Luxembourg

Contributed by Guy Harles, Etude Arendt & Medernach

1. ASSET VERSUS SHARE PURCHASE

1.1 Tax considerations and successor liability are the two major considerations in choosing between an asset acquisition and the acquisition of shares.

The transfer of immovable property attracts a registration tax that varies from nine percent to ten percent, depending upon the location of the property. The transfer of shares, as with the transfer of movable property generally, is exempted from registration tax. A transfer of shares, unlike other transfers of movable property, does not attract value added tax (VAT). The sale of a business as a going concern is exempt from VAT.

The acquisition of assets generally provides greater protection against successor liability.

1.2 In an acquisition of all the shares of a company, a change in the direct ownership of the assets intervenes, whereas in an acquisition of all the assets, this is not the case. Important consequences pertaining to successor liability, contract assignments and other matters follow from this distinction.

1.3 If a buyer is interested in only a specific department or aspect of the seller's activity, it may want to acquire that department alone. Thus, the choice between the acquisition of shares and the acquisition of assets depends upon whether the buyer wishes to acquire control over the whole company or over only a part of the seller's business activity.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement could be used as the basis for an agreement.

2.2 One document may be sufficient, although the transfer of certain assets (such as real estate) requires a notarial deed. Thus, depending upon the nature of the assets being conveyed, several documents may be necessary. A notarial deed must be written in either German or French, or, if it is written in another language, a translation into German or French must be provided.

2.3 The form of the document has no influence on the tax effects of the transfer.

2.4 The transfer of specific types of assets requires registration. For example, the transfer of real estate must be registered with the cadastral survey (Administration du cadastre et de la topographie), the transfer of patents must be registered with the Luxembourg Intellectual Property Service and the transfer of trademarks or design rights must be registered with the

competent Benelux offices for trademarks and design. (The Benelux countries are Belgium, Luxembourg and the Netherlands.) The transfer of vehicles (cars, trucks, planes, etc.) also requires registration.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 As a matter of general principle, government approval for foreign investments and preacquisition administrative filings are not required in the Grand-Duchy of Luxembourg.

Any sale of a company's assets that is outside the scope of the daily or ordinary responsibility of management (i.e., a sale that is a "major transaction") requires the approval of the board of directors or of the shareholders, depending upon the provisions of the statutes and the nature of the assets transferred. Although the line between "major transactions" and transactions made by management in the course of the ordinary administration of the company is not clear, the transfer of real property would generally be regarded as a major transaction. Similarly, the sale of the shares of a subsidiary corporation could, in some circumstances, be held to be a major transaction.

3.2 Luxembourg has no nationality or residence requirements for the acquisition of assets or shares. Special regulations, however, apply to all buyers, whether they are Luxembourg companies, European companies or non-European (foreign) companies that wish to acquire shares of Luxembourg companies listed on a stock exchange in the European Union (EU). When the proportion of the voting rights held by the person acquiring or disposing of a holding in such company reaches or exceeds one of the thresholds of ten percent, twenty percent, one-third, fifty percent or two-thirds of the total voting rights existing when the situation giving rise to a declaration occurs, or falls below one of these thresholds, the persons in question are required to notify the company and the Exchange Supervisory Authority—within seven calendar days—of the proportion of voting rights it holds following that acquisition or disposal (Law of December 4, 1992).

4. UNFAIR COMPETITION

Luxembourg does not have any domestic merger control provisions, nor does it regulate takeover bids. Mergers or acquisitions with a "European dimension," however, may be subject to EU antitrust provisions.

5. SUCCESSOR LIABILITY

5.1 Any corporation operating a business that creates any risk of harm to the environment must make arrangements for insurance to cover such risk and to provide a guarantee for the restoration of the site to its former state (Law of May 9, 1990).

Depending upon the terms of the insurance contract, the benefit of the contract may be assigned to a buyer of assets. In such a case, the same insurance company bears the risk. A conflict between insurance companies may arise, however, if the buyer must conclude a new insurance. As a matter of general principle, a buyer of assets is not responsible for any environmental liabilities of the seller unless the assets are polluted. A court may impose joint and several liability on the seller and buyer if it is not possible to determine exactly when the damage or contamination occurred or who was responsible (either the seller or the buyer).

5.2 A buyer of assets does not incur any liability for products or services sold by the seller before the acquisition transaction because the buyer was not a party to such sales.

5.3 A buyer of assets generally has no obligations related to outstanding orders, unless the contracts were included in the transfer. In that case, the transferee may need to fulfill outstanding orders, depending upon the nature and terms of the contract. A buyer may have this obligation under an exclusive distribution agreement. (Also see Section 9.)

5.4 A buyer is not liable under Luxembourg law for warranty claims that originate before the acquisition date.

5.5 A buyer of real property may be held liable for certain obligations of the former owner. For example, the buyer of a building that has been rented to another person before the date of its acquisition by the buyer must comply with the lease and may terminate it only in accordance with its provisions. The buyer of a building owned cooperatively (whether a multiunit residential or commercial building) may need to pay for work that was decided upon by the building's co-owners before the acquisition but that had costs that became due after the acquisition. The buyer must also comply with court orders requiring the closure, demolition or repair of a building. Under certain circumstances, the buyer may obtain a new authorization to carry on the business activity on the purchased property.

A lessee does not, as matter of general principle, incur any liability for obligations or defaults of the previous lessee.

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

5.7 It is customary to conduct due diligence investigations (and eventually environmental audits) before the acquisition of assets.

6. PUBLIC RECORDS

Information pertaining to the seller's assets may be obtained from the following bodies.

- **(i)** The ownership of immovable property is recorded by the cadastral survey (administration du cadastre et de la topographie).
- **(ii)** Mortgages are registered at the Register of Mortgages (conservation des hypothèques).
- **(iii)** The Ministry of Environment has information on environmental issues affecting immovable property.
- **(iv)** There is no register for movable property.
- **(v)** Information about the ownership of intellectual property is available at the Service of Intellectual Property of the Ministry of Economics, the Benelux trademark office or the Benelux design office.
- **(vi)** There is no source of information available regarding pending litigation.
- **(vii)** Information on corporations incorporated in Luxembourg is available from the Companies' Register and is also published in the Luxembourg *Memorial*, the Luxembourg official gazette. This information includes the articles of association, any amendments to them and the names of the officers and directors of the corporation. It is not possible to obtain a certificate of "good standing" from the Register.
- **(viii)** Information on certain corporations' and other business associations' financial affairs and financial statements is also available from the Companies' Register. The organizations whose financial information is available through the Companies' Register include public limited companies, limited liability companies, partnerships limited by shares (société en commandite par actions), limited liability partnerships (société en commandite simple) and general partnerships if the partners are corporations that come within the scope of various EU directives.

7. LABOR MATTERS

7.1 As a matter of general principle, the employment contracts concluded by the former owner remain applicable, and thus the employees of the seller automatically become the employees of the buyer.

7.2 The transfer of the enterprise to a new owner is insufficient by itself to justify the dismissal of employees under Luxembourg law. The seller, by terminating the employment contracts to conclude the transaction, risks having to pay substantial damages to its former employees, unless the dismissals were motivated by serious economic and financial reasons.

7.3 A buyer is, as a matter of general principle, bound by all the obligations of the former employer toward its employees. These obligations include those under pension, retirement, health and other benefit plans. The buyer may eventually modify certain terms of the employment contract, subject to a number of legal requirements. (See Subsection 7.6.)

7.4 The seller and buyer may agree that, if a court made one of them liable for severance payments, the other will bear all or part of the charge. Such an agreement is legally enforceable between the two parties.

7.5 The factory inspectorate (Inspection du Travail et des Mines) and the employees' representatives (or the employees themselves if they have no representatives) must be informed about a planned transfer of assets. When the employer is bound by a collective bargaining agreement, labor unions must also be consulted. The reasons for the transfer, the legal, economic and social consequences of the transfer for the employees, and any contemplated measures affecting the employees must be communicated in the way that has been described. In any case, when the terms of employment have been set forth in a collective bargaining agreement, the seller and buyer must start negotiations with the employees' delegations and trade unions to reach agreement on the measures they propose regarding the employees.

7.6 A buyer may change the terms of employment for employees only in accordance with the provisions set forth in the Law of May 24, 1989, on employment contracts. This law provides that any substantial amendment of the terms and conditions of an employment contract requires that each employee be notified. If the employer has more than 150 employees, a meeting must be organized with the employees to explain the reasons for the proposed changes. The employees may require written notification of the proposed amendments. If the legal procedure for amending the employment contract is not followed, the amendments are void. If the employee is dismissed or resigns as a result of his or her refusal to accept the amendments (if motivated by legitimate reasons), such dismissal or resignation may be construed as a dismissal due to the fault of the employer and give rise to a claim by the employee for substantial damages.

As a matter of general principle, a buyer must assume all accrued liabilities related to employees. The buyer and seller may agree, however, that the seller will hold the buyer harmless for any loss suffered as a result of the seller's former liabilities as an employer.

8. PLANT CLOSING LAWS

Mass layoffs are regulated by the Law of July 23, 1993, which implements into Luxembourg legislation EC directives 75/129 and 92/56.

The Employment Administration, which forms part of the Ministry of Labor, must be given notice of any proposal for mass layoffs. The employer and the employees' representatives must negotiate in an attempt to settle the terms of the social measures that will, as much as possible, limit the number of dismissed employees and the consequences of the layoffs. If the employer and the employees' representatives can agree on a "social plan," the terms of the plan are submitted to a government body, the Inspection du travail et des mines. If the parties cannot agree on a social plan, notice of the fact of their disagreement must be given

in a written report to the National Office of Conciliation. When the appropriate notices have been given, the employer is entitled to give notice of dismissal to individual employees. No dismissal can, however, take effect until seventy-five days after the individual employee receives notice.

Noncompliance with these procedures may result in the layoffs being either annulled or regarded as abusive dismissals, giving rise to damages in favor of the dismissed employees.

9. ASSIGNMENT OF CONTRACTS

As a matter of general principle, contracts may be assigned only with the consent of the co-contractor. Thus, contracts are generally not transferred automatically with assets. In particular, and as a matter of general principle, insurance contracts are not assigned to a buyer by the mere fact of the transfer of assets or of a business.

10. NONCOMPETITION

10.1 A noncompetition clause may, as a matter of general principle, be enforced only against the person who was a party to the contract stipulating such a clause.

- **(i)** Enforcement against a seller is subject to the clause being limited in its scope, both in time and in geographic area.
- **(ii)** A principal of the seller will be bound only if the noncompetition clause is in a contract between the principal and the buyer.
- **(iii)** Similarly, an employee of the seller may be bound by a noncompetition clause if it (a) is written, (b) relates specifically to the employee's activities that are similar to those carried on by the employee for the buyer, (c) lasts for no more than twelve months and (d) is limited in its geographic extent to the lesser of the territory of Luxembourg or the area in which the buyer does business.

10.2 A noncompetition clause may be enforced only if it is limited in time and restricted to a specific geographic area. Further, it must relate to a specific professional activity. Registration of the clause is not required.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Under Luxembourg law, parties are free to choose the law applicable to their contract, provided that the choice is not fraudulent (e.g., aimed at avoiding the application of any mandatory requirements of the law).

In general, contracting parties may freely agree upon the jurisdiction where any claim may be pursued. In a contract governed by Luxembourg law, a clause providing for the jurisdiction of a court that would not be competent (in accordance with the common procedure rules) requires specific, written acceptance by the co-contractor.

11.2 Arbitration clauses are possible under Luxembourg law. The award is final and enforceable. It may be declared void by a court only in a limited number of circumstances (e.g., the award is against public policy in Luxembourg or concerns a matter not capable of settlement by arbitration). Luxembourg is a party to the New York Convention and the enforcement of foreign arbitration awards is governed by that Convention.

11.3 Arbitration is generally must faster than court proceedings. Also, an arbitral award is often accepted more readily by the parties than a court decision.

12. OTHER ISSUES

12.1 It is not typical for an asset acquisition agreement to include a clause dealing with the allocation of attorney's fees. As a general rule, the costs are borne by each party.

12.2 Luxembourg legislation does not provide any protection for the seller's creditors against bulk sales of their debtor's assets. No notice need be given to the seller's creditors, nor is there any other requirement imposed upon the seller or buyer if all or substantially all of the seller's goods are sold.

12.3 There are no other significant issues.

Malaysia

Contributed by Thomas M.L. Lee, Lee Hishammuddin

1. ASSET VERSUS SHARE PURCHASE

1.1 By acquiring shares in a company, a buyer becomes a shareholder of the company and participates in its business and fortunes. Acquiring a seller's assets means that the buyer is only a purchaser of those assets, taking the assets out of the ownership of the seller—the seller's relation with the buyer is merely as seller. If, however, the asset being purchased is land, and the land is a substantial asset of the seller, the same capital gains tax will be payable, regardless of whether assets or shares are purchased.

Acquisition of land and acquisition of shares of a company which substantial assets is land both have capital gains tax implications. Capital gains tax is payable on both the disposal of real property and on the disposal of shares of a "real property company." A real property company is a company having not more than fifty members and is controlled by not more than five persons, which owns shares in real property company(ies) or real property the value of which (determined in accordance with the Real Property Gains Tax Act, 1976) is not less than seventy-five percent of the value of the company's total tangible assets. Capital gains taxes are chargeable on a decreasing scale of the differential in the dates of acquisition and disposal. At present (April 2001), the disposal by an individual and a company within two years of acquisition would attract thirty percent tax; disposal in the third year would attract twenty percent tax; disposal in the fourth year would attract fifteen percent tax; and disposal in the fifth year would attract five percent tax. No capital gains tax is chargeable for disposals after the fifth year of acquisition if the seller is an individual, but capital gains tax of five percent is chargeable if the seller is a company.

Asset acquisition and an acquisition of shares attract stamp duty on the conveyance, assignment, transfer or absolute bill of sale of the asset and shares. The former attracts stamp duty at the following rates:

> For every RM100 or fractional part of RM100 of the amount of the money value of the consideration or the market value of the property, whichever is the greater—
>
> (i) RM1-00 on the first RM100,000;
>
> (ii) RM2-00 on any amount in excess of RM100,000 but not exceeding RM500,000; and
>
> (iii) RM3-00 on any amount in excess of RM500,000.

The rate of stamp duty payable on a transfer of shares on the sale of any stock, shares or marketable securities is RM3-00 for every RM1,000 or franctional part of RM1,000.

An asset acquisition may also have different implications on labor relations compared to a share acquisition. Where shares of a company are acquired, employees of the company do not experience any change in employer. Where the assets of a company are acquired and a change occurs in the ownership of the business of the company, the buyer who acquires the business must offer to continue to employ the employees of the company whose wages do not exceed RM1,500 a month on terms and conditions of employment not less favorable than those under which the emloyees were employed before the change occurs. If the buyer of the business does not make such an offer, the employees are entitled to termination benefits.

1.2 See Subsection 1.1 for a discussion of the distinctions between the purchase of the shares of a company and the purchase of its assets.

1.3 The answer in Subsection 1.1 does not depend upon whether all or only a part of the assets were purchased. However, if only part of the assets of a company is acquired by the buyer and there is no change in the ownership of business of the company, the payment of termination benefits and offer of continued employment referred to in subsection 1.1 are not applicable.

2. FORM OF DOCUMENTS

2.1 With some modifications (if necessary), the Model Asset Purchase Agreement could be used for acquisitions of assets generally, except when the asset is land or buildings.

2.2 The instrument of transfer required depends upon the nature of the asset being conveyed. Trademarks are transferred by assignments and real estate, depending upon whether separate document of title has been issued for such real estate, is conveyed by assignment or by statutory land registry documents. Shares are conveyed by share transfer in a statutory prescribed form.

2.3 The form of the document does not affect the incidence of any tax liability.

2.4 Certain transfers of businesses and assets must be registered. An acquisition of maritime vessels are subject to registration with the relevant port authority. The transfer of motor vehicles requires registration with Jabatan Pengangkutan Jalan. The transfer of business requires registration with the Registry of Businesses. The transfer of real property with separate issue document of title should be registered with the relevant land office/registry, and the transfer of shares should be registered with the relevant company.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 All acquisitions of a company or business that is a "nonmanufacturing concern" and acquisition of real property by a foreign individual or company are subject to the approval of the Foreign Investment Committee (FIC). The government established the FIC to monitor and control the flow of foreign investment into the country. The FIC and the guidelines made thereunder do not have the force of law. Nevertheless, the FIC's considerable clout stems from the blacklisting of noncomplying parties by all other governmental authorities. FIC guidelines apply regardless of the size of the company.

All acquisitions of a company or business that is a "manufacturing concern" by a foreign individual or company are governed by the Malaysian Industrial Development Authority (MIDA). MIDA is empowered to approve the establishment or acquisition of manufacturing concerns and the issuance of manufacturing licenses.

When deciding whether to approve acquisitions, FIC and MIDA look for local participation in ownership and control over the companies or businesses and consider net economic benefits and national policies.

The acquisition or disposal of a "substantial undertaking" by a company that would materially and adversely affect the performance or financial position of the company requires the approval of the shareholders at a general meeting. Unless otherwise provided in the articles of association or in a shareholder agreement, there is no requirement for a special resolution. Whether an undertaking is a "substantial undertaking" is a question of fact, and no guidelines have been published. The rule of thumb, however, is that any undertaking exceeding five percent of the net tangible assets of the company would be a substantial undertaking.

The acquisition of more than thirty-three percent of the voting rights of public companies and certain prescribed private companies is subject to restrictions imposed under the Securities Commission Act 1993 and the Malaysian Code on Take-Overs and Mergers 1998. Where the target company is listed on the Kuala Lumpur Stock Exchange, and the proposed acquisition is likely to result in significant movement in the share price, the Stock Exchange may be requested to halt dealings on the share counter temporarily. Other regulatory requirements may have to be complied with depending on the nature of the assets involved and the buyer and seller involved.

3.2 The restricted activities for non-nationals include banking, insurance, printing, publishing and mining.

4. UNFAIR COMPETITION

Malaysia does not have antitrust legislation. Large acquisitions, however, require FIC approval and possibly other regulatory authorities, depending upon the buyer and seller and the nature of the aquisition involved. The jurisdiction of the FIC is not limited to foreign acquisitions; it extends also to acquisitions by local enterprises.

5. SUCCESSOR LIABILITY

5.1 There is no legislation in Malaysia imposing liability on a buyer for environmental liabilities that the seller may have incurred. The continuing operations carried on by the buyer and the failure to comply with the conditions of the title to the land will, however, expose the buyer to the risk of liability for breach of environmental laws or land laws in addition to the ordinary instances of liability at common law, such as nuisance or escape of dangerous things from the land.

5.2 A buyer is not liable to purchasers for products or services sold by the seller before the buyer took over the seller's business. The buyer could, of course, contractually assume the responsibilities of the seller for such defects on the basis of an indemnity given by the seller for any claims made on it or costs incurred by it.

5.3 A buyer is not liable to fulfill outstanding orders.

5.4 A buyer is not liable for meeting warranty claims arising out of sales completed before the purchase.

5.5 A buyer of real property, or the assignee of a lease, is bound by the obligations that run with the land. These may be in the form of encumbrances (such as registered charges [statutory hypothecation], caveats and prohibitory orders) or registered interests on the title to the land (such as leases and easements) or other conditions that are endorsed on the title document by the land offices/registry (such as quit rent [taxes], conditions of use or restrictive covenants).

5.6 The government may impose other conditions on use of the land when the acquisition is made by foreign interests. The government may, for example, endorse on the title to the land the requirement that the land be used for industry having a certain percentage

of bumiputras (native Malays) in the workforce, or the government may restrict the rights to transfer without its prior consent.

5.7 Environmental audits are undertaken only if the asset being acquired raises a concern. Due diligence investigations are usually conducted before completion of the acquisition of assets.

6. PUBLIC RECORDS

(i) The ownership of immovable property can be searched at the land offices/registries if the property has a separate issue document of title.

(ii) It is possible to conduct searches at the relevant land office/registry of the charges and other encumbrances affecting immovable property which has a separate issue document of title.

(iii) There is no method for searching for information about environmental issues affecting immovable property.

(iv) Depending on the nature of the movable property, there are some registries where searches can be conducted on liens and encumbrances on movable property. For example, it is possible to search ownership claims and mortgages on maritime vessels and motor vehicles, respectively. In addition, certain charges created by a company must be registered with the Registry of Companies, and the register will disclose the quantum of the claim, the chargee, whether further charges are permitted, the date of creation of the charge and the salient conditions.

(v) The ownership of trademarks and patents can be searched in the Registry of Trademarks.

(vi) Although searches for information about pending litigation could be made in each court, it is not practical because there are so many courts and there is no central registry that can provide a comprehensive answer.

(vii) There is no register that can be searched to determine the standing of a Malaysian corporation. In practice, it is usual to seek bank references. However, it is possible to search at the Registry of Companies to check on the incorporation and continued existence of a corporate seller, and it is possible to search at the Official Receiver's office to check whether any winding up orders have been made against a corporate seller.

(viii) Financial statements may be obtained for all companies that operate in Malaysia and have lodged a return with the Registrar of Companies.

7. LABOR MATTERS

7.1 The employees of a seller do not automatically become employees of the buyer. If the asset acquired is the whole business, the buyer is required to offer continued employment to certain employees as referred to in Subsection 1.1. If the employee is not offered employment, the seller is liable to pay termination benefits. The amount of the benefit is dependent upon the employee's length of service.

7.2 The buyer is required to make the offer to the employees within seven days of the change in ownership of the business. In the event the buyer does not intend to employ some employees, the ordinary course of action is for the seller to give such employees notice of termination before the change in ownership of business. There can be no liability for termination benefits on the part of the buyer in those circumstances, and the seller is also exempt from such liability, but only if sufficient notice of termination is given and there is ground for termination. The required notice is dependent upon the length of service of the employee.

7.3 If a buyer offers reemployment to the seller's employees, it is bound to offer terms no less favorable than those the employees had under the seller, including health benefits, pension fund contributions and other benefits.

7.4 The buyer and seller may allocate between themselves the responsibility for severance obligations. This allocation does not limit the right of claim of employees who come within the protection discussed in Subsection 7.1 for termination benefits.

7.5 No consultation with—or authorization from—any works council or labor union is required, unless the employees are members of a works council or labor union.

7.6 The buyer may change the terms of employment of the employees transferred to it if the change is either for the benefit of the employees or made with the employees' consent.

7.7 The buyer becomes principally liable by reason of the transfer. There is no right of indemnity arising from the sale of the business itself.

8. PLANT CLOSING LAWS

There are no restrictions for plant closings, except that prescribed notice must be given to any employees who are dismissed as well as to the labor department. Failure to give the prescribed notice merely results in the employer's liability for compensation in lieu of prescribed notice. If there is a union protecting the employees, the collective agreement must be considered.

9. ASSIGNMENT OF CONTRACTS

There is no customary or usual situation concerning the assignability of contracts in an asset acquisition, and the result varies from contract to contract and among different types of insurance coverage. There is no legislation requiring insurers to allow for the assignment of the benefits of an insurance contract.

10. NONCOMPETITION

10.1 A noncompetition clause can be enforced in the sale of a business when the goodwill is sold. The clause applies only to the seller and not to the principals or employees.

10.2 Noncompetition clauses are subject to a test of reasonableness concerning the length of the restriction and its geographical limits.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 There are no restrictions on choice of law or jurisdiction; however, when the assets are in Malaysia, it is very unlikely that a Malaysian court would find it acceptable for the law and venue to be anything other than Malaysian law and Malaysia.

11.2 Arbitration is possible. Awards are final and can be reexamined by the courts only if there is an error of law.

11.3 The most significant advantages of arbitration are speed and the ability to choose the arbitrator(s).

12. OTHER ISSUES

12.1 The buyer and seller usually pay their own attorney's fees.

12.2 There is no legislation that requires a seller to give notice of an asset acquisition or disposal to creditors.

12.2 U.S. buyers and sellers should be aware that the acquisition or disposal of the ownership of businesses or companies is subject to the approval of government regulatory authorities.

Mexico

Contributed by John E. Skogland, Martin Marietta Materials

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

1. ASSET VERSUS SHARE PURCHASE

1.1 The major considerations for a buyer when choosing an asset acquisition rather than an acquisition of shares are the following:

- Regardless of the identity of the shareholders, when the shares of a corporation are acquired, all liabilities of such corporation remain with the corporation. The legal existence of a corporation does not change when its shares are sold. As a general rule, however, shareholders are liable for the debts of a corporation up to the nominal value of their shares.
- There are foreign-investment restrictions on the ownership of shares in real estate. A decision about whether to choose an asset acquisition rather than an acquisition of shares depends upon the nature of the investment and the location of the real estate. For example, under the Mexican Constitution, foreigners may not directly own real estate that is one hundred kilometers from the borders or fifty kilometers from the coast.
- Tax considerations are always crucial. For a buyer of real estate in Mexico City and in some states, there is a real estate acquisition tax of two percent of the value of the property. There is also a real estate property tax at the local level. An acquisition of shares has no special tax treatment, although there is a tax of thirty-four percent on the payments of dividends. For a seller, the income generated by the transaction is subject to a twenty-percent tax, with special treatment depending upon the type of transaction, whether for the sale of shares or the sale of assets.

1.2 There is a distinction between the acquisition of substantially all the assets of a company and the acquisition of the shares of the company. This distinction depends upon the considerations discussed in Subsection 1.1.

1.3 Generally speaking, and from a legal standpoint, if only part of the assets were to be acquired, it would be easier to buy the assets instead of the entire company due largely to successor liability.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement may be used in general terms to understand the rights and duties of the parties. For real estate transactions, however, each sale must be executed individually before a notary public in a public instrument.

2.2 The transfer of real estate requires special formalities and must therefore be executed in a single document for each property (see Subsection 2.1). Generally speaking, other than real estate transactions, the transfer of assets may be conveyed in a single document.

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

2.4 Each sale of real estate must be executed individually before a notary public in a public instrument. The sale must be recorded in the real property's public registry within its jurisdiction to protect against third-party rights. Under the Foreign Investment Law, there are other filings required by the Secretary of Commerce (e.g., the transfer of trademarks) and the Foreign Investment Commission.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 The following administrative formalities are required for a foreign company to purchase assets:

- Approval (or notice, depending upon the type of activity) by the Ministry of Commerce and the Foreign Investment Commission in case such approval is required by the Foreign Investment Law
- Approval by the shareholders, the board of directors or any other body or person vested with authority by the shareholders
- Other administrative filings depending upon the nature of the transaction

3.2 The Foreign Investment Law establishes the following four categories of business activities:

- Activities reserved to the state, such as (a) oil production and refining, (b) basic petrochemical production, (c) the sale of electricity, (d) nuclear power and (d) the local postal service;
- Activities reserved for Mexican investors, such as (a) transportation, (b) retail gasoline sale and distribution, (c) radio broadcasting and television services, (d) credit unions and (e) development banks;
- Activities subject to specific participation percentages where foreign investment is authorized up to ten percent, twenty-five percent or forty-nine percent, such as (a) ten percent in cooperative production companies, (b) twenty-five percent in domestic air transportation and (c) forty-nine percent in holding companies of financial groups, commercial banks, brokerage houses, insurance institutions, bonding institutions, finance lessors, etc.; and
- Activities in which foreign investors may hold more than a forty-nine-percent interest, subject to approval of the Foreign Investment Commission, such as (a) port services, (b) shipping companies, (c) administration of air terminals, (d) legal services and (e) private educational services

4. UNFAIR COMPETITION

In 1993 the Competition Law was enacted in Mexico. This antitrust and unfair trade practices law was created for the protection and promotion of full and open competition in Mexico. The Competition Law establishes an autonomous administrative body—the Competition Commission—to enforce the law.

One of the principal areas of concern under the law is the regulation of mergers and acquisitions. The Competition Commission has broad authority to dissolve a completed merger, to order a purchaser to dispose of all or part of the purchased assets or shares or to block the parties from proceeding with all or part of a proposed merger or acquisition when

the proposed transaction lessens, impairs or hampers competition over a relevant product or geographic market.

The Competition Law also contains a prearrangement notification formula, which is triggered by one of the following thresholds: (a) the value of the transaction is more than $32 million USD, (b) the transaction involves the accumulation of thirty-five percent or more of the assets or shares of a business with assets or shares in excess of $32 million USD or (c) the merger partners' joint assets or annual sales exceed $128 million USD.

5. SUCCESSOR LIABILITY

5.1 A buyer of property may be liable for the costs of cleanup even if it can show that the land was contaminated by the previous owner. The buyer could also be liable to any person who can show that its personal or real property was damaged by the contamination. The seller has the obligation to let the buyer know of any environmental liability that may arise. If environmental liability is imposed upon the buyer, the buyer has an action against the seller.

5.2 Mexican law does not contain specific provisions governing product liability. The Consumer Protection Law and the Civil Code, however, provide general rules applicable to harm caused—either to persons or their property—by products. The Civil Code states that (a) those persons acting illegally or against good customs and who cause damage must indemnify the person harmed, unless it is proved that the damage was caused as a consequence of fault or negligence of the injured party and (b) a person who uses an apparatus, instrument, mechanism or dangerous substance that causes damage must repair the damage caused, unless it is proved that the damage was caused by the fault or negligence of the injured party.

Furthermore, if a buyer purchases the assets and not the shares of the seller, the buyer is not liable in connection with products sold before the transaction. If the transaction is a share purchase, the buyer is liable for all products sold at any time by the company. The buyer may have a legal action against the seller, however.

5.3 A buyer of the assets of a business is not responsible for meeting outstanding orders accepted by the seller.

5.4 See Subsection 5.2 regarding a buyer's responsibility for warranty claims arising before the sale.

5.5 A buyer who takes title to, or a lessee who takes possession of, real property may be liable for any obligations imposed upon the seller or lessor. In this sense, the buyer or lessee must ensure that the seller or lessor complied with all its obligations.

5.6 No other obligations of the seller are automatically transferred to the buyer of assets.

5.7 It is customary to conduct due diligence investigations to determine the prior and future liabilities of the seller and buyer of assets.

6. PUBLIC RECORDS

In Mexico, a buyer has a right of access to information that is publicly maintained at any federal or state registry (e.g., the Federal Mining Registry, the Federal Maritime Public Registry and the Public Property/State Registry). The buyer may conduct searches or submit written inquiries to the appropriate authorities.

- **(i)** The ownership of any immovable property can be verified in the Public Property Registry where the immovable property is located.
- **(ii)** A mortgage on land can be searched in the Real Estate/Local Public Property Registry.
- **(iii)** There are no public registries or other resources indicating that assets comply with environmental regulations; a buyer has an individual duty to verify such compliance.

(iv) The existence of liens and encumbrances on movable property can be discovered by searching several registries, depending upon the goods or assets subject to filing. For example, a lien or encumbrance on an aircraft can be searched in the Airplane/Aeronautic Public Registry.

(v) The Mexican Institute of Industrial Property has its own registry; the Institute is the authority that records the owners of any industrial property rights. There is a public registry for copyrights, headed by the General Copyright Director, whose office is a branch of the Ministry of Education.

(vi) Although there is no agency or registry where pending litigation may be searched, a seller may be contractually bound to reveal—before execution of the respective agreement—any pending litigation against its assets.

(v) Under Mexican law, there are no "good standing certificates" like those used in the United States. The only way to verify the status of a company is through an investigation in the Public Commercial Registry located at the domicilio social (place of incorporation) of the corporation and not its domicilio (address of the corporation's principal place of business).

(viii) A prospective buyer may gain access to a corporation's financial statements and other information as part of the due diligence process. There is no public registry that keeps records of such information. The seller's auditors will not provide any information unless they are authorized to do so by the seller.

7. LABOR MATTERS

7.1 If a buyer acquires the assets of the seller, it acquires no labor rights or duties. If, however, the buyer purchases the shares of a corporation, the employees of the corporation become the buyer's employees.

7.2 It is permissible to request that the seller terminate or lay off employees before the buyer acquires the company. The buyer may terminate either labor relations or severance liability and start new relations with the employees.

7.3 Although a buyer who employs the seller's employees is bound to the seller's terms of employment, the buyer may change the terms if it reaches an agreement with the employees. The buyer may ask the seller to terminate all contracts of employment (and pay the employees' severance allowances), and then recontract with the employees on a new contract with new terms.

7.4 An allocation of responsibility between the buyer and seller for severance payments is legally enforceable. The employees may, however, have a claim against the buyer if their severance pay and other rights on termination have not been honored.

7.5 No consultation with, or authorization from, a works council or union is required unless the workers or employees are part owners of the assets.

7.6 The buyer may not change the terms of employment; it must terminate all labor relations with the employees (and deal with any consequential liability) to begin a new relationship with changes in the terms of employment or renegotiate the existing terms with the employees.

7.7 A buyer assumes all accrued liabilities in connection with the employees transferred to it. The agreement may, however, allocate that cost to either the buyer or seller.

8. PLANT CLOSING LAWS

Workers have extensive rights regarding termination of employment. The protection of employees under the Mexican Federal Labor Law goes well beyond that to which U.S.

employers are accustomed and commonly amounts to between thirty and forty percent of basic payroll costs. The Federal Labor Law governs all work relationships. Its requirement that all employment contracts be in writing can be satisfied by either a single collective bargaining agreement covering all unionized workers or individual agreements between each worker and the employer.

Employment agreements can be for a specific task, a defined period of time or an indefinite period. Contracts for a limited duration are permissible only when work conditions so require or when needed to obtain coverage for a worker who is temporarily absent. Even when permitted, contracts for a defined period of time may be deemed to extend beyond their fixed duration if the underlying conditions giving rise to the need to retain the worker continue to exist. The Federal Labor Law permits an employer to terminate employees only upon the occurrence of specified events, including "plant closings" due to the manifest cost inefficiency of the operation or the bankruptcy of the employer declared by the proper authority. In such cases, the employer is obligated to give the workers severance pay unless the termination is by mutual consent or for cause. Whenever the employer terminates a worker for cause, it must give the worker written notice of the date and cause of the termination. If the worker refuses to accept such notice, then the employer must give notice to the appropriate labor court within five days of the termination along with the terminated worker's address and request that notification be given to the worker. Failure to provide the requisite notice to the worker or the labor court is sufficient reason to consider the dismissal unjustified.

On the other hand, the employee is free to resign at any time. As a general rule, workers who resign are not entitled to severance pay unless the employer coerced the resignation. (A worker who resigns has the burden of proving that the employer coerced the resignation through pressure or threats.) Workers having more than fifteen years of service with the employer are entitled to a seniority premium of twelve days' salary for each year of service upon resignation. Because of the limited right of termination, it is common for employers to negotiate for the resignation of employees whom they wish to terminate. Under such an arrangement, the parties typically agree to a "severance bonus" amounting to two to three months' pay, plus a seniority premium.

The Federal Labor Law requires that any termination agreement be in writing and be ratified by the Arbitration and Conciliation Board. The amount of severance pay that a worker is entitled to receive depends upon the reason for the termination or resignation. It can range from nothing (if, for example, termination is for cause) to four months' salary plus twenty days' pay per year of service (if, for example, the employee is terminated because the installation of new machinery renders the employee's services unnecessary). This amount is in addition to the mandatory seniority premium discussed previously and, unlike the seniority premium, is not subject to any ceiling.

9. ASSIGNMENT OF CONTRACTS

The substantive and procedural requirements that one must satisfy to have a valid assignment of a contract depend upon (a) the requirements provided in the contract at issue and (b) whether the contract is civil or commercial in nature. Civil contracts are governed by the provisions of the applicable Civil Code. Commercial contracts are governed by the Commercial Code to the extent that it provides specific guidance and by the Civil Code to the extent that the Commercial Code is silent. A wide variety of contracts must be assigned in a particular form if the assignment is to be valid. Some assignments must be in the form of a public deed issued before a notary public or a public commercial broker. Most transfers require this formality, whereas others need only be in writing to be valid. As a general rule, no contracts are transferred automatically with the assets in Mexico.

10. NONCOMPETITION

10.1 Generally, a noncompetition clause may be enforced against a seller of assets, its principals and its employees. In most cases, however, the only remedy available is the payment of liquidated damages, agreed upon in the contract when it is made.

10.2 The enforcement of a noncompetition clause is not subject to any legal limitations or registration with competition authorities, although it is subject to various practical limitations.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Other than any specific legal dispositions to the contrary in the laws regulating certain industry activities, there are no restrictions (either for choice of the applicable law or jurisdiction) regarding asset acquisitions by foreign parties.

11.2 The United States and Mexico both subscribe to the New York Convention regarding the enforcement of arbitral awards, and Mexican law permits virtually any type of commercial dispute to be arbitrated. These actions make arbitration of commercial disputes a realistic alternative. Arbitration offers the parties unlimited flexibility to devise whatever dispute resolution mechanism they desire. Also, in many cases, it may be possible to create a private method for enforcing the arbitral award. This has the advantage of eliminating the expense and delay of judicial proceedings.

The New York Convention recognizes the parties' right to submit their disputes to arbitration and gives the arbitral award the effect of a judicial decree, mandating its enforcement in Mexico; nevertheless, the losing party may still establish one of a limited number of defenses enumerated by the New York Convention. The burden of proof, however, lies on the losing party if it wants to avoid enforcement of the arbitral award on the basis of such defenses. These defenses are designed primarily to protect sovereignty over economic regulations (the "public policy" exception to enforcement) and to safeguard the parties' inalienable right to a process that comports with the notion of fundamental fairness.

Foreign arbitral awards will be enforced upon the presentation of a certified copy of the award and the arbitration agreement (with Spanish translations), unless the losing party can establish one of a limited number of defenses akin to those provided in the New York Convention.

11.3 The North American Free Trade Agreement (NAFTA) set the stage for a substantial increase in commercial transactions between the United States and Mexico. NAFTA does nothing to resolve the most common trade-related disputes, however. This leaves businesses with the traditional alternatives of the courts and arbitration. Each system has its share of advantages and disadvantages. Careful advance planning can help ensure that whichever system is selected will work as well as possible.

12. OTHER ISSUES

12.1 A clause addressing the allocation of attorney's fees is typical in an asset acquisition agreement.

12.2 Mexico has no legislation dealing with bulk sales.

12.3 Long considered the hallmark of civil law systems, codification has declined in significance as a distinction between common law and civil law. One reason is the increased use of codes or similar devices in the common law (e.g., the Uniform Commercial Code, the various Restatements and the model codes of the American Law Institute). The differences between civil law and common law are found in the susceptibility to and the acceptability of codification. These differences are continuing to narrow as the United States becomes somewhat more code-oriented and Mexico updates a number of its laws by effectively codifying much of the common law.