Sweden

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1. ASSET VERSUS SHARE PURCHASE

1.1 The major considerations for a buyer in choosing an asset acquisition rather than a share acquisition in Sweden are the following:

- Normally an asset acquisition is more tax advantageous for the buyer. In an asset transaction, the buyer can take tax-deductible depreciation based upon the full value of the acquired assets. The purchase price in an asset acquisition—including any payment for goodwill—is allocated for depreciation purposes to the various assets acquired. The goodwill can, at the option of the acquiror, be separated as an asset of its own. The assets—including goodwill but not real estate—can be depreciated for tax purposes at a maximum rate of thirty percent on a declining basis. The minimum depreciation for accounting purposes for goodwill is ten percent per annum on a straight-line basis.

  In an acquisition of shares, no part of the purchase price—including that for goodwill—may be amortized for tax purposes. For accounting purposes, however, it is mandatory to amortize the goodwill part of the purchase price at the minimum rate of five percent per annum, straight line in the consolidated accounts for the group (i.e., the entity holding at least fifty percent of the voting power). The impact of this amortization is that an equal amount of the buyer's free equity would be blocked for distribution purposes.

  An asset acquisition including real estate triggers a stamp duty liability amounting to, for corporations, three percent of the purchase price for the real estate. Further, an asset acquisition might be subject to value added tax (VAT), depending upon the assets and parties involved, including when the buyer is not Swedish. As such tax should be recoverable, this would be most often a cash-flow issue rather than a tax-cost issue.
- The successor liability assumed by a buyer through an asset acquisition is much more limited than that assumed through an acquisition of shares. The general principle is that a seller cannot transfer its obligations to the buyer without the express agreement of the buyer and the consent of the obligee. For further discussion, see Section 5.
- An asset acquisition often requires more third-party notifications and approvals than an acquisition of shares. No obligations can be transferred from the seller to the buyer without the consent from the obligee. It can be time consuming and difficult to obtain such consents, and third-party obligees tend to take advantage of the situation to re-

negotiate existing contracts. An asset acquisition may be disadvantageous in connection with a transfer of receivables because the buyer must notify all debtors to secure payment. If notification is not properly made, the debtors may repay their debts to the seller and thus reduce their obligations to the buyer.

- If there are licenses necessary to conduct the acquired business, an asset acquisition could be disadvantageous because such licenses then must be obtained by the buyer. (There are licenses and regulatory approvals that would also need to be renewed in the event of a share transfer.)

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

1.3 An acquisition of only part of the assets is normally subject to VAT, regardless of the nationality of the purchaser. Otherwise, there are generally no differences, except that a cross-border acquisition of only part of the assets—as opposed to a cross-border acquisition of substantially all assets—could be governed by the Swedish Act on International Sales (based upon the Vienna Convention) if the other requirements for application of that act are met.

2. FORM OF DOCUMENTS

2.1 Agreements based upon the common law may, in general, be used in Swedish law, although some of the representations and warranties found in such agreements may be unnecessary or inapplicable under Swedish law.

2.2 Generally, it is possible to make a transfer of assets legally binding on both parties by way of one document. This is, however, normally not done if the assets include real property because the transfer of real property is subject to certain formal regulations. Real estate is therefore often transferred under a separate contract. Furthermore, registration with the appropriate authorities is necessary to finalize the transfer of trademarks, patents and company names. The transfer of contracts, debts and other liabilities normally requires third-party consent.

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

2.4 Registration is not needed for transfers to be binding between the parties. The ownership of certain items, however, such as real estate, trademarks, patents and company names, must be registered to give the buyer protection against third-party interests. See Section 6.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 Governmental approval or permission is not required for the sale or acquisition of assets involving foreigners. Foreign entities may make direct investments in Sweden and in Swedish assets without prior approval. Exchange controls are essentially abolished, although there are certain reporting requirements for purposes of statistical compilation and preventing tax evasion. Export licenses are required for certain products, including, for example, armaments, scrap metal, petroleum products, devices and material for the production of nuclear power, gold, antiques, certain photographs and maps, certain drugs, certain seeds and agricultural products.

With respect to a third party, there are no formal legal requirements for a specific body within the seller to approve the sale or acquisition of company assets. Such requirements may follow from the company's bylaws, however. For example, if a sale of assets involves the cessation of a field of activity provided in the company's bylaws, then under certain

circumstances, the company may not be bound by the sale unless the shareholders approved it.

In all other respects, the board of directors may always represent and sign for the company. A managing director is always authorized to represent the company and sign for the company in its day-to-day business and management. For steps that, with regard to the scope and nature of the company's operations, are unusual or of great importance, the managing director needs the authorization of the board of directors. Consequently, the managing director normally is not authorized to approve the sale of all or the majority of the assets of the company without authorization from the board of directors.

In Sweden, administrative filings before an acquisition of assets are required only for purposes of merger control. See Section 4.

3.2 Except as described below, there are no special regulations that prevent nonnationals from engaging in business activities or that require special approvals merely because the business is conducted by nonnationals. Restrictions on foreign equity ownership have been abolished and are not allowed. Restrictions on foreign ownership are still maintained, however, for companies involved in the production of defense material and other sensitive areas such as armaments, petroleum products, nuclear power and certain drugs. Furthermore, under the Law on Permission for Certain Acquisitions of Real Property, acquisition of small houses, vacation homes and agricultural property by companies with foreign ownership may require permission.

4. UNFAIR COMPETITION

The Swedish Competition Act, enacted in July 1993, regulates and controls mergers. The Competition Act is modeled on EC rules on merger control. The Swedish Competition Authority (Konkurrensverket) has primary responsibility for administration of the Competition Act.

Filing is required if the contemplated transaction falls within the scope of the Competition Act, which involves an acquisition of a business carrying out commercial activities in Sweden when the companies to be combined have an aggregate annual turnover (i.e., gross revenue) exceeding SEK 4 billion, and at least two of the companies concerned each have a turnover from sales in Sweden of more than SEK 100 million. The buyer must obtain a "decisive influence" over the target company. Accordingly, a partial acquisition requires notice only if it would give the buyer a decisive influence over the acquired business.

There are no pecuniary sanctions for failing to notify the Competition Authority about a merger. Should the Competition Authority become aware of an unnotified merger, however, it may order the parties to notify. Failure to comply with such order may result in a fine. If the Competition Authority finds that a completed merger would not have been permitted under the Competition Act, it may bring an action before the Stockholm District Court for the divestiture of the acquired entity. Failure to notify thus subjects the merger to being annulled ex post facto.

There are no time limits for filing under the Competition Act, although early contacts with the Competition Authority usually occur due to the risk that a merger will be invalid if it is found to be prohibited under the Competition Act. It is generally recommended that clearance be received before closing. No measures may be taken against a merger, whether or not notified, if more than two years have passed since the signing of the acquisition agreement.

The filing may be conducted by any party to the transaction jointly or separately. The filing requires a specific form that must be completed in Swedish and that contains questions on the parties, competitors, market conditions, etc. Upon receipt of a complete notification, the Competition Authority must decide within twenty-five working days whether to initiate

an in-depth investigation, or the merger will be deemed to have been cleared. If an in-depth investigation is initiated, the Competition Authority has three months to either clear the acquisition or apply before the Stockholm District Court to request the prohibition of the merger. The court must reach a decision within six months. The decision of the Stockholm District Court may be appealed to the Market Court, which must decide the case within three months.

The timetable for clearance may, at the decision of the Competition Authority, be expedited. During the twenty-five-day deadline for preliminary examination, no party to the agreement may take any steps to complete the transaction unless the Competition Authority clears the merger within that period.

Because Sweden is a European Union (EU) member, large-scale mergers involving Swedish companies are subject to European Commission approval.

5. SUCCESSOR LIABILITY

5.1 Environmental regulations in Sweden are strict and generally exceed EU standards. Even though the "polluter pays" principle is applicable in Sweden, a seller's environmental liabilities may follow the assets acquired. Thus, a buyer could be ordered to remedy contamination or pollution violations caused by the seller's breach of any environmental regulations before the acquisition. This is true even if an environmental permit has been granted to the transferred business because such a permit includes all related rights *and* obligations related thereto. Because an environmental permit normally is given for the operation of a business rather than a legal entity, such a permit follows the business if it is sold to a third party. Further, a buyer could be liable for environmental liabilities relating to soil and groundwater contamination.

5.2 The general rule regarding the liability of a buyer for products or services sold before an acquisition transaction is that the liability remains with the seller and does not transfer with the assets. This is based upon the principle that the person who put the product into circulation on the market is liable for any damage caused by that product. The same rule applies to services.

5.3 The general rule regarding a buyer's obligation to fulfill the seller's outstanding orders is that no such liability exists for the buyer. Accordingly, this liability remains with the seller. Normally, however, a buyer of assets agrees with the seller (and seeks the approval of the relevant third parties) to assume the seller's rights and obligations under such orders.

5.4 The general rule regarding a buyer's obligation for warranty claims originating before the acquisition is that such liability remains with the seller and does not transfer to the buyer upon completion of the acquisition.

5.5 The general rule regarding obligations related to real estate is that the owner of the real estate is liable to any third party for claims relating to the real estate, including claims based upon obligations or defaults of the previous owner. The lessee's liability toward the real estate owner is subject to separate agreement. Generally, no lessee may be held liable for any prior lessee's actions.

5.6 In addition to the liabilities and obligations related to real estate (see Subsection 5.5) and employees (see Subsection 7.1), the most important encumbrance on assets that remains on the assets acquired is the floating charge (Företags-inteckning). A floating charge on assets in the seller's business automatically remains attached to those assets, even after the acquisition is duly accomplished. There are no other liabilities or obligations that automatically transfer from the seller to the buyer, except minor liabilities (e.g., certain obligations relating to a purchased car, such as tax, Ministry of Transportation test, etc.) or certain taxes that are not otherwise relevant to this discussion.

5.7 When an acquisition is significant, it is customary for a buyer to conduct environmental audits (often only if real estate is included in the transfer) and other due diligence

investigations before the acquisition of assets. Lawyers, auditors, environmental specialists and real estate surveyors are normally involved in such investigations.

6. PUBLIC RECORDS

The following records are available to disclose the existence of, or provide information about, a seller or a target company:

(i) Records showing the ownership of real immovable property such as real estate are kept by the district court where the property is situated. All transfers of ownership must be recorded in this land register. Certified abstracts from the register are available.

(ii) Mortgages on real estate are recorded in the public register maintained by the district court where the real estate is located.

(iii) Information on environmental issues affecting immovable property is available from the applicable land register. Seriously polluted areas (Sw: miljöriskområden) are listed in a specific register kept by the National Environmental Protection Agency (Sw: Naturvårdsverket) and regional County Administrative Boards (Sw: länsstyrelser). Information on environmental operating permits can be obtained from the environmental courts (Sw: miljödomstolar), the National Environmental Protection Agency, the County Administrative Boards and the relevant municipalities.

(iv) Records showing liens and encumbrances on movable (i.e., personal) property include records regarding floating charges (Företagshypotek), real estate, aircraft and ships. The records regarding floating charges and real estate are kept by the domicile district court of the company. Records for aircraft and ships are kept by the district court of Stockholm.

(v) Records showing ownership of intellectual property, such as patents and trade names, are kept by a separate authority: Patent och Registreringsverket (PRV). The register for patents is kept by PRV in Stockholm; the trademark department of PRV is in Söderhamn.

(vi) Records of pending litigation are kept by the district courts. Although these records are kept for the benefit of the district courts, they are available to the public for review.

(vii) Records of good standing (i.e., due incorporation and continued existence of a company) are kept by various institutes, both public and private. These include the public register of corporations with PRV as well as entities such as UC, a private entity credit information agency.

(viii) All corporations and limited liability companies must file audited annual accounts with PRV.

7. LABOR MATTERS

7.1 Under the Swedish Employment Protection Act (SEP Act), all rights and obligations of the seller in connection with its employees who are assigned to the business (or the part of the business) acquired by the buyer in an asset acquisition are automatically transferred to the buyer, and their employment agreements remain in force and are binding on the buyer. An employee, however, may oppose a transfer to the buyer and will, in that case, remain in employment with the seller. Such transfer of the employment agreements does not occur merely because various assets are transferred but only if a business or part of a business is transferred as "a going concern."

7.2 A seller may not terminate any employees who are assigned to the business or the part of the business that is transferred, and the buyer may not require the seller to do so.

7.3 The transfer to the buyer of rights and obligations related to transferred employees does not include the employees' rights to pension claims, including old-age, invalidity and survivor benefits.

7.4 It is legally enforceable to allocate responsibility between a seller and buyer for severance payment obligations, but such an agreement is not binding on the employees. In relation to the employees, the seller and buyer are jointly and severally liable for obligations arising before the transfer, and the buyer is liable for obligations arising after the transfer. In practice, a buyer generally seeks indemnification from the seller for severance obligations.

7.5 Before any decision is made to sell or purchase a business or part of a business, a seller and buyer must consult in "codetermination negotiations" with the trade unions with which there are collective bargaining agreements. If the seller and buyer are not bound by any collective bargaining agreements, both must consult with all trade unions concerned (i.e., the trade unions representing employees who will be affected by the contemplated transfer). If the seller and buyer do not consult with the trade unions, the trade unions are entitled to receive penalty payments from the seller and buyer.

7.6 A buyer may change the terms of employment for transferred employees subject to the same restrictions as previously applied to the seller, provided the acquisition itself is not the reason for the change.

7.7 A buyer assumes all accrued liabilities, with the exception of pension claims, including old-age, invalidity and survivor benefits.

8. PLANT CLOSING LAWS

If an employer intends to reduce personnel due to redundancy (i.e., termination for economic reasons relating to the business, as opposed to employee conduct or capacity), and at least five employees will be affected, the employer must notify the County Labor Board two to six months before the reduction, depending upon the number of employees who will be affected by the reduction. Failure to fulfill this obligation is subject to fines payable to the government. The fine is based upon the number of employees affected by the reduction and the extent to which the employer failed to meet the notice period. It is calculated at a minimum of SEK 100, up to a maximum of SEK 500, for each week and employee.

9. ASSIGNMENT OF CONTRACTS

If an asset acquisition includes real property, any lease agreements affecting the real property are automatically transferred to and become the responsibility of the buyer, provided there is a written lease agreement and the lessee takes possession of the property before the date of transfer. Other than lease agreements, no contracts (except employment agreements) automatically transfer to the buyer.

10. NONCOMPETITION

10.1 Noncompetition clauses can be enforced against a seller, its principals and employees.

10.2 Swedish courts will enforce a noncompetition clause so long as it is considered reasonable. Swedish courts may modify or set aside a noncompetition clause deemed unreasonable. It is not possible to determine with precision whether certain provisions are reasonable because the legislation is very general and the case law, in connection with

asset acquisitions, is not very extensive. Whether a noncompetition clause would be considered unreasonable depends upon the merits and facts of the case. Consideration would be given, among other things, to the geographic area, time and activities contemplated by the clause.

Noncompetition clauses against a seller and/or its principals in connection with asset transfers can be quite lengthy (e.g., up to three years) without being considered unreasonable.

The guiding principles that determine whether a noncompetition clause against employees is too extensive can be summarized as follows:

- A noncompetition clause should be used only (a) by employers who either make their own product or acquire manufacturing know-how or similar know-how through development or research and (b) when a possible disclosure of the know-how would lead to certain damage.
- A noncompetition clause should be used only for employees who, in the course of their work, receive information about manufacturing know-how or similar know-how and, owing to their education or experience, have a possibility to use the know-how.
- A former employee must always be in a position to use his or her personal skill, personal knowledge and personal experience after termination of employment.
- After an employee ceases to work for an employer, a noncompetition clause should not be effective for more than the estimated useful life of the know-how and normally not longer than twenty-four months.
- A penalty corresponding to six average monthly salaries should normally be sufficient protection for an employer.
- If the former employer wishes to enforce a noncompetition clause, during the time that the clause is in force, it must pay the difference between the employee's former pay and the lower pay that the employee can earn in new employment as a result of the restriction imposed by the noncompetition clause.

A noncompetition clause may be contrary to the Competition Act. In cases where an asset acquisition is subject to mandatory notification to the Competition Authority (see Section 4), the Competition Authority will usually consider the clause in connection with the notification. A noncompetition clause of limited duration (two years if the acquisition includes only goodwill and a maximum of five years if it includes know-how not previously known to the buyer) will normally be considered ancillary to the acquisition and thus acceptable, provided the noncompetition clause applies only to the type of business conducted by the acquired entity and to the geographic area where it has conducted its business.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 There are no restrictions on the choice of applicable law, and the parties to an asset acquisition agreement are free to agree upon the law that will govern the agreement. Certain issues, however, such as the capacity of the parties to enter the agreement and the question of retention of title, would be determined by the law established under specific conflict-of-laws rules, regardless of the parties' choice.

The parties are free to agree upon the place where the action may be brought.

Swedish courts will, however, claim exclusive jurisdiction in some cases, such as disputes in connection with transfers of real property situated in Sweden.

11.2 A Swedish arbitral award is final and enforceable, and it may not be appealed on the merits of the case. It is, within a limited time, possible to challenge the award in the courts for certain breaches of the procedural rules.

11.3 For the resolution of business disputes, arbitration is considered to be more expeditious and flexible than litigation. An important factor in choosing arbitration over litigation is that arbitration is not public. A common opinion within the Swedish business community

is that it takes far too much time for Swedish courts to deal with business disputes and that the judges, to some extent, lack the necessary experience in international business transactions. In spite of the impossibility of appealing arbitral awards on the merits, arbitration is considered a more expensive way to resolve disputes than litigation. This is mainly because the parties have to pay the arbitrators. The fees to initiate court proceedings are very low in Sweden, and judges are paid by the Swedish state.

12. OTHER ISSUES

12.1 It is not typical, but neither unusual, for an arbitration clause to provide that the losing party bears all costs, including attorneys' fees, that arise from the arbitration. If the arbitration agreement lacks such a provision, the question of allocation of costs is at the discretion of the arbitral tribunal.

12.2 The buyer of all or substantially all the seller's assets may be liable to the seller's creditors. It may therefore be necessary to protect a buyer from claims that the seller's creditors may have against the transferred assets. In order to achieve this protection, Swedish law requires a buyer to publish notice of the sale in the seller's local paper and to register it with the enforcement service in the region where the goods are kept. The buyer is protected from claims for the seller's debts for thirty days after the documents are submitted to the enforcement service.

12.3 The following are additional issues that a foreign buyer should be aware of when purchasing assets in Sweden.

- Swedish law is heavily influenced by European continental law in terms of notions, terminology and important principles of law. Anglo-Saxon legal terms such as "representations," "indemnities" and "covenants" do not have a defined meaning under Swedish law. Even though a seller and buyer are, in principle, free to stipulate to the terms and conditions of their contract and may agree upon definitions of Anglo-Saxon legal terms, the contract rarely contains terms to meet all situations. Regarding the seller's liability, it is increasingly provided that only the contract governs. Swedish law allows a written contract to be supplemented by statutes. Consequently, if a contract is silent, the relevant Swedish statute applies. In cases where all or the majority of the assets of a business are acquired, the Swedish Sale of Goods Act will principally be applicable.
- The inclusion of express warranties in a contract does not by itself limit the right of a buyer to raise a claim against the seller for matters not covered by such express warranties. For example, the seller could, based upon the Sale of Goods Act, under certain circumstances be held liable for information provided to the buyer by the management of the sold business, even if the accuracy of such information is not expressly warranted in the contract. If the seller wants to limit its liability to what is expressly agreed in the contract, this limitation must be made through various express provisions in the contract.
- A general rule under the Sale of Goods Act is that a buyer may not invoke liability for deficiencies it was aware of prior to entering into the contract. The extent to which that rule of law applies to warranties is somewhat uncertain. Under general principles of contract law, if a seller is not aware of a breach and this is known by the buyer, the buyer must inform the seller thereof before entering into the contract to be able to invoke a warranty for such breach. Consequently, if the seller, notwithstanding its due diligence findings, wants to rely fully upon the express warranties in the contract, this must be expressly provided in the contract (which provision may be set aside by the courts if deemed unreasonable).

- If a buyer desires the right to claim damages instead of price reduction, it is advisable to make such right an express term of the agreement. Note, however, that the sanction for breach of a warranty is, by law, entitlement to damages.
- It is a common opinion in Swedish legal literature that the right of a buyer to rescind a contract for the purchase of a business exists only during a limited period of time after closing and that such sanction must be used with great caution. Further, it is provided by law that a purchaser rescinding a contract has an obligation to return the business in a basically unaltered state and, if that is not possible, to compensate the seller for any decrease in value resulting from measures taken as of the closing.

Taiwan

Contributed by Sophia H.H. Yeh, Lee and Li

1. ASSET VERSUS SHARE PURCHASE

1.1 In the Republic of China (ROC), a buyer may choose an asset acquisition rather than a share acquisition if (a) the liabilities of the target company are substantial or its contingent liabilities are difficult to identify, (b) the title to the assets owned by the target company are free from encumbrance, (c) the assets of the target company do not consist of intangible assets such as qualification, trade name or goodwill, which are not transferable or (d) the tax payable for the acquisition of assets, such as land value increment tax, is not substantial.

1.2 The distinctions between an acquisition of substantially all the assets of a company and the acquisition of its shares include the following tax and successor liability issues:

- In an acquisition of shares, the Security Transaction Tax is levied at 0.3 percent of the selling price of the shares, which is borne by the seller but withheld by the buyer out of the payment of the purchase price. The capital gains tax imposed upon gains realized from the sale and purchase of shares of a Taiwan company currently is suspended.
- An acquisition of assets is subject to various taxes, including a five-percent business tax (value added tax) imposed upon the sale price of assets other than land, stamp duty on the purchase agreement (NT $12 per contract for sale and purchase of movables) and on the land/building title transfer agreement (0.1 percent of the transfer price payable by the buyer), land value increment tax (payable by the seller on the transfer of title at a progressive rate ranging from forty percent to sixty percent) and deed tax (six percent of the government-assessed value payable by the buyer).
- In an acquisition of shares, the liabilities of the target company remain unchanged with the target company.
- In an acquisition of assets, the buyer is not obligated to assume any liabilities of the target company or seller, provided that any encumbrances attached to the assets are transferred with the assets, unless the seller is required by contract to remove such encumbrances before the closing.

1.3 The answer under Subsection 1.2 would be the same if only part of the assets were to be acquired.

2. FORM OF DOCUMENTS

2.1 The scope of the Model Asset Purchase Agreement appears to be sufficient to cover representations, warranties and indemnities.

2.2 The form of the transfer varies according to the nature of the asset. For personal property, the transfer takes effect upon delivery of the property. For rights related to trademarks, patents, copyrights, real property and certain encumbrances on personal property, a separate transfer document must be executed for each item. For contracts, the transfer cannot take effect until consent from the counterparty has been obtained unless it is intended to be a bulk transfer of all assets, liabilities and business according to Article 305 of the Civil Code (as mentioned in Section 9).

2.3 There is no difference in the tax effect of an asset acquisition based upon the form of the document.

2.4 To be effective, the transfer of rights related to real property must be registered with the Land Office for the locality. The transfer of rights related to patents, trademarks and certain encumbrances on personal property must be registered with the relevant authority to be effective against any third party (e.g., Intellectual Property Office and Ministry of Economic Affairs for patents and trademarks).

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 **(i)** In general, to purchase a seller's assets and business and assume the seller's business operations, a foreign company must establish either a local subsidiary or a branch.

In forming a local subsidiary, the foreign company must file an application form called the Foreign Investment Application (FIA) with the Investment Commission (IC), Ministry of Economic Affairs, to qualify for certain investment incentives, such as (a) exemption from restrictions concerning the domicile and nationality of the shareholders, the chairman and the supervisor, as well as the place of meetings of the board of directors and (b) assurance of foreign exchange for items such as investment capital, dividend income and tax incentives.

When a branch of a foreign company is used, the foreign company must be recognized as a legal entity under the Company Law to conduct business operations in ROC, and a certificate of recognition must be obtained. In addition, a company license, business license, trader's license, factory license or other government permit, if any, must be obtained for the local subsidiary or branch. Activities that require special approval from relevant governmental authorities include banking, telecommunications and transportation.

(ii) A shareholders meeting must be held to adopt a resolution approving the proposed sale if the assets and business to be sold consist of all or a substantial part of the assets and business of the target company. The resolution must be made by a majority of the affirmative votes at a shareholders meeting attended by the shareholders representing two-thirds or more of the total shares of the target company.

(iii) No administrative filing is required before an asset acquisition other than a filing with the Fair Trade Commission as described in Section 4.

3.2 Nonnationals are prohibited or restricted from conducting business activities that appear on the so-called Negative List, as shown below. Foreign persons may engage, without restriction, in business activities not on the Negative List.

Prohibited Industries:

1. Agriculture, animal husbandry and hunting
2. Forestry
3. Fishing
4. Manufacture of chemical materials:
   (a) nitroglycerin
   (b) alcohol
   (c) soda-chloride factories operating with mercuric

5. Manufacture of chemical products:
   (a) certain pesticides and herbicides
   (b) certain toxic chemicals
   (c) CFC
   (d) trichloride ethane
   (e) tetrachloride carbon
   (f) HCFCS
   (g) gunpowder and fuse, agents for fire and fulminating mercury
6. Refining metallic cadmium
7. Manufacture of firearms, weapons and arms repair
8. Passenger bus service
9. Taxi transport
10. Tour bus transport
11. Truck freight transport
12. Postal service
13. Postal saving and remittance service
14. Radio and television broadcasting
15. Special entertainment business

Restricted Industries:

1. Coal mining
2. Crude petroleum, natural gas and geothermal energy mining
3. Metal mining
4. Nonmetal mining
5. Manufacture of chemical products:
   (a) certain toxic chemical products
   (b) medicine
   (c) Chinese medicine
   (d) pesticides and herbicides
   (e) stearic acid cadmium
   (f) nitroglycerine/nitrated glycerine
6. Coking
7. Recycling industries of waste
8. Ivory processing
9. Gun/cannon barrel forging
10. Saber manufacturing
11. Military aircraft, instruments and equipment
12. Power generation
13. Power transportation and power distribution
14. Fuel and gas supply by pipelines
15. Water supply
16. Ship leasing services
17. Railway transport
18. Water transport
19. Harbor and related services
20. Air transport and related service
21. Type I telecommunication businesses (generally, manufacture of telecommunications equipment and cable and provision of telecommunications services including mobile phones, pagers, trunk radios and mobile data communications)
22. Banking, trust and investment, securities financing and other financing
23. Securities, futures and securities investment trust
24. Insurance
25. Sale and lease of real property and development of land

26. Legal and accounting services
27. Civil engineering and construction services
28. Short-term supplementary school
29. Medical test and examination services
30. Midwife services
31. Other medical and health services
32. Broadcast and television
33. Satellite broadcast and television

4. UNFAIR COMPETITION

The Fair Trade Law (FTL) places certain restrictions on taking over or consolidating a business if such a transaction meets any of the defined conditions. The term "combination" refers to circumstances whereby an enterprise (a) merges with another enterprise, (b) holds or acquires the shares or capital contributions representing more than one-third of the total voting shares or the total capital stock of another enterprise, (c) is transferred or leases the whole or the major part of the business or properties of another enterprise, (d) frequently operates jointly with another enterprise or is entrusted by another enterprise to operate its business or (e) directly or indirectly controls the business operation, or the employment and termination of the personnel, of another enterprise.

If any of the following circumstances exist in connection with a combination of enterprises, an application for prior approval must be filed with the Fair Trade Commission (FTC): (a) following the combination, the surviving enterprise will have one-third of the total market share, (b) one of the participants in the combination holds one-quarter of the market share or (c) in the preceding fiscal year, the amount of sales of one of the enterprises participating in the combination exceeds the amount publicly announced by the FTC (currently NT$ 5 billion).

The FTC must determine whether premerger approval should be granted under an economic cost-benefit analysis. If the advantages of such a combination to the national economy outweigh its disadvantages, the combination may, within the FTC's discretion, be approved.

5. SUCCESSOR LIABILITY

5.1 Under the draft Soil Pollution Control Law, the owner, user and polluter of land are jointly and severally responsible for pollution on the land if they fail to discontinue or remove such pollution, even if the owner is not the original polluter.

5.2 A buyer of assets is not liable for products or services sold before the transaction so long as it does not specifically assume the liability.

5.3 The obligation of a buyer for fulfilling outstanding orders depends upon whether the buyer specifically assumes that liability of the seller. The buyer may choose not to assume the liability unless the sale of assets constitutes a bulk transfer of all the assets, liability and business under Article 305 of the Civil Code, as described in Section 9.

5.4 A buyer of assets is not liable for warranty claims that originated before the acquisition date unless the buyer assumes liability by agreement with the seller.

5.5 Encumbrances attached to real (immovable) property run with the real property, even after transfer. In the case of a mortgage, if the debtor is in default, the mortgagee may claim under the mortgage, and the real property will be subject to foreclosure even though ownership has passed to the buyer.

5.6 Encumbrances attached to personal property run with the property, even after the property is transferred. A lease existing on property before the transfer, whether real property or personal property, runs with the property after the transfer.

In the event of a bulk transfer of all the assets, liabilities and business under Article 305 of the Civil Code, the buyer assumes the seller's liabilities after the creditor is informed of such transfer.

5.7 It is customary for a buyer to conduct an environmental audit only if the target company engages in manufacturing activities or owns any land. For the buyer to obtain a clean and marketable title of the assets without any encumbrances, a title search of certain of the assets to be acquired is needed. These assets include buildings, machinery and equipment, patent rights, trademark rights and copyrights.

6. PUBLIC RECORDS

Public information from the relevant governmental report or register is accessible to a buyer as follows:

- **(i)** Information regarding the ownership of, and mortgages on and other charges or real rights affecting, immovable property is available at the Land Registration Office of the city or provincial government where the land is located.
- **(ii)** See Subsection 6(i).
- **(iii)** There is no publicly available information on environmental issues affecting immovable property.
- **(iv)** Information regarding liens and encumbrances on movable (i.e., personal) property is available from the Construction Bureau of the city or provincial government.
- **(v)** Information regarding the ownership of intellectual property is available at the National Bureau of Standards of the Ministry of Economic Affairs.
- **(vi)** There is no publicly available information regarding pending litigation.
- **(vii)** Information regarding standing (i.e., due incorporation and continued existence) of the seller is available at the Ministry of Economic Affairs, Commerce Department.
- **(viii)** There is no publicly available information regarding financial statements and other financial information for companies.

7. LABOR MATTERS

7.1 The employees of a seller do not automatically become employees of a buyer as a consequence of an acquisition of assets. The seller, the buyer and the transferring employees must agree upon the transfer of employees.

7.2 Under the Labor Standards Law, an employer may lay off an employee with an indefinite employment term only under any of the following circumstances: (a) the business is suspended or assigned, (b) there is an operating loss or business contraction, (c) force majeure necessitates business suspension for more than one month, (d) a change of a business nature requires a reduction in the number of workers and the particular worker cannot be assigned to another appropriate position or (e) a particular worker is determined to be incompetent for the work assigned.

If the seller lays off an employee under one of these circumstances at the request of the buyer, the seller must pay severance to the employee. The buyer is not liable for the severance payment to the terminated employees.

7.3 A buyer is not obligated to the seller's employees for employees' benefits if the employees to be hired by the buyer are terminated by the seller. By contractual arrangement, however, if the seller's employees are to be transferred to the buyer, the buyer may assume

and recognize the seniority of the employees with the consent of employees. In practice, the purchase price is adjusted, as pension funds are not transferable from the seller to the buyer.

7.4 A seller is responsible for severance payments to employees who will be terminated as of the closing as a result of the transaction. A contractual arrangement between the seller and buyer for allocation of responsibility for severance payments to the transferred employees is enforceable by making an adjustment to the purchase price, provided the employees consent to the buyer assuming responsibility for the employees' benefits.

7.5 Asset sales are not subject to consultation with, or authorization from, any works council, labor union or other such body.

7.6 After the consummation of an asset acquisition, the buyer may change the terms of employment of the transferred employees by entering new employment agreements with them.

7.7 A buyer does not assume accrued liabilities related to employees unless it is otherwise agreed among the buyer, the seller and the transferred employees.

8. PLANT CLOSING LAWS

According to the Labor Standards Law, when a seller lays off its employees under one of the circumstances listed in Subsection 7.2, the seller must give prior written notice to the employees based upon the seniority of the employees as follows: (a) for employees who have continuously worked for between three months and one year, the notice must be given ten days in advance, (b) for employees who have continuously worked for between one year and three years, the notice must be given twenty days in advance and (c) for employees who have continuously worked for more than three years, the notice must be given thirty days in advance. In addition, the employer must notify the local competent authority and public employment agencies at least seven days before termination of employment.

9. ASSIGNMENT OF CONTRACTS

Agreements of the seller can be transferred only with the consent of the counterparties, except in the case of a bulk transfer of all assets, liabilities and business from the seller to the buyer according to Article 305 of the Civil Code. In a bulk transfer, the buyer assumes the seller's liabilities when the creditors are informed of the transfer. The seller is jointly and severally liable with the buyer for two years from the notice date or the due date if the debt is not yet due on the notice date.

10. NONCOMPETITION

10.1 **(i)** A noncompetition clause against a seller may be deemed an act of unfair competition under FTL if it is likely to impede fair competition by imposing improper restrictions on the seller's business activities as a condition of the transaction, even if the seller is getting out of the business. Whether such a restriction is improper is determined by factors such as the following: the intent, aim and market power of the parties; the structure of the market; the nature of the goods; and the effect on competition from such restriction. FTC usually reviews this issue on a case-by-case basis. Persons determined by FTC as violating FTL are subject to fines of up to NT $50,000,000 or imprisonment for up to three years.

(ii) A contractual noncompetition obligation imposed upon third parties (i.e., the seller's principals) other than the parties to the contract in question can be enforced against those third parties only with their consent. A noncom-

petition clause is enforceable against a principal shareholder who individually signed the agreement only if the noncompetition clause is not deemed an act of unfair competition under FTL.

(iii) A noncompetition clause is enforceable against a seller's employees only if the employees agree to the limitations discussed in Subsection 10.2 and provided that the employees' constitutional right to work is not deprived as a result of such restriction.

10.2 Imposing a restriction on a person to not conduct certain businesses for an unreasonably long period of time may be held by a court as unenforceable for depriving the person from the right to work under the Constitution of the ROC. A court determines whether the term is unreasonable. A court precedent has held that a noncompetition clause restraining an employee's choice to work for competitors for a period of two years should be deemed reasonable.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 **(i)** The contracting parties may choose the law to be applied under an asset acquisition agreement, except such choice is unenforceable if the chosen law is against the good morals and public order of the ROC.

(ii) The contracting parties should be free to choose the place where the action may be brought, although there are certain limitations on the recognition and enforcement of foreign judgments in Taiwan. Under Article 402 of the Rules of Civil Procedure, an irrevocable judgment by a foreign court shall not be deemed valid if:

- according to the law of the ROC, the foreign court has no jurisdiction over the case;
- it is a default judgment against a citizen of the ROC, except when the summons or order necessary for the commencement of the action was served on the party in that country or served on the party through the judicial assistance of the ROC;
- the judgment of the foreign court is considered incompatible with public order or good morals; or
- judgments given by ROC courts are not reciprocally recognized by the foreign court concerned.

11.2 An arbitration award is final and has the same binding effect between the parties as a final judgment of a court. The arbitration award is not enforceable until an execution order from the court is obtained unless the parties have agreed in writing in advance that the arbitration award may be enforced without the court's order and the subject matter involves (a) a pecuniary claim, a claim for fungibles or a claim for a fixed quantity of valuable securities or (b) a claim for delivery and/or retrieval of specific chattels.

11.3 Contracting parties normally prefer arbitration to the judicial system because (a) the arbitration procedure is more efficient, (b) arbitration is less expensive and (c) the parties may choose an arbitrator with professional background related to the subject matter.

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 See Subsection 5.6 and Section 9 regarding a buyer's liability for a seller's debts following the transfer of all the assets or business of the seller.

12.3 There are no other significant issues.

United Kingdom

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The material in this section is based upon the laws of England and Wales. In certain specific instances (particularly in relation to real estate), the laws of the other parts of the United Kingdom (Northern Ireland and Scotland) are different. Furthermore, the Isle of Man and the Channel Islands are outside the United Kingdom (UK).

1. ASSET VERSUS SHARE PURCHASE

1.1 The major advantage to a buyer acquiring assets rather than shares is that, subject to limited exceptions, a buyer of assets does not assume the liabilities associated with the acquired business. When all the shares of a target company are acquired, although the buyer does not thereby assume the liabilities of the acquired company, the acquired company (which is now owned by the buyer) continues to be responsible for all its own liabilities. Other considerations include the following:

- The assets of the acquired business may include, or the acquired business may depend upon, contracts or other assets (such as leasehold land and buildings) that are not assignable or that may be assignable only with the consent of another party. It is less common (but not unknown) for contracts to provide for termination or other adverse consequences on change of ownership or control of a company.
- Generally speaking, stamp duty (a documentary tax due when title to property is conveyed by means of a written instrument) is payable on the consideration for an acquisition of shares of a UK company at the rate of 0.5 percent of the purchase price, whereas the rate of stamp duty payable on an acquisition of assets can be as high as four percent of the "purchase price" (cash paid plus liabilities assumed). The amount on which the stamp duty is assessed, however, can vary according to the structure of the transaction, which can erode the apparent difference between the applicable rates. Stamp duty can sometimes be reduced or eliminated by careful planning and structuring of a transaction. Generally speaking, there is more scope for stamp duty planning and mitigation in asset acquisitions than in share acquisitions. The significance of stamp duty and the scope for planning and mitigation depends upon the facts and circumstances of the particular transaction.

- On an acquisition of shares, there is no "step-up in basis," and the target company retains its historic base cost (basis) in its assets for capital gains taxation purposes. On an acquisition of assets, the buyer's basis is the price paid for the assets. On a shares acquisition, the buyer's basis in the shares is the price actually paid for them (in both cases this is subject to an annual increase to reflect inflation when the buyer is a company). When the buyer is not itself a UK taxpayer, however, disposal of the acquired shares will in most cases be free of UK taxation. A disposal by the acquired company of its UK assets, however, normally gives rise to UK taxation of any gain realized over the inflation-adjusted historic basis. If the disposal proceeds are reinvested in business assets, it may be possible to defer the taxation. Detailed consideration of the tax affairs (in all relevant jurisdictions) of the buyer and the target company is required to form a fair assessment of the comparative tax advantages/disadvantages of a share or an asset acquisition.
- On a sale of shares, the target company might be deemed to be leaving a group of companies for UK taxation purposes. Sometimes this can trigger taxation charges against the target company itself and not just against the seller.
- When the acquired business constitutes only part of the undertaking of a company, it can sometimes be easier to structure the transaction as an asset acquisition.
- When the business is conducted by more than one company in the seller's group, it can sometimes be easier to structure the transaction as an asset acquisition.
- On a sale of shares, there is no interruption in the identity of the entity conducting the business, which can sometimes ease the transition on day-to-day legal/operational matters, such as collection of accounts receivable.
- A sale of shares is quite often much more tax-efficient from the seller's standpoint. Accordingly, a seller may demand a higher price for a sale of assets than a sale of shares.

1.2 and 1.3 In general, English law respects the form chosen for the transaction (shares acquisition or assets acquisition) even if the assets acquired constitute the entire undertaking of the company. English law will not (subject to limited exceptions) transfer liabilities to a buyer of assets merely because the business itself is being transferred. Employment obligations (discussed in Section 7) are transferred on an acquisition of assets. When the buyer is acquiring part of the business, it will also acquire the obligations of the employer in relation to employees of the acquired part of the business.

2. FORM OF DOCUMENTS

2.1 As a general proposition, the form and structure of the Model Asset Purchase Agreement could be used in a transaction for the acquisition of the assets of a UK business. The language of many of its provisions will need to be modified, however, to reflect local laws and customs. For example, the provisions concerning employment and employee benefits (including pensions) must be rewritten in light of local law. It also would be appropriate to replace or supplement references to U.S. statutes with the appropriate local analogues. As a matter of custom, closing legal opinions are not exchanged in a purely domestic transaction between a UK buyer and UK seller. The buyer needs to consider whether (and to what extent) it requires a closing opinion from the seller's UK counsel in light of the particular circumstances of the transaction.

2.2 Full legal title to certain classes of assets must be conveyed by separate documents. When the assets of the business include real estate, patents, trademarks or shares in other corporations, a separate transfer document is normally required for the buyer to be registered as the legal owner of the relevant assets. In addition, it is sometimes desirable to obtain specific assignments of receivables to make it easier for the buyer to bring collection proceedings. Stamp duty is payable within thirty days of the later to occur of execution of the

conveyance instrument in the UK or the bringing of that instrument into the UK (e.g., to enforce rights). Accordingly, stamp duty considerations might make it desirable for certain conveyancing documents (including the contract itself) to be executed and kept outside the UK. This needs to be carefully considered in each case because if the signed document is ever brought back into the UK, interest will be payable for the period beginning thirty days after the date of signing and continuing until the date the duty is actually paid. Even if the assets are such as can be transferred by a single document, it is normally desirable to apportion the purchase consideration among various classes of assets for tax and accounting reasons. When the assets include shares of a UK company, the scope for stamp duty planning is greatly reduced.

2.3 Generally speaking, the form of the document is irrelevant to most types of taxation. The form of the document can affect stamp duty, however, which applies to documents that convey title to assets. Certain types of assets (such as inventory) can be effectively conveyed by physical delivery rather than by documentary transfer. Thus, if the contract provides for inventory to be conveyed by physical delivery, the purchase of the inventory is normally free of stamp duty, although stamp duty would be payable on the purchase price of the inventory if the document contains language conveying title. The allocation of the purchase consideration within the document generally has tax consequences.

2.4 As noted in Subsection 2.2, full legal title to certain assets (such as real estate, patents, shares and trademarks) will not pass to the buyer until the buyer is registered in the appropriate register as the owner. Registration is not compulsory, however. Failure to register means that the seller remains the legal owner of the property, subject to a trust in favor of the buyer, with the buyer the equitable owner of the property pending registration in its name.

3. PRELIMINARY LEGAL REQUIREMENTS

3.1 and 3.2 There are very few circumstances in which the acquisition of a UK business by a foreigner requires the advance approval of any governmental body. An example might be the purchase of a defense supplier involving national security issues. There are situations, however, in which the buyer's ability to continue conducting the business might require a personal license or permit, which the buyer would need to obtain for itself (e.g., export licenses for defense products, liquor licenses or Data Protection Act Registrations). Apart from legally required filings, the UK government has the power to order divestiture of assets in circumstances where it considers divestiture to be in the public interest. These powers are generally exercised on grounds of competition and are discussed in Section 4. They can, however, be used in connection with other perceived public interests (i.e., national security). Accordingly, it is often in a buyer's interest to make filings or other informal representations to the government, even when there is no legal duty to do so.

Generally speaking, the board of directors of a British company has authority to dispose of all the company's assets without reference to shareholders. The charter documents (memorandum and articles of association) of the target company may provide to the contrary, however. The law is not entirely clear on the extent of a purchaser's duty (if any) to look beyond a resolution of a board of directors into the content of the charter documents (which are published documents). The authority of individual members of management may also be difficult to determine. Accordingly, when the selling entity is a British company, it is normal practice for the buyer to examine both a certified copy of a board resolution and a certified copy of the memorandum and articles of association to satisfy itself that the contract has been properly authorized and is within the capacity of the selling entity. It is not normal practice in the UK to seek a closing opinion from the seller's counsel on these issues unless the selling entity is a foreign corporation.

If a seller (or its parent) is a company listed on the London Stock Exchange (LSE), the

rules of LSE may require the disposal to be conditioned upon the approval of shareholders at a general meeting of the listed company. This shareholder approval is required when the size of the business being sold (measured on a variety of bases) equals or exceeds a materiality threshold of twenty-five percent by reference to the listed company. In addition, if the buyer is related to the seller (e.g., by holding ten percent or more of the shares of the seller or its parent), LSE rules might require the transaction to be conditioned upon a resolution of shareholders, on which the related party will not be allowed to vote.

4. UNFAIR COMPETITION

Under European Union (EU) law, certain transactions that are deemed to be of sufficient magnitude to have a "community dimension" must be notified to and approved by the European Commission before they can be consummated. The precise criteria and thresholds are contained within the relevant European Council regulation. Aside from this, there is no positive obligation to prefile or notify any acquisition to the UK competition authorities. When, however, an acquisition is made of more than £70,000,000 worth of assets (gross book value) worldwide, or an acquisition creates or enhances a combined share of twenty-five percent or more of the relevant market for goods or services in the UK or a substantial part of the UK, the UK competition authorities have the power to order complete or partial divestiture or to impose other restrictions on the buyer's activities after the transaction has been consummated. Accordingly, it is often in the buyer's interest to insert provisions into the contract making its obligations to close conditioned upon obtaining the appropriate comfort from the competition authorities. There are three different ways in which this comfort can be sought: formal merger notification, informal merger notification and confidential guidance. The choice depends upon the facts and circumstances of the individual transaction.

Special UK rules apply to news media mergers where governmental consent can be required in certain circumstances.

In addition, if the transaction documentation includes noncompetition covenants, these should be assessed by reference to both EU law (Articles 81 and 82 of the Treaty of Rome) and UK domestic law. Classic seller noncompete covenants that are sufficiently limited in duration, geography and product are unlikely to infringe upon either EU or UK law. A covenant with a duration in excess of two to three years may be problematic. Incorporation of noncompetition provisions that *do* offend EU law could result in substantial fines as well as unenforceability and civil liability. In some circumstances it might be appropriate to notify the contract to the European Commission, seeking individual exemption or clearance for the particular noncompetition covenants.

Finally, the common law restricts the enforceability of noncompetition covenants. See Section 10.

5. SUCCESSOR LIABILITY

5.1 A buyer can become responsible for environmental liabilities arising out of the acquired business assets under the following circumstances:

- by statute, when the buyer allows pollution (particularly of the acquiror) to continue after the acquisition;
- when the buyer allows a common law nuisance to continue after the acquisition; and/or
- when the seller ceases to exist (e.g., due to insolvency), in which case regulatory authorities have certain powers to proceed against the current owner of the relevant land or asset.

5.2 As a matter of law, a buyer of the assets of a business (even if it bought all the assets) is not liable to third parties for products or services sold by the seller before the acquisition

transaction, except to the extent the buyer has contractually assumed such liabilities. As a business matter, however, the buyer might feel obliged to accept liability to preserve the goodwill of the acquired business.

5.3 As a matter of law, acquisition of assets does not normally carry with it assumption of liabilities, except to the extent that an acquired asset is itself a contract under which the buyer has agreed to become bound. As a matter of practice, however, asset acquisitions normally entail the buyer and seller agreeing that the buyer will take the benefit and burden of all (or an identifiable portion of) outstanding orders.

5.4 As a matter of law, a buyer is not responsible for contractual or other legal defaults of the seller committed before the acquisition date, except to the extent that it contractually agreed to be so bound.

5.5 Freehold and leasehold property must be distinguished. As far as freehold property is concerned, a buyer is not normally bound by positive obligations of the seller. On the other hand, negative obligations (e.g., not to use the land for certain purposes) can sometimes bind the land and pass with it. Furthermore, if the property is subject to mortgages or other security interests that are not discharged at closing, the rights of the secured creditor against the property continue notwithstanding its sale, even though the buyer is not personally liable for the secured debt.

In relation to leasehold property, the transfer to a buyer will probably require the landlord's consent. This consent is normally granted only if the buyer agrees to be bound by all the obligations and liabilities of the tenant (sometimes including past breaches). Furthermore, even when the landlord's consent is not required, if there are continuing breaches of the lease, the landlord may be able to take action to evict the buyer by reason of the continuing breaches, even though the landlord may not be able to sue the buyer to remedy the breaches.

Although this is primarily a problem for sellers, it should be noted that a seller might continue to be personally liable for breaches of a lease committed after transfer of the lease to the buyer, particularly in relation to leases of real estate granted before January 1, 1996. Because a lease is a contract between the landlord and the original tenant, historically the original tenant (seller) would retain primary liability for the remainder of the lease notwithstanding the transfer of its leasehold rights. For leases signed after January 1, 1996, an original tenant can assign its rights and avoid continuing liability if the lease is silent. As a practical matter, however, landlords require that the original tenant remain obligated on the lease for as long as its assignee is the tenant. Accordingly, it is common for the contract or conveyancing document to include appropriate indemnification language in favor of the seller in connection with future breaches of terms of the lease. Even when such language is absent from the document, a statutory covenant to perform the tenant's obligations and indemnify the seller against future breaches of the lease will be implied into the conveyancing document unless the contrary is expressly agreed.

5.6 See Subsection 5.1 in relation to environmental liabilities and Section 7 in relation to labor matters.

5.7
(i) Environmental audits are becoming increasingly common in the UK.
(ii) Generally speaking, prudent buyers conduct legal, regulatory, business and financial due diligence investigations. Even though liabilities for the seller's prior defaults do not normally pass to the buyer, the buyer will want to be sure that, if the business continues to be conducted as it was conducted by the seller, the buyer will not incur unacceptable liabilities.

6. PUBLIC RECORDS

(i) Title to registered land in England and Wales can be checked by obtaining searches and by copying entries from the Land Registry, which has district reg-

istries in the different regions. Copies of the Land Registry entries and official searches can be ordered by post and by telephone. For historical reasons, not all land titles are registered at the Land Registry, however. Ownership of unregistered real estate is evidenced by title deeds that are held by the owner. In 1925, a system of title registration was introduced. Since then, title is evidenced by deed and recordation in the Land Registry with compulsory registration the first time real estate is sold. No registration has been required, however, when there has been no change of ownership of the land (e.g., land continuing to be held by the same family, churches, universities, etc.). Such titles remain unregistered and can be checked only by reviewing the title deeds.

(ii) Security interests on immovable property in England and Wales are normally required to be registered at the Land Registry but, as noted above, not all land titles are registered at the Land Registry. Nonetheless, certain security interests over unregistered land are recorded at the Land Charges Department of the Land Registry. When land is unregistered, "first legal mortgages" are effected by deed and by the mortgagee taking possession of the title deeds. Subsequent mortgages are either registered in the Land Charges Department at the Land Registry or taken without notice to third parties. Thus, in an asset acquisition that includes unregistered land, the buyer should ask for production of the original title deeds.

Certain encumbrances in favor of public authorities (e.g., local taxes) can be discovered by carrying out local authority searches and other appropriate searches and by making inquiry of the relevant authorities.

When the seller is a British company or a foreign corporation with a branch or place of business in the UK, certain security interests over its assets (movable and immovable) must be filed with the relevant Companies Registry. The Registry for English and Welsh companies is in Cardiff (with a branch office in London). The Registry for Scottish companies is in Edinburgh, and the Registry for Northern Irish companies is in Belfast. The Companies Registry records these filings on microfiche, which can be obtained on short notice. A buyer may be exposed, however, in the case of security interests that are in the course of being filed or whose filing time limits have not yet expired.

British companies are also required to record all security interests over their assets in their own statutory registers, which are maintained at the company's registered office and which are open to public inspection.

(iii) A government body called the Environmental Agency provides replies to standard inquiries concerning its own knowledge of pollution and contamination at particular sites. This is not a substitute for proper site surveys, however.

(iv) As noted above, certain security interests must be filed at the Companies Registry and in a company's own internal registers. There is also provision for registration of certain security interests created by other entities, including natural persons. All of the above is applicable to personal (movable) property.

(v) There are public registration systems for patents, trademarks and registered designs. The seller, however, may have intellectual property in the form of copyrights for which there is no register and may own the benefit of unregistered trademarks at common law.

(vi) There is no reliable system for ascertaining the existence of pending litigation. Larger cases (typically involving sums of £50,000 or more) are within the jurisdiction of the High Court in London. High Court actions are listed alphabetically by plaintiff, but there is no cross-referencing system to identify defendants. There is no computerized register of High Court judgments. Smaller claims are addressed in the County Courts and there is a computerized register of the County Court judgments. Thus, one can discover the existence of small, but not large, judgments affecting the seller. The High Court does, however, maintain a com-

puterized list of companies that are subject to certain kinds of insolvency proceedings.

(vii) The microfiche records available from the relevant Companies Registry will disclose whether the company is current with its statutory filings and whether any insolvency procedures have been notified to the Registrar of Companies. The Registrar of Companies (a public official) will issue a certificate of continued existence of a company. In addition, as noted in Subsection 6(vi), the High Court maintains a computerized register of companies that are subject to certain insolvency procedures.

(viii) Companies incorporated with limited liability are obliged to file annual audited accounts (financial statements) with Companies House. Companies whose primary listing is on LSE must also file half-yearly unaudited results, as well as annual results, with LSE.

7. LABOR MATTERS

7.1 In an asset acquisition, employees of the seller automatically become employees of the buyer. When a business is transferred, the buyer assumes liability for the obligations of the seller in relation to employees of the business (except, for the moment, certain obligations relating to an occupational pension scheme) as though the buyer were the original employer.

7.2 An agreement that requires a seller to terminate some employees as a condition of closing the transaction is fraught with difficulty and normally results in the buyer inheriting an "unfair dismissal" liability. A dismissal is "unfair" if it is not based upon economic, technical or organizational reasons or if the employer has acted unreasonably in the procedures it has operated in implementing the dismissal. A determination on whether a dismissal is unfair is made by an industrial tribunal (comparable to a labor law court). The remedies for the terminated employee could be reinstatement in the prior job or reengagement in a different position. In addition, the buyer could be liable for damages.

7.3 A buyer normally is not required to continue any occupational pension scheme, such as a company final salary (or defined benefits) pension scheme. Benefits provided through such a scheme, other than retirement benefits, must be continued, however. Moreover, the buyer may be bound by obligations of the prior employer (the seller) if, for example, an employee has a contractual right to a contribution to his or her personal pension scheme.

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

7.5 An asset sale is subject to consultation (as opposed to authorization) with trade unions or employee representatives. Long enough before a transfer of an undertaking (i.e., an asset sale) takes place, the seller must inform and consult with appropriate representatives of any affected employees concerning the following:

- the fact that the relevant transfer is to take place, approximately when it is to take place and the reasons for it;
- the legal, economic and social implications of the transfer for the affected employees;
- the measures that the seller envisages it will, in connection with the transfer, take in relation to those employees or, if it envisages that no measures will be taken, that fact; and
- if the employer is the seller, the measures that the buyer will, in connection with the transfer, take in relation to the affected employees or, if it envisages that no measures will be taken, that fact.

In this context, appropriate representatives means representatives of a recognized independent trade union or, if no union is recognized, representatives elected by the employees.

7.6 After the consummation of an asset acquisition, only with difficulty may a buyer change the terms of employment of employees who are transferred to it as a result of the acquisition. Recent case law suggests that changes can safely be made only if the change is for the betterment of the employees and is with their agreement. Forcing changes unilaterally or dismissing the employees with notice and, at the same time, rehiring them on the new terms is likely to result in breach of contract and "unfair-dismissal" liability. This applies even when the business rationale is harmonization of terms and conditions of employment.

7.7 As a result of an acquisition, the buyer takes over all rights, powers, duties or liabilities under—or in connection with—the contracts of employment of the employees transferred to it. This includes contractual and statutory liabilities. The liabilities that do not transfer include occupational pension schemes, criminal liabilities. Liabilities of the seller for failure to consult with appropriate representatives of the employees in connection with the asset sale do, however, transfer.

8. PLANT CLOSING LAWS

There are restrictions on the ability of employers to terminate significant numbers of employees. Consultation with the appropriate representatives of the affected employees must begin "in good time" and must, in any event, begin at least thirty days before the first dismissal takes effect when the employer is proposing to dismiss as "redundant," at one establishment, twenty or more employees within a period of ninety days. This increases to ninety days when the employer is proposing to dismiss one hundred or more employees. If an employee is dismissed before the statutory consultation period expires, the employer will be in breach of the redundancy consultation provisions and the employee would likely be awarded compensation. This duty to consult is separate from the duty to give proper notice to the employees to terminate their employment contracts. If an employment contract does not specify a notice period, the statutory minimum notice period is one week for each year of service.

Consultation must be conducted "with a view to seeking agreement" with the appropriate representatives about ways of avoiding the dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals. To achieve this, certain information must be disclosed in advance, and in writing, to the appropriate representatives. Appropriate representatives are either employee representatives elected by the employees or representatives of a recognized independent trade union.

Additional care is required if the redundancies are a consequence of an asset sale. In this case, it is likely that any dismissals will be automatically considered unfair unless they are for an economic, technical or organizational reason entailing a change in the workforce.

9. ASSIGNMENT OF CONTRACTS

In general, aside from employment contracts, there is no provision for automatic transfer of contracts from a seller to a buyer of assets by operation of law without the prior consent of the co-contractor.

10. NONCOMPETITION

10.1 Covenants expressly binding a seller's employees or principals are not enforceable against the relevant individual unless that individual is a party to the sale contract or to an ancillary document and either the buyer gives consideration to the individual for the covenant or, if no consideration is given, it is entered as a deed. Whether or not entered by deed, lack of payment of actual consideration by the buyer may render the covenant enforceable in damages only (i.e., not by injunction). Generally, longer and more extensive covenants (in terms of geography and scope of activity) are more difficult to enforce at

common law for individual employees and officers than for a seller. Courts consider non-competition agreements on the specific facts of each case.

10.2 See Section 4 regarding competition authorities.

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

11.1 Generally speaking, English law gives effect to choices of law, venue and jurisdiction, with very limited exceptions.

11.2 It is possible to include a clause regarding arbitration in an asset acquisition agreement. Under English law, an arbitration award is normally enforceable and not subject to appeal, except in very limited circumstances.

11.3 There are no reasons specific to the English judicial system that would favor selecting arbitration, as opposed to court proceedings, for the resolution of business disputes. Arbitration might be favored because of the private nature of the proceedings and the difficulty of appealing an arbitral award. Court proceedings are cheaper, however, because the parties do not have to pay the cost of the arbitrator.

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. Normally, each side pays the cost of its own attorneys in connection with the negotiation and drafting of the transaction documents. In any ensuing litigation in England, the court normally orders the losing party to pay the majority of the winning party's costs. Given this legal background, it is unusual for the question of legal costs to be addressed in the agreement, although it is not unknown.

12.2 There is no such legislation in England. Disposals at less than fair value can be attacked if the seller goes into insolvency, however.

12.3 [No response.]

Glossary of Foreign Terms

Book Debts:	A synonym for accounts receivable or accounts.
GST:	Goods and Services Tax. (See VAT.)
Hypothec:	Roughly the equivalent of a common law mortgage.
Immovable Property:	Corresponds roughly with the common law concept of real property, as distinguished from personal (i.e., movable) property.
Movable Property:	Corresponds roughly with the common law concept of personal property, as distinguished from real (i.e., immovable) property.
Real and Personal Rights:	Civil law distinguishes between "real rights" and "personal rights." A real right is an interest in property that can be exercised directly against the property. A personal right is a right exercisable against a person, such as an individual or a corporation.
Usufruct:	A real right in either immovable or movable property, which gives the "usufructuary" the right to use and enjoy property that is owned by another person.
VAT:	Value Added Tax. VAT (or GST, see above) is a tax levied on each consecutive purchaser of goods or services based upon the purchase price.