4.13 Requirements for Transferring Shares

Legal transfer restriction related to payment

Before the Act of 13 April 1995, a share in an SA could not be transferred if the legal minimum of one quarter had not been paid up. Consequently, it was impossible to transfer 'future' shares before the company had been established (Article 46 of LCSC). This prohibition was inspired by a concern to prevent speculation on non-existent shares.

The Act of 13 April 1995, however, has introduced a fundamental change. Shares in an SA may be transferred even though the minimum amount has not yet been paid. Therefore, the transfer of 'future' shares of a company which is not yet established is possible. If third parties have a claim against the company dating from before the publication of a transfer of partly paid shares, the seller is still liable for the unpaid part for five years following publication (Article 52 of LCSC). This issue should be dealt with carefully in the sale of share agreement.

Transfer restriction following from the will of the incorporators

In the SA, free transferability of shares is the rule, irrespective of whether these shares are registered ('*nominative*') or to bearer ('*au porteur*'). However, this transferability can be restricted by the articles of association. A transferability restriction in the articles in an SA usually takes the form of an acceptance clause combined with a preemption clause. These clauses only make sense if the articles of association also provide for the shares being registered: otherwise adherence to the clause could not be enforced:

- An acceptance clause means that a shareholder in an SA who wishes to transfer all or part of his or her shares can only do so if the prospective purchaser is accepted by the board of directors or the general meeting. Under Belgian law, if the board of directors or the general meeting refuses the candidate, it assumes the responsibility for finding a purchaser for the shares.
- A pre-emption clause means that the other shareholders may purchase the shares by priority if one shareholder decides to sell his or her own participation. If the shares in an SA are to bearer, shareholders' agreements can lead to a degree of control over the transfer of shares: the parties to the agreement give each other a pre-emption right. The question remains, however, whether a vote held or a transfer effected in breach of the agreement may be cancelled. As immediate relief, an injunction can be obtained from the court to suspend the voting or dividend rights. The courts generally cancel the sales of shares made in breach of pre-emption rights.

Since the new legislation, acceptance and pre-emption clauses can only restrict the transferability of shares for a maximum period of six months.

The Act of 13 April 1995 has moreover created two new types of shares:

- *Dematerialised shares*. Article 41 mentions, next to the nominative shares and the shares on bearer, the so-called 'dematerialised shares'. This type of share has the same value as the other two types, but is to be distinguished by the fact that it only appears through an inscription on a bank account. This inscription with an authorized institution gives the dematerialized share all its effects. No material support is needed for the existence of all rights attached to the dematerialized share.
- *Certification*. Since the Act of 15 July 1998, the certification of shares or convertible bonds in a public or private limited company has been made possible. This separate document (certificate) can be nominative, on bearer or dematerialized shares, and represents the shares or convertible bonds referred to in the certificate. Certificates are issued, after an 'exchange' with the company's shares, by a different legal entity (holding) which becomes owner of the shares and all the rights attached to it. The issuing company retains the ownership of the certificates, but commits itself to transfer all the capital gains or bonds to the certificate's beneficiary.

4.14 Requirements for Transferring Land and Property Leases

Belgium has a comprehensive registration system for title to land.

The transfer of land only has effect against third parties after it has been notified and registered in the Mortgage Office. In order to be registered, the transfer agreement needs to be drawn up in a notarial act.

However, when a company's shares are transferred, assuming that the company remains the owner of the land, no registration is required.

4.15 Requirements for Transferring Intellectual Property

'Intellectual property' is a generic term covering patents, trade marks, utility models and industrial designs and copyright.

Patents

Patent law in Belgium must be analysed in the light of EU law. However, note that national patents continue to exist side by side with Community Patents (Parliament Act of 28 March 1984). The European Patent Convention of 1973 enables applicants to obtain from the European Office in Munich a set of patents in respect of each of the states which have ratified the Convention. Each transfer of patents must be notified and registered by the European Patent Office.

Trade marks

The Convention regarding the Uniform Benelux Legislation in relation to trade marks was signed on 19 March 1962.

This Convention was adopted in Belgium by Parliament Act of 30 June 1969, which resulted in the abolition of the old Belgian legislation of 1879.

As in the case of patents, applications for trade mark registration can be filed with the Benelux Trade Mark Office in The Hague.

7.4 Taxes Affecting the Structure and Calculation of the Price

An acquisition can be achieved in many ways, including the wholly indirect offshore acquisition, direct onshore equity acquisition, direct onshore asset acquisition by foreign investors, and direct onshore asset acquisition by the *FIE* established for the acquisition purpose. Besides other factors to be taken into consideration, tax considerations play an important role in ascertaining what structure is to be adopted.

Except under certain circumstances, a wholly indirect offshore acquisition involving no sale or purchase of equity interests in Chinese companies or transactions in China is not subject to Chinese tax law.

The direct acquisition of equity interests in domestic Chinese companies by foreign investors would normally result in enterprise income tax levied on the seller and stamp tax levied on the seller and acquirer, but generally, no value-added tax or business tax, or deed tax will be imposed. If an unlisted domestic Chinese company is converted into an *FIE* upon the equity acquisition in which the foreign investor holds no less than 25 per cent of the registered capital, the *FIE* may enjoy applicable tax preferential treatment in normal circumstances. Losses arising from the previous period of the domestic Chinese company before conversion can be made up by the *FIE* after conversion on a continual basis during the remainder of the term using the method for making up losses as specified in the relevant PRC tax law.

Where a foreign investor of a *FIE* transfers its equity interests therein to another foreign individual or entity, enterprise income tax will normally be imposed on this foreign investor if the selling price exceeds the amount of its original capital contribution for the transferred equity interests.

Compared with equity acquisitions, asset acquisitions are subject to a variety of taxes. In addition to enterprise income tax levied on the seller, value-added tax, business tax, stamp tax, deed tax, and land appreciation tax, among others, may be applicable to the transfer of certain assets.

Considering the complexity of the taxation of acquisitions, a thorough understanding of acquisition-related tax laws and a careful consultation with local tax authorities are suggested for the purpose of arranging a suitable acquisition structure and ascertaining the acquisition price.

7.5 Extent of Seller's Warranties and Indemnities

The sellers of the equity interests or assets are usually required by the purchasers thereof to provide warranties and indemnities upon the occurrence of certain events. The extent of the warranties and indemnities by and large depends on the nature of each relevant transaction and the respective negotiation power of the parties.

Since an acquirer of equity interests shall generally bear the debts and liabilities of the target company upon acquisition under PRC law, it will be in the best interests of the acquirer if full and comprehensive warranties and representations regarding the entire business operation of the target company, including but not limited to the assets, debts, taxation, labour issues, social welfare, and any litigation of the target company,

have been specified in the relevant equity transfer agreement. For an asset acquisition, the warranties and indemnities of the seller generally focus on the title to and the quality of the assets to be sold.

An indemnity clause relating to the warranties and representations is usually required by the purchaser. In some circumstances, the purchaser also requests the seller to provide guarantees to secure the performance of the Seller's obligations.

7.6 Liability for Pre-contractual Representations

According to PRC law, a party who causes losses to another party due to the deliberate provision of false information in concluding a contract or the performance of other acts violating the principle of good faith shall be liable for damages caused as a result of those indiscretions. Where a party enters into a contract as a result of serious misunderstanding or when the terms of the contract are obviously unfair at the time it is concluded, the party has the right to request a court or an arbitration commission to modify or revoke such contract. However, from a practical point of view, without detailed guidance on defining relevant terms (such as 'serious misunderstanding', 'obviously unfair', etc.) the court or arbitration commission is often reluctant to render a verdict in favour of a party who claims against the other party for the compensation or rescission of the contract based on the said grounds.

It is therefore advisable for an acquirer of equity interests or assets to specify the detailed pre-contractual representations and the indemnity for the violations thereof in relevant equity interests (or assets) agreements.

7.7 Liability for Pre-acquisition Trading and Contracts

Given that the target company still exists after an equity acquisition, the benefits and liabilities arising out of pre-acquisition trading conducted by the target company usually remains with the target company, and will be borne by the buyer in proportion to and to the extent of its capital contribution to the target company. In practice, the pre-acquisition contracts originally executed by the target company might nevertheless be updated to reflect the change in the legal status of the target company.

In a situation where the main business of a target company is acquired, the issue of whether or not the purchaser shall be liable for the pre-contractual trading and contracts largely depends on the agreement between the buyer and the seller, subject to certain mandatory legal requirements.

7.8 Pre-completion Risks

In an equity acquisition, the purchaser is likely to be in a more risky position than the seller due to the following reasons: first, there is no clear guidance on when the risk of losses or damages may pass to the buyer; second, the seller of an equity acquisition usually expects to receive a fixed price for transferring its equity interests based on the result of a valuation usually conducted before the execution of relevant transfer agreement, in which case the purchaser will be obliged to pay such price irrespective of

8.22 Employee Superannuation/Pension Plans

There are no statutory requirements in relation to pension schemes. Collective agreements (see **8.23**) increasingly contain provisions relating to pension rights, but otherwise there are no requirements for the employer to offer a pension scheme to the employee, unless an individual agreement has been made with the employee to that effect.

8.23 Employee Rights

In Denmark it is common for the relationship between employer and employee to be regulated mainly by either collective or individual agreements. As trade unions and employers' organizations have a great impact on the labour market, general or local collective agreements apply, in particular to wage earners, but also to certain salaried employees. In addition, the Danish Employees Act governs the rights and obligations of salaried employees towards their employers.

The relevant collective agreements and the Employees Act cannot be deviated from to the employees' detriment.

Disputes relating to collective agreements are settled before the Labour Court or by arbitration, whereas disputes involving salaried employees who are not subject to collective agreements are settled before the ordinary courts.

8.24 Compulsory Transfer of Employees

As in the other EU Member States, Denmark has an act determining the legal position of wage and salary earners in the event of an acquisition. This implies that the buyer of an undertaking must respect the rights of the employees in full, including the right to wages or salaries, to seniority and to other benefits. In principle, it therefore makes no difference whether the buyer acquires shares or assets.

Dismissals should not be effected in connection with the acquisition. Furthermore, special statutory provisions, and *inter alia* collective bargaining agreements, if any, (concerning notification of employees and consulting of trade unions) must be observed before dismissals can be implemented. According to statutory law as applicable, certain obligations to involve an independent body overseeing the interests of employees, and to negotiate with employees or their representatives, apply in the case of dismissal within a period of 30 days exceeding certain numbers of employees within different intervals of total individuals employed.

Conversely, employees must accept transfer to another undertaking if the buyer acquires shares.

8.25 Tax Deductibility of Acquisition Expenses

Where the buyer is a company or an individual not resident or taxable in Denmark, the deductibility of its acquisition expenses is determined by the laws of its home jurisdiction.

If the buyer is a Danish taxpayer, acquisition expenses are not normally deductible. Generally, expenses incurred in the acquisition of capital or fixed financial assets such as shares or business assets are not deductible. However, in case of a subsequent sale of the acquired capital or fixed financial assets, the acquisition expenses may be added to the acquisition price for the purpose of calculating any taxable gain on the transaction.

Interest on acquisition debt in a Danish corporate acquisition vehicle would as a main rule be tax deductible and may normally be set off against income in the acquired Danish target.

8.26 Levies on Acquisition Agreements and Collateral Documents

No stamp duty is payable on the transfer of assets or shares. A registration duty is, however, payable when purchasing real property or when taking out a mortgage on real property or ships (see **8.14**).

8.27 Financing Rules and Restrictions

Thin capitalization rules apply to certain controlled debt, and is normally deemed to exist when a Danish company has non-arm's length debt to a company, if the borrower and the lender are under common control (subject to definition) and the debt equity ratio exceeds 4:1. If the debt equity exceeds that ratio, tax deductibility of interest expenses and capital losses is reduced for tax purposes in respect of the excess part of the controlled debt.

The Danish Companies Act prohibits the provision of loans or the offering of funds or security by a Danish company in connection with an acquisition of shares in the said company or of shares in its parent company. Contravention of these prohibitions constitutes a criminal offence. A recent EU directive provides for certain voluntary relaxation—it remains to be seen to what extent it will be implemented in Danish law.

8.28 Exchange Controls and Repatriation of Profits

No Danish exchange control permission is required for conclusion of an acquisition in Denmark. However, the exchange control authorities must be notified of the transaction—only for statistical purposes—with details of any part of the purchase price paid from abroad and how it was settled. Furthermore, there are no exchange controls in Denmark over the flow of funds in and out of the country.

Dividends paid are subject to a 28 per cent withholding tax that under a double taxation treaty may be eligible for refund in whole or in part to shareholders resident abroad. No withholding tax is imposed on dividends paid to a parent company resident in another EU Member State, or a parent company eligible for reduction or elimination of Danish withholding tax on dividends, if the recipient has owned at least 20 per cent (for the years 2005–2006), reduced to 15 per cent (for the years 2007–2008) and to 10 per cent (as of 2009 and later) of the nominal share capital of the distributing company for a period of at least one year during which time the distribution takes place.

8.29 Groups of Companies

A Danish company exerting a controlling influence (typically by owning more than 50 per cent of the share capital or holding more than 50 per cent of the voting rights) on one or more companies (parent company), whether Danish or foreign, must prepare

circumstances, the target is liable to pay for its share of any deficit as a debt. It can be possible to prevent the full debt from falling due, but to do so requires negotiation with the scheme's trustees and the Pensions Regulator (see below) and is not straightforward. Also, when employees are transferred to a buyer as a result of an asset purchase, there is a legal obligation on the buyer to meet certain pension commitments to these employees for the future. These commitments depend on the type of pension scheme the employee is a member of pre and post transfer.

Where the buyer is to acquire the target by way of share purchase and the target has its own scheme then, unless alternative arrangements are put in place, the target continues to be the sponsoring employer of the pension scheme and the buyer will have introduced the scheme into its own group of companies. In such circumstances the buyer needs to investigate the financial state of the pension scheme, taking account of any underfunding in the scheme in its negotiations as any deficit will remain the responsibility of the target and could be substantial.

In April 2005 a new Pensions Regulator with wide-ranging powers came into operation. These powers include powers to 'pierce the corporate veil'—that is, impose liabilities on companies in a group other than the employer (and, sometimes their directors)—if a defined benefit scheme is in deficit and other conditions apply. These conditions are, in brief, that the Regulator believes that there has been avoidance of a pensions debt or deliberate prevention of such a debt from falling due, or that the pension scheme's position has been prejudiced by a weakening of the employer's finances. This raises significant issues for underfunded pension schemes in corporate transactions. If a party is concerned that the Regulator will use its powers, it can apply for clearance which, if obtained, removes that risk.

Where there is no occupational pension scheme, employers frequently contribute to personal pension schemes. These are contract-based arrangements between the individual members and insurance companies. Personal pension schemes are always money purchase schemes.

9.24 Employee Rights (share transfers)

Employee rights and employer obligations on a share transfer may be affected by the following:

- Employees' individual contracts of employment (which may incorporate terms negotiated with trade unions at local, industry or national level), which will contain relevant notice provisions applicable to any terminations and may contain relevant procedural or 'change of control' clauses and restrictive covenants;
- Domestic legislation which confers various rights on employees and specifies minimum terms and conditions of employment and termination rights. Where the minimum terms and conditions are not met the statutory regime prevails over the contract terms. Employers may have duties to inform Government of mass redundancy proposals. Listed companies may also have duties to inform and consult employee representatives about aspects of the transaction following the UK's transposition into domestic law of the EU Takeover Directive;

- Establishment-wide, divisional or national information and consultation forums, established voluntarily or pursuant to regulation, which may need to be consulted, particularly over associated large-scale redundancies. If not already in existence, the employer may need to invite elections for the appropriate employee-representative body;
- International group-wide information and consultation mechanisms such as European Works Council agreements or European Company (Societas Europea) provisions, which typically affect cross border transfers involving major multinationals, may be triggered;
- Employees will have legislative protection against any associated dismissal being deemed 'unfair' either substantively or procedurally. Reinstatement, re-engagement or compensation up to statutory maximum amounts can be awarded. If dismissals surrounding the acquisition are discriminatory on grounds including sex, sexual orientation, race, ethnicity, religion, physical or mental disability, or age, unlimited compensation is potentially available. Part-time employees, atypical workers and fixed term contract staff are also protected.

Warranties and indemnities will be required in the acquisition agreement to ensure that the buyer is informed of and protected against accrued liabilities and exposures within the target company or group. Wording will be dictated by the results of due diligence on issues such as compliance with tax withholding obligations, health and safety matters, industrial unrest, employment litigation, regulatory investigations, grievances, collective agreements, unusual terms and conditions, efficacy of post-termination covenants (particularly in a people business), details of bonus plans, stock options and the like.

9.25 Compulsory Transfer of Employees (business transfers)

On an acquisition or disposal of assets by way of business transfer, where the assets comprise an identifiable and stable economic unit, the employer is at greater risk. EU-derived regulations require the seller to:

- inform and consult affected employees (through elected representatives), whether or not appropriate mechanisms yet exist, and in addition to any other provisions which might apply in a share transfer (see Section **9.24** above);
- seek information from the buyer as to measures it, the buyer, intends to adopt in relation to employees and to pass that information on to the seller's employee representatives; and
- assist the buyer by providing stipulated employee information at least 14 days in advance of the transfer.

The buyer must:

- likewise inform and consult elected representatives of any of its affected existing employees: if the representative body does not exist, the buyer may have to hold elections;

notify the AMF, and (ii) make an offer for 100 per cent of the shares and securities of the company concerned. The same obligation arises in relation to the acquisition of control of a company which itself holds, directly or indirectly, more than 33.33 per cent of the share capital or voting rights of a listed company, provided the shares or securities concerned represent a significant part of the assets of the company of which control is taken. The AMF, however, provides a limited number of exceptions to the obligation to make a mandatory offer. As part of its control, the AMF verifies whether or not there has been an actual change in control of the target company. For example, the AMF may rule that the shareholder reaching the relevant threshold is exempt from filing a mandatory offer when the target company was already in fact controlled by the investor, acting alone or in concert, prior to the triggering event.

11.12 Continuation of Government Licences

Some professions and commercial activities may only be carried out if the person or corporate entity doing business in France obtains prior authorization from the appropriate authorities or procures a permit, licence or registration. It is strongly advised that before proceeding with an investment in France, the foreign investor ascertains whether its targeted activity is subject to specific regulations. For example, banking, insurance and the manufacturing of pharmaceutical products are subject to authorization from the relevant Ministry.

11.13 Requirements for Transferring Shares

SARL

With respect to an SARL, the transfer of any shares to a third party that is not a shareholder requires the prior consent of a majority of the shareholders representing at least one half of the company's share capital, unless the by-laws provide for a larger majority. Each share transfer must be set forth in a written agreement between the purchaser and the seller and such agreement must be notified to the company. See section 10.4 above for information regarding the registration tax.

SA or SAS

With respect to an SA or an SAS, the by-laws may require the approval of the company in the event of a share transfer, but such a clause is not mandatory. The company's approval may be given by its board or be made subject to the approval of the shareholders.

As a result, the share of an unlisted SA or an SAS is transferred by signing a transfer order form (*ordre de mouvement*). This is a form signed by the purchaser and countersigned by the company. The *ordre de mouvement* is notified by the purchaser to the company and the transfer of the shares is recorded in the share register thereby making the purchaser a new shareholder of the company. See section 10.4 above for information regarding the registration tax.

11.14 Requirements for Transferring Land and Property Leases

Under French law, the direct transfer of real property must be made pursuant to a formal deed of sale in an authentic act, prepared by a French notary (*notaire*) who is a public official and legal professional with a monopoly in conveyancing, matrimonial and testamentary matters.

With regard to the sale of real property, it is important to determine whether the local authorities have a pre-emption right (*droit de préemption urbain*). Such right is limited to certain geographical zones. If the real property is located in such a zone, then a pre-emptive right exists granting a district or municipality the priority to purchase the real property. Prior to the closing of the sale, the seller must notify the holder of this right (generally the mayor) of its intention to sell and provide such holder with information on the sales price and general conditions. The holder may exercise its pre-emptive right during the two months following such notification. If the holder fails to respond within such two month period, the pre-emptive right is deemed to have been waived and the sale may be completed. For information, the district or municipality rarely exercises its right of pre-emption.

In order to be enforceable against third parties, all direct transfers of real property must be recorded in the Land Registry of the place in which the real property is located. The acquisition of commercial real estate is currently subject to transfer taxes (*droits de mutation*) of approximately 5.09 per cent of the sale price, unless the sale is subject to VAT. This tax rate may vary slightly depending on the location of the real property. *Notaire's* fees, which are based on a sliding scale in conjunction with the sale price, are also due and payable by the purchaser.

This registration requirement concerns only direct transactions involving real estate. The transfer of shares of a company, which holds or owns real estate, is not generally subject to this right of pre-emption.

11.15 Requirements for Transferring Intellectual Property

Intellectual property rights referred to under French law as 'industrial property rights,' such as trademarks and patents, are generally protected by an entry in an official register.

Registered intellectual property rights may only be validly transferred pursuant to a written agreement. In order for such transfer to be enforceable against third parties, the transfer must be registered with the central registry of industrial property rights (*Institut National de la Propriété Industrielle* or the INPI). Failing such registration, the new owner may not assert his or her rights against third parties (e.g. in the context of a patent law suit based on infringement by a third party).

The transfer of shares of a company has no direct impact on these property rights, unless the target company only holds a licence and the licence agreement provides for termination in the event of a change in ownership.

When the seller of a going concern is a licensee, the licensor must consent to the transfer of the licence.

Share acquisitions

When the shares of a company are acquired by an entity from its existing shareholder, the seller will be subject to capital gains tax on gains realized by it from such transfer.

Long term capital gains arising from transfer of shares held for a period of more than 12 months from the date of acquisition are taxed at rates lower than short-term capital gains. However, sale of long term listed securities on a recognized stock exchange in India is not subject to capital gains tax, and a nominal rate of securities transaction tax on the transaction value is payable each by the transferor and the transferee. Short-term capital gains are taxed as part of the total taxable income of the entity at normal rates. However, short-term capital gains of listed securities transacted through a stock exchange attract a concessional rate of capital gains tax. Further, securities transaction tax would be payable each by the transferor and the transferee.

Cross-border taxation issues

India has entered into Double Taxation Avoidance Agreement (**DTAA**) with various countries which eliminates/minimizes dual tax levy in international transactions between residents of India and the relevant country and extends certain beneficial rates of taxation. Income arising from an international transaction between two associated enterprises, one or both of whom are non-residents, is computed in accordance with the arm's length price as per the transfer pricing regulations incorporated in the ITA.

Depreciation and Carry forward and set off

In an amalgamation/demerger, aggregate depreciation is calculated at the prescribed rates as if the amalgamation/demerger had not taken place. The depreciation is then apportioned between the transferor and transferee companies in the ratio of the number of day's usage during the year.

In the case of a slump sale or of acquisition of identifiable assets, only the transferee company is entitled to the benefit of depreciation on the assets transferred during the year on the acquisition cost.

In an amalgamation, it is possible for the transferee company to carry forward and set off the unabsorbed depreciation and losses of the transferor company for a specified number of years if it fulfils certain conditions stipulated in the ITA. In a demerger, where losses carried forward or unabsorbed depreciation are directly relatable to the undertaking being transferred, then the same are allowed to be carried forward and set off in the hands of the transferee or the resulting company. Where such loss or depreciation is not relatable to the undertaking being transferred, it is allocated in the ratio of assets transferred to assets retained. Unabsorbed depreciation and losses cannot be transferred to the transferee company in the case of a slump sale or share acquisition.

Deductions

In the case of amalgamations/demergers which fulfil the conditions set out in the ITA, certain special deductions with regard to amortization of cost of patents & copyrights, technical know-how, licenses to operate telecommunication services, certain preliminary expenses etc. which were initially available to the transferor company, can be utilized by the transferee company for the residuary period for which the benefit was originally available.

14.5 Extent of Seller's Warranties and Indemnities

The acquisition agreement usually contains detailed warranties and representations by the seller. The purchaser has relied on the same and no investigation or analysis shall absolve the seller from or detract from the validity or enforceability of the sellers' representations and warranties. Such representation and warranties are based on the result of the due diligence exercise and other disclosures made by the transferor company. The warranties and indemnities normally relate to the accounts of the business of the company to be acquired, proper authorizations, compliance with applicable laws, title to the assets, taxation, litigation, employee issues etc. It is advisable to define clearly the consequences of a breach of warranty, including the invocation of indemnity. Generally the seller seeks to limit the life of the warranties to a specified period, usually one to two years, and the maximum amount recoverable under the warranties to the total purchase price or otherwise. The seller's warranties and indemnities can be secured by third party guarantees or retention of part of the purchase price. The issuance of guarantees by an Indian entity in favour of a foreign entity, except in certain circumstances and repatriation of indemnity amount to a foreign entity require prior approval of Reserve Bank of India (RBI).

14.6 Liability for Pre-contractual Representations

Any agreement the object of which is immoral or contrary to public policy or which involves or implies injury to the person or property of another is unlawful. Every agreement the object of which is unlawful is void. An exclusion of liability for any inaccuracy or misleading statement in the information provided to the buyer in an agreement which is void will not be enforceable.

Normally, in acquisition agreements, a responsibility statement is included wherein the directors of the seller company confirm, and accept responsibility for, the information contained in the agreement, that the information contained therein is in accordance with the facts, and no material fact has been omitted. Such a responsibility statement/representation survives the termination of such acquisition agreement.

14.7 Liability for Pre acquisition Trading and Contracts

The distinction between the transfer date (also called the appointed day) and the effective date in the case of a share acquisition or merger is very important. The transfer date is the date on which assets and liabilities of the transferor company/undertaking vest in or are deemed to vest in the transferee company. The effective date is the date on which the last of the approvals shall have been obtained. Generally, as from the transfer date, the transferor company is deemed to have carried on and to be carrying on all business and activities and to stand possessed of the properties to be transferred on

15.5 Extent of Seller's Warranties and Indemnities

The nature of warranties and indemnities depends on the nature of the business being acquired, the consideration and the parties' relative bargaining power. It is usual for sellers to warrant accounts, title to assets and taxation compliance. Depending on the industry involved environmental warranties may also be given.

It is usual for the seller to seek to limit the amount it is liable for under warranties and indemnities in terms of amount and the time during which claims may be made under them. It is not unusual for warranties and indemnities to be secured by a parent company guarantee or retention of a portion of the purchase consideration.

15.6 Liability for Pre-contractual Representations

Negligent and fraudulent misrepresentations may be actionable. In certain cases, they permit both rescission of the contract and an action for damages. Acquisition agreements frequently seek to exclude all prior representations, heads of agreements or understandings with a view to precluding any action for a negligent misstatement or misrepresentation, and with a view to leaving the buyer with a remedy only in damages for breach of warranty under the acquisition agreement. Recent case law suggests that such exclusions do not protect the seller where the misrepresentation has induced the buyer to enter into the agreement.

15.7 Liability for Pre-acquisition Trading and Contracts

In a share acquisition, pre-acquisition profits may either be paid to the seller by way of dividend or retained in the company, in which case the buyer inherits those profits. For the purposes of Irish capital gains tax and stamp duty liability, the distribution of pre-acquisition profits to a seller may in certain circumstances be treated as consideration upon which capital gains tax or stamp duty should be paid. There are rules restricting the distributability of pre-acquisition profits.

In the case of an asset purchase agreement, the buyer bears the loss or is entitled to the profits from closing or, if the agreement includes a retrospective or prospective effective date, the buyer bears the loss or is entitled to the profits from this date.

In an asset purchase, after closing the seller remains liable under contracts to which it was a party unless they are entered into afresh or are novated and a release given to the seller. Certain contracts may be capable of assignment without the requirement for novation. Usually, major contracts are novated and contracts are undertaken by the buyer with the buyer indemnifying the seller against any liability under the contracts.

15.8 Pre-completion Risks

Irish law does not prescribe where risk lies as between a seller and a buyer of shares. Under the Sale of Goods Acts, risk in 'goods' passes to a buyer of such assets once the agreement comes into effect, although the parties can 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.

On share acquisitions there can be a warranty that there has been no adverse change to the business between signing and closing. It is possible to specify that the buyer has a right to rescind. Alternatively, there may well be closing accounts upon the basis of which a price variation may be agreed.

It is usual in Ireland, however, for business acquisitions and share acquisitions to be by way of contract which is signed immediately before closing; therefore, the question of pre-closing risks does not usually arise. Where there is an interval between signing the agreement and closing the transaction, it is usually because of a regulatory requirement, for example clearance under the Irish Competition Act or, in the case of a listed company, approval of the transaction by the company in general meeting, so as to satisfy Stock Exchange regulations.

15.9 Required Governmental Approvals

Since 1 January 2003, Ireland has been subject to a new mergers regime pursuant to the Competition Act, 2002. Under this new regime, the Irish Competition Authority rather than the Minister for Enterprise, Trade and Employment (as was formerly the case) has the power to approve, amend or veto mergers. The Competition Act includes thresholds in respect of the turnover of the parties involved which when exceeded render a merger compulsorily notifiable to the Competition Authority for assessment. The test against which the Competition Authority will assess mergers notified to it is whether the notified merger will result in substantial lessening of competition in the markets for the relevant goods or services within the Republic of Ireland. Public interest criteria are no longer applied (with the exception of media mergers). Where a merger is not compulsorily notifiable, the Competition Act allows parties to notify a merger which does not exceed the thresholds where the parties feel that the merger may give rise to competition issues. This has the effect of throwing a good deal of uncertainty into Irish mergers law as it will necessitate a thorough analysis of a proposed merger in order for the parties to satisfy themselves that a competition issue does not arise even where the thresholds are not met. A merger which is voluntarily notified by the parties is subject to the same procedures as a compulsorily notifiable merger and may not be put into effect until it has been approved by the Competition Authority.

If a compulsorily notifiable merger is not notified, it is void and an offence is committed. Once a merger has been approved by the Competition Authority, it is immune from attack on the basis of non-compliance with Irish Competition law. Where a merger does not exceed the thresholds and is not notified voluntarily, it could be open to attack for breaches of Irish competition law from both the Competition Authority and third parties. There are special provisions dealing with media mergers and the final decision on media mergers rests with the Minister for Enterprise Trade and Employment who must consider public interest issues in dealing with such mergers.

Some of the major employment rights that are enshrined in legislation include:

The Hours of Work and Rest Law, 5711-1951. This Law has established the maximum number of hours' work permitted per day and per week.

It also prescribes payment of overtime and which employees can be employed without the requirement of paying overtime (generally their position much involve a fiduciary duty to the company).

This Law also requires all employees to be given a weekly day of rest corresponding to their religious day of rest.

The Severance Pay Law, 5723-1963. This Law provides that whoever has worked for an employer or at the same place of employment for at least one year and been dismissed is entitled to severance pay from the employer in an amount equal to one month's salary per year of employment, based upon the last month's salary. The Law prescribes several cases in which the employee, although not dismissed, will be entitled to severance pay.

The Annual Leave Law, 5711-1951. This Law prescribes a duty to grant employees a minimum annual vacation which increases with seniority.

The Sick Pay Law, 5736-1976. Under this Law, an employee who is sick and cannot work is entitled to sick leave, up to a maximum of one and a half days per month's employment, but not more than a total of 90 days in any year. The sick pay due to the employee is 75 per cent of the employee's salary, although the employee is not entitled to any remuneration for the first day's absence and only 37.5 per cent of salary on the second and third day of absence.

Discrimination laws also cover sex discrimination (including protection for pregnancy), equal pay, sexual harassment, disability, discharged soldiers and foreign workers.

The Minimum Wage Law, 5747-1987. The Minimum Wage Law prescribes a duty to pay a full time employee a minimum wage, which is defined as 47.5 per cent of the average salary in the economy, but subject to change.

The Wage Protection Law, 5718-1958. This Law provides that a salary not paid on time is subject to the addition of wage delay compensation of 5 per cent for the first week of delay and then 10 per cent for every additional week, or full linkage (see the meaning of the term 'linkage' in Section 1.4) plus 20 per cent interest, whichever is greater.

The Notice Period for Termination Law, 5761-2001. A full time employee is entitled to one day's written notice for each month during the first six months of employment and two and a half days for every additional month. A full time employee who has worked for a year or more is entitled to not less than one month's prior notice.

Collective agreements applicable to employees are not uncommon in Israel. Where there is a personal contract of employment with an employee who is also subject to a collective agreement, it is necessary to examine each single provision in order to ascertain whether the personal contract or the collective agreement is more favourable to the employee; the employee is always entitled to the benefit of the more favourable provision.

Similarly, if an employee is subject to two collective agreements—for instance a special agreement governing the enterprise in which he or she works and a general agreement with regard to his or her trade, the provision most favourable to the employee will apply.

16.24 Compulsory Transfer of Employees

The accepted view in Israel is that the employment contract is a personal contract: the employee is entitled to decide who will be his or her employer and the employer is entitled to the performance of the job, by the employee, on a personal basis. Accordingly, it is not possible to transfer an employee to another employer without the employee's consent. If the employee agrees to the transfer, the employment contract between the employee and the new employer is considered a new contract, even when the employee has been hired by the new employer on terms identical to those which were in effect with the previous employer.

A distinction should be made between an asset transaction or merger, which result in a change of employer, and accordingly, give rise to certain protection provided to employees regarding their rights in the workplace, and a share purchase, which is not considered a change in the legal identity of the employer, and therefore, all of the obligations and rights of employees are preserved exactly as they existed before the sale. Recently, however, this distinction between assets and shares transactions has been blurred in National Labour Court decisions.

According to Israeli employment law, the general rule is that asset transactions (including mergers) result in a change of employer and, consequently, the transfer of an employee to another employer is subject to the employee's consent. Therefore, if an employee does not give his or her consent to the transfer, the seller would need to either continue to employ the employee or terminate the employment of such employee (with all the implications of such termination, i.e., the applicable notice period must be given and severance pay must be paid).

In practice, there are two methods of transferring employees from the seller to the new employer in an asset sale. The first method involves the seller terminating the employees' employment and the new employer re-hiring such employees. The second method involves maintaining the employees' continuity of employment and seniority—i.e. the new employer steps into the seller's position as the employer for all intents and purposes.

In the last few years, the Labour Courts have set out three main obligations on an employer undergoing structural changes in its business , including following a change of employers: the obligation to provide information concerning the change being effected; the obligation to consult with the employees regarding the aspects of the change of employers; and the obligation to conduct negotiations with the employees' organization, allowing for a proper hearing and discussion of the union's demands. It

19. SOUTH KOREA

Yong Suk Oh Bae, Kim & Lee

19.1 Introductory Comments

In the past, foreign investors faced numerous legal barriers when attempting the acquisition of Korean companies and business assets. However, the legal and business climate relating to foreign investment in Korea has in recent years undergone a transformation, and Korea embarked several years ago upon a sweeping liberalization plan of laws and administrative practices relating to foreign investment. Having received added impetus as a result of the ongoing financial recovery package that the IMF brokered with the Korean Government in December 1997, the Government has adopted measures designed to stimulate merger and acquisition activities of domestic companies by foreigners. Indeed, the Korean National Assembly passed a number of new laws relating to foreign investment, such as the Foreign Investment Promotion Act (FIPA), which replaced the Foreign Investment and Foreign Capital Inducement Act effective as of November 1998, and the Foreign Exchange Transaction Act (FETA), which replaced the Foreign Exchange Management Act (FEMA) effective as of April 1999, and amended other laws governing foreign investment, such as the Securities & Exchange Act (SEA) and the Monopoly Regulation and Fair Trade Act (MRFTA), for the purpose of dramatically liberalising the government restrictions.

While it is true that Korea has a central government system and that all laws passed by the central legislature are uniformly applied throughout the country, there are several individual local government entities situated in Korea's provinces and major cities. Foreign investors are therefore also advised to review local laws when contemplating a corporate acquisition.

As foreign investment and international corporate transactions increase, the regulatory infrastructure in Korea is rapidly becoming more sophisticated and complex, and, in given circumstances, sometimes provides for stiff penalties for violations of applicable law. Accordingly, it is essential for any foreign investor to seek legal advice early on before attempting to acquire either an individual Korean company or a group which includes Korean subsidiaries or Korean assets.

19.2 Corporate Structures

The Korean Commercial Code (KCC), FIPA and SEA, among others, comprise the principal sources of law in Korea pertaining to international corporate acquisitions.

Korean law provides for four types of corporations, comprising two classes of limited liability companies and two classes of unlimited liability companies. Most Korean limited liability companies take the form of joint stock companies, which are the most common target of acquisitions in Korea. Joint stock companies can be listed

International Business Acquisitions, M. Whalley, F.-J. Semler (eds.), Kluwer Law International, London, 2007; ISBN 9789041124838.

on the Korea Exchange (KRX)[1] provided that they meet certain criteria set forth in the SEA.

It is possible to acquire shares or assets from anyone having legal personality and capacity, including private individuals, companies, statutory corporations, local government entities or even central government. While partnerships do not have a separate legal personality, a buyer may contract with a partnership so as to bind each of the partners jointly and severally.

19.3 Letters of Intent and Heads of Agreement

An agreement, whether oral or written, is binding if it appears from the document itself or from the surrounding circumstances that the parties intended to create a legal relationship. Consideration is not necessary to show a binding and fully enforceable agreement. If the parties do not wish to be bound by a letter of intent until the exchange of formal contracts (if any), clear language unambiguously expressing this intention should be used. There is, however, no set formula, so long as the parties' intention in this regard is evident. Note, however, that expressions such as 'subject to contract' are generally insufficient for this purpose.

19.4 Taxes Affecting the Structure and Calculation of the Price

For real properties and certain kinds of assets (e.g. automobiles) that require registration, the local government imposes acquisition and registration taxes. If title to certain real properties or registered assets are transferred to the buyer in a bulk business transfer or asset transfer deal, acquisition and registration taxes are imposed on the buyer. If 51 per cent or more of the shares of the targeted Korean company are acquired, deemed acquisition taxes (in proportion to the shareholding in the acquired company) are imposed on the buyer as if such assets of the targeted company had been acquired.

An acquisition tax of 2 per cent (plus a 10 per cent surtax on the acquisition tax amount) is levied on transferred real estate. Such acquisition tax is increased three times if the real estate is located in certain metropolitan areas, such as Seoul. The mayor or governor having jurisdiction over the metropolitan area may adjust the tax rate within a 50 per cent range. In addition, a registration tax of 2 per cent (plus a 20 per cent surtax on the registration tax amount) is levied on transferred real estate. Such registration tax is increased three times if the real estate is located in above-mentioned metropolitan areas.

The tax base on which the acquisition and registration taxes are levied is the price reported by the taxpayer to the tax office as the acquisition price agreed between the parties. If such reported acquisition price is less than the 'current base value' (as defined under the pertinent tax regulations), then the current base value is the tax base.

1. The Korea Stock Exchange, the KOSDAQ (Korea OTC market) and the Korea Futures Exchange were merged and the new official name of the merged exchange is the Korea Exchange, which now consists of the Securities Market, the KOSDAQ and the Futures Market.

Aside from this, Luxembourg has many advantages to offer to foreign investors:

- the government strongly encourages investments from all sources, whether Luxembourg or foreign. Prospective investors may obtain assistance of several kinds for projects offering good opportunities for growth and employment;
- Luxembourg offers fiscal incentives to promoters investing in the audio-visual sector or in venture capital;
- captive reinsurance companies created under Luxembourg law offer highly valuable risk management possibilities and tax planning opportunities;
- the Luxembourg maritime flag;
- the Luxembourg stock exchange has emerged as one of the major jurisdictions for bond registrations.

The scope of this article is not to address all the legal and fiscal aspects in relation with the above-mentioned regimes and incentives. It is only to provide a brief overview of certain types of Luxembourg entities which are used in most major transactions.

I. THE VEHICLES: SOPARFI, INVESTMENT FUNDS AND SICAR

In this section, we have chosen to focus on the general characteristics of three types of Luxembourg vehicles: the SOPARFI, the investment funds and the new private equity investment company in risk capital *(société d'investissement à capital risque* or **'SICAR')**.

A/INTRODUCTION TO THE SOPARFI

1. General information

The SOPARFI is a limited company[2] subject to the ordinary tax regime. Its taxable base can be reduced or even eliminated in pursuance of the parent-subsidiary regime (hereinafter referred to as the 'regime')[3] aimed at avoiding economic double or multiple taxation of the same income. The regime provides an exemption at three levels i.e. (a) the exemption of dividends or liquidation profits received by the SOPARFI from its subsidiaries, (b) the exemption of capital gains realized on the transfer of participations and finally (c) the withholding tax exemption on dividends paid by the SOPARFI to its shareholders. Furthermore, participations whose revenues could benefit from the regime are exempt for net worth tax purposes. The regime only applies to income derived from substantial participations that comply with certain conditions. Any other income is, as a rule, taxable at the ordinary rate (e.g. income derived from bonds, non-eligible participations and units of non-taxable investment funds).

2. *sociétés de capitaux* (hereinafter, 'companies').
3. This regime relies, among others, on the implementation of EU Council Directive 90/435/EC of 23 July 1990 on the common system applicable in the case of parent companies and subsidiaries of different Member States (the 'Parent-Subsidiary Directive'). This regime is also referred to as the participation exemption regime or *Schachtelprivileg*.

The SOPARFI is an ideal vehicle only when the investment policy targets substantial participations in fully-taxable companies.

The SOPARFI benefits from the application of tax treaties.

2. Corporate Forms

The SOPARFI can take the form of either a joint-stock company (the *société anonyme* or 'SA'), a private limited company (the *société à responsabilite limitee* or **'Sàrl')** or a partnership limited by shares (the *société en commandite par actions* or '**SCA**'). These companies are governed by the provisions of the law dated 10 August 1915 concerning commercial companies, as amended (the **'Company Law').** The following paragraphs underline the major differences between these types of companies from a corporate law perspective.

a. Differences relating to the incorporation of each type of company

Capital

The minimum capital is EUR 31,000 for the SA and the SCA, and EUR 12,500 for the Sàrl. The use of the authorized capital is only possible for the SA and SCA and excluded for the Sàrl. In a Sàrl, the capital must be totally paid up, whereas in a SA and a SCA, shares may be partially paid up.

The number of partners of a Sàrl shall be comprised between 1 and 40. A SA may be incorporated with 1 shareholder without upper limit. It must be at least 2 for a SCA, without upper limit.

The SCA has two categories of shareholders, i.e. general partners being indefinitely (and jointly and severally) liable for the company's obligations and limited partners with limited liability.

The report of an independent auditor required in connection with the contribution in kind to a SA or SCA is not necessary for the contribution in kind to a Sàrl. Nevertheless, in practice some notaries require such a report.

The Sarl is not authorized to issue non-voting shares or bearer shares.

Bodies

In a SA the management body may be a one tier or two tier system. In a one tier system, the board of directors normally includes three directors, but under certain conditions a single director may be appointed. In a two tier system, the management is divided between the management board (at least two members, save for particular cases where one member is sufficient) and the supervisory board (at least three members, save for particular cases where one member is sufficient). The Sàrl and the SCA may be managed by a sole manager.

The manager(s) of a SCA must be selected from among the general partners of the company whereas a director/manager of a SA or a Sàrl can be any shareholder or a third party.

21.4 Taxes Affecting the Structure and Calculation of the Price

Malaysia does not have a full-blown system of capital gains tax. The Real Property Gains Tax Act 1976 taxes gains arising from the sale of real property or from the sale of shares of real property companies which are companies which have real properties as their substantial assets. There is a technical formula to determine what a real property company is.

The rate of tax on the gains from a disposal is on a graduated formula depending on the year of disposal. For instance, on a sale within the first two years of acquisition of the chargeable asset, the tax is 30 per cent. The rate reduces as the years go by. Clearly then, the Real Property Gains Tax Act was enacted to discourage land speculation.

Stamp duties are payable on instruments of transfers. In a sale of shares, the instrument of transfer is the share transfer forms. In the case of an asset sale, the instrument of transfer is the National Land Code 1965 Form 14A for real property or, in the case of choses in action, the assignment itself. Stamp duties are levied on an ad valorem basis. The rates vary. For instance, duty on share transfers would be 0.3 per cent of the total consideration whereas the duty on land transfers may be as high as 3 per cent. In the 2005 Budget, the Malaysian Government had proposed to introduce goods and services tax in Malaysia to replace sales tax and service tax. At the time of writing, we are unable to comment on how the introduction of this tax will affect transfers of assets.

21.5 Extent of Seller's Warranties and Indemnities

The fashionable thing to do nowadays is to do a due diligence on the company to be acquired. This takes place usually upon the parties indicating seriousness in proceeding further with their negotiations. The parties may or may not have entered into a letter of intent at this stage. Sometimes, the buyer carrying out the investigation is required to enter into a secrecy agreement with the seller or the target company. The covenant would be that all information obtained during the course of the due diligence would be used only for the purpose of progressing the negotiations further and shall not at all instances be disclosed to any party not involved in the negotiations.

A due diligence exercise should not preclude a buyer from still seeking the 'boilerplate' warranties and indemnities from the seller. Sometimes, a difficult seller may argue that since a due diligence investigation has been performed by the buyer's accountants and lawyers, the buyer should purchase the company or business on an 'as is where is' basis. This argument should not be accepted by the buyer because a due diligence does not necessarily disclose everything. In fact, if a cunning seller wishes to, he can quite easily hide whatever he wants to hide from the investigators. Therefore, it is always advisable for the buyer to obtain the appropriate warranties so that he has a remedy after completion but prior to the expiry of the warranty.

In the case of an asset sale, the question of having a list of warranties and indemnities is not so appropriate, as assets are more easily verifiable and liabilities attaching to assets are cleared prior to completion.

21.6 Liability for Pre-contractual Representations

When a formal written agreement is entered between the parties, it is difficult for one party to allege that there are other oral terms and conditions not contained in the written document. The courts will not necessarily reject a plea that there are other terms and conditions not in the written document, but the plaintiff will have an uphill climb to convince the courts to accept extra documentary evidence. Therefore, it is important for the parties to capture all their terms and conditions as exhaustively as possible in the written agreement.

21.7 Liability for Pre-acquisition Trading and Contracts

In an asset sale, there is no liability for pre-acquisition contracts. This is particularly so in the case of an acquisition of land. Malaysia adopts the Torrens system of land titles. Hence, in a purchase of land, if a search at the Land Office reveals there are no encumbrances or other interests registered against the land, the buyer can be said to purchase the land free from encumbrances notwithstanding, say, the seller having sold the land to another party. This is because the system of registration of title assures indefeasibility of title. As for purchase of equipment and machinery, again a buyer without notice of other claims would also be able to obtain a clean title to the equipment or machinery. Sometimes, the buyer may wish to inherit some existing contract or liability; this may be achieved by novation or assignment. In the case of transferring of liability, the method to go by is by novation of the liability whereby a third party assumes the liability of an earlier party with the consent of the party to whom the obligation is owed. In the case of a chose in action which is an asset and not a liability, the chose in action is transferred by way of an assignment and notice is served upon the party to whom the obligation is owed. Sometimes there may a clause restricting assignments. In such a case, the debtor's consent must be obtained.

21.8 Pre-completion Risks

There is no common law principle which states that a party shall assume the risks of a business prior to completion. This is a matter of contract to be agreed between the contracting parties and it is common to have negative and affirmative covenants pending completion. In the absence of express agreement, the courts must determine what the parties' intentions were. This is a difficult task as the decision will be based strictly on evidence. Generally, it can be argued that prior to completion, the seller assumes the risk of the business, particularly where only a deposit is paid upon signing the agreement. However, there may be situations where the buyer may wish to run the business prior to completion. In such an instance the courts will probably transfer the risk to the buyer. In the case of the purchase of shares, the risk of the business rests with the company. In such a case, the question of risks is addressed by the appropriate warranties in the sale and purchase agreement, as for instance a warranty to say that the company's net tangible assets shall not be less than a certain amount on completion.

In Malaysia, it is common to have the agreement of sale conditional upon the approvals of various governmental authorities. These approvals can take up to six or nine months to process. Hence, it is often necessary to control the direction or business of the

includes the tax liabilities of the company itself, e.g. for hidden reserves in assets with a book value lower than their fair market value. Furthermore, it may entail extraordinary liabilities for taxes payable by a (former) group company, where the target company had been part of a tax consolidated group (fiscal unity) prior to acquisition. This is the result of the fact that there is a joint liability for certain taxes in the case of tax consolidated companies. This issue is important to take into consideration in a share deal, and should be covered in an appropriate way in the share purchase agreement.

In cases where the target company has tax losses to carry forward, it needs to be examined whether such losses can be used by the target company after its shares have been sold. There are some important restrictions in this respect. In general, if and as long as the target company continues the same line of business without reducing it by 70 per cent or more, the losses in general remain available to be offset against future profits of the target company. This assumes that the activities of the target company do not consist of 90 per cent or more of holding or group finance activities, and that the assets of the target company do not consist of 50 per cent or more of portfolio investments.

In the case of a share deal, the acquirer often needs to pay a higher price, as the selling company usually needs to pay tax on any realized capital gain. On the other hand, in an asset deal the liability issues as described above generally do not come into play. In case of an acquisition of assets, for depreciation purposes, the acquirer usually may apply the price it paid for the assets.

23.5 Extent of Seller's Warranties and Indemnities

The terms representations and warranties are used synonymously, and they are perceived as being the same as a covenant. Non-fulfilment is considered a breach of the warrantor.

Certain representations and warranties (e.g. with respect to title) are implied. The purchaser may expect that the object of the transaction possesses the qualities that are necessary for a normal use thereof and the presence of which he does not have to doubt, as well as those qualities that are necessary for any special use specified in the contract.

Generally the claim period for warranties may range from one to three years (and five to seven years for tax warranties). The content of the representations and warranties are *grosso modo* the same as in Anglo-American practice.

The statute of limitations with respect to payment of damages is generally five years, running from the moment the damage became known.

Provided certain legal conditions are met, one can claim damages, annulment or recession of the purchase agreement. Annulment or recession may also be claimed partially, in which case an adjustment of the purchase price is one of the options.

23.6 Liability for Pre-contractual Representations

The reason for conducting a proper due diligence is in essence that Dutch law entails a duty to investigate. Improper due diligence may preclude a party from invoking nullity on the basis of mistake (*dwaling*). Dutch practice regarding due diligence investigations strongly resembles the Anglo-American practice.

If the agreement does not contain any specific representations and warranties, a buyer can, under certain circumstances, nevertheless raise a claim against the seller when it has been provided with incorrect or incomplete information about the target. Annulment of, or amendment of the conditions of, the agreement such as an adjustment of the purchase price, is possible under certain specific circumstances if the buyer has been given a wrong impression of the target and such impression has been material for the buyer in entering into the transaction. Furthermore, the agreement may be rescinded under certain circumstances or the buyer may claim damages if the target is not in conformity with the buyer, as (agreed upon) requirements.

23.7 Liability for Pre-acquisition Trading and Contracts

The parties may agree that an acquisition is deemed to take effect, economically speaking, at a date other than the completion date. As a result, profits and losses over the relevant period are attributed to the relevant party.

Since parties tend to negotiate on the basis of financial accounts of a certain date, it is customary to agree on a provision that deals with the period between the date of the accounts and the actual transfer of the shares. Generally parties agree on a guarantee issued by the seller that entails that in the interim period no circumstances arise that negatively affect the business/equity.

23.8 Pre-completion Risks

In many cases, completion includes both the execution of the share purchase agreement and the actual transfer of the shares. All risks relating to the period until completion remain the seller's, unless otherwise agreed. Should the parties wish to make a distinction between the execution of the purchase agreement and the transfer date, however, it is important to agree beforehand who will bear the risk during the interim period.

It is customary to include a number of conditions precedent in the share purchase agreement that must be fulfilled prior to the date of the closing.

In addition, parties may agree on certain escape clauses, such as the condition that the agreement is subject to (supervisory) board approval, or subject to financing, or subject to satisfactory due diligence.

23.9 Required Governmental Approvals

There are no requirements to report a proposed merger or acquisition, except when the Dutch Competition Act (see **23.10**) or the Merger Code (see **23.11**) is applicable. In this respect there is no distinction between a domestic or a foreign buyer of a Dutch business.

25. PERU

José Antonio Payet, Payet Rey Coun

25.1 Introductory Comments

The Peruvian Constitution of 1993 guarantees economic and legal freedom by providing rules to protect and promote national and foreign investment, such as:

- free competition;
- that contracts shall not be modified by any Law;
- freedom to hold and dispose of foreign currency;
- prohibition of discriminatory treatment between foreign and local investors; and
- guarantee of private property.

25.2 Corporate Structures

The General Law of Corporations (GLC), which is the main law in corporate matters, governs the organization of business entities in general.

Local and foreign investors mostly prefer the stock company ('*sociedad anónima*'), which may be compared to the US corporation. The *sociedad anónima* is a legal entity separate and apart of its shareholders that provides limited liability up to the amount of the shareholder's contribution, and where capital is represented by shares.

The GLC permits three types of *sociedades anónimas*: the privately held corporation ('*sociedad anónima cerrada*'), which may have no more than 20 stockholders, may not list its shares on a stock exchange and does not need to have a board; the publicly held corporation ('*sociedad anónima abierta*'), which is one that has made a public offer of its stock or has more than 750 stockholders or has more than 175 shareholders holding individual stakes of more than 0.2 per cent of the shares but not more than 5 per cent of the shares and which together hold more than 35 per cent of the capital; and the 'normal' stock corporation, which is a standard stock corporation that may register its shares on a stock exchange, must have not more than 750 stockholders and must have a board.

In addition, the GLC regulates various other business structures such as limited liability and general partnerships. Foreign investors can also establish a branch to conduct their business in Peru.

International Business Acquisitions, M. Whalley, F.-J. Semler (eds.), Kluwer Law International, London, 2007; ISBN 9789041124838.

25.3 Letters of Intent and Heads of Agreement

The legal value of letters of intent and heads of agreement depends basically upon their terms. The Peruvian Civil Code provides that a contract is not considered to be formed until the parties are in agreement over all of the contract's elements.

The Code also recognizes the validity of a preliminary contract ('*compromiso de contratar*'). This is a binding agreement under which the parties undertake to execute a contract on a certain future date. Failure to execute the contract on the set date is considered a case of breach and may make the responsible party liable for damages.

Therefore, it is especially important to carefully draft the terms of a letter of intent. If the parties' intent is not to have a binding agreement, this should be stated expressly.

25.4 Taxes Affecting the Structure and Calculation of the Price

The main taxes in Peru are income tax and valued added tax.

Under Peru's Income Tax Law, legal entities domiciled in Peru are subject to income tax on their global income. Non-resident legal entities and branches in Peru are subject to income taxes applicable only to their Peruvian source income. Capital gains obtained by the transfer of shares issued by a company incorporated in Peru are considered Peruvian source income. The main rates are the following:

- Resident individuals: 15 per cent and 30 per cent;
- Resident companies: corporate income flat tax rate of 30 per cent, including branches;
- Non-residents: natural persons not domiciled in Peru are subject, in most cases, to a flat rate of 30 per cent of their income from Peruvian sources; in other cases there are different rates depending the activity or business performed by taxpayers;
- Dividends paid to domiciled physical persons or non-domiciled physical or legal entities are levied with a 4.1 per cent rate.

Valued added tax is levied on individual and legal entities that perform sales of goods (*bienes muebles*), import goods, construction agreements, the first sales of real property made by builders and rendering of services, except those services which are expressly exempt such as transportation of people, airport services, banking, energy and water. The tax is not applicable to sales of shares. The rate is 19 per cent with a tax credit on the same tax paid by a buyer or user of services.

There is also an excise tax assessed on many goods and services.

A group of company exists when a company directly or indirectly owns at least 90 per cent of the share capital of the subsidiary or subsidiaries forming part of the group so long as this participation also confers 50 per cent or more of the voting rights.

Eligibility for the application of this special tax regime is subject to the fulfilment of several requirements, including:

- all related companies have their registered seat and actual management in Portugal;
- the controlling company must have held its participation in the subsidiary for more than one year;
- the controlling company is not controlled by any other company resident in Portuguese territory.

There are also several circumstances which may exclude a company from the application of the group taxation regime, such as companies which:

- have been inactive for more than one year or that have been dissolved;
- that are subject to formal corporate insolvency or recovery procedures;
- do not fall within to the normal regime of corporation tax;
- have a tax period which differs from the controlling company;
- where the participation requirement (90 per cent) is indirectly obtained through a company that does not fulfil the legal requirement to be included in the group;
- are not capital/corporate entities entities (*'Sociedade Anónima'*, *' Sociedade por Quotas'* or *'Sociedade em Comandita por Acções'*, in other words public or private limited companies).

In general, group taxable income is computed by the controlling company by adding together cumulatively the total sum of the taxable profits and tax losses assessed in the individual tax return for each entity of the group. However, group tax losses computed in a specific tax year are only deductible from the future taxable profits of the group.

Tax losses computed by the group entities before the application of the special tax regime may only be carried forward against the particular company's taxable income.

When the application of the regime ceases, or when a company no longer qualifies for this regime, tax losses computed during the application of the regime may not be carried forward and deducted from future individual company profits.

27.30 Other Relevant Tax Issues

Tax Neutrality Regime

The Portuguese Corporate Income Tax Code establishes a special tax neutrality regime for mergers, company disposals, company acquisition or incorporation by transfer of assets and share capital exchanges. This regime results from the transposing of

EU Directive no. 90/434/CEE, of 23 July 1990. To benefit for the tax neutrality offered, the entities intervening in the operation must be resident in Portugal or in another EU State Member for tax purposes.

Tax losses computed by the merged entity may be offset and deducted against profits computed by the new or incorporated entity over the next six tax years. However, this possibility is subject to authorization from the Ministry of Finance.

General Anti-avoidance Rule

Contracts or acts are deemed ineffective whenever it can be demonstrated that their purpose or intention is the reduction, elimination or temporary deferment of taxation obligations that are due in other contracts or actions of a similar nature having a similar economic effect.

27.31 Responsibility for Liabilities of an Acquired Subsidiary

As a general rule, a company is responsible for its subsidiary's liabilities where the subsidiary is 100 per cent owned by it. Where a company, however, acquires at least 90 per cent of another company's share capital, further special rules apply and must be taken into account. These rules are outside the scope of this guide and specific advice should be sought in this regard.

27.32 Governing Law of the Contract

The obligations of the parties to a commercial contract as well as the contract itself can be governed by any national law which the parties have freely chosen, provided that such national law has some reasonable or commercial connection with the parties or the agreement. Portugal is a signatory to the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

27.33 Dispute Resolution Options

Portuguese law allows the parties to a commercial contract to opt to have their disputes resolved by arbitration, submitting it either to the law or to a judgment under general principles of equity.

Portugal is a signatory to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards; the 1927 Geneva Convention; and the Washington Convention, dated 18 March 1965, on the settlement of disputes between Contracting States and nationals of other Contracting States in relation to investments. Portuguese courts recognize and enforce international arbitration awards. The Brussels Regulation, Council Regulation (EC) No 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters has been implemented into Portuguese law.

An arbitration award may be enforced by the Portuguese courts if certain legal rules are met in relation to the arbitrators' appointment, the internal rules of arbitration procedure and other matters which in general concern the requirement to ensure the equality of the parties before the arbitrators, amongst others.

The seller should retain part of the price to pay the value added property tax ('*plusvalía*'), a local tax on the increase in the property's value from the price paid when the property was originally acquired. Even if the contract provides that the buyer will pay the '*plusvalía*', the seller, as the last owner of the real property, is liable for its payment, but without prejudice to its right to be reimbursed by the buyer.

31.15 Requirements for Transferring Intellectual Property

Industrial and intellectual property rights are only transferred if expressly included in an assets acquisition agreement. However, pursuant to Article 47 of the Spanish Trademark Law, the transfer of an undertaking as a whole entails the transfer of the undertaking's trademarks, unless agreed otherwise or unless it is clear from the circumstances of the case.

It is also important to distinguish the requirements for transferring industrial property rights (patents, utility models, designs, trademarks, plant varieties rights) from the requirements for transferring intellectual property rights (copyright).

As regards industrial property rights, the assignment of the licenses held by the seller requires the licensors' consent. However, licenses that have been granted by the seller as licensor are transferred without the consent of the licensee or licensees. To be effective *vis-à-vis* third parties, the transfer must be filed at the Spanish Trademark and Patent Office.

The assignment of licenses for intellectual property rights (copyright) held by the seller requires the author's consent (the owner of intellectual property rights), except in the case of transfer of an undertaking. Pursuant to Articles 49 and 50 of the Spanish Intellectual Property Code, no consent shall be necessary where the transfer of intellectual property rights (exclusive or non-exclusive) occurs because of the change in ownership of the undertaking. As intellectual property rights do not have to be registered to be valid, it is not necessary to register the transfer of the license contract.

31.16 Requirements for Transferring Business Contracts, Licenses and Leases

The assignment of contracts with third parties requires, in general, the express acceptance of the transferor (the seller), the transferee (the buyer) and the third party. This rule applies to supply and maintenance agreements, distribution agreements, etc. However, certain types of contracts (such as employment contracts and insurance policies) are automatically assigned, to protect the continuity of these contracts and the business organization. Lease agreements for business premises may be assigned without the landlord's consent, unless the contract provides otherwise. However, in the case of assignment, the landlord has a right to increase the rent by 20 per cent.

Accounts receivable must be transferred expressly (giving details of each account receivable) and debtors must be informed of the transfer, so that debtors cannot extinguish their debts by paying the seller. However, the debtors' acceptance of the assignment is not required. A debtor who pays the seller before being notified of the transfer will have made a valid payment.

The seller is only released by its creditors if each agrees to the assignment.

31.17 Requirements for Transferring Other Assets

Non-registrable movable goods (i.e., movable items that cannot be registered at the Registry) do not need a public deed to be transferred. It is sufficient that the goods are made available to the buyer. However, in practice, when transferring a set of assets making up a business, a transfer by public deed is advisable.

The regime applicable to the transfer of a negotiable instrument depends on the type of negotiable instrument. For example, a bearer negotiable instrument can be validly transferred upon delivery to the buyer; a registered instrument must be renewed by the issuer; and bills of exchange must be endorsed.

31.18 Encumbrances and Third Party Interests

Encumbrances, pledges and any other third-party rights in the shares of a company must be established by a public document and, except in the case of bearer shares, notified to the directors of the company, which will register the encumbrance in the company's Register of Nominative Shares (or, in the case of an SL, in the Register of Members).

31.19 Minimum Shareholder and Officer Requirements

SA and SL companies may have a single shareholder, whether a natural person or a legal entity, and whether through incorporation or as a result of the concentration of all shares of the company into the hands of the single shareholder. The sole shareholder status must be referred to in company correspondence, documentation, order forms, invoices and advertisements, and a declaration to this effect must be registered at the Commercial Registry. If the declaration of the company's status is not filed at the Commercial Registry within six months from the date the company acquires sole shareholder status, the shareholder is jointly and severally liable for company debts incurred during the period it is under a sole shareholder.

As regards the management body of SA and SL companies, under Spanish law there are a number of different possibilities: (i) sole director; (ii) joint directors; (iii) joint and several directors; and (iv) board of directors. Directors do not need to be Spanish residents or citizens. However, if non-resident, individuals must hold a foreigner identification number (NIE) and entities must hold a tax identification number (NIF).

If there is a board of directors, it must have at least three members, and a chairman and secretary must be appointed. The secretary of the board does not need to be a director. Under Spanish law, the chairman has no special powers. The board of directors may appoint one or more managing directors, among its members, and delegate to them all the faculties that may be delegated under the law and the by-laws. The appointment of managing directors often facilitates the daily operation of the company. The scope of the managing director's authority is standard and non-derogable, and any limitations imposed on the delegated authority will not be effective *vis-à-vis* third parties. General