Philippines

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1. ASSET VERSUS SHARE PURCHASE

1.1 The principal consideration for a buyer in choosing to purchase assets and not shares is protection against successor liability. Because a buyer of assets generally assumes no liabilities of the seller (except to the extent of perfected liens upon the assets), an asset purchase is typically preferred.

Taxes constitute a secondary consideration because taxes for an asset acquisition differ from those for a share transfer. In general, capital gains on a sale of assets are taxed at the corporate tax rate of thirty-four percent. A value added tax of ten percent is also imposed upon the purchase price of inventory and goods normally held for sale by the seller. Capital gains on a transfer of shares are taxed at approximately ten percent, unless the shares are listed and the transfer closed at a stock exchange, in which case only a stock transfer tax of 0.5 percent of the purchase price is imposed.

Under the most recent Tax Code, the corporate tax rate was reduced from thirty-five percent to thirty-four percent effective January 1, 1998, to thirty-three percent effective January 1, 1999, and to thirty-two percent effective January 1, 2000.

Documentary stamp taxes are imposed at varying rates on certain types of documents or instruments; thus, there may be some savings favoring one alternative over the other, but these taxes tend not to be major considerations in the choice of transaction.

1.2 The principal differences between an asset purchase and share purchase are successor liability and taxes, as discussed generally in Subsection 1.1. Those differences will remain, even if all or substantially all the seller's assets are the subject of the sale.

If the property or shares sold constitute all or substantially all the seller's assets, the seller must (a) obtain the approval of its shareholders holding at least two-thirds of its outstanding capital and (b) comply with the Bulk Sales Law, which imposes certain notice and filing requirements.

1.3 The answer under Subsection 1.2 would not change if only part of the assets were to be acquired. If, however, the property to be sold constitutes only part of the assets of the corporation and the sale would not render the corporation incapable of continuing its business, the board of directors, as it may deem expedient, may dispose of the assets without the corresponding approval of the stockholders of the corporation. In this situation, the Bulk Sales Law does not apply.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement may be used in the Philippines. Philippine law does not prescribe any specific form of agreement. The document must be notarized, however, because to bind third parties, the sale of certain types of property—such as real estate, automobiles and "credits"—is required by law to be in a public instrument. This requirement does not affect the form of the document. The term "credit" refers to any claim or cause of action for a specific sum of money. It is a debt considered from the creditor's point of view and includes accounts receivable.

2.2 Depending upon the type of property sold, it is useful to provide for separate and simpler implementing deeds of sale to facilitate registration, issuance of title certificates and payment of taxes.

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

2.4 Transfers of businesses need not be registered, except to the extent they result in the merger or consolidation of corporations involved in the transfer. A merger or consolidation is effective only when the Securities and Exchange Commission (SEC) issues a certificate of merger or consolidation upon a finding that the merger or consolidation is not inconsistent with existing laws.

Philippine law, in general, does not require the registration of transfers of property. To bind third parties, however, the registration of the transfer of land with the appropriate registers is necessary. Every conveyance, mortgage, lease, lien, order or instrument affecting registered land, if entered in the office of the Registrar of Deeds for the province or city where the land lies, constitutes constructive notice to all persons from the time of entry.

Assignments of intellectual property rights must be recorded with (a) the National Library, in the case of copyrights and (b) the Intellectual Property Office (IPO), in the case of patents and trademarks, trade names and service marks. The assignment of patent rights is void against any subsequent purchaser or mortgagee for a valuable consideration and without notice, unless it is properly recorded either within three months from the date of the instrument that embodies the assignment or before the subsequent sale. Assignments of trademarks, trade names and service marks have no effect against third parties until properly recorded.

Unlike the case under the Decree on Intellectual Property, the validity and effect of an unrecorded assignment of copyright is not expressly addressed in the Intellectual Property Code (which took effect on January 1, 1998, and expressly repealed the Decree on Intellectual Property). In the absence of such a provision, the rule provided under the Civil Code regarding the assignment of credits and other incorporeal rights may apply. Although the Civil Code requires the assignment to appear in a public instrument to bind third parties, it does not require registration or recording of the instrument.

Also, no transfer of shares of stock is valid except as between the parties until the transfer is recorded in the books of the corporation showing the names of the parties to the transaction, the date of the transfer, the number of the certificates and the number of shares transferred.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 As a general rule, government approval and administrative filings are not required before the acquisition of assets. If, however, the assets that are sold consist of the property, franchise or rights of a public utility or other regulated entity, or of an entity enjoying fiscal, tax or other investment incentives, then approval of the relevant government agency is normally required before the sale.

The sale of substantially all a seller's assets requires (a) the majority vote of the seller's board of directors, (b) the vote of shareholders representing at least two-thirds of the outstanding capital stock in a meeting duly called for such purpose and (c) compliance with the procedural requirements of the Bulk Sales Law.

Finally, if a transfer of assets is made in connection with a tax-free exchange, then a tax ruling from the Bureau of Internal Revenue must be obtained before closing the transaction. A transfer of assets is a tax-free exchange when property is exchanged solely for shares in a corporation in pursuance of a plan of merger or consolidation and meets the requirements of the Tax Code.

3.2 There are business activities that are either partly or completely nationalized. The first general category covers activities in which foreign ownership is limited by mandate of the Constitution and specific laws. Among the activities where no foreign equity is permitted are the following:

- mass media, except recording;
- services involving the practice of licensed professions, save in cases prescribed by law;
- retail trade; and
- cooperatives.

Up to twenty-five percent foreign equity is permitted in the following activities:

- private recruitment, whether for local or overseas employment; and
- contracts for construction and repair of locally funded public works, with exceptions.

Up to thirty percent foreign equity is permitted in advertising. Up to forty percent foreign equity is permitted in the following activities:

- exploration, development and utilization of natural resources;
- ownership of private lands;
- operation and management of public utilities;
- ownership and administration of educational institutions;
- financing companies regulated by the SEC; and
- private domestic construction contracts.

The second general category covers activities in which foreign ownership is limited for reasons of security, defense and risk to health and morals or for the protection of small and medium-scale enterprises. Up to forty percent foreign equity is permitted in the following activities in this category:

- the manufacture, repair, storage and distribution of items requiring Philippine National Police clearance (e.g., firearms, gunpowder, blasting supplies, telescopic sights and similar devices);
- the manufacture, repair, storage and distribution of items requiring Department of National Defense clearance (e.g., guns and ammunition for warfare, guided missiles, armament training devices, military communications equipment and similar devices);
- the manufacture and distribution of dangerous drugs; and
- domestic market enterprises with paid-in equity capital of less than US $200,000.

A complete list of the foregoing nationalized activities is provided in the Second Regular Investment Negative List, issued pursuant to the Foreign Investment Act.

4. UNFAIR COMPETITION

There are no Philippine requirements similar to those of the Hart Scott-Rodino Antitrust Improvement Act. There is a general constitutional prohibition against the formation of combinations in restraint of trade, and the Revised Penal Code penalizes any person who enters any contract or agreement, or takes part in any conspiracy, to restrain trade or commerce or to prevent by artificial means free competition in the market. Antitrust legislation and administrative enforcement have not, however, developed to the degree found in the United States.

It is worth mentioning that as of May 1998, there were legislative measures pending before Congress that imposed restrictions similar to those prescribed by the Hart Scott-Rodino Antitrust Improvement Act.

5. SUCCESSOR LIABILITY

5.1 A buyer is not liable for the environmental liabilities of the seller. A buyer is, however, responsible for the treatment or amelioration of environmental hazards such as toxic wastes remaining on the property even though the extent of such liability is not clearly defined.

5.2 In general, a bona fide buyer of property is not liable for products or services sold before the acquisition.

5.3 A bona fide buyer of property is not liable for fulfilling outstanding orders accepted by the seller.

5.4 A bona fide buyer has no obligations for warranty claims arising before the acquisition date.

5.5 A buyer or lessee of registered lands holds title subject to encumbrances and liens duly annotated to such title, as well as encumbrances that, although unregistered, were known to the buyer or lessee at the time of the purchase or lease. Moreover, by express provision of law, there are certain burdens on registered land that continue to exist and remain in force though not noted in the title. These include statutory liens that attach to the property regardless of ownership or transfer (e.g., real estate tax liens provided in favor of the government under the Tax Code).

A tax lien in favor of the government does not extend to taxes that were not levied or assessed at the time of the transfer because of an erroneous declaration for taxation made by the previous owner, by reason of which the lands escaped taxation in the hands of the seller. Thus, when lands—the titles to which are registered under the Property Registration Decree—are transferred for value, the purchaser takes them free and clear of all taxes that might have been assessed by reason of an erroneous declaration for taxes made by the seller, whereby the lands escaped taxation in the seller's hands.

5.6 We are not aware of any other liabilities or obligations that automatically transfer to a buyer of assets.

5.7 It is customary for a buyer to conduct a due diligence investigation before the acquisition of assets. These investigations tend to focus on the identification of liabilities and encumbrances and the verification of title and less on environmental issues. Conducting environmental audits is not a common practice in the Philippines.

6. PUBLIC RECORDS

(i) The ownership of registered land and buildings on registered land may be verified with the relevant property registers. There are no records or registers that confirm the ownership of unregistered land.

(ii) There are two basic types of contractual liens available to a creditor in the Philippines: the mortgage and the pledge. A mortgage, whether on real property or chattels, must be registered in specified governmental registries to be binding upon third parties. In practice, it is fairly easy to determine whether a mortgage exists on registered real property (i.e., property registered under the Torrens system of land registration) and on certain types of movable property (such as motor vehicles), but it is difficult, without the cooperation of the seller, to ascertain such information for other types of property. This is due principally to the lack of consolidated and computerized records.

Encumbrances on registered land must be annotated on the certificates of title covering such land and recorded with the relevant real property register. A lease of real property must be registered to bind the buyer of the property.

(iii) There are no records on environmental issues affecting property.

(iv) A chattel mortgage must be recorded in the chattel mortgage register of the province in which the mortgagor resides and in the province in which the property is situated. Chattel mortgages on motor vehicles and marine vessels must be registered with the Land Transportation Office and the Maritime Industry Authority, respectively.

A pledge need not be registered and therefore cannot be verified through an examination of registers. Because the item pledged must remain in the possession of the pledgee, however, the delivery of assets to a buyer effectively confirms the absence of a pledge.

There are workers' and similar statutory liens that are not registered but that tend to be possessory in nature.

(v) IPO maintains publicly available records that disclose the current status of trademark or patent registrations or applications. The Copyright Section of the Philippine National Library also maintains records of registration of copyright ownership, which are also subject to public inspection. When trademark or copyright proprietors decide *not* to register their trademarks or copyrights, there is obviously no satisfactory means for searching for information about the ownership of such unregistered intellectual property.

(vi) There is no consolidated national record that discloses the existence of pending litigation. The practice is to examine the records of courts in the province or city where the seller is resident or where principal assets are located.

(vii) Information on the standing of a corporation, including statements of account, may be obtained from corporate records filed with the SEC. Such corporate records include the articles of incorporation, bylaws and financial statements required to be filed by the corporations. A certificate of good standing, signed by each of the department heads of the SEC, may also be obtained.

(viii) Financial information on corporations is available at the SEC, but this is often out of date and incomplete.

7. LABOR MATTERS

7.1 The employees of a seller do not automatically become employees of the buyer as a consequence of an acquisition of assets. This assumes that the transfer of ownership is done in good faith and not with the intent to contravene or subvert labor laws and regulations. The Supreme Court has held that "unless expressly assumed, labor contracts are not enforceable against a transferee of an enterprise, labor contracts being in personam." On the other hand, a transferor in bad faith may be held responsible to employees discharged in violation of the Industrial Peace Act.

In a bona fide sale of substantially all the assets of a corporation, the buyer is not legally obliged to hire or absorb the employees of the seller. If the buyer does not hire them, then the seller may terminate the employees under Article 283 of the Labor Code, which authorizes dismissal of employees on account of the closure or cessation of operations, subject to the payment of separation pay.

7.2 Because a buyer in good faith in the first instance is not required to assume the severance liabilities of the seller, it would not be appropriate or advisable for the buyer to require the seller to terminate employees as a condition of the sale. A more appropriate

condition for closing the transaction might be for the seller to settle all separation-pay claims made by any terminated employees.

7.3 As a general rule, a buyer is not bound by the obligations of the seller. Labor contracts are contracts in personam and are not enforceable against the transferee of an enterprise. This rule holds as long as no bad faith can be imputed to the buyer. Bad faith is present when the purchase is made to help the seller evade its obligations to its employees under applicable labor laws and regulations.

If the buyer does not hire the employees of the seller, then it is the obligation of the seller to pay separation pay arising as a result of the closure or cessation of operations. In addition, the seller must pay accrued employee benefits under applicable and subsisting pension and retirement plans and health or other benefits under individual or collective agreements. On the other hand, if the buyer continues the business of the seller and hires the employees without ensuring that the seller paid them their separation benefits and accrued pension and retirement benefits under applicable individual or collective agreements, then the buyer becomes a successor employer and is obliged to assume such obligations of the seller. The Supreme Court has held that employees absorbed by a successor employer enjoy continuity of employment status, and the employees' rights and privileges survive so as to be operative against the successor employer.

7.4 A buyer may, as a matter of contract, assume part of the seller's liabilities to the employees but the allocation agreed between the seller and buyer does not bind the employees to the extent that they are prejudiced by the allocation. Labor authorities and courts may disregard an allocation of responsibility when necessary for the protection of the employees. In light of the policy to accord full protection to labor, the allocation of responsibility for severance pay may be invalidated when it has the effect of defeating the rights of the employees to collect payment.

7.5 There is no law or regulation that requires consultation with any works council or similar body before an asset sale can be effected. It is well recognized that it is within the legitimate sphere of management control for an employer to adopt economic policies or make changes or adjustments in the organization or operations that would ensure profit to itself or protect the investment of its stockholders. Moreover, the Supreme Court has held that an employer's decision to merge or consolidate its business with another, or to sell or dispose of all or substantially all its assets and properties, is an exercise of a management prerogative.

On the other hand, the Constitution guarantees the right of workers to participate in policy and decision-making processes affecting their rights and benefits. When a sale of assets would clearly affect the rights and benefits of the employees, such as their right to security of tenure, it is arguable that some form of consultation is required before the asset sale can be effected. If there is a certified collective bargaining agent of the employees and an existing collective agreement, then there is an obligation to comply with the provisions of the collective agreement that relate to management action that results in the mass dismissal of the employees and the termination of the collective agreement. The Supreme Court has held that an employer which executes a collective agreement guaranteeing the continuation of certain positions may not unilaterally take action that results in abolition of the positions.

7.6 Upon their transfer to a buyer, the employees of a seller are rehired anew and the buyer becomes their new employer. If the sale of substantially all the assets of the seller results in the dismissal of its employees with separation benefits and other accrued benefits under their individual and collective agreements, then the buyer who decides to hire the dismissed employees may hire them under new contracts of employment on terms and conditions that are mutually acceptable to the parties, even if they differ from the terms and conditions of the previous contracts of employment.

7.7 A buyer is obliged to assume accrued liabilities only when it becomes a successor employer under the conditions discussed in Subsection 7.3.

8. PLANT CLOSING LAWS

Under the Labor Code, an employer may validly terminate the employment of employees due to the closure or cessation of the operations of the establishment or due to retrenchment to prevent losses. The employer, however, is required to serve written notice to the workers and the Department of Labor and Employment at least one month before the intended date of termination. The failure to serve the required notice may result in a declaration that the dismissal is illegal or in the imposition of greater separation benefits.

9. ASSIGNMENT OF CONTRACTS

Contracts creating real rights in connection with the assets sold continue to bind such assets regardless of transfer of ownership and, therefore, are automatically transferred with the assets upon their sale. Examples are mortgages and leases that are duly recorded in the relevant registries of property. Furthermore, a voluntary easement constituted by the owner of land and noted on title may be in the nature of a contractual obligation. Such obligations, if reasonable and not contrary to public policy, may bind the land regardless of the ownership and the transfer of such land.

10. NONCOMPETITION

10.1 A noncompetition clause is valid and enforceable if it is limited in time and place and if the prohibition is reasonably necessary for the protection of the parties. Otherwise, the noncompetition clause may be deemed void as contrary to the public policy against undue or unreasonable restraint of trade. The clause is enforceable against the seller and, if they agreed to it, the principals of the seller. A noncompetition clause may be difficult to enforce or defend against employees of the seller.

10.2 See Subsection 10.1. There is no law or regulation requiring registration of noncompetition clauses in the context of asset acquisitions.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Parties are permitted to select the law applicable to their contract, subject only to the limitation that such choice is not contrary to law, morals, good customs, public order or public policy. Also, it is likely that a Philippine court would require that the chosen law bear a substantive relationship to the transaction. Moreover, the choice of law may be disregarded and Philippine law applied when the relationship of the contracting parties involves the public interest (e.g., an employer-employee relationship). The Supreme Court has held that otherwise applicable Philippine laws and regulations cannot be rendered illusory by the parties agreeing upon some other law to govern their relationship. As in many jurisdictions, matters of intrinsic validity, such as the capacity of the parties, are decided by the applicable national law, notwithstanding the choice of law applicable to the contract.

Choice-of-forum clauses generally will be respected, except that a Philippine court will be reluctant to enforce exclusive-forum provisions that oust it from jurisdiction.

11.2 Arbitration is recognized in the Philippines as a valid method of dispute resolution. The arbitrator's award or decision is final if expressly provided in the arbitration agreement. Notwithstanding such express provision, however, an award or decision may be set aside when there is mistake, fraud, violence, intimidation, undue influence or falsity of documents. Furthermore, an arbitral award may be set aside when documents referring to one or more of the questions settled through arbitration have been concealed by one of the parties.

The Philippines is a party to the New York Convention.

An arbitration award that has been translated into a foreign judgment may be enforced in the Philippines by suit on the judgment, which is subject only to defenses based upon fraud, collusion, lack of notice or jurisdiction and clear mistake of law or fact.

11.3 Because of the overcrowded state of court dockets and a procedural system that allows extended review and appeal sometimes at different stages of litigation, arbitration remains a more expeditious and less expensive mode of dispute resolution than litigation.

12. OTHER ISSUES

12.1 There is no established practice on stipulations allocating attorney's fees.

12.2 Under certain circumstances, it is necessary to protect transferred assets in the hands of a buyer from claims of the seller's creditors. To achieve such protection, the seller must deliver to the buyer a sworn written statement listing the seller's creditors and must apply the proceeds of the sale to the pro rata payment of their claims. Before the sale, the seller must also notify each of its creditors—personally or by registered mail—of the price, terms and conditions of the sale. The notice protects the seller's creditors by letting them know that a sale of all or substantially all the seller's assets is proposed. The notice allows the creditors to make their claims against the seller before it disposes of its assets. The notice protects the buyer by making sure that the seller's creditors are paid before the buyer pays the purchase price. If the foregoing requirements are not followed, the buyer may acquire no right in the purchased assets as against the seller's creditors.

12.3 The foregoing discussions address the principal issues that in our experience are relevant to U.S. buyers and sellers of assets in the Philippines.

Poland

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1. ASSET VERSUS SHARE PURCHASE

1.1 An asset sale includes two distinct concepts: (a) a set or grouping of assets that constitutes a self-sufficient enterprise (i.e., going concern) or (b) a single asset, or multiple assets that are otherwise unrelated. As used in these responses, the term "enterprise" refers the former, whereas the term "assets" refers to the latter.

Upon acquiring an enterprise or individual assets of a company, a buyer becomes the owner of such assets and may dispose of them freely. In an acquisition of an enterprise, the buyer and seller are jointly liable for prior liabilities of the enterprise, which is not the case in an acquisition of unrelated assets.

In an acquisition of shares of a company, a buyer assumes legal title to the corporate entity. Ownership of shares also transfers title to any privileges, burdens or obligations associated with the company and its properties. As a result, the buyer is liable for any obligations existing before the acquisition and connected with the target company.

1.2 In many ways, an acquisition of an enterprise is treated similarly to an acquisition of the shares of a company. In both cases the seller is subject to income tax, although the tax rate depends upon the corporate form of the seller. Most significantly, in an acquisition of an enterprise, the buyer is able to enjoy a step-up in tax basis of the assets purchased, which is not the case with an acquisition of shares.

Generally, the stamp duty associated with an acquisition of shares is two percent, whereas the stamp duty in an acquisition of an enterprise is five percent for real estate and two percent for movable assets. There is no value added tax (VAT) payable with either an acquisition of an enterprise or of shares.

In an acquisition of an enterprise, a buyer acquires all the liabilities associated therewith and is jointly liable with the prior owner, excluding certain undisclosed liabilities. The employment relationships between the seller and the employees do not expire but are assumed by the new owner. In an acquisition of shares, a previous owner is not held liable for the obligations of the company after its sale.

1.3 If individual assets of the target company are acquired, a VAT is payable. The VAT rates could be twenty-two percent, seven percent or, in some cases, zero percent, depending upon the subject of the sale. There is no stamp duty payable, however. When acquiring assets, there are generally no successor liabilities because such an acquisition is considered merely an acquisition of property and other rights.

2. FORM OF DOCUMENTS

An asset sale must be evidenced in writing and witnessed by a notary. The assets must be clearly identified. Moreover, the transfer of an enterprise should be recorded in the commercial registry of the company. Real estate assets must be transferred in the form of a notarial deed, even if such assets are part of a larger enterprise.

2.1 Parties are generally allowed freedom of contract and may include extensive representations, warranties and covenants so long as they do not violate Polish law. The documentation of the transaction is flexible. As noted, the only requirements are that the acquisition be evidenced in writing and that the notarial deed be prepared for the transfer of the real estate in the transaction.

The Civil Code includes significant provisions that, unless otherwise agreed by the parties, govern the transaction. Most transactions do not contain a detailed listing of the obligations of the parties because they are already set forth in the Civil Code. Most provisions of the Civil Code are of a supplementary nature, but there are several provisions that govern regardless of any agreement between the parties (e.g., employment relationships and joint liability for past obligations).

2.2 A transfer of assets may be effected with one document unless the transfer involves real estate, in which case a notarial deed is also necessary. Because the definition of an enterprise includes any associated trademarks, real estate, contracts, receivables or other obligations arising out of the existence of the enterprise, separate transfer of such components by way of a special document is unnecessary. The Civil Code provides that an enterprise may be transferred in a single transaction.

2.3 The form of the document does not influence the tax effects of the transfer.

2.4 If the enterprise to be transferred is a registered company, then the transfer of the enterprise must be recorded with the applicable commercial register.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1

(i) A foreign-controlled entity (less than fifty-percent Polish ownership of a company) must obtain a permit from the Minister of Internal Affairs and Administration to acquire any real estate in Poland.

(ii) Shareholder approval is required for the sale of an enterprise. Shareholder approval is also required to transfer real estate associated with any ongoing operations of the enterprise. The articles of a company may provide for other types of company approvals or consents.

(iii) Preacquisition administrative filings are not required unless there is a prior agreement (e.g., investment agreement with the government resulting from the privatization of the company). Also, antimonopoly clearance may be required.

3.2 Several areas of economic activity are restricted in connection with non-Polish national participation, including telecommunications, postal services, insurance and the defense industry. Also, sectors requiring separate licensing, such as banking or securities trading, are restricted, which may limit foreign participation.

4. UNFAIR COMPETITION

The Act on Counteracting of Monopolistic Practices, dated February 24, 1990, explicitly requires notice to the Antimonopoly Office of an intention to merge with, or acquire, a

company in certain situations specified in the act. Generally, the requirement is triggered when (a) the buyer and seller have combined annual sales exceeding ECU 5 million, (b) one individual intends to become a member of the management board, a member of the supervisory board or chief accountant of two competitive enterprises and (c) one party takes direct or indirect control over the other party.

The Antimonopoly Office may issue a no-action letter stating that it does not have any reservations regarding the combination or a decision prohibiting the combination on the grounds that it would create a dominant position in the market. A dominant position is reached when a company meets no significant local or national competition. A company is deemed to have a dominant position if it controls over forty percent of its market.

5. SUCCESSOR LIABILITY

In an acquisition of an enterprise, the buyer and seller generally are jointly liable for any obligations existing before the acquisition unless the buyer did not know of the existence of such obligations despite conducting a reasonable due diligence effort. The buyer's liability is limited to the market value of the acquired enterprise at the time of acquisition.

5.1 A buyer of assets may be liable for damages resulting from an act, or a failure to act, that adversely affects the environment.

5.2 Product liability claims are not regulated by a separate statutory act. In the case of an acquisition of an enterprise, the buyer and seller are jointly liable for existing obligations, which include warranty and guarantee obligations. Therefore, liability for products and services sold before the acquisition is transferred to the buyer. Moreover, a buyer may be liable in tort for improper performance or nonperformance of contractual duties resulting from certain products. Provisions of the Civil Code apply in situations pertaining to liability for sold goods. The Civil Code differentiates between warranties for defects and guarantees of quality.

5.3 The obligation of a seller to fulfill outstanding orders becomes a joint and several liability of the buyer and seller.

5.4 Generally, Polish law distinguishes between warranties and guaranties, and both may be applicable. A warranty claim arises when a merchant or vendor is liable to a purchaser of a product because (a) the product has defects that reduce its value or utility in connection with the purpose stipulated in the sales contract, (b) the product does not have the characteristics represented by the merchant or vendor or (c) the product was rendered incomplete. In such cases, the purchaser of the product may terminate the sales contract or demand reduction of the price. A buyer of an enterprise assumes this warranty liability.

Guarantee liability arises when the merchant or vendor guarantees the quality of the product to a buyer of the product through a written document. The guarantor is obligated to perform its duties resulting from the guarantee or provide the product to the purchaser at its own cost. A buyer of an enterprise assumes the seller's guarantee liability.

5.5 When a purchaser acquires only real property, that purchaser is not liable for prior existing obligations of the seller but assumes the burdens associated with such real property (e.g., mortgages). When the acquisition of real estate is a part of the acquisition of an enterprise, then the buyer is jointly liable with the seller for all obligations of the former owner, including those connected with the real property.

5.6 In an acquisition of an enterprise, all existing liabilities and obligations transfer to the buyer, who is jointly liable with the seller up to the amount of the acquisition price paid for the acquired enterprise.

5.7 It is customary to conduct due diligence investigations before the acquisition of unrelated assets or of an enterprise, usually in connection with the financial and legal status of such assets of the enterprise. Environmental audits are also commonly undertaken when acquiring real property in Poland.

6. PUBLIC RECORDS

(i) A record of ownership of real immovable property is entered into an Eternal Book specifically established for that particular real estate. Eternal Books are kept at the applicable regional court and are open to the public.

(ii) Rights on immovable property are entered into the Eternal Book discussed in Subsection 6(i).

(iii) Environmental issues affecting real property are not entered into any special register.

(iv) As of January 1, 1998, there has been a national central register of liens related to personal (movable) property. The register is open to the public, but many liens created before this time are not recorded anywhere. Unregistered pledges may also exist.

(v) There is a national trademark register as well as a register of patents and protective rights, all of which are open to the public.

(vi) Pending litigation is not disclosed in a special register, although bankruptcy, insolvency or arrangement litigation for commercial entities is disclosed in the commercial register, which is kept at the applicable regional court.

(vii) The standing of a company, as well as certain corporate, legal and financial information, is disclosed in the commercial register, which is kept by the applicable local court.

(viii) General financial matters—such as share capital, balance sheets and reports of losses and profits—may be entered into the commercial register for certain types of companies. These are open to the public and are kept at the applicable regional court.

7. LABOR MATTERS

7.1 Whether employees of a seller automatically become employees of a buyer depends upon whether the entire enterprise, part of an enterprise or individual assets are acquired. Pursuant to the Labor Code, employees of an enterprise—or any part of an enterprise—that is transferred become employees of the buyer. There is no such legal effect in the case of an acquisition of individual assets.

7.2 It is generally permissible to insert such a clause in a civil contract regarding alienation of an enterprise. Such a clause is not binding on the employees, however. In other words, if the employment relationships are not properly terminated, the buyer's recourse is solely with the seller.

7.3 As a rule, a buyer is bound by all the obligations in the contracts of employment executed by the seller, including all benefits granted by the previous employer. For example, if a seller, on the basis of an employment contract or collective bargaining agreement, was required to obtain life insurance for the employees, then this obligation is transferred to the buyer. The majority of obligations of an employer, however, especially regarding retirement or health care matters, are statutory and independent of any contractual stipulations.

7.4 It is not legally possible to assign responsibility for severance pay from the buyer to the seller. The buyer remains statutorily liable. If such a provision were part of a sales contract, it would give the buyer recourse only against the seller in the event of its breach.

7.5 There is no legal obligation for privately owned companies to consult with, or obtain approval from, labor unions or similar bodies for selling assets or an enterprise. Labor unions may, however, express their opinions (which are not binding) in all matters regarding the collective interests of the employees, including the sale of assets.

In the case of state-owned or municipally owned enterprises, the employees constituting the General Assembly of Employees and Employees Council have the right to object to the

disposal of assets of such an enterprise. Many different rules on the matter apply in other cases (state companies, cooperatives, foundations, etc.), but closer analysis of such rules exceeds the scope of this response.

7.6 A buyer of an enterprise may propose to employees who are not under contract employment (e.g., designation or nomination as a member of the management board or as an independent contractor, neither of which is a contract position) new terms for work and remuneration. If the employees do not agree to the new terms, the employment relationship may be terminated. The terms of employment for employees under contract cannot be changed as a result of the acquisition itself but must be done in accordance with normal procedures.

7.7 All accrued liabilities of the seller regarding employment matters are transferred to the buyer as a result of an acquisition.

8. PLANT CLOSING LAWS

There are special rules for terminating groups of employees. Such rules apply to workplaces in which employment levels are decreased (a) for economic reasons, (b) in connection with organizational, production or technological changes and (c) when such changes occur for the purpose of improving work conditions or environmental conditions. These provisions apply if, within a three-month period, more than ten percent of the employees are to be terminated in workplaces employing up to 1,000 employees, or at least 100 employees are to be terminated in workplaces employing more than 1,000 employees. The director of the workplace must notify the applicable trade union of the intention to undertake such a mass layoff no later than forty-five days before the date of the intended termination notice.

9. ASSIGNMENT OF CONTRACTS

In an acquisition of an enterprise, all contracts related to the activity of the enterprise are transferred to the buyer by operation of law. In an acquisition of unrelated moveable and immovable assets, related contracts do not transfer automatically.

Transfer of a seller's insurance depends upon the terms of the insurance policy, but such rights do not transfer by operation of law.

Lease contracts connected with the activity of an enterprise, however, do transfer by operation of law because they are considered part of the rights and obligations connected with the activity of an enterprise.

Generally, permits and licenses granted by governmental bodies are not assignable and, therefore, cannot be part of an asset sale. As a result, stock purchases are used when such permits and licenses are to be part of the sales transaction.

10. NONCOMPETITION

10.1 A buyer may enforce a noncompetition clause against a seller so long as the clause does not produce a monopolistic result. This problem can arise in agreements dividing the market according to territory or subjective criteria as well as in agreements limiting access to the market or eliminating from the market enterprises not included in the agreement. Depending upon the nature of the clause and the circumstances of its enforcement, a noncompetition agreement can be considered anticompetitive. There are no legal restrictions related to enforcing a noncompetition clause against a seller's principals so long as the clause does not violate the Counteracting of Monopolistic Practices Act. Noncompetition clauses are permissible and common in employment agreements where the employee agrees not to

engage in competitive activity. Such clauses do not need to be registered. Additional information is required only when the clause is challenged as being anticompetitive.

10.2 See Subsection 10.1.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Parties to a contract may choose the governing law and jurisdiction, provided the choice is related to the nature of the obligation. Accordingly, in general, this usually limits the choice of law to the jurisdictions in which either of the parties is physically located or doing business. In addition, an acquisition of real estate requires that the transfer agreement be governed by Polish law.

11.2 Parties are free to submit their disputes to arbitration if an arbitration clause is included in the agreement. An arbitration award would be deemed enforceable and valid by Polish courts, subject to certain affirmative defenses.

11.3 Arbitration proceedings are preferred mainly because obtaining judicial relief in Poland is a lengthy process; the courts are not yet prepared to handle such cases promptly.

12. OTHER ISSUES

12.1 Although it is typical to include a clause concerning the allocation of fees connected with an asset acquisition agreement, the buyer and seller are jointly and severally liable for such fees.

12.2 Section 5 deals with the protection that a seller's creditors may have.

12.3 Polish law may be less certain on some aspects of asset sales because there is relatively little experience, legal commentary or judicial interpretation in the area. In addition, Polish commercial law is in the process of reevaluation and amendment as Poland harmonizes its laws to European Union standards.

Russia

Contributed by Axel Calissendorff, Mannheimer Swartling

1. ASSET VERSUS SHARE PURCHASE

1.1 The major considerations for a buyer in acquiring assets rather than shares are as follows:

- Normally, an asset acquisition is more tax advantageous for a buyer because the tax liabilities of the seller generally do not follow the assets. Nevertheless, a sale of assets is typically subject to a value added tax (VAT), which amounts to twenty percent of the price of the transaction.
- The successor liability assumed by a buyer through an asset transfer is more limited than that assumed through a share transaction (see Section 5).
- It should be noted that buying substantially all the assets of a company may qualify as an acquisition of a "property complex" (i.e., the company as a whole). In such a case, the seller of the assets must obtain prior approval from its creditors. In addition, the purchase agreement must be accompanied by a number of documents, such as an inventory, a balance sheet and a list of outstanding obligations of the company, all of which constitute an inalienable part of the purchase agreement. If the creditors do not approve the transfer of assets, the seller and buyer become jointly and severally liable for the debts of the entity that divested the property complex.

The law does not define the amount of assets necessary to constitute a property complex, nor has this been established by the courts. Consequently, the practical implications of the provisions regarding a property complex are somewhat uncertain at this stage. Nevertheless, it is generally advisable to structure an asset acquisition in a way that avoids the drawbacks associated with acquiring a property complex.

- If any licenses are required to conduct the acquired business, an asset transfer could be disadvantageous because the buyer may need to obtain such licenses separately.

1.2 There are distinctions between the acquisition of substantially all the assets of a company and the acquisition of the shares of a company. The major distinctions are discussed in Subsection 1.1.

1.3 If a buyer acquires only part of the assets, the risk of the transaction being considered an acquisition of a property complex would typically be eliminated. See Subsection 1.1.

2. FORM OF DOCUMENTS

2.1 [No response.]

2.2 The assets can be transferred by executing one document, although registration with the relevant authorities is necessary when the title to assets such as trademarks, patents and real property (which under Russian law also includes buildings, aircraft, ships and spacecraft) is being transferred. The parties may prefer to conclude separate contracts for such assets.

2.3 The form of the document is irrelevant to the tax effects of the transfer.

2.4 The transfer of certain property, mentioned in Subsection 2.2, must be registered. Furthermore, it is necessary to register a purchase agreement, whereby a property complex is transferred, in the local registration subdivision of the Ministry of Justice.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 An asset acquisition may be subject to certain preliminary legal requirements.

Under Russian law, a sale of assets can be construed either as a sale of a property complex (i.e., the company as a whole) or as a regular sale of goods or property. The sale of a property complex is expressly defined in Chapter 8, Part 2 of the Civil Code of the Russian Federation. This chapter contains special preliminary legal requirements for such sales (e.g., approval of creditors, certain documents to accompany the contract, state registration of the contract, etc.).

In general, no government approval is necessary for foreign investments for transfer; however, payment in connection with a nonresident's acquisition of either real estate (buildings, land, aircraft, spacecraft or ships) or an asset constituting a property complex requires prior approval of the Central Bank of Russia in accordance with Russian currency control legislation.

Transactions involving more than twenty-five percent of the value of a company's assets must be approved in advance by a unanimous vote of the board of directors. Transactions involving more than fifty percent of a company's assets must be approved in advance by a majority of votes of a general meeting of shareholders. If a company does not have a board of directors, all such transactions must be approved by a majority of votes of a general meeting of shareholders.

In cases covered by Russian antimonopoly legislation, asset acquisitions may require prior approval (see Sections 4 and 10).

3.2 For companies involved in so-called strategic spheres of economic activity of the Russian Federation, such as the production of defense materials and other sensitive areas, full restrictions on foreign ownership are maintained.

Foreign ownership of insurance companies is limited to forty-nine percent of the shares of such companies.

4. UNFAIR COMPETITION

The Law on Competition and Limitation of the Monopoly Activity at the Commodity Markets (Antimonopoly Act) requires that consent from the Antimonopoly Committee be obtained before any transaction whereby one entity acquires more than ten percent of the balance-sheet value of another entity is completed. The filing requires that a substantial amount of information be provided about both the buyer and the seller. The Antimonopoly Committee must render a decision within thirty days, provided, of course, that all the necessary documents were submitted.

In the event the antimonopoly requirements are not followed, the Antimonopoly Committee (or its territorial agency) is authorized by law to file a petition with the court to have the transaction declared invalid.

5. SUCCESSOR LIABILITY

5.1 A buyer is not liable for the environmental liabilities of the seller. The environmental liabilities do not follow the assets.

5.2 Any liability for products sold before the acquisition does not follow the assets. The liability for products or services remains with the seller (i.e., the entity that manufactured the product or rendered the services).

5.3 The liability to fulfill any outstanding orders remains with the seller, although the parties are free to agree otherwise.

5.4 Unless otherwise provided by the parties in the acquisition agreement, the liabilities for warranty claims are not transferred to the buyer if the warranty was made by the seller before the acquisition date.

5.5 A buyer of real property is not liable for the obligations or defaults of the previous owner. A lessee is not liable for any actions of a prior lessee.

5.6 Encumbrances of assets—such as leases and pledges—automatically transfer to the buyer of such assets. The seller is under an obligation to notify the buyer of any such encumbrances on the property.

5.7 Provided the buyer is a foreign entity, and/or the transaction is of a significant size, it is customary for the buyer to conduct legal and financial due diligence. If the acquisition concerns assets used for manufacturing purposes, it is customary for the buyer to conduct environmental due diligence before the deal.

6. PUBLIC RECORDS

In practice, it is quite difficult to gain access to public records in Russia.

(i) See Subsection 6(iv) concerning public records that disclose the existence of, or provide information about, the ownership of immovable property.

(ii) See Subsection 6(iv) concerning public records that disclose the existence of, or provide information about, mortgages on and other charges or real rights affecting immovable property.

(iii) Information regarding the specified use prescribed for certain pieces of land is kept by the local authorities, but it is not publicly available. The environmental standards and limitations regarding certain pieces of land are determined by the local environmental control authorities and can be found there. There are no public records available, however, for the environmental standards. Environmental licenses and permits issued to the seller do not follow the property.

(iv) Public records of liens and encumbrances exist only for immovable property (including ships and aircraft). As for real estate, such registration is effected by the local registration subdivisions of the Ministry of Justice and, for aircraft and ships, by the Ministry of Transportation.

Because the reform of registration of rights in real property is not yet completed, regions of the Russian Federation may have different local bodies responsible for the registration of rights in real property.

(v) The Russian Patent Office can provide the public with information about ownership of intellectual property (i.e., patents and trademarks).

(vi) There are no public records regarding pending litigation.

(vii) There is a public record regarding the financial standing of companies whose shares are publicly traded. This information is subject to disclosure through the Federal Commission of the Securities Market. There is no record on the financial standing of private companies (i.e., those whose shares are not publicly traded).

(viii) See Subsection 6(vii) regarding access to public records concerning financial statements and other financial information.

7. LABOR MATTERS

7.1 Under the Russian Labor Code, the employees of the seller do not automatically become employees of the buyer as a consequence of an acquisition of assets.

7.2 A buyer does not incur any severance payment obligations.

7.3 A buyer is not bound by the employment agreements entered by the seller.

7.4 The employees stay with the seller of assets. Consequently, when dismissing such employees, the seller bears responsibility for making severance payments.

7.5 Generally, an asset sale is not subject to consultation with labor unions or similar bodies. Such consultation may be conducted at the discretion of the seller, however.

7.6 See Subsection 7.1 concerning a buyer changing the terms of employment of employees who are transferred to it as a result of an acquisition.

7.7 A buyer does not assume all accrued liabilities in connection with employees transferred to it as a result of an acquisition.

8. PLANT CLOSING LAWS

Russia has no restrictions equivalent to the U.S. WARN Act.

9. ASSIGNMENT OF CONTRACTS

The following contracts automatically transfer to a buyer:

- If an asset acquisition includes real property where the seller is a lessor, lease agreements are automatically valid against the buyer, and the lessee must be duly notified.
- Insurance contracts automatically transfer, and the insurance company must be duly notified.
- Pledge agreements also transfer. Approval of the pledgee (creditor) is necessary for the transfer.

10. NONCOMPETITION

10.1 This area of the law is regulated by the Antimonopoly Act and other normative acts issued by the Federal Antimonopoly Committee of the Russian Federation. A noncompetition clause is not realistically enforceable in Russia. A party to a contract may apply to a court for termination of such a contract because the noncompetition clause may be considered contrary to antimonopoly legislation.

A noncompetition clause may be used by an employer in its employment contracts in connection with confidential information to which employees have had access. A noncompetition clause in an employment contract may not, however, restrict the personal skills, knowledge and experience of such employees.

10.2 See Subsection 10.1.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 **(i)** There are no restrictions concerning the choice of applicable law.

(ii) There are no restrictions concerning the choice of jurisdiction. Decisions rendered by foreign courts (not arbitral tribunals) generally are not enforceable in Russia unless an international treaty of the Russian Federation provides otherwise.

11.2 An arbitral award rendered by an arbitral tribunal is final and enforceable. Such award may be challenged in limited cases provided by law, namely, (a) when the award

violates Russian public order, (b) when one of the parties concerned was not informed about the arbitration proceedings, (c) when one of the parties is legally incapacitated or (d) when the subject matter of the arbitration is not arbitrable.

Awards of foreign arbitration tribunals are enforceable in Russia, provided they were rendered in countries that have agreed to be bound by the New York Convention of 1958.

11.3 Arbitrators are generally considered more competent and qualified than judges to examine the different issues that might arise in commercial disputes. Furthermore, the parties are free to choose the language and place of venue of arbitration.

12. OTHER ISSUES

12.1 It is not typical to include a clause regarding the allocation of attorney's fees in an asset acquisition agreement.

12.2 In the event that all or a significant part of the assets of a company are being sold, it is necessary to protect transferred assets in the hands of the buyer from claims of the seller's creditors. To achieve such protection, the laws of Russia require sellers or buyers to notify the seller's creditors in advance. The notice allows creditors to make claims for debts before the sale. As a result, the buyer is protected by not being held responsible for the seller's debts.

12.3 Below are significant issues not covered in the previous responses, which a foreign buyer should know when conducting an asset acquisition in Russia.

Russian law generally follows the European continental system of law. Therefore, U.S. legal terms—such as "representations," "indemnities," "covenants" and "goodwill"—do not have defined meanings under Russian law. Although the parties to a contract are generally free to stipulate the terms and conditions of their contract and can agree on definitions of U.S. legal terms, it may be difficult to cover, by definitions of such terms, all situations that may arise from the contractual relationship of a seller and buyer.

The Central Bank of Russia effectuates currency control by, among other things, issuing licenses for payment transactions regarding real estate and property complexes if a party to such a transaction is a nonresident. Foreign-currency loans with a term of more than 180 days also require the Central Bank's license.

The system of registration of property ownership rights is currently under reform in Russia. In practice, verifying and registering such rights might be very difficult. The system functions, more or less, only in Moscow and St. Petersburg.

Issues regarding private ownership of land are currently being processed by the Russian legislature. Presently, it is not possible for a private entity to acquire land other than by entering a long-term lease.

Russian law is formalistic. Most contracts must be executed in writing. Breach of the requirements regarding the form of a contract can lead to its invalidity.