companies must file there.

7. LABOR MATTERS

7.1 In the case of a transfer of an azienda, the labor relationships with personnel employed with the azienda continue with the buyer and the employees retain all rights deriving from such relationship.

7.2 A seller can agree to terminate some or all of the labor relations with employees of the azienda as a condition of closing. By acquiring the azienda, however, the buyer becomes jointly and severally liable with the seller for any and all rights that the employees may have for wrongful termination and/or insufficient payment of severance indemnities by the seller.

It is important to note that, irrespective of any undertaking with the buyer as a condition to closing, the seller cannot terminate any labor relations (except with dirigenti, who are employees higher in rank) in the absence of "just cause" or a "justifiable reason." The transfer of the azienda does not represent a per se "just cause" or "justifiable reason." In case of wrongful termination, an employee of an azienda employing more than fifteen persons can obtain a court order for reinstatement in his or her employment position, plus

damages. In other words, in the above-mentioned cases, labor relationships can be terminated only with the consent of the employees.

7.3 In the case of an acquisition of an azienda, the buyer becomes jointly and severally liable with the seller for all of the benefits and payments due in favor of the employees up to the time of the transfer, including, but not limited to, pension plans and retirement, health and other benefits.

7.4 A seller and buyer can agree to share liabilities relating to labor relations in any way they deem appropriate, but they remain jointly and severally responsible toward the employees, with the following exception: the seller may be exempted, totally or partially, from such liabilities by way of an ad hoc agreement stipulated among the buyer, the seller and the employees, assisted by representatives of the local Provincial Labor Office.

7.5 If the transfer involves an azienda that employs more than fifteen persons, the seller cannot proceed with the transfer before certain procedural steps are taken. These steps include notice to—and consultation with—representatives of the employees and of the unions. The consummation of the transfer cannot take place until twenty-five days after such notice. If the procedure is properly followed, the seller can proceed with the transfer, regardless of whether it reached any agreements with representatives of the employees and unions.

7.6 In connection with the employees of a transferred azienda, the buyer must apply the financial and regulatory regimes contemplated by the collective labor agreements applicable to the azienda until such agreements expire, unless such agreements are replaced by the collective labor agreements applicable to the existing employees of the buyer. In some cases, a "harmonization" agreement can be agreed upon among the seller, the buyer and the union aimed at the harmonization—within a limited period of time—of the provisions of the different collective labor agreements applied by the seller and the buyer. Individual terms of employment, however, cannot be amended to the detriment of the employee.

Except as noted above, the terms of employment of the personnel employed in the azienda may be changed only if more favorable conditions are granted to the employees.

7.7 As mentioned in Subsection 5.6, a buyer of an azienda becomes jointly and severally liable with the seller for all accrued liabilities related to the employees transferred as the result of the acquisition, regardless of whether they are evidenced from the mandatory books of the seller.

8. PLANT CLOSING LAWS

Mass layoffs (licenziamenti collettivi) are those in which an enterprise with more than fifteen employees dismisses at least five employees in a 120-day period. Mass layoffs are allowed only in cases of transformation of the enterprise, objective reductions of business activity or complete discontinuance of business (e.g., in a definitive plant closing). Before a mass layoff can be undertaken, a specific procedure must be followed, including notice to—and consultation with—representatives of the employees and of the unions, which may continue for about three months. If the procedure is properly followed, the employer can proceed with the mass layoff (and the definitive plant closing), regardless of any agreements with representatives of the employees and unions.

All dismissals served in breach of the said procedure are null and void by operation of law.

Unfriendly and temporary plant closings (serrate) are generally not allowed. Temporary plant closings may be legitimate in special cases identified by the courts (e.g., acts of "sabotage" by employees) or under an agreement with the employees and union representatives. An employer engaging in a serrate may be charged with unlawful behavior against the employees and/or the unions. The employer may be subject to criminal sanctions if it does not abide by a court order to cease and desist from the serrate.

9. ASSIGNMENT OF CONTRACTS

As stated in Subsection 5.3, unless otherwise agreed between a buyer and seller, the buyer of an azienda succeeds to all of the seller's contracts that are stipulated for the conduct of the azienda and that are not personal in nature. It has been argued that the parties can agree to exclude such succession either completely or in relation to specific contracts. According to some scholars, however, contracts that are "essential" for the continuance of the activity of the azienda cannot be excluded because it would result in an azienda not being transferred.

10. NONCOMPETITION

10.1 **(i)** Under Italian law, a seller of an azienda must refrain, for a period of five years, from starting a new business that, by reason of its object, location or other circumstances, is likely to divert the customers of the azienda that was transferred. An agreement to refrain from competition to a greater extent may be valid, provided it does not prevent the seller from engaging in any business activity and lasts no more than five years from the date of transfer. According to prevailing court decisions, these provisions do not apply in the case of an acquisition of shares.

(ii) The law provides that a noncompetition agreement between principals must be evidenced in writing and is valid only if confined to a specific territory or specific business and does not exceed a period of five years.

(iii) Any agreement intended to restrict the activities of an employee during the time subsequent to the termination of the contract is void unless (a) the agreement is evidenced in writing, (b) compensation is agreed upon in favor of the employee and (c) the restriction is confined within specific limits related to purpose, time and location. The duration of such a noncompetition agreement cannot exceed five years in the case of dirigenti and three years in all other cases.

10.2 Apart from the limitations indicated in Subsection 10.1, the Law on Competition generally prohibits all types of restrictive agreements and concerted practices between companies that have the object or effect of preventing, restricting or distorting competition within the Italian market or an important part thereof. Prohibited agreements under the Law on Competition include actions aimed at any of the following: (a) directly or indirectly fixing prices, (b) preventing or limiting production, market access, investments or technological development, (c) sharing markets or sources of supply or (d) applying objective dissimilar conditions to equivalent transactions with other parties.

If the agreement or practice has a negative effect on competition within the European market, then Article 85 of the Treaty of Rome is applicable.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 **(i)** There are no restrictions on the choice of law, except that any provisions of foreign law that are contrary to Italian "public policy" will not be enforced in Italy, and that certain Italian laws apply notwithstanding the choice of a foreign law (so-called rules of necessary application).

(ii) The jurisdiction of the Italian courts may be contractually waived in favor of a foreign jurisdiction, provided (a) the case concerns rights that can be validly renounced by a party under Italian law or public order principles, (b) the waiver results from a written document and (c) the designated court does not decline jurisdiction. However, certain cases must be decided by

Italian courts as provided for by the Private International Law and by the Brussels convention of 1968 (e.g., controversies relating to real properties located in Italy or relating to trademarks or patents registered in Italy).

11.2 It is common for an acquisition agreement to include a specific item dealing with the costs of professionals involved in the acquisition. Generally, each party pays the fees and disbursements of its own lawyers. All other costs of the acquisition, including the fees of independent auditors and notaries, are generally paid by the buyer. Most disputes that arise out of an acquisition of assets may be submitted to arbitration. Arbitration is not possible for certain labor disputes (i.e., in respect of all matters for which arbitration proceedings are not allowed by an ad hoc provision of the applicable labor collective agreement) and rights that may not be disposed of by the parties. Proceedings for setting aside the award may be instituted before Italian courts on specific grounds (e.g., when arbitrators have exceeded the powers conferred upon them by the parties). Recently, new rules have been enacted regarding international arbitration and recognition and enforcement of foreign arbitral awards.

The above-mentioned provisions do not prejudice the applicability of international conventions on arbitration. Pursuant to the New York Convention, to which both Italy and the United States are parties, awards rendered outside Italy are recognized in Italy regardless of the parties' nationalities or domiciles, even if rendered in a country that is not a party to the New York Convention.

11.3 The main reason for selecting arbitration—and therefore inserting an arbitration clause in an acquisition agreement for the resolution of business disputes—is that decisions by the Italian courts generally take years before becoming final due to various levels of appellate jurisdiction.

12. OTHER ISSUES

12.1 In Italian asset acquisition agreements, there are often clauses with respect to the allocation of attorney's fees, generally establishing that each party will pay the fees of his own attorney.

12.2 The following excerpt is taken from the Italian Civil Code concerning Bulk Sales:

1376. Contracts with real effects. In contracts having as their object the transfer of ownership of a specified thing, the constitution or transfer of a real right (810 *ff.*) or the transfer of another right, such ownership or right is transferred and acquired by virtue of the lawfully expressed agreement of the parties (1465, 2643 *f.*, 2684).

1377. Transfer of things in mass. When the object of the transfer is a specific mass of things, even if homogeneous, the provision of the preceding article is applicable, even though, for certain purposes, such things must be counted, weighed or measured.

1378. Transfer of thing specified only as to kind. In contracts having as their object the transfer of things specified only as to kind, ownership is transferred on identification by agreement between the parties or in the manner established by them. In the case of things which must be carried from one place to another, identification also takes place by delivery to the carrier (1678) or to the forwarding agent.

12.3 The differences between the two systems are reflected in the length of the acquisition agreements, which are generally much longer in the United States than in Italy. Lawyers from the United States tend to spell out many detailed provisions in the agreement, whereas Italian practitioners often make simple cross-references to provisions of the Italian Codes and other applicable statutes.

An issue that often arises in the context of a multinational acquisition of assets relates to the allocation of the purchase price among the assets purchased in the various jurisdictions. Although such allocation is often driven by income tax considerations, a number of provisions of corporate and criminal law must also be taken into account.

Japan

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Many American lawyers working in the area of acquisitions and divestitures have been confused by the Japanese legal concept of "Business Transfer," which is clearly distinguished from the transfer of individual assets under the Japanese legal system. The Business Transfer is different from the share transfer and is defined as a transaction in which all the tangible and intangible assets and liabilities associated with a seller's business are taken over and assumed by the buyer in a single package. In this sense, the transfer includes all assets of the seller (including real property, intellectual property, accounts receivable, employees and customer lists), and the buyer assumes all liabilities of the seller (including accounts payable, employee obligations, bank borrowings and other debt) unless the parties agree otherwise. Special provisions governing Business Transfers appear in various codes, including the Commercial Code, the antimonopoly laws and the tax laws. A Business Transfer has different implications for the parties than those accompanying a purchase or assumption of assets or liabilities. If an acquisition of branch operations is involved, the transaction generally falls under the Business Transfer category.

1. ASSET VERSUS SHARE PURCHASE

Under Japan's taxation system, any gain by a nonresident Japanese seller from a sale of the shares of a Japanese target corporation is not generally taxed, but the seller is subject to the securities turnover tax of 0.3 percent of the sale price. A gain arising from the transfer of assets is generally taxed, except for those transactions exempted under the tax convention. Under the current U.S.-Japan tax convention, the transfer of real estate is subject to a withholding tax of ten percent of the sale price. In the case of a Business Transfer, gains are calculated and taxed separately on each item of assets owned by the seller. The seller in a transfer of assets is taxed on the same basis as other Japanese companies, even if the seller is owned by an American parent. If, however, the seller is a subsidiary of an American parent and is liquidated after the asset transfer, the American parent may be subject to the ten-percent withholding tax on the residual assets distributed upon liquidation.

1.1 The principal considerations for a buyer in choosing between an asset acquisition and a share acquisition are as follows:

- A buyer of assets can purchase only the assets it needs, whereas a buyer of shares acquires the entire business of the target corporation. If the buyer desires to continue

receiving the services of some of the seller's employees or customers, the buyer may choose whomever it wants. The buyer may not have this option if the transaction is a Business Transfer, in which case all the employees and customers generally are transferred to the buyer.

- A buyer of assets does not assume the liabilities of the seller, whereas a buyer of shares must assume the liabilities of the target corporation. This will be more serious if the target corporation has contingent or off-balance-sheet liabilities.
- The procedures for an asset acquisition are more complex than those for a stock acquisition. The seller must perfect its title in connection with each item of assets and obtain agreements from counterparties to the agreements to be transferred. As discussed in Subsection 3.1, if the asset acquisition is held to be a Business Transfer by the seller, the seller must call a general meeting of shareholders to approve the transaction and file a prior notification with the Fair Trade Commission. Also, as discussed in Subsection 10.2, the seller may be subject to a noncompetition obligation. None of these procedures applies to a share purchase.

1.2 Under the Japanese legal system, there is a clear distinction between a transfer of assets and a transfer of shares; thus, the foregoing legal consequences (such as taxation implications and successor liability) should be noted. The transfer of substantially all the assets of a seller may be considered a Business Transfer so that shareholder approval and notification to the Fair Trade Commission would be required. If the transaction is a Business Transfer, the buyer succeeds to all of the seller's liabilities.

1.3 If only part of the assets is sold, the transfer does not constitute a Business Transfer but instead represents a simple sale and purchase of assets so that the legal doctrines noted in Subsection 1.1 would apply.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement (MAPA) can generally be used in its present form in Japan. Although the extensive warranty and representation clauses set forth in MAPA are not part of the Japanese legal system, the parties are free to make any covenants. It may be necessary, however, to categorize assets according to the types discussed in Subsection 2.4 in connection with procedures to perfect title transfers.

2.2 A seller can transfer its assets by means of one document. For registration of certain types of assets, as noted in Subsection 2.4, separate conveyance documents are generally prepared.

2.3 Generally, the form of document makes no difference in connection with the tax effects of a transfer under Japanese laws.

2.4 There are several title registration systems in Japan for immovables (real property), movables (such as automobiles, vessels and airplanes) and intellectual property (patents, utility models, trademarks, copyrights and design rights). The registration systems for real property are divided into land and buildings, which are considered to be separate objects of ownership in Japan and are maintained at the Legal Affairs Bureau, an organ of the Ministry of Justice. Encumbrances cannot be asserted in general against a buyer of real property unless registered. A leasehold on real property can be registered, although in most cases the parties do not register it and rely on the agreement. A Japanese company may register the plant or enterprise as a whole for the purpose of establishing a special mortgage. The registration of intellectual property is maintained at the Patent Office. In the case of real property and intellectual property, separate conveyance documents are prepared for the purpose of registration. A transfer of claims cannot be asserted against a debtor unless such debtor is notified or agrees to the transfer. To assert the transfer against third parties, including the transferor's creditors, such notification or agreement must be notarized by a notary public or confirmed by content certified mail. Therefore, in a typical asset purchase and sale agree-

ment, the assets are classified according the categories that correspond to the legal procedures necessary to perfect the transfers.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 The Japanese foreign-investment regulations were liberalized as of April 1, 1998. Pursuant to the amendment, a number of transactions are either exempt from previous requirements for prior notification or license or are required to file post facto notification. In addition, any transactions involving assets in Japan are not regulated by the foreign-exchange regulations so far as the settlement is made in a foreign currency outside Japan.

In the event of a Business Transfer by a seller, a special resolution of a shareholders' meeting (i.e., a majority of more than two-thirds at a meeting attended by a majority of shareholders) is required. If the seller proposes to sell important assets, a resolution of its board of directors is necessary.

Under the antimonopoly law, a notification to the Fair Trade Commission is required at least thirty days before a transfer if the transfer involves the whole or a substantial part of the seller's (or its branch operations') business in Japan.

3.2 Under the amended foreign-investment regulations, the following categories of regulations affect investments by nonnationals:

- Foreign investment is reviewed under regulations applicable to particular industries, such as banking, electricity and gas supply, insurance and securities.
- Investments in industries that are reserved from foreign investments under the Organization for Economic Cooperation and Development (OECD) commitments are reviewed upon filing of a prior notification to the ministers having jurisdiction over the relevant industries in light of the possibility that such investment may endanger the national safety, adversely affect the Japanese economy or harm public order or security. Industries that are not subject to the prior-notification requirement are listed in Joint Ministerial Ordinance No. 1 of 1994; all other industries are subject to the prior-notification requirement and, if there is any doubt concerning the timing of notification (i.e., prior or post facto), the parties may consult with The Bank of Japan. Although there are no clear-cut published guidelines, it is generally considered that foreign investments in agriculture, forestry, fishery, manufacturing of nuclear fuel, aircraft, weapons and munitions, the nuclear power industry and space development are subject to strict review. In the process, consideration is given to the principle of reciprocity (equal treatment of the Japanese enterprises in the United States).
- The real estate industry is subject to a post facto notification requirement for acquisitions of real property by foreign investors, unless the property is used for the investor's office or residence.

4. UNFAIR COMPETITION

As described in Subsection 3.1, there is a prior-notification requirement for Business Transfers under the antimonopoly law. If such transfer results in the restraint of business in certain industries, the Fair Trade Commission may issue an amendment or a "stop" recommendation or order. This does not apply to a simple acquisition of assets, however.

5. SUCCESSOR LIABILITY

5.1 Generally, a buyer of assets does not assume the liabilities of the seller, and there are no court rulings that have established the concept of successor liability for environmental contamination as is observed in the United States. The Civil Code, however, sets forth certain liabilities related to the buildings and structures of an occupant or owner of the land. If a third party is injured due to a defect in such buildings and structures, the occupant is liable. The occupant may be exempted only on proof that due care was taken to prevent the injury.

The owner is strictly liable and can only demand indemnification for any compensation paid to the injured party from the party who caused the defect. Based upon this statute, it is generally accepted that the Japanese legal system is likely to develop the concept of successor liability of the owner of land.

In addition, if the buyer in a Business Transfer continues to use the trade name of the seller, or if the buyer has advertised that it will be liable for any obligation arising out of the business of the seller, then it will be liable for the performance of any obligation arising out of the transferred business.

Japanese courts have also held that the buyer in a Business Transfer assumes liability in connection with the employees who have worked in the business to be transferred.

5.2 In general, a buyer is not liable for products or services sold before the acquisition transaction.

5.3 A buyer is not liable for outstanding orders accepted by the seller.

5.4 A buyer is not liable for warranty claims arising from transactions occurring before the acquisition date.

5.5 Under Japanese law, a buyer of real property is deemed to have assumed the status of lessor toward the lessee and thus is liable for all nonperformed liabilities of the seller, including the refund of key money received by the seller or its predecessors. On the other hand, the status of lessee cannot be assigned without specific approval of the lessor. In the limited cases in which such approval is expressly waived, the buyer of the lease is deemed to have assumed the liability of the selling lessee.

5.6 If a buyer knows or should have known of a defect in the title to the asset to be transferred (such as an unlawful acquisition by the seller), the buyer cannot assert a right of legal acquisition of the asset against the legitimate owner.

5.7 Because of the high standard of environmental protection enforced by the central and municipal governments at plant sites, environmental issues do not constitute an important part of due diligence in Japan unless the seller has used hazardous or harmful materials. If there is any specific environmental issue, specialized consulting firms are available to undertake an investigation on behalf of the buyer.

Due diligence is quite important in Japan, and most accounting firms and law firms specializing in mergers and acquisitions have sufficient experience and resources to conduct the type of due diligence done in the United States. Because of the possible defect in the real property registration system (noted in Subsection 6(i)), special attention must be paid to the title of real property.

6. PUBLIC RECORDS

(i) Ownership of real property is registered in the record at the Legal Affairs Bureau. Under the Japanese legal system, the registration of the title to real property is necessary to assert an acquisition against a third party, although registration does not necessarily assure absolute title. Any previous illegal transfer of title may invalidate a subsequent registration of the transfer of title. Therefore, if the title record indicates frequent transfers among doubtful parties or reflects a complicated succession, there is no assurance about the validity of the current registration, even if the registration record looks to be in order. There is no title insurance available in Japan.

(ii) Liens and encumbrances on real property are disclosed in the registration records as noted in Subsection 6(i), except for the possessory lien, by which the occupant may demand—without registration and as a condition of delivery—performance in connection with his or her claim to the real property. A builder may refuse to deliver the land and building until it is paid.

Title, surface rights, emphyteusis, servitude, preferential rights, pledges, mort-

gages, leases and mining rights on real property are disclosed in the registration record. Leases of land and surface rights for the purpose of owning buildings on the land are usually not recorded in the land registration but are disclosed in the record of building registration. Leases of buildings are not always disclosed but can be established against the buyer of the building if the lessee occupies the building.

(iii) There are no public records regarding environmental issues affecting real property.

(iv) Movable properties such as automobiles, vessels and airplanes have separate registration systems, which generally cover ownership and mortgages. If the movable properties are covered by the plant or enterprise mortgage, the mortgagor has preferential rights against other unsecured creditors. See Subsection 2.4.

(v) Ownership and other rights in intellectual property are recorded with the Patent Office; these may include security interests and any formal objections to the registration filed by third parties.

(vi) There is no publicly available database for litigation; obtaining information would require interviewing the appropriate officer or employee of the seller who has access to possible litigation. If there is any litigation pending, it is advisable to consult with the lawyers handling the litigation. In most cases, however, the lawyers in charge would be hesitant to give any prediction of the outcome, and, thus, independent verification of the case may become necessary.

(vii) A Japanese company obtains separate legal status as a legal entity by registering with the Legal Affairs Bureau, and, until the registration of its dissolution, it maintains such status. This is the only way to confirm good standing. Under the Commercial Code, the company must update the registered information; this process is usually undertaken every two years because the term of office for directors is two years. If the company fails to update the registration for five years, the Minister of Justice has the power to place an order in the official gazette, requiring a report of the continuation of the company's business. If the company does not comply with the order within two months, it is deemed to have been dissolved.

(viii) The Commercial Code requires the board of directors to prepare financial statements consisting of the balance sheet, profit and loss statement, business report and proposal for disposition of profit or loss. These statements are sent to shareholders, but there is no official filing system for the financial statements of companies in Japan, except for the requirement of a public notice of the summary of the balance sheet (which most nonpublic Japanese companies ignore). Financial statements are prepared in accordance with detailed rules laid down by the Minister of Justice and, except for companies whose capital is $500 million or more or whose total liabilities are $20 billion or more, no audit by certified public accountants is required.

7. LABOR MATTERS

7.1 In a simple transfer of assets, the employment relationship generally is not transferred, although many precedents from the courts have stated that employees of a seller in a Business Transfer automatically become employees of the buyer. Therefore, if an acquisition of assets is held to be a Business Transfer, employees of the seller would automatically become employees of the buyer as a consequence of the acquisition of the assets. The courts also have admitted, however, that the specific consent of the relevant employees is required if the buyer desires to assert continued employment.

7.2 A buyer of assets generally requires the seller to terminate the employment of its employees, who would consequently lose their jobs. Termination of the employment by the

seller in an asset transfer, however, is permissible only when it is done as part of a business retrenchment plan. Under the Japanese lifetime employment system, the courts are reluctant to endorse a termination of employment unless there exists a retrenchment plan that meets the following four conditions:

- the retrenchment is necessary for the corporation to continue in business;
- the employer has made its best efforts to avoid retrenchment;
- the standard used in selecting the employees to retire is rational and applied properly; and
- the employer has consulted with the employees and fully discussed the matter with them.

Notwithstanding such court rulings, the employees whose employment is terminated in connection with an asset transfer often claim continuity of employment against the buyer based upon the theory developed in the case of the Business Transfer. The seller also must make severance payments if it is so required in the work rules or the retirement rules. As a result, if the asset transfer involves the transfer of some employees from the seller to the buyer, with the balance being terminated, it is advisable to receive written agreements from those retiring employees as a condition to closing the transaction.

7.3 Under the Japanese employment system, pension plans and retirement are governed by internal work rules or retirement rules, but companies usually set aside reserves only to the extent permitted by the tax laws (forty percent), and the entire amount accrued is not reserved. If the company has a qualified pension plan, it may charge the entire amount paid during the fiscal year to the income. In most cases, the amount of a severance payment is calculated by a formula using the length of employment and the amount of the last salary. Any amendment to the pension plan or severance arrangement that is disadvantageous to the employees is valid only if the substance of the amendment is rational. Against such a background, in the case of a Business Transfer or asset transfer, it is likely that the employees would claim that the buyer has assumed the total severance payment obligations. To cope with such claims, it is recommended that the buyer examine the issue during the due diligence period and, if possible, require the seller to make all accrued severance payments and then make a new calculation upon transfer. Health and other insurance programs are generally regulated by statute, and the related changes are not so complicated.

7.4 It is theoretically possible for the seller and buyer to allocate severance payments. Severance payments are made only upon the retirement of the relevant employees, however, so it is not practicable to place on the seller the burden to pay after the closing. In addition, if the pension is established as a welfare pension or qualified pension fund, there will be complicated tax issues, and it is highly advisable to settle the accrued portion upon the transfer of assets or to transfer the total liability to the buyer upon payment of the accrued portion by the seller.

7.5 If an asset sale is accompanied by changing the employer to the buyer, then it is necessary to consult with relevant employees and the labor union, if any. This will also be true if the asset sale results in termination of employment. No consultation is required with any government or public bodies.

7.6 Generally, any change in the work rules must have a rational reason if there will be a change disadvantageous to employees. (Work rules are statutorily required documents for any employer with more than ten employees; they contain the basic terms of employment so that a separate employment agreement is not generally used in Japan.) Any change in the terms of the separate employment agreement needs the consent of the relevant employees. It is therefore advisable to obtain the consent of the relevant employees before the change of employment.

7.7 Unless a buyer obtains a specific agreement from the relevant employees to show otherwise, it is likely that the employees would claim the continuity of the obligation of the seller regarding items not covered by the agreement.

8. PLANT CLOSING LAWS

There are no special restrictions regarding plant closings or mass layoffs, except in connection with environmental regulations. Under Japanese labor laws, however, an employer must notify an employee of the termination of employment at least thirty days before the termination or pay the salary for the number of days short of such thirty-day notification period.

9. ASSIGNMENT OF CONTRACTS

A contract for the lease of land is assigned automatically with the transfer of the land if the lessee's ownership of a building on the land is registered. A lease agreement between the seller of a building and a lessee is assigned automatically with the transfer of the building if the lessee has legal possession of the building. There is no automatic transfer of the insurance contract covering the relevant assets, however.

10. NONCOMPETITION

10.1 A noncompetition clause can be enforced against a seller, its principals and its employees, subject to certain legal limitations.

10.2 The Commercial Code imposes a noncompetition obligation on the seller in a Business Transfer within a geographical scope covering the same and adjacent towns and for a period of twenty years. The seller is further prohibited from carrying on the same type of business for the purpose of unfair competition. The parties may agree to a more restrictive covenant, but the period cannot exceed thirty years. A noncompetition covenant by the seller's principals and employees is subject to the freedom—under the Constitution—to select one's job. The courts review the need for the restriction, its implications on the restricted parties and the balance of those factors. Although there have been no decisive guidelines established in court rulings, any restriction without compensation for a period of three years or more may be ruled illegal. Competition authorities have no registration system for noncompetition clauses.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Generally, Japanese courts recognize the parties' choice of law and the submission by Japanese parties to the jurisdiction of foreign courts. If, however, the legal issues involved conflict with mandatory provisions of Japanese laws, the court will apply Japanese law notwithstanding the choice-of-law agreement in the contract. Examples are the Commercial Code, the antimonopoly law, the rights associated with real property and labor relations. The courts also recognize the validity of a foreign judgment in the application for an enforcement order if the following conditions are met:

- the foreign judgment is final;
- the jurisdiction of the foreign court is not denied under Japanese law (i.e., there is no law denying the jurisdiction of any foreign court);
- the defendant has received service of process otherwise than by public notice or has appeared before the foreign court;
- the foreign judgment is not repugnant to public policy as applied in Japan (e.g., monetary payment generally is not considered as being against public policy, but punitive damages of an extremely high amount are ruled to be repugnant to public policy); and
- reciprocity exists (i.e., the courts of such foreign country recognize a final judgment obtained in a Japanese court).

11.2 Arbitration is possible. An award is final and enforceable without reexamination of the merits of the case because Japan is a party to the New York Convention.

11.3 The Japanese business society is not aggressive in bringing legal action to solve disputes. It is generally recognized that litigation in a court takes substantial time (three to five years for the first instance), and arbitration is not open to the public. Against such a background, Japanese companies often select arbitration to resolve business disputes, although the number is still quite small when compared with that in the United States.

12. OTHER ISSUES

12.1 The standard asset acquisition agreement used in Japan provides for the allocation of legal fees for the initial transaction but not for certain other matters relating to litigation, such as a provision requiring the loser to pay the winner's legal fees. If, however, such a clause is expressly contained in the agreement, the court usually endorses its effect.

12.2 The Japanese legal system does not have Bulk Sales Laws that protect a seller's creditors in sales out of the ordinary course of the seller's business. This concept is, however, partially embodied in the regulations on the Business Transfer, which require the seller to obtain approval from the general meeting of shareholders. Although there is no general requirement to give public notice or notice to the seller's creditors, the Commercial Code provides that, if the buyer in a Business Transfer continues to use the trade name of the seller, or if the buyer advertises that it will be liable for any obligation arising out of the business of the seller, then the buyer will be liable for the performance of any obligation arising out of the transferred business. In such case, both the seller and the buyer are liable to the seller's creditors for a period of two years after the Business Transfer or the advertisement, as the case may be, after which period the seller is released from the obligation arising out of the transferred business.

12.3 There are several emotional factors that should not be overlooked by Americans doing business in Japan. The Japanese employment system is characterized by lifetime employment and a seniority system in which increases in salary and promotions are tied to age. Changes of employment, in many cases, have a negative emotional impact on employees. In addition, businesspeople still have strong psychological ties to real property. If the seller has owned the land for a long period of time, the owner and its employees may have special affection for it. To buy assets without causing disruption, a buyer must be careful to pay particular attention to the psychological state of Japanese business people.

Japanese courts are not quick in the enforcement of judgments or foreclosures of mortgages on real property. Against such a background, a buyer of real property often finds illegal occupants in the property it has bought. Those occupants may include gangsters (yakuza) or other professional trespassers; thus, it is advisable to inspect the real property before to the closing.

Although there are licensed evaluators of real property in Japan, some of them may not be reliable. It is advisable to select an evaluator with a high reputation, or more than one evaluator, to obtain precise information on the possible market value of the real property before the transaction.

Due to the financial difficulties currently faced in the Japanese economy, it may be dangerous to rely totally upon effective enforcement of the seller's warranties and representations in the purchase of assets. It is advisable to use an escrow arrangement to provide a reserve in case of a breach of the seller's warranties and representations. Many Japanese banks have started acting as escrow agents.

Non-Japanese residents generally do not pay the consumption tax, but when a seller that is a subsidiary of an American parent transfers assets to an American buyer, it is customary

for the buyer to pay the consumption tax. Unless the buyer has a Japanese vehicle that has received credit for the consumption tax, there would be no way for the buyer to file the consumption tax return to offset the consumption tax paid.

If a buyer of assets does not have an appropriate corporate vehicle to take it over in Japan, it may be necessary to establish a new company. In such case, if the price of such assets exceeds five percent of the amount of the paid-in capital of such new company, it must request the court to appoint an inspector who will examine the fair value of the assets to be purchased. This procedure may take three to six months and, in some cases, has a serious effect on the scheduling of the transaction.

Korea

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Transactions of the type addressed here may take place in two forms.

In the first case, an American company may purchase shares in a Korean company (whether that company is a subsidiary of another American company or not). In such a case, although the shares acquired by the American company are viewed as an asset of the American company, from the Korean perspective, the transfer is treated as a share transaction. In the second case, an American company may purchase, through its own Korean entity, the assets of the target Korean company. From the Korean perspective, such a transaction is viewed as an asset transfer.

When an American seller's business presence in Korea is not through a subsidiary, but rather a Korean branch office, only the second type of transaction is possible because branch offices issue no shares of their own.

In the following discussion, we have assumed the second type of transaction (i.e., the purchase of the assets of a Korean corporation) and therefore consider the asset transfer from the Korean perspective.

In any case, when the assets are to remain within the Republic of Korea and be used for a business purpose, a Korean business entity—either a corporation or a branch office—must be established to hold the ownership of the assets. The establishment of a Korean business entity in the form of a corporation is governed by the Foreign Investment Promotion Act (FIPA), whereas the establishment of a branch office is governed by the Foreign Exchange Transactions Act.

1. ASSET VERSUS SHARE PURCHASE

1.1 The major consideration for a buyer in choosing an asset acquisition rather than share acquisition is whether the asset acquisition will trigger successor liability. Generally, successor liability becomes an issue when a buyer not only acquires all or substantially all the assets of a business that constitutes an organized business structure but also continues to engage in the same kind of business using the assets so acquired. In Korea, such a transaction is termed a "Business Transfer" to distinguish it from the purchase of individual assets.

Whether a Business Transfer has occurred does not depend upon the complete transfer of an entire company's assets; instead, the determination is made by looking at each line of business. For example, if a Korean company that engages in several lines of business were to transfer all of the assets that comprise one line of business while retaining its other lines

of business, such a transaction would be a Business Transfer.

Business Transfers may create successor liability when a buyer continues to use the seller's trade name without registering before the court that it is not undertaking the seller's liabilities, and also when certain legislation—such as the tax code (see Subsection 1.2), labor law (see Section 7) or another law (see Section 5)—creates, by operation of law, successor liabilities limited to the specific issues addressed in those laws.

1.2 Generally, a Business Transfer is treated as one form of an asset transfer, not a share transfer. A Business Transfer does not, therefore, trigger any successor liability—except in cases as explained above—nor does it generally create liability for tax purposes, again subject to certain exceptions:

- When the shares of an unlisted corporation are acquired, the purchase of fifty-one percent or more of the company's shares is deemed an asset acquisition for the purpose of the asset acquisition tax. Both the securities transaction tax of 0.5 percent and any asset acquisition tax, as appropriate, would be due. This rule prevents asset acquirors from choosing share acquisition as a lower-cost way around asset transaction taxes when they are due.
- When a seller has unpaid taxes arising from its usual business activities, the buyer is obligated to pay those liabilities.

1.3 Generally, when transferring less than all or substantially all of the assets (such that the transfer is not deemed a Business Transfer), the question of successor liability does not arise.

2. FORM OF DOCUMENTS

2.1 Although one agreement is enough to cover all transferred assets, the actual transfer of title may require certain additional actions and documents as appropriate for certain classes or types of assets.

The Model Asset Purchase Agreement in its present form—including its representations, warranties and indemnities—is acceptable for use in Korea.

2.2 One agreement is enough to cover all kinds of assets. Depending upon the nature of assets being transferred, various additional actions and documents are necessary to ensure transfer of title.

Transfer of title for real estate and certain other items—such as automobiles, heavy equipment, vessels and aircraft—must be recorded. Transfers of real property are recorded in the district where the property is physically located; automobiles are registered with the Department of Motor Vehicles; heavy equipment is registered with the Heavy Equipment Management Office; vessels and aircraft are registered with the Ministry of Construction and Transportation (MOCT). Unless a transfer of title is recorded, it is defective and a buyer who fails to record the transaction may be left defenseless against a later purchaser who does record.

Trademarks and other intellectual property may be transferred only by registering the transactions with the Korea Industrial Property Office (KIPO), also known as the Patent Office.

No registration is required for accounts receivable, but the acquiring creditor must give notice to the debtors whose accounts are bought.

2.3 In general, transfers and assignments of contracts require the consent of the nontransferring parties to the contracts (see Section 9). The form of the document used for asset transfers makes no difference in the tax effects of the transfers in Korea.

2.4 As noted, certain types of assets, such as real estate, must be registered with the relevant authorities.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Any foreign investor acquiring assets that will be used in Korea must establish a Korean business entity to hold those assets. To do so, an investor must follow three steps:

- seek government approval for the foreign investment;
- transfer the funds provided by the investor to the bank that will hold the funds on behalf of the Korean entity; and
- register the investment with the court.

According to the FIPA certain business sectors in Korea are either restricted or limited in connection with foreign investment. The Ministry of Commerce, Industry and Energy (MOCIE), which has approval authority over foreign investment, periodically issues a so-called Negative List detailing industry sectors that are either closed to foreign investment or limited in some way. Such forbidden sectors include governmental services (even when such services are delegated to private firms), education, religious instruction and affairs of state. Restricted sectors include certain publishing, utility, transportation and financial services. Any sector not contained in the Negative List is open to foreign investment without restriction. Because the sectors on the list change periodically, it is best to consult a lawyer.

For those sectors not on the Negative List, the MOCIE has delegated its authority to accept and process required filings and reports to designated foreign-exchange banks in Korea. The banks typically can accept and process the clearance of foreign investments a few days after receiving a routine filing from the foreign investor. After the investor transfers the funds to the bank (which will hold the funds on behalf of the Korean entity) and the receipt of foreign capital is confirmed, the court usually effects registration of the investment within a few days.

Of course, an investment in a sector on the Negative List takes more time and receives greater scrutiny from MOCIE.

3.2 Foreign investment in Korea is governed by FIPA. In addition, when all or substantially all of a firm's assets are to be sold, regardless of the buyer's nationality, both the board of directors and the shareholders of the selling firm must approve the transaction by supermajorities.

Foreign-invested companies' land ownership is also subject to government control. (FIPA defines a foreign-invested company as a company in which a foreign investor has made an investment; a foreign investor is defined as a foreigner who owns shares in accordance with FIPA.) Generally, if land ownership is essential to the firm's business purpose, and if the business sector is otherwise open to foreign investment, approval will be forthcoming.

For businesses that are open to foreign investment (now almost all Korean businesses), the amount of foreign ownership in a Korean company, including a joint venture with foreign partners, does not matter. For businesses that fall within the restricted sectors, the amount of foreign ownership in a Korean company or joint venture is subject to a ceiling prescribed by the relevant laws and regulations.

4. UNFAIR COMPETITION

Asset acquisitions are recognized as a type of business combination under the Monopoly Regulation and Fair Trade Act (MRFTA), Korea's analogue to the Hart Scott-Rodino Act. The MRFTA prescribes notice procedures and a thirty-day advance clearance period for certain business combinations. Large transactions—those exceeding either 5 billion Korean won, or more than ten percent of a target having total assets or annual turnover exceeding 100 billion won—must be reported to the Korean Fair Trade Commission within thirty days after the closing of the business combination; if the total assets or annual turnover of the buyer,

including its affiliates, exceeds 2 trillion won, then a report must be made in advance of the actual acquisition, and the parties must wait for at least thirty days.

5. SUCCESSOR LIABILITY

Generally speaking, the concepts of environmental and product liability are not as well developed in Korea as in other industrialized states. Citizens' groups are increasingly active in demanding progress in environmental and consumer protection as befits a modern economy. Accordingly, it is difficult to say whether answers given here today will be correct in the future. As of October 2000, there were no laws known to be under consideration that would affect these answers. (Although the Product Liability Act has been passed recently by the national assembly and will become effective as of July 1, 2002, it does not specifically address the question of whether product liability will transfer to an acquiror of assets or business.) Legal scholars and commentators are, however, proposing expanded environmental and consumer protection legislation.

5.1 As of October 2000, there was no general successor liability related to environmental liability, except in a few cases provided by specific laws. For example, when a buyer acquires a mine license, environmental liability for previous activities of the seller is imposed under the Mining Act. Also, certain polluting industries are subject to a so-called environmental enhancement levy, and when such levies have gone unpaid, successor liability is imposed.

5.2 As a general rule, no warranty liability accrues from asset transfers.

5.3 Generally, no specific law or regulation obliges asset acquirors to fulfill outstanding orders.

5.4 Asset acquirors generally have no liability in connection with warranty obligations of the former asset owners' products.

5.5 A buyer of real property or a lessee does not inherit liabilities of the owner or of the previous lessee.

5.6 There are no other liabilities or obligations of a seller that will automatically transfer to a buyer of assets in Korea.

5.7 Although it is not customary for buyers to conduct environmental audits, such audits are often conducted if the buyer is a foreign company. Other due diligence investigations are typically limited to title and encumbrance inquiries.

6. PUBLIC RECORDS

- **(i)** Ownership of real immovable property is recorded in the real property register.
- **(ii)** Mortgages and other charges against real immovable property are recorded on the real property register.
- **(iii)** There are no public records dealing with environmental issues affecting real property.
- **(iv)** For certain other assets—such as automobiles, aircraft, vessels and construction equipment—liens and encumbrances are recorded on the property register. Otherwise, there is no registration system for movable property.
- **(v)** Intellectual property ownership records for trademarks and patents are maintained by KIPO. Copyrights are not systematically recorded.
- **(vi)** Pending litigation regarding real estate is recorded on the real property register. Pending litigation against business enterprises or persons is not listed on public court records.
- **(vii)** Verification of the seller's corporate status is available from the court in the district where the company's head office is physically located.

(viii) There is no public source for financial statements of Korean corporations. Regarding general financial condition and business reputation, Korea has no analogue to the U.S. Better Business Bureau.

7. LABOR MATTERS

Generally speaking, Korean labor laws are very hostile to the idea of terminating employees. All Korean employees have a right to organize labor unions, which have a right of approval of most unfavorable employment decisions. Layoff or termination of employees requires a minimum advance notice of thirty days, as well as "just cause." The evolution of Korea's "just cause" concept has created a very narrow set of conditions that allow termination. Generally, the employee must be either criminally culpable for misconduct against the firm or the business must be in such dire straits that layoffs are unavoidable. Terminations for poor performance or for the convenience of the employer are very difficult in Korea.

Major changes in Korean labor laws have, however, been introduced after the economic crisis resulting in the International Monetary Fund (IMF) involvement pursuant to the 1997 IMF loan agreement. The years following the IMF loan in Korea have been marked by corporate downsizing and layoffs. The Labor Standards Act of Korea was amended at the end of February 1998 to make it easier to terminate employees in the course of restructuring a business by codifying some doctrines developed by the Supreme Court of Korea.

Under the Labor Standards Act, as amended, firms may lay off excess employees if the five requirements listed below are met. The first three requirements are carried over with modifications from the previous law, but the final two are new to the act. Generally speaking, the additions to the act are intended to make it easier for employers to rationalize their workforce.

- Imminent managerial necessity: The amended Labor Standards Act says that, when a layoff is due to managerial necessity, it should be as a last-ditch effort to stave off "business deterioration" or further economic distress to the company. Also specifically included in the definition of managerial necessity are mergers and acquisitions and Business Transfers—the transfer of business units, lines of business or consolidations of operations.
- No discrimination: The act previously said the employer should use its best efforts to avoid layoffs, but if such are necessary, there must be rational guidelines for selecting employees to be laid off. The amended act further (and expressly) states that discrimination based upon the sex of the employee is forbidden.
- Consultation with labor: Management must negotiate with the employees' labor union (representing half or more of the total workforce) or, when there is no union, a representative elected by vote of half or more of the workers. The employer must formulate guidelines to follow for selecting the workers to be laid off and share those guidelines with the labor representative. The employees must ratify the guidelines by majority vote, as they would elect a labor representative. Additionally, at least sixty days' notice must be given to labor before the effective date of the layoffs, during which time management and labor coordinate the layoffs. (The Ministry of Labor, however, recently issued its interpretation regarding this provision, saying that management may be exempt from the negotiation requirement if it complied with both the first and second requirements noted above. As this interpretation is given by the Ministry of Labor under its authority, the extent to which a court will uphold it is unclear.)
- Government approval: If an employer must terminate an as-yet-to-be-determined proportion of its workforce, the employer must report to the Ministry of Labor. According to Presidential Decree, government notification is required when the workforce has fewer than one hundred employees and the employer terminates ten or more of those employees.

- Good-faith effort to rehire: If an employer lays off workers due to managerial necessity and subsequently hires new workers within the following two years, the employer must make a good-faith effort to locate and offer positions to its former employees. This requirement, although not technically a prerequisite to laying off workers, will be of concern to an employer in the event that the business expands and additional workers are added in the future.

In summary, the amended act makes it easier to terminate employees in the course of restructuring a business. It should be noted, however, that not all Business Transfers automatically permit layoffs. Only when a Business Transfer is effected to prevent economic distress or "business deterioration" are the act's requirements met. Because the law is new, it is not yet clear what evidence will be required to support a claim of necessity due to "business deterioration."

Even when layoffs are permitted, employers must still bear the burden of Korea's severance pay system. Workers are due one month's pay for each year of service with a company; the severance is payable in a lump sum at termination. When a firm is in financial difficulty to the degree that mass layoffs are necessary, the severance pay issue becomes a major obstacle to reducing the workforce.

7.1 In cases where an asset sale is deemed a Business Transfer, employees of the seller automatically become employees of the buyer as a consequence of the asset acquisition. (But see also Subsection 7.2.)

7.2 Traditionally, a Business Transfer does not create an exception to normal termination requirements; hence the buyer may not require the seller to make employee layoffs a condition of the sale without being liable for compensation to the affected employees. The Labor Standards Act, as amended, is intended to make it easier for employers to terminate employment in cases where the company is in dire financial distress.

7.3 So long as the employees are not terminated, the buyer is bound by all of the seller's obligations related to its employees.

7.4 It is legally enforceable for a buyer and seller to allocate responsibility between themselves for severance pay obligations. Because the buyer in the case of a Business Transfer inherits the seller's obligations, however, the affected employees' claims will be against the buyer, who owes the workers' severance pay for the entire period of their employment, including that which occurred before the Business Transfer. The buyer may seek indemnification from the seller in accordance with their agreement. The buyer is not liable to employees who voluntarily terminate employment or who are lawfully terminated from employment.

7.5 The general rule is that asset sales are not subject to prior consultation with any labor bodies. (But see the general discussion at the beginning of Section 7.)

7.6 If a buyer changes the terms of an employment agreement in an unfavorable way for an employee, the buyer must first gain the consent of the affected employee's labor union or elected labor representative. Because the labor law is so protective of workers, it is unlikely that the labor union will assent to such unfavorable administrative action against a member, unless the company is in severe financial distress or there is extreme unfitness for duty on the part of the employee.

7.7 In accordance with the law, the buyer assumes all accrued liabilities in connection with employees who are transferred to the buyer.

8. PLANT CLOSING LAWS

Although Korea has no specific plant closure law, closures are governed by Korean labor law, as discussed in Section 7. Because of the difficulty of reducing payroll, closing plants in the absence of severe financial duress is generally not possible.

9. ASSIGNMENT OF CONTRACTS

Contracts in effect at the time of an asset transfer are not automatically assigned to the buyer. When a buyer of assets wants to maintain some contractual relationships, such as maintenance agreements for capital equipment, an audit of all contracts currently in force should be conducted. The buyer should then seek an express assignment of contractual rights from the seller with the consent of the obligee.

10. NONCOMPETITION

10.1 The Korean Commercial Code prohibits a seller from competing with the buyer in the sales territory, generally for a period of ten years. The Commercial Code defines the territory as the general metropolitan area—or the county in a rural area—and the surrounding areas. Because of this statutory definition, it is unclear whether a noncompetition clause that covers the whole country is enforceable, and no judgment bears directly on this issue. If, however, a suit is brought and the court finds either the period of the restraint or the territory overbroad, it will not invalidate the agreement but will, instead, "redline" the offending part and apply a reasonable standard.

10.2 Registration of a noncompetition covenant is not required for enforceability. The legal limitations on such covenants are those discussed in Subsection 10.1.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Korea generally has no restrictions regarding venue, jurisdiction and choice of law in asset transfer agreements. Certain areas, such as real estate transactions in Korean property, are reserved exclusively to Korean jurisdiction, venue and choice of law.

11.2 Arbitration is possible and, in accordance with the Korea Arbitration Act and Korea's signatory status on the New York Convention on Enforcement of Foreign Arbitral Awards, awards are final and enforceable. It is therefore not likely that Korean courts would reexamine arbitral awards.

11.3 Korean courts have been very enthusiastic in following the New York Convention. Accordingly, when the parties are certain that arbitration is their preferred means of dispute resolution, there is no circumstance unique to Korea that makes litigation preferable to arbitration. In fact, there are strong arguments for choosing arbitration over litigation.

Korean courts demand reciprocity as a precondition for enforcing a foreign judgment. The court must be convinced that the foreign jurisdiction accords Korean court judgments the same respect as the judgment that is to be enforced. Practically speaking, Korean courts have been quite reluctant to find the required reciprocity.

12. OTHER ISSUES

12.1 It is not typical to include a clause allocating attorney's fees in an asset acquisition agreement. Should such a clause be included, however, it would likely not be considered unconscionable and, hence, would be enforceable.

12.2 There is no legislation in Korea equivalent to Bulk Sales Laws.

12.3 There are no other significant issues.