Foreword

Purpose

This fourth edition of *International Business Acquisitions* (the Handbook) is intended as an easily accessed desk reference for lawyers, business executives and others concerned with the acquisition of the securities or business assets of a company located outside their own national jurisdiction. It is also directly relevant to those representing the sellers in such transactions, as they must anticipate and prepare for the foreign buyer's requirements and concerns.

Despite occasional set-backs in the pace of mergers and acquisitions activity, the number and diversity of international acquisition transactions continues to increase, reflecting the need for every successful company to develop or acquire the resources to compete on an international scale. Many local business enterprises have discovered, often to their surprise and detriment, that this need to acquire or be acquired by foreign companies is no longer limited to large multinational groups. The World Trade Organisation, regional and bilateral trade agreements, instant worldwide communication, internationalisation of management, the spectacular growth of what were previously third-world economies, the reduction of language barriers and other factors have created a worldwide marketplace, where companies will compete primarily on the basis of economic efficiency. International acquisitions, to access foreign markets, to provide foreign production or marketing capacity, to obtain regulatory approvals, to acquire complementary product or service lines or simply to spread product, service or market risk and to reduce costs, have become the norm.

In addition, there has been an explosion in venture capital and private equity driven acquisitions, their aim generally being to identify and exploit underperforming assets or businesses (at the same time giving an outlet to companies wishing to divest themselves of such assets and businesses which are no longer central to their strategies, generally being described as 'non-core'). The high gearing (debt finance) of these acquisitions puts enormous pressure on management and investors to make assets and businesses perform quickly so as to realise value for investors through a subsequent trade sale or IPO (initial public offer), itself leading to further acquisition

Once the commercial decision has been taken to proceed, there are five clear stages in most international acquisitions:

- initial identification of the target (which may be instigated by the target or its shareholders inviting expressions of interest) and negotiation of the broad terms of the deal, possibly leading to an exchange of heads of agreement or a letter of intent;
- either before or after the exchange of a formal agreement, a 'due diligence' examination of the target;
- negotiating and drafting formal agreements;
- obtaining third party and government consents or licences and satisfying other conditions precedent; and
- finalisation of the transaction (referred to variously as closing, completion or settlement).

The first two stages are crucial to the buyer because a decision to complete the transaction should only be made once a proper assessment has been made of the target and its business. During the first stage, the buyer needs to decide on the structure of the deal, and identify any legal (including tax) issues associated with the acquisition. In the second stage, the buyer needs to satisfy itself that everything which it has been told about the target, or which it has assumed about it, is correct.

While this publication deals with these two stages separately, they are necessarily closely linked in the case of an international acquisition.

§1.01 MAJOR LEGAL ISSUES

The first stage requires the buyer or its advisers to look at a number of major legal issues which will be common to most jurisdictions throughout the world. Those issues will determine the structure of the acquisition and whether there are any major impediments to it. Using an economics analogy, the major legal issues list deals with macro-economic questions. It looks at the environment surrounding the target business: foreign investment controls, other government regulation, taxation, contract law, competition law, employment law and employee rights, exchange controls and other issues relevant to any acquisition in that jurisdiction. The buyer's decision to acquire the target, and its assessment of the appropriate price to pay, must be based on a clear understanding of the environment in which the target operates.

Where the target operates in the same jurisdiction as the buyer, the buyer's enquiries will focus on the business itself, as the legal and regulatory environment in which the business operates is already familiar. The position is entirely different in a cross-border transaction. In that case, the buyer must be made aware of the inherent risks, both legal and commercial, which an unfamiliar jurisdiction involves. For that reason, the process for an international acquisition must also focus on the regulatory and business environment in which the target operates. The major legal issues identified in Chapter 2 provide a framework for, and answers to many of, these enquiries.

Because a familiarity with the legal and regulatory environment in which the target operates is essential, these threshold questions will always involve recourse to appropriate professional advice.

§1.02 DUE DILIGENCE

The second stage involves what is commonly known as 'due diligence' – the detailed examination of the particular target's business or, to continue the analogy with economics, the micro-economic aspects of the acquisition.

While the object of the acquisition may be specific shares or assets, the target in a business sense is the enterprise as a whole. The target is not simply the sum of the individual assets or rights which are to be transferred, but a complex bundle of relationships (customers or clients, employees and management, and creditors and suppliers), goods and services, tangible and intangible assets, rights and obligations and business customs.

Effective due diligence requires the buyer's professional advisers to examine, and report on, each of these tangible and intangible assets and liabilities and the material business relationships which underpin the target's business. In an international acquisition, an understanding of the major legal issues identified in Chapter 2 enables the buyer and its decision-makers to view the results of the due diligence enquiries, which are the subject of the checklist in Chapter 3, in context.

§1.03 TERMINOLOGY

While the international business language tends to be English, there is, unfortunately, no common terminology of international business. Throughout this publication, the editors have attempted to use consistent terms, the most obvious of which, with their common international variations, being:

- closing: settlement, completion;
- seller: vendor, transferor;
- buyer: purchaser, transferee;
- company: corporation, legal entity;
- shares: stock, securities;
- officers: directors;
- shareholders: members, stockholders.

In addition, the word 'target' is generally used throughout to describe either the company being acquired (in the case of a share purchase) or the business as a whole (in the case of an acquisition of the goodwill of a business and its assets), depending on the context.

This guide does not deal with takeover offers for companies, the shares of which are listed on a stock or securities exchange, but only with the buying and selling of shares or assets by private treaty or contract. Listed company takeovers involve compliance with stock exchange listing rules and the takeover laws or rules of the

foreign companies participating as shareholders in local companies, and foreign companies having registered branches in Argentina shall submit evidence of assets and/or activities abroad and prove that these assets are substantial when compared to those of the Argentine investment. They must evidence that the investment in Argentina is not the foreign company's main business.

These regulations also require the foreign company to disclose information on the identity of its shareholders, with some exceptions for public companies.

Registration of foreign off-shore companies in the City of Buenos Aires has also been restricted by the Inspección General de Justicia of the City of Buenos Aires (IGJ).

1.3 Letters of Intent and Heads of Agreement

Since the acquisition of shares or assets usually requires long negotiations, preliminary agreements are often concluded on specific issues and topics. Letters of intent and other forms of preliminary agreements are enforceable documents, generally subject to the same regulations as other types of contracts. They may consist of confidentiality agreements, conditions of the due diligence, and disclosure of information about the target company during the negotiations. They may also set out guidelines or criteria for determining the price. Therefore, these covenants and stipulations are valid, unless the parties have clearly stipulated otherwise.

Preliminary agreements oblige the parties to conduct negotiations on the basis of loyalty and good faith, and inform their respective partner of their intentions to conclude or withdraw. Therefore, if one of the parties fails to fulfill the promises contained in such preliminary agreements, the other party may request specific performance of the obligations provided for in the preliminary agreement or make a claim for damages. For these reasons, careful drafting is necessary when preliminary agreements are not intended to create binding obligations.

1.4 Taxes Affecting the Structure and Calculation of the Price

Sales of unlisted shares of an Argentine company by a foreign corporate entity are subject to income tax at an effective rate of 13.5% of the selling price or at a rate of 15% on the net gain at the seller's discretion, while the sale of unlisted shares of an Argentine company by a non-resident individual is subject to income tax at an effective rate of 31.5% on the selling price. The sale of unlisted shares by an Argentine corporate entity is subject to income tax at a rate of 35%, while the sale of unlisted shares by a resident individual is subject to income tax at a rate of 15%.

A Stock Purchase Agreement is subject to stamp tax at a rate varying from 0.8% to 1%, depending on the jurisdiction.

A purchase of shares will result in the purchasing company inheriting all of the tax and social security liabilities of the target company.

Dividends paid by the local company to the foreign investor are subject to withholding tax in Argentina at a rate of 10% (in addition to equalization tax, if applicable).

If a taxable local company sells its business by asset transfer, the transaction might be considered a "transfer of a going concern" (TGC). The TGC is regulated by a law in Argentina that sets forth special rules to protect the seller's non-taxable creditors. Notice of the sale must be published in the Official Gazette of Argentina and in one or more local newspapers in order to remove any implication of the seller's non-tax liabilities to the buyer. The seller's non-taxable creditors have ten days to object to the sale of the assets.

A purchase of assets is, in principle, more costly than an acquisition of shares, from a tax point of view, mainly due to the potential for the application of income tax, VAT, and turnover tax on the sale of the assets. However, the investor might prefer to purchase assets instead of purchasing stocks, if it does not want to assume the company's liability or if the stock purchase involves taking over tax attributes, such as the tax basis, net operating carry forwards, etc, since the acquisition of assets may, subject to certain restrictions, exclude the seller's tax liabilities.

1.5 Extent of Seller's Warranties and Indemnities

In general, the parties are free to determine the extent of the warranties and indemnities to be granted by the seller in order to enable the buyer to bring an action for damages caused by any breach or inaccuracy of a representation or warranty provided by the seller.

Regarding hidden defects, Argentine law provides that the seller is liable for those defects within the extent of his knowledge. Therefore, it is advisable to include a provision stating that the seller will be always liable for any hidden defects, as well as claims from a third party that reduce the value of the business or of any of the items sold; it would be particularly prudent to specify those items which are considered essential for the business.

Warranties and indemnities may be backed by banking guarantees, collateral securities, or by withholding a portion of the purchase price until the limitation period agreed upon by the parties expires.

1.6 Liability for Pre-contractual Representations

The general principle, as stated in Argentine Law, is that all contracts shall be entered into, construed, and executed in good faith according to what the parties understood or could have understood, acting with care and foreseeable ability. This principle also applies to the entire negotiation process.

Likewise, in cases of fraud or certain misrepresentations the contract may be terminated and/or the seller may be held liable for damages. The purchase agreement can cover the seller's liability with specific warranties and indemnities.

2.3 Letters of Intent and Heads of Agreement

An agreement (which can be either oral or written) is binding if it appears either from the document itself or from the circumstances that there is an intention to create legal relationships and if there is consideration given for any promises made or undertakings given by either party. Consideration does not have to be monetary.

If it is intended that letters of intent or heads of agreement should not be binding on the parties until the exchange of more formal contracts, clear words should be used to that effect. The expression 'subject to contract' is often used in correspondence to achieve this, but agreements should have more specific provisions inserted to clarify whether, and to what extent, they are intended to be binding. This is particularly important in cases where certain parts of an otherwise non-binding heads of agreement are intended to be enforceable, for example, confidentiality or lock-out provisions.

2.4 Taxes Affecting the Structure and Calculation of the Price

A detailed examination of Australia's business taxes is beyond the scope of this guide. However, subject to our comments regarding the acquisition of a company from a tax consolidated group, a purchase of shares will result in the buyer inheriting all of the target's taxation liabilities, whereas a purchase of assets will generally avoid this. Therefore, it is often the case that an acquisition of shares requires a more extensive tax due diligence process. Appropriate warranties or taxation indemnities can protect the buyer from certain taxation liabilities of the target which should properly fall upon the vendor in the former case.

A group of Australian whollyowned companies may elect to form a tax consolidated group. Australia's income tax consolidation regime broadly allows for groups of whollyowned Australian companies to elect to be treated as a single entity for Australian income tax purposes. This effectively means that the assets of the subsidiary members are treated as the assets of the head company of the group, and intra-group transactions will be ignored for income tax purposes.

A consolidated group must include a head company and at least one subsidiary member. There are slightly different requirements for groups of companies that have the same foreign ultimate holding company.

If a group is consolidated, certain tax attributes (including tax losses and franking credits) will be transferred to the head company of the consolidated group. Some tax attributes will remain with the head company even when a group member leaves the consolidated group. Further, if a buyer purchases the shares in a subsidiary member of a consolidated group, the buyer will not generally inherit the historical tax liabilities of the company if certain exit conditions are met. Provided these conditions are met, the company leaving the consolidated group is released from certain liabilities of the consolidated group.

Electing to form a tax consolidated group will usually result in a resetting of the cost bases in the underlying assets of the corporate group. The tax cost setting process can result in the tax values of the assets brought into the consolidated group being reset

at a higher value than prior to consolidation. In this case, the head company could have access to higher depreciation deductions in the future or increased cost bases. There could, conversely, be a reduction in tax costs of assets as part of the tax consolidation regime. The income tax consolidation rules and the tax cost setting exercise can create opportunities in a business acquisition.

While an Australian company may hold assets which are exempt from capital gains tax (because they were acquired prior to 20 September 1985), anti-avoidance provisions remove this exemption where control of the company changes. Other assets will fall within the capital gains tax net in any event, and there may be significant potential taxation liabilities in respect of appreciating assets, against which no provision may have been made by the company.

In addition, where a change in control occurs when the target is acquired, prior year losses (which could otherwise have been carried forward and offset against future profits) may be forfeited unless the target carries on substantially the same overall business at particular testing times.

Therefore, the calculation of the acquisition price should take into account potential capital gains and other tax liabilities, and the potential forfeiture of carried forward losses.

A non-resident acquiring business assets in Australia may be deemed to have established a branch or a permanent establishment in Australia, and its profits attributable to the Australian branch would then be subject to Australian taxation. An acquisition of shares, on the other hand, insulates the non-resident buyer from Australian taxation, other than taxation paid by the Australian target on its profits, any withholding taxes due on interest or dividends received by the buyer and taxation due on any gain on the subsequent disposal of shares.

A transfer of either shares or assets (including goodwill) may attract stamp duty in the state of Australia where the target is incorporated (in the case of shares) or in each state where assets are located (in the case of assets). Stamp duty rates vary, but asset transfers or assignments attract conveyancingduty at rates as high as 5.5%, while the rate of duty on share transfers is 0.6%. There is no transfer duty on shares in companies incorporated in Victoria, Tasmania and Western Australia unless they are a 'land holder' or 'land rich' which will be the case where a target holds land above a certain value.

A goods and services tax (GST) also applies in Australia to the supply of goods, real property, services and other supplies. The GST is currently payable at the rate of 10% and may be payable on certain acquisitions.

2.5 Extent of Seller's Warranties and Indemnities

The nature and extent of warranties and indemnities depends on the size of the acquisition, what is acquired (i.e., shares or assets) and the parties' relative bargaining strength. However, it is not unusual for sellers to give full warranties and indemnities relating to, for example, the accounts of the business or company to be acquired, title to the assets, taxation, litigation, employee issues etc.

Austrian merger control regulations do not apply to concentrations falling within the European Commission's jurisdiction under the Council Regulation (EC) No. 139/2004 (EC Merger Regulation).

The Austrian rules on restrictive agreements have been amended in 2005 to reflect EC Regulation No. 1/2003 on the interpretation of the rules of competition stipulated in Articles 101 and 102 of the Treaty on the Functioning of the European Union. The Austrian regulations generally accord with the EC competition law regime prohibiting agreements which restrict, distort or prevent competition in Austria.

3.11 Required Offer Procedures

The Austrian Takeover Act (*Übernahmegesetz*) regulates both voluntary and mandatory public takeover bids for shares in a joint-stock company with its registered seat in Austria, provided that such shares are listed on the Vienna Stock Exchange for official trading (*amtlicher Handel*) or on the regulated unofficial market (*geregelter Freiverkehr*). The Austrian Takeover Code has been substantially revised as of 9 June 2006, not only to implement the EU Takeover Directive but also to address concerns about the clarity of the existing law.

The Takeover Act provides that the acquirer of a controlling shareholding in a target company has to make a public takeover bid to the remaining shareholders for all outstanding shares (mandatory takeover bid). Under the revised Act, a shareholding of over 30% constitutes control. Certain restrictions and obligations, other than the obligation to make a public takeover bid, are triggered by the acquisition of a shareholding exceeding 26%. Mandatory takeover bids (and voluntary tender offers by which the offeror is seeking control of a target company) have to be priced at the higher of: (i) the average share price for the six-month period preceding the offer, and (ii) the highest price paid by the bidder for target shares during the twelve-month period preceding the offer.

Non-compliance by a (potential) bidder with certain material obligations under the Takeover Act leads to a suspension of voting rights and attracts monetary fines.

The Minority Shareholder Squeeze-Out Act (*Gesellschafterausschlussgesetz*) facilitates the squeeze-out of minorities holding up to 10% of the share capital of a corporation, particularly following public tender offers.

3.12 Continuation of Government Licences

Governmental licences are generally issued to specific persons, and a transfer or assignment to a third party requires the consent of the competent authority or the re-issuance of the licence.

In some cases, licences are issued in respect of physical objects. Such licences authorise and oblige the owner from time to time in respect of the object, and therefore transfer automatically to the acquirer in the event of an asset deal. Such in rem licences include permits for the operation of plants, building permits or water rights.

In the event of a share deal, licences held by the target company generally remain unaffected, and no approval by an authority is required unless the licence contains a change-of-control provision.

3.13 Requirements for Transferring Shares

Shares in a private-limited company are freely transferable, unless a restriction is stipulated in the articles of association. The transfer may be subject to approval by the company, the shareholders' meeting or even by all shareholders. The sale and transfer of a quota in a private-limited company as well as arrangements for a future transfer of a quota (including call- and put-options) require a notarial deed form. This formal requirement relates to the transfer itself. It is therefore possible to acquire a quota in an Austrian *GmbH* on the basis of a share purchase agreement which is not notarized and contains provisions regarding the determination of the purchase price, representations and warranties and a short-form notarial deed providing for the transfer of the quota. Certain Austrian notaries (qualified as court-sworn translators) may draw up Austrian notarial deeds in the English language without the requirement of a German translation. Deeds created by German notaries are generally recognized as equivalent to Austrian deeds. The situation regarding other foreign notaries is less clear.

Any change of shareholders of a GmbH has to be registered with the Commercial Register. Such registration is, however, only of a declaratory nature and a failure to notify does not affect the validity of the share transfer. On the other hand, one may not fully rely on the entries in the register when conducting due diligence of the ownership of an Austrian private-limited company.

Bearer shares, which may only be issued by listed Austrian joint-stock companies, may be transferred without observing any particular form, by physical delivery or instruction to a depositary. Registered shares in a joint-stock company may be transferred by endorsement or assignment followed by the surrender of the share certificates to the acquirer. The transfer of registered shares must be declared to the company that records the new shareholder in the shares register. Such registration is only of a declaratory nature. The sale and transfer of registered shares may require the approval of the target company or its shareholders' meeting. If such approval is withheld without cause, the court may approve such transfer instead. The transfer of a shareholding in a general or limited partnership is only permissible if the articles of association so provide or if all partners (including the limited partners) approve such transfer. There are no formal requirements for the transfer. The change of shareholders has to be declared to the Commercial Register.

3.14 Requirements for Transferring Land and Property Leases

In an asset deal including real property, a purchase agreement containing specific transfer and registration language, which has to be notarized, has to be created. The transfer must be registered with the Land Register (*Grundbuch*) in order to be effective towards third parties. The purchaser of real property may generally rely on the

partnership. Each partner is jointly liable for all debts and obligations incurred by the partnership. However, a partner is generally not liable for obligations incurred before it became or after it ceased to be a partner. All partners may take an active role in operating a general partnership. As each partner is an agent of the others, each partner may bind the others unless there are restrictions in the partnership agreement of which third parties have notice.

A limited partnership combines the advantages of limited liability and the ability to flow profit and losses for tax purposes through to passive investors. This form of business structure is often used for public financing and real estate syndication. A limited partnership is made up of one or more general partners, each of whom has the same rights and obligations as a partner in a general partnership, and one or more limited partners, whose powers and liabilities are limited. The general partner or partners manage the partnership. A limited partner may not take part in the partnership's management without jeopardizing its limited liability, though in most circumstances it may act as an employee, agent or consultant. The primary advantage of a limited partnership over a general partnership is the limited liability of the limited partners. This enables passive investors to receive returns proportional to the amount of their contribution with minimal personal risk.

Joint Venture

A joint venture is an agreement entered into by two or more parties (individuals, partnerships or corporations) to pool capital and skills for the purpose of carrying out a specific undertaking. Since a joint venture is not a recognized entity for tax purposes, income and losses for tax purposes are computed separately by each joint venturer, rather than at the joint venture level. A joint venture is thus a means to carry out a single operation using common resources, with each party retaining a substantial degree of independence and its own flexibility in tax matters. Joint venturers who do not want their joint venture to be a partnership should enter into a written agreement setting out their respective rights and obligations in detail. Otherwise, there is a risk that the joint venture may be characterized as a general partnership. If so, each partner would be fully liable for partnership obligations and subject to tax as a partner rather than as a joint venturer.

Corporations

The federal and provincial levels of government have each enacted legislation providing for the incorporation and regulation of corporations (or companies, which are indistinguishable from corporations), and the parties can choose which statute they wish to govern the corporation. A federal corporation has the right to carry on business under its corporate name in any province in Canada, while under the provincial corporate statutes there is no such entitlement. Although most of the corporate statutes are similar, they are not uniform. In terms of liability, with the exception of unlimited liability companies that may be incorporated in the provinces of Nova Scotia, Alberta

and British Columbia, all corporations have limited liability. Although this protects the shareholders, there is legislation, particularly with respect to tax, environment and criminal laws, which hold the directors personally liable for certain infringements of the corporation.

Trusts

The trust is derived from English common law but is subject to different rules in each province, particularly Québec. The trust is primarily used in certain tax-driven circumstances to achieve tax deferral. A unique feature of Canadian tax law regarding trusts is that the trust is deemed to dispose of all of its assets every twenty-one years at a fair market value. This rule is subject to some exceptions.

6.3 Letters of Intent and Heads of Agreement

Letters of intent outline the 'business deal' of the transaction as they express the intent of the parties and the general principles, terms and conditions that will be the subject of further, more detailed, negotiation and documentation. Although these letters can be binding on the parties, language is most often used so that the letters are non-binding and solely express an intention to enter into a definitive agreement upon more formal terms at a later date. Despite this, some sections of letters of intent are often expressed as being binding regardless of the eventual outcome of the proposed transaction. For example, provisions respecting confidentiality provisions and 'break-up' fees will necessarily contain language expressing binding intent.

6.4 Taxes Affecting the Structure and Calculation of the Price

As in every jurisdiction, taxes have an important role to play in the assessment of the feasibility of a transaction and in the structure. The combined federal/provincial basic rate of tax for a general corporation carrying on business in Ontario is 26.5%, but it may be reduced to 25% in respect of profits from Canadian manufacturing or processing. In Québec, the basic rate is 26.9%, but there is no reduction in respect of profits from Canadian manufacturing or processing. Note that a 'general corporation' typically includes public companies and their subsidiaries that are resident in Canada, as well as Canadian-resident private companies that are controlled by non-residents.

On 1 January 2006, the federal capital tax was eliminated and, effective 1 July 2012, all provinces have stopped levying corporation capital taxes.

A non-resident corporation that is a member of a partnership which carries on business in Canada is generally subject to tax in Canada on its share of the partnership profits as if it carried on the partnership business directly as a Canadian branch. A partnership with a non-resident partner is considered to be a non-resident for the purposes of determining whether the withholding tax must be deducted from certain passive income payments made to non-residents. In addition to liability for normal income tax on its Canadian source business income, a non-resident corporation that

In general terms, the acquisition of shares or ownership interests in a company involves the buyer retaining all the benefits, obligations, debts, liabilities and prior charges of the entity, since companies are considered a legal entity separated from the owners. Agreements should be reviewed in order to determine if a change in ownership could involve termination rights.

7.8 Pre-completion Risks

The parties to the transaction will always have the ability to determine which one of the contracting parties will bear the risks before completion. The issue is usually covered in the pre-contractual agreements or in the agreements itself if closing will occur at a later stage.

In the absence of contractual stipulations, the general rules will apply. For example, in a sale of assets, the loss or impairment of an asset while delivery is pending, for reasons other than the seller's negligence, as it would be in the case of force majeure, the risk will be borne by the buyer if the purchased object is a specific asset and by the seller if it is a generic one.

7.9 Required Governmental Approvals

As mentioned, in general, foreign investors may conduct almost any kind of business activity in Chile and may freely acquire shares, ownership interests or assets of local target companies, with some restrictions in the case of publicly held corporations, regulated industries and where competition issues arise. Some approvals or registrations are also required under foreign investment or tax regulations.

If the business activity of the target company forms part of a regulated industry or market (as in the case of banks, insurance companies, pension funds administrators, casinos, mass media and telecommunications companies, among others), the transaction will be subject to additional statutes and regulations, and some requirements may apply with regard to the concessions, permits and licences that may be necessary to duly operate in the corresponding sector or industry, as the case may be.

Some restrictions may also apply to foreign investors acquiring properties located in zones declared as a national border line as well as in the case of public lands located within 10 and 5 kilometres from the Chilean borders or coast.

7.10 Anti-trust and Competition Laws

Chile does not have a mandatory pre-merger control system. Mergers or other horizontal concentrations may be voluntarily submitted by the parties to the transaction to the Chilean Competition Court under a non-adversarial procedure established in the Competition Act (with the exception of some specific markets, industries or companies, where mandatory filing is required).

However, transactions not voluntarily submitted that are thought to contravene competition either by the Chilean Competition Agency or by any person alleging a

legitimate interest may be challenged before the Chilean Competition Court either before or after the completion of the operation.

A transaction executed in accordance with a decision of the Chilean Competition Court will not carry any kind of anti-trust liability except if, in the future, on the basis of new evidence and facts, the referred Court decides that the transaction is harmful to competition (but only as from the moment that the decision is notified or published).

7.11 Required Offer Procedures

In Chile, the take-over or acquisition of a certain percentage of shares, or control, of a publicly held corporation must be effected by a public tender offer, unless a legal exemption is available. The tender offer process and requirements are established in Law No. 18.045 and in the regulations of the Chilean Securities Agency.

If a legal exemption is available and the take-over of a publicly held corporation is not made through a tender offer, then the party that intends to obtain control of the corporation must disclose such intent to the Chilean Securities Agency, the stock exchanges and the public in general before taking control.

Other than as agreed in shareholders agreements or other documents, the acquisition of the control of a non-publicly held corporation does not require special offer procedures.

7.12 Continuation of Government Licences

Assets involving a government licence can generally be transferred without any communication to the government entity that provided the original authorization. Nonetheless, the matter should be reviewed in order to verify that there is no specific assignment or change of control provision that could affect a licence in place.

There are some cases, when the licence compromises a public need, as is the case with electricity services licences and other public services developed by private enterprises, in which an authorization of an administrative entity is required. To preserve the licence, the buyer will usually have to prove that it is qualified to carry on the activity and that it has the economic capacity to provide the specific service.

7.13 Requirements for Transferring Shares

Corporations are obliged to register in their Shareholders' Registry transfers of shares that are presented by shareholders without further process, even if there is a private agreement in place limiting such transfer, if the transfer complies with the formalities specified in the Regulations of Law No. 18,046. A transfer of shares can be made by means of a public deed or a private instrument executed before two witnesses of lawful age or before a stock broker or a notary public.

The bylaws of publicly held corporations cannot restrict the free transfer of shares. Private agreements between shareholders relating to the transfer of shares must be deposited with the corporation and must remain available to other shareholders and

For those industries that may produce serious pollution such as energy source fields and heavy industries, it is always advisable to entrust a qualified environmental assessment company to conduct a thorough environmental investigation in the early stages of an acquisition.

8.22 Employee Superannuation/Pension Plans, Social Insurance and Housing Funds

The Chinese government has developed a social insurance system including basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance and maternity insurance to maintain citizens' right to receive material assistance from the state and society in the case of seniority, illness, work-related injury, unemployment and maternity. The social insurance premium is paid by both the employers (including *FIEs*) and employees in proportion to the employees' income, and the detailed ratio of such payment is determined by local human resources and social security administrative authorities. Social insurance premiums to be paid by the employees must be withheld by employers on the employees' behalf. Specific social insurance institutions (i.e., social insurance agencies) have been established in China to provide social insurance services and to take charge of social insurance registration, records of the rights and interests of individuals, payment of social insurance benefits and other related duties.Employers are normally required to apply to the local social insurance agency for social insurance registration, open a social insurance account and pay a social insurance premium to such account. Other than these social insurances, companies (including *FIEs*) may also provide commercial insurance.

Furthermore, the Chinese government has also established a housing fund system. Housing funds must be used for the employees to purchase, construct, renovate or rebuild a self-occupied home, and no unit or individual may misappropriate it for any other purpose. Housing funds contributions are paid by both the employers (including *FIEs*) and employees in proportion to the employees' income, and shall be owned by the employees.

It is not unusual that certain companies have failed to fully pay the required social insurance and housing fundpayments in strict compliance with relevant PRC law and local policies, which may cause an increase in the acquisition cost. Therefore, it is advisable for the acquirers to conduct a due diligence investigation with respect to this issue.

8.23 Employee Rights

The Chinese government has attached great importance to safeguarding the rights of employees and workers (including but not limited to equal access for employment, minimum wages, maximum working hours, rest and vacations, work safety and health protection, job training, social security and welfare, and labour union etc.) during the past several years via the promulgation of comprehensive labour laws and regulations at both the central or local levels. Relevant labour administration authorities and

labour dispute resolution organizations have been established and play a significant role in the implementation of such laws and regulations and in the protection of the rights of employees.

All employers are obliged to enter into written labour contracts with their employees, and the employees may also conclude a collective labour contract on matters such as labour remuneration, working hours, rest time, labour health and safety and insurance benefits with the employers through fair consultation. A labour contract must cover such aspects as required by PRC law and comply with other mandatory provisions of relevant laws and regulations. According to PRC law, the employees of any enterprise (including *FIEs*) have the right to establish a labour union, and a labour union shall be established if such enterprise has more than twenty-five employees. The enterprise shall provide assistance, including contributing a certain amount of funding, for the establishment and operation of such labour union.

In most acquisitions involving state-owned enterprises, employees have the right to determine their own fate by vetoing or approving any staff resettlement plan proposed by the foreign purchaser and the target company.

8.24 Compulsory Transfer of Employees

The *Provisions for Merger with and Acquisition of Domestic Enterprises by Foreign Investors* which were promulgated and became effective on 22 June 2009 ('M&A Regulations')impose no mandatory requirement on the transfer of employees; instead, only providing that a plan for resettlement of employees, together with other application documents and material, should be submitted to the competent authority for approval, for either equity acquisitions or asset acquisitions by foreign investors. A resettlement plan generally deals with specific issues concerning the resettlement of the employees of the target company, such as retaining the employees, the settlement of unpaid wages and outstanding social insurance premiums and payment of severance fees. It is important to review relevant local policies and consult local authorities to ascertain if any specific conditions must be satisfied.

Special requirements will apply to equity or asset acquisitions if the controlling equity interests in or main assets of a state-owned enterprise are to be sold to a foreign investor for reorganization. A resettlement plan must be prepared by the foreign investor and the state-owned enterprise and approved by the staff and workers' congress of the state-owned enterprise, and submitted to the relevant governmental authorities (e.g., MOC) for examination and approval. By voting for the resettlement plan at the staff and workers' congress, the staff and employees may exercise their actual veto power on an acquisition, should they be unsatisfied with the staff resettlement plan.

Moreover, the state-owned enterprise must use its current assets to pay, *inter alia*, overdue employee salaries and overdue social insurance premiums. New or modified employment contracts must be signed by the retained employees, and a severance payment must be paid in full to employees who are not retained. Relevant social insurance fees must be fully prepaid in one lump sum for those employees who

To clarify both parties' positions, specific contractual provisions should be considered which exclude liability for representations made in pre-contractual negotiations and which restrict rights of rescission/termination to the period between exchange of contracts and completion. The result will normally be that the buyer can rely only upon statements specifically repeated in the agreement and matters specifically warranted or in relation to indemnities which have been given.

11.7 Liability for Pre-acquisition Trading and Contracts

On a sale of assets, the agreement itself invariably specifies an effective date of sale, prior to which trading is for the seller's account and following which trading is for the buyer's account. Often this is the date of completion of the sale, but if a retrospective effective date is included, the buyer, for accounting and taxation purposes, bears the loss or is entitled to the business's profits from that date.

Section 9.17 deals with the transfer of contracts under an asset acquisition. Following completion, the seller remains liable in relation to pre-acquisition contracts to which it was a party unless released from the contracts by the third party. In relation to contracts which could have a major effect on the business, it is recommended that the rights and obligations under these contracts be transferred to the buyer under a contract of novation to which the third party is a party. To the extent that contracts are not novated, the rights under them are agreed to be assigned under the assets sale agreement to the buyer who undertakes to the seller to perform the contracts following the sale and to indemnify the seller against any liability he or she might incur under them after that time.

In the case of a share acquisition, pre-acquisition profits and losses are on the target's account itself. However, pre-acquisition profits may be paid to the seller by way of dividend before the sale. If they are retained in the target, the buyer effectively inherits them. In addition, the consideration for the share acquisition might have been determined, or be adjusted following completion, to reflect the profit or losses in the target at completion.

Whilst the target itself remains liable for any contracts it has entered into before the sale, the seller might have guaranteed the target's obligations under the relevant contracts, in which case the buyer often undertakes to use reasonable endeavours to procure the release of the seller from such guarantee following completion and, in the meantime, to indemnify it against any liability it might incur thereunder.

11.8 Pre-completion Risks

If there is a gap between the exchange of the purchase agreement and completion, the question of who should bear the risk of anything adverse arising prior to completion, which affects either the target shares which are being transferred, or the assets which are being transferred, is one which should be considered carefully by the parties and addressed in the purchase agreement.

There are no fixed rules in this regard, but often the buyer is given a limited right to terminate the purchase agreement. This right might arise, for example, if there has been a material breach of any of the warranties given by the seller which are, or are deemed to be, repeated at completion. Sometimes the agreement excludes the buyer's right to terminate the agreement, in which case the buyer must complete the acquisition and rely on any right to claim damages against the seller. A refinement of this might involve a provision under which there is no right to terminate the agreement, but the price is adjusted by reference to the loss suffered by the target or the business being transferred.

In the case of a business acquisition agreement, it is sensible for the buyer to insure the assets with effect from the signing of the agreement. The alternative is to include a provision enabling him or her to terminate the agreement in the event of significant loss or damage to the business assets before completion. In the case of a share acquisition, the buyer should ensure that the target has adequate and proper insurance cover in place from the date of completion.

11.9 Required Governmental Approvals

The acquisition of a business or company in the UK is subject to anti-trust and competition laws as described in section 11.10 below. The Secretary of State for Business Innovation and Skills (a Government Minister) also has the power to intervene in relation to certain limited cases relevant to the UK public interest, including mergers in the defence sector which may raise issues of national security.

In relation to certain sectors, such as regulated utilities and financial services, additional consents or modification of operating licences may also be required. In the context of healthcare, Monitor, the regulator for health, may need to be consulted.

11.10 Anti-trust and Competition Laws

The legal basis for merger control in the UK is the Enterprise Act 2002 (the 'Act'). Merger control in the UK is 'voluntary'. This means that there is no requirement for companies to notify and obtain clearance prior to completing transactions. However, a merger may qualify for investigation under the Act if either of the following two threshold tests is satisfied:

- the value of the turnover in the United Kingdom of the target enterprise exceeds GBP 70 million (the 'turnover test'); or
- at least two of the merging enterprises supply or acquire goods or services of a particular description, and the merged entity will supply or acquire at least 25% of those goods or services in the UK as a whole, or in a substantial part of it, with the merged entity increasing its share of supply or acquisition as a result of the merger (the 'share of supply test').

As a general rule, mergers that fall under the scope of the European Union Merger Regulation are excluded from review under the Act.

general, losses are also tax effective at shareholder level. Only trade tax and VAT are assessed at company level.

14.3 Structure of the Acquisition Agreement, Letters of Intent and Heads of Agreement

Structure of the Acquisition Agreement

German Law provides for a very strict demarcation between a sale under the law of obligations and a transfer in rem. In some cases, both steps will take place on separate days through separate agreements. Alternatively, the parties may declare both: (i) sale, and (ii) transfer in rem, in one central SPA upon signing of the transaction and make its effectiveness subject to certain conditions precedent (the last of which will usually be the payment of the purchase price). In such case, the closing of the transaction will not require a separate transfer agreement, but will usually feature mutual confirmations of the condition precedents' fulfillment and the payment of the purchase price.

The SPA will, both in case of a share or an asset acquisition, usually differentiate between: (i) the "effective date" (date as of which the company's commercial development shall be to the benefit or disadvantage of the buyer), (ii) the signing date of the SPA, and (iii) the closing date (the date the shares or assets are transferred in rem). The effective date may coincide with the signing or the closing date, but it may fall before or after each of these (for instance the end of the business year may be chosen).

Letters of Intent, Heads of Agreement

The conclusion of a Letter of Intent is nowadays very much part of the standard process for M&A transactions in Germany. In comparison, pre-contractual arrangements in the form of Heads of Agreements will be encountered less often, although the distinction between these and Letters of Intent is of course blurred, and Letters on Intent will in many cases include a list of key issues already negotiated by the parties.

Letters of Intent usually state the key economic parameters along with the central assumptions and conditions of each party. If no separate NDA has been concluded, confidentiality may also be agreed upon in a Letter of Intent. The document will also often describe an agreed timeframe for the process including details of the due diligence procedure.

Most Letters of Intent will explicitly stipulate their non-binding nature, and this is recommended to avoid disputes between the parties in case the proposed transaction is aborted. An exception is usually made for such elements of the Letter of Intent which the parties explicitly declare to be binding, for example: (i) confidentiality, (ii) exclusive right to negotiations for a certain time period, (iii) cost-coverage, (iv) break-up fees, or (v) applicable law and responsible courts. In this context, it is important to note that the sale and transfer of shares in a GmbH must be notarized – as must, in principle, any agreements entered into in connection with such a sale or transfer. This means that

any of the aforementioned "binding elements" of a Letter of Intent are only permitted within very narrow parameters. If, for instance, a cost-coverage fee is "unreasonably high" and without correlation to the actual costs incurred this may (unless the Letter of Intent was notarized) very well render such "binding parts" invalid. The legal rationale behind this is that non-notarized Letters of intent must, in the eyes of the courts, not create an economic pressure to buy shares in a GmbH.

A party that negotiates in good faith and informs the other party in time when withdrawing from the transaction will rarely be made liable. Even if there is a liability under the Letter of Intent, this will usually only extend to frustrated expenses (see also section 14.6 – Liability for Pre-contractual Representations).

14.4 Taxes Affecting the Structure and the Calculation of the Price

When considering the acquisition structure, tax effects at the time of the acquisition, ongoing taxation of the target, and a possible later sale of the target, need to be taken into account. Whereas a detailed analysis of all tax-related aspects would be beyond the scope of this guide, there are certain aspects the foreign investors should be aware of.

In an asset deal, the acquired assets (including goodwill) will be capitalized (pro rata) at acquisition costs. In the years following the acquisition, they are subject to depreciation which reduces the taxable profit. Upon a sale of assets, all capital gains are taxed on the level of the selling company. The average tax rate for corporations in Germany is 30% (15% Corporate Income Tax + approx. 15% Trade Tax).

For inbound investors, it should be noted that the acquisition of a business via asset deal may result in a permanent establishment in Germany with corresponding tax liability.

In a share deal, the seller will usually accept a lower purchase price, as the sharedeal is 95% tax-exempt on the level of the seller (provided the seller is a corporation taxable in Germany). However, when acquiring shares, these shares must be capitalized at acquisition costs and are not subject to depreciation. Capital gains contained in the company's assets will not be realized (no step-up) and thus not be subject to increased depreciation. In particular, a company's goodwill may not be capitalized in the balance sheet in the case of a share deal.

Losses carried forward in a corporation are forfeited on a pro rata basis if more than 25% of the shares are – directly or indirectly – transferred to a new owner (or a group of new owners). In a scenario where more than 50% of the shares are transferred, the losses carried forward are fully forfeited.

Corporations with unlimited tax liability in Germany can form a tax group (the holding company may even be a partnership). In a tax group, the profits and losses of the group members are consolidated on the level of the holding company. Services and sales within the group are not subject to VAT. The holding company must hold the majority of voting rights in order to form a tax group. Among other requirements, in order to form a tax group for income tax and trade tax purposes, a profit-and-loss transfer agreement must be concluded for a minimum period of five years between the

18.8 Pre-completion Risks

The question of pre-closing risks does not usually arise, as it is usual in Ireland for business acquisitions and share acquisitions to be by way of contract signed immediately before closing. An interval between signing the agreement and closing the transaction usually arises because of a regulatory requirement, e.g., clearance under the Irish Competition Act or, in the case of a quoted company, approval of the transaction by the company in general meeting so as to satisfy Stock Exchange regulations.

Irish law does not prescribe where risk lies as between a seller and a buyer of shares. In the case of an asset deal, while the Sale of Goods Acts provides the default position that the risk in 'goods' passes to a buyer of such assets once the agreement comes into effect, parties are free to agree otherwise.

A business acquisition agreement usually contains provisions specifying which party bears the risk of loss of assets between signing and closing. Risk usually remains with the seller so that it needs to maintain insurance until closing. Frequently, a buyer seeks to take over such insurance and a seller seeks to remain a co-insured on the buyer's policy for third-party liability after closing.

A buyer may mitigate risk by receiving a warranty from the seller that there has been no adverse change to the business between signing and completion. A buyer may also seek a right to rescind the contract.

18.9 Required Governmental Approvals

The acquisition of a business in Ireland is subject to both the national competition law framework commented upon in section 18.10 and to European law (see *Major Legal Issues: European Union*).

While the Irish Competition Authority (the 'Authority') is responsible for merger control in Ireland, special rules apply to media mergers and to mergers in the banking sector.

Media mergers are deemed under the Competition Act to include: mergers or acquisitions in which two or more of the undertakings involved carry on a media business in the state; and mergers and acquisitions in which one or more of the undertakings involved carries on a media business in the state and one or more of the undertakings involved carries on a media business elsewhere. A media business is defined as 'a business of the publication of newspapers or periodicals consisting substantially of news and comment on current affairs, a business of providing a broadcasting service, or a business of providing a broadcasting services platform'. Media mergers must be notified to the Authority regardless of whether the turnover thresholds are met.

The final decision to approve a media merger rests with the Minister for Jobs, Enterprise and Innovation who must consider public interest criteria in dealing with such mergers. The prior consent of the Broadcasting Authority of Ireland (the BAI) is also required in the case of any material change in the ownership of a broadcasting

company which is licensed (referred to as a 'contract' in the relevant legislation) by the BAI.

Where the Minister for Finance forms an opinion that a proposed merger involving a credit institution is necessary to maintain the financial stability of the state, the merger must be notified to the Minister rather than to the Authority.

Acquisitions of insolvent undertakings by receivers or liquidators are not notifiable mergers under the Competition Act; neither are intra-group transfers or testamentary dispositions. Financial undertakings (such as banks, credit institutions or insurance companies) which temporarily acquire shares with a view to disposal are also exempted under the Competition Act, provided the voting rights acquired are not exercised in relation to carrying on business or affecting competition in the state. Sector-specific regulatory legislation may also apply to mergers in the financial services and insurance markets.

18.10 Anti-trust and Competition Laws

The Competition Act sets out the statutory basis for competition and merger control law in Ireland. Many of the concepts used in the Competition Act are based on and applied analagously with the EU merger control regime.

Mergers in Ireland are regulated by the Authority, which has the power to approve, require amendment to or veto mergers. A notification must be made to the Authority (within one month after the conclusion of an agreement or the making of a public bid) if, in the most recent financial year:

- the worldwide turnover of each of at least two of the undertakings involved in the merger or acquisition is not less than EUR 40 million;
- at least two of the undertakings involved carry on business in any part of the island of Ireland (i.e., including Northern Ireland); and
- the turnover in the Republic of Ireland of any one of the undertakings involved is not less than EUR 40 million.

It is a criminal offence under the Competition Act and punishable by fines not to notify a notifiable merger or to put a merger into effect in defiance of a prohibition determination or in breach of a conditional clearance. Further, any notifiable merger that is put into effect in the absence of Authority approval is deemed void.

Where the above thresholds are not met, mergers and acquisitions may be notified to the Authority on a voluntary basis. Voluntary notifications are considered in the same way and under the same rules as mandatory notifications. Voluntary notification is recommended for mergers and acquisitions that do not meet the thresholds but have the potential to substantially lessen competition in the state. Where a merger does not exceed the thresholds and is not notified voluntarily, it could be open to challenge for breaches of Irish competition law from both the Authority and third parties.

The Authority will assess whether the result of the merger will be to substantially lessen competition (SLC) in markets for goods or services in the state. The Authority

representations and warranties is limited in time (for tax purposes the term is usually six years).

The indemnities granted are normally secured by a guarantee issued by the seller or by its parent company or, as an alternative, by a bank guarantee, or by depositing part of the purchase price into an escrow account.

20.6 Liability for Pre-contractual Representations

Italian law provides for pre-contractual liability. As a general principle, the parties are under an obligation to conduct the negotiations in good faith, disclosing, to the extent possible information which is relevant for the agreement. Any breach of this duty of disclosure during the pre-contractual phase may trigger the obligation to compensate the other party within the limit of the damages incurred.

Normally, the agreement provides for an indemnity in case of breach of representations and warranties. However, where such a clause is not set forth under the relevant agreement, the party which has suffered damages because of pre-contractual misrepresentations or behaviour in bad faith may also bring an action to recover damages incurred.

20.7 Liability for Pre-acquisition Trading and Contracts

Representations and warranties, and the related indemnities, are aimed at protecting the buyer or the target from losses in connection with events that occur prior to execution or closing of the acquisition.

In the case of share or quota acquisitions, the target will continue to perform any existing contracts unless the termination of those contracts constitutes a condition precedent of completion. Pre-acquisition profits may be paid to the seller by way of dividends or by way of a price adjustment. Similarly, losses deriving from events which occurred prior to, but arising subsequent to the closing of, the acquisition can be reimbursed to the buyer through price adjustment mechanisms.

In the acquisition of a going concern, unless otherwise agreed, the buyer succeeds to the agreements entered into by the seller relating to the going concern transferred. (Note that a third party is always entitled to terminate, within three months from the transfer, the assigned agreements for cause.) In addition, the buyer is jointly liable with the seller for all obligations relating to the going concern. In this respect, an indemnification clause to protect the buyer is usually provided.

20.8 Pre-completion Risks

Until the transfer of shares (or quotas), going concern or assets has actually occurred, the risks of loss remain with the seller. Transfer occurs at completion, but the parties usually sign an agreement which contains all the terms and conditions, with the formalities for the transfer postponed to a subsequent date. Such practice is usually adopted for acquisitions of shares, quotas and going concerns.

The agreements typically provide a clause that would terminate the agreement in case of a material adverse change in the business between signing and completion and state that the seller and seller's counsel must deliver to the buyer, on the completion date and as a condition precedent of completion, a certificate to confirm that all the representations and warranties given at the time of the signing are still valid and effective.

A price adjustment clause may also be inserted in relation to losses incurred between signing and completion.

20.9 Required Governmental Approvals

Governmental approvals are required, in some areas, for the implementation of an acquisition. Governmental controls are delegated to relevant public agencies such as the Bank of Italy, the supervisory authority for private insurance companies (IVASS), the supervisory authority in the communication industry (AGCOM) and the supervisory authority for the securities market (CONSOB).

As indicated in paragraph 17.1, according to the recently issued 'golden powers' regulation, the company shall give a special notice to the Government, when it intends to carry out any 'significant transaction', so that the Government is in the position to timely exercise, if necessary, its 'golden powers'. Similarly, any person who acquired a shareholding in a 'strategic company' shall notify the Government of the acquisition, within ten days, providing detailed information necessary to evaluate the acquisition's potential impact on the state interests.

Moreover, it has to be noted that, should the acquisition of a shareholding in a 'strategic company' be carried out by a non-EU person and/or entities, a reciprocity condition will apply, so that the acquisition is prohibited if, in the relevant non-EU state of origin of the counterparty, Italian subjects cannot acquire any relevant stake in 'strategic companies', with equal conditions.

In the case of acquisitions of companies involved in a specific business (such as banking and insurance), the approval of or communication to the relevant public agency may constitute a prerequisite for the completion of the acquisition. The procedure for gaining approval may, depending on the circumstances and the complexity of the acquisition, require some time to be completed (the average is usually one month). Such a requirement may be extremely important when determining the structure and the time frame of the acquisition.

20.10 Antitrust and Competition Laws

The Italian Antitrust Act, virtually reproducing the EU competition rules, is aimed at controlling horizontal and vertical agreements, as well as acquisitions of shares, quotas or going concerns, and mergers and joint ventures ('concentrations') affecting the Italian market. In particular, concentrations creating or strengthening a dominant position of an undertaking in the national market may be prohibited by the Italian Antitrust Authority.

22.26 Levies on Acquisition Agreements and Collateral Documents

Stamp duty is payable on the instruments conveying the assets and shares. Stamp duty of 0.3% of the purchase consideration or the value of the shares, whichever is higher, is payable on the transfer of Malaysian shares, whereas ad valorem stamp duty ranging from 1% to 3% is payable on an asset purchase agreement.

Transfers of shares listed on Bursa Malaysia Securities Berhad, the stock exchange, are done using contract notes. The stamp duty payable by both buyer and seller is 0.1% up to a maximum of MYR 200, and a clearing fee of 0.03% of the transaction value is payable by both buyer and seller, up to a maximum of MYR 1,000 per contract.

22.27 Financing Rules and Restrictions

A Malaysian company obtaining credit facilities from a non-resident requires permission from the Central Bank of Malaysia if such credit facilities exceed the prescribed thresholds (presently, the equivalent of MYR 100 million in aggregate for resident companies and the equivalent of MYR 10 million in aggregate for resident individuals).

Each financial institution has its own rules for lending, but they are generally quite similar to rules practised internationally by other banks. If a project is commercially viable, many banks would willingly finance it.

The target company is not permitted to finance, or provide any form of financial assistance in connection with, the purchase of its own shares, and as such, the buyer must look for its own funding. This is not an issue in an asset purchase.

22.28 Exchange Control and Repatriation of Profits

There is no restriction on a non-resident investor repatriating funds out of Malaysia arising from the proceeds of sale of assets, or from the profits, dividends or any other income arising from investments in Malaysia. Repatriation, however, must be made in a foreign currency.

The requirements in relation to exchange control are subject to changes and amendments by virtue of exchange control circulars, notices and guidelines issued from time to time by the Central Bank of Malaysia.

22.29 Group of Companies

For income tax purposes, group companies are generally not taxed as a group. Each individual group member is treated in law as a separate legal entity. It is always a moot point whether the courts would lift the corporate veils of group companies to regard them as one single entity. Generally, the courts have approached this matter cautiously, following the common law closely. However, it is envisaged that if a holding company persistently trades by way of a pattern of using 'MYR 2' companies

(companies with only a nominal capital base that are unlikely to meet their obligations to creditors), the courts may be inclined to lift corporate veils.

There is currently only limited group relief available in Malaysia introduced by the Finance Act 2005 with effect from the year of assessment 2006. The group relief is provided to all locally incorporated resident companies under the Income Tax Act 1967 and allows 70% of a company's current year losses to be offset against the income of other companies in the same group. The relief only applies to companies with a paid-up capital exceeding MYR 2.5 million, and companies within a group must have, amongst others, a minimum of 70% ownership between them.

22.30 Responsibility for Liabilities of an Acquired Subsidiary

The liabilities of an acquired subsidiary stay with the subsidiary in line with the concept of a separate legal entity. In some instances, the previous holding company or shareholder could have executed corporate guarantees for the subsidiary. Care should be taken by the sellers of these subsidiaries to have these guarantees released prior to or on completion of the sale.

22.31 Governing Law of the Contract

As the Malaysian system of law is the common law system, most foreign investors are quite content to have their contracts governed by Malaysian law as they are familiar with the concepts.

Occasionally, foreign laws can be agreed between the contracting parties as the governing law of the agreement. The Malaysian courts do recognize the parties' choice of foreign laws, if the choice is not made *mala fide* or to avoid the operation of Malaysian law or public policy.

22.32 Dispute Resolution Options

Parties may choose to either litigate, mediate or refer disputes to arbitration. If parties choose the latter, in Malaysia, there is an arbitration centre called 'The Kuala Lumpur Regional Centre for Arbitration' (KLRCA). The KLRCA was set up under the auspices of the Asian–African Legal Consultative Organisation and has its own rules for arbitration which were adopted from the UNCITRAL Arbitration Rules with certain modifications. Arbitration is usually used when the dispute is very technical, and experts are called in to resolve the dispute.

Also, activities that modify the natural state of resources such as water, land, fauna and flora require a technical assessment by the Environmental Authority before being initiated.

Damage to the environment is subject to administrative, civil and criminal liabilities.

26.22 Employee Superannuation/Pension Plans

All workers must belong to a pension regime. Workers may choose between the Private Pension System (PPS) and the National Pension System (NPS). The PPS operates on a defined contribution basis. Employers must withhold approximately 13% from the employees' salary. A total of 10% is saved in an account with an AFP and the balance is used to pay for AFP fees and insurance. The NPS is operated by the government. Employers must withhold 13% of each worker's salary to finance a pension.

Mandatory health insurance must be paid by the employer (9% of income).

26.23 Employee Rights

Workers may be hired for a fixed term or for an indefinite term. Peruvian labour law presumes that an employment relationship is indefinite unless otherwise proven. Temporary contracts may be executed only for seasonal activities, temporary needs, or some other situations specified in legislation (including new businesses or business expansion). If a fixed term agreement is terminated by the employer before the term expires, or if a worker is fired without just cause as defined by law, significant penalties may have to be paid.

The maximum legal workday is eight hours per day or forty-eight hours per week. The minimum monthly salary is approximately USD 270. In addition to salaried remuneration, workers are entitled to other benefits, including one additional monthly salary in July and one in December ('*gratificaciones*'), one additional salary as termination benefit ('*compensación por tiempo de servicios*'), and one month of paid vacation. In addition, a statutory profit sharing regime gives all workers of businesses with more than twenty workers a share in the annual profits of the business. The aggregate percentage varies by economic sector, between 5% (services) and 10% (manufacturing). Rehiring previously fired employees is subject to administrative approval and certain limitations.

Hiring foreigners is subject to limitations (cannot exceed 20% of the total staff of the company) and a maximum amount of compensation (compensation of all foreign personnel may not exceed 30% of the payroll of the company).

Peru has very detailed labour laws, and it is important that legal advice be obtained before executing any labour agreements.

26.24 Compulsory Transfer of Employees

There is no general legal provision for the transfer of employees from one legal entity to another. These individual agreements need to be reached with employees.

When a company ceases its operations, labour contracts are terminated.

26.25 Tax Deductibility of Acquisition Expenses

In order to establish net income, the law allows a deduction from the gross income of the expenses necessary to generate taxable income or to maintain the business entity's source of income, unless the deduction is expressly excluded or prohibited. In the absence of proof to the contrary, it is presumed that expenses incurred abroad are related to foreign income and are consequently non-deductible items.

Start-up expenses (including expenses triggered by an expansion of the business) may be deducted when incurred or carried over, and deducted over a period of up to ten years.

26.26 Levies on Acquisition Agreements and Collateral Documents

There is no levy or stamp tax on transfers or mortgages of assets other than fees to be paid to the notary issuing the deed and the Public Registry for registration, when applicable.

26.27 Financing Rules and Restrictions

Local and foreign investors and companies have the same rights and obligations in relation to access to credit, banks and other financial services companies.

Banks are free to establish interest rates and insurance companies are free to establish the conditions attaching to insurance policies. The government is not permitted to own banks or insurance companies.

26.28 Exchange Controls and Repatriation of Profits

The Constitution guarantees the right to hold and dispose of foreign currency.

There have been no exchange controls in Peru since 1991. No government authorisation is required for any foreign exchange transaction.

Anti money-laundering legislation requires banks and other entities to report suspect transactions.

26.29 Groups of Companies

An 'economic group' is defined as a group of corporations in which one has control over the rest, or where control of the corporations that form the group is held by one

obtained by means of licence agreements may be assigned without the consent of the respective holder, sub-licensing not being permitted.

Copyrights require no registration before any Portuguese entity. Non-patrimonial rights may not be the subject of any kind of assignment, whereas patrimonial rights may be freely transferred. In the event of an assignment, the author is still the holder of the corresponding non-patrimonial rights, meaning that he is entitled to claim authorship and paternity of a work, as well as its authenticity and integrity.

Full assignments of copyrights are only valid if executed by public deed, identifying both the work and its price.

Authors are further entitled to authorise third-party use of their works (i.e., the right of licensing third parties), which is assumed as being onerous and non-exclusive, unless otherwise provided. Such authorisation shall be executed in writing, with an indication of authorised form of disclosure, publication and use, as well as duration, territory and price.

29.16 Requirements for Transferring Business Contracts, Licences and Leases

As a rule, assignment of a contractual position to a third party requires the consent of the counterparty. In this case, the contractual relationship remains unchanged.

Commercial agreements will often include 'change of control' clauses, which allow a party to terminate an agreement in the event of a change of control in the counterparty to that agreement.

The transfer of licences is, in some cases, conditional on the abrogation of all rights and obligations for the remainder of the term of the licence at issue. The consent of the entity that issued the licence is normally required before the actual transfer as a condition of the transfer's validity. Attempted transfers without consents are to amount to a breach of the terms of the licence and may trigger its revocation.

Acquisition of leased real estate properties entails the transfer of all the previous landlord's rights and duties to the new owner, and does not require prior approval of the tenant (a tenant of urban real estate leased for more than three years shall, however, have a pre-emption right on its acquisition or new lease). Sublease of real estate properties by tenant is subject to prior written authorisation by the landlord. Temporary transfer by the tenant of a business operating in a leased property does not require authorisation by the landlord, although it must be communicated to the same within one month. Definitive transfers of the tenant's position by means of transfer of a commercial or industrial business are also permitted, provided they are executed in writing and communicated to the landlord, and the same business is conducted by the transferee (the landlord shall have a pre-emption right over transfers made by sale or payment in kind).

29.17 Requirements for Transferring Other Assets

As a rule, contracts of purchase or sale of physical goods require no specific form in order to be valid and effective, except for real estate assets (see section 29.14), which

are executed by public deed, and some personal property (e.g., vehicles), which are subject to specific registration requirements. These types of contracts are understood as being completed upon signing, regardless of delivery of the goods, which is an obligation of the seller.

29.18 Encumbrances and Third-Party Interests

Encumbrances over specific assets (such as pledge and usufruct) remain in place following the transfer of the asset and are enforceable against third parties.

Any creation, amendment or extinction of usufruct, pledge or other encumbrances over securities follows the respective *inter vivos* transfer of title.

In respect of participation in companies, the following should be taken into consideration:

(a) any lien, third-party security interest, other charge, or encumbrances of any kind that may affect the transfer of quotas is subject to registration before the Commercial Registry Office;
(b) preference shares entitle the respective creditors to enforce the preferential shares credits (as well as any interests thereof) with preference over other creditors. The creation of a share pledge is made by means of a particular document, and follows the rules detailed above. Thus, share pledges require delivery of the relevant share certificates to the pledgee or registration in the account of the pledgee as to deposited shares, or by book-entry, followed by registration by the issuer or its financial intermediary, in case of nominative shares. In any case, the corresponding patrimonial rights (rights to dividends) may only be exercised by the pledgee if so agreed by the intervening parties.

Considering the above, transaction agreements normally contain appropriate representations and warranties on seller's side regarding the absence of any liens, encumbrances or charges over quotas/shares.

Charges and encumbrances over real estate – such as mortgages, liens, easements, financial leases, urban leases for more than six years, use restrictions, lawsuits and others – are subject to registration and do not take full legal effect in respect of third parties until they have been definitively registered. However, once registered and as a general principle, encumbrances survive the transfer of the real estate to a third party.

29.19 Minimum Shareholder and Officer Requirements

Share companies shall have at least five domestic or foreign shareholders (individuals or companies). Incorporation of a share company by a foreign company (to be its sole owner) is also legally permitted.

The buyer's liability is limited to the amount of the assets acquired from the seller.

33.5 Extent of Seller's Warranties and Indemnities

The nature and extent of warranties and indemnities largely depend on the size of the acquisition and the parties' relative bargaining power. However, it is not unusual for sellers to give full warranties and indemnities covering the accounts of the business or company to be acquired, title to the assets, taxation, litigation, employee issues, etc.

It is always advisable to consider whether warranties and indemnities from a seller should be supported by a parent company guarantee, or by a partial retention of the purchase price.

33.6 Liability for Pre-contractual Representations

Negligent and fraudulent misrepresentations may give rise to both criminal and civil liability. In certain cases, they can furnish grounds for rescission of the contract, as well as an action for damages under the Korean Civil Code. Furthermore, various criminal statutes establish penalties (fines, imprisonment) for sellers who engage in fraudulent conduct. Acquisition agreements often attempt to preclude actions for negligent misstatement or misrepresentation, leaving the buyer with a remedy only in damages for breach of warranty.

However, such protective clauses are likely to be null and void where it is established that the seller intentionally defrauded the buyer or intentionally withheld material information from the buyer.

Since sellers frequently use contractual provisions shielding them from liability for representations made during pre-contractual negotiations, and restricting rights of rescission to the period between the exchange of contracts and completion, buyers are well advised to rely only upon representations specifically repeated in the agreement, or facts and matters specifically warranted or related to indemnities that have been given.

33.7 Liability for Pre-acquisition Trading and Contracts

If the purchase agreement contains a retroactive effective date, the buyer, for accounting purposes, bears the loss or is entitled to the business profits from the effective date.

After completion, the seller remains liable for contracts to which it was a party unless they are novated and a release is given to the seller. Occasionally large contracts are novated (where the buyer fully steps into the seller's place, the seller being released from all further liability); however, contracts are often assigned with the buyer promising to the seller to perform the contract from completion and indemnify the seller.

In a share acquisition, pre-acquisition profits are generally retained in the company and hence ultimately received by the buyer. Therefore, such profits should be taken into consideration when calculating the purchase price.

33.8 Pre-completion Risks

Under the Korean Civil Code, the seller bears the risk of loss or damage to the assets and shares occurring between signing and completion of the transaction unless otherwise provided under the acquisition agreement.

In a share acquisition, the matter is usually addressed by a warranty to the effect that there has been no material adverse change to the business since a warranted accounts date and declaring that if indeed there has been such material adverse change, the buyer has a right to terminate.

Occasionally, provisions allowing for a price adjustment in proportion to any loss or damage to assets are included.

33.9 Required Governmental Approvals

In general, all foreign investment into Korea (whether subscribing for new shares or acquiring existing shares in an existing company or establishing a new company) is governed by the FIPA and the Foreign Exchange Transaction Act (FETA).

The first issue is whether the FIPA and its related regulations restrict or prohibit foreign investment in the target's business activities. As part of the restructuring of the Korean foreign investment system, almost all activities have become fully open to foreign investment, although certain business areas (classified according to the Korean Standard Industry Classification System) are still partially or completely closed to foreign investment. If foreign investment in a given business activity is restricted, then such restrictions may require that the potential foreign buyer obtain additional governmental approvals and may affect the foreign investment ratio, among other factors. In this regard, the Korean Government significantly reduced the number of business areas that are partially or completely closed to foreign investment and accelerated its schedule for further liberalization of foreign investment, including investment in the capital market.

For acquisitions of existing shares by foreigners, a buyer is required to report its acquisition to a foreign exchange bank pursuant to the FIPA or FETA unless the targeted Korean company falls into the category of the defence industry, in which case the acquisition of shares in such industry requires the approval of the Ministry of Trade, Industry and Energy (MOTIE).

For acquisitions of newly issued shares by foreigners, a buyer is also required to report its acquisition to a foreign exchange bank pursuant to the FIPA or FETA.

There are no general foreign portfolio investment ceilings on the acquisition of beneficial ownership of any class of shares in a company listed on the KRX.

A foreign buyer may also consider establishing or using an existing subsidiary in Korea to acquire the targeted Korean company. The FIPA regulates only direct equity

(a) the source of acquisition or nature of the acquirer falls within the scope allowed under the notification;
(b) the acquirer reduces his shareholding or controlling interest in accordance with the provisions set out in the notification; or
(c) a waiver has been granted by the SEC.

38.12 Continuation of Government Licenses

Any benefits derived specifically from FTAs may not continue after an acquisition. For example, if a company was established under the Thai-American Treaty of Amity, an acquisition which would change the shareholding structure, resulting in less than an American majority, would render the benefits under that treaty no longer applicable. Other licenses, such as those granted under any double taxation treaty, would also not be transferable for the same reason.

38.13 Requirements for Transferring Shares

The share acquisition of a private company requires that the transfer be made in writing and signed by the transferor and transferee and certified by at least one witness. The number of shares transferred must be documented in the share transfer instrument. Such a transfer becomes effective against the company and third parties only after its details are entered in the share register book of the company.

Any transfer of a public limited company's shares becomes valid only upon the endorsement of the share certificate by the transferor, and the said certificate must state the name of the transferee. Both the transferee and transferor must sign the certificate upon delivery to the transferee. The transfer of shares will be binding against the company only when the company has received a request to register the transfer of the shares, but it may not be binding against a third party until the company has registered such transfer. If the company is listed, the transfer is recorded by the company's registrar.

38.14 Requirements for Transferring Land and Property Leases

Under the Land Code, foreigners are generally prohibited from owning land in Thailand. In Bangkok and certain other areas, foreigners may purchase up to 1600 m^2 of land for residential purposes, subject to making an investment of THB 40 million or more in specified assets or government bonds and complying with regulations of the Ministry of Interior. This exception is rarely granted in practice and, when it is, it is generally under strict conditions. Under the Condominium Act, a maximum of 49% of the surface area of condominium units may be foreign-owned.

A company promoted by the BOI or IEAT, for industrial purposes, may be granted the right to own land, as noted below. A foreign company may also lease immovable property and register a lease for up to thirty years. A law which allows leases of up to

fifty years for commercial and industrial purposes was enacted in 1999 but has not been implemented.

Any acquisition, which would include such land ownership, must adhere to the legal requirements of any BOI or IEAT exception to the general prohibition, or such acquisition must not result in an entity being majority foreign-owned, unless the permission is granted for the ownership of such land.

In any share acquisition, the existing company continues. As such, any liabilities, or outstanding property leases (including ownership of IP) that the company holds remain, and there are no general transfer issues. However, in an asset acquisition, the acquiring entity is different from the previous owner. Thus, the assignments of all contracts, including leases, require the consent of each counterparty. Licenses will have to be reapplied for in most circumstances in an asset acquisition, and property ownership arrangements need to be examined to confirm that the new ownership structure is not prohibited.

38.15 Requirements for Transferring Intellectual Property

Registered IP rights remain with the company in a share acquisition, thus all registrations will remain registered under that company. If any IP is not registered under the company's name, the same process in an asset acquisition should be followed.

In an asset acquisition, any registered IP rights of the target business must be assigned to the offeror. In such a case, the value of the IP will be included in the assignment agreement. Once the IP is assigned, a Deed of Assignment must be registered with the Department of Intellectual property to record the assignment of ownership.

38.16 Requirements for Transferring Business Contracts, Licenses and Leases

With the exception of non-transferable government licenses, the same rules apply as stated under section 38.14 above.

38.17 Requirements for Transferring Other Assets

There are no provisions under Thai law requiring approval from shareholders for the acquisition of assets in a private company, However, limitations may be contained in the company's articles or in shareholders agreements.

The rules for acquisition of assets of a public company differ depending on whether the company is listed or non-listed. For a non-listed public company, section 107 of the PLC Act requires an affirmative vote of at least three-quarters of the shareholders for a sale or transfer of all or a significant portion of a company's assets.

If the company is listed, the Capital Market Supervisory Board requires reporting of any activities which will either affect, or are likely to affect the interests of securities holders of the company, or impact investment decisions by the general public. In