The Netherlands

Contributed by J. Freek K. Jonkhart, NautaDutilh

1. ASSET VERSUS SHARE PURCHASE

1.1 A buyer's major considerations for choosing an asset acquisition are the following:

- Only a part of the business operated by the selling company (such as a specific division) is the subject of the sale.
- Acquisition policies of the buyer (e.g., strengthening business divisions within the same corporate vehicle) may be prohibitive when buying shares.
- Environmental concerns can lead to the transfer of the business as a whole (without the real property from which the business is operated) in combination with postcompletion lease arrangements.
- The desire to avoid the assumption of contingent liability indirectly (i.e., through acquiring the shares of the target company) may affect the decision.
- Asset transfers are sometimes preferred in cases of threatened insolvency of the target company. Through the acquisition of a part of the company, solvent parts of the business can be safeguarded.

1.2 By choosing an asset acquisition, individualized assets and liabilities are transferred. The tax history of the target company is, in principle, not inherited. By choosing a share acquisition, all assets and contingent liabilities (including the target company's tax history) are transferred indirectly to the buyer (i.e., through acquiring control). Whenever real property is transferred, a six-percent tax is levied. This is not the case if shares are transferred, unless the only assets of the company are those in real estate. In that case, the transfer of shares triggers the six-percent tax.

The acquisition of substantially all the assets of a company still requires the observance of all transfer formalities applicable to each of the assets involved in order to vest title to such assets in the buyer (see Subsection 2.2). The concept of individualized business units capable of being transferred as such (other than by means of a company split) has not been implemented in Dutch law. The buyer may "step up" the value of the assets to the cost price (i.e., the actual acquisition price).

The transfer of title to shares in a target company can be effected by passing a simple notarial deed of transfer.

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

2. FORM OF DOCUMENTS

2.1 The purchase and sale of assets does not require a specific form of documentation. The Model Asset Purchase Agreement can therefore be used as a basis to structure an asset acquisition in the Netherlands, although the extensive wording of U.S.-drafted documents is generally resisted by parties in the Netherlands. This follows from the fact that agreements made under Dutch law are, by law, governed by the principles of reasonableness and fairness. A party must respect the reasonable interests of the other party. Transfer formalities require typical Dutch law provisions in the agreement.

2.2 A variety of conveyance or transfer documents is required for the transfer of certain assets.

Tangible assets are transferred by physical delivery (in practice, by allowing the buyer to take possession). The transfer of real property requires the execution of a notarial deed of conveyance, followed by registration in the Land Register (and triggering a six-percent transfer tax). The transfer of trademarks is effected through private deed, which may be either the asset acquisition agreement or an ancillary document. The transfer of receivables is effected through private deed (which may well be the asset acquisition agreement), followed by a notification sent to the debtor.

The transfer of contracts can be effected by an agreement between the buyer and seller, although the cooperation of the contract counterparty is required. Any private document evidencing such cooperation will suffice. The cooperation of third parties (e.g., customers or suppliers) is required to transfer contracts or outstanding orders. In practice, parties seek the cooperation of only those third parties who are considered essential to the commercial transaction. The cooperation of other parties is anticipated by assuming that such third parties will continue doing business and, hence, the agreement will be transferred tacitly.

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

2.4 The transfer of real property and certain intellectual property rights (see Section 6) needs to be registered in the public registers.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Governmental approvals regarding foreign investments are not required.

A Dutch company is managed and represented externally for all purposes by its board of management (bestuur). The company may (and certain companies must) install a board of supervisory directors (raad van commissarissen) whose main task is to supervise the policy of the board of management and the general course of affairs of the company. With some exceptions, the supervisory board is not capable of representing the company externally.

Approval of a specific body within the seller is required (or advisable) only in the following cases:

- The seller's articles of association may provide that certain resolutions of the board of management are subject to prior approval of the board of supervisory directors (if a two-tier system has been implemented) or the general meeting of shareholders. Management resolutions for the sale of assets outside the ordinary course of business, or the disposal of a business unit, may require such resolutions. The general meeting of shareholders has the power to approve these managing board resolutions. The general meeting may convey this power to the supervisory board. Normally, this power is vested in the supervisory board by special provisions in the articles of association.
- When the seller's entire business is sold, obtaining shareholder approval is advisable.

Administrative filings need not take place before the acquisition. There are certain regulatory consent issues that must be considered, however. (See Subsection 7.5.)

3.2 No business activities are subject to special regulations that would prevent a nonnational from engaging in such activities or require special approvals for a nonnational.

4. UNFAIR COMPETITION

On January 1, 1998, the Dutch Act on Competition was radically changed, implementing a system of merger control. Dutch merger control is now similar to the European merger control regulations set forth in the European Concentration Regulation. Merger control requirements exist under Dutch law if:

- the aggregate turnover of all companies involved in the merger (which includes unrelated group companies) in the calendar year immediately preceding the transaction amounts to more than NLG 250 million and
- at least two of the companies involved have each realized a turnover of at least NLG 30 million in the Netherlands.

If these thresholds are met, the proposed merger must be notified to the Cartel Authority (Dienst voor de Mededinging). The merger may not be effected within the four weeks following notification. If, within that four-week period, the Cartel Authority states that a permit is required for the consummation of the transaction, such a permit must be sought. The Cartel Authority has thirteen weeks to deal with the application for a permit, and the merger may not be consummated within that period. A permit will be refused if, as a result of the merger, an economically dominant position will arise or will be consolidated.

5. SUCCESSOR LIABILITY

5.1 A full discussion of Dutch environmental liability issues is beyond the scope of this response given the complexity of the subject. The following general observations can be made, however.

Under the Dutch Soil Protection Act, the owner of real property can be held liable for soil (including groundwater) contamination, regardless of whether such owner caused the pollution. This liability is based upon the general tort doctrine that polluting soil is tortious conduct against the State of the Netherlands. The State of the Netherlands also has a direct claim against the polluter (based upon tort) if the owner is shown to be an innocent owner.

As a consequence, if real property is acquired within the framework of an asset acquisition, without further contractual arrangements (indemnification) between the buyer and seller, the buyer is exposed to liability.

In a wider context, if not only land is acquired but also an entire plant (warehouse or other business operation), further environmental legislation must be considered. Environmental factors such as noise, dust, chemical emissions, waste treatment and effluence determine the scope of the buyer's liability. The business must comply with the respective standards (in most instances, regulated through environmental licenses and associated license conditions), and it is the buyer's obligation to ensure continued compliance. The buyer and seller should agree on the division of risk through indemnity arrangements.

5.2 In short, obligations related to products or services can be incurred only by natural persons or by legal entities. Liability for products or services sold before the consummation of the transaction accrue against the party who sold the product or service (i.e., the seller). The buyer would need to assume these contingent liabilities explicitly within the framework of the acquisition agreement. Typically, risk division in Dutch asset acquisition practice forms one of the central themes of negotiations, with an emphasis on identifying mechanics that allow the parties to establish whether a product or service was sold before, on or after the acquisition date.

5.3 Unless a buyer has explicitly assumed an obligation to fulfill outstanding orders, it will have no such obligation. It is standard practice, however, to provide in the acquisition agreement that the buyer acquiring the production facilities will fulfill the outstanding orders. Normally, a distinction is made between products manufactured before and after the acquisition date in relation to possible product liability risks. (See Subsection 2.2 for transfer formalities.)

5.4 See Subsections 5.2 and 5.3, as the same principles apply here.

5.5 Environmental liabilities can accrue against both the buyer and the lessee of real property. (See Subsection 5.1.)

In the event of real property being encumbered by a mortgage to secure the debts of the seller, the buyer is not personally liable for the debt, although the real property continues to serve as security which may be enforced against the buyer. It is therefore standard practice to negotiate a transfer of property free of mortgage.

Any liability for obligations or defaults of the previous owner or lessee accrues against the buyer or the successor lessee if assumed, whether under the acquisition agreement or under the lease agreement (as a consequence of the lease agreement being transferred to the successor lessee). As a general principle, liability for obligations or defaults of the previous owner or lessee do not transfer to the buyer or successor lessee by operation of law.

5.6 If a business or part of a business is transferred to a buyer, all rights and obligations (with certain exceptions) arising out of employment agreements existing between the seller and the employees employed in the business that is being transferred are transferred to the buyer by operation of law. For further comments and discussion of exceptions, see Section 7.

5.7 It is customary for a buyer to conduct environmental audits and specific due diligence investigations related to certain aspects of the business.

6. PUBLIC RECORDS

(i) The ownership of immovable property is registered at the so-called kadasters (land registers), which are open to inspection by third parties. Each transfer of title—which can be effected only through the passing of a notarial deed—is immediately registered. It is the duty of the civil law notary to ensure that registration takes place.

(ii) Mortgages and attachments on immovable properties are registered in the so-called hypotheek registers (mortgage registers) in the order by which they have been presented to determine priority.

(iii) Environmental issues affecting real immovable property are not registered in any specific public register, although general information on the environmental status of certain areas can be obtained from the local authorities.

(iv) Liens and encumbrances on tangible personal property are not recorded in a public register.

(v) The following intellectual property rights are capable of being registered in the following places:

- Trademarks: Benelux Trademark Office
- Models/designs: Benelux Office for Models & Designs
- Trade names: Trade register at the Chambers of Commerce
- Patents: Office for Industrial Property
- Plant breeders' rights: Board for Plant Breeders' Rights

Registration is not essential to transfer title, but it is required to obtain protection against third parties.

(vi) Pending litigation is not registered in a public register. Litigation is public, however, and information on the status of pending litigation can be obtained from the courts. Court rulings—in both civil law cases (including bankruptcy) and criminal law cases—are public, as are administrative rulings.

(vii) There is no specific organization that can provide a buyer with information regarding standing. In practice, information on a company's corporate status can be obtained by searching the trade registers, in which the buyer will find the deed of incorporation, deeds of amendment of the articles of association, appointments to managing boards and supervisory boards and certain other typical corporate information. Tax information is not publicly available.

(viii) A company's annual accounts must be published in the trade register of the Chamber of Commerce in the area where the company is registered. The Act on Annual Accounts (as stated in Book II, Title 9 of the Dutch Civil Code) applies to cooperative societies, mutual guarantee associations, public companies with limited liability and private companies with limited liability. An exemption from the publication obligation exists when two of the following three criteria are met:

- The asset value according to the balance sheet and explanatory notes, valued at historic purchase-or-production price, does not exceed NLG 6 million;
- The net turnover during the financial year does not exceed NLG 12 million; or
- The average number of employees during the financial year amounts to fewer than fifty persons.

A limited publication duty exists for companies that meet two of the following three criteria:

- The asset value according to the balance sheet and explanatory notes, valued at historic purchase-or-production price, does not exceed NLG 24 million;
- The net turnover during the financial year does not exceed NLG 48 million; or
- The average number of employees during the financial year amounts to fewer than 250 persons.

Although not mentioned in the questionnaire, large vessels are registered in ships' registers.

7. LABOR MATTERS

7.1 The transfer of employment agreements under Dutch law is related to the "transfer of a business," defined as the transfer of a business enterprise, or a part thereof, pursuant to an agreement (in particular, an agreement for the sale, lease, long lease or issue in usufruct). A transfer of a business occurs when, following the purchase of the assets, title to such assets vests in the buyer.

As a result of the transfer of a business, all rights and obligations of the employer resulting from the respective employment agreements in force on the date of transfer will transfer to the buyer by operation of law. For one year following the transfer, the former employer is jointly liable with the buyer for the fulfillment of obligations that existed before the transfer.

7.2 The seller may be required to terminate some employment contracts as a condition precedent to closing. A Cantonal Judge, however, has no obligation to terminate, and if he does, redundancy payments may be relatively high if termination is requested merely in view of the pending transaction.

The Cantonal Judge becomes involved at the request of either the employer or the employee. Usually, the employee files a request with the Cantonal Judge for a redundancy award. The employer may also file a request to terminate the employment contract and to award a certain amount of redundancy payment (which is sometimes a negotiated amount). In this circumstance, proceedings with the Cantonal Judge serve merely as a means of ensuring the employee is involuntarily unemployed, which is necessary to qualify for social unemployment benefits.

The termination should be effected before the transfer, absent which the general rule applies (see Subsection 7.1). In practice, both the former and successor employers act jointly as the applicants requesting termination from the Cantonal Judge.

7.3 The general rule noted in Subsection 7.1 does not apply to pension obligations as defined in the Pension and Saving Schemes Act.

7.4 An agreement to allocate responsibility for severance payments between a seller and buyer has effect only between the seller and buyer. Employees retain their rights against either party.

7.5 Under the so-called SER Fusiegedragsregels (the Dutch Merger Code, which still has the status of a code of conduct), the trade unions and merger committee must be notified of the transaction. The notice must be given at an early stage—the moment when negotiations reach the point where the prospects of reaching agreement become probable. The code requires that certain consultation procedures be followed. The code applies if the merger involves a company or a group of companies that, on average (alone or together with group companies), employs one hundred or more employees in the Netherlands. The code also applies when the applicable collective labor agreement stipulates its applicability.

Under the Dutch Act on Works Councils, the works council of each of the parties, and of the target company, has a right to render advice on the proposed transaction. The decision to implement the transaction cannot be executed until positive or neutral advice has been obtained. The advice should, in consultation with the trade unions, be requested when the works council may still influence the proposed decision. If the decision to execute the transaction is inconsistent with the advice, the transaction cannot be consummated for a one-month period, during which the works council is entitled to appeal to the Entrepreneurs Chamber of the Court of Appeal in Amsterdam. The Court of Appeal can block the transaction, and there is no appeal from this ruling. Parties will then need to renegotiate in order to meet the concerns of the works council.

A works council needs to be installed in companies that, on average, employ fifty or more employees. Companies employing between ten and fifty employees may appoint an employee representative who has certain advisory rights.

7.6 The post-acquisition position of the buyer is no different to its position in relation to its other employees. Any employer that wishes to change labor conditions must either obtain approval from the works council (if installed) or agree to the change with the individual employees. If a small works council is installed, the rule referred to in Subsection 7.5 applies.

7.7 With the exception of the matters discussed in Subsections 7.1 and 7.2, a buyer assumes all accrued liabilities in connection with employees transferred to it as a result of the acquisition.

8. PLANT CLOSING LAWS

In the Netherlands, the Notification of Collective Dismissals Act applies when an employer wishes to dismiss twenty or more of its employees in one district within a period of three months. The employer must notify the relevant trade unions and the labor bureau (Regionaal Directeur voor de Arbeidsvoorziening [RDA]) of its intentions in writing, stating the reasons for the dismissal and describing all relevant circumstances. RDA may consider a request for a permit (required for a massive dismissal) only upon the expiration of one month from the date of the notification. The rationale for such delay is that it provides the employer and the unions with an opportunity to limit the number of dismissals and negotiate a social plan.

9. ASSIGNMENT OF CONTRACTS

Contracts are not automatically transferred with assets (but see issues discussed in Section 7). Note, however, that security rights in rem follow the secured assets, regardless of the debtor's position, even though the underlying contracts are not transferred automatically.

10. NONCOMPETITION

10.1 A noncompetition clause can be enforced against a seller, its principals and its employees, provided the restricted party accepts such a clause in writing. A court may mitigate the operation of the clause if, in its opinion, enforcement of the restrictive covenant would, under the principles of reasonableness and fairness, be unreasonable or unfair vis-à-vis the restricted party. Moreover, a court may change the effect of an agreement if, due to an unforeseen change in circumstances, its enforcement would be unreasonable or unfair.

10.2 Restrictive covenants that are unlimited in time, scope or geographic area may easily be found unreasonable or unfair. Consequently, the parties should agree to reasonable time limits (in cases of acquisitions, an average of between two and three years). The scope should be limited to the business conducted by the target company at closing, the rationale being to allow the buyer to get settled in the market without the seller disturbing the process. The same applies in broad outline for geographic restrictions. Other exceptions to these general rules may exist.

Restrictive covenants imposed upon employees are always interpreted in a very restrictive manner. Time limitations especially are normally restricted to one or two years.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Choices of applicable law and jurisdiction are customarily made in agreements prepared in the Netherlands.

- **(i)** The choice of foreign law to govern the agreement will be given effect by the courts of the Netherlands. These courts may, however, (a) apply rules of Netherlands law in situations where those rules are mandatory, regardless of the law otherwise applicable to the contract concerned, (b) give effect to the mandatory rules of the laws of any other country with which the situation adjudicated has a close connection, if and insofar as, under the laws of such other country, those rules must be applied regardless of the law applicable to the contract concerned and (c) refuse the application of such foreign law if such application is manifestly incompatible with the public policy of the Netherlands.
- **(ii)** There are no specific restrictions on a choice of jurisdiction. Judgments rendered by a foreign court will normally be recognized and enforced by the courts of the Netherlands in accordance with the provisions and subject to the limitations of applicable treaty provisions such as the European Union Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
- **(iii)** In the absence of applicable conventions between the United States and the Netherlands, a judgment rendered by the competent courts in the United States against a party in the Netherlands will not be directly enforceable in the Netherlands. In order to obtain a judgment that is enforceable in the Netherlands, the claim involved must be relitigated before a competent court in the Netherlands.

11.2 Arbitration is often chosen as a means of settling disputes. The enforceability of arbitral awards made by a non-Dutch arbitration panel is subject to the availability of treaty provisions. The Netherlands is a party to the New York Convention of 1958.

11.3 Arbitration is considered to be especially appropriate when the arbitration panel must have specific knowledge of the business or technical environment involved in a case. Arbitration under the rules of the Netherlands Arbitration Institute is slightly more expensive than dispute settlement through the Dutch courts.

Generally, litigation in the Dutch courts is quite efficient and very reliable. The disadvantage is that rulings from certain courts take an extremely long time to obtain due to very heavy caseloads.

12. OTHER ISSUES

12.1 In exceptional cases, a clause regarding the allocation of attorney's fees in an asset acquisition agreement is made. The main rule, however, is that each party bears its own costs.

12.2 In the Netherlands, laws or regulations similar to the Bulk Sales Laws in the United States do not exist.

12.3 Due to the existence of significant differences between the U.S. law system and the European continental law system, considerable differences exist in the manner in which an acquisition is prepared and negotiated. These responses to the questionnaire support this comment. The differences emerge mainly when comparing a U.S.-style document with a Dutch-style document, especially in connection with the in-depth, detailed provisions. There is a trend in the Netherlands toward the preparation of more detailed contracts, however. In practice, contract documentation prepared in the United States is suitable as a basis for an acquisition in the Netherlands, provided that the text is rewritten when typical Dutch law principles must be reflected. (But see Subsection 2.1.)

New Zealand

Contributed by Robert F. McLean, Simpson Grierson

1. ASSET VERSUS SHARE PURCHASE

1.1 The major consideration in choosing an asset purchase over a share purchase is the desire to avoid acquiring a company's history (i.e., the avoidance of successor liability). This is especially important in relation to taxation, employment and environmental liabilities. Secondary considerations include the possibility of acquiring assets at an appropriate value for tax and depreciation purposes and "selecting" or "carving out" relevant or irrelevant assets.

A consideration in buying assets is that, in New Zealand, the purchase of shares is exempt from the Goods & Services Tax (GST). GST is a value added tax (VAT) similar to United Kingdom VAT. Since May 20, 1999, stamp duty (i.e., conveyance tax) has not been payable on any transaction.

A final issue is regulatory clearances or approvals. There is little difference between a share and asset purchase in this regard. The types of assets and amounts involved that trigger governmental concern (see Section 3) generally apply equally to a share or asset purchase, although this may depend upon the nature of any land involved in the transaction.

1.2 There are distinctions between the acquisition of substantially all the assets of a company and the acquisition of the shares of the company, as follows:

- In general, a business acquisition by way of asset purchase does not entail the acquisition of corporate liabilities, unless they pass with a particular asset by law or are contractually assumed or assigned by the parties.
- In New Zealand, the acquisition of a business by way of asset purchase is normally "zero-rated" for GST purposes so long as (a) the acquisition is the sale and purchase of a going concern, (b) the parties agree in writing that this is the case, and (c) the seller and the buyer qualify. The sale and purchase of shares is exempt from GST. GST is, therefore, neutral for both sorts of acquisitions, although the parties must carefully adhere to the qualifications for a going concern business sale of assets.
- Tax considerations are obviously different between an asset purchase and a share purchase, as the taxation history of the corporation whose shares are acquired comes with the shares. As is true in many jurisdictions, any tax losses that may be available are not carried forward unless there is at least forty-nine percent shareholder continuity. A further issue in New Zealand relates to the ability to attach tax credits to distributions. At least a sixty-six percent shareholder continuity is required if the credits are to be carried forward and available to the purchaser. Apart from the usual differ-

ences between a seller and buyer concerning the allocation of value to the assets being sold and purchased, little—if any—taxation history attaches to any asset transferred or assigned in New Zealand.

- In New Zealand, important exceptions to the general statement that liabilities do not pass with the sale and purchase of business assets include environmental liability for contaminated sites and liability for building safety, use and construction. (See Section 5.)
- Of increasing importance in acquisitions are cases where it is necessary to structure the transaction as a share purchase to avoid the need to seek consent from an unwilling counterparty (when the obligations of the seller are to be assumed by the buyer) or where there is a prohibition against assignment without consent. In this regard, it is not uncommon for contracts to provide that a change of control of a contracting party requires the consent of the counterparties.

1.3 Assuming that the asset acquisition, although of only part of the assets, is still an acquisition of a business as a going concern, all the above considerations still apply (i.e., there is little difference if only part of the business is purchased). If, however, the purchase does not involve the purchase of a business as a going concern, then liability for GST would arise.

2. FORM OF DOCUMENTS

2.1 On the basis of its table of contents and description, the Model Asset Purchase Agreement is a form reasonably familiar to commercial lawyers in New Zealand. In any specific area, changes may need to be made to some of the wording and clauses. The laws of New Zealand generally do not dictate a specific form of agreement, although when statutory approval of a transaction may be required, it is recommended that, as a general rule, the language and forms used by the parties reflect the requirements of the legislation.

2.2 A company may transfer its assets by way of one document or a variety of conveyancing documents, depending upon the nature of the assets being conveyed. Any chattel may be transferred by way of delivery and no particular form of document is prescribed for such a transfer. That, however, is a general statement. In a business acquisition context, it would be considered unusual *not* to have a document of transfer (usually the sale and purchase agreement itself) that evidences the transfer of chattels.

Other assets—particularly those controlled by statute or regulation or maintained in a Registry (such as fisheries, trademarks, copyrights, real estate, registered ships, motor vehicles, dangerous goods, certain operational licenses and patents)—require special forms, including written evidence of the transfer or compliance with statutory procedures to achieve a valid change of ownership, registration of the transfer or recording on a statutory register. New Zealand follows common law principles for the assignment of contracts: There is a prima facie assumption that a person may freely assign the "benefit" of a contract unless the parties expressly agree otherwise. In contrast, the "burden" of a contract cannot be assigned in the true sense without the consent of the "beneficiary" of that burden. The burden of performance can be addressed by way of subassignment or subcontract.

2.3 The form of the document makes no difference in the tax effects of the transfer. The terms of the transaction, however, can be critical in establishing an allocation of the price paid for a particular asset (e.g., land, chattels or intellectual property). The terms should be clear on the allocation of the price to particular assets; otherwise, tax issues arise and the Inland Revenue Authorities may challenge values for depreciation purposes of other assets, particularly intellectual property.

2.4 Generally, the transfer of a business is not itself registrable. Rather, the transfer of specific assets of the business—if they are on a register or controlled or prescribed by statute or regulation—require registration. Examples include land and motor vehicles.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Government approvals regarding foreign investment for any transfer, approvals of specific bodies within a seller (e.g., board of directors or the shareholders) or administrative filing procedures may all need to be observed or undertaken on or before an acquisition in New Zealand. Foreign investments may need to take account of the New Zealand Overseas Investment Commission (OIC) and the regulations under the Overseas Investment Act 1973.

"Major transactions" proposed by corporations may require prior filing or notification to the New Zealand Stock Exchange if the seller is a listed company. More generally, major transactions may also require a seller to comply with the requirements applicable for approvals by boards of directors or shareholders. Subject to compliance with OIC and antitrust legislation (the New Zealand Commerce Act of 1986), administrative filings before the acquisition are not required.

3.2 Generally speaking, no business activities are subject to special regulations that might prohibit nonnationals from engaging in them, although certain industries (such as the telecommunications industry) may be subject to restrictions or requirements for obtaining necessary rights or licenses. Under the Overseas Investment Regulations, the acquisition of certain classes of land is a specifically controlled issue. Controls are placed on the disposition of littoral islands and certain other sensitive lands as well as lands of a certain size. In general, a formal consent procedure must be followed for the acquisition of assets by an overseas person involving: (a) land with a combined area in excess of five hectares, (b) land with an area of over 0.4 hectares that includes or adjoins the foreshore, (c) land with an area of over 0.4 hectares on an offshore island, which includes or adjoins lakes or reserves or other sensitive land areas and (d) any land acquisition over a value of NZ$10 million.

For assets other than land, OIC consent is required when a foreign buyer:

- acquires or takes control of twenty-five percent or more of the securities of another person (including increasing the proportion of ownership or control when the foreign buyer already had twenty-five percent), when the consideration exceeds NZ$50 million;
- spends NZ$50 million in establishing a business;
- acquires property (including goodwill and other intangibles) used in carrying on a business in New Zealand when the consideration exceeds NZ$50 million; or
- acquires securities in a land-owning person, which results in a land-owning buyer acquiring twenty-five percent or more of ownership or control (or increasing ownership or control if the buyer already has twenty-five percent) in a land-owning person.

There are a number of exceptions to these requirements. OIC's current policy is that, if an acquisition or investment would be beneficial to New Zealand, consent will usually be given reasonably quickly. The criteria for consent are more stringent if farmland is involved, requiring consideration of whether the investment will result in substantial and identifiable benefits to New Zealand or part of New Zealand. Also, approval for the acquisition of farmland is not granted until the land—or securities in a company or body corporate that owns or controls farmland—is offered for sale on the open market (although this requirement can be waived). There is ongoing monitoring to ensure compliance with any conditions associated with granting consent.

The Minister of Fisheries, under the Fisheries Act of 1996, controls the extent to which annual fisheries catch entitlements, fishing quotas and provisional catch history are allocated to foreign companies. The Minister grants permission for an interest in fisheries rights to be allocated to an overseas company only if it is in the national interest.

Certain other asset-specific activities are controlled, but the focus is not so much on nonnational participation as on other factors. Certain ownership rights are, for example, expressly reserved to the New Zealand Maori. Other investments are subject to license procedures or strict environmental controls (e.g., mining and oil exploration). Foreign participation in these areas is not generally proscribed but may be a relevant factor.

4. UNFAIR COMPETITION

The Commerce Act of 1986, similar to the Hart Scott-Rodino antitrust law, is the New Zealand enactment that relates to the competition aspects of mergers and acquisitions.

The basic purpose of the Commerce Act is to promote competition in markets. Part III of the act deals with business acquisitions. Broadly speaking, the regime puts the onus on a person who proposes to acquire assets of a business or shares to notify the Commerce Commission and seek clearance or authorization for the acquisition. The government has recently amended the current provisions of the Commerce Act by replacing the concept of dominance with a general competition test, which prohibits business acquisitions that have the effect of substantially lessening competition in a market. This change brings the New Zealand law in line with the equivalent Australian provision.

The emphasis has therefore now changed to an assessment of the impact of the new merger or acquisition on the state of competition as a whole in the market. In this regard, a merger analysis under the new threshold is likely to consider whether the merger is likely to result in anticompetitive behavior in the relevant post-merger market. There is likely to be a period of uncertainty as the Commission works out the parameters of the new test.

In very broad terms, the Commerce Act and Hart Scott-Rodino are parallel. There is a considerable onus on the buyer and target company to ascertain whether the acquisition will lead to a substantial lessening of competition in a market. In other words, the seller and buyer must assess whether they fall within the ambit of the Act.

5. SUCCESSOR LIABILITY

5.1 Liability for environmental damage can follow the owner of interests in land; therefore, transferees of interests in land may be liable. This liability can extend to both the owner and lessee of the land. New Zealand's environmental legislation, in particular the Resource Management Act of 1991, provides that liability for environmental matters can attach to the owner or occupier (lessee) of land in addition to the perpetrator of any environmental offense. When there is a contaminated site and the perpetrator cannot be identified, the authorities will look to the owner or occupier.

5.2 The general rules in New Zealand follow, broadly, those of the United Kingdom (i.e., the sanctity of contract prevails). New Zealand has a privity-of-contracts regime created by the Contracts Privity Act of 1982, which confers rights on specifically nominated "beneficiaries" to a contract who are not parties to it. In addition, some consumer protection laws (such as the Consumer Guarantees Act of 1993) give noncommercial consumers broad rights. There is, however, no general principle that a person or entity not a party to a contract can be bound to perform or undertake obligations in relation to goods and services provided by another. This statement is, of course, subject to the overall qualification that a seller and buyer may agree, as a matter of contract between themselves, that the buyer will assume the burden of performing a particular contract or the burden of assuming liability for particular products or services.

5.3 The principles discussed in Subsection 5.2 also apply to a buyer's obligation for outstanding orders. Unless the buyer becomes contractually obligated, there is no such duty. The seller remains contractually liable to perform unless it is released or a novation occurs.

5.4 A similar result applies to warranty claims that arise before the date of the acquisition. The buyer is not liable unless, as a contractual matter between the buyer and seller, the buyer assumes the burden of meeting the warranty claims.

5.5 Apart from environmental liability (see Subsection 5.1), there are several instances in which a buyer or lessee of real property could be liable for obligations or defaults of the previous owner or lessee. These include liability for:

- unpaid local municipal taxes and charges (known as rates in New Zealand);
- unpaid rent or breaches by an assigning lessee (though as a practical matter, most lessors will not consent to assignment of a lease when the lessee is in breach);
- unauthorized—or improperly certified or completed—building works, including ground works;
- incomplete or illegal safety features in buildings;
- past noncompliance with municipal bylaws, when the occupier is prima facie liable; and
- any deficiencies of major equipment items (such as boilers, cranes, boats, aircraft, etc.) when the current owner or occupier may require licenses or minimum statutory operating standards. (Shipping and aviation are good examples—the operation of plants often requires licenses, and transfer of these may be subject to compliance with performance, operating and safety standards.)

5.6 There are no other liabilities or obligations of a seller that automatically transfer to a buyer of assets in New Zealand. (But see Section 7.)

5.7 Whether a buyer conducts environmental audits or due diligence investigations generally depends upon the value of the transaction, perceived risks and the likelihood for potential loss of bargain if there is an undisclosed defect. The New Zealand starting point is caveat emptor; hence, for commercial transactions of any size, due diligence—and if land or interests in land are involved, an environmental audit—is strongly recommended. If there is any indication of past industrial use and possible contamination, then an environmental audit is virtually mandatory.

Although due diligence investigations are strongly recommended, they can be watered down by the presence of strong seller warranties or by the bargaining positions of the parties. An increasing focus in New Zealand is on the duties of directors of companies in "major transaction" areas. This effectively means that most company directors who face a major transaction insist that the value and risk of the transaction be supported by the best due diligence information that can be made available to them.

6. PUBLIC RECORDS

The public records in New Zealand that would disclose information about a seller or its assets are as follows:

(i) The New Zealand Land Registry system is comprehensive and generally works well in providing information about the ownership of immovable property. It is a Torrens system and, aside from the area of Maori land (which is also capable of being searched through a separate register system, and which would not generally be of concern to buyers of businesses), the land transfer system in New Zealand is both easily accessible and transparent.

(ii) Information about mortgages on, and other charges affecting, immovable property is available as part of the Land Registry system. Although it is not compulsory to register a mortgage or charge on real property, most are registered in practice because, otherwise, priority is lost and the mortgage or charge does not appear as an encumbrance on the certificate of title to a property. The register copy of a certificate of title is available for public searching. If a charge on real property is created by a corporate entity, details of that charge must also appear on the corporate register at the Companies Office (Corporate Affairs Registry).

(iii) Information about environmental issues affecting real property is only partly available. A comparatively recent statutory procedure enables an interested party to obtain a land information memorandum from the relevant Territorial Authority. The procedure is very useful but limited in that only such information as the relevant Territorial Authority holds or has on file will be disclosed. Thus, unknown or inherent defects and problems would not appear. Current zonings and other geotechnical building and environment matters are generally obtainable.

(iv) Information about liens and encumbrances on movable property is available only if such claims must be registered. The only register currently maintained deals with motor vehicles.

(v) Information about the ownership of intellectual property is available to the extent that there is a register. There is no copyright register in New Zealand, although there is an extensive Copyright Act. Trademarks, service marks, patents and designs each have a statutory regime and a statutory register. New Zealand does not have a register as such for trading or business names beyond the name under which a company is registered at the Companies Office (Commercial Affairs Registry).

(vi) Information about pending litigation can be accessed through Court Lists, which are published, but details of litigation are not made available by the courts or the Court Registrars or Registries (except in very unusual circumstances) to non-litigants. Court Lists are not necessarily published in a broad or media sense; it is necessary to ascertain at each Court Registry if any litigation has occurred.

(vii) Information about the standing or due incorporation of the selling company is only partly available. The information required by the Commercial Affairs Registry in relation to each individual company is often limited or confined to the last year's financial accounts. Entities listed on the Stock Exchange, which must publish financial details, are in a slightly different category, but New Zealand has no documents equivalent to the North American certificates of incumbency or good standing.

(viii) Corporations listed on the Stock Exchange overseas companies, subsidiaries of a company or body corporate incorporated outside New Zealand and certain other companies must publicly report or file their accounts.

7. LABOR MATTERS

7.1 In an asset purchase, the seller and buyer are likely to enter negotiations regarding whether the seller's employees will be offered employment by the buyer and on what terms. It is common in New Zealand for employment contracts to provide that, when an employee is offered employment with a buyer on the same or substantially similar terms and conditions of employment, including benefits such as superannuation (pension), the seller is not liable for severance payment for the loss of employment. (The phrase "same or substantially similar" includes not only the level of remuneration but also the employee's job function, status and physical factors such as location.) If the employment contract does not give the seller the right to transfer the employee, then the employee may bring a claim against the seller for severance compensation for wrongful termination of employment, provided that a right to such a payment is expressly provided in the employee's contract. Individual employment contracts and collective bargaining agreements must be carefully examined.

7.2 It is possible (i.e., it is not illegal) to require the seller to terminate certain employees as a condition of closing the transaction, but it is unlikely that a buyer would request this. Instead, a buyer would simply require the seller to retain certain employees, and, thus, the seller would retain their severance costs. Requiring the seller to terminate the employment of some employees as a condition of closing the transaction could be regarded as wrongful interference in a third party's contract, which is a concept common to most common law jurisdictions. The buyer would simply exclude the particular employment contract or employee from the acquisition, leaving it to the seller to do whatever was required under the contract with that individual.

7.3 A buyer is bound by the seller's obligations to its employees in connection with pension plans and retirement, health or other benefits, but only to the extent discussed in Subsection 7.1. There is no statutory duty to continue such benefits, except (and this applies to all employees) those relating to the compulsory accident insurance scheme (Accident Compensation Scheme) that is levied on all employers and employees.

7.4 It is possible to allocate responsibility between the seller and buyer for severance payment obligations, but again, for the reasons discussed in Subsections 7.1 and 7.2, this would be unusual. For taxation purposes, a severance payment is deductible only by an employer who employs the employee in income-producing work. It follows that a buyer would rarely, if ever, agree to assume liability for severance payments to employees other than its own. If the buyer wishes, it can offer employment on different terms, but this may trigger severance claims against the seller (as the type of clause discussed in Subsection 7.1 would be ineffective). Consequently, this approach is also not the norm.

7.5 Employment contracts can be individual or collective with varying degrees of input by trade unions or other authorized bargaining agents. There is a statutory obligation to consult with either employees or bargaining agents as part of a statutorily imposed good-faith duty of an employer to its employees. This would be a seller's obligation. When severance is likely, there may be obligations on the employer to consult with the employees as part of the duty of fair dealing.

Parties to an employment relationship must deal with each other in good faith and must not do anything, directly or indirectly, to mislead or deceive each other or that is likely to mislead or deceive each other. It expressly provides that the duty of good faith applies to:

- consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees collective employment interests, including the effect on employees of changes to the employer's business;
- a proposal by an employer that might impact the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business;
- making employees redundant.

An employer has at least the following obligations:

(i) When consulting with staff about collective interests (including changes to an employer's business which might affect employees); and/or

(ii) Where an employer has a "proposal" which might impact employees (such as selling or transferring part or all of the business) or making staff redundant, then:

the employer must not do anything to mislead or deceive employees or their union, or act other than in good faith.

7.6 Once employees are transferred, a buyer may not materially change an employee's terms of employment without the employee's consent. If the buyer does make such a change, it may constitute a unilateral rewriting of the employee's employment contract, leading to a claim for unjustified disadvantage, and, in some cases, constructive dismissal with the consequent obligation to pay compensation. There is, however, nothing to prevent a change of employment terms and conditions by mutual and fair negotiation. Employers may wish to take particular care to avoid employee claims of undue pressure or unfair bargaining when negotiating changes to employment contracts, particularly when there is a change in the ownership of the business.

7.7 As part of a sale and purchase agreement, a buyer may need to assume some of the accrued liabilities related to employees transferred to it as a result of the acquisition. As yet, a buyer is not entitled to a deduction for paying liabilities accrued before the purchase (e.g., accrued leave). Some payments are by law the responsibility of only the employer for the time being (i.e., the contracting employer at the time). There are, however, some very serious exceptions. A particular trap, which often can be revealed only by probing due diligence, is the possibility of the Accident Compensation Corporation "back-levying" a business (i.e., making a retrospective reassessment when employees have "come across" from a seller to a buyer). The Accident Compensation Corporation can, on a five-year cycle, back-levy businesses for recovery of the true cost of sustaining the Accident Compensation Corporation scheme. This is a prime example of how a liability can "follow" an asset—the asset being the employment contract. The back-levying is made against the current employer of the business. There are often difficulties in allocating a reasonable degree of risk between the seller and the buyer in this area.

8. PLANT CLOSING LAWS

New Zealand has no statutory provisions similar to the U.S. WARN Act. Individual or collective employment contracts may stipulate requirements and matters that must be observed between specific employers and their employees.

9. ASSIGNMENT OF CONTRACTS

Contracts are not transferred automatically with assets.

10. NONCOMPETITION

10.1 The New Zealand common law on restraint of trade closely follows United Kingdom law but without the overlay of EC law. The basic premise is that covenants in restraint of trade are prima facie void. The courts, however, uphold restraints that are reasonable. Problems of enforceability occur when establishing the parameters of reasonableness, whether they relate to time, scope, geography or extent of activity. If reasonable (and not illegal as contrary to competition law), a noncompetition clause can be enforced against a seller and also against the seller's principals and employees if they are parties to the agreement and receive consideration for their promises. The standard of reasonableness may be more stringent for employees than for principals or sellers.

10.2 Although there are legal limitations on the enforceability of noncompetition clauses, there are no registration requirements or notification procedures, unless the restraint would constitute a breach of competition law, thus requiring authorization.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 There are no restrictions on choosing applicable law or jurisdiction in asset acquisition agreements. The parties may contract for both, although the overriding discretion of the court must be taken into account. As in the United States, there are rules of forum conveniens. Thus, if a court in the exercise of its discretion feels that the chosen law or jurisdiction has no proper or direct relationship to the subject matter of the contract, then the court can override both choices. New Zealand law differs little from U.S. law in this regard.

11.2 Arbitration is possible. New Zealand reenacted its Arbitration Act in 1996; the act became effective in 1997 and replaced the 1908 legislation. The 1996 Arbitration Act is largely based upon the UNCITRAL Model Law. A court can reexamine any award, but the parties have certain options to exercise in that regard. Judicial intervention is now more circumscribed than in the past, although still possible.

11.3 New Zealand now has a "commercial list" based in Auckland, the major commercial center. This is a court list that is proactively managed by the judges and courts. If an action is included in that list, then the length of time a court action may take and thus the costs of delay can be drastically reduced. It is a form of hands-on management that is more prevalent in North American jurisdictions than, for example, in the United Kingdom. Arbitration has often been regarded as a less expensive and swifter dispute resolution technique than litigation. With the increase of technically complex matters as the subject of disputes, however, arbitration can be more expensive than court proceedings. Therefore, the assumption that arbitration is necessarily better and cheaper than court proceedings is often questionable.

There is a strong trend in New Zealand toward alternative dispute resolution (ADR) with tacit or active court support. Choosing among arbitration, court proceedings or ADR often comes down to assessing the most appropriate dispute resolution technique or forum as well as the litigants' objectives. New Zealand courts (especially in commercial list matters) have been known to give strong indications to the parties that they should be using an alternative forum to resolve issues that the court believes should be negotiated rather than litigated. In the context of an asset purchase, where the disputes often arise from accounting matters or stock-taking matters, there is a strong preference for ADR or arbitration because it is normal for experts in the stock-taking area or accounting area to resolve these types of issues. A judicial forum is appropriate for more complex issues surrounding, for example, breach of warranty claims.

12. OTHER ISSUES

12.1 It is typical to have a clause stipulating that each party will bear its own costs.

12.2 [No response.]

12.3 New Zealand law fits reasonably well with North American concepts and laws. (There is, however, no Uniform Commercial Code in New Zealand.) In the finer details, of course, there is an enormous range of differences between New Zealand and North American law, but no more than would be expected in differing jurisdictions. It would be dangerous to generalize further.

Individual assets and situations can differ enormously, depending upon how they relate to local legislation. Various procedures are alien to the New Zealand environment. For example, escrow concepts are not practiced as widely in New Zealand as in North America. Another consequential matter that must be understood is how the law of contracts operates in New Zealand, including when a contract can be cancelled or terminated and the circumstances under which cancellation or termination may be effective or ineffective. Speaking broadly, the New Zealand Contractual Remedies Act of 1979 codifies common law positions on contracts, but there should not be an assumption that contractual procedures are the same in New Zealand as in other common law jurisdictions.

On 1 July, a new Takeover Code will come into force, repealing the relevant sections of the Companies Amendment Act 1963 in this regard. The fundamental rule underpinning the Code is that a person must not increase his or her holding or control of voting rights in a "Code Company" beyond twenty percent of the shares on issue other than in a manner permitted by the code. (A "Code Company" is a company that is, or that was in the previous twelve months, listed with the Stock Exchange or has more than fifty shareholders and more than $20 million in assets.) The Code provides that offers that would increase the holding or control of voting rights in a Code Company beyond the twenty-percent threshold must be made to all shareholders and, if the offer is made for more than one class of security, the consideration and terms offered must be reasonable as between classes.

Norway

Contributed by Anders Arnkværn, Thommessen Krefting Greve Lund AS

1. ASSET VERSUS SHARE PURCHASE

1.1 Important legal aspects in determining whether to execute an asset acquisition or a share purchase typically include the following:

- As a general rule in a purchase of assets, the assignment of the seller's contracts to the buyer requires the prior consent of the contract party. Thus, if the seller holds important favorable contracts, a purchase of shares may be the preferred route. Assignment of the shares, however, may, in some instances, also require prior consent from a contract party. This must be examined in each and every case.
- When acquiring a business through a purchase of assets, the buyer is generally responsible for the employees of the business. In this regard, purchase of assets has more or less the same effect as purchase of shares where the employer remains the same entity and is thereby responsible for the employees.
- The purchase of shares means that the acquired company continues to be responsible for its existing liabilities, even if they were unknown to the buyer at the time of the acquisition. A buyer of assets may also become responsible for some of these liabilities, such as the liability relating to real property that was contaminated.
- Financing the purchase may be less complicated when buying assets because a buyer may mortgage or pledge the acquired assets as security, making leveraged buyouts easier. A purchase of shares is subject to the restrictions set forth in the Limited Liability Companies Act of 1997 and the Public Limited Liability Companies Act of 1997 relating to financial assistance from a company in connection with acquisition of its shares and a company's ability to provide guarantees or credits to its shareholders.
- Tax Aspects. An important consideration when acquiring a business in Norway is the tax consequence of the transaction. For a buyer, the most important issues are normally the possible step-up basis for depreciation purposes and the future position for withholding taxes. It is not possible, however, even as a point of departure, to say that, due to tax consequences, a purchase of assets is more favorable than a purchase of shares or vice versa. The tax positions of the buyer and seller must be examined carefully before establishing the exact transaction structure.

A buyer usually prefers to purchase the seller's assets because the buyer thereby obtains a step-up basis for tax purposes on the relevant assets. Any amount paid for the business exceeding the value for each of the particular assets is treated as goodwill, having a fixed rate of depreciation of thirty percent applied to the declining book value at the end of the year. Other rates vary from zero to thirty percent.

The seller's position depends upon the seller's tax basis for the shares and the assets, respectively. In many instances, a seller has a higher tax basis on the shares and would therefore prefer to sell shares. If the seller's tax basis on the shares is not higher, and if the seller is making a profit on the sale, then it may be more interested in selling the assets because it would then be entitled to defer the gain resulting from the sale.

The consideration paid for the assets must be allocated to each of the acquired assets to determine the taxable gain or loss. This allocation is important for the buyer, as it affects the depreciation to which the buyer is entitled.

Distribution of the gain to Norwegian shareholders is generally taxable for the shareholders at a rate of twenty-eight percent. However, under the Norwegian imputation credit system, the shareholder is entitled to an imputation tax credit equal to the tax paid by the company on the profits being distributed. Corporate shareholders are entitled to a full imputation credit, and dividends received are thus de facto not being taxed. Personal shareholders are only entitled to an imputation credit equal to 17/28 of the tax paid by the company on profits being distributed. Consequently, dividends received by personal shareholders are de facto taxed at a rate of eleven percent.

In general, a seller that is not resident in Norway for tax purposes has no tax obligations in Norway on capital gains arising from a sale of shares. A seller may, therefore, depending upon the tax consequences in the country where the seller is resident for tax purposes, prefer to sell the shares of the business rather than the assets.

There is no Norwegian stamp duty on the transfer of shares, nor is there normally any value added tax (VAT) or investment tax on the transfer of assets or shares, provided that, in the case of assets, they are transferred as part of a business as a going concern. There are certain transfer taxes on a transfer of assets, by far the most important of which is a 2.5-percent transfer tax levied on the market value of real estate.

1.2 The approval of governmental bodies is normally triggered when purchasing both assets and shares. Other main differences between acquisition of shares and acquisition of assets are described in Subsection 1.1.

1.3 Distinctions must be made between the purchase of all the assets of a business, the purchase of a separate part of a business and the purchase of separate assets. A purchase of assets that is not a business acquisition (i.e., a purchase of a going concern) has other legal effects (e.g., the tax consequences might be less favorable and there are no liabilities toward the employees).

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement could be used in Norway. However, if an acquisition agreement imposes burdens on, or is onerous to, one of the parties (initially or as a result of changed circumstances) and this is deemed to be grossly unreasonable, then the agreement may, pursuant to the Norwegian Contract Act of 1918, be set aside or revised. Furthermore, pursuant to Norwegian contract law, the parties are generally responsible for their gross negligence or willful misconduct in connection with the acquisition, regardless of the content of the agreement.

2.2 The transfer of real property, ships, oil rigs or aircraft requires a deed of conveyance (bill of sale) to be issued and filed with the respective registers of such assets. The transfer of other assets can be made by one document.

2.3 The form of the document makes no difference in respect of the tax effects of the transfer; the actions of the parties and the realities will be decisive.

2.4 Certain steps must be taken to gain protection against third parties and to provide the buyer with the legitimation to dispose of the object legally. The transfer/assignment of claims must be notified to the debtor to obtain such legal protection. The transfer of real estate must be registered with the relevant local land register. The transfer of ships and oil rigs must be registered with one of Norway's centralized ship registers, NOR (national) or NIS (international), whereas the transfer of aircraft must be registered with the Norwegian Civil Aircraft Register.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Statutory limitations on foreign ownership of Norwegian businesses have been abolished and replaced by the Norwegian Business Acquisition Act of 1994, which covers most industries. Pursuant to that act, an acquisition of at least one-third of a business that (a) has more than fifty employees, (b) has an annual turnover exceeding NOK 50 million or (c) has received at least NOK 5 million in public funding for research and development for at least one project during the last eight years, must be notified to the Ministry of Trade and Industry (Ministry).

The parties must notify the Ministry within thirty days of entering an agreement for the acquisition of the assets or within thirty days of the buyer obtaining title to the assets. The Ministry has thirty days during which it must advise the parties if it wishes to undertake a closer examination of the acquisition. This time period is extended by fourteen days if the employees submit a statement on the acquisition to the Ministry. A closer examination may be undertaken if the Ministry considers that the acquisition could have significant negative effects for the enterprise, the business sector or the society in general, including any effects on employment. The acquisition will be approved unless the public interest suggests otherwise. The Ministry can prescribe conditions for its approval of the acquisition, but no conditions may be imposed upon grounds of nationality.

A concession (i.e., a permit) from the Ministry of Agriculture is necessary, pursuant to the Norwegian Concession Act of 1974, when purchasing (or leasing) real property in Norway. A concession is not required if the purchase must be notified pursuant to the Norwegian Business Acquisition Act. Furthermore, no concession is required when purchasing small properties with buildings, provided the property is smaller than 5,000m^2. The Kingdom of Norway or counties in Norway may have preemptive rights pursuant to the Norwegian Concession Act. The seller may, subject to certain conditions, withdraw from the contract if these preemptive rights are exercised; otherwise, for buyers not resident in Norway, this exception will only apply, provided that (i) the buildings on the property are necessary for the buyer's business or services, or (ii) the property shall serve as the buyer's principal residence. The Norwegian Concession Act is nondiscriminatory toward foreigners (except in relation to vacation homes and similar items).

A concession from the Ministry of Trade and Industry is necessary, pursuant to the Norwegian Industry Concession Act of 1917, when purchasing businesses that have certain rights with respect to waterfalls and mines. The Norwegian Industry Concession Act is nondiscriminatory toward foreigners.

Other businesses requiring special approvals or concessions include, but are not limited to, those involving petroleum (oil and gas), energy, fishing, limestone and quartz quarries, insurance, investment services, savings banks, commercial banks, stockbrokers, personal data information and market research and opinion polls.

The disposal of a company' s assets normally requires the approval of the board of directors. If all, or the major part of, the assets of a company are sold, it is advisable that this be approved by the general meeting of shareholders. If the disposal of the assets is contrary to the company's articles of association (e.g., the objects of the company), the transaction requires the approval of two-thirds of the votes cast, as well as two-thirds of the shares (share capital) represented at the general meeting. The approval of the corporate assembly (a corporate body mandatory for larger companies) is necessary if the disposal of assets will result in fundamental changes or a restructuring of the company.

3.2 There are few specific regulations in Norway that either prevent nonnationals from engaging in business activities in Norway or require special approvals for nonnationals. Regulations of fishing activities is one of the most prevalent examples.

4. UNFAIR COMPETITION

The Norwegian Competition Authority (Konkurransetilsynet) may, under the Norwegian Competition Act of 1993, prohibit or impose conditions for allowing a business acquisition if, in its opinion, the acquisition will reinforce or result in a significant restriction on competition.

A notification of the acquisition is not mandatory, but if an intervention from the Competition Authority is likely, it is advisable to make such a notification. The Competition Authority will usually not investigate an acquisition if the market share of the parties is below forty percent or if the combined market share of the three largest enterprises in the relevant market, including the parties, does not exceed sixty percent. Before taking any action, the Competition Authority will seek an amicable agreement with the buyer. Intervention by the Competition Authority to review an acquisition is subject to a six-month time limit, commencing on the completion of the acquisition. The Competition Authority may intervene within one year, however, if special grounds exist.

The EC competition rules apply in Norway as a result of the European Economic Area (EEA) agreement.

5. SUCCESSOR LIABILITY

5.1 Pursuant to the Norwegian Pollution Act of 1981, actions may be taken toward the owner of an asset for any environmental liabilities relating to such asset. If the Norwegian Pollution Authority believes that certain actions must be taken (e.g., a polluted area must be purified or refuse must be removed), the owner is, for all practical purposes, subject to the order, even if the pollution originates from circumstances that occurred before the owner's acquisition of the real property, and even if the responsibility, pursuant to the asset purchase agreement, is on the seller of the asset. The same may apply for liabilities for damages due to pollution. When negotiating the acquisition agreement, the buyer may seek an indemnity from the seller or from another person responsible for the circumstances causing the environmental liability exposure.

Similar actions may be taken by the Norwegian Labor Inspection in connection with infringements of the Norwegian Employment Act of 1977.

5.2 As a general rule, a buyer of assets is not responsible for products or services sold before the acquisition.

5.3 As a general rule, a buyer of assets does not have any obligations for fulfilling outstanding orders, unless otherwise agreed between the parties.

5.4 As a general rule, a buyer of assets is not responsible for warranty claims that originate from circumstances prior to the acquisition, unless otherwise agreed between the parties.

5.5 An owner or lessee may be subject to actions taken by the Norwegian Pollution Authority due to infringements of the Norwegian Pollution Act (see Subsection 5.1), or to actions taken by the Norwegian Labor Inspection due to infringements of the Norwegian Employment Act of 1977.

5.6 We know of no other liabilities or obligations of a seller that automatically transfer to a buyer of assets. The assets may, however, be subject to liens that will follow the assets, including unregistered liens imposed by law.

5.7 It has not been customary to include environmental audits when performing a due diligence investigation, although these are becoming more common. The important factors in determining whether to perform such a review include the size of the acquisition, the type of business concerned and whether real property is part of the assets being acquired. There are no due diligence investigations specific to Norway that would not normally be included in an ordinary due diligence.

6. PUBLIC RECORDS

- **(i)** Information about the ownership of real property and mortgages and other charges or rights affecting real property is public information and may be obtained from the local land registers.
- **(ii)** See Subsection 6(i).
- **(iii)** A centralized register for environmental issues affecting real property does not exist.
- **(iv)** There are centralized registers for aircraft, ships and oil rigs. Information about liens and encumbrances on movable property may be obtained from a central register, but this information will not disclose all liens (e.g., information on the seller's chattel mortgages or pledges when possession of the secured object is given to the pledgee).
- **(v)** There is a central and public register of patents, trademarks and design rights.
- **(vi)** There is no central register providing information about pending litigation.
- **(vii)** The legal standing and continued existence of the seller may be verified with the Norwegian Register of Business Enterprises (Foretaksregisteret).
- **(viii)** Shareholders' information, including financial information, is public and available for all companies listed on the Oslo Stock Exchange. Shareholder information is also available in the Norwegian Registry of Securities (VPS) for companies that register their shares in that register. Furthermore, shareholders' registers and annual financial statements are available to the public in more or less all Norwegian companies.

7. LABOR MATTERS

The Norwegian Employment Act of 1977 has, as part of the EEA agreement, implemented EC directive 77/187/EEC relating to the protection of employees in transfers of undertakings. This directive strengthens the protection of employees in connection with individual contracts of employment. The directive is, however, only marginally relevant in dealing with collective agreements, which traditionally have been the main regulator in Norway for the protection of employees. The directive applies to legal transfers of an undertaking, business or part of a business.

7.1 Regardless of the structure of the transaction, and in both asset and share acquisitions, the buyer (with the exceptions discussed in Subsection 7.3) must directly or indirectly assume all responsibilities of the seller toward its employees when acquiring a business. The employment contracts must be changed to show the name of the new employer.

A distinction must be made between a purchase of assets as part of a running business (i.e., a going concern) and a purchase of part of the assets, as the latter does not result in any continuing obligation for the buyer toward the employees.

7.2 The purchase of a business is not itself a valid justification for termination of an employment contract. Consequently, an obligation on the seller to terminate some employees on this basis is not enforceable.

7.3 A buyer is responsible for any outstanding salary payments and vacation allowances as of the date of the transfer of the assets. For any such payments, the seller and buyer are jointly and severally liable. The seller, however, is in the event of an asset purchase solely responsible for any retirement pensions, disability pensions or pensions to related parties following death earned before the transfer date.

7.4 A buyer is, toward the employees, responsible for any severance payments that arise as a result of the purchase of the assets, regardless of any agreements between the seller and buyer. The buyer may, however, under the asset purchase agreement, be entitled to seek indemnification from the seller for any liability imposed upon the buyer.

7.5 According to the Norwegian Employment Act of 1977, a buyer of the assets of a Norwegian undertaking must, at the earliest stage possible, notify the representatives of the employees. There may also exist an obligation to notify employees as soon as possible pursuant to the general agreement governing the employment relation (i.e., an agreement between the employer's organization—NHO—and the employees' organization—LO).

If notification under the Norwegian Business Acquisition Act of 1994 is needed, the employees must have been informed at the earliest date possible and, at the latest, before the Ministry of Industry and Trade is notified. The protocol (i.e., record) from the meeting during which the employees were informed must be included in the notification to the Ministry. The employees are entitled to furnish the Ministry with their views on the acquisition.

7.6 The purchaser may change the terms of employment of the employees, within the limits of the Norwegian Employment Act, to the same extent as other employers.

7.7 See Subsection 7.3.

8. PLANT CLOSING LAWS

The Norwegian Employment Act of 1977 has implemented the EC directive 75/129/EEC as amended by 92/56/EEC. Mass layoffs are defined in the act as dismissals not related to the individual workers concerned of more than ten employees during a period of thirty days. The employer is obliged to fulfill requirements relating to information and consultation with the employees, the employees' representatives and the Norwegian Public Employment Service (Arbeidsformidlingen). The collective redundancies may, at the earliest, be executed thirty days after notice is furnished to the Public Employment Service, which may prolong the period for another thirty days, if this is considered necessary to reach an agreement between the employer and employees. Failure to comply with these requirements is subject to penalties. The employer may also be responsible for damages toward the employees, and the terminations may be deemed void and unenforceable.

9. ASSIGNMENT OF CONTRACTS

Contracts are not transferred automatically in a purchase of assets but need the consent of the contract parties. If a business is sold as a going concern, the right to a trademark is transferred to the buyer, unless otherwise agreed.

10. NONCOMPETITION

10.1 A noncompetition clause can be enforced against the seller, its principals and its employees.

10.2 A noncompetition clause is subject to several limitations under Norwegian law.

A noncompetition clause concluded with an employee or a director may, under the Norwegian Contract Act of 1918, be held void and unenforceable if a Norwegian court holds that it limits, in an unreasonable manner, the person's ability to carry on a profession or if the scope of activities covered by the clause or the geographical area of the restriction cannot be justified. A noncompetition clause concluded with principals and employees normally must be limited to one year, and occasionally two years, depending upon its scope of activities. If the noncompetition clause is concluded with a subordinate employee, it is enforceable only if the employee is in possession of information that, if utilized by the buyer's competitors, might cause damage to the buyer's business.

The Norwegian Competition Act of 1993 and EC Competition Law govern a noncompetition clause concluded with the seller. Such clauses are permitted and enforceable under Norwegian law if they are necessary to give the buyer the full value of the goodwill associated with acquiring the business. Pursuant to the Norwegian Competition Act, the Competition Authority may prohibit or impose conditions for allowing a business acquisition if, in its opinion, the acquisition will reinforce or result in a significant reduction of competition. The noncompetition clause will be regarded as an ancillary restraint to the business acquisition and will be permitted so long as, and to the extent that, it is necessary to protect the buyer.

The noncompetition clause must be limited in scope both in terms of time and the current geographic area of the seller's business. The limit is two years if only goodwill is transferred, and five years if both goodwill and know-how are transferred. These criteria are based upon EC Competition Law, and the Competition Authority has stated that it will follow the guidelines of EC Competition Law when assessing noncompetition clauses. The Competition Authority is not required to adhere to these guidelines, as it may, on a case-by-case basis, forbid noncompetition clauses that go beyond what is necessary to protect the buyer.

Registration of a noncompetition clause with any authorities is not required.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 In principle, the parties are free to agree upon the choice of law and venue/jurisdiction. If, however, the choice of law or jurisdiction is made to avoid mandatory Norwegian law, the choice may be void and unenforceable. The status on enforceability of the selected law, according to applicable treaties and conventions, must also be considered.

11.2 Arbitration is possible and may be a good alternative to the proceedings before the ordinary courts of Norway. An arbitral award is final and enforceable and may not, unless it is held to be void, be reexamined by a judicial body.

11.3 Arbitration in Norway is customary, efficient and well regulated and usually gives the parties a good examination by competent arbitrators.

12. OTHER ISSUES

12.1 A clause dealing with the allocation of attorney's fees is unusual in Norway.

12.2 [No response.]

12.3 Generally, Norwegian asset purchase agreements are considerably less extensive than American asset purchase agreements. The reason for this is that underlying Norwegian contract law, including the Norwegian Sale of Goods Act of 1988, applies to such transactions, making many of the provisions that are usually included in an American asset purchase agreement superfluous. The Norwegian Sale of Goods Act, based upon the United Nations Sale of Goods Convention, applies to the sale of movable property unless otherwise agreed between the parties, whereas the Norwegian Act on the Sale of Real Property of 1992 applies to the sale of land and buildings.

This contribution contains description of what we deem to be the most relevant Norwegian legislation. It will not necessarily cover all aspects of a specific transaction, and adoption of some principles described herein could be different in individual cases. Futhermore, the legislation could change. Local legal advice should therefore be sought if a transaction is considered in Norway.