Singapore

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1. ASSET VERSUS SHARE PURCHASE

1.1 A purchase of assets does not, in most cases, carry with it the liabilities attached to the business that is selling the assets, whereas a purchase of shares involves taking all the assets and liabilities of the business. A purchase of assets rather than shares involves a higher stamp duty. Generally, stamp duty on the transfer of assets is at an ad valorem rate of three percent of the purchase price, whereas for shares the rate is 0.2 percent of the higher of the purchase price or the net asset value with effect from February 28, 1998. However, stamp duty on several instruments has been abolished. Stamp duty is generally payable on transactions involving transfers of shares/stocks or immovable property.

If the target company has any nontransferable licenses or rights necessary for carrying on the business, a purchase of shares is preferable because the buyer does not need to incur time and costs reapplying for the licenses or rights in the buyer's name. Financial assistance is also illegal in the context of a purchase of shares, whereas in the context of a purchase of assets, a buyer may lawfully encumber or grant a security interest in the assets to a financial institution as security to finance the acquisition.

1.2 In distinguishing between the acquisition of substantially all the assets of a company and the acquisition of the shares of a company, stamp duty is again a significant consideration but only if immovable property is involved. This is because of the higher rate of stamp duty for asset transfers. Acquiring substantially all the assets of a company need not involve successor liability. A share acquisition could result in successor liability and the target company could become a subsidiary of the buyer. There are tax considerations for the seller in both instances if the gains on the sale are deemed income instead of capital. Singapore has no capital gains tax.

1.3 There would be no difference in the answer to Subsection 1.2 if only part of the assets were acquired.

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement could be used with suitable modifications to the terminology to customize it for the Singapore context. There is no specific or standard form required by the laws of Singapore.

2.2 A seller could transfer its assets under one master document. However, in order to register, notify or effect the transfer of certain assets—such as real estate, trademarks and debts—with relevant statutory authorities or third parties, it is necessary to also use specific documents (e.g., transfer forms, notice of assignment of debt, etc.).

2.3 Generally, it is the content and effect of a document, not its form, that determines the tax effects of a transaction.

2.4 Transfers of certain assets must be registered. For example, a transfer of real property must be registered with the Registry of Land Titles and Deeds, and a transfer of trademark rights must be registered with the Registry of Trade Marks. In some cases, prior consent of the relevant statutory authorities is required (e.g., the transfer of certain types of residential property to foreign individuals or corporations requires the approval of the Controller of Residential Property).

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Generally, if a seller is a company, the corporate approvals of the seller's board of directors and shareholders are required. With some assets (e.g., a lease granted by a statutory authority), prior approval of the authority is required. If the assets are to be encumbered in any way (e.g., by creating a charge), then consent of the seller's creditor may be required.

3.2 Singapore's business environment is generally open to foreign investors, and there are further moves to liberalize more sectors. One example is the telecommunications sector where, with the recent privatization of the telecommunications industry, foreign investors are now allowed to wholly own telecommunications companies. The banking, financial insurance and broking industries have also liberalized to varying degrees. Local defense-related companies and the mass media are some of the industries for which specific approval and licensing are required. It would be difficult for a nonnational, on its own, to engage in these activities in Singapore because approval and licensing for these industries are strict.

4. UNFAIR COMPETITION

There are no preacquisition restrictions, notice requirements or other requirements pertaining to the potential impact of an asset acquisition transaction on competition.

5. SUCCESSOR LIABILITY

5.1 The parties normally agree on a cut-off date for the assumption of liabilities by a buyer. Statutory environmental liability, however, is enforced by authorities that may not recognize any change in ownership of assets (e.g., the Property Tax Department, Public Utilities Board and Public Works Department). A buyer can protect itself through indemnification agreements with the seller.

5.2 As a matter of practice, a buyer adopts a cut-off date for product liability and thereafter accepts liability for products or services sold before the acquisition transaction only if it has an indemnity from the seller, the purchase price is adjusted or a retention sum (e.g., five percent of the purchase price) is held for a specified period (e.g., twelve months).

5.3 Third parties, such as customers, may deal with the buyer after the transaction as though it were the original party to that dealing. In an asset acquisition, the buyer could contractually limit its obligations to fulfill outstanding orders or require the seller to cancel outstanding orders. If the buyer agrees to acquire the seller's existing contracts, then it could be obliged to meet outstanding orders and provide warranties.

5.4 Whether a buyer is obligated for warranty claims that originated before the acquisition date depends upon whether the buyer acquires the contracts (and the continuing obligations) relating to such products. If the buyer does not acquire the obligation (i.e., warranty), then the seller continues to be liable.

5.5 A buyer that acquires real (immovable) property under an asset acquisition agreement is not liable for preacquisition obligations or defaults of the previous owner (seller) unless the contract specifically provides for assumption of those obligations. If a buyer acquires a lease by way of a novation, then it assumes the obligation for prior liabilities as well as future benefits.

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

5.7 It is customary for a buyer to conduct due diligence investigations, including environmental audits, before an acquisition of assets.

6. PUBLIC RECORDS

In Singapore, there are public records and statutory registers that provide information as follows:

- **(i)** The Registry of Titles and Deeds has information about ownership of immovable property (i.e., real property and leases).
- **(ii)** The Registry of Titles and Deeds has information about mortgages on, and other charges or real rights affecting, immovable property.
- **(iii)** No records are available regarding environmental issues affecting immovable property.
- **(iv)** Liens and encumbrances on property belonging to Singapore companies are subject to statutory charges under the Singapore Companies Act and may be checked at the Registry of Companies (for corporate assets) or the Register of Bills of Sale (for property belonging to individuals).
- **(v)** Information about ownership of specified intellectual property is available at the Registry of Trademarks or Registry of Patents, as applicable.
- **(vi)** Information about pending litigation is available through Cause Book searches at the Supreme and Subordinate Court Registries and winding-up and bankruptcy searches on companies and individuals.
- **(vii)** Information about standing (i.e., due incorporation and continued existence) of the seller is available through a company search at the Registry of Companies.
- **(viii)** All companies must file financial information in the form of annual returns and accounts with the Registry of Companies.

7. LABOR MATTERS

7.1 If a business is acquired through an asset acquisition, the employees must continue to be employed by the buyer on terms no less favorable than before the acquisition. Employees cannot be compelled to stay after the acquisition, however.

7.2 It is permissible to require the seller to terminate some employees as a condition of closing an assets acquisition without saddling the buyer with severance liability.

7.3 If the seller's employees continue as employees of the buyer, then the buyer is required by law to offer them terms that are no less favorable than before the acquisition. The buyer is free to offer better terms.

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

7.5 If there is a collective agreement with a trade union, it may provide for retrenchment (i.e., terminate for economic rather than performance reasons) or a similar form of compensation to be paid to employees in the event of a change of ownership. Rarely is an asset acquisition transaction subject to any collective agreement or labor union, however, because a buyer making an acquisition generally retains the current employees. Therefore, any collective agreement with a labor union would not be invoked. Even in a situation where a buyer did not intend to retain the target company's employees, the normal arrangement between the buyer and seller is for the seller to retrench the current employees and attend to the provisions and obligations of the collective agreement. The acquisition transaction would then not need to address retrenchment.

7.6 After an asset acquisition, a buyer may change the terms of employment of employees who were transferred to it in the acquisition only if the terms are more favorable than those before the acquisition.

7.7 A buyer assumes all accrued liabilities in connection with employees transferred to it as a result of an asset acquisition. It is important for the acquisition price to reflect this and for the buyer to know the nature and extent of these accrued liabilities.

8. PLANT CLOSING LAWS

There are generally no prior notice requirements for layoffs of any particular size, but Singapore employment legislation provides that employees in continuous employment for three years or more may be entitled to retrenchment payments. This depends upon the terms of employment. Provisions of any collective agreement may also need to be implemented (e.g., notice period, retrenchment benefits, etc.).

9. ASSIGNMENT OF CONTRACTS

In an asset acquisition, no contracts of the seller are automatically transferred to the buyer due to the concept of privity of contract. The consent of the other contracting party is generally required to transfer a contract.

10. NONCOMPETITION

10.1 To be enforceable against a seller of assets, a noncompetition clause must be reasonable considering all the circumstances, including the agreement's time limits, geographic area, scope of restricted activities or products and necessity to protect specific interests of the buyer. Whether a limit is reasonable is a question of fact and varies from case to case. Generally, a time limitation must not be perpetual and should be long enough only for the buyer to take action to protect itself. Such restraint should also be restricted to the geographic area where the buyer is actually carrying on the particular business that was acquired. A clause is usually held unreasonable if it extends to regions where the buyer has no business dealings and to businesses other than the one that was acquired.

A noncompetition clause can be enforced against a seller, its principals and, to a lesser extent, its employees. A restraint against employees is void unless it can be shown that there is some proprietary interest that requires protection (e.g., trade secrets or trade connections).

10.2 A noncompetition clause generally is construed and interpreted narrowly as a matter of public policy. Singapore courts tend to view noncompetition clauses unfavorably and will enforce these only if the party choosing to enforce it can prove that it is vital or necessary that such clause be enforced. Noncompeition per se will not be allowed. See Subsection 10.1.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 In connection with asset acquisitions by foreign parties, there are no restrictions on the choice of applicable law or the place where an action may be brought. If the asset is real property, however, it is advisable that Singapore law be chosen (due to registration requirements to effect the transfer). When the assets to be acquired include movables or intangibles, the agreement could provide that Singapore law would apply only to the transfer of the real property. This is not usually the practice, however, and the preference is to have one law govern the entire contract.

11.2 Arbitration is possible, and the arbitral award can be final and enforceable except that the jurisdiction of the High Court cannot be ousted completely. Although the right of appeal to the High Court may be ousted contractually, the Court's power of judicial revision on the grounds of procedural impropriety, illegality and irrationality cannot be excluded. Upon application by any of the parties, the High Court has the power to review the arbitral award and, when any one of these grounds is shown, set aside or modify the award.

11.3 Apart from the usual (and sometimes perceived) advantages of arbitration over court proceedings (e.g., more confidentiality and less cost and time), there are no specific reasons for favoring arbitration.

12. OTHER ISSUES

12.1 It is common to include a clause regarding the allocation of attorney's fees.

12.2 Singapore has no laws similar to Bulk Sales Laws. Generally, creditors have covenants or representations from a seller if the sale of assets requires consent from the seller's creditors. Except for liquidation due to insolvency or an auction of assets, there is no requirement to publish a notice of a sale of assets in advance of the sale.

12.3 It is worthwhile to consider issues such as confidentiality and publicity relating to the proposed acquisition. Customers and suppliers could react negatively to major changes and new owners if not handled properly.

South Africa

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1. ASSET VERSUS SHARE PURCHASE

1.1 A major advantage of an asset acquisition (purchasing a business) in the Republic of South Africa (RSA) is the ability of a buyer to obtain debt financing for the transaction through the avoidance of the provisions of Section 38 of the RSA Companies Act of 1973, as amended. Under this section, a company may not give any financial assistance for the purpose of, or in connection with, the purchase of or subscription for any of its shares. Thus, this section effectively prohibits a purchaser of shares from "gearing up" or obtaining financial assistance from a bank or other financial institution on the strength of the encumbrance of assets by a target company because the target company's assets cannot be encumbered for the purpose of assisting in the purchase of its own shares. On the other hand, if a buyer purchases the business of another company, the assets being acquired may be encumbered in favor of a financier.

A major consideration in a purchase of shares of a company is that stamp duty is payable at the rate of 0.25 percent of the amount or value of the consideration given for the shares (but not for the claims on loan account) or, when no consideration is given or the consideration given is less than the value of the shares transferred, of the value of the shares transferred. (A loan account arises when a shareholder lends money to a company in which it owns shares). No stamp duty, however, is incurred if the business is acquired. Moreover, value added tax (VAT) is payable at the rate of zero percent if, in terms of a written agreement, (a) a business that is capable of separate operation is sold as a going concern, (b) the parties to the sale (both of whom must be registered VAT vendors) agree that the business will constitute an income-earning activity on the transfer date and (c) the assets necessary to carry on the enterprise are disposed of by the seller to the buyer in terms of the same agreement of sale.

A further consideration relates to the ability of a buyer to obtain comprehensive warranties in relation to the target company. If the parties are unable to reach a consensus on such warranties, it may be preferable to purchase the business or assets of the target company because the buyer knows that only the liabilities specifically assumed will be its responsibility. On the other hand, in the case of an acquisition of shares, in the absence of appropriate warranties, the buyer assumes full liability for the debts and other obligations of the target company incurred before the effective date of the sale, regardless of whether it was aware of them on the date of purchase.

1.2 A decision to acquire the shares in a company or its business is often motivated by tax considerations. If the target company has a large tax loss, a buyer normally insists on purchasing the shares of the target company if there is any prospect of utilizing this loss. If the buyer itself has a low tax rate or unutilized tax losses or any other tax shelter, it is preferable for it to acquire the business on the basis that the profits generated by the business would be sheltered by the buyer's tax base.

To the extent that the acquired assets comprise plant, machinery, implements or other articles used by the buyer for the purposes of trade, special tax deductions in the form of wear-and-tear or depreciation allowances are available for the useful life of the assets concerned. The higher the value ascribed to such assets and the lower the value ascribed to goodwill in asset acquisitions, the higher the depreciation and/or wear-and-tear allowances the buyer is entitled to claim for tax purposes and the lower the effective tax rate on the earnings generated by the assets acquired. The corollary is that the higher the value ascribed to such assets, the greater the chance that, as a result of the sale, the seller will be liable for a recoupment, for income tax purposes, for depreciation and/or wear-and-tear allowances previously claimed by it.

When a buyer acquires by assignment certain categories of assets that are used in the production of income or from which income is derived (e.g., patents), the buyer is entitled to an income tax allowance under which the cost can be written off over a period (to a maximum, in the case of patents, of twenty years) that is determined with the Commissioner for Inland Revenue (CIR) as representing the probable duration of the use of the property or knowledge.

When acquiring a business, a buyer can normally deduct the interest on borrowed funds used to fund the acquisition. When shares in a target company are acquired, interest paid by a buyer is not generally deductible because shares are regarded as a capital asset.

The South African tax regime has undergone substantial changes in order to bring it in line with international trends. In particular, a capital gains tax (CGT) will be introduced with effect October 2001. In terms of the Revenue Laws Amendment Act, a residence-based system of taxation has been introduced for all years of assessment commencing after January 1, 2001. This system is in contrast to the source-based system of taxation in force in South Africa for a number of years. The implications of the introduction of CGT and a residence-based system of taxation need to be considered, in particular, whether a transaction is structured in a manner that minimizes capital gains tax liability and whether the proceeds that arise from the transaction are taxable in South Africa.

1.3 If only part of the assets of the business are acquired and those assets sold are not sufficient to constitute a business capable of separate operation, the transaction is subject to the payment of VAT at a rate of fourteen percent of the purchase price. VAT is not levied on the purchase price in a sale of shares.

The advantage of acquiring shares in a company as opposed to its business is that a buyer acquires control of the target company by acquiring fifty-one percent of the shares; thus, it pays a price equal to only fifty-one percent of the company's value, all things being equal. Unless a buyer of the assets of a business acquires 100 percent thereof, it cannot attain absolute control in the absence of a partnership or joint venture with the seller that confers such control on the buyer. A further advantage of acquiring shares in the target company as opposed to its business is that the buyer avoids "delivery" problems associated with transferring a business and all its inherent parts, such as plant, equipment, machinery and vehicles, as opposed to the simple matter of merely transferring the shares and claims.

2. FORM OF DOCUMENTS

2.1 There is no law, custom or practice in RSA that dictates a specific form of agreement different from the Model Asset Purchase Agreement. There is no legal bar on including in an asset acquisition agreement representations, warranties and indemnities. Such inclusions may, however, necessitate the attachment to the document of revenue stamps of a nominal value.

2.2 The sale and delivery of movable assets can be addressed in a single sale-of-business/asset acquisition agreement, although certain statutory documentation must be completed for the assignment of trademarks and designs registered in connection with the business. To enable the registration of motor vehicles to be transferred to the buyer of the business, certain certificates of roadworthiness and registration forms must be completed and lodged. A conveyancer must be briefed to prepare documentation relevant to the conveyance of immovable property from the seller to the buyer.

2.3 The form of document for an asset acquisition generally is irrelevant in connection with the tax effects of the transfer, except that specific wording must be used to qualify for zero-percent VAT if the business is purchased as a going concern, as discussed in Subsection 1.1. As a matter of law, VAT is borne by the buyer. Certain other tax implications of a sale of business are discussed in Subsection 1.2.

2.4 Transfers of businesses need not be registered. Transfers of certain assets, however, must be recorded, including land (with the Registrar of Deeds), trademarks and designs (with the Registrar of Trade Marks) and motor vehicles (with the relevant municipal licensing departments). There are restrictions on the transfers of shares in a number of sectors in the South African economy, including banking (regulatory permission is required to acquire more than fifteen percent of the total nominal value of all the issued shares of a bank).

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 In terms of Section 228 of the Companies Act, the sale of the whole or substantially the whole of the undertaking of a company, or the whole or the greater part of the assets of a company, must be authorized by a resolution of the members (i.e., the seller's shareholders). A resolution of the seller's board of directors is required as a matter of course.

The Listings Requirements of the JSE Securities Exchange require the consent of the members of the company in general meeting when a listed company or its subsidiary proposes to implement a material acquisition or disposal.

The Securities Regulation Code on Takeovers and Mergers (Code) governs transactions or schemes that have the effect of vesting in excess of thirty-five percent of the securities of any company in any person, or two or more persons acting in concert, in whom such shareholding did not vest before such transaction or scheme, provided the target company is a public company (including all listed companies) or a private company, the shareholders' interests in which exceed R5 000 000 and in which there are more than ten beneficial shareholders. The Code also affects companies described above that dispose of their businesses pursuant to and in terms of Section 228 of the Companies Act. The basic principle of the Code is that, upon the occurrence of a scheme or transaction of the nature described above, an offer must be extended to all holders of any class of equity capital in the relevant company to acquire all their securities for a consideration that is comparable to that paid pursuant to the relevant transaction or scheme.

3.2 Generally, there are no restrictions on the inbound or outbound transfer of funds of which nonresidents are the sole beneficial owners. Nonresidents are, however, subject to certain limited exchange controls in their dealings with RSA residents, the most significant of which are the following:

- The level of borrowings by a domestic company or business that is seventy-five percent or more foreign owned is limited to a percentage of the "total effective capital" of the company or business calculated in accordance with a formula called the financial assistance ratio.

- Loans by nonresidents to RSA residents, or by RSA residents to nonresidents, outside the ordinary course of trade (including the funding of domestic companies and/or businesses via loan capital) require the prior approval of the South African Reserve Bank (Reserve Bank).
- Income earned by nonresidents is generally remittable out of the RSA in full, but the remittance of interest, royalties, license fees and similar fees (including management and consultancy fees) requires the prior approval of the Reserve Bank. The amount of such payments and the method of their calculation are important. In this regard, (a) permitted royalty remittances usually are calculated as a percentage of the manufacturing costs or of the net ex-factory selling price, excluding any taxes such as VAT, (b) requests for remittances of management, consultancy and administration fees are considered on their merit, taking into account the reasons for them, the nature of the services provided and the basis of calculation, (c) remittances of such fees to a holding company or another entity that directly or indirectly owns a domestic company are more difficult to justify because the Reserve Bank prefers that profits be remitted out of the RSA by way of dividends or direct remittance of profits to ensure that RSA income tax is not avoided or materially reduced and (d) the Reserve Bank allows interest to be paid at market-related rates.

4. UNFAIR COMPETITION

The Competition Act of 1998, as amended, provides for the maintenance and promotion of competition in the RSA, the prevention of certain forms of anticompetitive behaviors that are classified as restrictive practices, the curbing of entities with market dominance abusing their dominant positions, as well as the approval of all "mergers" as defined. The Competition Act establishes a Competition Commission, Competition Tribunal and Competition Appeal Court for the fulfillment of its objectives.

The Competition Commission has wide powers to investigate restrictive practices and abuses of dominant market positions and to forward the findings of such investigations to the Competition Tribunal for adjudication. In addition, mergers—the size of which falls above certain set monetary thresholds—are scrutinized by the Competition Commission, which must approve a merger before it may be implemented. The Competition Tribunal scrutinizes and decides whether to approve proposed mergers above certain higher monetary thresholds.

The primary effect of the Competition Act on commercial transactions is that any transaction that results in a merger, the size of which exceeds the prescribed monetary threshold, may not be implemented until approved by the Competition Commission or, in the case of larger mergers, the Competition Tribunal. Application for such approval attracts a filing fee that varies from R75 000 to R250 000, depending upon the size of the merger. Mergers below the prescribed threshold are classified as small mergers which do not require regulatory approval. The Competition authorities are, however, given the power to intervene in such mergers.

"Merger" is defined in the Competition Act to mean the direct or indirect acquisition or establishment of control by one or more firms over the whole or part of the business of another firm, notwithstanding how this control is achieved. "Control" is, in turn, broadly defined to include, inter alia, the ability to materially influence the policy of the entity acquired. The approval by the competition authorities usually takes between one and three months but may take longer in the case of larger mergers.

Drafting issues arise when an agreement requires the approval of the Competition Commission or Competition Tribunal. All agreements that result in a merger other than a small merger should be made subject to a condition that Competition Authority approval be obtained. Also, the agreement should contain provisions dealing with the payment of filing fees and the responsibility for obtaining approval. It may also be necessary to deal with the possibility of revocation of the approval; warranties should be included in this regard as well to the effect that the activities of the business in its current form do not amount to a violation of the Competition Act.

As a secondary consideration, foreign entities conducting business in South Africa must ensure that they do not engage in any prohibited restrictive practices. The Competition Act lists such practices under the categories of horizontal and vertical restrictive practices. Horizontal restrictive practices include agreements and concerted practices between competitive firms, which substantially prevent or lessen competition in a market. Such agreements could result in price fixing or amount to an agreement not to compete or collusive tendering. Vertical restrictive practices include agreements between a firm and its customers or suppliers, which substantially lessen competition or result in minimum resale price maintenance.

With regard to so-called dominant firms, it should be noted that a firm will be presumed to be dominant if it controls more than forty-five percent of a particular market. A firm that controls less than forty-five percent of a market is regarded as being dominant if it has market power, which is, for example, the ability to influence prices. A dominant firm may not charge excessive prices, refuse access to essential facilities or engage in exclusionary acts, such as inducing suppliers or customers not to deal with competitors, undercutting prices, refusing to supply scarce goods to competitors or "buying up" scarce goods in excess of its requirements.

Notwithstanding that a practice amounts to a restrictive practice or an abuse of a firm's dominant market position, such practice may still be allowed if, inter alia, it enhances and maintains exports, promotes the previously disadvantaged people of South Africa, promotes economic stability in an industry or stops the decline of an industry.

5. SUCCESSOR LIABILITY

Section 34(1) of the Insolvency Act of 1936, as amended, states that, if a company or other business-owning person or entity transfers under a contract any business belonging to it or the goodwill of such business or any goods or property forming a part thereof (except in the ordinary course of that business or for securing the payment of a debt) and the trader has not published a notice of the intended transfer in certain newspapers and the *Government Gazette* (the official publication of the government) within a period of not less than thirty days and not more than sixty days before the date of the transfer, such transfer is void against creditors for a period of six months and is void against the trustee of the trader's estate if the estate is transferred at any time within that period. Upon the publication of any notice, each of the trader's liquidated liabilities in connection with the business immediately becomes due and payable, even if it would otherwise have become due sometime in the future, provided only that the creditor demands payment. Where no notice has been published in terms of Section 34(1) then during the six-month period after the date of transfer, an individual creditor of the seller may institute proceedings against the seller and, after obtaining judgment, may levy execution on the business, goods or property transferred by the seller, notwithstanding that ownership may have passed to the buyer or any other person in terms of the agreement of sale.

The purpose of Section 34(1) of the Insolvency Act is to protect a trader's creditors against the trader dispossessing its property without paying its debts either before the transfer or out of the proceeds. This means that if Section 34(1) is followed, then subject to certain limited exceptions (such as legal actions instituted against the seller before the date of transfer), the purchaser of a business or any assets thereof cannot be held liable for any debt incurred or liability owed by its predecessor-in-title unless the debt or liability is specifically assumed.

5.1 A buyer of assets will not in the ordinary course be held liable for environmental liabilities previously incurred by the seller.

5.2 Liability related to products sold or services rendered before the effective date of the transfer of the business or assets is borne by the seller unless, in the asset acquisition agreement, the seller, with the consent of its creditors, delegates its obligations to the buyer and the buyer assumes these obligations.

5.3 Unless the asset acquisition agreement specifically states that the buyer is responsible for executing any unfulfilled orders for goods accepted by the seller in the ordinary course of business before the effective date, the responsibility remains with the seller.

5.4 The buyer is under no obligation to deal with warranty claims unless the buyer and seller specifically agree otherwise.

5.5 A purchaser or lessee of real property cannot, unless it is specifically agreed otherwise, be deemed to have accepted for its own account any obligations or liabilities of the previous owner or lessee. Privity of contract (insofar as the obligation or liability is contractual in nature) is paramount in RSA law and delictual (tortuous) liability is, with minor exceptions, premised on fault.

5.6 Employees' contracts are transferred. This is discussed further in Section 7.

5.7 The overriding source for environmental law in South Africa is, in the first instance, found in the Constitution of the Republic of South Africa, 1996, as amended. The Constitution guarantees to every person the right to an environment that is not detrimental to health or well-being. The emphasis given by the Constitution to improving the social environment means that all laws must be interpreted within the context of the Constitution. After the Constitution, the National Environment Management Act of 1998, as amended, and the Environmental Conservation Act of 1989, as amended, are of fundamental importance.

The objective of the National Environmental Management Act is to provide for cooperative environmental governance by establishing (a) principles for decision making on matters affecting the environment, (b) institutions that promote cooperative governance and (c) procedures for coordinating environmental functions exercised by organs of state. The National Environmental Management Act establishes a number of principles that apply to the actions of all organs of state that may significantly affect the environment. These principles are designed to serve as a general framework for environmental planning, as guidelines under which organs of state must exercise their functions and as guidelines for the interpretation, administration and implementation of the National Environmental Management Act and any other law concerned with the protection or management of the environment.

The objective of the Environment Conservation Act is to provide for the effective protection and controlled utilization of the environment. Following the enactment of the National Environmental Management Act, a number of the provisions of the Environmental Conservation Act were repealed. The remaining provisions include those that address the classification of terrestrial and marine protected areas, waste management, regulations on noise, vibrations and shocks and other general environmental policies.

In view of the regulatory regime outlined above, environmental audits are frequently conducted and are becoming more frequent as time goes by. There are currently a number of environmental risk service organizations that offer environmental risk assessments, environmental audits covering waste management systems and compliance with environmental legislation, environmental impact assessments, environmental management systems, the review and development of chemical handling systems, hazard and operability studies, closure advice and consultancy, preacquisition environmental audits, waste minimization studies and educational services.

Due diligence investigations are frequently conducted before (and often as a condition precedent to) the acquisition of businesses and assets to allow a buyer to satisfy itself about the affairs of the target company, including its employees, history, state of affairs, financial position, assets and liabilities. The seller generally agrees to cooperate fully with the buyer and to make available to it all documents, contracts, reports, printouts, audited annual financial statements, auditors' working papers, management accounts and income tax assessments and returns.

The parties to an asset acquisition agreement frequently agree to use their best endeavors to ensure that third parties to all agreements between the seller and such third parties (including installment sale, credit, hire purchase and lease agreements in relation to leased assets of the business) consent to the seller's assignment of all rights and obligations under such agreements to the buyer effective on the date of the sale. Alternatively, the seller and buyer agree that, effective on the date of the transaction, the rights and obligations under any such agreement are for the benefit and account of the buyer but usually with the express understanding that, should any such agreement be cancelled by the third party, the buyer has no claim of any nature whatever against the seller.

6. PUBLIC RECORDS

(i) A conveyance of land from one person to another may, as a general rule, take place by means of a deed of transfer only, executed or attested by the Registrar of Deeds. The deed of transfer must be prepared in the form prescribed by regulations, by a conveyancer who annexes supporting documentation, such as the existing title deed, existing mortgage bonds with the mortgagee's consents for the disposal, rates clearance certificates, a transfer duty receipt or exemption certificate and consents required for specific enactments. Thus, it is possible to ascertain at any time the ownership and history of ownership of land by examining the register maintained in the office of the Registrar of Deeds.

(ii) See Subsection 6(iv).

(iii) There are no public records that provide information about environmental issues affecting immovable property.

(iv) Liens are not contractual rights because they are conferred not by virtue of a contract but by operation of law or statute when one person is enriched at the expense of another or when money or money's worth is put into the property of another in consequence of a prior contractual relationship. There is no public record of liens.

A mortgage is based upon an agreement by which the mortgagor undertakes the obligation to pass a mortgage bond over specified immovable property in favor of the mortgagee. The bond is prepared by a conveyancer practicing within the province within which the deeds registry relating to the land is situated and is executed by the owner of the immovable property or by a conveyancer duly authorized by a formal power of attorney granted by the mortgagor. The real right in the mortgaged property is registered and comes into existence at that time. The existence of mortgage bonds may, thus, be ascertained by referring to the register maintained in the office of the Registrar of Deeds.

Notarial bonds provide a means by which a debtor may hypothecate (pledge) movable property without delivering it to the creditor in whose favor the bond is passed. A special notarial bond that describes specific movable property for which the bond operates must be registered within three months after the date of execution or within such extended period as the court may, on application, allow to provide the creditor with a real right of security. The proceeds of particular assets that are subject to the real right of security are first distributed to the holder thereof in the event of the debtor's insolvency.

Ordinary pledges of corporeal movables are not publicly documented because the existence of the pledge is sufficiently demonstrated by the delivery of the pledged object to the creditor. Such delivery is a prerequisite for the creation of a real right of pledge.

(v) Patents, designs and trademarks can be registered. A registered patent endures for twenty years, subject to annual renewal fees commencing after the third year.

Registration of an aesthetic design affords protection for five years, subject to renewal for two further terms of five years each. Registered trademarks endure for a period of ten years and may be renewed for further periods of ten years ad infinitum. Designs and trademarks are not required by law to be registered, although this fact does not prevent a person from asserting a common law right to use them exclusively.

(vi) It is not practically possible to ascertain whether litigation is pending against a target company, and it is advisable to include an appropriate warranty in the asset acquisition agreement.

(vii) It is possible, by conducting a search of the office of the Registrar of Companies, to ascertain whether an entity is registered and, if so, the nature of that registration (e.g., it may be registered as a public company, private company or a close corporation—a juristic entity with a simplified legal and accounting structure). It is impossible to ascertain whether liquidation proceedings have been instituted against a company until such liquidation is completed and the company deregistered by the Registrar of Companies.

(viii) The annual financial statements of a company are compiled from information contained in its accounting records. Every company must retain, in one of the official languages of the RSA, such accounting records as are necessary to present the state of affairs and the business of the company fairly and to explain the transactions and financial position of the trade or business of the company. The accounting records may be kept either by making entries in bound books or, subject to adequate precautions against falsification, by recording the matters in any other manner. The accounting records must be kept at the registered office of the company or at such other place as the directors may decide, and must be open at all times for inspection by the directors. Annual financial statements must be distributed to members (shareholders) and debenture holders of a company, and public companies must submit a copy of the annual financial statements to the Registrar of Companies. Annual financial statements so submitted to the Registrar are public documents.

7. LABOR MATTERS

7.1 Before the enactment of the Labor Relations Act of 1995, the sale of a business resulted in the termination of the contracts of existing employees; thus, the buyer could decide whether to offer such employees reemployment. Section 197 of the Labor Relations Act creates a right to continued employment, bringing RSA law in line with European standards by prohibiting the unilateral transfer of a contract from one employer to another unless the whole or part of the business is being transferred as a going concern. Unless there is an agreement to the contrary between the employer and the representative trade union, workplace forum or affected employees, all existing rights and obligations between the former employer and the employees continue between the new employer (buyer) and the employees. This means that an employee's continuity of employment is not interrupted by the transfer of the employer's business.

7.2 The Labor Relations Act regulates unfair dismissals. The model adopted by the Labor Relations Act closely follows the ILO Convention (No. 158) Concerning Termination of Employment. Certain dismissals are automatically unfair. In all other cases, an employer may dismiss an employee only for reasons relating to conduct, capacity and the employer's operational requirements, and only after following a fair procedure. In the case of a dismissal for operational requirements, the court generally accepts the employer's reason to dismiss, provided the employer is not acting in bad faith. The court is reluctant to otherwise inquire into the commercial rationality of the employer's decision. The obligations of an employer in this instance are largely procedural and require consultation with affected employees and their representatives to consider alternatives to dismissal, selection criteria for such dismissals and severance pay. In the absence of an agreement, the Labor Relations Act prescribes the payment of one week's remuneration for every completed year of service as severance pay, although this right is forfeited if the employee unreasonably refuses to accept an offer of alternative employment. In practice, severance payments of up to two weeks' remuneration per year of completed service are common.

The Labor Relations Act regulates the remedies to which employees are entitled if their dismissals are found to be unfair. The primary remedy is reinstatement, but if an employee does not wish to be reinstated, or a continued employment relationship is intolerable or not reasonably practicable, financial compensation can be awarded. The maximum amounts payable are two years' salary for automatically unfair dismissals and twelve months' salary for dismissals found to be unfair for other reasons.

7.3 A buyer is bound by the seller's obligations to its employees in connection with pension plans and retirement, health and other benefits.

7.4 The consent of the employees is required if the seller delegates to the buyer any part of the seller's liability to make severance payments (whether as a result of legislation or the employees' contracts). The buyer and seller can make their own arrangements for payment, but these would not be binding on the employees in the absence of their consent.

7.5 Section 85(1) of the Labor Relations Act requires an employer, before implementing certain proposals, to consult with a workplace forum and attempt to reach consensus with it. A workplace forum may be established in private-sector workplaces with more than 100 employees. Application for the establishment of a workplace forum may be made only by a representative trade union (a trade union or two or more registered trade unions acting jointly) that has as members the majority of the employees employed by an employer in a workplace.

Under Section 84 of the Labor Relations Act, subjects that must be discussed in a workplace forum include issues relating to the restructuring of the workplace and mergers and transfers of ownership if they will have an impact on employees. Section 197(3) of the Labor Relations Act requires the employer to conclude an agreement regulating the transfer of a business as a going concern with a workplace forum (this may render the duty to consult under Section 84 redundant in most cases).

Under the Labor Relations Act, consultation means the employer's disclosing to the workplace forum all relevant information and giving the workplace forum the opportunity to make representations and advance alternative proposals. The employer must consider and respond to these proposals, including stating the reasons for not granting them.

7.6 A buyer may not unilaterally change the terms and conditions of employment of employees who are transferred to it as a result of an acquisition.

7.7 A buyer assumes all the seller's obligations to employees as a result of an acquisition.

8. PLANT CLOSING LAWS

Section 84(1) of the Labor Relations Act states that a workplace forum is entitled to be consulted in relation to partial or total plant closures. A registered union also enjoys the right to be consulted about contemplated retrenchments if there is no workplace forum in the workplace concerned (see Section 7). Before any retrenchment can take place, the employer must satisfy itself that such retrenchment is necessary and must engage in consultation, either with the workplace forum or union or, if there is no such workplace forum or union, the employees likely to be affected by the dismissals or their representatives nominated for that purpose. Topics for consultation include the following:

- appropriate measures to avoid the dismissals;
- appropriate measures to minimize the number of dismissals;

- appropriate measures to change the timing of the dismissals;
- appropriate measures to mitigate the adverse effects of the dismissals; and
- the method for selecting the employees to be dismissed.

9. ASSIGNMENT OF CONTRACTS

At common law, unless an agreement specifies otherwise, a seller's rights under a contract may generally be transferred to a buyer without the prior consent of the co-contractor. This, however, is not the case with the transfer of obligations. As most contracts constitute both rights in favor of the seller as well as obligations on the seller, the transfer of contracts normally does not require the prior written consent of the co-contractor.

10. NONCOMPETITION

10.1 A noncompetition or restraint-of-trade clause can be enforced against a seller or any of its principals or employees, provided the clause does not conflict with public policy. Whether the clause is reasonable (as between the parties to the agreement) is not by itself a measure of its compatibility with public policy, although unreasonableness may indicate that it is against the public interest. Interests that may be legally protected are normally patrimonial interests, such as business or trade connections, clientele and trade secrets. A restriction intended to exclude competition as such, without also protecting some legitimate interest, is normally considered to be against public policy.

10.2 In determining whether the enforcement of a noncompetition agreement is contrary to public policy, a court regards the nature of the restricted activity, the geographic area in which the restriction is intended to operate, the period of the restriction and the particular interests that stand to be protected.

A court may partially enforce a noncompetition agreement (e.g., only in a certain locality or for a shorter period of time if, in its view, the agreement is too widely framed) but only if the parties have contemplated such partial enforcement in the agreement or, in the absence of this, only if such partial enforcement can be justified in terms of public policy. Thus, it is common to include a clause in noncompetition agreements providing that a court may, if it deems the clause as written to be unenforceable as a whole, apply the clause partially to ensure that the public interest is not offended.

The greater the need to protect the seller's proprietary interests, the longer the permissible restraint. Generally, a restraint is not permitted for more than three years, but it may be longer in certain circumstances. Usually, the whole of the RSA and the neighboring countries are included, but the clause is generally phrased so that the geographic area is divided into localities/regions in case a court is not prepared to enforce a restraint in the entire geographic area.

The party seeking to escape a noncompetition agreement bears the onus of proving its illegality (i.e., that its enforcement would be contrary to public policy).

Noncompetition agreements are not registered with any authority.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Submission or consent to the jurisdiction of an RSA court is not sufficient in all cases to confer jurisdiction on the court. In cases where both parties to the litigation are foreigners and no other ground for jurisdiction exists, and in cases relating to immovable property not within the court's territorial jurisdiction, the parties cannot by agreement confer on a court jurisdiction that it would not otherwise have.

Parties may, under RSA law, submit to the jurisdiction of a foreign court.

Parties are free to elect which law is to be applied in a dispute between them, although such choice alone cannot bind an RSA court in resolving the dispute if RSA law is chosen.

11.2 Parties are entitled, by contract, to agree that any disputes arising between them in relation to that contract be decided by an arbitrator. The Arbitration Act of 1965, as amended, provides that if any party to an arbitration agreement commences legal proceedings in any court, the other party to the agreement may, after entering an appearance to defend but before taking any other steps, apply for a stay of those proceedings. If the court is satisfied that there is no sufficient reason why the dispute should not be transferred to arbitration in accordance with the agreement in dispute, it may grant the stay. Alternatively, a party to the dispute may, after entering an appearance, file a special plea, relying on the arbitration clause. The arbitration clause does not, however, oust the jurisdiction of the court, which has discretion not to uphold the reference to arbitration, although it rarely does so.

11.3 Arbitration is generally chosen in asset acquisition agreements because it offers a speedy and efficacious remedy to disputes that arise pursuant to a contract. There is generally a waiting list to obtain a court date. Furthermore, an arbitrator is generally entitled, in terms of an agreement between two parties, to use informal means to reach a decision, while at all times applying principles of law. In addition, an arbitrator is generally an expert in the particular field in which the dispute has arisen.

The Arbitration Foundation of Southern Africa (AFSA) has a comprehensive set of rules that govern arbitrations conducted under its auspices. Many parties to an acquisition agreement specifically provide that any dispute submitted to arbitration will be determined in accordance with the AFSA rules.

12. OTHER ISSUES

[No response.]

Spain

Contributed by Rafael Alonso, NautaDutilh

1. ASSET VERSUS SHARE PURCHASE

1.1 The major consideration for a buyer in choosing an asset acquisition rather than an acquisition of shares is that, under an asset acquisition, the buyer can be exempt from any successor tax liability, provided a specific procedure is followed for that purpose.

1.2 No indirect taxes, such as value added tax (VAT) or transfer taxes, are levied on share transfers, except for share transfers in companies whose assets are mainly composed of real estate situated in Spain. Indirect taxes (VAT or transfer taxes) are levied on a transfer of substantially all the assets of a target company to a buyer. The level of these taxes depends upon the nature of each asset or right concerned. A sixteen-percent VAT or a transfer tax is levied on real estate transfers, depending upon whether the transfer is deemed to be a "first" or a "second" transfer. In general, a sixteen-percent VAT is levied on the transfer of movables. A transfer of all assets and liabilities of a company is exempt from VAT. VAT is a tax levied on sales transactions imposed upon each consecutive purchaser based upon the purchase price.

Under Spanish common law and Spanish labor law, both the acquisition of substantially all the assets of a target company and the acquisition of all the shares of a target company may lead to successor liability. Pursuant to Article 13, (4) of Spanish Royal Decree 1.684/1990 of December 5 on the General Regulation of Tax Collections, tax liability can be avoided in connection with the acquisition of all the assets of a target company as follows: (i) if the buyer, with the consent of the seller, applies to the competent tax authorities for a certificate stating that the seller has no tax debts related to the transferred activity and (ii) if the tax authorities issue the certificate confirming the foregoing, or fail to issue it within two months of the date on which the buyer files the application, then the buyer is deemed exempted from any tax liability in connection with that acquisition of assets.

1.3 If only part of the assets are acquired, successor liability in relation to taxes, labor matters and commercial matters may be limited or avoided, provided the acquisition involves isolated assets that do not allow the buyer to succeed in the seller's main activities (Article 13, (2) of the Spanish Royal Decree).

2. FORM OF DOCUMENTS

2.1 The Model Asset Purchase Agreement could generally be used in its present form, including its extensive representations, warranties and indemnities. Spanish law does not dictate a specific format for asset acquisition agreements. Generally speaking, however, the

Model Asset Purchase Agreement must meet the minimum standards required under Spanish contractual law for it to be considered an enforceable agreement.

2.2 In practice, a transfer requires a variety of conveyance documents, depending upon the nature of the assets being conveyed (e.g., trademarks and real estate). Agreed-upon documents are usually attached in draft form to an asset acquisition agreement.

2.3 The form of an asset acquisition agreement does not make any difference in the tax effects of the transfer.

2.4 The transfer of certain assets must be registered with the competent public registries, depending upon the nature of the asset. For example, trademarks and patents are registered with the Spanish Patents and Trademark Bureau in Madrid, copyrights with the Spanish Intellectual Property Registry based in Madrid, and real estate with the competent Land Registries located in each Spanish province. In addition, the transfer of certain regulated businesses requires registration with the competent Spanish regulatory authorities (e.g., banking, insurance and gambling).

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 The acquisition of assets by nonresidents may qualify as a foreign investment in Spain if, through the acquisition, the buyer acquires a Spanish subsidiary or branch in the country. The acquisition of real estate situated in Spain also qualifies as a foreign investment in the country if the total investment exceeds Ptas. 500,000,000. If the investment originates from a tax haven within the meaning of Spanish Royal Decreee 664/1999 of April 23, previous notification of the investment shall have to be made to the Ministry of Finance.

These foreign investments must be declared to the Spanish Foreign Investment Registry for statistical, administrative or economic reasons and after the investment has been made.

If a transfer of assets qualifies as a global transfer of a business (a transfer of all assets and liabilities connected with the business), and the transferor is a private limited liability company (Sociedad de Responsabilidad Limitada) pursuant to Article 117 of the Spanish Private Limited Liability Companies Act, the transfer requires the prior approval of the general meeting of partners. The general meeting of partners provides the specific terms and conditions under which the transfer must be carried out. The resolution by which the general meeting of partners consents to the transfer must be published in the *Official Commercial Registry Gazette* and in one of the major newspapers in the place where the seller has its domicile. The transfer can only be carried out one month after the notice unless, within that period, any of the seller's or buyer's creditors oppose the transfer. The validity of the transfer is subject to the registration of the seller's liquidation with the Spanish Trade Registry where the seller has its corporate seat.

These rules do not apply to Spanish joint stock companies (Sociedades Anonimas). The sale by joint stock companies of their businesses can be decided and executed by the corporate body (a board of directors, a sole director, various directors acting jointly and/or severally or any person to whom the board or the director has delegated powers to do so).

3.2 In Spain, foreign investments in activities related to national defense (including, but not limited to, the production or trade of arms, ammunition, explosives and war materials) are subject to prior governmental approval.

For certain types of activities, foreign investments in Spain must also comply with requirements imposed by specific Spanish regulations for such activities (such as air transport, radio, minerals and mineral raw materials of strategic interest, mining, television, gambling, private safety, national defense and arms and explosives for civil use.)

4. UNFAIR COMPETITION

The Defense of Competition Act of July 17, 1989, as amended by Spanish Royal Decree-Law 6/2000 of June 23, mandates that parties who propose to engage in a concentration (mergers, acquisitions, joint ventures or takeovers) must notify the Spanish competition authorities prior to the consummation of the proposed transaction. This compulsory notification must be made when either (a) a market share equal to or exceeding twenty-five percent of the national market (or of any specific part thereof) will be reached for a product or service as a result of the transaction, or (b) the participants' aggregate sales volume over the last fiscal year exceeds Ptas 40 billion, and at least two of the participants individually make a sales volume of Ptas 10 billion. Lack of notification will result in a fine of Ptas 5 million. For every day of delay in notifying the authorities, an additional fine of Ptas 2 million will be imposed. If the Spanish government opposes the concentration or if its imposed compliance measures are not adopted, a fine of up to ten percent of the participants respective sales volumes may be imposed on the year in which the concentration was made.

If the contemplated transaction has a European dimension, the European Commission (EC) will examine it under the rules set forth in the European Merger Control Regulation, pursuant to which the planned transaction must be notified.

5. SUCCESSOR LIABILITY

5.1 The general principle under Spanish law is "[he] who pollutes, pays." This system seeks to direct the costs of pollution to the polluter.

There is specific legislation to deal with each element of the environment, such as the Water Act, the Solid Urban Waste Act, the Dangerous and Toxic Waste Act and the Air Protection Act. Any breach of the relevant legislation results in liability. In certain cases, a breach may also result in closing the polluter's installations and requiring the polluter to reinstate the polluted environment.

The owner of real property may be liable for soil pollution regardless of whether it caused the pollution. This results in legal exposure for a potential buyer who intends to enter an asset acquisition agreement. This exposure should be avoided by the seller's acceptance of liability for any pollution originating on the transferred site before the effective acquisition date. In addition, penal liability for environmental offenses should be considered.

5.2 Generally speaking, a buyer is not liable for products or services sold by the seller to third parties before the acquisition date. Pursuant to the Act of July 6, 1994, on the Civil Liability for Damages caused by Defective Products (implementing European Directive 85/374/CEE of July 25, 1985), a buyer could, under certain circumstances, be liable for damages caused to a third party by defective products manufactured and sold by the seller before the acquisition date but actually supplied by the buyer. After that date, the buyer would still have legal recourse against the seller for any amount paid to the third party.

5.3 A buyer has no legal obligation to fulfill outstanding purchase orders, but it is not unusual in Spain to insert such an obligation into the asset purchase agreement.

5.4 Article 12 of the Spanish Act on Retail Trade of January 15, 1996, provides that a vendor of goods is liable for any claim related to their quality. This article provides for a general warranty period of six months following the sale of the goods. Moreover, the manufacturer and importer of the goods must provide adequate postsale service to the consumers or users and must maintain a stock of spare parts for five years after the date on which the manufacturing of the goods ceases.

In an acquisition of all or substantially all the assets and liabilities of a company, the buyer may be held liable by users or consumers for warranty claims that originated before the acquisition date. The buyer's liability arises not by operation of law but from the following principles: (a) warranty obligations are inherent liabilities in a global business transfer and (b) if the buyer cannot be held liable for warranty claims, Spanish consumers or end users would be deprived of any remedy.

5.5 A buyer of real property should ensure, by a proper legal audit, that the previous owner fully paid for the property and that it is free from any lien or encumbrance. Certified registration data about an estate may be obtained by a Spanish Civil Law notary before the completion of the transfer.

5.6 Except for the employment liabilities discussed in Section 7, there are no liabilities or obligations that automatically transfer to a buyer of assets.

5.7 It is customary for a buyer to conduct both an environmental audit and a complete due diligence investigation before an asset acquisition.

6. PUBLIC RECORDS

The following public records exist in Spain:

(i) and (ii) Information regarding the ownership of, and liens and encumbrances on, real immovable property can be obtained from the Spanish Land Registries (Registros de la Propiedad Inmobiliaria).

(iii) There is no public information available regarding environmental issues affecting immovable property.

(iv) Information regarding the ownership of, and liens and encumbrances on, movable (i.e., personal) property can be obtained from the Spanish Chattel Mortgage and Pledge without Transfer of Possession Registries (Registros de Hipoteca Mobiliaria y Prenda sin Desplazamiento). Information regarding lease sales on movable property can be obtained from the Spanish Reservation of Title Registries (Registros de Reservas de Dominio y Prohibiciones de Disponer).

(v) Information regarding the ownership of, and liens and encumbrances on, industrial property rights (such as patents, trademarks, trade names, industrial designs and licenses) can be obtained from the Spanish Industrial Property Registry (Registro de la Propiedad Industrial).

(vi) Information regarding pending litigation can be located in the public records listed in Subsections 6(i), 6(v) and 6(vii), and in other records now that it is common practice in Spain that the complainant or creditor inform the general public about the existence of a court proceeding, thereby affecting the ability of the debtor to dispose of its assets.

(vii) and (viii) The corporate standing of the seller and financial information about the seller can be obtained from the Spanish Trade Registries (Registros Mercantiles). The Registry provides general information about the target company, including whether it has complied with applicable corporate rules (e.g., minimum capital, removal and appointment of directors and proxy holders, corporate amendments, objects and domicile), and the company's annual accounts, which must be regularly deposited with the Spanish Trade Registries. Information regarding the ownership of, and encumbrances on, securities can be obtained from the public records handled by the Spanish Securities Exchange Commission (Comision Nacional del Mercado de Valores).

7. LABOR MATTERS

7.1 If a buyer acquires all the seller's assets or a significant part of the seller's assets, then the seller's employees—by operation of law—enter the employment of the buyer, provided the assets transferred constitute an autonomous production or economic business unit.

7.2 It is common practice to insert in an asset acquisition agreement a requirement that the seller terminate some employment contracts as a condition precedent without saddling the buyer with severance liability.

7.3 A buyer is bound by all labor obligations of the seller vis-à-vis its employees. It is common practice in Spain to insert in an asset acquisition agreement a specific representation by the seller that, as a result of the asset transfer, no employees of the seller will be transferred to the buyer. The buyer then will be held harmless from any liability resulting from the breach of that representation, with the seller obligated to indemnify the buyer fully.

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

7.5 The seller must notify the proposed asset transfer to the employees' works council (Comite de Empresa) or the labor representatives (Delegados de Personal), as the case may be, but no approval or consultation advice is required from them.

7.6 After the consummation of the acquisition, the buyer cannot unilaterally change the terms of employment of employees who are transferred to it.

7.7 The seller and buyer are jointly and severally liable for a period of three years for all liabilities accrued before the date of the asset acquisition.

8. PLANT CLOSING LAWS

The Spanish Workers Statute restricts the ability of Spanish employers to engage in plant closings or mass layoffs. An employer intending to engage in such a procedure must open a consultation period during which it must (a) notify both the applicable labor authorities (either the Spanish Ministry of Labor or the Spanish Autonomous Community to which the relevant labor competences have been transferred) and the workers' representatives about the specific reasons for the mass layoff and (b) request their consent. If an agreement is reached before the expiration of the consultation period, it is ratified by the competent labor authority and is fully enforceable. If an agreement cannot be reached within the consultation period, the competent labor authority must make a decision on the requested mass layoff within fifteen days of the expiration of the consultation period. If the labor authority does not resolve the request before the end of the fifteen-day period, the plant closing or mass layoff is deemed to have been tacitly authorized.

The consultation period for an employer employing between five and forty-nine persons is fifteen days, whereas for employers with fifty or more employees, the consultation period is thirty days. Employers employing five or fewer employees are not required to observe this procedure.

9. ASSIGNMENT OF CONTRACTS

Under Spanish law, save otherwise agreed in the contract, credits arising out of the contract can be assigned by either party provided notification is given to the other party. Insurance contracts, however, are transferred from the seller to the buyer of assets by operation of law without prior consent of the insurance company.

10. NONCOMPETITION

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

10.2 Noncompetition clauses imposed upon employees are subject to the following legal limitations: (a) the employer must be able to prove that it has an industrial or commercial interest in imposing the noncompetition obligation on its employee, (b) the employer should compensate the employee fairly in consideration for the restrictive obligation and (c) the duration of the noncompetition obligation cannot exceed two years for qualified employees and six months for nonqualified employees. The same restriction applies to noncompetition obligations imposed upon managing directors (Altos Directivos), who, under certain circumstances, may qualify as special employees.

Noncompetition clauses may be imposed upon a seller and its principals without any particular legal restrictions other than those resulting from the general principles of Spanish common law, including good faith, equity, respect of morals and public order.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 (i) It is customary to insert a choice-of-law clause in an asset acquisition agreement with foreign parties. The law chosen by the parties must have a connection to the transaction and cannot avoid any imperative or mandatory Spanish rule. The choice of law is permitted under Article 10.5 of the Spanish Civil Code and under the Rome Convention on the Law Applicable to Contractual Obligations of June 19, 1980, to which all the present members of the European Union (EU) are contracting parties.

(ii) It is also customary in Spain to insert a choice-of-jurisdiction clause in an asset acquisition agreement with foreign parties. The choice of jurisdiction is permitted under Article 22.2o of the Spanish Constitutional Act of the Judiciary and under Article 17 of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, to which all the present members of the EU are contracting parties. Jurisdiction cannot be freely determined by the parties on matters that, according to the Spanish Constitutional Act or the Brussels Convention, are exclusively entrusted to the jurisdiction of a specific court. The Spanish Civil Procedure Act no. 1 of January 7, 2000, has expressly declared in force Article 22.2o of the Spanish Constitutional Act of the Judiciary as of January 7, 2001.

11.2 It is possible and customary in Spain to insert an arbitration clause in an asset acquisition agreement. Arbitration may be entrusted to either national or international tribunals. A judicial body can reexamine the arbitration award only on limited formal grounds (e.g., the arbitration clause is null and void, the arbitration procedural rules were not observed, the award was rendered outside the prescribed term, the matter could not be submitted to arbitration or the award is contrary to public order). Spanish arbitration awards are enforceable in accordance with the provisions of the Spanish Arbitration Act of December 5, 1988. Foreign arbitration awards are enforceable in accordance with the specific enforcement treaties to which Spain is a party (e.g., the Geneva Convention of September 26, 1927, the New York Convention of June 10, 1958, and the European Convention on International Commercial Arbitration of April 21, 1961).

11.3 Arbitration is recommended because it is generally faster than Spanish court proceedings. Traditionally, Spanish companies have not frequently used arbitration, although in view of the significant volume of international transactions being carried out in Spain over recent years, there has been an increasing demand for arbitration.

12. OTHER ISSUES

12.1 It is typical to include a clause regarding the allocation of attorney's fees in an asset acquisition agreement.

12.2 Spain has no legislation similar to the U.S. Bulk Sales Laws. In Spain, however, if a seller's assets are sold "in bulk" (thereby leaving the seller with no assets that its creditors may seize) and the proceeds of such sale are put out of the creditors' reach, the sale would be deemed a transfer of assets in fraud of the creditors' rights. Pursuant to Article 1.111 of the Spanish Civil Code, any creditor may invalidate such a transfer by bringing a nullity court action against both the seller and the buyer. Moreover, the affected creditor may also try to hold the directors of the seller and the buyer liable for the fraudulent transfer. This situation could lead to the seller's bankruptcy, under which a competent Spanish court might declare that the transfer was null and void with retroactive effect.

12.3 [No response.]