

Model Questionnaire for Asset Purchases

Please answer the following questions as briefly as possible, as though you were in a one- or two-hour discussion with an American lawyer having very limited familiarity with your legal system. Your answers are intended to be of a preliminary nature, designed to provide the reader with an overview of the “big-picture” issues that must be addressed within your jurisdiction.

1. ASSET VERSUS SHARE PURCHASE

In some jurisdictions, an asset acquisition (i) has considerable tax advantages, (ii) has tax disadvantages, (iii) is more complicated or (iv) provides the buyer with greater protection against successor liability.

- 1.1 What are the major consideration(s) for a buyer in choosing an asset acquisition rather than an acquisition of shares?
- 1.2 Is there a distinction between the acquisition of substantially all the assets of a company and the acquisition of the shares of the company with regard to, for example, tax considerations, successor liability, etc.?
- 1.3 Would the answer under 1.2 be different if only part of the assets were to be acquired?

2. FORM OF DOCUMENTS

In some jurisdictions, an asset acquisition (i) must describe in some manner each asset being transferred, (ii) takes place as the acquisition of a single entity, (iii) requires specific documentation or (iv) must be duly registered with the Tax Authorities.

- 2.1 Could the Model Asset Purchase Agreement be used, generally, in its present form, including its extensive representations, warranties and indemnities? Do the laws, customs or practices of your country dictate a specific or different form of agreement?
- 2.2 Can a company transfer its assets by way of one document or does the transfer require a variety of conveyancing documents depending upon the nature of the assets being conveyed (e.g., trademarks, real estate, accounts receivables, contracts, etc.)?

- 2.3 Does the form of the document make any difference in the tax effects of the transfer in your jurisdiction?
- 2.4 Does your jurisdiction require transfers of businesses, or of specific types of assets, to be registered?

3. PRELIMINARY LEGAL REQUIREMENTS

In some jurisdictions, the sale or acquisition of assets requires (i) government approval regarding foreign investments for the transfer, (ii) the approval of a specific body within the seller (e.g., the board of directors or the shareholders) or (iii) administrative filing before the acquisition.

- 3.1 Would any of the above apply in your country?
- 3.2 Are there business activities that are subject to special regulations that would prevent a nonnational from engaging in such activities or require special approvals? If so, please describe the general categories of business activities that would be subject to such special requirements.

4. UNFAIR COMPETITION

In the United States, the Hart Scott-Rodino Antitrust Improvement Act (15 U.S.C. § 18a *et seq.*) requires that parties of a certain size who propose to engage in mergers or acquisitions involving assets or voting securities of certain values to provide the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice with information regarding their operations and the proposed transaction. The act prohibits the consummation of covered mergers and acquisitions for a minimum of thirty days after the filing so that the government agencies can assess the impact of the proposed merger or acquisition on competition.

Are there any similar restrictions in your jurisdiction?

5. SUCCESSOR LIABILITY

In certain jurisdictions, a buyer of assets may be held responsible, under successor liability theories, for (i) environmental liabilities, (ii) product liability claims, (iii) warranty claims and/or (iv) fulfilling outstanding purchase orders existing before the date of the acquisition.

- 5.1 In what circumstances (if any) could a buyer of assets be responsible for any environmental liabilities of the seller?
- 5.2 What are the general rules regarding liability of the buyer for products or services sold before the acquisition transaction?
- 5.3 What are the obligations of the buyer for fulfilling outstanding orders?
- 5.4 What are the obligations of the buyer for warranty claims whose origin is before the acquisition date?
- 5.5 In what circumstances (if any) could a buyer or lessee of immovable property (i.e., real property and leases) be liable for the obligations or defaults of the previous owner or lessee?
- 5.6 Are there any other liabilities or obligations of a seller that will automatically transfer to a buyer of assets in your jurisdiction?
- 5.7 Is it customary for a buyer to conduct:
 - (i) environmental audits or
 - (ii) other specific due diligence investigations before the acquisition of assets?

6. PUBLIC RECORDS

In certain jurisdictions, courts, chambers of commerce, central registries or other organizations can provide a potential buyer with information about the seller and/or its assets.

Are there public records in your country that would disclose the existence of or provide information about:

- (i) the ownership of immovable property;
- (ii) mortgages on and other charges or real rights affecting immovable property;
- (iii) environmental issues affecting immovable property;
- (iv) liens and encumbrances on movable (i.e., personal) property;
- (v) the ownership of intellectual property;
- (vi) pending litigation;
- (vii) standing (i.e., due incorporation and continued existence) of the seller; or
- (viii) financial statements and other financial information?

7. LABOR MATTERS

In certain jurisdictions, employment agreements remain in force and binding on the buyer of all or part of the assets after the acquisition transaction. In other jurisdictions, employment agreements can be terminated if the seller sells assets, or at least the buyer will not be bound.

In your jurisdiction:

- 7.1 Do employees of the seller automatically become employees of the buyer as a consequence of the acquisition of the assets?
- 7.2 Is it permissible to require the seller to terminate some employees as a condition of closing the transaction without imposing severance liability on the buyer?
- 7.3 Is the buyer bound by obligations of the seller to its employees in connection with pension plans and retirement, health or other benefits?
- 7.4 Is it legally enforceable to allocate responsibility between the seller and the buyer for severance payment obligations?
- 7.5 Will an asset sale be subject to consultation with or authorization from any works council, labor union or other similar body?
- 7.6 After the consummation of the acquisition, can the buyer change the terms of employment of employees who are transferred to it as a result of the acquisition?
- 7.7 Does the buyer assume all accrued liabilities in connection with employees transferred to it as a result of the acquisition?

8. PLANT CLOSING LAWS

In the United States, the Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 *et seq.*, commonly known as the WARN Act) restricts the ability of employers of more than fifty employees to engage in “plant closings” or “mass layoffs” without providing at least sixty days’ notice of the intended action to various individuals and agencies. There are several penalties for failure to comply with WARN Act requirements.

Are there any similar restrictions in your jurisdiction?

9. ASSIGNMENT OF CONTRACTS

In certain jurisdictions, some contracts, such as insurance contracts, will transfer from the seller to the buyer of assets by operation of law without the need for the prior consent of the co-contractor.

In your jurisdiction, are any contracts (with the exception of employment agreements, such as discussed above) transferred automatically with the assets?

10. NONCOMPETITION

In certain jurisdictions, noncompetition clauses cannot be enforced against the seller of assets or can be enforced only with certain limitations concerning time, scope of covered activities or geographic area.

10.1 In your jurisdiction, can a noncompetition clause be enforced against:

- (i) the seller;
- (ii) its principals; or
- (iii) its employees?

10.2 In your jurisdiction will the enforcement of a noncompetition clause be subject to legal limitations (time, scope, geographic area or other) or registrations with competition authorities?

11. CHOICE OF LAW, JURISDICTION AND ARBITRATION

In certain jurisdictions, it is customary to include clauses regarding choice of law, jurisdiction/venue and arbitration in asset acquisition agreements.

11.1 In your jurisdiction, do you have any restrictions relevant to asset acquisitions by foreign parties regarding:

- (i) the choice of applicable law and
- (ii) the place where the action may be brought?

11.2 Is arbitration possible and, if so, is the award final and enforceable or is it likely that it will be reexamined by a judicial body?

11.3 Are there any reasons specific to your country's judicial system that would favor selecting arbitration as opposed to court proceedings for the resolution of business disputes?

12. OTHER ISSUES

12.1 Is it typical to include a clause regarding the allocation of attorney's fees in an asset acquisition agreement?

12.2 Does your jurisdiction have legislation, sometimes called "Bulk Sales Laws," that protects a seller's creditors from the risk that the assets of the seller will be sold in bulk, leaving the seller with no assets that its creditors may seize? Protection is often provided by the requirement that notice of the sale be given to the seller's creditors and, if notice is not given, by making the buyer liable to the seller's creditors.

12.3 If, during asset acquisition transactions with U.S. buyers or sellers, you have experienced significant differences between your system of law and the U.S. system of law, or there are other significant issues that any foreign buyer should be made aware of in purchasing assets in your jurisdiction and that are not addressed above, please comment briefly.